DEMOCRACY & JUSTICE
COLLECTED WRITINGS
BRENNAN CENTER FOR JUSTICE

THE FIGHT FOR VOTING RIGHTS
Wendy Weiser, Myrna Pérez, Rudy Mehrbani

RUSSIAN ELECTION INTERFERENCE
Lawrence Norden, Ian Vandewalker

REDISTRICTING
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RELIGIOUS LIBERTY
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JUSTICE FOR ALL
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PLUS:

PRESIDENTIAL POWER
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MASS INCARCERATION
Kamala Harris, Cory Booker, Mary Fallin, Eric Holder, Sally Yates, Hilary O. Shelton, Mark Holden, Danielle Allen

THE CONSTITUTION AND ECONOMIC INEQUALITY
Donna F. Edwards, Ganesh Sitaraman

AND:

Rev. Dr. William Joseph Barber II, Chris Coons, David Frum, Norman Ornstein, Aziz Huq

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 ending mass incarceration to preserving Constitutional protection in the fight against terrorism. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, the courts, and in the court of public opinion.

About Democracy & Justice: Collected Writings 2017

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 and fellows in 2017. The volume was compiled and edited by Jessica Katzen, Jim Lyons, Jeanine Plant-Chirlin, and Vivien Watts with assistance from Lauren Anderson, Sheri Arnold, Alan Beard, Naren Daniel, John Donahue, Stephen Fee, Adureh Onyekwere, and Thomas Wolf. For all full version of any material printed herein, complete with footnotes, please email jessica.katzen@nyu.edu.

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Introduction from the President

In 2017, our nation saw a great battle for the future of liberal democracy. A new president challenged longstanding norms of constitutional self-governance. Even before this, over many years, it became plain that our systems of democracy and justice urgently needed repair.

The Brennan Center for Justice at NYU School of Law is at the center of those debates. We're independent. Nonpartisan. Our work is rooted in rigorous research. This volume offers a taste of our work during this tumultuous year.

When necessary, we fiercely resisted abuse. After the demise of the White House panel that tried to prove bogus voter fraud claims, the *Guardian* reported: "The Brennan Center was at the forefront of the resistance to the commission's work." When Attorney General Jeff Sessions falsely claimed that crime was soaring, aiming to bolster harsh and racially divisive policies, we countered him with facts. We played a key role in the wave of legal challenges to extreme partisan gerrymandering. Our attorneys went to court to challenge the unconstitutional ban on travel from predominantly Muslim countries.

But what counts is not what we are against, but what we are for.

The country urgently needs solutions — new policies that can ensure that government will work for everyone. We are mapping out reforms to bolster the rule of law and strengthen ethics and protect democracy. We crafted a plan to protect voting machines and databases from future tampering by foreign foes. Our proposals on criminal justice funding would shift financial incentives away from mass incarceration. And 11 states have enacted automatic voter registration to modernize our elections.

Justice William J. Brennan Jr. once said: "The Constitution will endure as a vital charter of human liberty as long as there are those with the courage to defend it, the vision to interpret it, and the fidelity to live by it." The Brennan Center is proud to bear his name, and to carry on its work in that spirit. Thank you for your support at this time of testing for our country.

Michael Waldman
President

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THE PRESIDENCY AND THE RULE OF LAW

A New President

David Frum, Michael Waldman, Gayle Trotter, and Clive Crook

Donald Trump had been in office less than two weeks when the radio program "Intelligence Squared U.S." held a debate about his presidency. Should it be treated as a "normal" term, with a honeymoon for the new chief executive? Clive Crook, a columnist for Bloomberg View, and Gayle Trotter, writer for The Hill *and commentator for Fox News, argued to give Trump a chance. David Frum, a conservative writer and senior editor at* The Atlantic, *and Brennan Center president Michael Waldman joined forces to argue that Trump presents a new threat to democratic and governing norms.*

DAVID FRUM: [Donald Trump] has shown the country who he is and what he is and what he stands for and what he will do. We already know some of these things. We know that he has already decided to run the least ethical and transparent administration in the modern history of the presidency, and I would say in the history of the presidency, period. And those decisions are not in the future but in the past. He has already decided you will not see his tax returns. He has already decided that he will not put his assets in a blind trust, and he will not separate himself from his business interests.

He has already decided to run the least ethical and transparent administration in the modern history of the presidency, and I would say in the history of the presidency.

He has already said that he may or may not honor America's commitment to its NATO allies under Article 5. Having said that, you can never unsay that, that knowledge, that something that was certain is now uncertain. The biggest journey in logic, and that is the journey from zero to one, the chance of the United States not honoring its obligation to its friends was zero. Now it's one. Now it exists. Before it didn't. And that you cannot take away. Nor can you take away … the ever more sickening stink of the mysterious but dangerous connection and possible collusion between this administration and the government of Russia. We don't know what that arrangement is. There's much about it we don't know. But while there are many secrets, there are no mysteries. We understand that something is terribly wrong.

MICHAEL WALDMAN: This is not a normal presidency, and this is no ordinary time. As you know, David Frum and I come to this through different paths. He is a proud conservative. I am a proud progressive. But we both believe, and I think millions of Americans passionately believe, that we need to stand up to the potential abuse, to the potential threats to the Constitution, to the potential extremism of this administration and this president, a kind that we have not seen in this country in years, if ever.

This debate was hosted by "Intelligence Squared U.S." in Washington, D.C., February 1, 2017.

Let's only look at what Trump's actually done since being sworn in. It seems like a million or two years ago; it was 13 days ago … No president in a century has installed an administration this extreme. A chief strategist who previously ran a white nationalist website; a national security adviser who peddles conspiracy theories and who said Islam is "a cancer;" an attorney general nominee so far on the fringe that the Senate controlled by the Republican party rejected Jeff Sessions for a judgeship because of racial insensitivity. No president in this century or last has posed this kind of threat to civil rights and civil liberties. Just days in, the president of the United States, who swore to uphold the Constitution, started peddling the nonsensical argument that there were 3 million illegal votes in this country.

And no president in the beginning of his administration has provoked a constitutional crisis one week in. We all know, because we've been living through it, that the president hastily drafted an executive order banning travel from seven Muslim-majority countries — has provoked a crisis in so many different ways. The order was a travesty. It was basically a Tweet turned into an executive order. Four federal judges blocked it one week in. He had to fire the acting attorney general of the United States, who properly and correctly pointed out that the law was illegal one week in. This is not a matter of projecting in the future. This has happened in front of our appalled eyes all within the last 13 days.

For all those reasons … we ask you to stand up, take advantage of our role in democracy as citizens. Say no to abuse and do not give President Trump an untrammeled chance to trash our institutions, or the Constitution, or the law.

GAYLE TROTTER: Giving Trump a chance does not necessarily mean that you want his policies to succeed. Giving Trump a chance simply means that you're open-minded enough to allow the new administration to do its job and to succeed or fail on its own terms. Ironically, the failure to give Trump a chance has largely fueled his success. Overtly adversarial media, over-hyped predictions of calamity, reflexive comparisons to autocracy, dictatorship, Watergate, Nazi Germany. These over-the-top criticisms detract from the credibility of his critics and they reinforce Trump's popularity with those who elected him.

CLIVE CROOK: I believe in these checks and balances. I think American democracy is strong. I think the press is uncowed. I mean, it's actually — they're extreme. The press is rabidly hostile to Trump. And I think you could argue that's a good thing. I think it's slightly counterproductive, as I mentioned at the beginning, because I think it enflames his supporters. But the fact is the checks and balances of the system — they're working. They're already working. The civil service is resisting. Judges are ruling against him. And Trump — what can Trump do? He is bound by the law. Now, if a point comes where he says, "I'm not interested in what that court says. I'm not interested in the fact that the Supreme Court has said I can't do this. I'm going to do it anyway," then you're talking about high crimes and misdemeanors and we don't need to wait for the next election.

The Presidency and the Breaching of Norms

George Stephanopoulos, Emily Bazelon, John Podhoretz, and Preet Bharara

On the first anniversary of the 2016 presidential election, the Brennan Center asked leading commentators to assess President Trump's challenges to the norms of American governance — and to think about what the next wave of response could be. The conversation was moderated by George Stephanopoulos, Chief Anchor for ABC News and host of "This Week" and "Good Morning America." Preet Bharara is former U.S. attorney for the Southern District of New York. Emily Bazelon is a staff writer for The New York Times Magazine. *John Podhoretz is editor of* Commentary Magazine *and a* New York Post *columnist.*

GEORGE STEPHANOPOULOS: Emily, you wrote an article in *The New York Times Magazine* which was titled, "How Do We Contend with Trump's Defiance of Norms." I wonder if you could define that.

EMILY BAZELON: I went to law school, and that trained me to think mostly about laws, and rules, and the formal written instructions that the government gives us. It struck me that in this era of President Trump, laws haven't done the work that we need to do, to maintain all of the elements of our liberal democracy that are crucial.

There's no way we can write down every standard of behavior that we want people in the government to follow, in particular the president. That's why we're focused on them now, as we watch standards of behavior slip away.

That's why I started thinking about norms, which are softer. They erode. We talk about breaking a rule, snapping a rule, but norms fade away like sand. Yet they're extremely precious. We rely on them all the time. There's no way we can write down every standard of behavior that we want people in the government to follow, in particular the president. That's why we're focused on them now, as we watch standards of behavior slip away, or sometimes the president blows right through them.

STEPHANOPOULOS: One of the things that I found most difficult to contend with is that the president doesn't particularly seem to care whether or not what he's saying is true. Our system doesn't know how to handle it. Presidents lie all the time, but they tip their hat toward the truth while they're doing it. That hasn't happened here.

JOHN PODHORETZ: Presidents and their staffs have gone to unbelievable lengths to have statements in the name of the president conform with the truth in the most basic sense. It can be spun wrong. It can be a false representation. But people strain to make sure there is a hard factual basis for what is being said.

These remarks were given at *One Year Under Trump: Solutions for Restoring Law and Democracy* at NYU School of Law, November 8, 2017.

Clearly this White House has blown through that norm. I'm not even talking about whether or not Trump cares about the truth. There is no structure in place to provide any ballast when he does not conform to the truth.

The interesting problem with the alteration of the structure of norms is that Trump is not breaking them. He is reflecting the fact that the norms have broken down. His election is a result of very long-term trends in American life, American public life, and American academic life about how we handle the truth. If that ground had not been softened up, and softened up in ways that we weren't even aware were going on, Trump could not have survived five minutes of the primary process, let alone a general election.

Someone can only be a disruptor if much of what he argues has already been accepted by the people. Basically, Trump is saying, "It's all nonsense, everybody's a liar, everybody's a cheat, both parties stink, and if I'm not telling you the truth, don't worry. Everybody before me didn't tell the truth either." Trump exploited that deep cynicism, but he did not create it.

STEPHANOPOULOS: The one place that Trump and his team may be forced to tell the truth, eventually, is when they're questioned under oath by [Special Counsel] Robert Mueller or by Congress. When we look at how he's dealt with his own Justice Department, we use the word "unprecedented" all the time.

PREET BHARARA: What he's doing in the sphere in which I have some familiarity is relatively shocking. He's defied every single normal way that the Justice Department operates. I want to add one caveat to that. Just because you're defying some norm, or you're breaking some precedent, does not mean it's automatically bad.

For instance, when Trump says incredibly derogatory things about his own attorney general, he breaks a norm. It is also not a good idea generally for the morale of that person, and the morale of the people who serve under him.

I don't think that's great, but I'm less concerned about that than I am about Donald Trump saying things to [former FBI Director] Jim Comey, *"Lay off of Michael Flynn."* Or saying to [Attorney General] Jeff Sessions with respect to Joe Arpaio [the former Maricopa County sheriff who was convicted of criminal contempt and later pardoned by Trump], "*Is there a way we can do something different?*" Or, telling people in Tweets, and who knows what he's saying in private, that the Democratic National Committee should be investigated, or that Hillary Clinton should be investigated. Maybe these things should happen, but the president should not be saying them.

The ‘Back-Door’ Muslim Ban

Faiza Patel and Harsha Panduranga

Days into his presidency, Donald Trump imposed a ban on travel from majority-Muslim countries in a bid to implement his campaign call to “ban Muslims.” A roaring national controversy ensued, and the courts blocked the action, as well as two more versions of the executive order. Six months into his term, Trump tried a different approach. In essence, it involved extensive State Department cross-examination of tens of thousands of visa applicants from Muslim-majority countries.

With his Muslim ban thus far blocked by the courts, President Donald Trump is talking about another way to stop Muslims from coming to the U.S.: extreme vetting. [On June 5th] his usual complaints about the courts included this Tweet: “we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe.”

Extreme vetting and the Muslim ban are cut from the same cloth. Trump introduced extreme vetting in a campaign speech, as part of his plan for stopping immigration from “Syria and Libya.” The day before the first Muslim ban executive order, Trump was asked why he hadn’t banned travel from countries like Saudi Arabia or Pakistan, whose nationals had carried out attacks in the U.S. He answered: “We’re going to have extreme vetting in all cases. And I mean extreme.” Indeed, extreme vetting is part of his Muslim ban executive order, which a federal court of appeals has described as emanating from a “context [that] drips with religious intolerance, animus, and discrimination.”

On May 25, the State Department implemented emergency extreme vetting rules for people determined to warrant additional scrutiny but didn’t explain how these people would be identified. The department estimates that the new rules will affect 65,000 people. That’s roughly the number of visas issued to tourists, businesspeople, and students from Iran, Libya, Yemen, Somalia, Sudan, and Syria, the countries targeted by the Muslim ban, suggesting that the new rules are aimed at the same pool of people.

Extreme vetting is founded on stereotypes about what Muslims believe. On the campaign trail, Trump promised “extreme vetting … [for] … any hostile attitude towards our country or its principles, or who believed sharia law should supplant American law.” The first version of the Muslim ban singled out for rejection “those who would place violent ideologies over American law” (an obvious reference to jihad, although equally applicable to the Ku Klux Klan), honor killings (associated with Muslims, although violence against women in the name of protecting honor is prevalent in many societies), the persecution of minority religions (Trump often remarks on how badly Christians are treated in Muslim countries), and discrimination based on race, gender, or sexual orientation (on which many Muslim countries have shameful records, as do several high-level officials in the Trump administration). The second version of the ban removed many of the provisions transparently targeted at Muslims, but Trump has called it “the watered down, politically correct version.”

This op-ed was published by The Daily Beast, June 12, 2017. The Brennan Center released a report *Extreme Vetting and the Muslim Ban,* October 2, 2017.

Social media will be used to investigate what people think. Would-be travelers are now required to list all social media handles they have used during the past five years. Consular officers will have to interpret statements that may be difficult to understand without context, often in a language they don't speak. And they will have to figure out how to assign meaning to non-verbal communications — for example, would "following" someone mean you agree with them? It's hard to see the security benefit here, but it's easy to see how the new rule will squelch free speech. Those with sinister motives will just scrub their accounts, but so will people worried that their political or religious views will be misinterpreted.

Nor is this back-door Muslim ban the result of careful study. Homeland Security Secretary John Kelly told Fox News that the administration was "just guessing" what might work. If administration officials actually bothered to look, they would find that getting a visa to the U.S. has always been difficult, but especially since the 9/11 attacks, after which the government implemented multiple layers of national security checks. The names and identifying information of all those applying for U.S. visas are run through a number of databases that link to intelligence holdings across the government. Photographs and biometrics are run through facial recognition and other identity-verification technologies. And consular officers across the world do not hesitate to tag for further scrutiny people who raise suspicions, or deny visas on that basis. Indeed, one front-line officer told us that hearing the cautionary tale of the officer who approved visas for several of the 9/11 hijackers is part of consular onboarding.

This back-door Muslim ban is not the result of careful study. Homeland Security Secretary John Kelly told Fox News that the administration was "just guessing" what might work.

Like the Muslim ban, extreme vetting is the product of prejudice, not proof. It signals to Muslims that they're not welcome, and it's working — data from this year suggests a significant decrease in visas being issued to applicants from the Muslim ban countries, as well as an overall dip in travel to the U.S. That's not just a loss for travelers, but also for Americans who aren't able to see family and friends, businesses that can't recruit talent, cultural institutions that can't bring in artists and singers, and universities that can't recruit top Muslim students.

We Have Faith in the American Legal System to Protect Us

Eblal Zakzok

In October, the Brennan Center, along with the law firm Paul, Weiss, Rifkind, Wharton & Garrison, sought a preliminary injunction blocking the third iteration of the Trump administration's travel ban. After a flurry of litigation, a district court granted the motion and stopped the ban. One of the three plaintiffs is Eblal Zakzok, a torture survivor from Syria who now teaches at Ohio State University. When Zakzok and his family were granted asylum, his adult daughter Turkie was left out. Now the ban would bar her from coming to the U.S. and joining her family.

Despite what some may think, coming to the United States is far from easy. While I'm now teaching at Ohio State University, I was once a professor in my native Aleppo, Syria. Reluctantly, I fled my homeland after life became unbearable and I was tortured by the Assad regime. My wife, my children, and I faced a veritable gauntlet of screening procedures before we were granted asylum. My 19-year old son was forced to stay behind for an additional two years of screening, and was finally approved just last week. I know from personal experience that the U.S. visa vetting system is already very thorough — and that President Trump's latest travel ban is not necessary to keep Americans safe.

I know from personal experience that the U.S. visa vetting system is already very thorough — and that President Trump's latest travel ban is not necessary to keep Americans safe.

The main reason I'm speaking out is because the ban, if allowed to move forward, will have a tragic and personal impact on the lives of many Americans and those whom they love most. Yes, the ban is contrary to the traditional American values I've come to love. But its damage will go far beyond contradicting our values. Real people — wives, children, siblings, and parents, who might otherwise find safety in the country that saved my life — will face separation and unspeakable harm if the ban is implemented.

I'll tell you my story and the stories of two of my co-plaintiffs in a lawsuit aimed at stopping Trump's third travel ban from taking effect, and you can decide whether this newest ban is moral, necessary, or American in character.

For my family, the ban is personal. When I was granted asylum, one member of my family — my eldest daughter Turkie — was left out. She was over 21 so she did not qualify. As soon as I became a legal permanent resident, I filed a petition to reunite Turkie with our family, and it is still pending. If the ban goes through, simply because she is Syrian, Turkie will be barred from coming here and our family may remain forever shattered. We miss her more than I could ever put into words.

Of course, I want Turkie to have the opportunity to experience the same richness of American life that I have — in fact, she's already been accepted to study English Literature at Ohio State, if she can ever get here. But I'm even more worried about her safety. She's currently stuck as a refugee

This op-ed was published by *USA Today,* October 16, 2017.

in Turkey, where Syrian girls and women are frequently targeted by criminals. And she could be deported back to Syria, where her life would be at even greater risk. The house we used to own there is now a pile of rubble. There is nothing left there for Turkie or the rest of our family.

Getting Turkie to safety is something I never stop thinking about. If the courts block the ban, like they did the previous two, then there is real hope for my family to be made whole again. But lately, I haven't just been bearing my own burden. My involvement with this lawsuit has shown me just how many American families will be grievously harmed if the ban is put in place.

Fahed Muqbil is one of my co-plaintiffs in the case. An American citizen who moved to Louisiana from Yemen when he was just a year old, he now lives in Mississippi. Fahed met his wife in Yemen in 2012 while visiting family. Together they have two daughters, both U.S. citizens. With the U.S. embassy in Yemen closed due to the country's civil war, it has taken longer than he ever dreamed to get his wife here legally.

Fahed had planned to stay with his wife until her travel to the U.S. could be approved, but on Nov. 9, 2016, their second daughter was born with a severe birth defect, requiring intensive medical treatment in the U.S. Fahed's petition to have his wife join him in the U.S. to help take care of their sick daughter was approved in August, but is pending final approval following a visa interview. The ban would indefinitely separate her from her sick daughter — an inhuman and immoral consequence that does nothing to keep America safe.

Sumaya Hamadmad, another co-plaintiff, is also an American citizen and, like me, an Ohioan. Her sister is legally Syrian but has never lived in Syria, and was in fact born in Jordan. Because of her unique professional qualifications, she has been invited by a renowned U.S. university to participate in a scientific research project. If the ban goes forward, she'll be unable to visit her sister and other family here, and a top American university will be deprived of her significant contributions to the field of genetic research — simply because of her Syrian heritage. What sense does it make to ban some of the brightest minds from coming to our shores simply because of an irrational fear of their country of origin?

My hope is that those who read these stories will understand that the president's attack on people from Syria, Yemen, and other Muslim countries — his effort to live up to a despicable and un-American campaign promise — does not simply have abstract costs. If the ban takes effect, thousands will suffer, including some of our own American citizens, many of them Muslims, and all of them human.

Our case will be argued in federal court Monday in Maryland, just two days before the October 18 ban is supposed to begin. We have reason to hope. After all, courts stopped the previous versions of the ban. Despite everything, we will continue to have faith in the American legal system to protect us and our loved ones, and the American people who have already welcomed us with open arms.

Lessons From Watergate

Michael Waldman, John Dean, and Elizabeth Holtzman

The Watergate scandal shook the country over four decades ago. Most Americans weren't alive when Richard Nixon's helicopter lifted off the White House lawn for the last time in August 1974. Today, at a time of abuse of power, efforts to stymie investigations of the Oval Office, and an electronic break-in at the DNC, Watergate offers eerie echoes. What are the lessons of that earlier scandal? John Dean, White House counsel, was deeply involved in the misconduct. In 1973, his riveting Senate testimony put Nixon at the center of the cover-up. Elizabeth Holtzman was the youngest member of the House Judiciary Committee and a prominent participant in the impeachment proceedings.

MICHAEL WALDMAN: John Dean, you have cited the political scientist James David Barber. He divided presidents into their personality types: whether they were active or passive, or whether they had a positive view of things or a sour and negative view of things. You've said that you think that Richard Nixon, as well as Donald Trump, are both active and negative and that this was really quite important.

Other scholars have looked at the same set of people and concluded that structural questions are more important. As I think you know, I worked for President Clinton as one of his senior aides in the White House for seven years. We were very taken by a book by the political scientist Stephen Skowronek, *The Politics Presidents Make*. He looked at President Nixon and thought that, above all else, his troubles were driven by the fact that he was a minority president in the sense that he won in a three-way race and had Congress controlled by the other party.

How important is a president's personality to what happens in the White House, and how did it play out in Watergate?

I think we have two very different men in Nixon and Trump. I think with Nixon you might have had one of the most qualified people to ever become president. I think right now with Trump we have probably the least qualified man who's ever fulfilled that post.

JOHN DEAN: I was struck when I found that both Nixon and Trump are what Barber calls active-negative, meaning they get into a job they don't like and don't have any self-satisfaction in the job. That was certainly true of Nixon. He didn't like a lot of the things he had to do whereas [Clinton] just thrived on crowds, thrived on the job, worked that job to literally the last minute he could work it.

I think we have two very different men in Nixon and Trump, but the Barber test supersedes that. I think with Nixon you might have had one of the

These remarks were given at a Brennan Center event at NYU School of Law, October 18, 2017.

most qualified people to ever become president. He was in the House. He was in the Senate. He served as vice president. He actually was acting president for a while during the Eisenhower heart operation, so he actually felt the full weight of the office. When he arrived there, he certainly had the qualifications to handle the job. What he did with the job is something else. I think right now with Trump we have probably the least qualified man who's ever fulfilled that post. I don't sense that Mr. Trump has even a very good newspaper knowledge of the job.

It's worrisome to me that he doesn't understand the job and what he might confront. It worries me even more once he understands the job and knows what those different levers and buttons do.

Right now there probably is a case to be made legally under the Constitution that Donald Trump has violated the impeachment clauses and is subject to impeachment.

ELIZABETH HOLTZMAN: I'm not a professional psychologist, and I haven't read Barber. But I've been in government, and sometimes in leadership positions. Obviously personality makes a big difference. It makes a big difference in terms of how the public responds to you, in terms of how you carry out your job. But if we're really talking about values here or if we're talking about something deep, then we have to talk about character. In the end, that's what determines what a president is going to do. Am I going to do the right thing, or am I going to do the political thing? Am I going to do this because reelection is there or not? Am I going to help this person because that's going to benefit me? Not good for the country, but it's good for me. Those decisions come up every single second you're in public office.

I think what we had in the end with Nixon — and it certainly seems to be the case with Trump — is that the end justifies the means. With Nixon, it was the break-ins and the misuse of power. With Trump, it is the constant lying. I don't know if Trump can tell the difference between what's true and what's not true. I think we're in a serious situation.

A few years before he became White House Counsel, Dean was chief minority counsel on the House Judiciary Committee. He spoke about the panel's limited ability to conduct impeachment investigations.

DEAN: The House Judiciary Committee has zero capacity to investigate impeachment inquiries. They never have had any disposition to acquire that capability.

When Watergate occurred, what they really did was rely on the Senate Watergate Committee and their hearings. While the House Judiciary Committee had hearings, they were really perfunctory in the bigger picture. They were trying to educate themselves. It's to me one of the flaws of the system and one of the congressional flaws that the committee that has jurisdiction over impeachments has zero capacity to undertake impeachments. That's true today. That's true yesterday.

HOLTZMAN: I think the critical thing to understand is that actually right now there probably is a case to be made legally under the Constitution that

Donald Trump has violated the impeachment clauses and is subject to impeachment. I don't know how you translate the serious abuses of power that have taken place into public demand for action, which is what happened in Watergate.

Despite all the revelations that had taken place before the Senate Watergate Committee, including the discovery of the tapes, the House of Representatives was not moving on impeachment. It didn't matter that the Democrats were in control and that you had a Republican president. It didn't matter. This was not even actually a partisan issue. The House of Representatives wasn't going to move. Maybe it's because the public wasn't demanding any movement, and there was enormous inertia.

There is something similar today. If people stopped to think about the assaults on our constitutional rights and the Constitution itself, then maybe we would have some movement. Maybe it's also being postponed because of the Mueller investigation and people are waiting for the criminal prosecution to take place, because somehow there's this idea that you need to have a crime to have high crimes and misdemeanors.

High crimes and misdemeanors has nothing to do with crimes. It has to do with assaults. It has to do with an abuse of power and an assault and subversion of our system of government. We have to mobilize, make people understand the potential or actual violations of the impeachment clause and what they can do to get involved to try to make this happen.

Tax Returns Aren't Everything

Lawrence Norden and Daniel I. Weiner

Donald Trump refused to release his tax returns, the first president in decades to do so. Yet tax returns were never intended to be financial disclosure documents. Presidential transparency must move beyond the 1040.

It has become clear that much of the president's conduct in office could impact his businesses, from his tax reform proposal to foreign relations not only with Russia (the focus of a wide-ranging inquiry in connection to its interference in the 2016 election), but other countries like China and the Philippines. This presents the potential for numerous conflicts of interest, with no effective legal restraint since the president is exempt from federal conflict of interest rules (although every president for the last 50 years has voluntarily adhered to them). A network of holdings as vast and opaque as the one President Trump controls also presents opportunities for outright bribery and influence peddling on a vast scale, all under the guise of ordinary commercial transactions (that just happen to be exceptionally favorable to the president and his companies) — a dynamic we have seen play out in other countries where unscrupulous corporate magnates reached the height of political power.

The likelihood is that Trump's tax returns contain more relevant information than the president and his defenders will admit — but significantly less than his critics might hope.

There is no way to know for sure how much light the president's personal tax returns would shed on such risks without actually seeing them. However, the likelihood is that they contain more relevant information than the president and his defenders will admit — but significantly less than his critics might hope. Tax returns are filed for the purpose of paying taxes, not to provide financial disclosure. Even for a filer with nothing to hide, key information related to sources of income, debts, and the identities of key business partners is likely to be missing. For those who hope to obscure such information on their personal returns, there are many ways of legally doing so.

To gain a fuller picture of how the president's financial affairs could intersect with his official duties, it would be necessary to see not only his personal returns, but also those filed by his various companies, a point that is often missed in public debates. And even then, a great deal of relevant information would most likely still be missing — including the original sources for much of his income and the names of many creditors to whom he owes money.

Excerpted from the Brennan Center report *Presidential Transparency: Beyond Tax Returns,* published June 21, 2017.

Over the long term, and leaving the specific case of Donald Trump aside, instead of fighting about the release of tax returns, advocates of transparency for the president and other senior federal officials and candidates would do better to push for strengthening federal ethics law to require that more pertinent information be included in the ethics disclosures that these individuals are already required to make. In particular, the law ought to require disclosure of information not only about the filer's personal assets, income, and debts, but also (with certain exceptions) the assets, income, debts, and co-owners of any closely-held (not publicly-traded) entity in which the filer has a significant interest. At the same time, in order to achieve a better regulatory balance, monetary thresholds for the disclosure of particular assets and income ought to be significantly raised.

As the future Justice Brandeis pointed out more than a century ago, when it comes to the behavior of those in power, "sunlight" is often "the best of disinfectants." This is true no matter who is in the Oval Office. Improved financial disclosure will not only help address the many legitimate concerns about President Trump, but provide a lasting safeguard for the integrity of our government. It is a priority everyone should be able to support.

[W]e propose the Ethics in Government Act be amended to require officials who already have a public filing obligation, including the president and vice president (and candidates for those offices), to also:

- Disclose the assets, ultimate sources of income, and liabilities (including the names of creditors) of any non-publicly-traded entity — whether foreign or domestic — in which the filer has a significant direct or indirect interest (with a specific monetary threshold to be set in consultation with OGE, as discussed below);

- Disclose, for each of these entities, the names of any co-members or owners, and the individuals or entities that ultimately control them (where applicable);

- Provide more precise estimates for the value of particular assets, sources of income, and debts, rather than the broad ranges currently provided; and

- Sell any asset with respect to which the filer cannot or does not wish to provide the information described above.

These changes would be consistent with the underlying transparency goals of federal ethics law, and would provide a much-needed backstop for other ethics safeguards. While not erasing otherwise unaddressed ethical problems, more transparency would at least help mitigate the resulting harms by allowing the public to act as a check on self-interested government decision-making.

How to Fix Presidential Ethics Law

Daniel I. Weiner

Many have bemoaned Trump's refusal to follow longstanding practice about presidential financial conflicts of interest. What can be done about it? The Brennan Center set out a proposal to prevent a future chief executive from adopting Trump's approach.

President Donald J. Trump has decided to maintain ownership and effective control of his far-flung businesses despite potential conflicts of interest. This decision broke with norms to which his predecessors of both parties had adhered for more than 40 years. But it was not illegal.

Americans have worried about high-level self-dealing by government actors since the founding era. When it comes to the president, however, it has never been clear how the law should address this problem. Before he took office, Trump himself famously declared that the president "can't have" a conflict of interest. That is legally true, at least to the extent that the president and vice president are exempt from federal conflict of interest rules that prohibit officials from participating in certain government matters where they have a financial interest. And while the Constitution itself contains express prohibitions on the president accepting certain questionable gifts or other payments — known as the foreign and domestic "Emoluments Clauses" — nobody had ever tried to enforce these provisions in court until now.

The surge of interest in government ethics on the part of members of Congress and reform advocates has not yet translated into a coherent policy agenda. The problem here is not a lack of generally applicable standards: Federal conflict of interest rules are actually quite detailed. They have been in place in some form since the Progressive Era, with significant expansions in the wake of Watergate and other scandals in the 1970s and 1980s. But the federal ethics regime has a gaping loophole at the very top, and suffers from inconsistent enforcement given the absence of a strong regulator.

To deal with these problems, we need a package of legislative reforms. The package should include three key components:

- **Close the presidential loophole.** Congress should amend the federal conflict of interest statute to cover the president and vice

Excerpted from the Brennan Center report *Strengthening Presidential Ethics Law,* published December 13, 2017.

president, just as parallel laws in the states and in peer democracies cover governors, presidents, and prime ministers. Contrary to prevailing assumptions, there is a strong constitutional case that Congress has the power to do so.

- **Expand the scope of financial disclosure.** Congress should also amend federal ethics disclosure requirements for high-level officials to include, among other things, the income, assets, and debts of any closely-held (non-publicly-traded) business in which the official or an immediate family has a substantial interest. Currently, these entities are mostly exempt from disclosure, allowing significant potential conflicts to escape public scrutiny.

- **Improve administration and enforcement of federal ethics law.** Congress should also provide for better administration and enforcement of federal ethics law in the executive branch. To start, it should afford the Office of Government Ethics the same autonomy from the president that it has conferred on other independent agencies, clarify that OGE's rules are binding on all executive branch officials, and enhance the agency's oversight over ethics officials in other federal agencies. It is also critical to step up civil enforcement of federal ethics law, either by creating a new enforcement division within OGE or assigning civil enforcement to a separate body. These changes will require funding increases relative to OGE's current miniscule budget.

These reforms would represent a significant step toward fixing the most pressing shortcomings in federal ethics law and enforcement. That in turn would help to renew our nation's longstanding commitment to the ideal of public service as a public trust, leaving our democracy stronger in the years to come.

Democratic Deterioration at Home and Abroad

Norman Ornstein, Sheri Berman, and Aziz Huq

The United States is not alone. Liberal democracy faces challenges around the world. The Brennan Center, New America, and the American Constitution Society gathered a group of eminent scholars to discuss how democracy has eroded both in the U.S. and abroad.

The bad news: If you go through a checklist of movement towards authoritarianism, we could see a lot of things to check off right now. The good news: We have been jolted.

NORMAN ORNSTEIN: I will give bad news and good news. The bad news: If you go through a checklist of movement towards authoritarianism, we can see a lot of things that we could check off right now. First is when you have a president who says that the press is the "enemy of the people," a phrase originated by Stalin that Khrushchev, when he became Premier of the Soviet Union, said he would not use because it's too dangerous and now has been resurrected by Donald Trump.

We see attacks on the press for fake news and for other things on a daily basis, check that off. Attacks on an independent judiciary, and of course hitting judges which Trump did before he got elected with the "Mexican judge," which he has done since multiple times with the travel bans and their various iterations, not to mention his attacks on the rest of the justice system including the FBI, check.

Blowing up the norms — we've seen this, of course, in a whole host of ways. We've seen it from the president, we see it from his cabinet members, and we see it from Congress. We have a Congress that has become a joke. We have a kleptocracy, which is another element of authoritarianism and we have it with the president and his own family.

The good news is that we have been jolted. Now, large numbers of people and groups are aware that we're going to have to do things to try and knit society together. We've been jolted by this movement towards authoritarianism. Whether it's lawyers mobilizing for the travel ban on the immigration front, or religious groups stepping up to protect the safety net, or public interest groups moving in to try and put some restraint and shore up the independent judiciary. The civil society groups from the bottom up are beginning to

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mobilize, [and that] may mean that our larger, cultural antipathy away from a democratic society will enable us to move back on track. You have to stretch a little bit to find that pony in the pile of manure.

SHERI BERMAN: It is also really important to recognize that these trends are cross-national. If we look cross-nationally, particularly in the West, we can see that in the '70s you began to see a real breakdown in traditional party systems, traditional political dynamics. In Europe, because we don't have a first-pass-the-post system in most of those countries, that is to say a majoritarian type of system where you end up with two parties, you began to see party fragmentation at this time.

That is to say the two main parties, center right and center left, began to lose voters, and you began to see the rise of new parties. Manifestations of discontent in Europe tended to come via the formation of new parties. In the United States, they tended to come via insurgence within parties. Then the question is, well why? What is it about the '70s that caused breakdowns cross-nationally? I think if we are pretty careful, we can understand precisely what was going on.

It's in the '70s that the growth that we had come to take for granted for 30 years in the West began to break down. That is to say, that kind of post-war economic order that delivered pretty standard, pretty high rates of growth for three decades began no longer to be able to do that. Also, many of the social changes that had begun to percolate in the '60s really began to take form in the '70s. In Europe, this was, of course, also aggravated by rising immigration.

In the United States, this was aggravated for many people by the increasing mobilization and empowerment of minority groups. In the '70s, you began to see across the West signs of backlash against traditional parties. The underlying reasons for this were, again, the same: the breakdown of the post-social order and the post-war economic model.

AZIZ HUQ: I guess I have a more skeptical view of scholars and pundits' ability to identify the causes of the shift that, I think, we're all describing. I'm skeptical that the American party system up through 1970 was some sort of model to be emulated. That the American party system up through, certainly, the Civil Rights Act and the Voting Rights Act, was one characterized by substantial numbers of elected national representatives who were vocally and persistently committed to economic and racial stratification. It was a form of economic and racial stratification that plainly has echoes in the mobilization and the form that the Republican Party takes today.

I think anyone who gives you a mono-causal, a single cause explanation of events today is peddling something. I just don't think that's plausible. There was a phase shift in the early 1970s, and it might do something toward explaining the phenomena that we see today, along with the shifting dynamics of cultural and racial capital that are unique to the United States. Remember that the rise of populist quasi-authoritarian uncompetitive democracies is not a European or an American thing alone.

There is a Latin American story, which is distinct and curves along a different time scale. There are stories in Russia, which are not particularly related to the story that we've been telling. There's a story in Turkey, where the slice of the population that votes for Erdoğan is the rising petit bourgeoisie. It is the economically successful slice of the population. The same is true in India. It is a rising petit bourgeoisie that is economically successful that is nonetheless committed to a form of democratic politics that is antithetical or adopts institutional changes and policies that are antithetical to liberal, democratic, and constitutional democracy.

I think that the stories here are way more complicated and way more varied than a single causal explanation allows.

Time to End Warrantless Domestic Surveillance

Elizabeth Goitein

Little-known to the public, Section 702 of the FISA Amendments Act permits massive surveillance of international communications. Inevitably it scoops up law-abiding Americans' calls and e-mails. Section 702 was supposed to expire at the end of 2017. After this testimony, Sens. Patrick Leahy (D-Vt.) and Mike Lee (R-Utah) introduced a bill to reform the law. In January 2018, Congress passed a different bill that, for the first time, would explicitly endorse warrantless surveillance of millions of Americans' online and phone communications.

Congress's goal, when it passed the FISA Amendments Act in 2008 (thus creating Section 702), was to give our government more powerful tools to address terrorist threats. The authorities conferred by Section 702 have been used to monitor suspected terrorists overseas in order to trace their networks and interrupt their plots. This use of the law is widely recognized as appropriate and has caused little controversy.

In writing the law, however, Congress did not expressly limit Section 702 surveillance to such activities. Instead, Congress gave significant discretion to the executive branch and the FISA Court, trusting them to ensure that the law was implemented in a manner consistent with its objective. For instance, Congress allowed the government to target any foreigner overseas, counting on intelligence agencies to focus their efforts on those who pose a threat to our interests. Congress also did not specify what minimization should look like, leaving that to the agencies and the judges of the Foreign Intelligence Surveillance Court.

Despite multiple requests from lawmakers dating back several years, the NSA has yet to disclose an estimate of how many Americans' communications are collected under 702.

There has been very little evidence of intentional abuse or misuse of [Section 702]. The executive branch, however, has taken full advantage of the leeway provided in the statute. Instead of simply acquiring the communications of suspected terrorists or foreign powers overseas, the government is scanning the content of nearly all of the international communications that flow into and out of the United States via the Internet backbone, and is acquiring hundreds of millions of these communications each year. Based on the manner in which the data is collected, this surveillance inevitably pulls in massive amounts of Americans' calls and e-mails.

We have also seen mission creep. A statute designed to protect against foreign threats to national interests has become a major source of warrantless access to Americans' data, and a tool for ordinary domestic law enforcement. This outcome is contrary, not only to the original intent of the Foreign Intelligence Surveillance Act, but to Americans' expectations and their trust that Congress will protect their privacy and freedoms. It is now up to Congress to enact reforms that will provide such protection.

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Testimony before the House Judiciary Committee, delivered March 1, 2017.

Within constitutional bounds set by our nation's courts, it is up to the American people — speaking through their representatives in Congress — to decide how much surveillance is too much. But they cannot do this without sufficient information.

While a significant amount of information about Section 702 has been declassified in recent years, critical information remains unavailable. For instance, the certifications setting forth the categories of foreign intelligence the government seeks to collect — but not the individual targets — have not been released, even in redacted form. Unlike the NSA and the CIA, the FBI does not track or report how many times it uses U.S. person identifiers to query databases containing Section 702 data. The list of crimes for which Section 702 data may be used as evidence has not been disclosed. Nor have the policies governing when evidence used in legal proceedings is considered to be "derived from" Section 702 surveillance. The length of time that the FBI may retain data that has been reviewed but whose value has not been determined remains secret.

It is up to the American people — speaking through their representatives in Congress — to decide how much surveillance is too much. But they cannot do this without sufficient information.

Perhaps most strikingly, despite multiple requests from lawmakers dating back several years, the NSA has yet to disclose an estimate of how many Americans' communications are collected under Section 702. The NSA has previously stated that generating an estimate would itself violate Americans' privacy, ostensibly because it might involve reviewing communications that would otherwise not be reviewed. In October of last year, a coalition of more than 30 advocacy groups — including many of the nation's most prominent privacy organizations — sent a letter to the Director of National Intelligence urging that the NSA go forward with producing an estimate. The letter noted that, as long as proper safeguards were in place, the result would be a net gain for privacy.

In April 2016, a bipartisan group of 14 House Judiciary Committee members sent the DNI a letter making the same request. Eight months later, the members wrote again to memorialize their understanding, in light of interim conversations and briefings, that the DNI would provide the requested estimate "early enough to inform the debate," and with a target date of January 2017. It is now March, and the administration has issued neither the estimate nor any public response to the members' second letter.

This basic information is necessary for Americans to evaluate the impact of Section 702 on their privacy. It is also necessary because most Americans are not lawyers, and when they hear that a surveillance program is "targeted" only at foreigners overseas and that any acquisition of Americans' communications is "incidental," they may reasonably assume that there is very little collection of their own calls and e-mails. An estimate of how many communications involving Americans are collected would help to pierce the legalese and give Americans a truer sense of what the program entails.

In short, Section 702 is a public statute that is subject to the democratic process, and the democratic process cannot work when Americans and lawmakers lack critical information. More transparency is urgently needed so that the country can begin an informed public debate about the future of foreign intelligence surveillance.

Vet Judges Now or Vet Them Later

Ciara Torres-Spelliscy

The Trump administration has moved at a blistering pace to fill federal judicial vacancies. Despite the fact that the American Bar Association has found nearly 10 percent of the nominees "unqualified," the Senate has largely acted as a rubber stamp. Its lack of scrutiny may return later in the form of impeachment.

One of the few "successes" of the Trump administration has been the rapid pace of nominations to the federal bench. When Trump took office last January, there were more than 100 judicial vacancies, including one on the Supreme Court. As of early November, Trump had put forward 58 names to fill those slots, including 18 for the federal appellate courts. Although Republicans are generally more invested in the ideology of the courts than Democrats, to some, Trump is mounting nothing less than a complete a makeover of the federal courts.

And that's just the way some conservatives want it. Carrie Severino, policy director of the conservative Judicial Crisis Network told, The Daily Signal, "President Trump and his allies in the Senate campaigned on the promise to remake our federal courts…"

Republicans tend to go for ideological extremes in their nominees. While Democrats tend to steer toward the middle of the road. Think plain vanilla Merrick Garland as President Obama's last Supreme Court nominee and the norms GOP Senate Majority Leader Mitch McConnell broke to thwart his nomination, and then going on to change Senate rules to win confirmation of Trump's more ideologically extreme choice of Neil Gorsuch.

The Senate is also toying with the idea of getting rid of blue slips, a traditional process where the home senator of a judicial nominee can raise an objection to a nomination. If blue slips go, then packing the courts with Trump nominees could move at warp speed.

Abandoning the practice of past presidents, Trump has refused to submit his nominees to the American Bar Association's Standing Committee on the Federal Judiciary for evaluation before they are announced. Perhaps it is merely pique, but a majority of the 15-member panel has found nearly 8 percent of his nominees "not qualified." This frequency of "not qualified" ratings is no small thing. In the 27 years ending in 2016, in both Democratic and Republican administrations, a majority of the panel only found less than 1 percent (0.7 percent) of nominees "not qualified."

Law professor Ciara Torres-Spelliscy is a Brennan Center fellow. This piece appeared on the Brennan Center website, December 26, 2017.

Indeed, some of the Trump's selections seem like peculiar picks for the federal judiciary. For instance, it is positively painful to watch the video of Matthew Peterson, currently a member of the Federal Election Commission, reveal how little he knows about litigation during questioning by Sen. John Kennedy, a Republican from Louisiana. Peterson withdrew his nomination to the Washington, D.C. federal district court the next day.

Then there were the curious nominations of Brett Talley and Jeff Mateer. Talley, 36, who had practiced law for all of three years and never tried a case, sought a lifetime appointment to the federal district court in the Middle District of Alabama. And the ABA did not pull its punches with this one. The panel unanimously found him unqualified.

If that weren't bad enough, Talley's nomination was also complicated by the fact that he is married to Ann Donaldson, the chief of staff to the White House counsel Donald McGahn. Donaldson is a witness in Robert Mueller's investigation into the firing of the FBI Director James Comey. The nomination of Donaldson's husband to the federal bench at least raised the question of whether the White House was trying to tamper with a witness.

After Senate Judiciary Committee Chairman Sen. Chuck Grassley (Iowa) announced "he would advise the White House not to proceed" with the nomination, Talley withdrew. The same fate befell Mateer, who was tapped for a judgeship in the federal district court in the Eastern District of Texas.

Mateer's problem wasn't a lack of experience (he's currently first assistant attorney general of Texas) but his on-the-record statements that were deemed too extreme even by GOP standards. In 2015, when he was general counsel of the First Liberty Institute, Mateer said that transgender children are proof "Satan's plan is working." He also predicted that the legalization of same-sex marriage would lead to "disgusting" forms of matrimony. "I submit to you that there'll be no line there," Mateer remarked. "Why couldn't four people wanna get married? Why not one man and three women? Or three women and one man?" These sort of comments do not demonstrate what is commonly known as "judicial temperament."

If Trump persists in nominating such a ragtag bunch of federal jurists, keep an eye on them. If they disgrace themselves on the bench, they could be impeached. Lately, impeachment has been thought of as a possible response to Mueller's investigation of Trump. At the moment, however, presidential impeachment seems remote. A GOP-controlled House would be unlikely to pass articles of impeachment, and a GOP-controlled Senate would be even less likely to convict.

And while it's true the Congress tried only once to remove a Supreme Court Justice, the unsuccessful impeachment of Samuel Chase in 1805, there actually is a fairly extensive record of lawmakers forcing lower court judges from the bench. Since 1803, 15 federal judges have been impeached. Eight were convicted by the Senate, four were acquitted, and three resigned before trial. Put another way, a judge's chances of survival once they are impeached by the House is only about 26 percent.

The most recent impeachment was in 2010 for G. Thomas Porteous Jr., a judge in the Eastern District of Louisiana. Among other things, Porteous was accused of accepting cash and favors from lawyers who appeared before him. The Senate convicted him on four articles of impeachment and he left the bench.

Admittedly, 15 judicial impeachments in 215 years make them a relatively rare occurrence. But if Trump persists in nominating unsuitable people, and the Senate persists in the confirming them, then the vetting that should have been done on the front end, may end up being done on the back end through impeachment.

VOTING RIGHTS AND ELECTIONS

The Voter Fraud Hoax Isn't Funny

Michael Waldman

To justify his claim of millions of illegal voters, President Trump launched a federal commission to try to find widespread fraud. It only met twice. Its work quickly was met with both litigation and ridicule. Early in the new year, the White House shut it down. As the Guardian *reported, "The Brennan Center was at the forefront of resistance to the commission's work."*

On January 2, 2018, President Trump abruptly announced he was disbanding his Presidential Advisory Commission on Election Integrity. This was the panel charged with finding proof of Trump's absurd claim of millions of illegal voters, and it went downhill from the beginning. But while the panel has vanished, its spurious arguments remain widespread. Claims of voter fraud still form the basis of efforts to suppress the vote across the country. Now can we call a stop to that effort, too?

First, let's marvel at the curious story of the commission. On the campaign trail in 2016, Trump warned supporters, "The election is going to be rigged." Then as president-elect, he tweeted, "I won the popular vote if you deduct the millions of people who voted illegally." He told startled members of Congress that 3 million to 5 million had cast illegal ballots.

This was widely recognized as false. Statistically, you are more likely to be struck by lightning than to commit in-person voter fraud. Law enforcement officials, election administrators from both parties, and scholars all agree voter fraud is incredibly rare.

Challenged to back up his spurious claim, Trump launched the voting commission. In contrast with similar earlier panels, which strove for bipartisanship, this one was chaired by Vice President Pence and guided by vice chair Kris Kobach, the secretary of state of Kansas, both Republicans. The panel was crammed with members, including Kobach, well known for spurious warnings of fraud.

Claims of voter fraud still form the basis of efforts to suppress the vote across the country.

Immediately the panel began to flail. It first asked states to provide voters' individual data, including the last four digits of their Social Security numbers, illegal under the laws of many states. Twenty-one states declined to provide any data, citing legal restrictions, privacy concerns and uncertainty about how the information would be used.

Things only got worse. Voting rights groups, including the Brennan Center for Justice, which I lead, pelted the panel with lawsuits. Ahead of a session in New Hampshire, Kobach claimed voter fraud there because voters used out-of-state driver's licenses as IDs. In fact, many were likely college students voting legally. By November, Maine Secretary of State Matt Dunlap, a commissioner, actually sued his own panel for violating open government rules and cutting him out of the flow of information. Perhaps the White House's announcement was an act of mercy.

This op-ed was published by *The Washington Post,* January 4, 2018.

It's tempting to shake our heads and move on. But the ideas that undergirded the commission in the first place, unfortunately, still have malevolent potency.

Bogus claims of misconduct remain a campaign-trail staple. Roy Moore claimed voter fraud in refusing to accept his defeat in the recent U.S. Senate race in Alabama, filing a suit that was quickly tossed out of court. Cynical voters are prone to credit allegations. After the 2016 election, one poll found that 62 percent of Trump voters believed his claims.

Worse, states across the country still have laws that make it harder to vote specifically due to the supposed specter of voter fraud. In Wisconsin, the best recent study suggested that as many as 23,000 eligible voters could have been blocked by a harsh ID law that purported to deter fraud. Next Wednesday, the Supreme Court will hear a case challenging Ohio's practice of purging voters from the rolls who have not cast ballots in federal elections. One proffered rationale: to prevent fraud. The result, however, is to block many eligible citizens who simply choose not to vote. Watchdogs worry that improper purges will be the method of choice to prune minority, poor, and Democratic voters from the rolls, often without the highly visible controversy that attends state legislative action.

The panel's overreaching may have had an unexpected positive consequence, though: State officials of both parties roundly denounced its premise.

That's good, because real problems mar the way we run elections in the United States, and those problems will need bipartisan solutions. Voter registration lists are, in fact, often rife with duplication and error, even as they omit tens of millions of eligible citizens. Happily, even amid partisan wrangling over voting, states have moved to enact "automatic registration." In nine states and the District, the government will automatically register voters (unless they choose to opt out) when they interact with the departments of motor vehicles or (in some cases) other agencies. Most recently, such a measure passed the Illinois legislature unanimously and was signed by Republican Gov. Bruce Rauner. Automatic registration adds citizens to the rolls, costs less, and bolsters election security.

The panel's overreaching may have had an unexpected positive consequence, though: State officials of both parties roundly denounced its premise.

We also cannot forget Russia's attempts to threaten the integrity of our elections. We now know that Moscow's interference in 2016 went well beyond stealing campaign emails. Hackers probed state databases and voting-machine software companies. There's no evidence that they switched tallies, but there's every reason to think Russia — or China, or North Korea, or a homegrown partisan — will be back in 2018. A bipartisan group of senators just introduced a bill to help states buy new secure machines and harden their systems from attack.

Yes, Trump's commission began as a tragedy and ended as a farce. But the "voter fraud" hoax really is not funny. The next federal effort should find ways to protect the right to vote, not spread scare stories.

The Heritage Foundation's Flimsy Database

Rudy Mehrbani

Many conservatives hold a theological belief that in-person voting fraud is widespread. Buttressing this view is a so-called "database" of voter fraud assembled by the Heritage Foundation. The Brennan Center examined the data. Our conclusion: There is far less than meets the eye.

President Donald Trump's "Fraud Commission" members are relying on a Heritage Foundation database that claims to contain almost 1,100 instances of voter fraud. But a close review of the database reveals that it substantially inflates and exaggerates the occurrence of voter fraud.

There is nothing in the database to confirm claims of rampant voter fraud. In fact, it shows just the opposite.

Hans von Spakovsky, one of the Commission's members and a senior legal fellow at the Heritage Foundation, distributed a copy of the Foundation's "database" — "A Sampling of Election Fraud Cases from Across the Country" — at the panel's first meeting. Since its release, the database has been touted by von Spakovsky and others as widespread evidence of misconduct. Von Spakovsky said that it included "almost 1,100 proven cases of voter fraud." Indeed, it has become its main piece of supposed evidence of voter fraud. The Commission's Vice Chair, Kansas Secretary of State Kris Kobach, was photographed with a copy of the database the day of the panel's first meeting. He later referred to the database in justifying the Commission's existence by claiming "the Commission presented 938 cases of convictions for voter fraud," though the Commission did not review or even discuss a single case at the meeting.

The Brennan Center for Justice has conducted an analysis of the Heritage database, and here's our conclusion: There is nothing in the database to confirm claims of rampant voter fraud. In fact, it shows just the opposite. The database includes an assortment of cases, many unrelated or tangentially related, going back decades, with only a handful pertaining to non-citizens voting or impersonation at the polls. They add up to a molecular fraction of the total votes cast nationwide. Inadvertently, the Heritage Foundation's database undermines its claim of widespread voter fraud.

The database includes 749 "cases" involving almost 1,100 individuals. A closer examination reveals:

Excerpted from the Brennan Center report *Heritage Fraud Database: An Assessment,* published September 8, 2017.

- Only 105 cases come within the past five years, and 488 within the past 10 years. Thirty-two cases are from the 1980s and 1990s. Indicative of its overreach, the database even includes a case from 1948 (when Harry S. Truman beat Thomas Dewey) and a case from 1972 (when Richard Nixon defeated George McGovern). Over the period considered by Heritage, there have been over 3 billion votes cast in federal elections alone, and many more when you include the state and local elections also covered in the database. The number of cases in the database represent a miniscule portion of the overall number of votes cast during this time span.

- In reviewing decades of cases and billions of votes cast, the Heritage Foundation has identified just 10 cases involving in-person impersonation fraud at the polls (fewer than the number of members on the president's Commission). Heritage thus confirms what extensive prior research has shown — it is more likely that an individual will be struck by lightning than impersonate another voter at the polls.

- The database includes only 41 cases involving non-citizens registering, voting, or attempting to vote. This is particularly striking given the claims made by President Trump in setting up the Commission that millions of illegal votes were cast in 2016; on other occasions, he said 3 to 5 million unauthorized immigrants robbed him of the popular vote majority. The fact that only 41 such cases were identified over a time span of more than four decades highlights the absurdity of claims that millions of non-citizens voted in the 2016 election alone.

- The 51 cases referenced in the two previous bullets are the only examples in the database that would be addressed by the reforms most often trumpeted by the Heritage Foundation — laws requiring documentary proof of citizenship or government-issued identification to vote. It underscores that the potential harm from such proposals greatly outweighs any potential benefit.

- At least a quarter of the cases in the database do not even involve ineligible people voting or attempting to vote — the conduct of concern to the president's Commission. Instead, the database inflates the prevalence of voter fraud by including a broad variety of conduct. For example, it includes allegations of voter intimidation, vote buying, interfering or altering ballots by election officials, wrong-doing pertaining to the collection and submission of signatures on ballot petitions, and technical violations of ballot-assistance laws. These cases may identify misconduct and problems associated with election administration, but they are not the kind of voter fraud that the Commission members profess to seek to address.

The Missing Millions

Myrna Pérez, Christopher Famighetti, and Douglas Keith

One of the president's new claims was of widespread voting by noncitizens. Was that true? The Brennan Center investigated these charges and found them to be false.

Are the president's claims [of noncitizen voting] plausible? The Brennan Center reached out systematically to those who would know best: the local officials who actually ran the election in 2016. These officials are in the best position to detect improper voting — by noncitizens or any other kind. To make sure we were speaking to the right individuals, this study relies on interviews with officials who ran the elections in jurisdictions (towns, cities, or counties) nationwide with the highest share of noncitizen residents, and those in states identified by Trump as the locus of supposed misconduct. We interviewed a total of 44 administrators representing 42 jurisdictions in 12 states, including officials in eight of the 10 jurisdictions with the largest populations of noncitizens nationally. Our nationwide study of noncitizen or fraudulent voting in 2016 from the perspective of local election officials found:

- In the jurisdictions we studied, very few noncitizens voted in the 2016 election. Across 42 jurisdictions, election officials who oversaw the tabulation of 23.5 million votes in the 2016 general election referred only an estimated 30 incidents of suspected noncitizen voting for further investigation or prosecution. In other words, improper noncitizen votes accounted for 0.0001 percent of the 2016 votes in those jurisdictions.

- Forty of the jurisdictions — all but two of the 42 we studied — reported no known incidents of noncitizen voting in 2016. All of the officials we spoke with said that the incidence of noncitizen voting in prior years was not significantly greater than in 2016.

- In the 10 counties with the largest populations of noncitizens in 2016, only one reported any instances of noncitizen voting, consisting of fewer than 10 votes, and New York City, home to two of the counties, declined to provide any information.

Excerpted from the Brennan Center report *Noncitizen Voting: The Missing Millions,* published May 5, 2017.

- In California, Virginia, and New Hampshire — the states where Trump claimed the problem of noncitizen voting was especially acute — no official we spoke with identified an incident of noncitizen voting in 2016. The absence of fraud reinforces a wide consensus among scholars, journalists, and election administrators: voter fraud of any kind, including noncitizen voting, is rare. Two features of this study stand out. It is the first analysis to look at voting from the perspective of local officials in 2016 — the year that Trump claimed was marred by widespread illegal voting.

Why speak with local officials? In the United States, elections are administered within local jurisdictions — counties, cities, and townships. These bodies and their officials run elections, process registration applications, and directly deal with voters. To be sure, local elections officials may not be aware of every incident of ineligible voting, and the tools at their disposal are imperfect, but they remain well-positioned to account for what is happening in the area they oversee.

Second, this study casts a wider net than studies focusing on prosecutions or convictions. It identifies both those who voted improperly by mistake, and those who did so with malicious intent. We asked administrators both the number of incidents of noncitizen voting they referred for prosecution or further investigation, and the number of suspected incidents they encountered but did not refer in 2016. In all but two of 42 possible jurisdictions, the answers to both questions were zero. Some who claim widespread misconduct insist that, because prosecution is hard, there is likely a much wider pool of people who were caught voting improperly, but who simply were not prosecuted. This study finds that both the number of people referred for prosecution and the number of people merely suspected of improper voting are very small.

A Donor-Driven Tax Bill

Daniel I. Weiner

The tax overhaul should put to rest once and for all any doubts about the real-world impact of the Supreme Court's evisceration of campaign finance law.

As Republicans in the Senate pushed a giant tax overhaul last week, the media took on many angles, from winners and losers, to subplots ranging from politicized churches to actor Paul Newman's charitable foundation. But one dimension deserves far more attention: the role that vast sums of political money — much of it unleashed by *Citizens United* and other court cases — played in setting the agenda.

Eleven families who spent a total of $205 million on federal races in 2016 could save as much as $67.5 billion just from repeal of the federal estate tax.

Republicans in Congress have been surprisingly forthright that they are pressing ahead a broadly unpopular set of tax code changes to satisfy their major donors. It is no secret that large donors have more sway than the average voter — but we have truly crossed the Rubicon when donor demands become an acceptable justification for major legislation. This should put to rest once and for all any doubts about the real-world impact of the Supreme Court's evisceration of campaign finance law.

As many have noted, this seems like an odd time to enact a $1.5 trillion tax cut package primarily benefiting large corporations and the wealthy, while raising taxes for many in the middle class. We just had an election dominated by anger at the political and economic status quo, in which the so-called "forgotten men and women"— middle and working class people who have missed out on decades of economic growth — cast the deciding votes. Indeed, polls show that most people think the GOP tax cuts will not benefit them, and overwhelming majorities oppose the elimination of popular deductions for wage earners, like that for state and local taxes. And the package does not fare any better among the experts, with most leading economists doubting it will actually spur significant growth.

So why is the train still moving? Well, as one representative from a super PAC funded by the billionaire Koch Brothers recently warned, if Republicans fail to cut taxes for business, "there are going to be consequences." The Kochs and their fellow mega-donors have contributed the lion's share of the over $3.3 billion in new spending that has flooded into federal races since *Citizens United*. And they will benefit hugely from the proposed tax cuts. Eleven

This piece appeared on the Brennan Center website, December 4, 2017.

families who spent a total of $205 million on federal races in 2016 could save as much as $67.5 billion just from repeal of the federal estate tax. And corporate lobbyists were so involved in crafting the Senate's tax bill that they were the ones circulating last-minute changes to the Democrats.

In short, campaign donors are not only far wealthier on average than their fellow citizens, but also have very different priorities. Studies show that representatives' voting records track the preferences of their donors more than the preferences of ordinary voters or even wealthy, politically-active non-donors. All of which has fueled an ever-wider disconnect between the political elite and ordinary citizens (one that we should note, lest Democrats be tempted to gloat, is thoroughly bipartisan).

This divide has alienated many Americans from our political system. Distrust of government is at unprecedented levels. According to a recent Associated Press poll, three-quarters of Americans feel they lack influence in Washington. Only 14 percent have a great deal of confidence in the executive branch; for Congress, the number was 6 percent. These results mirror those of other recent surveys.

Studies show that representatives' voting records track the preferences of their donors more than the preferences of ordinary voters or even wealthy, politically-active non-donors.

Americans know that unrestricted campaign money is a big part of the problem. In the AP survey, 80 percent of respondents said the wealthy have too much political influence. Ninety-three percent in another survey said they thought elected officials listen more to big donors than their constituents. Millennials are especially concerned about this issue, which was a key factor driving their 2016 support for Bernie Sanders, who railed against *Citizens United*.

Ironically, many took Sanders' unexpected strength — and that of President Trump, whom Hillary Clinton outraised almost 2-1 — as proof that campaign money simply does not matter. But recent events tell a different story. While money does not always determine the outcome, those who have it still get to call the shots — especially when they bankroll down-ballot races that don't get the same free media as a major presidential campaign. That is why Congress is poised to pass sweeping tax cuts that the public doesn't want, but donors desperately do.

If we want government to be truly responsive to most Americans, we need to address our broken campaign finance system. This is something the public supports; in fact, outside the Beltway, few issues enjoy as much consensus. And while the Supreme Court has taken some sensible policies off the table, others remain constitutional.

One is transparency. An immediate priority should be to ensure that any final tax overhaul excludes the House's repeal of the so-called Johnson Amendment barring tax-exempt 501(c)(3) entities from intervening in politics, which would turn them into conduits for secret campaign spending. Other measures, including stronger campaign contribution

limits and public financing, don't stand much chance of passing Congress now, but ought to be championed in the states. It is also essential to continue pushing for better enforcement of existing laws and, over the long term, a change of course by the Supreme Court.

In this unstable and fractious time, it is easy to get distracted by the latest crisis and lose sight of the underlying problems that got us to where we are today. We cannot allow that to happen. Politicians come and go, and laws can be changed, but if we want a to have a truly prosperous society over the long-term, we will need a political system in which all Americans have a meaningful stake.

The Case Against Political Entrenchment

Wendy R. Weiser and Daniel I. Weiner

When Democrat Roy Cooper beat GOP incumbent Pat McCrory in the 2016 North Carolina governor's race, it was a political earthquake. The legislature, still controlled by Republicans, swung into action and passed a series of measures to limit Cooper's power. For example, it passed a law preventing the governor's party from controlling state and county election boards, as had been the case for more than a century. In addition, the GOP director of the state election board would remain in office, and not be replaced by a Cooper appointee. During a legal challenge to the slate of new laws, the Brennan Center and Democracy North Carolina filed a friend-of-the-court brief making a distinct constitutional argument: The U.S. and state constitutions, it asserted, frown on steps by political parties to entrench themselves in power. This theme runs through much of American jurisprudence, and is becoming more important as courts weigh redistricting and other matters. In early 2018, the court struck down the law.

Amici come before the Court to emphasize that the reorganization of North Carolina's electoral machinery in Session Law 2017 is no ordinary encroachment by one branch of government on another, but the centerpiece of sweeping effort by the General Assembly to entrench one political party in power regardless of its loss of voter support. Unless this Court intervenes, the challenged law would foster precisely the sort of unchecked, unaccountable government dominated by one faction that the separation of powers exists to prevent.

Unless this Court intervenes, the challenged law would foster precisely the sort of unchecked, unaccountable government dominated by one faction that the separation of powers exists to prevent.

Political entrenchment is more than partisan or factional advantage. It reflects the manipulation of electoral rules and governmental structures to make it so that the rule-making party prevails irrespective of the voters' will. The rules governing democracy may at times benefit one side. Entrenchment happens when the group in power tries to make that advantage permanent. That is the case here.

Political entrenchment clashes with bedrock principles underlying the constitutional order of this state and our nation. Indeed, the General Assembly's previous entrenchment attempts have repeatedly drawn rebuke from federal courts, including the U.S. Supreme Court. This latest gambit similarly merits invalidation.

To be sure, attempts by factions to entrench themselves in power are older than the Republic itself. As the late Justice Antonin Scalia put it, "[t]he first

Excerpted from an amicus brief submitted by the Brennan Center to the North Carolina Supreme Court in *Cooper v. Berger,* August 3, 2017.

instinct of power is the retention of power…" But the fact that entrenchment has long been with us does not render it a constitutionally valid government interest.

To the contrary, both the United States and North Carolina Constitutions were structured to prevent officeholders and political factions from manipulating rules to shield themselves from democratic accountability. Building on this constitutional history, courts have interpreted the law to thwart entrenchment efforts in many circumstances involving the electoral and political processes.

Our constitutional system's innate hostility toward political entrenchment is key to resolving this case. Opposition to entrenchment is exactly the sort of "fundamental principle[] … absolutely necessary to preserve the blessings of liberty" to which the North Carolina Constitution requires "frequent recurrence," especially when the constitutional text affords no clear answer.

Amici recognize that political entrenchment in North Carolina has been a bipartisan phenomenon. The Democratic Party also sought to manipulate the political process to frustrate the will of North Carolina voters when it had the chance. But "they did it too" is not a legal defense, especially when the real losers from the escalating series of violations are not North Carolina's political class, but the rest of this state's citizens. "We the people" are entitled to a political system in which elected leaders are responsive to citizens and can be held accountable for their decisions.

Where, as in this case, the other branches abdicate or otherwise cannot fulfill their duty to safeguard the people's fundamental interest in representative government, it is incumbent upon this Court to intervene. We urge the Court to do so.

Besides Russia, There is a Sustained Attack on Voting From Within

Sen. Chris Coons (D-Del.) and Nicole Austin-Hillery

For years, a sustained effort to make it harder to vote was pressed forward in state capitals across the country. Now the federal government seems poised to join in that push. A member of the Senate Judiciary Committee joined the director of the Brennan Center's Washington, D.C. office to explain the stakes.

Over the past several months, we've heard a lot about the Russian government's interference in our 2016 election, and rightly so. But we've heard less about another threat that has nothing to do with Vladimir Putin but is just as destructive and just as effective at undermining the integrity of our democracy: a decades-long assault on voting rights. This campaign is nothing less than a sustained attack on American democracy from within.

We have no doubt that voter suppression laws have been "passed with racially discriminatory intent," as federal courts have recognized. We also know that others were passed with an unacceptable tolerance of discriminatory effects. In 2013, those who seek to discriminate were empowered by the Supreme Court's decision in *Shelby County v. Holder*, which struck down a key part of the Voting Rights Act, the landmark law that was one of the greatest achievements of the modern civil rights movement. These days, discriminatory barriers to the ballot box often hide behind seemingly benign objectives of "fighting voter fraud" and "protecting election integrity."

As a result, too many Americans don't realize that 10 percent of Americans who are fully eligible to vote don't have the right form of identification to satisfy new voter ID laws. They may not appreciate how difficult it can be to take time off work to vote on Election Day or get a legally acceptable form of ID. They don't notice that DMVs and early-voting places have been closed only in certain neighborhoods, disproportionately impacting communities of color. They don't understand why discriminatory voting laws wouldn't just be struck down by the courts. They don't realize that after *Shelby County*, even the most egregious laws often aren't blocked until after an election, when the damage has already been done.

Too many Americans don't realize that voter suppression works, and that it has a cumulative, destructive effect on our democracy that builds with every election.

These days, discriminatory barriers to the ballot box often hide behind seemingly benign objectives of "fighting voter fraud" and "protecting election integrity."

Think about the Americans who have been denied the right to vote in recent elections. The Ohioans who, in 2004, took hours off work and waited in line to vote, but had to leave before getting a chance to cast a ballot. The Texas students turned away from voting even though they brought a state-issued university ID as proof of identification. The black churchgoers in North Carolina who used to vote the Sunday before Election Day —

This op-ed was published by *TIME,* June 30, 2017.

until Sunday voting was eliminated in counties across the state. The Wisconsin voter in 2016 who brought three forms of ID to vote but was still turned away from the polls because she didn't have a driver's license.

Can anyone blame these voters for thinking the democratic process doesn't include them?

We have a few ideas about how to fight back.

First, we should keep fighting in the courts. We have to continue to use the portions of the Voting Rights Act that remain intact to defend access to the ballot box. This fight is more challenging — and more urgent — without the support of the Justice Department. Since Attorney General Jeff Sessions was sworn in, we've already seen the Department drop one claim of intentional discrimination in Texas.

Second, we have to consistently debunk the Trump Administration's baseless claims of voter fraud. The president's so-called Commission on Election Integrity should be called out for what it is: a waste of time and taxpayer dollars. There is no evidence whatsoever that voter fraud occurs on any appreciable scale. This commission is a futile attempt to justify the president's groundless claims that millions of people voted illegally. And it's a pretext for future suppression.

Third, Congress should restore or modernize the provisions of the Voting Rights Act struck down by the Supreme Court. In 2015, more than 40 Senators and 100 members of Congress supported a bill that would do just that, but we only found one Republican. More broadly, those of us who care deeply about this issue have to fight state-by-state to encourage legislatures and governors to restore the voting rights of those with felony convictions who have served their time and paid their debt to society.

In announcing her dissent to the *Shelby County* decision, Supreme Court Justice Ruth Bader Ginsburg observed, "The arc of the moral universe is long, but it bends toward justice if there is a steadfast commitment to see the task through to completion." It's up to us to make and maintain that commitment. Nothing less than the integrity of our democracy depends on it.

Who Pays for Judicial Races?

Alicia Bannon, Cathleen Lisk, and Peter Hardin

In recent years, special interest funding has come to dominate state judicial elections. Now another dangerous trend has infected these races: dark money. In its regular analysis of spending and contributions in judicial races, the Center and its coauthors looked at ostensibly independent spending. By spending independently — or at least claiming to — special interests can spend more and often can hide their activities. Our study finds that the vast majority of outside money — 82 percent — could not be traced to the actual interest responsible.

It's no secret that the proliferation of big money in politics, abetted by 2010's *Citizens United* Supreme Court decision, has upended American elections from the smallest mayoral races to the most high-profile U.S. Senate battles. What has received far less attention, however, is that influence-seeking money has also made tremendous inroads into our courts — institutions that are constitutionally obliged to provide equal justice regardless of wealth, status, or political connections. Thirty-eight states conduct elections for their state supreme courts, powerful entities that are generally the final word on interpreting state law. This report, the most recent edition in a series that has tracked and analyzed state supreme court elections since 2000, looks at the 2015-16 supreme court election cycle. We identified several disturbing new developments that sharpen questions about partisan and special interest pressures in judicial races and about the capacity of impacted courts to deliver evenhanded justice.

For the first time, we undertook an in-depth analysis of donor transparency among interest groups and found that "dark money" spending, by groups whose funding sources are concealed from the public, is booming in state supreme court elections. Outside spending by interest groups also broke records again, while there were more high-cost races than ever before.

Outside spending by interest groups shattered records.

Rather than contributing to candidates or political parties, wealthy interests are increasingly relying on outside spending by groups to influence state supreme court elections, mirroring the trend in elections for political offices since the Supreme Court's 2010 decision in *Citizens United v. FEC*. During the 2015-16 supreme court election cycle, political action committees, social welfare organizations, and other non-party groups engaged in a record $27.8 million outside spending spree, making up an unprecedented 40 percent

Excerpted from *Who Pays for Judicial Races?,* published by the Brennan Center and the National Institute on State Politics, December 14, 2017.

of overall supreme court election spending (as compared with only 29 percent in 2013-14). Funneling spending through outside groups may be attractive to donors because it often allows them to avoid campaign contribution limits and disclosure requirements.

Supreme court elections saw an influx of secret money.

The growth of outside spending by interest groups has brought with it a stunning lack of transparency. For the first time, this report quantified the amount of money in state supreme court elections coming from sources concealed from the public. We found that only 18 percent of interest groups' outside expenditures during 2015-16 could be easily traced to transparent donors. With respect to the remaining expenditures, donors were either undisclosed (54 percent), a type of spending known as "dark money," or buried behind donations from one group to another (28 percent), making it difficult or impossible to discern the ultimate funding source, a type of spending known as "gray money." Such secrecy risks leaving voters uninformed about who is seeking to shape state high courts, and leaves litigants (and often even judges) without the tools to identify potential conflicts of interest.

There were more million-dollar supreme court races than ever before.

Twenty-seven justices were elected in $1 million-plus races in 2015-16, compared with the previous high of 19 justices in 2007-08. Pennsylvania also set an all-time national record for its 2015 election, attracting a total of $21.4 million in spending for three open seats. A greater number of justices elected in high-dollar races means more potential conflicts of interest and heightened pressure on all judges to curry favor with wealthy interests who can subsidize the increasingly high-cost of a future election.

More than half of all states with elected high courts are now impacted by big-money elections.

By the start of 2017, 20 states had at least one sitting justice who had been involved in a $1 million race during his or her tenure. By contrast, in 1999, the number was only seven. As of January 2017, one-third of all elected justices sitting on the bench had run in at least one $1 million-plus election. These figures highlight that across the country, politicized state supreme court elections are no longer the exception but the rule.

Campaign ads targeted judicial decisions, often in misleading ways.

More than half of all negative television ads aired during the 2015-16 election cycle criticized judges for their rulings on the bench, often in a misleading way designed to stoke emotion and anger. Targeting judicial decisions poses worrying threats to judicial independence, and there is both anecdotal and empirical evidence that such election pressures impact how judges rule in cases.

Courts are powerful. Their rulings impact our health, our freedom, and our bank accounts — leaving behind winners and losers. Our system can only work if judges decide cases, in good faith, based on their understanding of what the law requires — and if the public believes that they are doing so. As powerful interests increasingly see the courts as an effective vehicle for furthering their political, ideological, or financial agendas, this promise of both the appearance and reality of evenhanded justice is at risk.

We Have Seen This Before

Rev. Dr. William Joseph Barber II

Each year at the Brennan Legacy Awards Dinner, the Brennan Center celebrates leaders who advance what Justice William J. Brennan Jr. called "common human dignity." In 2017, the Center honored the National President of Repairers of the Breach and Co-Chair of the upcoming 2018 Poor People's Campaign for his contributions to American democracy.

I come from North Carolina, where we saw extremists using race and class, and we had to stand against that and turn them back. We won in the courts against some of the voter suppression, the worst that we've seen since Jim Crow and, in fact a redistricting plan that some historians said we had not seen the likes of since the 19th century, surely since *Shelby.* We became the only state in the South, in fact the only state in the Union, to stop the Trump down-ballot power. We sent an extremist governor home. We elected a progressive governor and a progressive attorney general, and we put, for the first time in history, two African-Americans on the Supreme Court.

We learned and we taught the nation that if you have a movement strategy and a civil disobedience strategy and a legal strategy and a voter registration strategy and a fusion movement strategy — and you're willing to not just do it for a week, but week after week — we can win in the South and in other parts of the nation. The Brennan Center was important to our movement, because we have a saying, "The worst thing to do is be loud and wrong." The Brennan Center was there to make sure that, when our cries needed a footnote, empirical data that could not be questioned, we were able to put that footnote and say, "According to the Brennan Center's report."

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By 1896, we had *Plessy v. Ferguson*. By 1883, we had the overturning of the Civil Rights Act of 1875. By 1898, we had riots in the street, and by 1902, there were no more African-Americans and no more fusion politics in the country. We've seen this before. Nell Painter says, *"America has this strange reality called call and response, the call for justice, and either simultaneously or concurrently, we have a response of hatred and vitriol."* Don't ever say we've never seen this before.

Almost 100 years exact to the date, the same thing was happening in America.

It was in a time of economic struggle. It was a time of immigrant hatred. It was in a time of rolling back voting rights. Woodrow Wilson was elected, and in

These remarks were given at the Brennan Legacy Awards Dinner in New York City, November 16, 2017.

1916, before Steve Bannon ever went in the White House, Woodrow Wilson played "Birth of a Nation" to his whole staff. He began to resegregate the federal government, stop desegregation, kick black civil rights leaders out of his office.

We can never say we've never seen this before. In '68, George Wallace gave a speech right here in Madison Square Garden. If you read his speech and close your eyes, you can hardly discern whether that's Trump or Wallace.

Kevin Phillips said to Richard Nixon, *"You can win if you learn how to do this. Find out who hates who. Find out how to talk race without sounding racist. Talk about tax cuts. Talk about states' rights. Talk about entitlement programs. Use those as racial code words, and you'll win in the South, and you'll win in certain ethnic enclaves in the north…"*

We need a moral revival. We have in America right now not a left and a right problem, not a liberal versus a conservative problem ... we have a moral problem.

What we have seen is because of an audience that has been cultivated for the last 50 years, and it is as American as apple pie, but what is also as American as apple pie is that there's always been those who would not just stand up and resist, but would stand up and move forward, and refuse to go backwards. We need a moral revival. We have in America right now not a left and a right problem, not a liberal versus a conservative problem ... That language is too puny for this moment. It's too small. We have a moral problem. We have a soul problem as a nation. We must challenge systemic racism, and we must challenge it not as interpersonal relationship. That's not what we mean when we talk about racism.

We have seen more attacks on voting rights since Jim Crow, and we actually have less voter protection since the *Shelby* decision than we had August 6, 1965, when the Voting Rights Act was first passed. We must deal with systemic racism.

The question before us is not left or right, or conservative versus liberal, but the real question before us is the question that was before us during slavery, the question that was before us in the 1800s, the question that was before us in 1877, the question that was before us with *Plessy v. Ferguson,* the question that was before us with Woodrow Wilson, the question that was before us in the civil rights movement: Is America possible, and will we fight for that possibility? That is the question that is before us. It's bigger than party. Our fight now is not to save a party; it is to save the very heart and soul of this democracy.

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All is not lost. We have seen this before. We have overcome it before, but we've got to fill up the malls and fill up the streets and fill up the Congress, and demand that we be heard. Make them hear you! That must be our rallying cry.

RUSSIAN ELECTION INTERFERENCE

Congress Must Ensure Elections Are Fair and Secure

Lawrence Norden

A National Security Agency report that leaked in June said Russian military intelligence had mounted a cyberattack against a company that develops voter registration software. The Russians used data from that operation to launch a campaign targeting "U.S. local government" voter registration records.

Protecting our elections against foreign attackers ultimately requires the will to squarely address known vulnerabilities.

On one level, the National Security Agency report was not particularly surprising. We knew from a January report from American intelligence agencies that hackers working on behalf of the Russian government were targeting state and local voter registration databases. And there is nothing in the NSA report that supports the idea that Russian hacks against election offices and registration systems prevented anyone from voting or changed vote totals in any way. (It always bears repeating that the voter registration system and vote tallying systems are different. An attack against the registration system will not change vote totals on a voting machine.)

The details about Russian hacking cast into stark relief Congress' stunning passivity around the issue of election infrastructure security — not just for the past few months, but for more than a decade.

Over the past few years, the need for new investment in our election infrastructure has become more and more apparent to anyone who studied the issue. In 2014, the bipartisan Presidential Commission on Election Administration warned of an "impending crisis" of aging voting technology. The Brennan Center noted in a comprehensive study of voting machines in 2015 that this old equipment has significant security vulnerabilities. It hasn't been tested to the relatively rigorous federal certification standard that exists today and often runs on unsupported software (like Windows 2000 and Windows XP) that doesn't receive regular security patches to protect against current methods of cyberattack. Even more troubling, many of these systems don't have a "software independent record," such as a paper ballot, that can be used to independently verify that the software totals weren't hacked.

While these studies' main focus was often on voting machines, many of the same concerns about outdated hardware and software could be applied to state and county voter registration systems.

For the past 10 years, in the face of evolving cyberattacks and warnings from security experts about protecting our elections from hacking, Congress has remained strangely silent. Just about the only discussion there has centered around whether to shut down the tiny Election Assistance Commission, the federal agency charged with setting standards and providing guidance for electoral systems on criteria like performance and security. It has an annual budget of about $10 million, or less than five cents per registered voter.

Of course, under the American system, states and counties are in charge of running elections. But Congress clearly has a supporting role. After all, among the elections that states and counties run are federal contests for Congress

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and the presidency. Congress has an obligation to ensure that these elections are fair and secure.

For the past 10 years, in the face of evolving cyberattacks and warnings from security experts about protecting our elections from hacking, Congress has remained strangely silent.

Moreover, many of the expenses that states and localities now must bear to secure our election system from cyberattacks stem from actions Congress has taken over the past 15 years. It was Congress that mandated the replacement of outdated and failing punch card and lever machines in 2002. It was Congress in 2009 that mandated states transmit ballots to military and overseas voters at least 45 days before an election, requiring states to offer to send blank ballots by email, fax, or online delivery system.

The revelations in the leaked NSA document make it plain that Russia is likely to continue to escalate its efforts to interfere in our democracy, and this fact may embolden other foreign powers or terrorist groups like ISIS to act against us as well. States and counties have done much to improve election security in recent years — most importantly, the vast majority of states have moved away from paperless voting machines. But more needs to be done.

We must recognize that we live in a world where foreign interests are vying for power on the world stage by trying to shape American politics or even attempting to create doubts that democracy really works. Against that backdrop, it is clear that strengthening election security is essential to protecting our national security.

It is time for members of Congress to step up. They can encourage urgent action by state and local funders by providing them with time-limited grants to do things like replace antiquated machines, upgrade the hardware and software that supports voter registration, and conduct post-election audits to confirm to the public that they can trust the results. State and local election officials know what improvements their systems need, and security experts have made clear recommendations. Congress should listen to these voices and use its powers to strengthen election systems' ability to withstand the next attack.

The Russians Will Be Back

R. James Woolsey Jr.

In June, the Brennan Center published a comprehensive report Securing Elections From Foreign Interference. *The study offered several recommendations, such as replacing antiquated voting machines and upgrading voter registration databases. Michael Chertoff, former secretary of Homeland Security, joined an op-ed at* The Wall Street Journal *urging lawmakers to treat security as it would any other measure of national security, and upgrade vulnerable infrastructure. Sens. Amy Klobuchar (D-Minn.), Lindsey Graham (R-S.C.), Kamala Harris (D-Calif.), James Lankford (R-Okla.), Susan Collins (R-Maine), and Martin Heinrich (D-N.Y.) introduced federal legislation that mirrors the Center's recommendations.*

In the last few months, we have learned extraordinary details about a Russian assault on our election infrastructure. While there is no evidence that this assault altered the vote count, that fact should be cold comfort as we look to protect ourselves against future attacks.

I am confident the Russians will be back, and that they will take what they have learned last year to attempt to inflict even more damage in future elections. Of course, Moscow is not the only adversary that we have to worry about.

One doesn't have to be an expert on cybersecurity or election technology to understand how dangerous this is. Based on my experience, as a former Director of Central Intelligence, and in service to this country under both Democratic and Republican presidents, I am confident the Russians will be back, and that they will take what they have learned last year to attempt to inflict even more damage in future elections. In particular, their history of interfering in other nations' politics, their antipathy to the United States and Western democracies generally, and their proven ability to multiply the impact of their actions through cyberattacks should put us on the highest alert, and spur us to take all necessary actions to protect ourselves from further attack.

Of course, Moscow is not the only adversary that we have to worry about. North Korea has been implicated in the ransomware attack that locked up the computers of government agencies and businesses worldwide this May, while Al Qaeda and ISIS have a history of executing cyberattacks on foreign government websites. They too might be emboldened by Russia's actions against us last year.

Woolsey served as Director of Central Intelligence in the Clinton administration. He wrote this foreword for the Brennan Center report *Securing Elections from Foreign Interference,* published June 29, 2017.

This report offers important guidance on how to protect ourselves. In particular, it looks at the two most critical parts of America's election infrastructure: voting machines, which could be hacked to cast doubt on the integrity of vote tallies, or change them; and voter registration databases, which could be manipulated to block voters and cause disorder when citizens attempt to vote.

As the authors explain, much has been done to secure these systems in the last few years. But hackers have grown increasingly sophisticated in this time as well. And the state and local elections officials who are custodians of our election infrastructure often operate with highly constrained resources.

What more must be done? The key security measures detailed in this report are the right place to start: replace paperless electronic machines, upgrade the hardware and software that supports voter registration, and conduct post-election audits to confirm the results.

These are common-sense solutions that will increase security and public confidence in the integrity of our system. Importantly, they will do so without interfering with the right of any eligible citizen to participate in the choice of who will govern the nation.

Sadly, as polarization has increased in this country, even discussions of topics like how to safeguard our voting systems have broken down into partisan fighting, with each side looking for an advantage in the debate, and failing to take the steps necessary to secure our infrastructure from attack. We can no longer afford such indulgence. As has happened at key moments in our history, we face a test from outsiders who would like to harm us. We are forced to answer whether we can, once again, lay aside our differences to work together to protect the common interests of our nation.

The history of national defense shows that threats are constantly evolving. When the United States was attacked at Pearl Harbor, we took action to protect our fleet. When we were attacked on 9/11, we took action to upgrade transportation security and protect our ports and other vulnerable targets. We were attacked in 2016. The target was not ships or airplanes or buildings, but the machinery of our democracy. We will be attacked again. We must act again — or leave our democracy at risk.

James Comey's Notes Are Trump's Smoking Gun

Michael Waldman

Four days after the president fired the director of the FBI, a leaked memo by James Comey revealed that Trump had asked him to shut down the investigation of former National Security Adviser Michael Flynn. Echoes of Watergate?

Today's startling news that Donald Trump told FBI Director James Comey to end the investigation of former National Security Advisor Michael Flynn comes less than four months into this president's first term.

Trump is not the first president to be vexed by Justice Department or FBI investigations. Chief executives don't like the idea of someone with subpoena power peering into their inner circle and activities. Nixon, Bill Clinton, and George W. Bush, among others, faced high-stakes investigations. How they reacted set the course of their presidencies. Few have handled it worse than Trump.

To set the scene, let's begin ages ago in our great national lesson in what constitutes "obstruction of justice," say, four days ago. When Trump fired Comey, there was plenty of evidence — commonsensical, circumstantial, but not quite direct — that the purpose of the firing was to derail a looming and increasingly threatening investigation. Then the president did us all the favor of explaining to Lester Holt that "this Russia thing with Trump and Russia" was on his mind when he decided to fire Comey.

Now comes word of Comey's extraordinary contemporaneous memo describing a meeting with Trump. The president asked the FBI chief to hang back after a meeting in the Oval Office, the day after Michael Flynn resigned for having lied about his contacts with Russia. "I hope you can see your way clear to letting this go, to letting Flynn go," Trump told the no-doubt astonished Comey in his written account. "He is a good guy. I hope you can let this go."

If the White House can just order investigators to shut down when they get close to the president, there's no possible independent check on Oval Office lawlessness.

This was blunt and explicit — no hinting inferences here. It's wildly problematic, of course, for several reasons. Trump is not just some kibitzer or constituent. He was Comey's boss. "Letting Flynn go" sounds rather, well, literal. Already, in an earlier conversation, the president had asked for "loyalty."

If the White House can just order investigators to shut down when they get close to the president, there's no possible independent check on Oval Office lawlessness. Trump's words seem to violate one of the federal obstruction of justice statutes, which applies to "whoever corruptly … endeavors to influence, obstruct, or impede the

This op-ed was published by The Daily Beast the day the memo was published, May 17, 2017.

due and proper administration of the law under … any pending proceeding."

Is this new allegation proof of criminal obstruction of justice? Let's remember, for starters, that most legal scholars generally believe a sitting president cannot be indicted. He can, however, be impeached. Firing Comey to turn off an investigation might be impeachable but not indictable. That's the kind of abuse of power that checks-and-balances must prevent. But Comey's new allegation is simpler, blunter, more brutal, and more plainly illegal.

The playwright Anton Chekhov (yes, Russian) famously said that if you put a gun on the table in the first act, it should be fired in the last act. The audience has barely settled into its seats. But in Donald Trump's increasingly implausible drama, the gun is smoking.

Russian Ads and American Voters

Lawrence Norden and Ian Vandewalker

The Russians spent an estimated $500,000 on online political ads in 2016. Not a penny was disclosed to voters.

Thanks to a recent revelation from Google, we now know that Facebook, Twitter, and YouTube — three of the most prominent online platforms in the U.S. — sold political ads to the Russians ahead of the 2016 election.

Congress has long been concerned about foreign spending in our elections, which it sees as a national security issue: It banned such spending in the 1966 congressional amendments to the Foreign Agents Registration Act. But the law hasn't kept up with technology, creating a loophole that allowed the Russians to purchase ads without detection in 2016.

Congress banned such spending in the 1966 congressional amendments to the Foreign Agents Registration Act. But the law hasn't kept up with technology, creating a loophole that allowed the Russians to purchase ads without detection in 2016.

The loophole exists because the Bipartisan Campaign Reform Act (BCRA), which was passed in 2002, only refers to broadcast, cable, and satellite communications in its definition of "electioneering communications" — that is, political advertisements that attack or praise a candidate without explicitly urging the viewer to vote for or against her. BCRA required the purchaser of such advertisements on TV or radio to be disclosed, and amended the original Federal Election Campaign Act of 1974 to prohibit foreign nationals (and governments) from engaging in such political spending. But BCRA didn't mention internet advertisements — which is unsurprising since they barely existed at the time.

The revelations about Russian ads online have fueled calls for Congress to revisit campaign finance law as it applies to the internet and make sure we find a way to prevent Russia, or any other foreign power, from spending on political ads in the United States again.

On October 19, we took a step in the right direction. Minnesota Democratic Sen. Amy Klobuchar, Republican Arizona Sen. John McCain, and Virginia Democratic Sen. Mark Warner have introduced the bipartisan Honest Ads Act. The bill creates a framework for updating campaign finance law for the 21st century, making a broader swath of online activity subject to transparency requirements and the ban on spending by foreign nationals.

The Honest Ads Act does this by expanding the definition of "electioneering communication" to include paid political advertisements online. It also requires major internet platforms to maintain a public database of all such communications purchased by a person or group if they spend more than $500. The company would include a digital

This op-ed was published by Slate, October 19, 2017.

copy, a description of the audience targeted, and the rate charged for each ad. Finally, the act requires online platforms to make all reasonable efforts to ensure that foreign citizens and powers are not purchasing political advertisements, just as radio and television broadcasters are already required to do.

Of course, the Honest Ads Act is not a silver bullet. The ad purchases on Facebook, Google, and Twitter were a brazen undertaking. The act would close off some avenues that the Russians used in 2016, but Moscow could in the future — and let's not kid ourselves, may have in 2016 — also purchase political ads through "dark money" groups. Thanks in part to Supreme Court decisions like *Citizens United,* these groups can take unlimited contributions from donors without having to disclose them.

The good news is that this problem, too, has a legislative solution. The DISCLOSE Act, versions of which have been introduced in Congress since 2010, would eliminate dark money as we know it. At its core, the legislation would require any group that spent above a threshold amount on elections to disclose its major donors of $10,000 or more.

Even without the passage of the DISCLOSE Act or similar legislation, the Honest Ads Act can play an important role in exposing and limiting the influence of Russian and other foreign election propaganda online. That is in large measure thanks to the work of nongovernmental organizations and the media, which have begun to expose how Russian political propaganda is influencing the political discourse in the United States.

Social Media and Dark Money

Ian Vandewalker

In the 2016 election, $1.4 billion was spent online — almost 50 times more than was spent in 2004. Without strengthened legislation around political advertisements, the internet is a ripe target for foreign adversaries seeking to meddle in elections.

Political advertising is experiencing a shift toward spending on the internet, which makes it easy and inexpensive to disseminate messages widely or with pinpoint audience targeting. Yet our laws have not been updated for this new era, leaving much political spending on the internet unregulated. Investigations into the 2016 election have revealed a widespread, multipronged effort by the Russian government to alter the course of public debate by injecting propaganda and divisive messages into the American political discussion. Russian operatives bought thousands of ads discussing political issues here, reportedly including messages advocating the election of candidates. And they did so while disguising their identity with fake profiles designed to look like they were controlled by Americans.

The potential for online ads to enable agents of a foreign government to pose as Americans while spreading propaganda creates risks for our democracy.

The potential for online ads to enable agents of a foreign government to pose as Americans while spreading propaganda creates risks for our democracy. American audiences can be misled about how popular an idea is with their compatriots and make decisions about which candidate to support, whether to vote, or even which facts to believe, all under false premises.

The intelligence community is confident that Russia will attempt to meddle in our elections again. And of course, the threat is not limited to Russia. Moscow's efforts in 2016 may serve as a blueprint, enabling an unknown number of copycats interested in meddling in American affairs, whether it's China, Iran, North Korea, or ISIS. As former Homeland Security Secretary Jeh Johnson put it, "the Russians will be back, and possibly other state actors, and possibly other bad actors." There are actions that Congress can immediately take to limit the opportunities for foreign governments to spend on election ads, and to ensure that Americans have the information they need to make informed decisions about what to believe and how to vote.

This testimony was delivered before the House Oversight Committee, Subcommittee on Information Technology, October 24, 2017.

The Brennan Center recommends legislation that would accomplish the following:

1. Require the same disclosure and disclaimers for online ads that the law currently requires for other mass media, and require that information about political ads online is preserved in a database available to the public.

2. Eliminate "dark money" spending by organizations that do not disclose their donors, which can be used to hide foreign expenditures on elections.

3. Expand the ban on election spending by foreign nationals to include domestic corporations with substantial foreign ownership or control.

4. Reform the Federal Election Commission to reduce the likelihood of deadlock by providing for an odd number of commissioners, at least one of whom is nonpartisan.

To be sure, the possibilities for foreign governments meddling in our elections in the future go beyond the financing of political advertisements. Reports of Russia's activities last year include unpaid posts on social media and the use of automated accounts, or "bots," to amplify messages. There are likely benefits of increasing transparency on social media to make it harder for foreign governments to engage in coordinated, covert attempts to sway American elections, and there may be steps for the social media companies, the public, and even Congress to take to improve transparency.

Regardless, it is clear that there are essential measures, recommended here, that Congress can and should enact now in order to keep foreign powers from secretly spending as much as they want on political ads in the next election.

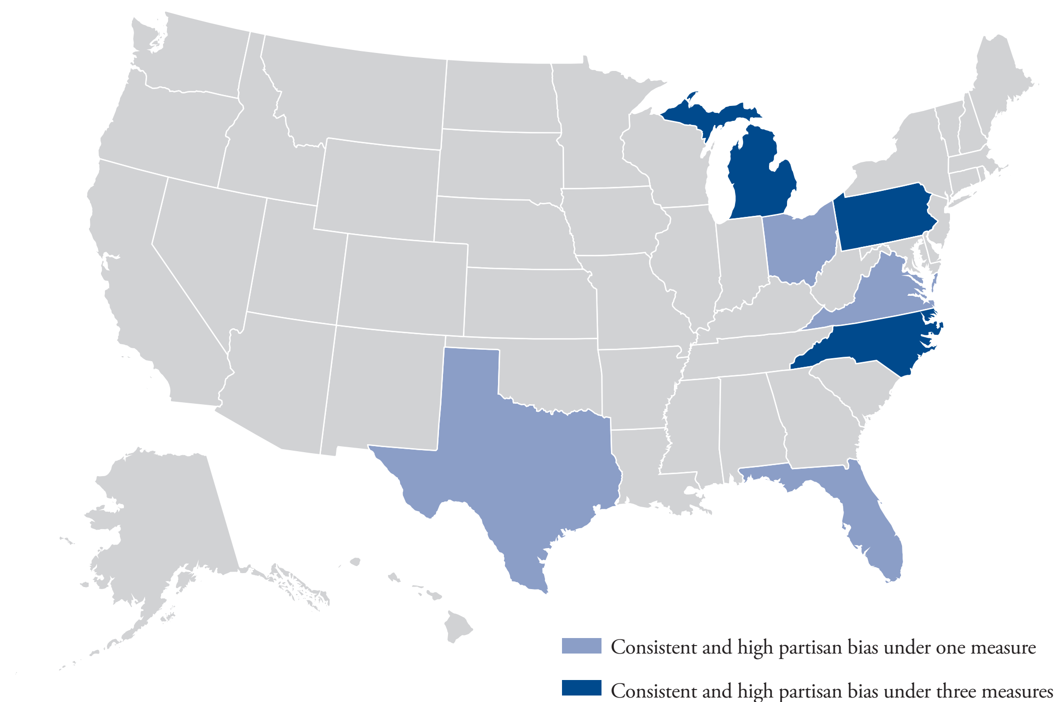
GERRYMANDERING

Extreme Maps

Laura Royden and Michael Li

In 2017, a wide legal assault on partisan gerrymandering moved through the courts. A major Brennan Center study found that the problem was not universal throughout the country. Rather, the most distorted maps were produced by "extreme partisan gerrymandering," and found in seven states. Together these biased maps produced an extra 16 House seats for Republicans.

States with Consistent and High Partisan in Current Congressional Maps



Every decade, states redraw congressional maps after the decennial census. Redistricting allows districts to be rebalanced, ensuring in theory that all districts are both equally populated and representative. But redistricting also provides an enormous opportunity for politicians: The chance to redraw a district map means the opportunity to gerrymander and to manipulate a map to create a more favorable set of districts for themselves and for their party.

Excerpted from the Brennan Center report *Extreme Maps,* published May 9, 2017.

Congressional maps were last redrawn en masse after the 2010 Census, and accusations of gerrymandering in states nationwide soon followed. Complaints about redistricting abuses ran the gamut from allegations that some maps had been drawn to favor incumbents to outrage at the sprawling and unnatural shapes of districts in others.

This report focuses on one of the most egregious of these abuses: the manipulation of district lines to give the party drawing the map a share of seats grossly at odds with statewide election results, thus ensuring that one party is overrepresented and the other underrepresented in a delegation.

To gauge where this type of gerrymandering is taking place and its magnitude, this report used election results in states with six or more congressional districts to assess the extent and the durability of "partisan bias" — the degree of systematic advantage one party receives over another in turning votes into seats. For this analysis, this report used multiple quantitative measures of partisan bias to examine the 2012, 2014, and 2016 congressional elections. It also looked at the relationship between the body that drew the maps and the degree of bias observed. It is among the first analyses to use 2016 electoral data to examine maps, and the first report of its kind to measure maps using multiple measures of bias and to identify the handful of single-party controlled states that are responsible for nearly all of the bias in this decade's maps.

Our key findings include:

This decade's congressional maps are consistently biased in favor of Republicans.

- In the 26 states that account for 85 percent of congressional districts, Republicans derive a net benefit of at least 16-17 congressional seats in the current Congress from partisan bias. This advantage represents a significant portion of the 24 seats Democrats would need to pick up to regain control of the U.S. House of Representatives in 2018.

Just seven states account for almost all of the bias.

- Michigan, North Carolina, and Pennsylvania consistently have the most extreme levels of partisan bias. Collectively, the distortion in their maps has accounted for seven to ten extra Republican seats in each of the three elections since the 2011 redistricting, amounting to one-third to one-half of the total partisan bias across the states we analyzed.

- Florida, Ohio, Texas, and Virginia have less severe partisan bias but jointly account for most of the remaining net extra Republican seats in the examined states.

Single-party control of the redistricting process is closely linked with biased maps.

- The seven states with high levels of partisan bias are all states where one political party had sole control of the redistricting process. Court-ordered modifications to maps in Florida, Texas, and Virginia — all originally drawn under sole Republican control — have reduced but not entirely curbed these states' partisan bias.

- States where Democrats had sole control of redistricting have high partisan bias within state congressional delegations, but the relatively small number of districts in these states creates a much smaller effect on partisan bias in the House overall.

- By contrast, maps drawn by commissions, courts, and split-control state governments exhibited much lower levels of partisan bias, and none had high levels of bias persisting across all three of the elections since the 2011 round of redistricting.

There is strong evidence that the bias in this decade's congressional maps is not accidental. With the exception of Texas, all of the most biased maps are in battleground states. These states routinely have close statewide elections and a fairly even distribution of partisanship across most of the state — two factors that do not naturally suggest that there should be a large and durable underrepresentation of one political party.

Extreme Partisan Gerrymandering at the High Court

In October, the U.S. Supreme Court heard oral arguments in Gill v. Whitford, *a challenge to partisan gerrymandering in Wisconsin. Justice Ruth Bader Ginsburg predicted the case would be the term's most significant. The justices considered an appeal of a three-judge panel's ruling that struck down Wisconsin's legislative map as unconstitutional. If the Court upheld the ruling, it would be the first time in American history that it place constitutional limits on extreme partisan gerrymanders. The Brennan Center, together with Common Cause, coordinated 25 of the friend-of-the-court briefs that urged the justices to act. Altogether, the briefs made a compelling broad public case for action. Excerpts from some of the briefs are below.*

Partisan Gerrymandering Has Never Been Acceptable

Peter H. Argersinger, Carol Berkin, Holly Brewer, John Brooke, Saul Cornell, Joanne B. Freeman, Jonathan Gienapp, Hendrik Hartog, Alexander Keyssar, James Kloppenberg, Gerald F. Leonard, Peter S. Onuf, Jack Rakove, John Fabian Witt, and Rosemarie Zagarri represented by Cliff Sloan and Brendan B. Gants

Contrary to some misconceptions, although partisan gerrymanders have occurred at various times, they never have been regarded as an acceptable feature of American democracy. Rather, consistently since its inception, partisan gerrymandering has been forcefully denounced as unconstitutional, as a form of corruption that threatens American democracy, and as an infringement on voters' rights. Even those who engaged in partisan gerrymandering have generally not defended the practice as sound or meritorious or democracy-enhancing; rather, the defense typically has been simply that the other party did it before or would do it if given the opportunity. In short, any claim that partisan gerrymandering has been regarded as an acceptable characteristic of our democratic system is demonstrably ahistorical.

Defend Democracy, organized by Common Cause

Sens. John McCain (R-Ariz.) and Sheldon Whitehouse (D-R.I.) represented by Kathryn Cahoy, KeAndra Barlow, Mark W. Mosier, Ryan Mowery, and Alec Webley

Democracy is not abstract or academic. It is a battleground on which competing interests exert all the pressure they can muster. This battleground often pits special interest groups against a general population that wants only to be treated fairly. Special interest groups have long influenced the

Excerpted from amicus briefs in *Gill v. Whitford,* argued October 3, 2017.

outcome of elections. But this Court's decision in *Vieth* made redistricting a particularly attractive tool for these groups. No longer concerned about the prospect of judicial review, state legislatures now push gerrymandering to its limits, and special interests, supported by dark money, help them do so. The result has greatly undermined the public's faith in our democracy.

When Politicians Select Voters, organized by Common Cause

Republican Statewide Officials Sen. Bill Brock (Tenn.), Sen. John Danforth (Mo.), Sen. Bob Dole (Ks.), Gov. James Douglas (Vt.), Gov. Jim Edgar (Ill.), Gov. John Kasich (Ohio), Gov. Frank Keating (Okla.), Sen. Richard Lugar (Ind.), Gov. Jock McKernan Jr. (Maine), Gov. Bill Owens (Colo.), Gov. Arnold Schwarzenegger (Calif.), Sen. Alan Simpson (Wyo.), Gov. Christine Todd Whitman (N.J.), and Lt. Gov. Corinne Wood (Ill.) represented by Charles Fried, David C. Frederick, Daniel V. Dorris, and Matthew R. Huppert

Amici have decades of experience serving in statewide elective office. This gives them a unique vantage point. Because they do not owe their political careers to the spoils of partisan gerrymanders, they govern with the goal of building consensus and crafting policy that is bipartisan and responsive to the will of the entire electorate. Partisan gerrymandering frustrates those efforts. It entrenches political parties against popular will; it polarizes legislatures and creates gridlock; and it engenders voter cynicism about a political system that has been rigged to achieve predetermined electoral results, potentially in opposition to their will. Politicians now select their voters, instead of voters electing politicians.

Wisconsin's Districts Cannot Withstand Constitutional Scrutiny

Heather K. Gerken with Jonathan N. Katz, Gary King, Larry J. Sabato, and Samuel S.-H. Wang represented by Kevin K. Russell and Heather K. Gerken

Plaintiffs ask this Court to do what it has done many times before. For generations, it has resolved cases involving elections and cases on which elections ride. It has adjudicated controversies that divide the American people and those, like this one, where Americans are largely in agreement. In doing so, the Court has sensibly adhered to its long-standing and circumspect approach: It has announced a workable principle, one that lends itself to a manageable test, while allowing the lower courts to work out the precise contours of that test with time and experience. Partisan symmetry, the principle put forward by the plaintiffs, is just such a workable principle. The standard is highly intuitive, deeply rooted in history, and accepted by virtually all social scientists. Tests for partisan symmetry are reliable, transparent, and easy to calculate without undue reliance on experts or unnecessary judicial intrusion on state redistricting judgments. Under any of these tests, Wisconsin's districts cannot withstand constitutional scrutiny.

Voter Behavior is Predictable and Exploitable

Robert A. Atkins, Nicholas Groombridge, Andrew J. Ehrlich, Pietro Signoracci, and Michael Pernick

The past decade has seen an explosion in data gathering and data analytics. This explosion is poised to have a significant impact on mapmaking and plan analysis in the redistricting context. Mapmakers have at their disposal more data — and more accurate data — about individual voters than ever before.

Mapmakers have access to sophisticated analytical software and technology allowing them to leverage this data to predict and exploit voter behavior with a high degree of accuracy. These new and enhanced data and tools — coupled with the demonstrated stability of partisan identity and increasing stability of partisan behavior — allow mapmakers seeking to engineer a gerrymander to sort through a vast

array of maps and select those that would entrench the most extreme partisan bias, all without violating historical redistricting principles. As a result, gerrymandering techniques that were only theoretical in the 2010 redistricting cycle could become commonplace in the 2020 redistricting cycle and beyond.

The Right to Join a Political Party is at Stake

Bradley S. Phillips

Under this Court's precedents, the right to freedom of association does more than just safeguard the right to join a political party or other group of like-minded people. It also prohibits state regulations that discriminatorily burden a political group's ability to influence the electoral process. As Justice Kennedy suggested in *Vieth v. Jubelirer*, redistricting laws that discriminatorily burden one political party at the expense of another — partisan gerrymandering — effect this type of injury and warrant strict scrutiny. Unless they are narrowly tailored to a compelling state interest, such laws must be struck down.

Extreme Partisan Gerrymandering is Not Normal Politics

Wendy R. Weiser, Michael Li, Daniel I. Weiner, Brent Ferguson, Thomas Wolf, Anton Metlitsky, Bradley N. Garcia, and Samantha M. Goldstein

When a single party takes control of the redistricting process in a state with a recent history of competitive statewide elections, the majority is more likely to intentionally seize the opportunity to entrench itself, that attempt is more likely to work, and any proffered justification for the state's actions is less likely to be plausible. The presence of these two factors is therefore strong evidence of an unconstitutional gerrymander, and their absence should usually lead a court to reject a partisan-gerrymandering challenge. Courts can use these indicia — in conjunction with statistical evidence and other easily identified deviations from normal legislative processes, such as unusual secrecy or speed — to readily distinguish rare, invidious partisan gerrymanders from "normal politics."

History Frowns on Partisan Gerrymandering

Cliff Sloan and Michael Waldman

Wisconsin's lawyers, in defending that state's gerrymander, relied on history: The practice has always been a part of American political life, going back to the founding era. The author of the definitive modern book on Marbury v. Madison *joined with the Center's president, who has written two books of constitutional history, to set the record straight. Sure, the framers knew about manipulation — but they tried to forestall it. For the Founders, gerrymandering was a bug, not a feature of our constitutional order.*

As the Supreme Court prepares to consider whether gerrymandering can ever be so partisan as to be unconstitutional, some defenders of the practice will contend that its long historical pedigree should immunize it from judicial review. But history tells a different story. Partisan gerrymandering is inconsistent with the democratic ideals enshrined in the Constitution, and Americans since the founding generation have vehemently denounced it. In the extreme form it takes today, with districts drawn to give the controlling party a stranglehold on power, gerrymandering represents an unprecedented threat to our democracy.

The case to be argued Tuesday, *Gill v. Whitford*, comes from Wisconsin. In 2011, Republicans, with control of the legislature and statehouse, rammed through a legislative map explicitly crafted to guarantee that the GOP would maintain its political power and could not be unseated by the ordinary operation of elections. The plan used sophisticated digital tools to ensure that Democrats could not regain control even if they won all swing districts. It was, in effect, a perpetual-motion entrenchment machine. A three-judge court held the plan unconstitutional.

Partisan gerrymandering is inconsistent with the democratic ideals enshrined in the Constitution, and Americans since the founding generation have vehemently denounced it.

Partisan gerrymandering — like racial gerrymandering and violations of the one-person, one-vote principle — has occurred at various times in American history. But it has been forcefully condemned as unconstitutional at every turn. Patrick Henry, for example, crafted a district to separate James Madison from his political supporters. But newspapers decried Henry's scheme as a violation of the right of a free people to choose their representatives. In the action that gave gerrymandering its name, Massachusetts Gov. Elbridge Gerry in 1812 signed a districting bill designed to give his party a decisive political advantage. Opponents objected that the law "inflicted a grievous wound on the Constitution" — it "subverts and changes our Form of Government" and "silences and stifles the voice of the Majority." The machinations of Henry and Gerry, adamant opponents of the Constitution, hardly embodied its spirit.

Cliff Sloan is a partner at Skadden, Arps, Slate, Meagher & Flom LLP, which filed an amicus brief in *Gill v. Whitford* on behalf of 15 leading historians of the founding era. This op-ed was published by *The Washington Post,* October 1, 2017.

The next two centuries saw continued objections to partisan gerrymandering as a violation of our core constitutional principles. For example, in 1870, Rep. (and future president) James Garfield excoriated the practice and objected that "no man, whatever his politics, can justly defend" it. In 1891, President Benjamin Harrison condemned gerrymandering as a form of "political robbery." He declared that its "overthrow of majority control by the suppression or perversion of the popular suffrage" represented "our chief national danger." Other examples throughout our history abound.

All this vehement condemnation of gerrymandering as at odds with the Constitution should not surprise. The framers were keenly aware of the corruption of the English system of parliamentary elections, in which "rotten boroughs" and similar devices interfered with genuine democratic expression. Americans in the revolutionary age scorned the British concept of virtual representation, in which defenders claimed Parliament would act wisely even if it was not directly representative. Instead, they embraced actual representation as a central animating principle of the Constitution. Elected representatives would have close ties to their constituencies, and the assembly would be responsive to the popular, democratically expressed will. While omissions from the voting polity (such as race, gender, and economic circumstance) now seem glaring, the commitment to actual representation — unimpeded by contrived barriers between the electorate and its representatives — was fundamental and widely shared. When colonists shouted, "No taxation without representation," they articulated a view of legitimate governance very much relevant to this case. And nobody thought that "representation" meant a government-imposed permanent minority status.

Madison understood the abuses that could come from state legislators trying to entrench their own faction. "Whenever the state legislatures had a favorite measure to carry, they would take care so to mold their regulations as to favor the candidates they wished to succeed," he warned at the Constitutional Convention. Inequality in legislatures would lead to inequality in congressional representation. "It was impossible to foresee all the abuses that might be made of the discretionary power," he said.

Partisan gerrymandering violates the framers' core principle of actual representation. It likewise conflicts with the First Amendment right to meaningful political speech and association, and with the 14th Amendment's extension of constitutional responsibilities to the states. Viewed through the prism of history, partisan gerrymandering is not an accepted and cherished feature of our American system. And the extreme gerrymanders we see today go dramatically further than anything we have seen in the past. They sabotage fundamental constitutional values. For those defending partisan gerrymanders, contrary to their sweeping claims, history is not on their side.

Ending Partisan Gerrymandering Will Not Hurt Minorities

Michael Li and Laura Royden

Whenever there is a push to end partisan gerrymandering, Democrats or Republicans argue that ending party dominance will harm minorities. Yet, the evidence — using three different statistical measures — shows that is not the case.

Is the goal of eliminating partisan gerrymandering in conflict with the goal of making sure minority communities have an effective electoral voice?

We looked at the issue empirically, by analyzing more than two decades' worth of electoral maps — from 1992 to 2006 — from 18 states that that had majority-minority districts in this period.

Our findings upend conventional wisdom. The data categorically demonstrates that minority voting power can be protected when partisan gerrymandering is forbidden. Not only can the two goals coexist, but majority-minority districts can help prevent minority communities from being used to maximize partisan advantage — by *either* Republicans or Democrats.

Looking at the evidence

To find out, we analyzed congressional election returns from the 1990s, 2000s, and 2010s, and measured each party's seat share using three statistical tests used by social scientists to gauge the degree of partisan bias in electoral maps. Those tests are the "efficiency gap" (subject of much publicity recently), the "seats-to-vote curve," and the "mean-median difference." The tests vary in their approach, but all measure the degree to which a political party is able to translate votes into seat share. (If one party can consistently win a majority of seats despite attracting a minority of votes, that can in effect lock the other party out of power.)

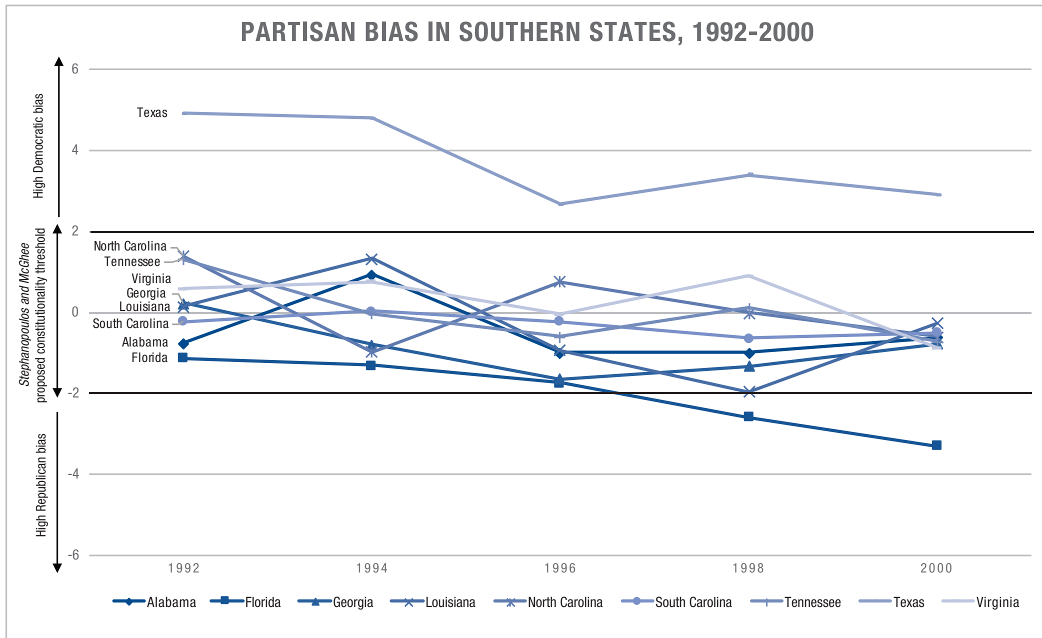
If a map scores high in partisan bias under any of these measures, it's a strong signal of partisan gerrymandering; if it scored high under all three, the signal is even stronger. Although some justices appeared skeptical of these tests last week — Chief Justice John Roberts referred to "sociological gobbledygook" — they hold out the hope of making the identification of gerrymandering a more scientific process than it's been.

We found little to no link between partisan gerrymandering and majority-minority districts — and the evidence from the South was especially compelling.

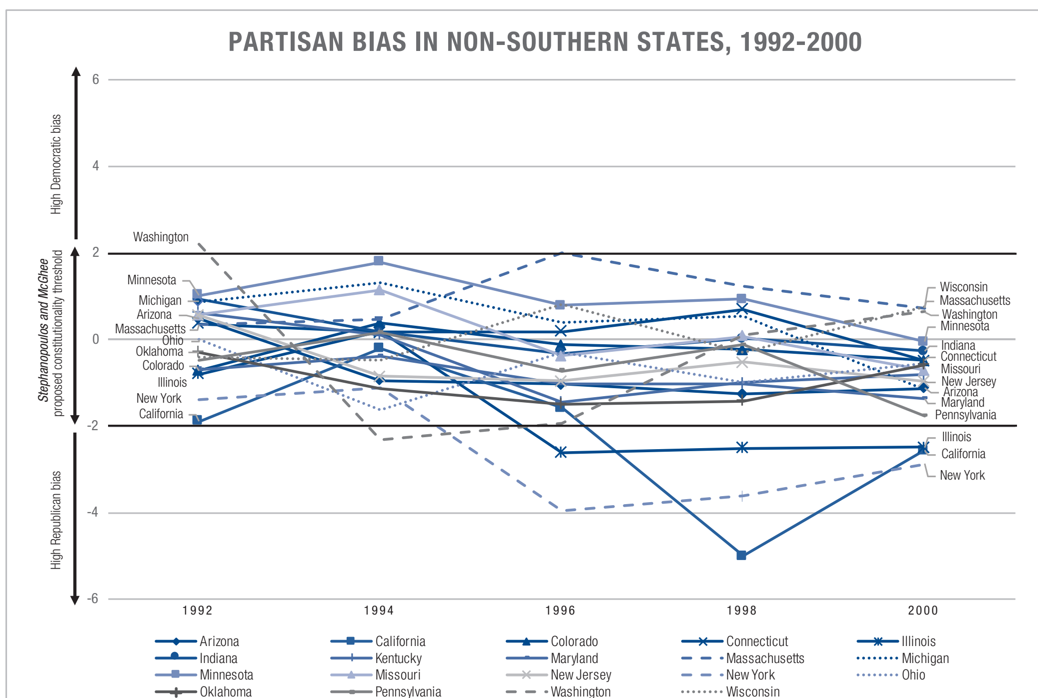
Although majority-minority districts in the South more than doubled in the 1990s, Southern states displayed low, and in most cases negligible, rates of partisan bias in their congressional maps. The one exception was

This analysis was published by Vox, October 10, 2017.

Texas, where congressional maps exhibited durably high rates of bias in favor *of Democrats* as a result of artful "cracking" of white Republican suburban voters. (They were split among various Democratic-leaning districts.) The chart below shows partisan bias in the South, from 1992 through 2000, using the efficiency gap:



The same trend can be seen in the congressional maps of non-Southern states with majority-minority districts (again, using the efficiency gap).

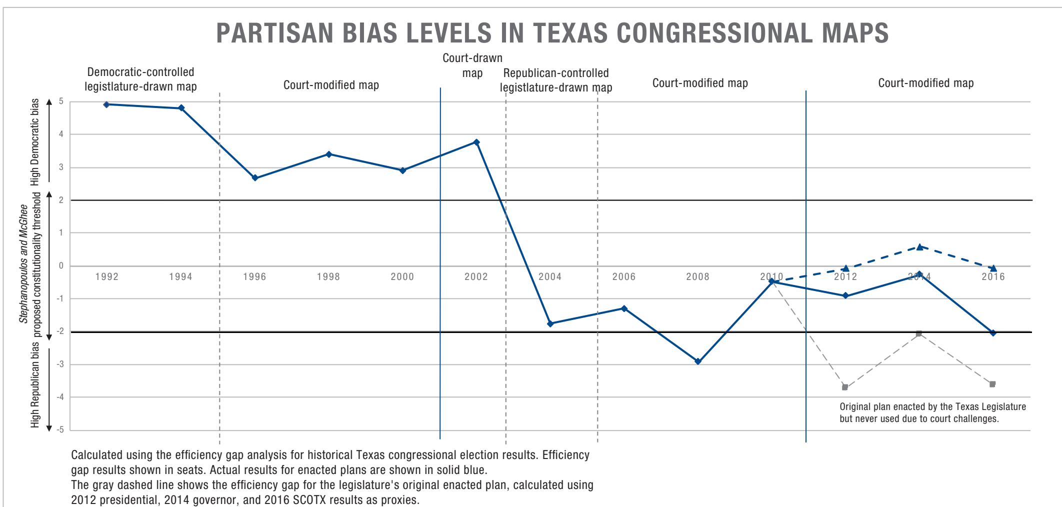


Only California, Illinois, and New York had any degree of significant pro-GOP bias. All three only developed the high bias late in the decade. It is hard to attribute the emergence of that bias to majority-minority districts, however. Majority-minority districts in the three states all were in heavily Democratic areas, such as New York City, Chicago, and Los Angeles, where surrounding districts continued to elect white Democrats by safe and comfortable margins.

Our study found the same lack of a connection between majority-minority districts and partisan bias in the 2000s. The finding held, as well, in both Southern and non-Southern states.

But what about today? The answer again, for this decade, is no.

In fact, strikingly, the maps of this decade reveal that Republicans have been using the same kind of slicing and dicing of minority voters once practiced by white Democrats to engineer a lopsided advantage for their interests. The creation of more majority-minority districts helped eliminate artificial pro-white-Democratic bias in the 1990s. In the same way, majority-minority districts might combat pro-Republican bias in states like Texas today.



Calculated using the efficiency gap analysis for historical Texas congressional election results. Efficiency gap results shown in seats. Actual results for enacted plans are shown in solid blue.
The gray dashed line shows the efficiency gap for the legislature's original enacted plan, calculated using 2012 presidential, 2014 governor, and 2016 SCOTX results as proxies.

In short, there is simply no conflict between preventing outrageous partisan abuses during redistricting and ensuring fair treatment for minority communities. We can do both — and we should.

JUSTICE FOR ALL

The Crime Decline Continued in 2017

Ames C. Grawert and James Cullen

At the year's end, the Brennan Center found that the overall crime rate, the violent crime rate, and the homicide rate would decline in 2017. Like the Center's previous statistical analysis, the report does not find a nationwide crime wave requiring a law enforcement crackdown.

In September, the Brennan Center analyzed available crime data from the nation's 30 largest cities, estimating that these cities would see a slight decline in all measures of crime in 2017. The report, *Crime in 2017: A Preliminary Analysis*, concluded by noting that "these findings directly undercut any claim that the nation is experiencing a crime wave."

That statement holds true in this analysis, which updates the September report with more recent data and finds that murder rates in major American cities are estimated to decline slightly through the end of 2017. Murder rates in some cities remain above 2015 levels, however, demonstrating a need for evidence-based solutions to violent crime in these areas.

Updated Tables 1 and 2 show conclusions similar to the initial report, with slightly different percentages:

- The overall crime rate in the 30 largest cities in 2017 is estimated to decline slightly from the previous year, falling by 2.7 percent. If this trend holds, crime rates will remain near historic lows.

- The violent crime rate will also decrease slightly, by 1.1 percent, essentially remaining stable. Violent crime remains near the bottom of the nation's 30-year downward trend.

- The 2017 murder rate in the 30 largest cities is estimated to decline by 5.6 percent. Large decreases this year in Chicago and Detroit, as well as small decreases in other cities, contributed to this decline. The murder rate in Chicago — which increased significantly in 2015 and 2016 — is projected to decline by 11.9 percent in 2017. It remains 62.4 percent above 2014 levels. The murder rate in Detroit is estimated to fall by 9.8 percent. New York City's murder rate will also decline again, to 3.3 killings per 100,000 people.

- Some cities are projected to see their murder rates rise, including Charlotte (54.6 percent) and Baltimore (11.3 percent). These increases suggest a need to better understand how and why murder is increasing in some cities.

Excerpted from the Brennan Center report *Crime in 2017: Updated Analysis,* published December 19, 2017.

Table 1: Crime in the 30 Largest Cities 2016-2017

(updated Dec. 19, 2017)

City	2016 Crime Rate (per 100,000)	2017 Crime Rate (per 100,000)	Percent Change in Crime Rate	2016 Violent Crime Rate (per 100,000)	2017 Violent Crime Rate (per 100,000)	Percent Change in Violent Crime Rate
New York	2,008	1,904	-5.2%	546	508	-6.9%
Los Angeles	3,134	3,166	1.0%	661	692	4.7%
Chicago	4,238	4,292	1.3%	1,047	1,056	0.8%
Houston	5,295	5,127	-3.2%	975	1,012	3.9%
Philadelphia	4,049	3,927	-3.0%	909	852	-6.2%
Las Vegas	3,663	3,495	-4.6%	774	746	-3.5%
Phoenix*	4,301	Unavailable	Unavailable	610	Unavailable	Unavailable
San Antonio†	5,829	Unavailable	Unavailable	638	640	0.3%
San Diego	2,362	2,139	-9.4%	337	323	-4.0%
Dallas	4,104	3,873	-5.6%	704	710	0.9%
San Jose	2,705	2,743	1.4%	330	336	2.0%
Austin	3,835	3,465	-9.7%	329	318	-3.4%
Charlotte†	4,805	Unavailable	Unavailable	707	690	-2.5%
Jacksonville†	4,148	Unavailable	Unavailable	566	582	2.8%
San Francisco†	6,113	Unavailable	Unavailable	671	681	1.4%
Indianapolis†	6,090	Unavailable	Unavailable	1,295	1,223	-5.6%
Columbus†	4,491	Unavailable	Unavailable	421	372	-11.8%
Fort Worth	3,769	3,757	-0.3%	468	510	9.0%
El Paso†	2,143	Unavailable	Unavailable	345	322	-6.6%
Seattle	6,065	5,901	-2.7%	577	608	5.4%
Denver	4,166	4,137	-0.7%	576	585	1.5%
Louisville	5,071	4,711	-7.1%	647	638	-1.3%
Detroit	6,683	6,249	-6.5%	1,960	1,846	-5.8%
Washington, D.C.	5,703	4,996	-12.4%	1,055	806	-23.5%
Boston	2,816	2,611	-7.3%	666	614	-7.8%
Nashville	4,730	4,775	1.0%	1,033	1,077	4.3%
Memphis†	7,373	Unavailable	Unavailable	1,739	1,925	10.7%
Oklahoma City*	4,615	Unavailable	Unavailable	714	Unavailable	Unavailable
Baltimore	6,510	6,733	3.4%	1,732	1,948	12.5%
Portland	5,585	6,198	11.0%	432	448	3.8%
AVERAGE			**-2.7%**			**-1.1%**

Source: Police department and city reports. Cities are ordered by population size. Percentage changes in rates are calculated from unrounded estimates.

* These cities did not respond to requests for data in time for publication.

† For these cities, the authors were able to obtain data on violent crime only.

Table 2: Murder in the 30 Largest Cities 2016-2017

City	2016 Total Murders	2017 Total Murders	Percent Change in Murder	2016 Murder Rate (per 100,000)	2017 Murder Rate (per 100,000)	Percent Change in Murder Rate
New York	335	281	-16%	3.9	3.3	-16.8%
Los Angeles	293	274	-7%	7.3	6.8	-7.5%
Chicago	765	675	-12%	28.1	24.7	-11.9%
Houston	301	220	-27%	12.9	9.2	-28.6%
Philadelphia	273	304	11%	17.4	19.3	10.8%
Las Vegas	158	130	-18%	9.9	8.0	-19.5%
Phoenix*	146	Unavailable	Unavailable	9.2	Unavailable	Unavailable
San Antonio	149	131	-12%	9.9	8.5	-14.4%
San Diego	50	36	-29%	3.5	2.5	-29.7%
Dallas	171	160	-7%	12.9	11.9	-8.3%
San Jose	47	32	-33%	4.5	3.0	-33.6%
Austin	39	31	-20%	4.1	3.1	-22.8%
Charlotte	67	106	58%	7.5	11.6	54.6%
Jacksonville	106	118	11%	12.0	13.2	9.8%
San Francisco*	57	79	39%	6.5	9.0	36.9%
Indianapolis	148	135	-9%	17.1	15.5	-9.2%
Columbus	91	126	38%	10.6	14.3	35.5%
Fort Worth	66	69	5%	7.7	7.9	2.6%
El Paso	17	17	0%	2.5	2.5	-0.4%
Seattle	19	27	41%	2.7	3.7	37.2%
Denver	57	59	4%	8.2	8.2	1.1%
Louisville	119	110	-7%	17.4	16.0	-8.1%
Detroit	303	269	-11%	45.2	40.8	-9.8%
Washington, D.C.	138	118	-15%	20.3	17.0	-16.3%
Boston	49	59	21%	7.3	8.7	19.1%
Nashville	81	91	12%	12.1	13.4	10.4%
Memphis	196	186	-5%	29.9	28.4	-5.0%
Oklahoma City	70	86	23%	10.9	13.2	20.7%
Baltimore	318	353	11%	51.4	57.2	11.3%
Portland	14	17	21%	2.2	2.6	20.1%
AVERAGE			**-4.4%**			**-5.6%**

Source: Police department and city reports. Cities are ordered by population size. Percentage changes in rates are calculated from unrounded estimates.
* These cities did not respond to requests for data in time for publication.

It's Time to Open Up Private Prisons

Lauren-Brooke Eisen

In its final year, the Obama administration moved to cut off the use of private prisons by the federal government. The Trump administration, by contrast, has been a boon for private prison companies. Its restrictive immigration policies, in particular, will be carried out by private correctional companies. For example, the Trump administration has requested $1.2 billion from the federal government to expand detention capacity. Yet despite private prisons' significance in our criminal justice system, and the controversy they inspire, they have received little scrutiny. The Brennan Center's senior counsel published a first in-depth look at private prisons, the product of hundreds of interviews and visits to the institutions. One conclusion: at the very least, they should receive the same level of scrutiny as their public counterparts.

America's for-profit prison industry controls 126,000 Americans' lives. It's a $5 billion industry — one that encompasses the operation of 65 percent of the nation's immigration detention beds. And at the same time, it is largely opaque, often unaccountable to the public or the government.

Donald Trump's presidency has been a boon to its business. Within months of taking office, Trump ramped up the private sector's role in building more immigrant detention centers. In a one-paragraph memo, Attorney General Jeff Sessions reversed the Obama administration's policy to reduce the use of private prisons at the federal level.

The private sector profiteering from punishment raises moral questions about the very existence of these centers. But the political reality is that private prisons aren't going away any time soon. If that's the case, then how can we reform them to improve life now for the thousands of prisoners behind their bars?

Aside from a handful of states where legislation extends public records disclosures to private corporations taking government money, such as Connecticut, Florida, and South Carolina, private prisons are not covered by the same freedom of information and open records laws as are other government functions, making it difficult for the public to learn the most basic information about what life is like behind its doors.

Private prisons are not covered by the same freedom of information and open records laws as are other government functions.

While there are abuses in public correctional facilities as well, a public prison has very little reason to hide its wrongdoings — no matter how horrible the scandal — because they very rarely lose a contract. The opposite is true for private prisons. In 2010, an Associated Press video revealed that prison guards at Idaho's largest prison, an Idaho State Correctional Institution operated by CoreCivic, allegedly failed to halt an attack on a prisoner whose head was stomped several times, leaving him permanently disabled.

This op-ed was published by *TIME,* on November 8, 2017, following the release of Eisen's book *Inside Private Prisons: An American Dilemma in the Age of Mass Incarceration* (Columbia Univ. Press).

Even attorneys can struggle to gain access. In the summer of 2015, for instance, two lawyers who represented clients at the immigrant detention centers in Texas — one operated by CoreCivic and one operated by GEO Group, the two largest private prison corporations — said they were barred from the facilities after they pointed out that officials forced detainees who they represented to sign documents without legal counsel.

Without this access, it is impossible to know what other injustices are being done in these detention centers.

Without this access, it is impossible to know what other injustices are being done in these detention centers.

Just last month, the Supreme Court effectively ruled against CoreCivic and GEO Group, which attempted to block Freedom of Information Act requests by government watchdog groups related to information about immigration detention.

Given the current political environment, how can we hold these corporations' feet to the fire more than we are doing today?

To start, state and the federal governments ought to require outside monitors to pop in unannounced at private prisons. Far too often, when I asked departments of corrections how they monitored private prisons, they told me that government prison monitors would call ahead and tell the private facility what day they would be there.

Government should also write into contracts with private prison corporations that the media ought to have more access to these taxpayer-funded facilities. Members of the press should be able to speak to inmates and take tours. This allows journalists to see what conditions of confinement are inside these facilities and how individuals are being treated.

State and federal governments also need to ensure that the fines levied against private prison corporations are high enough that the industry finds it cheaper to comply with a contract than to pay for noncompliance.

And private prison corporations should have to abide by the same disclosure requirements as government-run prisons and detention centers.

These recommendations merely provide a starting point for how both state and federal governments can make the industry more transparent and accountable to the public.

Jeff Sessions Throws DOJ Into Reverse

Inimai M. Chettiar and Ames C. Grawert

The new attorney general pushed hard to return to the policies of the "war on drugs." Amid the chaos of the Trump administration, Sessions moved quickly and methodically. In few areas did the federal government shift as abruptly and controversially than when it comes to criminal justice.

Last month, Attorney General Jeff Sessions stripped federal prosecutors of their traditional discretion to fit the punishment to the crime, directing them instead to seek the maximum penalty possible in all criminal cases. Last weekend in *The Washington Post*, Sessions defended this abrupt shift as necessary to confront the specter of rising crime, claiming "violent crime surged" while "the federal government softened its approach to drug enforcement."

Sessions's new policy will reverse progress. While it may fill our prisons, it won't "make America safe again."

Don't believe it. Between 2009 and 2014, crime fell to its lowest level in a generation, even while prosecutors pared back their use of strict federal penalties. Sessions's new policy will reverse that progress. While it may fill our prisons, it won't "make America safe again."

First, let's set the record straight. The attorney general's new order replaced an August 2013 memo from former Attorney General Eric Holder, which asked prosecutors to avoid triggering harsh federal "mandatory minimum" sentences in some minor drug cases. Far from the lawless free-for-all that Sessions describes in his column — "prosecutors were required to leave out objective facts to achieve sentences lighter than required by law," he claimed — Holder's policy was a modest attempt to pare back draconian sentencing laws. It specifically excluded repeat and violent offenders, as well as defendants linked to "large-scale drug trafficking organizations." Under Holder, those defendants continued to face the harshest penalties available.

Nonetheless, Sessions argues this initiative led prosecutors to soften enforcement of federal drug laws, causing crime to increase. That doesn't square with reality. As Sessions's column acknowledges, drug prosecutions and sentence lengths were already falling by the time of Holder's 2013 order, and there's no evidence Holder exaggerated that trend. (The Justice Department's prosecution of the most serious drug offenders actually increased on his watch.) Nor did Holder's approach correspond to an increase in crime. Instead, overall crime also fell from 2009 to 2014, when the national murder rate reached its lowest point in decades. It's true that murder rates rose slightly in 2015, but this was highly concentrated: Almost half the increase in big-city murders occurred in Baltimore, Chicago, and Washington, D.C. Data from 2016 shows a similar trend, with Chicago causing 55 percent of the total increase in urban

This op-ed was published by *The Washington Post*, June 27, 2017

murders. These isolated upticks in no way signal a national crime wave. If federal policy was to blame, we'd expect broad, national increases — not these isolated changes.

Rethinking mandatory minimums did not jeopardize public safety, but instead produced something remarkable: For the first time in 40 years, crime and incarceration fell in tandem. By 2016, the number of federal prisoners dropped by more than 10 percent from its 2013 peak. And mandatory minimum use fell by nearly 30 percent between 2013 and 2016. That's welcome news in a country that still disproportionately incarcerates its citizens, especially people of color.

Unfortunately, Sessions is all but certain to reverse this progress. With U.S. attorneys now required to throw the book at all defendants, whether their prosecutors like it or not, mandatory minimum usage will almost certainly tick back up, dragging the prison population up along with it. In February, Sessions expanded the use of private prisons, grimly alluding to the "future needs of the federal correctional system." For Sessions, expanding mass incarceration seems to be a feature of the system, not a bug.

Lower-level offenders — the type of nonviolent drug users spared under Holder — are poised to bear the brunt of this expansion. Justice Department officials have hinted for months they're planning a crackdown on marijuana, even in states where the drug is legal.

"From a legal and scientific perspective," Deputy Attorney General Rod J. Rosenstein told a Senate committee last week, "marijuana is an unlawful drug." And Sessions privately asked Congress to relax a restriction blocking him from using taxpayer money to prosecute legal marijuana use in states like Colorado and California.

Police chiefs agree that forcing law enforcement to spend their time on low-level drug crimes may actually be counterproductive. First, more time arresting, prosecuting, and incarcerating nonviolent offenders means less time combating violent crime. From a public safety perspective, would you rather have Chicago police arresting shoplifters, or putting a stop to the city's spiraling murder rate? Second, prison makes people who have committed a minor offense more likely to commit a violent crime upon release, while leaving underlying problems, like drug addiction, unaddressed. Prison also saddles anyone who passes through it with a lifetime of consequences, making it harder for formerly incarcerated people to find a job or even housing after release. That may make returning to crime more attractive. All of this suggests that we should use prison sparingly — not as the one-size-fits-all solution favored by Sessions.

Would you rather have Chicago police arresting shoplifters, or putting a stop to the city's spiraling murder rate?

For anyone concerned about the fairness of our justice system, this is a true crisis. But the attorney general can only use (or abuse) the power Congress gives him. And there are a few ways lawmakers can rein Sessions in.

One option is to revive and pass sentencing reform. With Sessions out of Congress, the bill might have an easier route. Or lawmakers could give judges broader discretion to impose lighter sentences on a case-by-case basis. That's the goal of the Justice Safety Valve Act, recently introduced by Sens. Patrick J. Leahy (D-Vt.) and Rand Paul (R-Ky.).

To be sure, in some cases, such as particularly serious and violent crime, incarceration and longer sentences may be warranted. And some cities, like Chicago, are seeing a troubling increase in violence.

But Sessions's directive goes far beyond reason and risks reigniting the same, misguided "war on drugs" that brought the nation's criminal justice system to this crisis point, without doing anything to enhance public safety. Sessions's arguments to the contrary should be dismissed for what they are: more of the Trump administration's standard mix of half-truths and innuendo.

The Law Enforcement Vision for Criminal Justice Reform

Ronal Serpas, Mark Holden, Eric Holder, and Sally Yates

Law Enforcement Leaders to Reduce Crime and Incarceration is a national group of police chiefs, U.S. attorneys, district attorneys, and sheriffs organized by the Brennan Center in 2015. It has become a leading voice for proposing and implementing changes in local policing and prosecuting as well as advocating for broader policy reforms. In 2017, bipartisan momentum for reform appeared to waver, in the face of policy reversals at Jeff Sessions's Justice Department. The law enforcement veterans gathered at the National Press Club for a National Law Enforcement Summit on Crime *to present an agenda for reform.*

RONAL SERPAS, Co-Chair of Law Enforcement Leaders to Reduce Crime and Incarceration and former superintendent of the New Orleans Police Department: We know police keep our streets safe, not by putting more people in jail. The measure isn't how many people we can put in jail. The measure is that the right people are in jail, that the people we're afraid of are in jail, not the people that we're mad at. The people who are in jail, more than half of them suffer mental health or alcohol and drug addiction problems, and we incarcerate them in the most expensive possible way with the least likely good result to come from that incarceration. We have to remember we have limited police officers, we have limited prosecutors, and we have limited prison beds, and those three things tell us that, however we look at it, we have to prioritize the safety of our community and the safety of our officers.

Recent federal policy shifts seem to be possibly interpreted as moving away from some of the practices we've learned as police chiefs, as prosecutors, as corrections officials. We've come to learn that seeking the highest possible sentence for the lowest possible crime does not produce the maximum amount of safety. In fact, we've learned that focusing narrowly with a laser attention on dangerous violent offenders is what is going to do the most to help make our communities safer and make our officers safer, those who have to be on the frontline at 2 a.m. making these decisions. Today, we respectfully request the administration join the bipartisan effort of criminal justice reform and align its policy agenda with that mission.

We have five simple points the steering committee wrote in a letter [to President Trump and Attorney General Sessions]:

- Ensure that federal funding to local police departments prioritizes fighting violent crime without diffusing the focus with pushing low-level and non-level offenses.

These remarks were delivered in Washington, D.C., October 18, 2017.

- Champion and sign into law federal sentencing reform, specifically the bipartisan Sentencing Reform and Corrections Act, reintroduced just a couple of weeks ago.

- Utilize mental health and drug treatment as the primary response to addiction.

- Bolster local community policing by increasing funds from the Community Oriented Policing Services office.

- Expand reentry programs and rehabilitation programs so that those people who have served their time in jail have an opportunity to have a better life in the future.

MARK HOLDEN, senior vice president, general counsel, and secretary of Koch Industries: Why are we interested in this issue? Well, Ronal laid it out pretty succinctly. It's a moral case; it's a constitutional case; it's a fiscal case. We are, at Koch, all about trying to remove barriers to opportunity. We're also all about trying to make sure that government works smartly. We don't think top-down approaches work real well. If you look at our criminal justice system, particularly what has happened in the last 30-plus years with the "war on drugs," it has been a top-down approach that has probably done some good, but really overshot things from the number of people that were swept up in the system that probably didn't need to be swept up in the system.

We've come to learn that seeking the highest possible sentence for the lowest possible crime does not produce the maximum amount of safety.

For me, at a young age, it didn't make sense to me that low-level nonviolent offenders go to prison, and then once they're in prison, to survive they usually become more violent, and when they get out, they can't get jobs. It didn't make sense at all. It was self-defeating. And so I'm very heartened by the fact that, in the last 10 years, beginning with the hang 'em high, deep-red state Texas, they've started to reform their systems. In Texas, they've now closed eight prisons in the last six years, and their crime rates are at historic lows, and it's because of the same type of policies that we're going to talk about here today.

ERIC HOLDER, former attorney general: I believe our country is at a crossroads. Will we heed the advice of seasoned law enforcement professionals? Will we base criminal justice policy on the proven facts and accumulated evidence? Will we put in place policies that will make us safe and increase the necessary trust between communities and men and women in law enforcement who serve those communities? Or will we turn to the policies of the past that are not consistent with the needs of a 21st century America?

The answers from the executive branch and this capital city to the questions I've just posed I find disappointing, dispiriting, and ultimately dangerous. This administration's unwise and ill-informed decision to reverse the progress being made in the criminal justice reform efforts begun in the recent past ignores, I think, a rare bipartisan political consensus

that has formed around policing and sentencing reform efforts, and will take this nation back to a discredited past. In removing, for example, the discretion vested in the men and women of the Department of Justice to seek justice for the unique circumstances that each case presents, this administration has revealed its lack of faith in their judgment as well as their integrity. By encouraging local police to divert resources towards nonviolent crimes and urging federal prosecutors to seek higher sentences in all cases, I think we run the risk of igniting another drug war that will fill our jails, but not necessarily make our streets safer. There exists, we know, a different and more intelligent way.

The administration policies announced to date are not tough on crime, they are not smart on crime, and contrary to what has been said, they are not universally and unequivocally supported by the law enforcement community. They are, I believe, and it almost pains me to say this, but they are ideologically motivated and represent a cookie-cutter approach that has only been proven to generate unfair and unneeded harsh sentences that are often applied indiscriminately and do little to achieve long-term public safety. People most directly involved in law enforcement — police and prosecutors — have today sent a letter to the administration urging it to refocus its efforts on the reform agenda that was proven to work.

The notion that there is a tension between fair, respectful enforcement of our laws and the safety of those who risk so much in service to us all is simply not accurate.

We must also address an issue that has proven to be extremely divisive and, I believe, sadly exploited for political gain. The notion that there is a tension between fair, respectful enforcement of our laws, and the safety of those who risk so much in service to us all is simply not accurate. Trust is not now at a level that is needed between some in communities of color and some in law enforcement. We must face this difficult truth, and we must recognize that there are answers to this problem. Police officers must be given the best equipment and taught the most effective self-protection techniques. They must also get the best training in the use of force, and alternatives to it, that decrease the number of questionable fatal encounters while not increasing the danger to the involved officer. Community efforts to understand the difficulty and the stress of being on the beat must also substantially exist. Finally, and too frequently resisted, more widespread understanding of implicit bias and the impact it has on perceptions and decision making must be a part of any effort to make better police/community relations.

SALLY YATES, former deputy attorney general and acting attorney general: I've been a prosecutor for over 27 years. And to to me, it's certainly persuasive that we all know that the imperative for criminal justice reform is something that's not just supported by Republicans or Democrats, or conservatives or liberals. It's supported by law enforcement who have dedicated their professional lives to making our communities safer, who sometimes literally put their lives on the line for all of us to make our communities safer. And they are raising their hand and saying we need to stop and to rethink our approach here, and specifically when it comes to our levels of incarceration.

I believe that we're really at a critical juncture in our country right now in how we're going to approach criminal justice here going forward. Are we going to turn back the clock to the failed policies of the '80s and '90s? Are we going to go back to a time where people believed that, in a dragnet-like fashion, we ought to go out and sweep 'em all up and lock 'em up and throw away the key? Is that what, really what we're going to do with all we've learned and with all that we know now? That's not the way to build the safest communities.

We must decide whether instead of this dragnet approach, we're going to have a smarter approach to enforcement. Whether we're going to focus our resources on the relatively small number of people out there who are responsible for most of the violent crime in our communities; whether we're going to focus on alternatives to incarceration when those alternatives will be more successful and will make us safer.

We've asked a lot of our cops for a very long time to be the ones to have to deal with people who are suffering from mental illness because we have not, as a society, addressed that sufficiently ourselves. And in doing that, we are putting not only these individuals in harm's way every day, but we're putting law enforcement officers in harm's way as well. It's time as a country, as a society, that we do more to address mental illness so there are alternatives to just putting mentally ill people in prison.

A Powerful Story of Mass Incarceration

Nicole Austin-Hillery and Danielle Allen

Danielle Allen is one of the nation's leading scholars. The James Bryant Conant University Professor at Harvard University, director of the Edmond J. Safra Center for Ethics, and chair of the Pulitzer Prize board, she is the author of acclaimed books on the Declaration of Independence and Greek philosophy. But her most personal book is her searing 2017 memoir Cuz: The Life and Times of Michael A. *Allen tells the story of her cousin Michael, who spent 10 of his 13 years between the ages of 16 and 29 in prison before being murdered. At a forum at NYU School of Law, Allen spoke with the director of the Brennan Center's Washington, D.C. office.*

NICOLE AUSTIN-HILLERY: Danielle, you talk about how bright your cousin Michael was. You talk in the book about his smile. He was quite young when he went to jail the first time. Tell us a little bit how you saw him growing and developing, spending 11 years behind bars. Going in as a 16-year-old kid and coming out as what one would ostensibly call an adult. How did you see that impacting and changing him, and what role did the family play in trying to help ensure, despite the fact that he was behind bars, the he was still receiving nurture and love and care?

Our failure to provide real opportunity and institutions of care to young people ... leave[s] young people vulnerable to danger that we don't protect them from, and then they seek alternative forms of protection, which get them into more trouble.

DANIELLE ALLEN: Well, I wish I could say it was a steady and fully positive story, but it's not. It's uneven. These events are traumas for a whole family. Michael's mother is an incredibly hardworking person, and the whole time that he was incarcerated she was right there with him — with one exception. When he was 15, the judge who sentenced him wrote to the correction's department and said *"Keep this offender in juvenile until he turns 25."* That was the oldest age you could stay in juvenile in California at the time. Instead, for reasons that are completely inaccessible, when he turned 17 he was transferred to adult prison. Not only was he transferred to adult prison, but he's from Los Angeles and was transferred to a prison in Susanville, which is right on the Oregon border in California. His mom could not get there. He spent the first six months in adult prison without any family visits, which is a terrible thing to say out loud and to admit in public.

At any rate, that was the hardest time. His mother describes him on the phone at that time as very subdued, very quiet, slipping inside of himself. [He was] obviously, isolated and scared and alone. I'm sure many of you know when you do calls with people in prisons, they're always surveyed. Everything is recorded so there's not a lot of frank talk that happens over the phone. You have to register what's going on in people's voices. There was this turning point for Michael when he was about 18 or 19 when he stopped asking for things. He stopped

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saying I need, I need, I need, and he started every conversation with *"How are you? Are you taking care of yourself? What are you doing for yourself?"* He really projected care, the project of care toward other people because he had, in some sense, become a person who was going to take care of himself. He knew that nobody outside could actually take care of him on the inside.

AUSTIN-HILLERY: What is the role of government in this whole scenario? You're very clear in saying Michael shares personal responsibility for what happened to him, but you're also very clear in saying that there are some things that the government has put in place, like sending him to a penitentiary that his family can't get to, like deciding to put him in that facility at a very young age where he probably shouldn't have been. What do you think all of that says about who we are as a nation and how we're making these decisions about criminal justice?

ALLEN: It's devastating what it says about our society and about our failure to understand justice in a rudimentary way, our failure to provide real opportunity and institutions of care to young people, to leave young people vulnerable in all kinds of ways to dangers that we don't protect them from, and then they seek alternative forms of protection, which get them into more trouble.

How did the "war on drugs" work in the 1980s? One of the things that happened was scholars have been able to look back and see that roughly half of the drug transactions in the Los Angeles, for example, involved gangs, but the police perception was that 90 percent to 95 percent of transactions did, which meant the "war on drugs" turned into a "war on gangs." The state was attacking drugs by attacking street level distribution. If you have a $100 billion business, and somebody's trying to stop your distributors, what are you going to do? You're going to fight back.

What happens for the particular part of the business that's being targeted by the "war on gangs" is, you get the combination of the cartels and gangs developing systems of sanctions and rewards to keep control of their street-level distributors. You get a competition between the violence of the state and the violence of what I call the para-state. This makes cities very dangerous. Who is it most dangerous for? Kids ages 10 to 14. They're caught in the middle of this, and they need protection from it, and nobody's protecting them, except gangs are offering to protect them. The "war on drugs" itself is accelerated.

AUSTIN-HILLERY: The one thing you didn't mention is the big elephant in the room, and that's race. Some argue that the government is not so concerned about these problems because it's only impacting black and brown people. So where does this issue of race fit in to all of this?

ALLEN: It's the history of race in this country, it's how we've been fighting the "war on drugs," and it's the massive increase in surveillance and a militarization of police power and so forth that we've seen over the last 40 years. It's these things working together without any question. Michelle Alexander has written brilliantly about the way in which the "war on drugs" was racialized from the get go. Operation Pipeline, in the early 1980s was a policy whose purpose was to teach police to interdict narcotics on the nation's roads and highways. It was the way in which people were trained to do what we now call racial profiling. The disparate enforcement of the drug laws was built-in at a very early point. Yes, how is that a doable or possible thing? It's doable or possible because of racial preconceptions that continue to structure the choices that people make in our society. We, I think, all are very aware of this presently as we watch responses to the opioid crisis.

Regarding opioids, it's very easy to convince people it's a health issue, not a criminal justice issue. There are programs right now where you can seek help if you're an opioid user without fear of arrest. It's advertised that you can seek help without fear of arrest. I want to say okay, well doesn't equal protection mean then for other drugs, too, you should be able to seek help without fear of arrest?

Women in Prison

Sen. Kamala Harris (D-Calif.), Gov. Mary Fallin (R-Okla.), and Sen. Cory Booker (D-N.J.)

Women are the fastest growing part of the prison population. In July, the Brennan Center, in collaboration with the Justice Action Network and Google, drew over 500 people to an all-day conference at the Newseum that addressed this new, troubling trend. Among the speakers and attendees: a host of public officials from both parties. Some of their remarks are excerpted here.

SEN. HARRIS: For years, I have said I think that we have been offered a false choice on criminal justice policy, a choice that suggests one is either soft on crime or tough on crime, instead of asking, are we smart on crime? I can tell you, from my experience on this issue of incarcerated women, we need to be smarter. When the fastest-growing segment of our prison and jail population is women, we need to be smarter.

The answer, by the way, is not to build more prisons. The answer is certainly not to privatize those prisons. The answer, Jeff Sessions, is not to return to relying on mandatory minimum sentencing. We need to be smarter, and so let's think about how we can, in being smarter, reevaluate what we are doing and think about how we are treating women in the system before, during, and after incarceration.

An incarcerated woman means that a family will be impacted, and its effects can be generational.

An incarcerated woman means that a family will be impacted, and its effects can be generational. What impacts a mother impacts a child, because the fact is, on this subject, we must keep in mind nearly 80 percent of incarcerated women are mothers. Most, 65 percent, have children who are under 18 years old. Half of the incarcerated women in our country are more than 100 miles away from their families. Let's talk about what that means in terms of the ability to maintain the relationships with visitation, and be clear about this. These prisons aren't on the Acela line. They're not on a commuter line, so it's not easy to get there. These are real issues, and we must keep them in mind. Let's keep in mind that phone bills for a family can, during the life of a sentence, data shows us, be as much as $30,000 for that family. It's just not right. Research shows us that incarceration of a head of household can result in a two-third decline in the assets of that household. There are real economic costs in addition to the human costs associated with this issue.

Let's look at the fact that there is an issue around how much we are paying. Again, this gets back to the economic cost. It costs us about $33,000 a year to lock somebody up. In California, it costs about $75,000 a year. Drug treatment, on average, is about $4,700. It just makes economic sense, in addition to all that it means in terms of dealing with prevention. It only costs $10,000 for community mental health services. If we, like our friends in the private sector,

These remarks were delivered at *Women Unshackled: Policy Solutions to Address the Growth of Female Incarceration* in Washington, D.C., July 18, 2017.

are judging ourselves in government, unburdened by ideology, then this information forces us to understand that the best way to judge ourselves is to ask the question our friends in the private sector ask everybody. I use three letters. What is the ROI? What is the return on the investment? Because guys, as taxpayers, we're not getting a good return on our investment on this issue. Let's think about it from that perspective.

GOV. FALLIN: There's a large growing body of research that shows that prison is not the answer and the best option for everyone. For many of our nonviolent, low-level offenders, there are alternatives that work better, in my opinion, such as our drug and mental health courts that we have established throughout our nation. It's something that's very active in Oklahoma to bring community-based treatment, diversion programs, and supervision to work better and to help people get through whatever it is that they may have done to prevent future crime and also to, frankly, cause us to use fewer prison beds within our nation.

And there are states that are active in this reform effort. States like Texas, Georgia, South Dakota, Utah, Kentucky, certainly Oklahoma have designed various policy reform issues. We are using research to help us when it comes to our incarceration rates, and to control, frankly, our corrections spending in our individual states, because that money that you're spending on corrections is being taken away from education, healthcare, or some other important topic. It's also been shown that many states have been able to reduce imprisonment while reducing crime. By ensuring that expensive prison beds are used for those who are actually dangerous, who we need to keep locked up to protect ourselves and our families, while also reinvesting in programs that are successful — programs that help with the ability to reduce recidivism, address substance abuse, and address people who go back into the system itself.

We know that 83 percent of female prison admissions in our state are for nonviolent offenses. We know that 42 percent of our women in prison systems in Oklahoma have a drug-related conviction. Women that are imprisoned are also more likely to have substance abuse issues than males. Sixty-nine percent of women in prison in Oklahoma have had an actively managed mental health issue.

But there are some good things happening in the states. I want to tell you about some of the things that we can do on a state level, and Oklahoma's just one of the states, but we are very aggressive on this issue. We have been working with our Department of Mental Health Substance Abuse Services to prioritize treatment for services of women who are pregnant, for women who have children, and provide those services in a targeted way to meet their very special needs.

We tried to develop this system of care to take care of all the different needs of a woman in our criminal justice system.

This past year, I had a criminal justice task force that worked for about 16 months on various pieces of legislation. We were able to get many pieces of legislation signed into law. But I had a big battle … with some of our legislators that didn't want to do some of these different reform efforts.

We also sent two ballot initiatives to the vote of the people, in which they approved them by around 65 percent of the vote in our state, which means that our public is starting to understand that there are better ways of addressing these issues.

We know that children who have a parent that's incarcerated are five times as likely to enter into the criminal justice system. And I think there is a way that through smarter on crime policies and solutions that we can break that intergenerational cycle of children following in the footsteps of some of their parents and grandparents to not enter into the system and to produce a healthier society for our nation. So that's why I fight the fight.

SEN. BOOKER: I've visited prisons all over this country, but when women are in prison there's a sense of solidarity. It's amazing how women are pulling together knowing that they are facing injustice and create these communities of struggle where they watch out for each other, they fight for each other. I sat in Danbury and had woman after woman pull another woman, "Here, let me give you the details of this case. They're here unjustly. Can you help us? Can you help us? Can you help us?" The stories of the indignities and the violence. The assaults on humanity going on in our prisons. And we think we're not implicated in this?

One-third of the incarcerated women on the planet Earth are in the United States of America, the land of the free.

Twenty-five percent of the imprisoned people on the planet Earth are here in the United States. Well for women, the data is more stunning. The rates of female incarceration is going up 50 percent faster than the rates of male incarceration. Overall prison populations have gone up 500 percent since 1980, but women, over 700 percent. One-third of the incarcerated women on the planet Earth are in the United States of America, the land of the free. When they get there, are they helped? People with addictions, people with mental health challenges, survivors of trauma. Seventy-seven percent of the women that are incarcerated are survivors of partner violence. What do they experience? Having been sexually abused. Male officers, as one woman told me, walk in when they're undressed, stare at them while they're going to the bathroom. Do we take pregnant women and empower them? No, we shackle them and put them in solitary confinement.

[We should be] eradicating this injustice, to have our prisons be in America what they should be, which is a model to the planet Earth of what a free people and a free nation do to those who've done wrong. We have that capacity to set the example. To show folks how we can have restorative justice, to show folks how we could help and heal and deal with trauma. But instead we have a system that re-traumatizes.

SOLUTIONS

Give Tax Credits to Small Political Donors

Lawrence Norden and John Pudner

Public financing of campaigns has long been a major reform goal. In the past, the Brennan Center proposed a system of multiple matching funds for small contributions. There is another way to achieve a similar goal: tax credits to encourage broad political giving. Such a plan could win bipartisan support.

Americans of all political stripes are increasingly disgusted by our country's broken campaign finance system. Many believe that the system is out of balance, with big money having far too much influence over policy — drowning out the voices of individual voters and leaving them feeling disconnected from their government.

The problem has gotten exponentially worse over time, as shown by the change in giving patterns to federal candidates, parties, and committees. In 1994, small-dollar donors gave three times more money than donors giving $10,000 or more. Two decades later, those positions are reversed: Those who contribute over $10,000 now give more money than all small donors combined.

Since the 1976 *Buckley v. Valeo* decision, a series of Supreme Court rulings has eviscerated wide swaths of federal campaign finance law. That has led to super PACs, "dark money" groups, and widespread voter disenchantment. Yet in the last decade, Congress has failed to adopt any major reforms that could increase the participation and voice of average citizens.

So, how do we break the logjam? We think the key is to find a starting point where there is common ground. Counterintuitively, that starting place could be the current discussions on tax reform happening at the federal and state levels.

Why tax reform? Progressives and conservatives are oceans apart politically, but many on both sides agree that restoring federal tax credits for small-dollar donations could help address Americans' greatest concerns about the current campaign finance system.

If structured the right way, tax credits could increase and diversify participation in the electoral process by having a larger pool of Americans making campaign contributions. They could encourage candidates and parties to connect with a broader swath of prospective voters by having them spend more time fundraising from them. And they could encourage a more diverse group of candidates to run by assuring they'd have enough small donors to get their messages out — even if there are no huge donors sponsoring their campaigns.

Offering a tax credit to boost political participation is nothing new. Between 1972 and 1986, millions of Americans claimed federal tax credits for small-dollar campaign contributions. Ironically, this credit was eliminated in the last big federal tax reform in 1986 — a casualty of a tax simplification bill that consolidated rates and eliminated some deductions.

Similar programs introduced at the state level seem to spur candidates to spend more time appealing to small donors. For instance, in a 2006 survey

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from the State University of New York-Albany and The Campaign Finance Institute, 86 percent of state legislative candidates in Minnesota and 60 percent of candidates in Ohio “asked for contributions from less affluent people” because of their state’s system of tax incentives.

If structured the right way, tax credits could increase and diversify participation in the electoral process by having a larger pool of Americans making campaign contributions.

State-level programs also appear to promote contributions from a broader population than those who normally contribute to political campaigns. In Ohio, for example, filers using the state’s tax credit are more representative of the public than donors generally are. In 2006, 63 percent of donors who used the tax credit had annual incomes of less than $75,000. And in Minnesota, 66 percent of candidates surveyed said that the state’s tax credit program brought in new donors who would not have given otherwise.

Additionally, several cities have taken up campaign finance tax credits or similar programs. In Seattle, residents can make small political donations using tax dollars. Tallahassee voters passed a program that refunds small political donations.

Progressives and conservatives will disagree on plenty when it comes to exactly how federal tax credits should be structured, but it’s a conversation we need to have.

Our broken campaign finance system forces candidates and officeholders to spend an inordinate amount of time with big donors, leaving little time for them to connect with the constituents they represent. We owe it to our country to have this discussion, and exploring common agreement on a topic like tax credits is a constructive way to begin.

The Chosen One: Thoughts on a Better, Fairer, Smarter Way to Pick Presidential Nominees

Walter Shapiro

Every four years, each party tinkers with the process of choosing a presidential nominee. The veteran political journalist, who covered the last 10 presidential campaigns for Roll Call, *offers his ideas. While generally supportive of the process, he wants a system that allows voters — and delegates — to change their minds.*

When Americans cast their 2016 presidential ballots, the collective emotion could be summarized as: "How did we get this dismal choice?"

The Gallup Poll found that Donald Trump and Hillary Clinton were saddled "with the worst election-eve images of any major-party presidential candidates Gallup has measured back to 1956." The national exit polls painted an equally depressed picture. A stunning 57 percent of the voters said — before they knew the outcome — that they would be "concerned" or "scared" if Trump were elected. For her part, Clinton did not score much better.

Once we accept the logic that small states with relatively modest campaign costs should come first on the political calendar, it leads to a second principle — voters should have time for reflection and deliberation.

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Under the current system, Iowa and New Hampshire allow little-known candidates to get a fair shot at the nomination. Granted, the road to victory is still daunting — and Jimmy Carter (1 percent in the national polls in January 1976) remains the only outsider candidate without pre-existing name recognition to corral a nomination in this fashion.

But Rick Santorum (who narrowly won Iowa in 2012) and Bernie Sanders (who swept New Hampshire last year) did emerge as surprisingly serious presidential contenders by initially concentrating their limited resources on the early small-state contests. It is easy to forget that Santorum might have won the 2012 GOP nomination had he not fallen just 32,000 votes behind Romney in the Michigan primary (3.2 percentage points) and then lost Ohio by 12,000 votes (less than 1 percentage point).

Once we accept the logic that small states with relatively modest campaign costs should come first on the political calendar, it leads to a second principle — voters should have time for reflection and deliberation.

Walter Shapiro is a Brennan Center fellow, journalist, and lecturer in political science at Yale. Excerpted from the Brennan Center report *The Chosen One,* part of the *New Ideas for A New Democracy* series, published April 26, 2017.

Once you accept the premise that voting in state presidential primaries should stretch over several months, it is hard to reconcile that conviction with the belief that convention delegates should be robots devoid of the ability to make independent judgments.

Things change during the presidential primaries and often voters are afflicted with buyer's remorse. And this goes well beyond Trump 2016.

If Lehman Brothers had collapsed before the 2008 GOP Convention (instead of in September), the Republicans probably would have preferred a candidate with strong economic credentials like Mitt Romney rather than the foreign-policy-obsessed John McCain.

That flows into the final factor that governs my approach to presidential nomination contests: Major elected and party officials have a legitimate stake in the outcome. Candidates who will share the ticket with the presidential nominee are more than disinterested bystanders. They are, to resort to a 1990s buzzword, "stakeholders." And while governors, members of Congress and state party leaders should not be allowed to dictate the outcome as they could up until the 1970s, they should be granted far more influence than a single vote on primary day.

To summarize, here are my four guiding principles that should govern the parties' presidential nominations processes:

- A handful of small states should go first.
- Primaries should stretch over several months.
- Convention delegates should have discretion to react to changed circumstances.
- Elected officials should have a clear-cut, but limited, role in choosing a nominee.

A Federal Criminal Justice Reform Agenda

Ames C. Grawert, Natasha Camhi, and Inimai M. Chettiar

Federal policy plays an outsized role in criminal justice. True, state laws are the principal way we deter and punish crime, and the vast majority of prisoners are held in state facilities. But Washington's impact echoes throughout the system. Broad and bipartisan legislative majorities support reform, a remarkable shift from earlier eras. But legislation still has yet to move through a gridlocked, dysfunctional Congress. One reason: Lawmakers lack a roadmap. The Brennan Center published a comprehensive plan for reform.

Conservatives, progressives, and law enforcement leaders now agree that the country must reduce its prison population, and that it can do so without jeopardizing public safety. In the last decade, 27 states have led the way, cutting crime and imprisonment together.

Of course, because 87 percent of prisoners are housed in state facilities, changes to state and local law are necessary. But history proves that decisions made in Washington affect the whole criminal justice system, for better or worse. Federal funding drives state policy, and helped create our current crisis of mass incarceration. And the federal government sets the national tone, which is critical to increasing public support and national momentum for change.

This report offers solutions that would keep crime rates low and show support for law enforcement, while reducing mass incarceration. The strongest of these policies require congressional action. Others could be implemented by a sympathetic administration. Taken together, these policies form the core of a national agenda for federal leaders to make our country safer and fairer.

Legislation

- **End the Federal Subsidization of Mass Incarceration:** Federal grants help shape criminal justice policy at the state and local levels. For decades, these grants have subsidized the growth of incarceration. For example, the 1994 Crime Bill offered states $9 billion in funding to build more prisons. Today, $8.4 billion in federal criminal justice grants flow from Washington annually, largely on autopilot, encouraging more arrests, prosecution, and incarceration. To bring accountability to this flow, Congress can pass a "Reverse Mass Incarceration Act" that would dedicate $20 billion over 10 years to states that reduce both crime and incarceration. This would spur state and local action across the country.

Excerpted from the Brennan Center report *A Federal Agenda to Reduce Mass Incarceration,* May 15, 2017.

- **End Federal Incarceration for Lower-Level Crimes:** Our criminal justice system relies heavily on prison, using it as the default punishment for most crimes. But research has shown that unnecessary incarceration is costly and ineffective at preventing recidivism and promoting rehabilitation. Early estimates show that approximately 49 percent of the federal prison population is likely incarcerated without an adequate public safety reason. Congress can pass legislation to eliminate prison terms for lower-level offenses and shorten prison terms for other crimes. In doing so, it can safely, significantly cut the prison population, saving around $28 billion over 10 years, enough to fund a Reverse Mass Incarceration Act.

- **Institute a Police Corps Program to Modernize Law Enforcement:** The country faces a national crisis in policing. Some believe that overly-zealous enforcement has reached a breaking point. Others believe police are not adequately funded or supported. All can agree that something needs to change. To advance a 21st century police force, Congress can allocate $40 billion over five years to recruit new officers and train them in modern policing tactics focused on crime prevention, as well as techniques to reduce unnecessary arrests, uses of force, and incarceration.

- **Enact Sentencing Reform:** While lawmakers should aspire to the bold changes to federal sentencing described above, Congress can start with a milder first step: reintroducing and passing the Sentencing Reform and Corrections Act of 2015. This proposal would cautiously reduce prison sentences for some nonviolent crimes. A bipartisan group of senators, led by Chuck Grassley (R-Iowa) and Dick Durbin (D-Ill.), have already committed to reintroducing the bill this session. The White House has expressed cautious support.

Executive Action

- **Redirect Federal Grants Away from Mass Incarceration:** Since many of the harmful incentives in federal criminal justice grants are written into law, truly ending the federal subsidization of mass incarceration will take congressional action, as laid out above. But the Justice Department can take the first step, by changing performance measures for grants to reward states that use federal funds to reduce both crime and incarceration.

- **Institute New Goals for Federal Prosecutors:** The Justice Department should ensure that scarce federal criminal justice resources are focused on the most serious crimes, and evaluate U.S. attorneys nationally based on their ability to decrease both crime and incarceration.

- **Commute Sentences to Retroactively Apply the Fair Sentencing Act:** In 2010, Republicans and Democrats joined together to pass legislation to reduce the disparity between crack and powder cocaine crimes as the drugs are scientifically equivalent. But more than 4,000 federal prisoners remain incarcerated under outdated drug laws. Future presidents can bring justice to these prisoners by identifying clemency petitions meeting certain criteria, fast-tracking them for review, and granting clemency.

States Can Reduce Crime and Incarceration at Once

Hilary O. Shelton and Lauren-Brooke Eisen

After the 1994 Crime Bill, federal funds flowed to states that built more prisons. Washington, in short, was incentivizing mass incarceration. The policy remains in place long after its shortcomings have become clear. In 2016 the Brennan Center proposed a plan to give states incentives to reduce incarceration — using federal funds to spur not imprisonment, but reform. In 2017, a bipartisan group of lawmakers introduced federal legislation to enact the proposal. The director of the NAACP's Washington, D.C. office joined with the Center's senior counsel to explain the proposed change.

The early 1990s were a turbulent time for many cities and towns in America. The national violent crime rate had been steadily ticking up, increasing 40 percent from 1984 to 1992, as the murder rate climbed 20 percent between 1984 and 1993, disproportionately impacting communities of color. Congress reacted by passing the 1994 Violent Crime Control and Law Enforcement Act, better known as the "1994 Crime Bill," which restructured federal grant funding. It inspired states to build more prisons.

The Reverse Mass Incarceration Act is the only solution proposed on Capitol Hill that would help rein in state prison populations while reducing vast racial disparities in the system.

The number of people behind bars increased by almost 50 percent between then and now, from 1.5 million to 2.2 million people. African-Americans bared the brunt of that tremendous growth, making up 13 percent of the U.S. population but 37 percent of the nation's prisoners. Meanwhile, crime rates are down. Budgets are tight. Prisons are overcrowded with inmates who are serving time for nonviolent crimes. And we are beholden to an often-unjust justice system built on policies past, which highlights and exacerbates racial inequality in America's criminal justice system. In short, we are paying dearly to waste human lives.

But a new bill introduced Wednesday by Rep. Tony Cárdenas of California aims to reverse that decades-long trend. The Reverse Mass Incarceration Act, which Sens. Cory Booker and Richard Blumenthal introduced this summer in the Senate, sends federal funds to states that reduce crime and incarceration together. It is the only solution proposed on Capitol Hill that would help rein in *state* prison populations (where 87 percent of the country's prison population is housed), while reducing vast racial disparities in the system and ensuring hard-earned public safety gains over the past quarter-century are not lost. Sen. Blumenthal said on Wednesday, "the federal government can encourage more enlightened and effective action" at the state level with this bill.

For decades, through both the 1994 Crime Bill and other programs, the federal government has sent out grants to states and cities on autopilot to fight the "war on drugs" and to aid other anti-crime, public-safety initiatives. States and cities often seek these additional "bonus" dollars and are willing to modify policy to get them. It's one reason why almost all the funds ultimately allocated by Congress from the 1994 bill were

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used by states to build more prisons and lengthen prison sentences.

This new measure is designed to redirect that flow of funding — to upend that incentive. It would authorize $20 billion in incentive funds over 10 years to states that cut their prison population by 7 percent every three years and keep crime near record lows, or even lower. This can be done either by creating a new grant — or by directing current funds — to support state activities proven to reduce crime and incarceration at once. Lately, some states are already on a path to do this; the bill will encourage and could speed up further progress, promising federal dollars for successful and reform-oriented changes in policy.

But federal sentencing reform alone will not eliminate mass incarceration. The federal government must work with states to drastically cut the number of prisoners behind bars. Under this new act, states would be free to choose their best path to achieving these common goals, building on local expertise rather than just a federal mandate. If fully applied, this would result in a 20 percent reduction in the prison population nationwide in a decade, a result of local expertise at the state level. Certainly, Republicans and Democrats should be able to get on board with a program that improves public safety while reducing our expensive and inefficient incarceration system.

Not only is this possible, it's played out across the country. In the last 10 years, 27 states have reduced incarceration and crime together. It's a politically and geographically diverse group. They include states in the Northeast (New York and New Jersey), the West (California and Colorado) and the South (Mississippi, South Carolina, and Texas). Texas alone has closed eight prisons in just six years, while crime rates remain at historic lows. Similarly, under Gov. Andrew Cuomo and due to a reduction in the state's prison population, New York has closed 13 state prisons.

To be sure, local and state reform is key to making a dent in America's prison population. But this bill would set a tone from the top and directly help states continue already successful efforts. It would dramatically reduce prison populations, lessen the justice system's disproportionate impact on communities of color, and maintain hard-won declines in crime over the last 20 years. Passing this bill would send a message from the federal government that our society is capable of responding to crime in a way that is not only effective, but also humane.

The Constitution and Economic Inequality

Donna F. Edwards and Ganesh Sitaraman

A provocative new book offers a deep reassessment of the roots of American democracy. Sitaraman, a law professor and former policy director and senior counsel to Sen. Elizabeth Warren, argues in The Crisis of the Middle-Class Constitution *that American democracy depends on a basic level of economic equality. The framers — well aware of the gulf between the aristocracy and the people in Europe — assumed that the new nation would retain the striking equality found among white men. Over two centuries, that has proven a challenge. Former Maryland Rep. Donna Edwards interviewed Sitarman at a lunchtime event.*

DONNA F. EDWARDS: One of the things that I was struck by when I read the book is that you said that universal societies were subject to constant strife, even revolution. The rich would tyrannize the poor. The poor would revolt against the rich. What is it exactly about economic inequality that doesn't work for Americans and why is that a Constitutional theory?

[The Framers] could imagine that America was the most equal society the world had ever seen, and as a result they didn't need to have any class structures built into our Constitution.

GANESH SITARAMAN: The question is a really good one. What does the middle class, what does economic inequality have to do with the Constitution? The Constitution doesn't say economic equality in it. It doesn't say middle class in it. It says nothing about any of these concepts. What I argue in the book is there's a structural principle underlying our Constitution. It's an assumption that our Constitution requires a society that has relative economic equality.

What's striking about our Constitution is that we don't have a House of Lords. We don't have a tribune of the plebs. In fact, we don't have any structural parts of our Constitution that represent economic classes. This was something that the founding generation debated. Many of our state constitutions in the American Revolutionary period actually had these kinds of provisions in them. They debated them in the summer of 1787 in Philadelphia, and they did not put these kinds of features into our Constitution.

What this meant was they could imagine that America was the most equal society the world had ever seen, and as a result they didn't need to have any of these class structures built into our Constitution. This was a radical thing in the design of constitutions, and that's the core argument of the book. The structural feature of our system is that we don't have what most republics

Ganesh Sitarman is an associate professor at Vanderbilt Law School and senior fellow at the Center for American Progress. Donna F. Edwards is a senior fellow at the Brennan Center and former Member of Congress. These remarks were delivered at NYU School of Law, October 19, 2017.

from the ancient world until the 18th century had before us, which was an understanding that economic class should be built right into the structure of government. That was because people assumed we would just not be afflicted by the problem of inequality.

EDWARDS: I think part of your argument is that if we don't begin to reframe our policy toward that middle-class constitution that you describe as the origin, we run the risk that the entire system falls apart. What are the things that we can do now to prevent that?

SITARAMAN: I think we follow the playbook in some ways from 100 years ago. We need to do things on the economic side. Antitrust is a great example of something that has been relatively unenforced in any serious sense in the last generation. We live in an era in which most major sectors of our economy are now consolidated and run by a very, very small number of companies. Our antitrust laws are designed to prevent that. We have policies now in which some of the wealthiest people in the country earn income in certain ways that means they pay lower tax rates than people who are working class. That is crazy. That's not how we should think about an income tax system.

Many in politics have spent a lot of time attacking forms of organizing workers whether through unions or outside of that. That's something that obviously needs to change as well. I think there are big things we can do there on the policy side, and a big part of that is just people out there demanding of the people they're electing not just populist rhetoric, but actual action on these core economic questions in order to rebalance the economic power in our society.

The same thing is true on the political side. We consistently see people wanting to talk about how rigged the government is, but then they don't support campaign finance reforms. They don't support conflicts of interest reforms. They don't support closing the revolving door. You can talk about draining the swamp or ending the rigged game or whatever, but you actually have do to something about it. That's something that really falls to us, the people, to force them to do.

I think that kind of sustained engagement, which isn't going to be something you can do on one weekend or in one year or in one election cycle, but really building through is how we're going to make this happen.

Tampons Should Be Free for Women in Prison

Jennifer Weiss-Wolf and Chandra Bozelko

The Brennan Center's vice president for development is a nationally known leader in the fight for "menstrual equity." Her advocacy has resulted in Connecticut, Florida, Illinois, and New York, as well as the City of Chicago, ending the taxation of menstrual products (a.k.a. the "tampon tax"). She has persuaded governments in New York City and across the country to ensure the provision of menstrual products in schools, shelters, and correctional facilities. Among those most marginalized: women behind bars. In August 2017, following publication of this article, the federal Bureau of Prisons issued a guidance to ensure that people incarcerated in federal facilities are not denied menstrual products.

The Dignity for Incarcerated Women Act, introduced [July 11, 2017] by Sens. Cory Booker (D-N.J.) and Elizabeth Warren (D-Mass.), is a bold move to improve the care and treatment of the nearly 13,000 female inmates locked up in federal prisons. Among the bill's critical provisions, it would ban shackling pregnant women or placing them in solitary confinement. And it would help incarcerated mothers maintain close ties to their children by easing visitation restrictions and allowing for free phone calls.

It also acknowledges that for those behind bars, there are unnecessary hurdles to coping with menstruation and managing periods in a healthy and hygienic way. The bill includes a directive to distribute quality pads and tampons to inmates, free of charge.

The proposal seems so sensible — and the alternative so inhumane — that one might wonder why it hasn't been raised as a legislative priority before.

It has been raised on the local and state level: New York City passed a law last summer requiring the same in all of its correction facilities (shelters and public schools, too). Earlier this year, Colorado mandated funding for tampons in its state prisons; and Los Angeles County did in its juvenile detention centers.

When access to basic hygiene supplies is withheld, it is often the direct result of an abusive culture — one that many facilities tolerate and few laws can adequately address.

What none of these proposals regarding menstruation fully addresses, though, is the reality that the availability of sanitary products isn't simply a matter of budget lines and purchasing orders. It has little to do with stock, supply, or actual need.

Rather, it has everything to do with power.

Jennifer Weiss-Wolf is author of the book *Periods Gone Public: Taking a Stand for Menstrual Equity* (Arcade Publishing). Chandra Bozelko is the author of *Up the River: An Anthology* (BleakHouse Publishing). This op-ed was published by *The New York Times,* July 13, 2017.

In correction facilities across the country, from county jails to federal penitentiaries, the varied ways in which menstruating prisoners are disregarded or disrespected is staggering. When access to basic hygiene supplies is withheld, it is often the direct result of an abusive culture — one that many facilities tolerate and few laws can adequately address.

In 2016, a Kentucky judge was stunned to find a defendant appear in court for arraignment wearing no pants and menstruating. She explained that correctional officers refused to give her pads or a change of clothes when she told them she had her period, despite repeated requests. Footage from the courtroom went viral — an intense scene in which the outraged judge called the jail staff from the bench, demanding an explanation and shouting to the courtroom, "Am I in the Twilight Zone? What is happening here?"

Unfortunately, menstruating prisoners rarely receive such dogged intervention. Instead they get peppered with intrusive questions and insults: "Didn't I give you one yesterday?" Or, "Damn, girl, you must have a heavy flow." At one New York state prison (which has since been closed), inmates reportedly had to save and show their used, blood-soaked pads as proof more were needed. These inquiries and stunts are outlawed under the overarching prohibition of "undue familiarity" between staff and inmates — rules that regulate interactions that are too intimate, ranging from sexual relations to performing personal favors — but those rules aren't widely enforced either.

The Dignity for Incarcerated Women Act offers a smart starting place for shining the national spotlight on an otherwise hidden problem and establishing baseline expectations. But, truly, at the heart of the matter is the inherent power imbalance, coupled with rampant misogyny, to which incarcerated women are subject.

We urge the bill's sponsors to factor in clear-cut guidance for treatment of menstruating inmates, leaving as little room as possible for subjectivity and discretion as to the manner in which products are distributed. This includes limiting interactions among or between inmates and staff — especially where the ability to exert dominance or reinforce stigma looms. At last year's New York City Council hearings, for example, activists testified that pads should be centrally placed near toilets or in a common location so inmates can simply take what's needed without having to seek permission or intervention. That would be a small accommodation that could yield tremendous benefit.

Kudos to Sens. Booker and Warren for declaring that the ability to manage menstruation is not a bonus, a reward, an entitlement, or a favor to be begged or bargained for. Even if this bill doesn't get the attention it deserves this Congress, it has highlighted the fact that this is a core human need, even and most especially for those in government custody. And should be treated as such. Period.

When Guns Speak Louder Than Words

Eric Ruben

It is nearly a decade after District of Columbia v. Heller, *the U.S. Supreme Court case that first found that the Second Amendment recognizes an individual right to gun ownership. Since then, dozens of courts have ruled and largely have upheld existing laws. What is the interplay between gun rights and other constitutional protections?*

Guns have long been regulated in public precisely because they can instill fear.

The events in Charlottesville highlighted, yet again, how gun rights can dilute speech rights. The white supremacists did not arrive with leaflets. Many toted military-style rifles. Their guns, more than hateful words, conveyed a threat that silenced debate and intimidated even the police. Since the armed breakdown of civility in Virginia, one proposed solution has been to call for changes to First Amendment doctrine to "take the Second Amendment reality into account." But a simpler fix is simply to regulate gun carrying. In fact, a tailored restriction on public carry needn't be seen as a bold departure from longstanding law — one just needs to look to Second Amendment history and the foundation is there.

Guns have long been regulated in public precisely because they can instill fear. William Blackstone, whose work heavily influenced the drafters of our Constitution, explained that "by the laws of Solon, every Athenian was finable who walked about the city in armour," and similarly, in England "riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, *by terrifying the good people of the land*." That tradition was adopted in much of the colonies. In 1686, New Jersey enacted a law prohibiting the public wearing of pistols and other weapons because people are "put in great [f]ear." Similarly, a 1790s Massachusetts law gave justices of the peace the authority to arrest "such as shall ride or go armed offensively, to the fear or terror of the good citizens."

Strict regulation of public carry went forward in much of the country, but the tradition apparently fell off in Virginia. The armed intimidation we witnessed in Charlottesville would be illegal in New York City, for example, where the only permissible way for civilians to carry guns is concealed and with a license, and military-style weapons are prohibited.

This piece appeared on the Brennan Center's website, August 17, 2017.

To be sure, New York-style laws likely go beyond what is politically feasible in Virginia. But less aggressive restrictions could have reduced the armed intimidation. Local leaders may have barred open carry during the rally, for example. Virginia law, however, preempts Charlottesville from exercising even that limited authority.

Some might respond by invoking the perennial favorite: the Second Amendment. Such open displays of firepower in Charlottesville have been justified in the past as "a demonstration" of "Second Amendment rights." That time, a man walked through a grocery store with an AR-15 assault rifle, prompting shoppers to drop their groceries, grab their children, and race out of the store.

But such claims confuse Second Amendment *rhetoric* with Second Amendment *law*. Federal courts repeatedly have upheld complete bans on "assault weapons," laws that go way beyond what might have helped in Virginia.

With strong and reasonable public carry regulation, people could have protested with less fear of lethal violence, tension may not have surpassed the breaking point, and police may have felt safer doing their job. This is as good a time as any to think critically about our gun laws so we can enjoy *all* the liberties we cherish.

Do We Really Need a Second Constitutional Convention?

Wilfred U. Codrington III

In the guise of trying to pass a balanced budget amendment, as many as 27 states are poised to call for a constitutional convention. That's only seven short of what's required. The conservative forces behind this effort want far more than just a balanced budget amendment.

During this unsettled time in our nation's history, the durability of our constitutional democracy is being tested in unprecedented ways. The bizarre events unfolding daily turn some of the most well-known constitutional provisions on their heads, and put rarely invoked ones in the national spotlight. For better or for worse — but mostly for worse — the current political scene compels us to brush off our civics textbooks to better understand these threats.

Another provision in the crosshairs is Article V, which lays out the process for amending the Constitution. To say that it's infrequently used would be a gross understatement. In the 230 years that our national charter has been in existence, it has been amended only 27 times; 10 times in its first five years alone. Moreover, each amendment came about through the same process: They were proposed by Congress, adopted by two-thirds of both chambers, and then ratified by three-quarters of the states.

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Conservative political advocacy groups backed by two separate, well-funded campaigns are now trying to amend the Constitution through a second approach. If they can convince two-thirds (or 34) of the 50 state legislatures to pass resolutions, they will force what is known as an Article V convention for the first time in U.S. history.

These groups have focused most of their energies on trying to drum up support for a balanced budget amendment, a perennial favorite that conservatives often laud as the silver bullet for all economic woes. The effort began slowly in the late 1950s and the 1960s. It then went into overdrive in the 1970s, and almost succeeded, but tapered off as state legislatures began to rescind their resolutions in the 1980s. Over the past decade, Tea Party conservatives regrouped and restarted the push for a convention. Building on the nearly successful attempt from decades ago, they now claim to have support from 27 state legislatures — seven shy of their goal. As the balanced budget initiative approaches the finish line, democracy watchdog groups like Common Cause have become increasingly concerned. Many fear a "runaway" convention, with delegates going beyond the states' specific amendment proposals to pursue far more radical changes to the Constitution.

Because the Constitution has never been amended using the Article V convention, the courts have yet to weigh in on the unique legal questions that the convention method raises.

There is good reason to be concerned. Because the Constitution has never been amended using the Article V convention, the courts have yet

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to weigh in on the unique legal questions that the convention method raises. Since at least the 1960s, when the balanced budget amendment campaign first gained momentum, lawyers and constitutional law experts have disagreed sharply on whether the Constitution can restrain the delegates from going beyond the limited agenda items put forth to justify the convention. There is still no conclusive answer. There is not even consensus among convention supporters; some say that it may be difficult to limit a convention — and even unlawful — while others claim the runaway scenario is a fiction manufactured by liberals opposed to limited government.

Another conservative group is spearheading a separate effort that does not merely downplay the possibility of a runaway convention, *it advocates for one* — or at least its functional equivalent. Taking up the banner of federal government restraint, Citizens for Self-Governance is calling for a Convention of States "to restrict the power of the federal government, effectively returning the citizens' rightful power over the ruling elite." If it succeeds, the national charter would be subject to revisions restricting the ability of our elected representatives in Washington to regulate corporations, protect the environment, and safeguard hard-won civil rights.

The plan offers a deceptively simple claim: A so-called Convention of States would propose amendments to the Constitution to curtail government authority in three specific ways. They would impose national fiscal restraint, limit federal power and jurisdiction, and enact term limits for members of Congress and other officials. However, a closer reading reveals a plan that creates ambiguity — and deliberately so. States passing a resolution with such sweeping language may give convention delegates leeway to propose a wide array of other changes to the Constitution.

At a time when our democracy is already under strain, conservatives with a radical vision for the country want to overhaul our founding document, offering the country little more than false assurances about an obscure constitutional mechanism. Americans cannot afford to remain idle students during this important civics lesson.

It's Time for Federalism 3.0

Heather K. Gerken

At a time when the federal government lurches between drama and paralysis, increasing attention is being paid to states as laboratories of experimentation and forums for action. The new dean of Yale Law School argued for an embrace of a new vision of federalism at a Brennan Center lecture at NYU School of Law. Progressives, she noted, who long feared states' rights and lionized federal power, should rethink their preconceptions.

Two great twentieth 20th debates over federal-state relations have shaped how constitutional theory treats what the Court once called "Our Federalism." The first battle was over the legacy of the New Deal — call it Federalism 1.0. The second concerned the civil rights movement — Federalism 2.0. Whether you are a nationalist or one of federalism's stalwarts, the intellectual frames we now use to understand "Our Federalism" were largely forged during those battles. In effect, they created the operating system that has served as our interface between practice and theory. Each debate embedded a set of shared assumptions into constitutional theory. Both sides share those assumptions — hence the idea that constitutional theory has a common operating system — though each camp places a quite different normative spin on them.

Our Federalism, then, is not your father's federalism, and it's certainly not your grandfather's federalism. And yet constitutional theory is still geared around these past debates.

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The problem is that our operating system is outdated. It no longer matches on-the-ground realities, which means it can't help us negotiate the controversies that matter today. In our tightly integrated system, the states and federal government now regulate shoulder-to-shoulder. Sometimes they lean on one another, and sometimes they deliberately jostle one another, but neither reigns supreme. States are not sites where groups can shield themselves from national policy, national politics, or national norms. Instead, they are the sites where we battle over — and forge — national policy, national politics, and national norms. National movements, be they red or blue, begin at the local and state level and move their way up. National actors depend on states and localities to carry out national policies, which means that they need buy-in from state and local officials to get things done. Our Federalism, then, is not your father's federalism, and it's certainly not your grandfather's federalism. And yet constitutional theory is still geared around these past debates.

Excerpted from the Thomas M. Jorde Symposium, March 1, 2017. The Jorde Symposium — endowed by a longtime Brennan Center board member — takes place at UC Berkeley School of Law and another institution each year.

It's time for constitutional theorists of all stripes to catch up. We need an intellectual frame for thinking about today's federalism, Federalism 3.0.

Let me make one, final point about where federalism theory will go if we abandon the mistaken assumptions of the New Deal (that state and national power should be conceived of in sovereignty-like terms) and the civil rights movement (that decentralization is properly cast in opposition to the interests of dissenters and racial minorities). Here I will pull together the arguments I've offered about federalism's regulatory dimensions, the subject of the New Deal debates, and its democratic ones, the subject of the civil rights debates, in order to paint a picture of federal-state relations that constitutional theory has yet to fully absorb. All of these arguments suggest that it is time to dispense with the camps that have been at the bedrock of constitutional theory for decades. That is so for both analytic and normative reasons.

This observation returns me to my overarching theme: Constitutional theory is outdated. Embedded within federalism theory are a series of assumptions that no longer describe Our Federalism, today's federalism. Our regulatory structures and politics are deeply intertwined. Neither the federal government nor the states preside over their own empire; instead, they regulate shoulder-to-shoulder in a tight regulatory space, sometimes leaning on one another and sometimes deliberately jostling each other. So, too, states are no longer enclaves that facilitate retreats from national norms. Instead, they are the sites where those norms are forged. And while local and state structures were once condemned solely as tools for blocking racial change, they also provide crucial structures for seeking change. None of these truths has been fully absorbed by constitutional theory. It's time to update constitutional doctrine, to adapt constitutional theory to the realities of Federalism 3.0. That should be federalism's research agenda for the 21st century.

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CELEBRATING TWENTY YEARS

In 2016, the Brennan Center for Justice celebrated its 20th anniversary – marking its first two decades in the fight to reform and revitalize our systems of democracy and justice. We launched a special initiative to commemorate this milestone, and to lay the groundwork for an even stronger future. Among the new vehicles we established to help ensure the Center's long-term sustainability:

The Brennan Legacy Fund

We created the Brennan Legacy Fund to ensure the Center has the resilience and the resources to rise to the urgent challenges and opportunities ahead. We are pleased to recognize these generous supporters:

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Inez Milholland Endowment For Democracy

With the generous support and vision of The WhyNot Initiative, we formed the Inez Milholland Endowment for Democracy. Inez Milholland (1886–1916) was the bold, vibrant face of the women's suffrage movement in the United States, an ardent fighter for equality and social justice, and a graduate of New York University School of Law. The Endowment provides resources to support the Center's Democracy Program and ensures that Ms. Milholland's legacy lives on.

Brennan Legacy Circle

The Brennan Legacy Circle recognizes leaders who have made charitable bequests or otherwise included the Center in their long-term philanthropic planning — a meaningful way to ensure longevity in the fights for democracy and justice that lie ahead.

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If you would like to receive additional information about the Brennan Legacy Fund, the Inez Milholland Endowment, or the Brennan Legacy Circle, please contact Jennifer Weiss-Wolf at jennifer.weiss-wolf@nyu.edu or 646-292-8323.

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