DEMOCRACY & JUSTICE
COLLECTED WRITINGS
BRENNAN CENTER FOR JUSTICE

Volume One

The Brennan Center for Justice at NYU School of Law

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution—part think tank, part public interest law firm, part advocacy group—the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

About Democracy & Justice: Collected Writings 2007

The material in this volume is excerpted from Brennan Center reports, policy proposals, and issue briefs; we've also excerpted material from public remarks, legal briefs, Congressional testimony, and op-ed pieces written by Brennan Center staff in 2007. For a full version of any material printed herein, complete with footnotes, please contact: Susan Lehman, Director of Communications and Strategy, Brennan Center for Justice at NYU School of Law, susan.lehman@nyu.edu.

Democracy & Justice: Collected Writings 2007
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Introduction from the Executive Director

America is alive to the politics of possibility. We are engaged in a rare national conversation in which citizens debate not just the "who" of leadership but also the "how."

Animated by this hunger for change, in 2007 we at the Brennan Center for Justice worked hard - and with concrete results - to bring the fundamental American values of democracy and justice back to the center of our politics. We believe that the challenges we face - from economic anxiety, to global warming to the continued threat of catastrophic terrorism - can only be solved with a meaningful renewal of our governmental system.

This volume offers a sample - just a taste - of the Brennan Center's work. You'll find our work to expand the right to vote, ranging from an argument advanced before the U.S. Supreme Court debunking the myth of "voter fraud," to an agenda for federal election reform endorsed by dozens of groups. This year, as well, we issued a plan to improve access to justice for the poor. And as we continue to fight in the courts to uphold habeas corpus, we published a series of pathbreaking reports and a major book setting out concrete steps to restore checks and balances.

Today, social change comes not just only in the courtroom or even the legislature, but also in the court of public opinion. So we have included a sampling of the dozens of opinion articles we published in major newspapers and websites.

In this election year, we continue our work to knock away barriers to voter registration and accurate elections. We continue to defend campaign finance laws where they are under assault. And we are crafting a series of bold proposals, anchored in a plan for universal voter registration, that can form a key part of the nation's evolving policy agenda in 2009. It is time to think big again.

We take our cue from a president who governed and led us toward our best impulses at our most difficult time of turmoil: "As our case is new," said Abraham Lincoln, "so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country."

Michael Waldman
Executive Director

THE DEMOCRACY MOMENT

America's Promise, America's Story

Bill Moyers

America is ready for change. PBS journalist Bill Moyers invites listeners to follow in the path of abolitionist Theodore Parker who helped change the country through the power of the word.

You could not have chosen a better time to gather. Voters have provided a respite from a right-wing radicalism predicated on the philosophy that extremism in the pursuit of virtue is no vice. It seems only yesterday that the Trojan horse of conservatism was hauled into Washington to disgorge Newt Gingrich, Tom DeLay, Ralph Reed, Grover Norquist and their hearty band of ravenous predators masquerading as a political party of small government, fiscal restraint and moral piety and promising "to restore accountability to Congress...[and] make us all proud again of the way free people govern themselves."

Well, the long night of the junta is over, and Democrats are ebullient as they prepare to take charge of the multitrillion-dollar influence racket that we used to call the US Congress. Let them rejoice while they can, as long as they remember that while they ran some good campaigns, they have arrived at this moment mainly because George W. Bush lost a war most people have come to believe should never have been fought in the first place. Let them remember, too, in this interim of sweet anticipation, that although they are reveling in the ruins of a Republican reign brought down by stupendous scandals, their own closet is stocked with skeletons from an era when they were routed from office following Abscam bribes and savings and loan swindles that plucked the pockets and purses of hard-working, tax-paying Americans.

As they rejoice, Democrats would be wise to be mindful of Shakespeare's counsel, "'Tis more by fortune...than by merit." For they were delivered from the wilderness not by their own goodness and purity but by the grace of K Street corruption, DeLay Inc.'s duplicity, the pitiless exploitation of Terri Schiavo, the disgrace of Mark Foley and a shameful partisan cover-up, the shamelessness of Jack Abramoff and a partisan conspiracy, and neocon arrogance and amorality (yes, amoral: Apparently there is no end to the number of bodies Bill Kristol and Richard Perle are

These remarks are adapted from Bill Moyers' speech at a Brennan Center co-sponsored event in December 2006.

prepared to watch pile up on behalf of illusions that can't stand the test of reality even one Beltway block from the think tanks where they are hatched). The Democrats couldn't have been more favored by the gods if they had actually believed in one!

But whatever one might say about the election, the real story is one that our political and media elites are loath to acknowledge or address. I am not speaking of the lengthy list of priorities that progressives and liberals of every stripe are eager to put on the table now that Democrats hold the cards in Congress. Just the other day a message popped up on my computer from a progressive advocate whose work I greatly admire. Committed to movement-building from the ground up, he has results to show for his labors. His request was simple: "With changes in Congress and at our state capitol, we want your input on what top issues our lawmakers should tackle. Click here to submit your top priority."

DEMOCRACY WORKS WHEN PEOPLE CLAIM IT AS THEIR OWN.

I clicked. Sure enough, up came a list of thirty-four issues – an impressive list that began with "African-American" and ran alphabetically through "energy" and "higher education" to "guns," "transportation," "women's issues" and "workers' rights." It wasn't a list to be dismissed, by any means, for it came from an unrequited thirst for action after a long season of malignant opposition to every item on the agenda. I understand the mindset. Here's a fellow who values allies and appreciates what it takes to build coalitions; who knows that although our interests as citizens vary, each one is an artery to the heart that pumps life through the body politic, and each is important to the health of democracy. This is an activist who knows political success is the sum of many parts.

But America needs something more right now than a "must-do" list from liberals and progressives. America needs a different story. The very morning I read the message from the progressive activist, the *New York Times* reported on Carol Ann Reyes. Carol Ann Reyes is 63. She lives in Los Angeles, suffers from dementia and is homeless. Somehow she made her way to a hospital with serious, untreated needs. No details were provided as to what happened to her there, except that the hospital – which is part of Kaiser Permanente, the largest HMO in the country – called a cab and sent her back to skid row. True, they phoned ahead to workers at a rescue shelter to let them know she was coming. But some hours later a surveillance camera picked her up "wandering around the streets in a hospital gown and slippers." Dumped in America.

Here is the real political story, the one most politicians won't even acknowledge: the reality of the anonymous, disquieting daily struggle of ordinary people, including the most marginalized and vulnerable Americans but also young workers and elders and par-

ents, families and communities, searching for dignity and fairness against long odds in a cruel market world.

Everywhere you turn you'll find people who believe they have been written out of the story. Everywhere you turn there's a sense of insecurity grounded in a gnawing fear that freedom in America has come to mean the freedom of the rich to get richer even as millions of Americans are dumped from the Dream. So let me say what I think up front: The leaders and thinkers and activists who honestly tell that story and speak passionately of the moral and religious values it puts in play will be the first political generation since the New Deal to win power back for the people.

There's no mistaking that America is ready for change. One of our leading analysts of public opinion, Daniel Yankelovich, reports that a majority want social cohesion and common ground based on pragmatism and compromise, patriotism and diversity. But because of the great disparities in wealth, the "shining city on the hill" has become a gated community whose privileged occupants, surrounded by a moat of money and protected by a political system seduced with cash into subservience, are removed from the common life of the country. The wreckage of this abdication by elites is all around us.

Corporations are shredding the social compact, pensions are disappearing, median incomes are flattening and healthcare costs are soaring. In many ways, the average household is generally worse off today than it was thirty years ago, and the public sector that was a support system and safety net for millions of Americans across three generations is in tatters. For a time, stagnating wages were somewhat offset by more work and more personal debt. Both political parties craftily refashioned those major renovations of the average household as the new standard, shielding employers from responsibility for anything Wall Street didn't care about. Now, however, the more acute major risks workers have been forced to bear as employers reduce their health and retirement costs–on orders from Wall Street – have made it clear that our fortunes are being reversed. Polls show that a majority of US workers now believe their children will be worse off than they are. In one recent survey, only 14 percent of workers said that they have obtained the American Dream.

It is hard to believe that less than four decades ago a key architect of the antipoverty program, Robert Lampman, could argue that the "recent history of Western nations reveals an increasingly widespread adoption of the idea that substantial equality of social and economic conditions among individuals is a good thing." Economists call that postwar era "the Great Compression." Poverty and inequality had declined dramatically for the first time in our

history. Here, as Paul Krugman recently recounted, is how Time's report on the national outlook in 1953 summed it up: "Even in the smallest towns and most isolated areas, the U.S. is wearing a very prosperous, middle-class suit of clothes, and an attitude of relaxation and confidence. People are not growing wealthy, but more of them than ever before are getting along." African-Americans were still written out of the story, but that was changing, too, as heroic resistance emerged across the South to awaken our national conscience. Within a decade, thanks to the civil rights movement and President Johnson, the racial cast of federal policy – including some New Deal programs–was aggressively repudiated, and shared prosperity began to breach the color line.

To this day I remember John F. Kennedy's landmark speech at the Yale commencement in 1962. Echoing Daniel Bell's cold war classic *The End of Ideology*, JFK proclaimed the triumph of "practical management of a modern economy" over the "grand warfare of rival ideologies." The problem with this–and still a major problem today–is that the purported ideological cease-fire ended only a few years later. But the Democrats never re-armed, and they kept pinning all their hopes on economic growth, which by its very nature is valueless and cannot alone provide answers to social and moral questions that arise in the face of resurgent crisis. While "practical management of a modern economy" had a kind of surrogate legitimacy as long as it worked, when it no longer worked, the nation faced a paralyzing moral void in deciding how the burdens should be borne. Well-organized conservative forces, firing on all ideological pistons, rushed to fill this void with a story corporate America wanted us to hear. Inspired by bumper-sticker abstractions of Milton Friedman's ideas, propelled by cascades of cash from corporate chieftans like Coors and Koch and "Neutron" Jack Welch, fortified by the pious prescriptions of fundamentalist political preachers like Jerry Falwell and Pat Robertson, the conservative armies marched on Washington. And they succeeded brilliantly.

THE AMERICAN PUBLIC IS COMMITTED TO A SET OF VALUES THAT ALMOST PERFECTLY CONTRADICTS THE CONSERVATIVE AGENDA THAT HAS DOMINATED POLITICS FOR A GENERATION NOW.

When Ronald Reagan addressed the Republican National Convention in 1980, he a told a simple story, one that had great impact. "The major issue of this campaign is the direct political, personal and moral responsibility of Democratic Party leadership – in the White House and in Congress – for this unprecedented calamity which has befallen us." He declared, "I will not stand by and watch this great country destroy itself." It was a speech of bold contrasts, of good private interest versus bad government, of course. More important, it personified these two forces in a larger narrative of freedom, reaching back across the Great Depression, the Civil War and the American Revolution, all the way back to the Mayflower Compact. It so dazzled and demoralized Democrats they could not muster a response to the moral abandonment and social costs that came with the Reagan revolution.

We too have a story of freedom to tell, and it too reaches back across the Great Depression, the Civil War and the American Revolution, all the way back to the Mayflower Compact. It's a story with clear and certain foundations, like Reagan's, but also a tumultuous and sometimes violent history of betrayal that he and other conservatives consistently and conveniently ignore.

Reagan's story of freedom superficially alludes to the Founding Fathers, but its substance comes from the Gilded Age, devised by apologists for the robber barons. It is posed abstractly as the freedom of the individual from government control–a Jeffersonian ideal at the root of our Bill of Rights, to be sure. But what it meant in politics a century later, and still means today, is the freedom to accumulate wealth without social or democratic responsibilities and the license to buy the political system right out from under everyone else, so that democracy no longer has the ability to hold capitalism accountable for the good of the whole.

And that is not how freedom was understood when our country was founded. At the heart of our experience as a nation is the proposition that each one of us has a right to "life, liberty, and the pursuit of happiness." As flawed in its reach as it was brilliant in its inspiration for times to come, that proposition carries an inherent imperative: "inasmuch as the members of a liberal society have a right to basic requirements of human development such as education and a minimum standard of security, they have obligations to each other, mutually and through their government, to ensure that conditions exist enabling every person to have the opportunity for success in life."

The quote comes directly from Paul Starr, one of our most formidable public thinkers, whose forthcoming book, *Freedom's Power: The True Force of Liberalism*, is a profound and stirring call for liberals to reclaim the idea of America's greatness as their own. Starr's book is one of three new books that in a just world would be on every desk in the House and Senate when Congress convenes again.

John Schwarz, in *Freedom Reclaimed: Rediscovering the American Vision*, rescues the idea of freedom from market cultists whose "particular idea of freedom...has taken us down a terribly mistaken road" toward a political order where "government ends up servicing the powerful and taking from everyone else." The free-market view "cannot provide us with a philosophy we find compelling or meaningful," Schwarz writes. Nor does it assure the availability of economic opportunity "that is truly adequate to each individual and the status of full legal as well as political equality." Yet since the late nineteenth century it has been used to shield private power from democratic accountability, in no small part because conser-

vative rhetoric has succeeded in denigrating government even as conservative politicians plunder it.

But government, Schwarz reminds us, "is not simply the way we express ourselves collectively but also often the only way we preserve our freedom from private power and its incursions." That is one reason the notion that every person has a right to meaningful opportunity "has assumed the position of a moral bottom line in the nation's popular culture ever since the beginning." Freedom, he says, is "considerably more than a private value." It is essentially a social idea, which explains why the worship of the free market "fails as a compelling idea in terms of the moral reasoning of freedom itself." Let's get back to basics, is Schwarz's message. Let's recapture our story.

Norton Garfinkle picks up on both Schwarz and Starr in *The American Dream vs. the Gospel of Wealth*, as he describes how America became the first nation on earth to offer an economic vision of opportunity for even the humblest beginner to advance, and then moved, in fits and starts–but always irrepressibly–to the invocation of positive government as the means to further that vision through politics. No one understood this more clearly, Garfinkle writes, than Abraham Lincoln, who called on the federal government to save the Union. He turned to large government expenditures for internal improvements–canals, bridges and railroads. He supported a strong national bank to stabilize the currency. He provided the first major federal funding for education, with the creation of land grant colleges. And he kept close to his heart an abiding concern for the fate of ordinary people, especially the ordinary worker but also the widow and orphan. Our greatest President kept his eye on the sparrow. He believed government should be not just "of the people" and "by the people" but "for the people." Including, we can imagine, Carol Ann Reyes.

The great leaders of our tradition–Jefferson, Lincoln and the two Roosevelts–understood the power of our story. In my time it was FDR, who exposed the false freedom of the aristocratic narrative. He made the simple but obvious point that where once political royalists stalked the land, now economic royalists owned everything standing. Mindful of Plutarch's warning that "an imbalance between rich and poor is the oldest and most fatal ailment of all republics," Roosevelt famously told America, in 1936, that "the average man once more confronts the problem that faced the Minute Man." He gathered together the remnants of the great reform movements of the Progressive Age–including those of his late-blooming cousin, Teddy–into a singular political cause that would be ratified again and again by people who categorically

rejected the laissez-faire anarchy that had produced destructive, unfettered and ungovernable power. Now came collective bargaining and workplace rules, cash assistance for poor children, Social Security, the GI Bill, home mortgage subsidies, progressive taxation–democratic instruments that checked economic tyranny and helped secure America's great middle class. And these were only the beginning. The Marshall Plan, the civil rights revolution, reaching the moon, a huge leap in life expectancy–every one of these great outward achievements of the last century grew from shared goals and collaboration in the public interest.

So it is that contrary to what we have heard rhetorically for a generation now, the individualist, greed-driven, free-market ideology is at odds with our history and with what most Americans really care about. More and more people agree that growing inequality is bad for the country, that corporations have too much power, that money in politics is corrupting democracy and that working families and poor communities need and deserve help when the market system fails to generate shared prosperity. Indeed, the American public is committed to a set of values that almost perfectly contradicts the conservative agenda that has dominated politics for a generation now.

The question, then, is not about changing people; it's about reaching people. I'm not speaking simply of better information, a sharper and clearer factual presentation to disperse the thick fogs generated by today's spin machines. Of course, we always need stronger empirical arguments to back up our case. It would certainly help if at least as many people who believe, say, in a "literal devil" or that God sent George W. Bush to the White House also knew that the top 1 percent of households now have more wealth than the bottom 90 percent combined. Yes, people need more information than they get from the media conglomerates with their obsession for nonsense, violence and pap. And we need, as we keep hearing, "new ideas." But we are at an extraordinary moment. The conservative movement stands intellectually and morally bankrupt while Democrats talk about a "new direction" without convincing us they know the difference between a weather vane and a compass. The right story will set our course for a generation to come.

Some stories doom us. In *Collapse: How Societies Choose to Fail or Succeed*, Jared Diamond tells of the Viking colony that disappeared in the fifteenth century. The settlers had scratched a living on the sparse coast of Greenland for years, until they encountered a series of harsh winters. Their livestock, the staple of their diet, began to die off. Although the nearby waters teemed with haddock and cod, the colony's mythology prohibited the eating of fish. When their supply of hay ran out during a last terrible winter, the colony was finished. They had been doomed by their story.

Here in the first decade of the twenty-first century the story that becomes America's dominant narrative will shape our collective imagination and hence our politics. In the searching of our souls demanded by this challenge, those of us in this room and kindred spirits across the nation must confront the most fundamental progressive failure of the current era: the failure to embrace a moral vision of America based on the transcendent faith that human beings are more than the sum of their material appetites, our country is more than an economic machine, and freedom is not license but responsibility–the gift we have received and the legacy we must bequeath.

In our brief sojourn here we are on a great journey. For those who came before us and for those who follow, our moral, political and religious duty is to make sure that this nation, which was conceived in liberty and dedicated to the proposition that we are all created equal, is in good hands on our watch.

HUMANS ARE MORE THAN THE SUM OF THEIR MATERIAL APPETITES, OUR COUNTRY IS MORE THAN AN ECONOMIC MACHINE, AND FREEDOM IS NOT LICENSE BUT RESPONSIBILITY.

One story would return America to the days of radical laissez-faire, when there was no social contract and the strong took what they could and the weak were left to forage. The other story joins the memory of struggles that have been waged with the possibility of victories yet to be won, including healthcare for every American and a living wage for every worker. Like the mustard seed to which Jesus compared the Kingdom of God, nurtured from small beginnings in a soil thirsty for new roots, our story has been a long time unfolding. It reminds us that the freedoms and rights we treasure were not sent from heaven and did not grow on trees. They were, as John Powers has written, "born of centuries of struggle by untold millions who fought and bled and died to assure that the government can't just walk into our bedrooms and read our mail, to protect ordinary people from being overrun by massive corporations, to win a safety net against the often-cruel workings of the market, to guarantee that businessmen couldn't compel workers to work more than forty hours a week without extra compensation, to make us free to criticize our government without having our patriotism impugned, and to make sure that our leaders are answerable to the people when they choose to send our soldiers into war." The eight-hour day, the minimum wage, the conservation of natural resources, free trade unions, old-age pensions, clean air and water, safe food–all these began with citizens and won the endorsement of the political class only after long struggles and bitter attacks. Democracy works when people claim it as their own.

It is only rarely remembered that the definition of democracy immortalized by Lincoln in the Gettysburg Address had been inspired by Theodore Parker, the abolitionist prophet. Driven from his pulpit, Parker said, "I will go about and preach and lecture in the city and glen, by the roadside and field-side, and wherever men

and women may be found." He became the Hound of Freedom and helped to change America through the power of the word. We have a story of equal power. It is that the promise of America leaves no one out. Go now, and tell it on the mountains. From the rooftops, tell it. From your laptops, tell it. From the street corners and from Starbucks, from delis and from diners, tell it. From the workplace and the bookstore, tell it. On campus and at the mall, tell it. Tell it at the synagogue, sanctuary and mosque. Tell it where you can, when you can and while you can–to every candidate for office, to every talk-show host and pundit, to corporate executives and schoolchildren. Tell it–for America's sake. ■

Let's Not Miss a Chance to Change Voter Laws

Michael Waldman

July 2007. The Presidential campaign heats up. Brennan Center Executive Director Michael Waldman urges reformers to seize the Democracy Moment.

As progressives prepare for the political season, we might rue the "one that got away." There's a rare chance to reform voting laws to expand the electorate and strengthen democracy, not just next year but for the next decade. But election reform in 2008 must start in 2007 – and time is slipping by.

Voting is the heart of democracy. Yet millions of Americans face huge obstacles when they try to register, cast their ballot, or have it counted. We now know that last year partisans waged a frenetic effort to disenfranchise voters – orchestrated, remarkably, by the Justice Department itself. Happily, a growing grassroots voter protection movement pushed back. (The Brennan Center for Justice, to cite just one example, stopped the disenfranchisement of some 300-700,000 voters, with lawsuits and advocacy.) That was needed, and right, but ultimately defensive.

Now we can go on the offense: to change voting laws and reform election administration, in states across the country. Why the opportunity? The new Congress, of course, but even more, twelve new secretaries of state elected on voter protection platforms; sixteen states with potentially sympathetic Democratic governors and legislatures (up from eight); in some places, competition among both parties to be "pro reform." Rarely do the stars align as now. Key goals:

• **Keeping eligible citizens on the voter list.** State officials routinely purge voters from the rolls – a secret process prone to partisan manipulation. A purge list of "potential felons" in Florida in 2004 included 22,000 African-Americans and only 63 Hispanics, in the one state where those blocs vote for different parties. (What a coincidence!) Now we can end the system of secret and partisan purges of the voter rolls. Several Secretaries of State are preparing to reform their own systems. And the Brennan Center plans lawsuits in other states to force standards and accountability.

NOW WE CAN GO ON THE OFFENSE: TO CHANGE VOTING LAWS AND REFORM ELECTION ADMINISTRATION IN STATES ACROSS THE COUNTRY.

• **Ending felony disenfranchisement,** an ugly relic of Jim Crow. Florida's new Republican governor, Charlie Crist, with a stroke of a pen created the chance to restore the vote for about 500,000. Virginia's laws disenfranchise for life one out of three black men. The Democratic governor, Tim Kaine, could – and should – do what Florida's conservative Republican governor did, and change the state forever.

This piece was originally published on The Huffington Post *on July 10, 2007.*

• **Allowing Election Day Registration**. States with EDR have 5-7% higher voter turnout. That's an astounding jump, far higher than even the best voter registration or GOTV drive could muster. Recently Iowa and Montana joined six other states with EDR, and North Carolina is poised to be the ninth. Drives are underway in a half dozen other states.

VOTING RIGHTS SHOULD BE A NON-PARTISAN ISSUE, BUT NOT EVERYONE GOT THE MEMO.

• **Fixing electronic voting.** A Brennan Center task force of the nation's top computer scientists concluded emphatically that every one of the nation's electronic voting systems is insecure. Next week, the U.S. House of Representatives votes on the bill introduced by Reps. Rush Holt (D-NJ) and Tom Davis (R-VA), a strong measure that would ban touchscreen machines that lack an audit record, require random auditing, and prohibit wireless components in voting machines. Numerous states can be pushed to require paper trails and audits.

• **Stopping onerous ID requirements.** An individual is more likely to be killed by lightening than to commit voter fraud. The U.S. Attorney scandal has revealed the "voter fraud" scare for the political witch hunt that it is. But it has proven a highly convenient way for partisans to push for proof of citizenship and other ID requirements that are end up preventing voting, not fraud. (The necessary paperwork can cost up to $200. By contrast, the notorious poll tax was $8.97 in current dollars when it was declared unconstitutional in 1966.) For the first time in years, civil rights proponents are able to push back – which helps clear the field for pro-enfranchisement reform.

It all adds up to a rare opportunity for lasting change. But progressives must be truly strategic. In 2004 they spent hundreds of millions of dollars to register and mobilize voters. Activists plan similar, even larger efforts next year. Voter mobilization is vital. But this time there's a difference: a fraction of that significant investment, sharply targeted, can help sweep away barriers to civic participation. Soon it will be too late. Most state legislatures will finish their work just a few months into next year, and the polarized political season looms. For needed changes to have a chance to empower voters in November 2008, the activism must start now.

Stakes are achingly high. Voting rights should be a nonpartisan issue, but not everyone got the memo. In a moment of candor about just one obstacle to voting, the former Political Director of the Texas Republican Party told the Houston Chronicle "that requiring photo IDs could cause enough of a dropoff in legitimate Democratic voting to add 3 percent to the Republican vote." That's an affront not to a party, but to democracy. ■

The Genius of America: How the Constitution Saved America, and Why It Can Again

Eric Lane and Michael Oreskes

Senior Fellow Eric Lane and International Herald Tribune *editor Michael Oreskes appeal to Americans' "Constitutional Conscience," in this excerpt from their new book.*

AN EXTRAORDINARY ACCOMPLISHMENT

The United States of America is an extraordinary accomplishment. It is the richest, most powerful nation that has ever existed. From a handful of farmers and merchants on the edge of the known world, it has grown, endured, agonized and prospered. Millions have flocked to its shores, and millions more continuously hope to come. Saying that this has become something of a cliché does not make it any less true. Nor does the fact that some people in other parts of the world have come to resent the way America asserts its wealth and power make America's rise any less remarkable or significant. Even America's fiercest critics don't argue that.

But why did this success visit itself on the United States? Certainly it is a land blessed with enormous resources and intrepid people. They have been celebrated many times. But there are other nations with great resources and excellent people. Our purpose is to focus on something so apparent it is often underappreciated. America's extraordinary success is directly related to its unique form of government. Not just to its freedom or its democracy, but to its singularly American form of democracy.

Indeed, one of America's first and greatest inventions was the United States of America itself. This was something wholly new in the annals of government. There had been democracies before. There had been republics before. But what the framers invented was something no one had ever seen before.

They built a system of government entirely self-contained. They looked to neither God nor king for higher authority. This was, as they said, a government of "We the people." Everyone piece of it represented the people and drew its authority from the people, not, as for example in England, where the king or queen owed their power to the will of God, and the then powerful House of Lords to the lineage of its members.

But for government of the people to really work, the framers had to recognize what people were really like and then design a government around that reality. Through trial and spectacular error, they came to understand that anything less realistic was doomed to fail.

This, then, was their radical breakthrough: their recognition that government had to be designed around a cold-eyed acceptance of men as they really are, not as we might wish them to be. What was that cold-eyed view of human nature? They recognized that people pursue their own self-interests. And in this pursuit, they often regard what is good for them as good for all.

IN RECENT YEARS, AMERICANS HAVE BEEN LOSING TOUCH WITH BASIC CONSTITUTIONAL VALUES, MOST PARTICULARLY A COMMITMENT TO COMPROMISE AND A TOLERANCE FOR COMPETING IDEAS.

Other political thinkers had, of course, noticed this from time to time before the American Revolution. But before America, proponents of democracy (when they could be found) generally solved the problem of selfishness by suggesting that citizens could rise above their own interests to join in achieving some larger good that they would recognize through reasoning together.

This is an attractive thought. It was nice to believe – it is still nice to believe – that we each have this capacity for public virtue. Indeed, in the heady first days of the Revolution (but neither before nor after), the founders themselves by and large believed this. They generally thought that the simple act of breaking with England would free Americans in their new land from the corrupting values of the old world. In April of 1776, Tom Paine described America as "a blank sheet" on which a freed people could and would script a new start. All that was needed to make government work was virtuous Americans doing the right thing in their new land.

But in the first disastrous years of their independence they came to understand that they had been hopelessly naïve. Of course, there were individual examples of self-sacrifice for the larger cause. Yet overall, the framers found, the people could reliably be counted on to do what was best for themselves as individuals, not for some abstract larger whole. As a result, the people had nearly let their army starve in the field of battle. They had competed, one state against another, for the upper hand in trade. They had profiteered and stolen and refused to work together.

The American experiment in self-government was on the verge of failure. "We have probably had too good an opinion of human nature in forming our confederation," George Washington wrote in 1786. Then, a quintessentially American thing happened. A group of men, chosen by their states, got together in the sweltering late spring of 1787 to try to fix things. They locked themselves in a room and haggled and brokered and compromised. They went way

beyond any instructions they had been given by the states, which had sent them, or the Congress, which had belatedly endorsed their gathering. But they did not do it to impose an ideology or test some social theory. In that pragmatic American way that people all around the world still admire, they were just trying to make it work.

And out of that sweltering room in Philadelphia, out of that crisis of the early American nation, emerged a blueprint for government that was designed to let the people govern themselves despite their imperfections. They called it "this Constitution for The United States of America." It did not count on people to be selfless or somehow bigger than themselves. "If men were angels, no government would be necessary," wrote James Madison, one of the heroes of our story.

Indeed, the Constitution recognized that the great strength of Americans was their drive and ambition. For most, that is what got them to the new world (and still does). The Constitution would make a virtue of this "vice." This new idea for government presumed that people would pursue their own interests. Indeed, it counted on them to do just that. And it created paths for others to disagree, and resist them, or argue for something different.

The framers' invention was a government designed to channel these struggles. To impede change until enough people supported it. To force people to the middle. To encourage compromise. To spread power around so that, in Alexander Hamilton's succinct vision, the few could not oppress the many, and the many could not oppress the few. A lot could get done if people worked together in this system. But if they refused to compromise, it could all grind to a halt.

In other words, what they sent out of Philadelphia was more than just a piece of parchment. They created a set of ideas about government and democracy. Twenty years ago, the scholar Michael Kammen published a marvelous book on the Constitution in our culture. He described both the importance to us of the document itself and of the value and options that surrounded it, what he called constitutionalism. At the heart of constitutionalism is an acceptance of "conflict within consensus." Conflict over issues, within a consensus that we are bound one to another by our shared belief in our Constitution and its principles. This crucial tension has both held our country together and driven us forward. For conflict within consensus to be constructive, rather than destructive, Americans had to accept in their political bones several other ideas crucial to the Constitution. One was compromise. The Constitution was a set of compromises and assumed the vital need for compromise for the new government to function. Another crucial

idea was representation. The political philosophy of the framers assumed that Americans would accept compromises because they felt properly represented in the branches of government. For a long time this promise of representation was considerably greater than the reality.

All of the Constitution's ideas taken together – conflict within consensus, compromise, representation, checks and balances, tolerance of debate – became part of the political conscience of each American. We therefore call this set of ideas, these core political values, the *Constitutional Conscience.* This book describes the development of American's Constitutional Conscience and its vital role.

AN ANTIDOTE TO OUR FRUSTRATION AND CYNICISM IS TO REMIND OURSELVES FROM TIME TO TIME OF THE PRINCIPLES BEHIND WHAT THE FRAMERS INTENDED.

Every nation has a set of political values. But ours are, by comparison, more vital to us, as Americans, than a similar set of values would be to the people of many other nations. Ours is not a country "defined by blood, clan, land origin or religious belief," observed the journalist Ray Suarez. Indeed, said former Harvard president Derek Bok, "more than any other leading democracy, America is a country that preserves its unity through a shared belief in its Constitution, its institutions of government, and its democratic principles." So it is particularly important that we pay attention to our connection to our Constitution, institutions and principles.

We worry that in recent years Americans have been losing touch with some of these basic constitutional values, most particularly a commitment to compromise and a tolerance for competing ideas. To say it the way Professor Kammen might, conflict has been increasing, and consensus has frayed. American's faith in their system is not what it once was. "Our conviction about American greatness and purpose is not as strong today," is the way William J. Bennett describes it on the very first page of his history of the United States, *The Last Best Hope*. Bennett said he wrote his book in part to remind Americans of their debt of gratitude to those who built the country. We share that worthy goal. An antidote to our frustration and cynicism is to remind ourselves from time to time of the principles behind what the framers intended. ■

RESTORING FAITH IN OUR ELECTIONS

An Agenda for Election Reform

Wendy R. Weiser and Jonah Goldman

The 110th Congress takes office in January 2007; in February, the Brennan Center and the Lawyers' Committee for Civil Rights Under the Law issue a comprehensive agenda to fix America's broken voting laws. Two dozen national groups endorse the plan.

Our Constitution promises every eligible American a full and equal opportunity to participate in the political process. Unfortunately, defects in election administration and procedures undermine that promise by disenfranchising countless eligible Americans every election cycle. These defects can be remedied, and the promise of democracy restored, by implementing real reforms to ensure that all eligible Americans have a fair and equal opportunity to vote and to have their votes counted. This memorandum sets out a comprehensive reform agenda for the 110th Congress to achieve that goal and explains the reasons for each policy reform.

This agenda is the product of years of research and experience by a variety of organizations and institutes focused on civil rights, voting rights, and civic participation. Over the past few years, these organizations have created an extensive record of the problems voters face as they attempt to register, vote, and have their votes counted. The following recommendations are designed to address those problems, to promote the integrity of elections, and to ensure that our electoral process serves all American citizens.

I. IMPROVE VOTER REGISTRATION PROCESS

Voter registration problems typically are the largest cause of unwarranted voter disenfranchisement in the United States. Year after year, a substantial number of Americans show up at their polling places only to find that their names are not on the voter rolls, either because of a problem in the registration process or because their names have been incorrectly removed from the rolls. Others are unable to register to vote in advance of Election Day because of restrictive voter registration requirements. Although the new statewide voter registration databases mandated by HAVA have the potential to mitigate these problems, that potential has not been reached, and few states have

adopted policies and practices to use their databases to help voters. The causes of voter registration problems are multiple, and they have been fleshed out through extensive study and advocacy experience.

Any reform agenda should address the myriad barriers to voter registration that currently plague our electoral system. Since new barriers frequently arise, a reform agenda should also include protections to ensure that additional barriers do not disenfranchise voters. And since existing voter registration systems themselves are often a significant barrier to voting for many citizens, even when they function properly, a reform agenda should seek to expand the ways in which citizens can become registered to vote. Overall, the goals of federal reform of the voter registration process are: (a) to expand the avenues for voter registration; (b) to remove technical and other barriers to voter registration; (c) to improve practices for purging the voter rolls of ineligible voters by increasing public transparency and reducing the likelihood that eligible voters will be disenfranchised; and (d) to make it easier for citizens to determine their voter registration status.

A. Expand Avenues for Voter Registration

SAME DAY REGISTRATION

Election 2004 saw an encouraging trend in voter turnout nationwide—about a 5% increase from four years earlier. While voter turnout was up across the country, four of the top five states with the highest percentage of eligible voters who cast ballots had one thing in common: they allowed citizens to register and vote at the polls on Election Day. In the six states that had "same day registration" in 2004, eligible voter turnout was 13.6% higher than in those states that did not.

FOUR OF THE TOP FIVE STATES WITH THE HIGHEST VOTER TURNOUT HAD ONE THING IN COMMON: THEY ALLOWED CITIZENS TO REGISTER ON ELECTION DAY.

In addition to increasing turnout, same day registration helps overcome a number of problems in state registration systems. Americans often complain that voter registration deadlines prevent them from participating in elections because they frequently become engaged in elections and political discussions after the registration deadline has passed. Moreover, one of the most frequent causes of disenfranchisement on Election Day, even for those who have submitted timely voter registration applications, is the registration process. Year after year, thousands upon thousands of voters show up at the polling place only to find that a technical or administrative error prevented them from showing up on the rolls. Election officials often cannot meet the last minute demand for voter registration before the deadline, causing backlogs of voter registration cards that do not get processed in time for Election Day. These problems will not disenfranchise voters if states provide for same day registration. We therefore propose the following federal reform:

• **Same Day Registration.** Congress should pass legislation that allows every eligible Americans to register and vote the same day for all federal elections. Any such legislation must provide adequate resources to state and local election administrators to implement an effective same day registration system. It should also ensure that only eligible voters can take advantage of the same day registration system.

REGISTRATION WHEN CITIZENS BECOME ELIGIBLE TO VOTE

New citizens, young people who reach voting age, and Americans who reenter civic life after incarceration should be encouraged to participate fully in our democracy. Studies show that when voters cast a ballot the first time they are eligible to vote, they are far more likely to become life-long voters. To do so, they must first become registered to vote. According to the Census Bureau, more than 25% of voting-age Americans, and more than 50% of those aged 18-24, are not registered. We therefore propose the following federal reforms:

• **Voter registration for newly eligible citizens.** Congress should require that voter registration be made available at high school graduations, college freshmen orientations, naturalization ceremonies and, where applicable, when Americans become eligible to vote after they have lost their eligibility for a period of time. Currently, the NVRA requires all state departments of motor vehicles and state social service agencies to provide opportunities for their clients to register. This model should be expanded to encourage newly eligible voters to register by making registration available at naturalization ceremonies, at high schools and colleges, and at the appropriate departments of correction, probation or parole.

• **Mailing to newly eligible citizens.** Congress should require states to mail voter registration application cards to citizens on their eighteenth birthdays and to other newly eligible citizens.

• **Improve civic education.** Congress should also encourage, possibly through pilot programs, creative civic education in high schools to teach young people the importance of democratic participation as well as how to be effective voters. Such programs should include classroom voter registration and education on how to be a poll worker.

REGISTRATION WHEN ELIGIBLE CITIZENS MOVE

One of the problems most frequently reported to the voter protection hotlines on Election Day is that eligible registered voters do not know that they must re-register when they move, even if they move

just a few houses away. The NVRA already contains only limited protections for voters who change their address within a precinct, municipality, or county. Simple outreach to moving citizens can help ensure that all valid registrations are properly updated, and that all eligible citizens are thereby able to cast a valid vote. We therefore propose the following federal reform:

• **Voter registration materials in postal moving materials.** Congress should require that the United States Postal Service offer voter registration forms among the other materials they make available to Americans who change their mailing address. Currently, the NVRA provides for the use of postal change-of-address information to remove voters from jurisdictions where they are no longer eligible, but it does not provide a straightforward corresponding process for adding voters in their new jurisdictions.

ENSURE PROPER NVRA IMPLEMENTATION

The National Voter Registration Act (NVRA) provides for voter registration at motor vehicle and public assistance offices, at state disability agencies, and via the mail. Congress designated public assistance offices as voter registration sites so that low-income citizens would have equal access to registration at public agencies. These Americans are less likely to own automobiles, frequent departments of motor vehicles, and register at DMV agencies. While the NVRA requires that public assistance agencies offer voter registration to applicants and clients, research suggests that many states are ignoring this federal requirement. Voter registration applications from public assistance offices dropped by almost 60 percent from 1995 to 2004, while applications from all other sources increased by 22 percent. To ensure that registration opportunities are enjoyed by all Americans, regardless of income levels, Congress should ensure that the NVRA's provisions are implemented and enforced:

• **Congressional oversight of NVRA Implementation.** Congress should increase its oversight over state implementation of the NVRA's public assistance provisions and the Department of Justice's enforcement of the federal law.

ENCOURAGE INNOVATIONS IN VOTER REGISTRATION PROCESS

New technologies and ideas have the potential to improve the accuracy, accessibility, and effectiveness of our voter registration systems. Congress should promote innovations in the voter registration process to ensure that it better serves voters, including the following:

• **Public access portals to voter registration lists.** To enable citizens to verify and update their voter registration status and information, Congress should encourage states to make available secure and accessible public access portals through which individual voters or their agents can verify, correct, or update the information in their voter registration records. These portals should be accessible to individuals with disabilities and language minority voters.

• **Study on-line voter registration.** Congress should provide funding for research on whether and how the Internet can be useful in the voter registration process, including research on how to overcome security and privacy concerns. Although there are serious concerns about the security and reliability of using the Internet in connection with elections, if those concerns can be addressed, the Internet may provide a convenient way to enable eligible citizens to register and vote.

B. Remove Technical and Other Barriers to Voter Registration

FAIR PROCESSING OF VOTER REGISTRATION FORMS

VOTER REGISTRATION FORMS ARE OFTEN REJECTED FOR TECHNICAL REASONS THAT HAVE NOTHING TO DO WITH A VOTER'S ELIGIBILITY.

Voter registration forms are often rejected for technical reasons that have nothing to do with a voter's eligibility. For example, as they implemented their new statewide voter registration databases, a number of states refused to add registrants to the voter rolls unless their voter registration information "matched" data in other government databases. Unfortunately, given the inconsistent quality of existing government databases and the poor technology used for "matching," up to 20%—and in some cases, 30%—of registrants who should have "matched" did not because of typos, maiden names, and other immaterial differences in records. These policies resulted in the disenfranchisement of eligible voters through no fault of their own. To guard against unwarranted disenfranchisement as a result of incorrect processing of voter registration forms, the following additional protections are needed:

• **Construction of voter registration forms.** States should be prohibited from refusing to process voter registration forms that contain all the information necessary to determine voter eligibility, even if the forms are not completed entirely in the prescribed manner, such as if there are minor errors or omissions that are not determinative of eligibility. Ambiguous responses on a voter registration form should be construed in favor of the registrant. For example, states should be prohibited from summarily rejecting voter registration applications where applicants are unable to recall their driver's license or non-driver's ID numbers or make mistakes in transcribing those numbers.

• **Notice and opportunity to correct.** States should provide registrants timely notice and opportunities to correct errors on or information missing from their voter registration forms. Forms submitted before the voter registration deadline should be deemed timely submitted even if the correction is made or the missing information is provided after the voter registration deadline but before the election.

• **Matching as a tool, not a barrier.** Congress should make it clear that, under HAVA, states may not reject voter registration applications based solely on the fact that the information in the application does not match the information in existing government databases.

• **Uniform and transparent rules for processing forms.** States should be required to promulgate uniform and transparent rules for determining voter eligibility and for determining when a voter registration form may be rejected.

• **Coordination with social service agency databases**. States should be required to coordinate their statewide voter registration databases with the databases of social service agencies to ensure timely processing of voter registration forms submitted through social service agencies and to provide another tool for verifying and correcting information in voter registration records.

CLARIFY VOTER REGISTRATION FORMS

The Help America Vote Act of 2002 (HAVA) mandated several changes to state and federal voter registration forms that have caused confusion among many voters and, in a number of states, has led to the rejection of many voter registration forms submitted by eligible applicants.

The first set of requirements that have caused problems are HAVA's citizenship and age check box requirements. The new language HAVA requires on all voter registration forms is confusing to many voters and leads many reasonably to understand that they need not check any boxes in order to become registered. Unfortunately, some states have penalized voters for failing to understand this language and have refused to register eligible voters who fail to check the "yes" boxes on their voter registration forms, even though the forms contain no instructions to suggest that any adverse consequences would follow from failing to check those boxes, and even though the forms otherwise include sufficient information to determine the applicants' eligibility.

HAVA's identifying number provisions have caused similar problems. Although there is nothing inherently disenfranchising about those provisions, a number states have implemented them in a way that incorrectly blocks eligible voters from participating in the process.

For example, several states have refused to register voters without driver's license or Social Security numbers if those voters did not write "none" in lieu of providing the numbers, even though nothing on the form instructs applicants to do so. In addition, few state forms specifically indicate that a state-issued non-driver's ID number is acceptable as a "driver's license number."

To address these and similar problems, federal law should ensure that voter registration forms are easy for citizens to understand and use and should ensure that states do not refuse to register eligible voters because of technical errors or omissions. To address the problems arising from the forms themselves, Congress should require:

• **Clarification of check box language.** The HAVA language for the citizen and age check boxes should be revised to eliminate any ambiguity on the voter registration form.

• **Clarification of identifyng number language.** The HAVA language for identifying numbers should be clarified to specify that the space for a "driver's license number" includes non-driver's ID numbers, and to provide a clearly-marked space on the voter registration form for applicants who do not have the requested numbers to so indicate.

• **Usability testing.** State and federal voter registration forms should be tested for usability, to ensure that all eligible citizens can understand and properly complete them.

NO NEW REQUIREMENTS FOR VOTER REGISTRATION

In a recent trend that is causing great concern, several states are seeking to impose new and onerous requirements for voter registration. The most burdensome such policy currently in effect is Arizona's demand that citizens provide documentary proof of citizenship with their voter registration applications. Arizona's new requirement, which is currently the subject of federal litigation, has led to the disenfranchisement of many citizens, including more than 22,000 people whose applications were rejected in 2006 for lack of proof of citizenship.

Proof-of-citizenship requirements invariably put burdens – including financial burdens – on citizens themselves. While it would be ideal if all U.S. citizens had documents such as a passport, a birth certificate, or naturalization papers readily available, the truth is that many do not. A birth certificate usually costs $10 to $15. According to the Bureau of Consular Affairs, only 25-27% of eligible Americans have passports, which now cost $97. Naturalization papers, if they are lost

or damaged, cost $210. A proof of citizenship requirement would result in making the exercise of the right to vote unaffordable for many citizens. For some citizens, proof of citizenship may even be impossible to obtain. In certain parts of the country, for example, many African Americans and Native Americans were born at home, under the care of midwives, and were never issued birth certificates.

Congress should enact further protections to guard against these new barriers to voter registration:

• **No new requirements for voter registration.** States should not be allowed to require voters to meet additional requirements beyond those already required by the NVRA in order to be registered to vote for federal elections. In particular, states should not be allowed to require identity documentation or proof of citizenship as a condition of voter registration.

PROTECT VOTER REGISTRATION DRIVES

Nonprofit voter registration drives are playing an increasingly important role in expanding voter registration and participation in the United States, especially among those citizens who have traditionally faced the greatest barriers to the franchise. In 2004, several large nonprofits alone registered 10 million voters, more than one fifth of the total that year; in some jurisdictions, private voter registration drives accounted for as much as 40% of the total registrations. For certain groups of citizens, such as many people of color, people in low-income communities, and younger and elderly citizens, these drives provide the most convenient and accessible means of registering to vote.

Unfortunately, instead of praising voter registration groups for their contribution to democracy and civic participation, a number of states responded by passing laws restricting voter registration drives, making it difficult—and in some cases, impossible—for them to operate. These new restrictions, which vary from state to state, include short deadlines for submitting voter registration forms, backed by criminal penalties or heavy civil fines; rules limiting the number and types of forms available to organized voter registration drives; onerous pre-registration and training requirements; and rules specifying the manner in which voter registration drives are to be operated, among other things. As a result of these new laws and regulations, voter registration drives were seriously hampered in a number of states in 2006, including Florida, Ohio, New Mexico, Colorado, and Georgia, among others. To protect this important avenue of voter registration as well as the civic engagement essential to a vibrant democracy, Congress should:

• **Prohibit undue burdens on voter registration drives.** States should be prohibited from imposing undue burdens on the ability of private groups and individuals, as well as governmental entities, to conduct voter registration drives.

• **Additional protections for voter registration.** More specific protections may also be warranted. For example, states should be expressly prohibited from limiting the number of voter registration forms available to organized voter registration programs or from preventing those programs from using the federal voter registration form. In addition, states should not be allowed to impose financial or criminal penalties on individuals or groups for conduct in voter registration drives that is not willful, fraudulent, or likely to injure voters.

C. Fair List Maintenance

FAIR STANDARDS FOR PURGING INELIGIBLE VOTERS FROM VOTER ROLLS

Although purges of the voter registration rolls are an important component of list maintenance, poorly conducted purges can disenfranchise thousands of eligible citizens. New statewide voter registration databases make it easier for states to purge voters from the rolls by pushing a button. Most states are now able to develop lists of voters to be purged from the rolls by electronically "matching" names on voter rolls against government databases of persons ineligible to vote. Unfortunately, the "matching" processes used are inaccurate and may result in many eligible voters being purged from the voter rolls. Since states rarely provide effective notice of a purge, voters whose names have been removed from the rolls usually do not learn of the problem until they show up at the polls on Election Day and are denied a regular ballot. The secrecy of the process makes it easier for election officials to manipulate purges to target certain groups of citizens.

The most notorious examples of flawed purges occurred in Florida in 2000 and 2004. In 2000, thousands of legal voters were purged from Florida's voter rolls simply because their names shared 80% of the characters of the names on a list of people with felony convictions. In 2004, the state developed a purge list of 47,000 "suspected felons;" despite Florida's sizable Hispanic population, the list contained only 61 Hispanic surnames, over-represented African Americans, and also mistakenly included thousands who had had their voting rights restored. Although these errors were widely publicized, similar errors across the country escape public scrutiny. To protect eligible citizens from inaccurate or unfair purges, Congress should enact the following protections:

VOTERS WHOSE NAMES HAVE BEEN REMOVED FROM THE ROLLS USUALLY DO NOT LEARN OF THE PROBLEM UNTIL THEY SHOW UP AT THE POLLS ON ELECTION DAY.

• **Transparency of purge procedures.** States should be required to develop and publish uniform, non-discriminatory, and transparent standards for determining when, why, how, and by whom a voter registration record can be purged from the list of eligible voters.

• **Public notice of purges.** States should be required to provide effective public notice of an impending purge at least 30 days in advance of the purge. The NVRA already provides that no organized purge should take place within the 90 days preceding any federal election.

• **Notice to voter and opportunity to contest purge.** No state should be permitted to remove an individual's registration record from the list of eligible voters without giving the affected person sufficient notice and an opportunity to contest the purge or correct any errors. Notice should be provided at least 30 days in advance of a prospective purge by sending to the last known address of the affected person a certified, forwardable letter, accompanied by a postage pre-paid response card.

• **Maintain purge history to facilitate reinstatement.** States should be required to retain registration records that have been purged from the list of eligible voters, preferably in their computerized databases, and to develop procedures for reinstating records that have been incorrectly purged. States should also be required to transmit data regarding individuals who have completed incarceration or sentences from their departments of corrections or other relevant agencies to their chief election officials to facilitate reinstatement.

• **Acceptable basis for purge.** No state should be permitted to refuse to register a voter or to premise a purge based solely on one undeliverable mailing. Despite the serious potential for inaccuracy, postcards sent to voters and returned as undeliverable are often used as the basis for a purge or a bar to initial registration. The NVRA already provides some protection against using unreliable postcard mailings to obstruct registration, but several states ignore this provision in practice, and a Michigan federal district court has interpreted the language to be meaningless for new registrants.

PRIVACY AND SECURITY OF PERSONAL INFORMATION ON VOTER REGISTRATION LISTS

As a result of HAVA, each state is required to have a statewide voter registration database that is coordinated with other state databases and that contains personal information about each registered voter, such as her driver's license number or her Social Security number. This new development creates a substantial risk that confidential information

about voters may be accessed by unauthorized individuals and used for improper purposes. This could leave many voters susceptible to identity theft and other injuries. Although federal law already requires states to ensure the privacy and security of personal information in voter registration lists, few states have implemented serious security measures. Indeed, over the past two years, there have been several well-publicized security breaches involving voter registration lists. We therefore recommend that Congress take further steps to ensure the security and privacy of voter registration information:

• **Voter registration list privacy and security.** Congress should take additional steps to ensure the security and privacy of electronic voter registration lists, including by promoting research on best practices and by requiring the Election Assistance Commission or the National Institute of Standards and Technology to develop privacy and security standards.

II. IMPROVE VOTER SYSTEMS

Research shows that all of the most commonly purchased electronic voting systems have significant security and reliability vulnerabilities. For example, radio frequency wireless components in voting machines pose an especially large security risk, as does the failure of states to audit voter-verified paper records. Unless adequate protections are put in place, there is a risk that these voting systems could be tampered with so as to change the outcomes of elections. This risk further undermines Americans' confidence in our electoral system.
In addition to security and reliability problems, some voting systems have significant usability and accessibility problems that lead to the loss of votes. It is essential that, in making any reforms, Congress preserve the gains that HAVA made in ensuring that all voters, including voters with disabilities and language minority voters, have an opportunity to cast an independent and secret ballot. Those protections need not be compromised to ensure that new voting systems are secure and reliable.

Congress should pass comprehensive legislation mandating necessary security protections for all voting systems. Congress should also take additional steps to ensure that voting systems are usable and accessible. The most important such protections include:

• **Voter verified audit records.** Congress should mandate voter verified audit records for all electronic voting systems. The voter verified audit records must be independent of the software used in the voting systems, such as paper records.13 They must also be accessible to people with disabilities and language minority voters.

• **Mandatory audits.** Congress should require an audit of the voter verified audit records after every federal election. It should also ensure that the auditing procedures are transparent and effective.

• **Ban wireless components.** Congress should ban radio frequency wireless components in all voting systems. The use of all other wireless components should be severely curtailed, if not eliminated.

• **Ballot chain of custody practices.** Congress should require states to implement good practices concerning ballot chain of custody.

• **Access to firmware and software.** Many states have had difficulty gaining access to the firmware and software on their own machines. Congress should address this problem and end the exclusive private control that many vendors have over the code on voting machines owned by local jurisdictions.

• **Usability and accessability testing.** Congress should mandate usability and accessibility testing for all new voting systems and ballot designs.

• **Emergency ballots.** Congress should require all states to make available emergency ballots in all polling places using electronic voting systems.

• **Different election methods.** Congress should promote voting systems that are ready to implement effectively any election method currently used in elections in the United States, including cumulative voting and ranked choice systems.

III. PREVENT DISENFRANCHISEMENT ON OR NEAR ELECTION DAY

A. Prohibit Deceptive Practices and Voter Intimidation

Every election cycle, voters are inundated with a flurry of information aimed at educating them about issues, candidates, and the electoral process. Unfortunately, not all of this information is designed to help voters make informed political choices; instead, in nearly every election cycle many voters, disproportionately those in minority communities, are confronted with deceptive information designed to prevent them from casting a meaningful ballot. In 2004, for example, fliers in African American neighborhoods of Milwaukee, Wisconsin falsely warned voters that if they had not paid their parking tickets, if they had ever been convicted of a felony or if they had ever voted in an election that year that they would be punished for going to the polls. In 2006, fliers distributed to voters with Latino surnames in Orange County, California incorrectly intimated that it is illegal for naturalized citizens to vote. In Virginia, Colorado and New Mexico, voters received automated calls communicating incorrect information about where and when to vote and the requirements for voting.

• **Prohibit voter intimidation and deceptive practices.** Congress should pass legislation that prohibits and provides voters with adequate recourse for conduct aimed at preventing them from voting through intimidating or deceptive practices. This legislation should preserve the fundamental First Amendment freedom of speech, particularly in the political arena. In addition, the legislation should include a remedial structure that provides members of affected communities with immediate, correct information from a reliable and trusted source.

B. Prevent Disenfranchisement as a Result of Documentation Requirements

A wave of restrictive voter ID and proof of citizenship laws and proposed laws across the country seek to condition the right to vote on presentation of a strictly limited set of documents. Tens of millions of eligible citizens do not have the documents required under those proposals, especially people of color, low-income citizens, the elderly, and students. A recent study by the Brennan Center, for example, shows that more than half of all voting-eligible women do not have proof of citizenship with their current names on it. A 2005 Wisconsin study showed that 78% of African-American men between the ages of 18 and 24 do not have driver's licenses.

In 2006, new voter ID requirements caused enormous problems and disenfranchised many across the country, even where restrictive laws were not in effect. Most notoriously, South Carolina Governor Mark Sanford and Ohio Representative Steven Chabot were turned away from the polls for lack of proper ID, and Missouri's chief election official, Robin Carnahan, was improperly asked to show photo ID despite the fact that the state's supreme court had struck down Missouri's photo ID law. Equally problematic, calls to voter protection hotlines revealed that many voters were turned away across the country even though they showed military IDs or because their addresses on their photo IDs were not current.

In some jurisdictions, restrictive ID laws may have helped determine the outcome of the elections. In Franklin County, Ohio, for example, many voters were turned away or forced to cast provisional ballots because of new ID requirements which were improperly administered. Overall, 20,000 provisional ballots were cast in the county (5,000 more than in 2004). In the race in Ohio's 15th Congressional district, Rep. Deborah Pryce beat challenger Mary Jo Kilroy by only 1,062 votes. In Arizona, at least 22,000 voters were denied registration because of the state's new proof of citizenship requirement, and 1,300 voters in one county alone were forced to cast provisional ballots because of the state's new polling place ID requirements. Several local races were decided by a smaller margin.

• **Resist restrictive ID and proof of citizenship requirements.** First and foremost, Congress should resist any attempt to make proof of citizenship or photo ID a pre-condition of voting. Congress should similarly resist efforts to require voters to present a durable voter registration card, since a substantial number of Americans in states that currently produce such cards do not receive their cards in the mail or lose them before the election.

• **Repeal onerous provisions of the REAL ID Act.** The REAL ID Act of 2005, which is scheduled to go into effect in 2008, imposes a series of burdensome federal requirements on state photo ID cards, including driver's licenses. Among those is a requirement that each citizen show documentary proof of citizenship and that the state verify that documentation with the Department of Homeland Security before the individual is issued a driver's license or other photo ID. The National Governors Association, the National Council of State Legislatures, and the American Association of Motor Vehicle Administrators have estimated that it will cost states at least $11 billion to implement the REAL ID Act over the first 5 years.15 Because states cannot and will not comply with its mandates, and because individuals will be injured, Congress should repeal the onerous requirements of the REAL ID Act.

• **Resources for voter education on ID.** Congress should provide resources for state and local election officials to educate their voters and poll workers about what identification is necessary in order to vote as well as what identification is not required. Congress should amend Section 302 of HAVA to require that states post at every polling place, information about voter identification including what identification is required to receive a ballot.

• **Prohibit onerous state documentation requirements.** Congress should also enact protections to guard against voter disenfranchisement as a result of restrictive state-imposed voter ID or proof of citizenship requirements and the improper implementation of any such requirements.

C. Ensure Fair and Effective Provisional Balloting

Provisional balloting was one of the centerpieces of HAVA, intended to provide a fail-safe mechanism to ensure that eligible voters will not be disenfranchised as a result of administrative errors. Although provisional ballots have saved many votes that otherwise would have been lost, their promise has been severely hampered by the failure of states to adopt procedures to ensure that provisional ballots are a true fail-safe for eligible voters. Worse yet, a number of states have adopted provisional balloting procedures under which voters are provided ballots that will not be counted under

any circumstances. These "placebo ballots" not only fail to provide a fail-safe for eligible voters, but they also mislead voters into believing that they have cast meaningful ballots when they have not. The problems are compounded by the fact that many states do not have uniform rules for counting provisional ballots, which means that one county might count certain provisional ballots that neighboring counties will reject.

We therefore recommend the following proposals to restore the promise of provisional ballots:

• **Require provisional ballot forms to be used as voter registration forms.** All states should be required to add eligible voters who voted by provisional ballot to their voter registration lists. The provisional ballot envelope typically includes all information required on a voter registration form. This has been implemented successfully in a number of states.

• **Uniform and transparent counting standards.** All states should be required to publish uniform and transparent standards for determining when a provisional ballot will count, well in advance of an election.

• **Provisional ballots cast by voters sent to the wrong precinct or polling place.** States should not refuse to count a provisional ballot cast by an eligible voter in the wrong precinct or polling place for all the races for which that voter was eligible to vote. This would not prevent states from maintaining a precinct-based voting system or from penalizing voters or others for deliberately undermining that system without good cause.

IV. IMPROVE ELECTION ADMINISTRATION

A. Prevent Conflicts of Interest

Over the past few election cycles, Americans have become frustrated with election officials who seem more interested in partisan electoral successes than in ensuring that voters in their jurisdictions have the ability to cast meaningful ballots. In 2000 and 2004, the national spotlight shone on chief election officials in several states because of the conflicts of interest between their roles in running elections and their official positions in partisan political campaigns. Controversies arose over last minute election administration decisions in those states because those decisions appeared to benefit the candidates for whom those officials were working. Regardless of whether state election officials who hold positions in partisan political campaigns actually base their election administration decisions on illegitimate

partisan considerations, conflicts of interest create incentives for wrongdoing and cause voters to doubt the impartiality of those running their elections, undermining the integrity of the process. Voters should be confident that those who are selected to run their elections have the interest of democracy, and not the interest of partisanship, as their primary concern. To increase confidence in the fairness of elections, we recommend the following reforms:

• **Prevent conflicts of interest.** Congress should adopt legislation that prevents conflicts of interest by amending Title III of the Federal Election Campaign Act to prohibit chief state election officials from actively campaigning for a candidate for political office or serving as an official on a candidate's campaign.

• **Prohibit last-minute changes in election rules.** Congress should prohibit last minute changes in the rules that govern elections. Instead, states should be required to publicly post election laws and regulations 90 days before an election and should be prevented from changing the rules after that date, except in response to court rulings or an unforeseen emergency.

AMERICANS HAVE BECOME FRUSTRATED WITH ELECTION OFFICIALS WHO SEEM MORE INTERESTED IN PARTISAN ELECTORAL SUCCESS THAN IN ENSURING THAT VOTERS CAN CAST MEANINGFUL BALLOTS.

B. Ensure Adequate and Equitable Allocation of Election Resources

In the past two federal election cycles, voters across the country were disenfranchised by long lines at the polling place. In 2004, for example, some voters in urban districts in Columbus, Ohio waited to vote in the pouring rain for over 5 hours while other voters in suburban precincts in the same county quickly cast ballots at their polling places. In 2006, voters in St. Louis reported similar delays at the polling place to the Election Protection hotline. It is a constant struggle for state and local election officials across the country to ensure adequate and equitable allocation of election resources, including voting machines and poll workers. These problems disproportionately affect voters who have work, family or other considerations that prevent them from spending hours at the polling place on Election Day.

• **EAC study guidance.** Congress should require the Election Assistance Commission to study the issue of election resource allocation and develop recommendations on the most effective formula for states and local election officials to follow in making election resource allocation decisions. It should provide adequate resources for this task.

• **State plans.** Congress should require each state to submit a written plan about how it intends to adequately ensure, to the extent possible, equitable wait times for all polling places within each jurisdiction and that no voter has to wait more than one hour.

C. Improve Poll Worker Recruitment and Training

According to the Election Assistance Commission, two million poll workers are needed to run an effective federal election. Those Americans who devote their time to serve as poll workers should be praised for their commitment to our nation's democratic principles. Unfortunately, each election many polling places have too few poll workers to administer orderly and well-run elections. Equally problematic, the poll workers who do commit their time are frequently unfamiliar with essential rules and procedures.

In 2006, poll workers in precincts across the country showed up on Election Day to find unfamiliar voting machines and registration procedures, causing polling places to open late. In other precincts unfamiliarity with the proper procedures for overcoming election machine problems forced voting to slow to a trickle and, in some cases, led to lost votes. Voters from coast to coast were asked for identification in violation of state election laws. Some poll workers discriminated against certain voters, including voters with limited English-speaking skills. In 2004, there were widespread reports about poll worker confusion with provisional balloting that caused many voters to leave the polls without taking advantage of this safeguard. Clearly, poll workers need to be better trained. As federal, state and local election laws and rules are in a constant state of flux, poll workers should be trained before every election cycle.

Congress should do all it can to address the problems that voters face due to a lack of poll workers or because poll workers are undertrained and under-prepared.

• **Funding and incentives to states.** Congress should provide funding incentives to state and local jurisdictions to provide poll workers with the resources they need to do their job effectively. Congress should also provide incentives for states to develop adequate training protocols as well as incentives for states to make training more frequent, more comprehensive and better tailored to the experience and inexperience of those citizens who serve as poll workers.

• **Pilot programs on poll worker training and recruitment.** Congress should promote pilot programs to encourage public employees to serve as poll workers. These programs should develop a detailed training curriculum for workers who elect to participate and who can dedicate more time than most poll workers to preparing for Election Day service. Because of their superior training, employees who take advantage of the pilot program should lead operations at the polling place. They should be rewarded, not penalized, for their participation in the program. Similarly, Congress should promote pilot programs to encourage high school and college students to serve

as poll workers. This will serve the dual interests of bolstering the poll worker ranks and instilling civic responsibility and familiarity with our nation's democratic process in young citizens.

• **Uniform training manuals.** Congress should amend Title III of HAVA to require states to develop uniform statewide training manuals that cover those parts of the election process that can be standardized statewide.

• **Improve civic education.** As discussed in section I.A.2 above, Congress should promote civic education in high schools to improve democratic participation. Such programs should include education on how to be a poll worker.

D. Enhance Information Collection and Reporting

Although state election officials have access to useful information about voters, elections, and the electoral process, too little of that information is compiled and disseminated to the public. Better data about each election could provide a much better understanding of what works and does not work in election administration, which practices should serve as models for other jurisdictions, where problems occur, and the needs of voters in different communities, among other things. This data should be compiled on a regular basis because both the American public and state elections systems continue to change.

• **Information collection and reporting.** Congress should amend Title III of HAVA to expand the information states must provide in a timely and comprehensive reports about their elections. These reports should include: registration statistics, including demographic breakdowns and information about voters who have moved; detailed statistics about voter turnout; information about absentee balloting including the number of absentee ballots requested, processed, and rejected; details about provisional balloting including the number of provisional ballots cast, the number counted, and the number of provisional ballots rejected and the specific reasons those ballots were rejected; information about how voters with disabilities and language minority voters were afforded access to the ballots, as required by federal law; information about the number and location of voting sites, including how many voting sites were moved since the last election and why those sites were moved; information on voting machines including the number of machines available in each jurisdiction, where and how many of those machines were placed at each location; and detailed information on the costs and funding of elections.

E. Improve Voter Education

One of the most frequent causes of voter disenfranchisement is a lack of information. As our election system continues to change, voters often show up at the polling place to find new and confusing procedures and equipment. The drafters of HAVA were correct in emphasizing the responsibility of election officials to educate their constituents on how to cast a meaningful ballot. Voters need clear information about how the registration process works and what the qualifications to vote are. They should also know what to expect when they show up at the polling place. Rules about what voters cannot do, or what constitutes election fraud and intimidation, should also be clear and the penalties communicated to deter those who would like to unfairly manipulate the system. In addition, voter education programs are far less effective if they are not conveyed in a way that is accessible to the audience. Different communities respond to different messages and methods. Significant resources and attention are thus needed to improve voter education.

• **HAVA funding.** Congress should fully fund HAVA to ensure that states have the resources to conduct effective voter outreach and education. Congress should also expand the mandate for voter education to require jurisdictions to provide voters with more information.

• **Sample ballots.** Congress should encourage states to ensure that each jurisdiction sends each registered voter a sample ballot configured for the upcoming election, along with voting instructions, within a reasonable period of time before an election.

F. Encourage Electoral Innovation

Many citizens have work, family, or other obligations that make it difficult for them to participate in elections. Innovative new voting procedures could make it easier for those citizens to participate and increase voter turnout. Many states have been experimenting with new ways to vote in an attempt to increase access to the franchise. These new methods include expanded opportunities for absentee voting; opportunities for voters to vote early and in person; opportunities for voters to vote by mail; and vote centers or mega-polling places that seek to address problems created by precinct distinctions and poll worker shortages. Other innovations being considered at the federal level include moving Election Day to the weekend or making Election Day a holiday. While additional research is needed to determine the effect of the former proposal, the latter proposal is not helpful. Making Election Day a federal holiday will not help many eligible voters, especially those in lower-income communities. A large number of Americans who work in the service and retail industries will be unable to take advantage of an Election Day

holiday because federal holidays are typically among the busiest shopping days of the year. In addition, additional research is needed to determine whether the Internet can be safely used for voting. So far, the limited experiences we have had with Internet voting have been met with criticism, and across Europe, where there have been more widespread experiments, the results with Internet voting have been inconsistent.

• **Study new ways to vote**. Congress should encourage innovation in the electoral process by amending Title II of HAVA and providing the resources and direction for the EAC to study new methods of voting, including vote by mail, universal absentee voting, permanent absentee voting, early voting, vote centers, and Internet voting. The research should explore whether and how these methods can be used to increase the turnout of eligible voters; how they affect voters from different demographic and geographic communities; whether and how they can be misused or create the potential for misconduct and how such problems can be solved; and what it would cost for states to implement new programs.

V. EXPAND THE FRANCHISE

A. Restore Voting Rights to People with Past Felony Convictions

Voting is both a fundamental right and a civic duty. Yet, alone among modern democracies, the United States permits laws that lock people out of the voting booth for life once they have been convicted of crimes. These laws are often a remnant of Jim Crow. Restoring the right to vote strengthens democracy by increasing voter participation. Political participation also helps people reintegrate into the community after serving time in prison. And reenfranchisement means that the home communities of those convicted regain their political voice and the ability to elect representatives.

An estimated 5.3 million Americans are barred from voting because of a felony conviction. Approximately 4 millions of the disenfranchised are living in our communities, working, paying taxes, and raising families; 2 million are people who have completed their sentences but remain relegated to permanent second-class citizenship. About 1.4 million African-American men are barred from voting under these laws. Their 13% disenfranchisement rate is seven times the national average. In six states, more than one in four African-American men are permanently disenfranchised. There is a growing movement in the states—including Rhode Island, Iowa, Florida, Connecticut, Nebraska, and Alabama—to reform restrictive felony disenfranchisement laws. Congress should join this movement to halt this continuing injustice.

• **Restoration of Voting Rights**. To address this ongoing injustice, Congress should pass legislation that would restore the right to vote in federal elections to people as soon as they are released from prison and are living, working, and raising families in our communities.

• **No Conditioning Right to Vote on Ability to Pay**. No state should be permitted to condition the franchise on the payment of any legal financial obligations, including fees, fines, costs, or restitution. Currently, many states condition the restoration of the right to vote on payment of such financial obligations imposed as part of a criminal sentence, creating an economic or wealth barrier to the franchise.

• **Preventing Vote Dilution Due to Incarceration**. Congress should require the Census Bureau to initiate a research and testing program, including as part of the 2010 census, to evaluate the feasibility and cost of assigning incarcerated and institutionalized individuals with a legitimate preferred or permanent address to that address rather than to the address of the locations where they are in person, as recommended by the National Research Council of the National Academy of Sciences. The Census Bureau should also be required to provide tract- or block-level counts of prison populations along with the population data provided to the states for apportionment and districting purposes. This would address the problem of undercounting in the communities to which prisoners belong and over-counting in communities where prisons are located.

B. Ensure Voting Rights for Residents of the District of Columbia

More than half a million Americans living in the District of Columbia currently have no right to vote in any congressional elections. As a result, those Americans have no representation in either the U.S. Senate or the House of Representatives, and they have no say over a range of matters that affect their lives, from taxes, to military service, to health care, to education, to voting rights. Congress should address this injustice and eliminate second-class citizenship for DC residents.

• Congress should pass legislation to ensure that American citizens living in the District of Columbia have voting representation in Congress. ■

Protecting Voters in an Electronic Age

Michael Waldman

In 2006, the Brennan Center Task Force on Voting System Security issues a landmark study on the security risks posed by new machines. In 2007, Congress begins to move legislation requiring audit trails and banning wireless components.

Since 2000, it is important to stress the magnitude of what has happened. There really has been a move across the board into electronic voting in a variety of ways, and understandably, this has been complex and has had problems. Electronic voting, done right, offers the possibility for greater accuracy and greater accessibility. But it has also spawned enormous doubt, enormous concern, and enormous worries among ordinary citizens as well as experts about the accuracy of the systems. And we had theories and we had worries, and we felt that is was necessary to assemble some facts.

In 2005, we convened a task force of many of the nation's top computer scientists, voter security experts, and other experts from inside the Government, from academia, and from the private sector, and asked them if these worries were well founded. Are there, in fact, great security risks with the new voting systems? And the task force reported with great strength that, in fact, first of all, all the electronic voting systems now used in the United States have tremendous security risks. And they say this as computer scientists and experts. This is bad news.

The good news is that there are, in fact, remediation steps that can be taken to blunt these risks. That is the good news. The bad news, again, is that very few jurisdictions have taken these steps, and, hence, we do support federal legislation to impose some national standards on what is a very diffuse and localized system of election administration. And we are very pleased that you all are talking about this and moving in that direction.

I will mention just a few things in addition to what the other witnesses have said that we encourage you to think about as you do this.

This piece is excerpted from the transcript of Michael Waldman's testimony before the Senate Committee on Rules and Administration on February 7, 2007.

First, it is important not only that there be a voter-verified paper trail, which, of course, is important and you have heard this from so many of the witnesses, but that there be random audits of that paper trail. What the task force concluded was that the voter-verified paper trail without those random audits was of questionable value in ascertaining whether there had been problems either with the count or potential security flaws or hacking or something like that.

The second thing I would point out is that it is important to have parallel testing, which, as you know, is the term of art for basically checking the machines on election day to make sure that they are recording votes accurately. That is also very important, and that can be done more immediately than almost any of the other steps that are described.

The third thing that we would stress, which is considered in the legislation, is that the scientists and experts found a tremendous risk from wireless components. Wireless components are allowed in voting machines in all but two states. Only Minnesota and New York currently ban wireless components.

They are now the norm in computers, but although the computers are not linked up formally to a network, what the experts concluded is that it would be possible to walk into a polling place with a PDA or a PalmPilot and trigger an attack. And that can be stopped by simply banning and removing wireless components.

There is one final issue that I would mention that really goes to the human element in all of this. This is a complex system. There are many thousands of people, many of whom are part-time, many of whom are volunteers serving the country and the citizenry working in elections. It is extremely important that accurate resources and effort be put into training, and also to training of voters through videos to show people how to use the systems. And that raises ultimately the question of money.

I am asked, when I speak about this—and I am sure you are too. Many times people will say, well, I go to my ATM and it never once has given me the wrong amount of money. How come we cannot get these voting systems to work? The banks of the United States spend significantly more in one year maintaining the ATMs than the Federal Government has spent since 2000 entirely converting the voting system to electronic voting in the United States. Congressman Holt envisions $300 million. We think that is at least the amount that is needed to make this work. Done right, this can be a plus for democracy, but thus far it has not been done right. ■

Fixing the Vote: Post Election Audits, Now

Lawrence Norden

Voting System Security Task Force chair Lawrence Norden testifies on the importance of random audits to secure elections.

I. VOTING SYSTEM SECURITY AND POST-ELECTION AUDITS

In 2005, in response to growing public concern over the security of new electronic voting systems, the Brennan Center assembled a task force (the "Security Task Force") of the nation's leading technologists, election experts, and security professionals to analyze the security and reliability of the nation's electronic voting machines. One of the key findings of the Security Task Force is by now widely accepted by computer scientists, many election officials, and much of the public: all of the major electronic voting systems in use in the United States have serious security and reliability vulnerabilities.

ELECTRONIC VOTING IS NOT A MISTAKE. THE MISTAKE WOULD BE TO FAIL TO DEVELOP FEDERAL STANDARDS FOR THESE NEW MACHINES.

Many have advocated mandating voter-verified paper records as a solution to these vulnerabilities. In fact, voter-verified paper records by themselves will not address the security and reliability vulnerabilities the Brennan Center and many other groups have identified. To the contrary, as the Brennan Center Security Task Force noted in *The Machinery of Democracy: Protecting Elections in an Electronic World*, voter-verified paper records, by themselves, are "of questionable security value." Paper records will not prevent programming errors, software bugs, or the insertion of corrupt software into voting systems.

Voter-verified paper records will only have real security value if they are regularly used to check electronic tallies. It is for this reason that the Brennan Center urges Congress to adopt meaningful post-election audit legislation as soon as possible. Currently, only thirteen states require both voter-verified records and regular audits of those records.

This piece is excerpted from Lawrence Norden's testimony before the Committee on House Administration, Subcommittee on Elections, on March 20, 2007.

II. THE GOALS OF AN AUDIT AND HOW TO FULFILL THEM

How to use voter-verified paper records to check or "audit" the electronic records has, until recently, received very little attention, and even less systematic study. In *The Machinery of Democracy*, the Brennan Center made several audit recommendations, based in part on what we viewed as the best practices of the handful of states that already conduct regular audits.

The Brennan Center has concluded that, among other things, an effective audit scheme will do the following:

• **Use Transparent and Random Selection Processes for All Auditing Procedures**. Audits are much more likely to prevent fraud, and produce greater voter confidence in the results, if the ballots, machines or precincts to be audited are chosen in a truly random and transparent manner.

• **Allow the Losing Candidate To Select Precinct(s) or Machine(s) To Be Audited**. In addition to conducting random audits, jurisdictions should allow a losing candidate to pick at least one precinct to be audited. This would serve two purposes: first, it would give greater assurance to the losing "side" that the losing candidate actually lost; second, it would make it much more likely that anomalous results suggesting a programming error or miscount were reviewed.

• **Place an Independent Person or Body in Charge of the Audits.** To increase public confidence that the audit can be trusted, it will be helpful to ensure that the person or persons supervising the audit are viewed as independent of the State's chief election officer, vendors who may have sold machines being audited, and any candidate running in an audited race.

• **Implement Effective Procedures for Addressing Evidence of Fraud or Error.** If audits are to have a real deterrent effect, jurisdictions must adopt clear procedures for dealing with audit discrepancies when they are found. Detection of fraud will not prevent attacks from succeeding without an appropriate response. Such procedures should also ensure that outcome-changing errors are not ignored.

• **Encourage Rigorous Chain of Custody Practices**. Audits of voter-verified paper records will serve to deter attacks and identify problems only if states have implemented solid chain of custody and physical security practices that will allow them to make an accurate comparison of paper and electronic records.

• **Audit a Minimum Percentage of Precincts or Machines for Each Election, Including At Least One Machine or Precinct for Each County in the State**. An audit that targets a fixed percentage (e.g. 3 percent) of machines or precincts to audit in each Congressional District is an efficient method for catching broad-based error or fraud. By auditing at least one machine or precinct in every county, jurisdictions will greatly increase the likelihood that they will find discrepancies caused by fraud or error at the county level.

ELECTRONIC VOTING MACHINES COME WITH A COST: NEW SECURITY AND RELIABILITY PROBLEMS, AS WELL AS INCREASED PUBLIC DOUBT ABOUT THE ACCURACY AND FAIRNESS OF OUR ELECTIONS.

• **Record and Publicly Release Numbers of Spoiled Ballots, Cancellations, Over-votes and Under-votes.** Audits that record the number of over-votes, under-votes, blank votes and spoiled ballots could be extremely helpful in uncovering software attacks and software bugs and point to problems in ballot design and instructions.

• **Audit Entire System, Not Just the Machines**. History has shown that incorrect vote totals often result from mistakes when machine totals are aggregated at the tally server. Accordingly, good audit protocols will mandate that the entire system – from early and absentee ballots to aggregation at the tally server – be audited for accuracy.

• **Increase Scrutiny in Close Elections**. Software bugs and/or tampering that affect the software of a small number of machines will generally not affect the outcome of federal elections. In extremely close races, of course, such problems can change the outcome of a race. In such cases, a 3 percent audit is unlikely to uncover a software bug, programming error or malicious attack that might alter the results of the race. Accordingly, the Brennan Center recommends that exceptionally close races receive heightened scrutiny.

III. CONCLUSION

The nation's move to electronic voting has had many benefits, including increased accessibility for disabled voters and increased efficiency in election administration. Unfortunately, academic studies and Election Day problems over the last several years have shown that these new machines also came with a cost: new security and reliability problems, as well as increased public doubt about the accuracy and fairness of our elections.

This does not mean that the move toward electronic voting was a mistake. The mistake would be to fail to develop federal standards and procedures for these new machines. Most importantly, if we are serious about addressing the unique security and reliability vulnerabilities of these new machines, Congress must adopt solid post-election audit legislation as soon as possible. ■

The Myth of Voter Fraud

Michael Waldman and Justin Levitt

In December 2006, eight U.S. Attorneys resign. Soon the public learns these top prosecutors were in fact fired. And there's a scandal within the scandal: some were removed because they refused to make politically charged prosecutions against supposedly widespread "voter fraud." As congressional hearings expose the controversy, Michael Waldman and Justin Levitt debunk the myth of voter fraud.

As Congress probes the firing of eight U.S. attorneys, attention is centering on who knew what, and when. It's just as important to focus on "why," such as the reason given for the firing of at least one of the U.S. attorneys, John McKay of Washington state: failure to prosecute the phantom of individual voter fraud. Allegations of voter fraud – someone sneaking into the polls to cast an illicit vote – have been pushed in recent years by partisans seeking to justify proof-of-citizenship and other restrictive ID requirements as a condition of voting. Scare stories abound on the Internet and on editorial pages, and they quickly become accepted wisdom.

But the notion of widespread voter fraud, as these prosecutors found out, is itself a fraud. Firing a prosecutor for failing to find widespread voter fraud is like firing a park ranger for failing to find Sasquatch. Where fraud exists, of course, it should be prosecuted and punished. (And politicians have been stuffing ballot boxes and buying votes since senators wore togas; Lyndon Johnson won a 1948 Senate race after his partisans famously "found" a box of votes well after the election.) Yet evidence of actual fraud by individual voters is painfully skimpy. Before and after every close election, politicians and pundits proclaim: The dead are voting, foreigners are voting, people are voting twice. On closer examination, though, most such allegations don't pan out. Consider a list of supposedly dead voters in Upstate New York that was much touted last October. Where reporters looked into names on the list, it turned out that the voters were, to quote Monty Python, "not dead yet."

Or consider Washington state, where McKay closely watched the photo-finish gubernatorial election of 2004. A challenge to ostensibly noncitizen voters was lodged in April 2005 on the questionable basis of "foreign-sounding names." After an election there last year in which more than 2 million votes were cast, following much contrversy, only one ballot ended up under suspicion for double-voting. That makes sense. A person casting two votes risks jail time and a fine for minimal gain. Proven voter fraud, statistically, happens about as often as death by lightning strike.

This piece was originally published in The Washington Post *on March 29. 2007.*

Yet the stories have taken on the character of urban myth. Alarmingly, the Supreme Court suggested in a ruling last year (*Purcell v. Gonzalez*) that fear offraud might in some circumstances justify laws that have the consequence of disenfranchising voters. But it's already happening – those chasing imaginary fraud are actually taking preventive steps that would disenfranchise millions of real live Americans.

FIRING A PROSECUTOR FOR FAILING TO FIND VOTER FRAUD IS LIKE FIRING A PARK RANGER FOR FAILING TO FIND SASQUATCH.

Identification requirements often sound simple. But some types of paperwork simply aren't available to many Americans. We saw this with the new Medicaid proof-of-citizenship requirement, which led to benefits being cut off for many longtime citizens. Some states insist that voters provide photo IDs such as driver's licenses. But at least 11 percent of voting-age Americans, disproportionately elderly and minority voters, lack the necessary papers. Required documentation such as naturalization papework can cost as much as $200. By contrast, when the poll tax was declared unconstitutional in 1966, it was $1.50 ($8.97 in 2007 dollars). Congress should use this controversy as an opportunity to address true issues of voter protection. Experts have concluded that the most significant threat of fraud comes from electronic voting systems, now used by 80 percent of voters. Legislation introduced by Reps. Rush D. Holt (D-N.J.) and Thomas M. Davis III (R-Va.) would require a voter-verified record along with random audits to double-check against tampering. It would also bar wireless components from machines that could allow a hacker using a PDA to stage an attack.

Lawmakers should also immediately stop pushing ID measures that would turn away legitimate voters. Those investigating the U.S. attorney firings should ask what orders went out to other prosecutors in the run-up to the 2006 election. Prosecutors are not hired-gun lawyers on a party payroll. They have a special duty to exercise their power responsibly, particularly in the context of a heated election. Pressure on prosecutors to join a witch hunt for individual voter fraud is a scandal, not just for the Justice Department but for voters seeking to exercise their most basic right. ■

Court Supports Modern Day Poll Tax

Erika Wood

In August, Washington State's Supreme Court upholds the State's authority to block citizens from voting if they have outstanding fees or fines from an earlier felony conviction; Erika Wood slams the "modern day poll tax."

More than 40 years ago the U.S. Supreme Court declared in *Harper v. Virginia*: "Wealth or fee paying has ... no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."

The idea that a citizen's eligibility to vote should never hinge on his ability to pay has long been accepted as a basic tenet of our democracy. Nevertheless, last week the Washington Supreme Court rejected this bedrock principle.

The decision in *Washington v. Madison* upheld Washington's law that requires people convicted of a felony to not only complete their prison term and any subsequent parole or probation, but also to satisfy all fees, fines and restitution that accompanied their sentence, including all accrued interest and penalties.

The result of the court's ruling is clear: Wealthy citizens can vote despite a felony conviction while poor citizens cannot. Washington's law creates a lifetime voting ban for low-income individuals. Because the state charges interest and surcharges on top of heavy economic sanctions, a person who cannot afford higher monthly installments will continue to accrue debt even as he makes his monthly payments.

That is what happened to Beverly Dubois, a plaintiff in the *Madison* case. Dubois has completed all terms of the non-financial elements of her sentence. Although she makes monthly payments set by the court, the interest continues to accrue on her debt at a rate that is more than she can afford on her fixed disability income. Unless she wins the lottery, Dubois will never pay off her full debt and she will be denied the right to vote indefinitely.

WASHINGTON'S MODERN DAY POLL TAX HAS NO PLACE IN A DEMOCRATIC SOCIETY.

Washington is one of only nine states that require people to pay financial obligations before being able to vote. Most of the others are in the Deep South where the voting rights of poor and minority citizens have long been under attack. There used to be 10 but Maryland lawmakers, recognizing that wealth should never be a voting qualification, removed the requirement from their state's law in April.

This piece was originally published in The Seattle Post-Intelligencer *on August 3, 2007.*

Secretary of State Sam Reed has lamented the administrative burden of the current law. After the controversy created when ineligible people with felony convictions voted in the dead-heat gubernatorial election in 2004, Reed called for simplifying the system by allowing everyone to vote as soon as they are released from prison. Last week, Reed's office admitted it has no way of checking whether people out of prison meet the complicated eligibility requirements of the current law.

It is time for Washington lawmakers to get in step with the national movement to restore voting rights to people who are out of prison, living and working in the community. States across the country have come to understand that giving someone a stake in the political process helps build community ties and foster social responsibility.

Since 1997, 16 states have reformed their laws to expand the franchise or ease voting rights restoration procedures. In the past year alone, Rhode Island, Maryland and Florida reformed their laws.

Washington's modern-day poll tax has no place in a democratic society. Restoring voting rights as soon as people are out of prison would create a system that is fair and democratic, and one that the state can fairly administer. ■

Maintaining Voter Registration Lists

Deborah Goldberg

New computerized statewide voter registration lists can disenfranchise hundreds of thousands, often inadvertently. A 2006 Brennan Center lawsuit persuades a federal judge to strike down the voter database law in Washington State. Deborah Goldberg testifies on voter registration and list maintenance.

My testimony today focuses on three areas of concern that warrant congressional attention and action: (1) the unacceptable difficulties experienced by some eligible citizens in attempting to register and to get onto states' computerized voter registration lists; (2) the lack of adequate protections against unfair purges of the voter rolls, driving eligible citizens off of the states' voter registration lists; and (3) the misguided effort by the U.S. Department of Justice ("DOJ") to promote overly aggressive purges of the voter rolls, while failing to enforce federal requirements that states make voter registration more accessible to their citizens. Each of these problems can arise when decision-makers—some of whom may have the best of intentions—jump to unwarranted conclusions about the problems to be addressed or the means of addressing them, and in so doing, unduly jeopardize the registration status of eligible American citizens.

I. BARRIERS TO GETTING ON VOTER REGISTRATION LISTS

Federal law addresses appropriate voter list maintenance practices through two statutes, the National Voter Registration Act of 1993 ("NVRA"), and the Help America Vote Act of 2002 ("HAVA"). The relevant provisions of these two laws are intended to promote policies and practices that make it easier for eligible citizens to register and vote.

Most recently, HAVA spurred a substantial new improvement in voter registration by mandating the creation of statewide voter registration databases. When fully developed, these new electronic lists

This piece is excerpted from Deborah Goldberg's testimony before the Committee on House Administration, Subcommittee on Elections, on October 23, 2007.

would facilitate better maintenance of the rolls and prevent voters from getting lost in the shuffle.

One feature of these new mandatory lists was a unique identifying number associated with each eligible voter, to keep better track of voters moving within the state, and to ensure that a John Smith in one county would not be confused with a John Smith elsewhere. Following Michigan's model, HAVA decided to use the state's driver's license number as this unique identifier for voters with licenses, and asked voters without licenses to supply the last four digits of their Social Security number. The state would try to confirm these numbers by matching against other state databases, so that a registrant would not mistakenly be assigned another voter's unique identifier. And if a citizen had neither a driver's license nor a Social Security number, the state would simply assign that voter a unique identifier.

TYPOS, THE SWITCH FROM MAIDEN NAMES, AND COMMON DATABASE ERRORS UNRELATED TO VOTER ELIGIBILITY FREQUENTLY KEEP SUSBTANTIAL NUMBERS OF ELIGIBLE VOTERS OFF THE ROLLS.

Thanks to an amendment offered by Senator Wyden, this matching procedure reappeared in another provision of HAVA, also designed to assist voters. In addition to mandating statewide registration databases, HAVA addressed registration by mail, striking a balance between facilitating convenient mail-in registration and protecting the integrity of those mail-in registrations. It requires first-time voters who register by mail to provide some external validation of their identity at some point before voting. As a default, such voters must provide some form of acceptable documentary identification either at the time of registration or when the citizen shows up at the polls to vote. Under Senator Wyden's amendment, however, a citizen is exempted from this documentary requirement if the relevant election official is able to "match" the information on her registration form with the information in an existing state record. The availability of this exemption is an important example of Congressional intent to protect voters when regulating the exercise of the franchise— HAVA attempts whenever possible to limit burdens imposed on eligible voters, by using available technology to exempt voters from requirements that might otherwise prove burdensome.

After HAVA was passed, a small but substantial minority of states misinterpreted the HAVA matching process described above, to create a new barrier to registration. These states refused to place eligible citizens on the rolls unless the state could find a match between the voter's registration information and other state systems. Typos, the switch from maiden names, and a variety of common database inconsistencies unrelated to voter eligibility frequently prevented the successful "match" of information, keeping substantial numbers of fully eligible voter off the rolls.

In August 2006, one of these "no match, no vote" laws, in Washington State, was blocked by a federal court, and in part because of

the litigation, most of the other states that had erected the matching process as a barrier to registration changed course. There are now just three states of which we are aware that continue to misapply federal law and disenfranchise voters because of common but meaningless errors. Florida is one of these three, and the Brennan Center, along with the Advancement Project and Project Vote, filed suit in September to enjoin Florida's matching law before the 2008 elections. Still, other states may be pursuing "no match, no vote" policies under the radar: most of the practices governing the use of the new statewide registration databases are still uncodified.

Fortunately, there are a number of things Congress can and should do to rectify this problem. These include speaking consistently and clearly as to the important federal objectives at stake. Congress should continue to emphasize that it is still a priority to minimize the burden on voters from flawed registration procedures. For example, Congress should:

MOST STATES MAKE IT UNACCEPTABLY EASY FOR CITIZENS TO BE THROWN OFF VOTER REGISTRATION LISTS.

• **Clarify that states may not reject a voter registration application solely because information on that application does not match a record in an existing government database**. In February of this year, the Social Security Administration admitted that 46.2%, almost half, of all voter registration records that are submitted to it for verification fail to match with the Administration's records. The failure of government records to match other government records is an indication of technological imperfection, not an indication of wrongdoing.

• **Ensure that voters who provide information sufficient to determine their eligibility should be registered even if there are other omissions or minor errors on the registration form**. The Voting Rights Act establishes that immaterial mistakes on a registration form may not impair a voter's status. Forgetting to list a driver's license number or an apartment number has no bearing on a citizen's eligibility to vote and thus should not be a barrier to registration.

• **Protect voters who do not provide sufficient information to be registered, by providing notice of the defect and an opportunity to correct the error**. Forms submitted before the voter registration deadline should be deemed timely submitted even if the correction is made or the missing information is provided after the voter registration deadline but before the election.

• **Establish a presumption of eligibility when a person's eligibility is in question**. When the very fundamental right to vote is at stake, doubt or error should be resolved in favor of the policy that expands voting rights and opportunities, not contracts it. At present, distrust leads too often to decisions that allow meaningless errors to disenfranchise voters.

II. INADEQUATE PROTECTION AGAINST UNFAIR VOTER PURGES

At the same time that inappropriate hurdles make it difficult for citizens to get on voter registration lists, most states make it unacceptably easy for citizens to be thrown off, or "purged," from those lists. Although properly administered purges are an important component of state efforts to keep voter registration lists up-to-date and accurate, poorly conducted purges can and do result in widespread disenfranchisement of eligible citizens.

New statewide voter registration databases allow states to purge voters from the rolls with the push of a button. Most states are now able to develop lists of voters to be purged from the rolls by electronically "matching" names on voter rolls against government databases of persons ineligible to vote. Unfortunately, the "matching" processes used are inaccurate and may result in many eligible voters being purged from the voter rolls. Since states rarely provide effective notice of a purge, voters whose names have been removed from the rolls usually do not learn of the problem until they show up at the polls on Election Day and are denied a regular ballot. The secrecy of the process makes it easier for election officials to manipulate purges to target certain groups of citizens.

The most notorious examples of flawed purges occurred in Florida in 2000 and 2004. In 2000, thousands of legal voters were purged from Florida's voter rolls simply because their names shared 80% of the characters of the names on a list of people with felony convictions. For example, John Michaels, who never committed a crime, could be thrown off the list because John Michaelson had a felony record. In 2004, the Brennan Center uncovered evidence of yet another erroneous purge list in Florida, containing 47,000 "suspected felons." The flawed process used to generate the list identified only 61 voters with Hispanic surnames, notwithstanding Florida's sizable Hispanic population. To compound the problem, the purge list over-represented African Americans and mistakenly included thousands who had had their voting rights restored under Florida law. Although these flawed purge lists were widely publicized, similar errors across the country typically escape public scrutiny.

Although the NVRA and HAVA provide voters with some protections against unfair purges of the voter rolls, most aspects of the purge process are not addressed by federal law, and most of these processes take place without notice to the public—or the voters to be purged. Consequently, election officials have significant latitude and very little oversight when conducting list maintenance. This leaves room for inaccuracy even when officials act with the best of motivations, and room for worse in the rare instances when motivations are not so pure. Registered voters deserve more protection.

There are four areas in which Congress can act to improve list maintenance practices:

First, require transparency in the purge process. Sunlight can help protect against both pernicious and misguided purge practices. Congress should require states to make public both their procedures for conducting purges and their actual purges. Specifically, states should be required to develop and publish uniform, non-discriminatory, and transparent standards for determining when, why, how, and by whom a voter registration record can be purged from the list of eligible voters. States should also be required to provide effective public notice of an impending purge at least 30 days in advance of the purge.

Second, require the standardization of basic aspects of the list maintenance process, including protections for voters against erroneous purges. States, and even localities within states, employ different practices and guidelines for purging their rolls, which means that voters get treated differently, and are afforded different protections and are exposed to different risks, depending on where they live and how conscientious their purging officials are. Specifically, Congress should:

• **Require that voters be provided at least 30 days notice before their names are removed from registration lists and an opportunity to contest the purge**. Notice should be provided at least 30 days in advance of a prospective purge by sending to the last known address of the affected person a certified, forwardable letter, accompanied by a postage pre-paid response card.

• **Require states to delineate and publish uniform procedures for identifying ineligible registrants**. Without specific public rules for purging, list maintenance occurs on an ad hoc basis, increasing the likelihood of errors and precluding transparency. In addition, non-uniform purge practices that vary from jurisdiction to jurisdiction are unfair to voters and may be inconsistent with the Constitution.

• **Require states to maintain purge history to facilitate reinstatement**. States should be required to retain registration records that have been purged from the list of eligible voters, preferably in their computerized databases, and to develop procedures for reinstating records that have been incorrectly purged.

• **Improve protections against erroneous purges resulting from problems with mailings**. No state should be permitted to refuse to register a voter or to base a purge solely on one undeliverable mailing, as is done in the practice known as "voter caging." The NVRA already provides some protection against using unreliable postcard

mailings to obstruct registration, but several states ignore this provision in practice.

Third, take steps to prevent predictable errors in compiling purge lists. Many errors in list maintenance occur because decisions about an individual's identity are made with insufficient information. A particular voter is assumed to be the same person as the individual on a list of ineligible voters, when the voter is actually a different person.

Although such errors occur regularly, they often go undetected. For example, officials often assume that two records showing the same name and date of birth refer to the same person. Particularly for voters who share common names, statistics teaches that in a pool as large as a state, there will be several different individuals who share the same basic information.

Congress should protect against such errors by allowing voters to be purged only when there is a reliable unique identifier—like a signature, or photo, or Social Security number—that ensures that the voter on the lists is the same person as the individual flagged as ineligible.

Fourth, require improvements of lists used to identify ineligible registrants. When election officials seek to remove ineligible persons from registration rolls, they often use lists of supposedly ineligible individuals that are not entirely reliable. For example, the Social Security Administration's master death index, though not compiled for voting purposes, is nevertheless used by election officials to purge deceased voters—and it is notoriously rife with error. State lists can also be of questionable quality. Local election officials interviewed by Brennan Center staff reported that the state lists used to identify deceased voters were either unreliable or else contained insufficient information to reliably match the deceased individual with her voter registration record. Congress should require that lists used for the purpose of establishing ineligibility be audited for accuracy, and forbid the uncorroborated use of any such lists below a certain threshold of reliability.

III. INSUFFICIENT DOJ OVERSIGHT

Although the NVRA is generally acknowledged to have increased the registration rates of American citizens, its provisions to increase opportunities for voter registration have never been fully enforced. The gap in enforcement has been the greatest with respect to Section 7 of that statute, which requires that public assistance agencies provide visitors the opportunity to register to vote. A recent report produced by ACORN, Project Vote, and Demos revealed that since

1995, voter registration applications from public assistance agencies nationwide have declined by 59.6%, and 36 of 41 reporting states demonstrated a decline in registration applications from public assistance agencies.

The DOJ, which is charged with enforcing the NVRA, has largely declined to press states to improve the registration process at their public assistance agencies or their motor vehicle agencies. Instead, over the past few years, the DOJ has made it a priority to encourage aggressive purges of the voter rolls.

Congress should closely monitor the DOJ's aggressive campaign for voter purges, ensuring that the pressure does not promote unwarranted and unlawful purges of eligible voters, and should encourage greater emphasis on NVRA enforcement that will expand the franchise. The DOJ should be in the business of protecting voters and the franchise, instead of increasing the risk of voter disenfranchisement. Congress can and should not only demand answers, but also hold the appropriate persons accountable for their performance or lack thereof.

IV. CONCLUSION

The list maintenance process affords numerous opportunities for errors and mischief with significant consequences. Through no fault of their own, millions of eligible citizens could be denied their fundamental right to vote in the next election. Given the importance of the right to vote to our democracy, we should not be nonchalant about even unintended disenfranchisement. The straightforward recommendations offered in this testimony will reduce many of the most serious threats to the franchise. We therefore strongly urge the Subcommittee to consider adopting those recommendations. ■

Voter ID: A Remedy Incommensurate with Risk

Amicus Brief Submitted by the Brennan Center in Crawford v. Marion County Board of Elections

In the fall of 2007, the U.S. Supreme Court agrees to hear Crawford v. Marion County Board of Elections, *the most important voting rights case since* Bush v. Gore. *The Brennan Center coordinates two dozen friend-of-the-court briefs challenging Indiana's restrictive voter ID law. The Center's own brief undercuts the rationale for the law.*

STATEMENT OF THE ISSUE

Whether Indiana's interest in preventing impersonation fraud at the polls is sufficient under the First and Fourteenth Amendment to justify the requirement of Senate Enrolled Act No. 483 that voters present government-issued photo identification as a condition for in-person voting.

SUMMARY OF THE ARGUMENT

The district court purported to apply the balance test of *Burdick v. Takushi*, which requires that the magnitude and character of a burden on voting be weighed against "the precise interests put forward by the state to justify those burdens, taking into consideration the extent to which those interests make it necessary to burden the plaintiffs' rights." Amicus submits that in granting summary judgment upholding Indiana's photo ID requirement as a condition to in-person voting, the district court failed to properly apply this balancing test.

Appellants' briefs show that the district court gave too little weight to the burdens imposed on low-income, elderly, and disabled voters. In this brief, amicus reviews the nationwide experience which, together with the evidence of Indiana's own experience, shows that the district court failed to properly assess the extent to which the "precise interest" advanced by Indiana—impersonation fraud at the polls—makes necessary the burdens imposed by Indiana's photo ID requirement.

In granting summary judgment, the district court was obliged to

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This brief was submitted with the assistance of Paul, Weiss, Rifkind, Wharton & Garrison LLP.

treat all inferences in the light most favorable to the plaintiffs. Here, the district court not only construed every inference in the light most favorable to Indiana, but simply misread the record. That record makes it clear that impersonation fraud is not only a rare occurrence, but that the photo ID remedy imposed by Indiana is out of all proportion, and totally unnecessary, to address this remote risk. While the district court concluded that Indiana's photo ID requirement did not impose a "severe" burden warranting strict scrutiny, that did not end its obligation under *Burdick's* balancing test to fairly assess whether the burdens that were imposed were necessary to address the state's asserted interest in remedying impersonation fraud.

The district court acknowledged that there is not evidence of impersonation fraud in Indiana. Nevertheless, it concluded that studies and news reports from other states showed that this was a real danger. The district court's reading of this record was not only mistaken, but the very documents it relied on establish that impersonation fraud rarely, if ever, occurs.

Most importantly, it is clear that the remedy Indiana has chosen is out of all proportion to the risk of impersonation fraud. The district court failed to examine the extent to which this risk made necessary a photo ID requirement, and simply accepted Indiana's unsupported assertion that "without a photo identification requirement it is nearly impossible to detect in-person voter impersonation." That assertion is insupportable: every other state and the federal government provide voters with less burdensome alternative forms of identification, with the exception of Georgia. And Georgia's first try was held unconstitutional and its most recent attempt is being challenged in federal court in Atlanta.

A Missouri law enacted on June 14, 2006, would require a photo ID of Missouri voters beginning in November 2008, without an alternative means of identification except in the case of voters who are elderly, disabled, or have religious objections. But, as in Georgia, this statute was enacted over the objections of the state's highest election official that there was no evidence of voter fraud and that the state's existing voter identification requirements were fully adequate.

Indiana itself had no identification requirement prior to 2005, except that in 2003, like all other states, it adopted the identification requirements for first-time voters mandated by the federal Help American Vote Act ("HAVA"), that include a variety of alternative forms of non-photo identification. The Indiana legislature enacted the photo ID requirement in 2005, without any evidence that the burdens imposed by Indiana's photo ID requirement are necessary to address Indiana's interest in preventing impersonation fraud at the polls. ■

The Truth About Voter Fraud

Justin Levitt

In anticipation of Supreme Court review of Crawford*, the Brennan Center publishes a comprehensive White Paper assessing alleged "voter fraud."*

I. INTRODUCTION

Allegations of election-related fraud make for enticing press. Many Americans remember vivid stories of voting improprieties in Chicagoland, or the suspiciously sudden appearance of LBJ's alphabetized ballot box in Texas, or Governor Earl Long's quip: "When I die, I want to be buried in Louisiana, so I can stay active in politics." Voter fraud, in particular, has the feel of a bank heist caper: roundly condemned but technically fascinating, and sufficiently lurid to grab and hold headlines.

IT IS MORE LIKELY THAT AN INDIVIDUAL WILL BE STRUCK BY LIGHTNING THAN THAT HE WILL IMPERSONATE ANOTHER VOTER AT THE POLLS.

Perhaps because these stories are dramatic, voter fraud makes a popular scapegoat. In the aftermath of a close election, losing candidates are often quick to blame voter fraud for the results. Legislators cite voter fraud as justification for various new restrictions on the exercise of the franchise. And pundits trot out the same few anecdotes time and again as proof that a wave of fraud is imminent.

Allegations of widespread voter fraud, however, often prove greatly exaggerated. It is easy to grab headlines with a lurid claim ("Tens of thousands may be voting illegally!"); the follow-up — when any exists — is not usually deemed newsworthy. Yet on closer examination, many of the claims of voter fraud amount to a great deal of smoke without much fire. The allegations simply do not pan out.

These inflated claims are not harmless. Crying "wolf" when the allegations are unsubstantiated distracts attention from real problems that need real solutions. If we can move beyond the fixation on voter fraud, we will be able to focus on the real changes our elections need, from universal registration all the way down to sufficient parking at the poll site.

Moreover, these claims of voter fraud are frequently used to justify policies that do not solve the alleged wrongs, but that could well

disenfranchise legitimate voters. Overly restrictive identification requirements for voters at the polls — which address a sort of voter fraud more rare than death by lightning — is only the most prominent example.

This paper seeks to distill our findings: the truth about voter fraud. It first offers a straightforward definition to avoid the common trap of discussing election irregularities that involve neither voters nor fraud as if they showed voter fraud. It then discusses different alternative reasons more credible than voter fraud to explain many of the recurring allegations. The paper then analyzes, scenario by scenario, some of the more common types of alleged voter fraud and their more likely causes and policy solutions. Finally, the paper presents individual case studies of notorious instances of alleged voter fraud, and finds those allegations to be grossly inflated. For more information, analysis, and opinion about voter fraud, by the Brennan Center and others, please see www.truthaboutfraud.org.

II. WHAT IS VOTER FRAUD?

"Voter fraud" is fraud by voters.

More precisely, "voter fraud" occurs when individuals cast ballots despite knowing that they are ineligible to vote, in an attempt to defraud the election system.

FRAUD BY INDIVIDUAL VOTERS IS A SINGULARLY FOOLISH WAY TO ATTEMPT TO WIN AN ELECTION.

This sounds straightforward. And yet, voter fraud is often conflated, intentionally or unintentionally, with other forms of election misconduct or irregularities.

There are many such problems that are improperly lumped under the umbrella of "voter fraud." Some result from technological glitches, whether sinister or benign: for example, voting machines may record inaccurate tallies due to fraud, user error, or technical malfunction. Some result from honest mistakes by election officials or voters: for example, a person with a conviction may honestly believe herself eligible to vote when the conviction renders her temporarily ineligible, or an election official may believe that certain identification documents are required to vote when no such requirement exists. And some irregularities involve fraud or intentional misconduct perpetrated by actors other than individual voters: for example, flyers may spread misinformation about the proper locations or procedures for voting; thugs may be dispatched to intimidate voters at the polls; missing ballot boxes may mysteriously reappear. These are all problems with the election administration system … but they are not "voter fraud."

Conflating these concerns is not merely a semantic issue. First, the

rhetorical sloppiness fosters the misperception that fraud by voters is prevalent. That is, when every problem with an election is attributed to "voter fraud," it appears that fraud by voters is much more common than is actually the case.

This, in turn, promotes inappropriate policy. By inflating the perceived prevalence of fraud by voters, policymakers find it easier to justify restrictions on those voters that are not warranted by the real facts.

Moreover, mislabeling problems as "voter fraud" distracts attention from the real election issues that need to be resolved. It draws attention away from problems best addressed, for example, by resource allocation or poll worker education or implementation of longstanding statutory mandates, and instead improperly focuses on the voter as the source of the problem.

III. VOTER FRAUD AND THE PRESS FOR PHOTO ID

The most common example of the harm wrought by imprecise and inflated claims of "voter fraud" is the call for in-person photo identification requirements. Such photo ID laws are effective only in preventing individuals from impersonating other voters at the polls — an occurrence more rare than getting struck by lightning.

By throwing all sorts of election anomalies under the "voter fraud" umbrella, however, advocates for such laws artificially inflate the apparent need for these restrictions and undermine the urgency of other reforms.

Moreover, as with all restrictions on voters, photo identification requirements have a predictable detrimental impact on eligible citizens. Such laws are only potentially worthwhile if they clearly prevent more problems than they create. If policymakers distinguished real voter fraud from the more common election irregularities erroneously labeled as voter fraud, it would become apparent that the limited benefits of laws like photo ID requirements are simply not worth the cost.

Royal Masset, the former political director for the Republican Party of Texas, concisely tied all of these strands together in a 2007 Houston Chronicle article concerning a highly controversial battle over photo identification legislation in Texas. Masset connected the inflated furor over voter fraud to photo identification laws and their expected impact on legitimate voters:

> Among Republicans it is an "article of religious faith that voter fraud is causing us to lose elections," Masset said. He doesn't agree with that, but does believe that requiring photo IDs could cause enough of a dropoff in legitimate Democratic voting to add 3 percent to the Republican vote.

This remarkably candid observation underscores why it is so critical to get the facts straight on voter fraud. The voter fraud phantom drives policy that disenfranchises actual *legitimate voters*, without a corresponding actual benefit. Virtuous public policy should stand on more reliable supports. ■

LIBERTY AND NATIONAL SECURITY

Ten Things You Should Know About Habeas Corpus

Jonathan Hafetz

Twice in the past two years Congress passed laws that limit habeas corpus; Jonathan Hafetz recalls the history of the Great Writ and its essential purpose today.

The writ of habeas corpus protects individuals against unlawful exercises of state power. Since prerevolutionary American history, habeas has guaranteed people seized and detained by the government the right to question the grounds for their detention. It has been available to citizens, non-citizens, slaves, alleged spies, and alleged enemies alike. Habeas is so fundamental to America that the Framers wrote the writ into the Constitution. Indeed habeas is the common law remedy enshrined in the Constitution.

Twice in the past two years, however, Congress has passed statutes limiting habeas rights for a single class of prisoners. The Detainee Treatment Act of 2005 ("DTA") and the Military Commissions Act of 2006 ("MCA") limit federal courts' jurisdiction to hear petitions filed by foreign nationals detained as "enemy combatants." More, these suspensions are permanent – not limited to a timebound, immediate emergency.

These two statutes were passed amid a swirl of confusion and misinformation about habeas corpus – what it is, who uses it, what role it plays in our constitutional order, and why it is important. Is habeas a neat trick by which America's enemies can out get out of jail and back to the business of undermining our country? Or are the hundreds of men who have been held, without charge, simply asking for a meaningful hearing on the legality of their imprisonment?

This white paper seeks to explain facts and to correct misperceptions. Once policymakers and the public understand habeas corpus, they will see why it is essential to preventing abuses of executive power, preserving America's values, and giving the fight against terrorism the legitimacy it needs to succeed.

Bills to restore habeas corpus have already been introduced in both houses of Congress. Ongoing lawsuits challenging the legality of the MCA and DTA are making their way through the courts. But Congress should not wait for the outcome of what will no doubt be more protracted court battles. Lawmakers should act now to repeal the recent habeas-stripping provisions of the Military Commissions and

Detainee Treatment Acts and restore habeas to its rightful, historic, and fundamental place in American law.

I. HABEAS CORPUS IS A CORNERSTONE OF AMERICAN LAW

Habeas corpus traces its roots to 1215 and the signing of the Magna Carta. It was designed to keep kings from using power in an unchecked and arbitrary way. Habeas, simply put, is a means for a person detained by the state to require that the government demonstrate to a neutral judge that there is a legal and factual basis for his detention.

The Founders fought a revolution against the kind of excessive and arbitrary executive action habeas prevents. In the Declaration of Independence, they objected to King George III's abuse of his detention power. In the Federalist Papers, Alexander Hamilton declared habeas corpus a "bulwark" of individual liberty, calling secret imprisonment the most "dangerous engine of arbitrary government." That government power demanded a legal check was, to the Framers, "self-evident." So, at the Constitutional Convention in Philadelphia, no one debated whether to include habeas in the Constitution. The delegates instead discussed only what conditions, *if any*, could ever justify suspension of the writ.

ALEXANDER HAMILTON DECLARED HABEAS CORPUS A "BULWARK" OF INDIVIDUAL LIBERTY, CALLING SECRET IMPRISONMENT "THE MOST DANGEROUS ENGINE OF ARBITRARY GOVERNMENT."

With unmistakably clarity, Article 1, Section 9 of the Constitution enshrines habeas: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Habeas corpus has been suspended on only the rarest of occasions in American history and only temporarily. It was suspended twice during the Civil War, at a time when Washington, D.C. was surrounded by Confederate Virginia to the west and mobs in Maryland threatened to cut off supplies and troops to the capitol. It was also suspended after the Civil War when armed insurrectionists made it impossible for courts to function in the South; decades later, in the early 1900s, during an armed rebellion in the Philippines; and one final time in 1941 in Hawaii, immediately after Pearl Harbor. Each time, Congress responded to an present and immediate emergency. Each time, Congress specifically limited suspension to the duration of the emergency that necessitated it. And, each time, Congress made a determination that the public safety required suspension of this most fundamental right.

In short, habeas is at the core of America's laws and Constitution. It has rarely been suspended, and then only in the face of an active, outright insurrection. Repealing it, therefore, is not a casual act.

Permanent suspension of habeas corpus departs radically from the course of American history and the intentions of those who wrote the Constitution and established our laws.

II. POST 9/11 LEGISLATION CREATES UNPRECEDENTED RESTRICTIONS ON HABEAS RIGHTS

Are the recent statutes similar to the earlier restrictions on habeas corpus? Unfortunately, no. They are far more dramatic incursions on this core constitutional right.

First, the Executive has never before today claimed the power to permanently deny detainees basic rights. Second, the Executive has never sought to deny habeas rights to a singled-out class of people. The Detainee Treatment and Military Commissions Acts eliminate the writ of habeas corpus for individuals unilaterally designated "enemy combatants" by the President. Third, the Executive has never before claimed the power to eliminate habeas corpus without finding that the public safety required it. The President's interpretation of the statutes extends far beyond even what Congress intended. In passing the habeas-stripping provisions of the MCA and DTA, lawmakers sought to prevent habeas petitions from those detained at Guantanamo Bay and elsewhere outside the United States. Now, the Bush Administration claims these provisions go further, potentially depriving even legal immigrants within this country of habeas corpus. If true, this would mean U.S. officials could pick a man off the street anywhere in the United States and imprison him as an "enemy combatant" for years without any right to challenge his detention before a federal judge.

UNTIL NOW, NO AMERICAN LAW LEFT INDIVIDUALS DETAINED BY THE EXECUTIVE WITHOUT ANY LEGAL MEANS TO CHALLENGE THEIR DETENTION.

In fact, government officials have sought to do precisely that. In June of 2003, for example, the President designated as an "enemy combatant" 41-year old Ali Saleh Kahlah al-Marri, a Qatari national, who arrived in the United States, with his wife and five children, on a student visa to study at Bradley University in Peoria, Illinois. Though Mr. al-Marri was first arrested on fraud-related charges, the charged were dropped when, weeks before his trial was scheduled to commence, the President declared him an "enemy combatant." For the last four years, Mr. al-Marri has been detained indefinitely without charge and in solitary confinement at a military prison in South Carolina. Now, the government argues, the MCA prevents Mr. al-Marri even from invoking habeas corpus to contest his potentially lifelong imprisonment.

The MCA and DTA restrict habeas rights in an unprecedented way. Earlier laws imposed procedural limitations on habeas rights available to those convicted of crimes. (For example, a 1996 law known

as the Anti-Terrorism and Effective Death Penalty Act set stricter time deadlines for habeas petitions, and restricted prisoners' ability to file another petition after one had already been denied.) But until now, no American law left individuals detained by the Executive without any legal means to challenge their detention.

III. HABEAS PROTECTIONS EXTEND TO FOREIGN NATIONALS

Contrary to many misperceptions, habeas corpus rights have extended to those who are not United States citizens.

The Supreme Court has previously reviewed the habeas petitions of foreign nationals detained by the United States during armed conflict. In two separate World War II cases, for example, the Court reviewed habeas petitions filed by foreign nationals including a group of Nazi saboteurs and a Japanese general accused of war crimes. Though the Court in these cases, *In re Yamashita* and *Ex parte Quirin*, ultimately rejected the petitioners' claims, habeas review was nonetheless available to review the lawfulness of the detainees' situation.

The Administration principally and mistakenly rests its claim that habeas rights do not apply to Guantanamo detainees on another World War II case, *Johnson v. Eisentrager*. This case was brought by a group of German soldiers who had been captured and convicted in China and who were imprisoned in Germany. In denying their habeas petitions, the Supreme Court noted that all of the prisoners were admitted enemies of the United States and that all had been tried and convicted by a military court.

The current detention of "enemy combatants" is very different. An overwhelming majority of prisoners at Guantanamo deny they are enemies of this country; all but a handful have never been charged with any crime, let alone been tried by any court. Most will never be charged. In addition, the prisoners in *Eisentrager* were held in Germany; the Guantanamo detainees, by contrast, are imprisoned in territory over which the United States government exercises complete and exclusive control and jurisdiction – territory that, in the words of Supreme Court Justice Anthony M. Kennedy, "is in every practical respect a United States territory." For those detainees who seek to contest their designation as "enemy combatants," the United States is the only sovereign that can hear their cases or order them freed if they are wrongly imprisoned.

IV. THE SUPREME COURT HAS MADE IT CLEAR THAT HABEAS EXTENDS TO ALLEGED "ENEMY COMBATANTS"

In *Hamdi v. Rumsfeld*, the Supreme Court held that an individual captured during active combat in Afghanistan had the right to habeas corpus to determine whether his detention remained within "the permissible bounds" of the law.

What are the legal limits of the "enemy combatant" category? The Bush Administration defines this category so broadly that it would include a person who, for example, innocently donated money to a charity that he did not realize was secretly financing terrorist activities. In *Hamdi*, the Court made clear that the proper scope of the "enemy combatant" definition is subject to independent judicial review.

The Supreme Court also ruled in *Hamdi* that habeas requires sufficient factual evidence to sustain a prisoner's detention. The Court explained that detainees must receive notice of the allegations against them and a meaningful opportunity to rebut those allegations before a neutral decision maker. Habeas, the Court made clear, thus helps ensure that errant tourists, embedded journalists, local aid workers, and others captured amid the chaos of a foreign war zone are not mistakenly swept up and wrongly detained.

Hamdi was an American citizen. But in another decision, *Rasul v. Bush*, the Supreme Court made clear that habeas extends to foreign nationals held as "enemy combatants." Noting that "Executive imprisonment has been considered oppressive and lawless" since the Magna Carta, the Court affirmed the right of Guantanamo detainees to challenge their indefinite imprisonment through habeas corpus. Emphasizing that the detainees insisted that they were "wholly innocent of wrongdoing," the Court made it clear that there was just as good a chance that innocent foreigners, as well as American citizens, could be imprisoned by mistake.

V. HABEAS PROTECTIONS ARE ESSENTIAL DURING THE KIND OF INDETERMINATE CONFLICT IN WHICH WE ARE NOW ENGAGED

The United States has, President Bush says, never before fought a war like the Administration's current "Global War on Terror." According to the Administration, this struggle has no clearly identifiable enemies, no recognizable battlefields, and no foreseeable end. It is precisely the indeterminate, open-ended nature of the struggle that

increases the risk that government officials will inadvertently detain innocent civilians on the basis of unfounded suspicion, innuendo or mistake.

And, since the Administration says the "Global War on Terror" will last for generations, mistakes are thus of greater – possibly life-long – consequence to those wrongly deemed "enemy combatants." Some detained at Guantanamo are without doubt enemies of this country. But, disturbingly, there is much evidence that many, if not most, detained there are in fact innocent of any connection to terrorism – and that the government has long been aware of this. A confidential CIA memo written in 2002, for example, reported that most of the Guantanamo detainees "didn't belong there." A former Guantanamo commander went further: "Sometimes we just didn't get the right folks." But, the Commander explained, people remained in detention because: "Nobody wants to be the one to sign the release papers. There is no muscle in the system."

Habeas is the muscle on which prisoners have relied throughout American history. Restoring habeas review would protect this country – along with the citizens of the world – from the possibility that innocent people might mistakenly spend indeterminate terms – possibly *entire lives* – in prison, without charge, under the control of the United States government.

VI. HABEAS PETITIONS ARE NOT FRIVOLOUS PRISONER CONDITION SUITS

As Congress debated the 2005 and 2006 laws, many legislators appeared to believe that prisoners routinely use habeas petitions to file frivolous complaints about prison food or insufficient Internet access. "Crazy lawsuits out there." That's what Senator Lindsey Graham said about lawsuits in which Guantanamo detainees supposedly complained about slow mail service and the quality of medical services.

In fact, habeas petitions are categorically different from prison lawsuits. Prisoners often raise quality-of-life issues through lawsuits. They sometimes seek money damages. Congress previously curbed such suits. The Prison Litigation Reform Act, passed in 1995, limited prisoners' access to the courts. But a habeas petition is different. In essence, it asks, "Can this person be detained?" It does not ask "how" that detention should proceed. Habeas thus goes to the far more elementary question of whether there is a basis in fact and in law to hold a person in the first place. To be sure, in the habeas petitions filed by Guantanamo detainees, some of the detainees' lawyers have raised disturbing questions about prolonged isolation, brutal forced feeding of those engaged in hunger strikes, and other improper

practices. In so doing, they are simply ensuring they can zealously represent a client whose wishes they can discern. And this small number of cases indicates more about abusive interrogations and other problematic practices than it does about any possible danger that the habeas right will be abused for frivolous purposes.

VII. HABEAS CORPUS STRENGTHENS NATIONAL SECURITY BY GIVING LEGITIMACY TO THE FIGHT AGAINST TERRORISM

In his leaked 2003 memo, then Secretary of Defense Donald Rumsfeld asked a pointed question that should guide future counter-terrorism policy:

> Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?

The sense that the United States is a country that honors the rule of law and basic human rights has long been one of our greatest foreign-policy assets. But in the global struggle against al Qaeda and its affiliates, the idea that the United States no longer plays by its own rules is a huge recruiting boon to our enemies. Allegations of torture and images from Abu Ghraib have led to a state in which, as former Secretary of State Colin Powell said, "The world is beginning to doubt the moral basis of our fight against terrorism." Donald Rumsfeld's successor, Robert Gates, warned that the treatment of those detained at Guantanamo "taints" the fight against terrorism and deprives this country of international credibility. (Gates urged that the Guantanamo facility simply be closed.) Disregarding long-standing constitutional protections simply offers new ammunition to those who assert the United States is a lawless hyper power.

Worse, there is strong reason to believe that the effort to strip habeas rights from detainees is in fact an effort to hide unlawful conduct. According to a leaked Justice Department Memorandum from December 2001, the Administration decided to hold individuals as "enemy combatants" at Guantanamo precisely because, it believed, prisoners there would be beyond the protections of American law and, in particular, habeas corpus. In its memo, two Justice Department lawyers wrote that if a court reviewed the detentions, it might find some of them illegal under the Geneva Conventions and other legal obligations.

The creation of whole classes of people who can be held without habeas corpus or any other guarantee of fundamental rights undermines the United State's moral authority as well as its credibility as a defender of liberty. People around the world judge us by our deeds,

not our words. By subjecting detention decisions to habeas review, the United States demonstrates that the fight against terrorism is legitimate and that we are detaining the right people, an obvious predicate step to gaining the broad support necessary for success.

VIII. THE FEDERAL COURTS CAN HANDLE CLASSIFIED EVIDENTIARY ISSUES IN HABEAS CASES

For decades the federal courts have safely managed criminal and civil cases involving classified and top secret information. Such cases have been resolved fairly and expeditiously and without compromising national security. Numerous recent examples of the courts' effective protection against disclosure of classified evidence include the prosecution of individuals charged with bombing U.S. embassies in Kenya and Tanzania. In each instance, courts effectively protected against the disclosure of classified information without inhibiting the government's ability to convict the defendants.

The federal habeas statute and rules give federal judges specific tools to control and safeguard information. They also set out a workable, streamline series of procedures for evidentiary issues.

Effective procedures have already been developed for detainee cases involving "enemy combatants." Federal District Judge Joyce Hens Green who presided over early cases involving Guantanamo detainees, issued a protective order in 2004 that ensured secure storage, handling and control of classified national security information. The protective order, the product of extensive negotiations between lawyers for the detainees and for the United States and consideration of legal briefs from both sides, has since governed all of the more than two hundred habeas cases filed by or on behalf of Guantanamo detainees. It includes measures to prevent the inadvertent disclosure of classified information while enabling detainees to present evidence of innocence to a federal judge with the assistance of counsel. It provides an example of how liberty and security can successfully be balanced in the federal courts.

IX. CONGRESS HAS NOT CREATED AN ADEQUATE SUBSTITUTE FOR HABEAS CORPUS

The Military Commissions and Detainee Treatment Acts do not provide an adequate substitute for habeas corpus. Quite the reverse: these laws sanction indefinite imprisonment without due process and allow rendition to other countries for torture and other mistreatment.

Under the new statutes, "enemy combatants" can seek review in the U.S. Court of Appeals for the D.C Circuit. But both statutes limit the scope of that review in crucial ways. These laws confine judicial review to the record of facts created by a Combatant Status Review Trial ("CSRT"), a summary military proceeding devised in 2004 by the Executive precisely to avoid habeas review. The CRST lacks key protections against erroneous decisions: They simply do not, and cannot, serve as fair fact-finding instruments. For example, the CRST requires that the detainee prove himself innocent of allegations he cannot even see. A detainee has no counsel in CRST hearings. He has no right to present witnesses or evidence in his own defense. The government did not produce any witnesses at any CRST hearings and, in 96% of the cases, failed to provide any documentary evidence. In addition, the CRST allows for the use of evidence gained by coercion and even torture. Any detention review scheme that is grounded on acceptance of CSRT findings will necessarily be fundamentally flawed, and cannot provide the basic protections against unlawful executive detention that habeas has historically afforded.

As written, the MCA and DTA do not allow the CSRT records to be supplemented even if available evidence proves the detainee's innocence or shows that he confessed after prolonged abuse and/or torture. Court review limited in these ways undermines the integrity of the Judiciary by denying federal courts the basic tools necessary to actually review questionable practices and findings. Today, only the scrutiny of an *independent* federal judge on habeas corpus will be sufficiently credible to warrant further detention.

The new statutes also slow the judicial process. For many detainees, this means prolonging their wrongful imprisonment. The D.C. Circuit recently ruled that the MCA eliminates habeas corpus jurisdiction over the Guantanamo detainee habeas cases. The Supreme Court decided not to review this decision at the present time. In so doing, the Court indicated that prisoners at Guantanamo should first go back to the D.C. Circuit.But that court has already ruled that the detainees have no constitutional rights, so exhaustion of the DTA and MCA's limited remedies will almost certainly be futile. The Supreme Court may eventually review the D.C. Circuit's decision, but Congress doesn't need to – and should not – wait for the Court to act. It should instead restore habeas corpus now and provide the lawful process that should have been provided at the outset. In addition, the new statues enable other questionable government conduct, including "extraordinary rendition," a process in which the United States turns detainees over to the custody of other countries where they are likely to be tortured.

Where habeas is available, courts can at least review prisoner transfers to ensure that they comply with the United States' legal obligations, including the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, a treaty signed by more than 140 nations. The new laws, however, eliminate this important check along with other habeas protections, thus enabling the Executive to render prisoners for torture or continued imprisonment without due process.

X. CONGRESSIONAL ACTION IS THE MOST EFFECTIVE WAY TO RESTORE HABEAS CORPUS

Upholding the Constitution is the business of Congress as well as the Judiciary. As it did during the civil rights movement, Congress can – and should – play a key role in fulfilling America's commitment to equal treatment and justice under law. Congress is poised to play the most expeditious role it can by restoring habeas and protecting a writ that protects us all from the possibility that we might be subject to the unchecked whim of a government stronger than its individual citizens.

Congress has an equal duty to uphold the Constitution and enact wise policy. It should not simply delegate that job to the courts. The 2006 election was a demand for accountability in foreign policy. It was a call, from voters, to right the balance between the Executive and the other branches. The laws stripping habeas rights from a single class of people is among the most egregious evidence of a period when the Executive was unchecked, unbalanced, and hence lawless.

CONCLUSION

Misperceptions about habeas corpus have sometimes obscured its essential role in American law and society. But habeas corpus is central to our values and traditions, commitment to due process, and respect for the rule of law. We cannot abandon it now.

Habeas does not merely safeguard individual liberty against wrongful detention. It helps protect our system of checks and balances by curbing abuses by the Executive, something particularly important at a time in which fears of terrorism make excess more likely. Habeas enhances counter-terrorism efforts by helping ensure the United States lawfully detains those who threaten our security. Doing so will help legitimize those efforts and restore our international credibility. ■

Where's Congress in this Power Play?

Frederick A.O. Schwarz, Jr. and Aziz Z. Huq

The Administration's overreach stems from its radical and novel theory of presidential power. In this excerpt from their book Unchecked and Unbalanced: Presidential Power in a Time of Terror, *Fritz Schwarz and Aziz Huq push Congress to push back.*

Thirty years ago, a Senate committee headed by the late Sen. Frank Church exposed widespread abuses by law enforcement and intelligence agencies dating to the Franklin D. Roosevelt administration. In the name of "national security," the FBI, CIA, and National Security Agency spied on politicians, protest groups and civil rights activists; illegally opened mail; and sponsored scores of covert operations abroad, many of which imperiled democracy in foreign countries.

The sheer magnitude of the abuses unearthed by the committee shocked the nation, led to broad reforms and embarrassed Congress, whose feckless oversight over decades was plain for all to see. As a result, Congress required presidents to report covert operations to permanent new intelligence committees and created the Foreign Intelligence Surveillance Act, which squarely repudiated the idea of inherent executive power to spy on Americans without obtaining warrants. New guidelines were issued for FBI investigations.

For those of us involved in that effort to bring accountability and sunshine back to government, it is discouraging to read daily accounts of a new era of intelligence power abuses, growing out of a "war" on terrorism that is invoked to justify almost any secret measure.

In the past five years, we have learned that the executive branch has circumvented federal bans on torture, abandoned the Geneva Conventions, monitored Americans' phone conversations without the required warrants and "outsourced" torture through "extraordinary rendition" to several foreign governments. Recently we learned that the FBI recklessly abused its power to secure documents through emergency national security letters.

THERE'S NO REASON TO ABANDON THE FOUNDERS' SKEPTICISM OF UNCHECKED EXECUTIVE POWER.

Once again, congressional oversight of the growing national security, intelligence and law enforcement establishments has fallen short. But there are now obstacles to reestablishing effective oversight that did not exist three decades ago.

For one thing, the country and Congress are far more polarized. There was a high degree

This piece was originally published in The Washington Post *on April 4, 2007.*

of bipartisan unity on the Church Committee, and Republican President Gerald R. Ford generally cooperated in the effort to expose abuses and create remedies. The committee, formally known as the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, was created in Watergate's wake and had a Democratic majority. But it focused on abuses by administration of both parties. Indeed, its inquiries revealed that three Democratic icons, Presidents Roosevelt, John F. Kennedy and Lyndon B. Johnson, all knew about or approved questionable activities. Howard Baker, Jr., a senior Senate Republican who served on the panel, disagreed with some proposals but said it had carried out its task "responsibly and thoroughly."

But Congress now faces an even bigger problem than heightened partisanship. Past presidents have never claimed that the Constitution gave them power to set aside statutes permanently. (Richard M. Nixon was no longer in office when he declared: "When the president does it, it means that it is not illegal.") The Bush administration, however, appears committed to eliminating judicial and congressional oversight of executive action at all costs. This pernicious idea, at odds with the Founders' vision of checks and balances, lies at the heart of many of today's abuses.

In some ways, the "Magna Carta" of this combative ideology was the minority report issued by eight of the Republicans on the Iran-contra committee that investigated the Reagan administration's handling of covert arms sales to Iran and the secret—and illegal—effort to finance the contra rebels fighting in Nicaragua.

Among the report's signers was then-Rep. Dick Cheney, who led the group. They rejected the idea that separation of powers would "preclude the exercise of arbitrary power" and argued that the president needed to act expeditiously and secretly to achieve American aims in a dangerous world. Their solution to executive abuse was to water down congressional and judicial oversight. The minority report referred approvingly to "monarchical notions of prerogative that will permit [presidents] to exceed the law" if Congress tried to exercise oversight on national security matters. Cheney later insisted in an interview that "you have to preserve the prerogative of the president in extraordinary circumstances," by not notifying Congress of intelligence operations.

Cheney's views have not shifted since then. In December 2005, he referred reporters to the minority report for his view of "the president's prerogatives." And for the first time in U.S. history, executive branch lawyers have argued that the president has power to "suspend" laws permanently in the name of national security. In signing statements for new laws, the chief executive has repeatedly asserted this broad power. In internal legal opinions on torture, Justice Department lawyers have proposed that the president can set aside laws that conflict with his ideas of national security. Under this logic, laws against torture, warrantless surveillance and transfers of detainees to governments that torture all buckle.

We do not know precisely which laws were turned aside, because the administration still refuses to reveal Justice Department opinions that define what the laws the executive will and will not follow. Such secrecy, which has nothing to do with the legitimate protection of sources and methods of intelligence agencies, cannot be justified.

This crisis of constitutional faith did not begin with the current Republican administration. After a burst of reforms in the 1970s, Congress quickly fell back into Cold War apathy, finding it easier to let standards

lapse than to hold the executive branch to account. The Iran-contra scandal was the first warning that the Church Committee's lessons had been sidelined by the executive branch. Attorney generals issued looser guidelines on FBI investigations. The White House became a keen user of unilateral executive orders that bypassed Congress. President Bill Clinton's stint in the White House proved no exception. He broadly interpreted his war powers and aggressively used executive orders to bypass Congress – for example, ignoring a House vote opposing intervention in Kosovo. Clinton issued 107 presidential directives on policy, according to Harvard Law School Dean Elena Kagan. Reagan issued nine and George H. W. Bush just four.

Today, the argument for unchecked presidential power is starkly different from earlier invocations. While previous administrations have violated civil liberties – as in the post-World War I Palmer raids and the incarceration of Japanese Americans during World War II – such actions were public and short term. When Confederate troops neared Washington in the Civil War and mobs in Baltimore attacked Union troops, President Abraham Lincoln suspended habeas corpus – the principal legal protection against unlawful detention. As Baltimore's mayor threatened to blow up railroad bridges used by Union troops, Lincoln acted without waiting for Congress to return from recess. Yet he subsequently sought and received congressional approval.

Unlike Lincoln and other past chief executives, President Bush asserts that he has the power to set aside fundamental laws permanently – including those that ban torture and domestic spying. The White House today argues that there will never be a day of reckoning in Congress or the courts. To the contrary, it does all it can to shield its use of unilateral detention, torture and spying powers from the review of any other branch of government. Even after five years, the lawfulness of incarcerating hundreds of detainees at Guantanamo Bay, Cuba, has not been reviewed by another branch.

Never before in U.S. history, we believe, has a president so readily exploited a crisis to amass unchecked and unreviewed power unto himself, completely at odds with the Constitution. This departure from historical practice should deeply concern those in both parties who care for the Constitution. Even in military matters, Congress has considerable authority. For instance, the Constitution specifies that Congress can "make Rules for Government and Regulation of the land and naval Forces." Military intelligence, military surveillance and military detention are all matters on which Congress can dictate the terms of how the commander-in- chief's power is exercised.

Debates at the 1787 Constitutional Convention in Philadelphia, and in the state ratifying conventions that ensued, conclusively undercut the current administration's claim to unaccountable power. Alexander Hamilton, the founding era's foremost advocate of executive vigor, disdained efforts to equate the new president's authority with the broad powers of the English monarchs. And even assuming that Hamilton was wrong in asserting that presidents have less power than English kings, the British monarchy had in fact been stripped of power to "suspend" parliamentary laws after the Glorious Revolution of 1688, about 100 years before the Constitutional Convention. The Constitution simply contains no unfettered executive authority to annul laws on a president's security-related say-so.

There is no reason to abandon the founding generation's skepticism of unchecked executive power. The Constitution rests on a profound understanding of human nature. Hamilton, James Madison, and the other

framers and ratifiers knew that no single individual, whether selected by birth or popular vote, could be blindly trusted to wield power wisely. They knew that both the executive and Congress would make mistakes. The Supreme Court has repeatedly backed a strong oversight role for Congress. "The scope of [Congress's] power of inquiry… is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution," it wrote in 1975. Congress has repeatedly met its constitutional responsibility as a coequal branch, even in times of war, and regardless of partisan interests. Oversight is not a Republican or Democratic issue. In World War II, then-Sen. Harry S. Truman coordinated aggressive inquiries into the Democratic administration's mismanagement of war procurement. During the Civil War, Republicans in Congress drove Lincoln's first secretary of war from office by their investigations. Today's questions about presidential power are certainly not ones that have Republican or Democratic answers. The institutional imbalance that is evident today should trouble legislators of both parties.

We believe that most Americans still would agree with the Church Committee when it stated: "The United States must not adopt the tactics of the enemy," for "each time we do so, each time the means we use are wrong, our inner strength, the strength that makes us free, is lessened." ■

Defending Freedom, At Home

Governor Thomas Kean

On the eve of the anniversary of 9/11, the Brennan Center convenes national security experts, military and intelligence officials, and legal scholars for a day-long conference; in his keynote address, conference co-chair and former Gov. Tom Kean (R-NJ) reminds us that in times of war, we are obliged to defend our freedoms at home.

Every time our Nation goes to war, our civil liberties as well come under attack.

In times of war, there is a long tradition of clamping down on the home front in the name of national security.

Two of our greatest Presidents took wartime actions that each of us in this room would have made every effort to oppose in times of peace.

I am speaking here, of course, of President Lincoln's suspension of Habeas Corpus; and President Roosevelt's creation of internment camps for Japanese-Americans.

At such times, our freedoms bend. Most of us agree today that they bent too far. The saving grace for our country is that we take steps to restore the balance when our country returns to peace.

For us today, one question is: When will peace be restored? When will, what the President calls the "Global War on Terrorism," come to an end? No one can say. There will be no peace treaty signed; there will be no victory parade anytime soon.

THE NEED TO ACT NOW

We cannot wait for a decade or more to get the balance between national security and civil liberties right.

We cannot wait for the Executive branch to signal "all clear."

These remarks are adapted from Governor Kean's speech at the Liberty and National Security Conference on September 7, 2007.

We cannot wait for others to protect our freedoms.

We think our liberties are special. They are. We take great pride in our country and our long history of freedom.

But there is nothing magical about their continuation. They continue because we struggle every day to defend them.

Our soldiers are on the front lines of freedom, and so is everyone in this room. It is your obligation – our obligation – to defend our freedoms at home, even as we take all appropriate steps to defend our country against terrorist attack.

THE CHALLENGE AHEAD

WE THINK OUR LIBERTIES ARE SPECIAL. THEY ARE. BUT THERE IS NOTHING MAGICAL ABOUT THEIR CONTINUATION. THEY CONTINUE BECAUSE WE STRUGGLE EVERY DAY TO DEFEND THEM.

Six years after the 9/11 attacks, we are still struggling. So far, the President and Congress have failed to develop a legal framework for dealing with terrorists that also protects our civil liberties.

Fundamental justice requires a fair process before our government detains people for significant periods of time. The President and the Congress have not provided it. Guantanamo should be closed now.

It is a challenge as to what you do with the prisoners in Guantanamo. I am not the expert as to what should happen next – all of you are – but my instincts are that we should trust our own system of justice. It has served us well throughout our history, and we should trust its ability to serve us now.

It has its risks, but I also know that no word is more poisonous to the reputation of the United States abroad than Guantanamo. Our current policies are not reducing the overall terrorist threat.

THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

After 9/11, the American people and their elected representatives gave the Executive branch many additional powers so that it could protect us. The Patriot Act is the most obvious and visible example.

For me, the question is not so much what powers are granted - although we can legitimately disagree on that question.

The far more important question is the system of checks and balances and oversight on the exercise of these powers.

For this reason, the 9/11 Commission recommended, and the Congress adopted, the creation within the Executive Branch of the Privacy and Civil Liberties Oversight Board.

Unfortunately, that Board has been missing in action. It has raised no objections to detention and interrogation practices, or to warantless wiretaps. It let the White House edit its annual report.

What it needs most is an infusion of backbone and leadership. The country badly needs a strong, consistent public voice in support of civil liberties. We do not yet hear it.

CONGRESSIONAL OVERSIGHT

Three years ago, the 9/11 Commission said that strengthening congressional oversight was among the most difficult and important of our recommendations.

Both the success of our counterterrorism reforms and the protection of our civil liberties depend on it.

Oversight of homeland security and intelligence by the proper committees must be robust and effective. Currently, it is not.

On homeland security, we have gone backwards. We noted three years ago in our Final Report that the Department of Homeland Security reported to 88 congressional committees and subcommittees, a major drain on senior management and a source of contradictory guidance. Today, the number has grown to over 100.

On intelligence oversight, the new law signed by the President in August (PL 110-53) requires declassification of the overall intelligence budget. That is a potential step forward for potential oversight. Unfortunately, the law also allows the next President to waive that requirement. This reform should not be conditional.

A declassified overall budget makes it possible for the House and Senate to establish separate Appropriations subcommittees for review of the Intelligence budget. We believe they should do so.

If you want good oversight, you have to follow the golden rule. He who controls the gold makes the rules. Congress needs to provide systematic, unrelenting oversight of the intelligence community - both in support of effective counterterrorism reforms, and in support of unstinting defense of our civil liberties. ■

Release Justice's Secrets

Nicholas deB. Katzenbach and Frederick A.O. Schwarz, Jr.

On November 8, 2007, the Senate confirms Michael Mukasey as Attorney General; former U.S. Attorney General Katzenbach and Fritz Schwarz urge Mukasey to restore luster recently lost at the Department of Justice.

Michael Mukasey has been confirmed as attorney general. But the profound moral, legal and constitutional issues raised at his Senate Judiciary Committee hearings are unresolved. Mr. Mukasey should open the door to their resolution by releasing the Justice Department's long-secret legal opinions that have warped our fight against terrorism.

When the Justice Department, usually acting through its Office of Legal Counsel, issues legal opinions binding on the executive branch, there is never justification for keeping them secret. Opinions that narrowly define what constitutes torture; or open the door to sending prisoners for questioning to Egypt and Syria, which regularly use torture; or rule the president has some "inherent power" to ignore laws are all of concern to Congress and the public whether one agrees or disagrees with the legal analysis.

Yet all these opinions have been kept secret, along with many other, related post-9/11 opinions that purport to decide what America's law is.

Secrecy always increases the risk of foolish mistakes. If the withheld opinions are sound, why fear letting them see the light of day? Is there ever a justification in a government of law for keeping what one believes to be the law secret?

Some may say releasing the opinions will lead to more embarrassment. To this, there are two answers. First, what is most important is that we get it right and remain true to our country's values. Second, the best way to restore our reputation is to confront our mistakes openly and then resolve not to repeat them.

Some also say that releasing opinions on, for example, torture, may give terrorists a window into what techniques we do and do not use. Again, this has it backwards. The world should know we reject the tactics of the enemy.

THE BEST WAY TO RESTORE OUR REPUTATION IS TO CONFRONT OUR MISTAKES OPENLY AND THEN RESOLVE NOT TO REPEAT THEM.

These issues must be faced openly by the new attorney general, by Congress, by presidential candidates and by the American public.

Mr. Mukasey can do a great deal to help restore both our Constitution and America's reputation, and thus strengthen us at home and abroad. A good start would be to release the secret opinions of the Office of Legal Counsel. ■

This piece was originally published in The New York Times *on November 20, 2007.*

Twelve Steps to Restore Checks and Balances

Aziz Z. Huq

Plainly, checks and balances are out of balance. Candidates and the public recognize the need to curb presidential power. But how? The Brennan Center sets out twelve concrete steps that would restore Constitutional order and strengthen the fight against terrorism.

America's system of checks and balances is out of joint. Recognizing that people are "not angels," the Constitution's Framers crafted a system of government designed to "control itself." They installed three co-equal branches – Congress, the executive, the federal judiciary – to watch over each other and to guard against both overreaching harmful to the people and unwise acts arrived at without care. Setting each institution against each other in this way, the Framers hoped "[a]mbition [would] be made to counteract ambition." The resulting system of checks and balances would be "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."

A FRIGHTENING IDEA REJECTED AT AMERICA'S BIRTH - THAT A PRESIDENT, LIKE A KING, CAN DO NO WRONG - HAS REEMERGED TO JUSTIFY EXCESSIVE SECRECY, DISREGARD FOR FEDERAL AND INTERNATIONAL LAW, AND EVEN TORTURE.

Invoking "monarchical" prerogatives, this Administration has applied a theory first articulated by then-Congressman Richard Cheney in the 1987 congressional minority report on the Iran-Contra scandal. Coordinated by Cheney, the minority report rejected congressional checks when the executive claims to act in the name of "national security." It repudiated as a "fallacy" the Constitution's core notion that government power, republican or kingly, risks abuse. It scorned long-standing structures intended to check that power, and warned that the presidency would have to exercise "monarchical" powers should Congress try to check it.

Today, the executive branch argues that any and all presidential actions taken in the name of national security are by definition constitutional. It relegates Congress and the federal courts to the constitutional margin. The result: power – legislative, executive, and judicial – is now concentrated in the executive branch. And a frightening idea decisively rejected at America's birth – that a president, like a king, can do no wrong – has reemerged to justify excessive secrecy, disregard for federal and international law, and even torture.

The separation of powers has always been vital to our national security because it augments accountability and promotes wise choices. Checks and balances are not a historical curiosity. They are imperative today.

What can be done to right the constitutional balance? This paper proposes twelve specific steps to restore the checks and balances of American government. Its recommendations aim at fidelity to the original Constitution's overarching design, in which each branch plays an active role in keeping the nation secure and free. The twelve steps outlined here would undo much damage that has been inflicted by six years of erratic, lawless unilateralism. They do not proscribe *all* detention, *all* surveillance, or *all* interrogation, but promote wise use of those powers.

I. RENOUNCE THE THEORY OF THE MONARCHICAL PRESIDENCY

Restoring the Constitution's checks and balances should be a point of common agreement for all candidates seeking the presidency. Every presidential candidate should reject the unprecedented "monarchical prerogatives" asserted by the present Administration as contrary to the very ideals of the Constitution.

Presidential candidates in the 2008 race should make it unequivocally clear that they will keep faith with the original constitutional compact. The Constitution of 1787 was designed in conscious reaction to the British monarchy's concentrated power. As designed, it prevents the accumulation of power in any one branch of government. This is evident from the text of the Constitution, which not only split sovereignty between three branches of government, but also left all three branches subject to check by the others. These stipulations were eloquently and exhaustively expressed in the 1787 Philadelphia Convention and in all subsequent debates about the Constitution's ratification. Presidential candidates should publicly and unequivocally endorse this Original Wisdom.

The White House's insistence on unilateralism harms the country in two ways. First, it leaves the country with no effective national security policy-making mechanism. Presidential unilateralism provides no forum for debate to air pros, cons, and flaws in any policy. It deprives government of all effective means of identifying and correcting errors. Instead, it ensures that we spend precious resources on tough-sounding policies that in fact do little to promote security.

Second, the policies this President has enacted unilaterally have seriously undermined our credibility around the world and provided terrorists with a powerful recruiting tool. Today, America is linked internationally to images of Guantánamo and Abu Ghraib more often than to the ideals of liberty, equality, and law. As Bush Administration veterans acknowledge, these associations create an unacceptable "drag" on counterterrorism efforts. As General Colin Powell has said, "The world is starting to doubt the moral basis of our fight

against terrorism." Restoring our flagging credibility depends on the unambiguous renunciation of the monarchical prerogatives by those who will lead America on January 20, 2009.

Repudiating the "monarchical prerogatives" that lie beneath these harmful policies is the first and most important part of any course correction. It should be high on the agenda of all the presidential candidates, and a key point in presidential debates.

II. RENOUNCE THE USE OF SIGNING STATEMENTS TO CIRCUMVENT THE LAW

Every presidential candidate must commit to ending the use of open-ended signing statements as devices to repudiate laws based on the "monarchical" theory of executive power.

Presidential signing statements have become a tangible manifestation of the "monarchical prerogatives" vision of the executive. President Bush has used an unprecedented number of signing statements to bypass congressional enactments that protect liberties and ensure accountability. Presidential candidates must commit to stopping the use of signing statements as a way to evade congressional authority on national security matters.

Presidents have used signing statements since the founding of the Republic. But the Bush White House has made use of the device in new, troubling ways. First, the Administration has used such statements to signal aggressive non-compliance with an unprecedented range of laws. In more than two hundred years, presidents before Bush challenged the constitutionality of 600 statutory provisions. By 2007, Bush had challenged more than 1,100 provisions in signing statements. The Administration's aggressive reliance on statements has an *in terrorem* effect on Congress, which is on notice that even if it manages to take the political heat of disagreeing with the president, a law might in practice be worthless.

Second, President Bush's signing statements have been opaque about the precise statutory provisions being repudiated and the exact constitutional theory being asserted to justify the signing statement. This makes it impossible for Congress to know exactly what is being complied with, and what is being defied. The result is the appearance of transparency without any substance.

Finally, the Bush Administration has extended the use of signing statements by objecting to laws that require reporting of executive noncompliance with the law. That is, the President has publicly declined to tell Congress and the people what laws he refuses to follow – and has used a signing statement to do so.

The next president must do better. Each presidential candidate must commit to renouncing the abusive application of signing statements as a way to evade the law and then conceal such evasion from Congress and the people.

III. DISCLOSE PAST LEGAL OPINIONS THAT INFLUENCE THE USE OF NATIONAL SECURITY POWERS

The Administration should release to Congress and the public all internal legal opinions and presidential authorizations, especially those that rely on a "monarchical prerogatives" theory of presidential authority, or that otherwise negate or narrow the application of national security laws enacted by Congress.

THIS ADMINISTRATION SHOULD RELEASE ALL OF THE LEGAL OPINIONS ISSUED BY THE OFFICE OF LEGAL COUNSEL THAT LICENSE POLICIES OF INTERROGATION, DETENTION, TRANSFER AND SURVEILLANCE.

Since 9/11 , the Department of Justice, and in particular its Office of Legal Counsel, has played a pivotal role in corroding the Constitution's checks and balances. It has issued legal memoranda – including the infamous "torture memo" of August 2002 – that rely on a monarchical theory of presidential power to license torture, warrantless surveillance, and "extraordinary rendition." Remarkably, the present Administration has refused to expose its legal reasoning to the light of day – even as it continues to press its expansive vision of presidential power. If the Administration feels that its position is justified, then it should have no qualms about releasing its legal opinions to public scrutiny and discussion.

This Administration should release all of the legal opinions issued by the Office of Legal Counsel that license policies of interrogation, detention, transfer, and surveillance. It seems likely that these opinions each rely in some measure on the presumption of monarchical prerogatives. The disclosure of these opinions is critical to restoring the checks and balances. Without such disclosure it is impossible to know the extent of damage to America's values and to the separation of powers, i.e. which laws have been set aside and why. If the current Administration persists in its refusal to disclose these legal opinions, presidential candidates should commit to disclosing them.

To date, some legal opinions regarding compliance with international law, the detention of persons seized in Afghanistan in the course of Operation Enduring Freedom, and the use of coercive interrogation have been released or leaked. Other opinions, however, are still improperly hidden from the public. These include – but are not limited to – the following:

• Memoranda dated October 4 and November 2, 2001; January 9, May 17, and October 11, 2002; February 25, 2003; March 15, May

6, and July 16, 2004; and February 4, 2005; concerning the so-called "Terrorist Surveillance Program" of the NSA.

• Memorandum dated March 13, 2002, for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, entitled "The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations," and undated memorandum concerning the President's authority to transfer terrorist suspects to other countries where they are likely to be tortured.

• Memorandum dated August 2002 for the CIA discussing the legality of specific interrogation tactics.

• Memorandum dated March 2003, and entitled "Military Interrogation of Alien Unlawful Combatants Held Outside the United States," concerning interrogations by the military, which "dismissed virtually all national and internal laws regulating the treatment of prisoners, including war crimes and assault statutes, and was radical in its view that in wartime the President can fight enemies by whatever means he sees fit. According to the memo, Congress has no constitutional right to interfere with the President in his role as Commander in Chief, including making laws that limit the ways in which prisoners may be interrogated."

• Memorandum dated spring 2005, signed by Steven Bradbury, concerning the legality of CIA enhanced interrogation techniques used either alone or in combination, and concluding that these did not amount to "cruel, inhuman, or degrading" treatment.

These are the hidden opinions we are fortunate enough to know about due to cross-references in other documents or press reports. There are likely others that we do not know exist, but that should be in the public domain. There is no justification for the Administration's refusal to make these opinions available to the public. Each concerns subjects of core national importance. Each addresses instances in which the executive has decided that a law designed to protect civil liberties does not apply or is unconstitutional. In declining to release these opinions, the Administration hides the law from the people it governs. Again, this is fundamentally undemocratic.

IV. MAKE IT CLEAR: NO MORE TORTURE, NO MORE 'TORTURE LITE'

Congress should enact legislation closing loopholes that the Administration believes allow or decriminalize the use of coercive interrogation measures including (but not limited to) waterboarding, prolonged sleep deprivation, and stress positions.

American law clearly prohibits all torture and all lesser forms of coercive interrogation, commonly known as cruel, inhuman, and degrading treatment. Since 9/11, however, the Administration has secured from the Justice Department legal opinions that seed ambiguity about these unequivocal American legal limits. Despite the fact that federal law and international law clearly, and without reservation or caveat, prohibit all forms of torture and cruel, inhuman, and degrading treatment, the Administration has found ways to sanction interrogation tactics – including water-boarding and prolonged sleep deprivation – that clearly involve torture.

The Administration's deliberate dilution of the anti-torture ban has had serious repercussions. It has, in the words of Marine General P. X. Kelley and former Reagan Justice Department official Robert F. Turner, "compromised our national honor and … place[d] at risk the welfare of captured American military forces for generations to come." The notion that "America does stand up for its values" – which the 9/11 Commission designated as pivotal to the success of national security policy – is questioned around the world. While some presidential candidates have indicated that they understand this, others have shamefully failed to do so.

Congress should not have to once again clarify the law against torture. But given the executive's repeated evasions of that law, Congress must do so. Among other measures, Congress must consider whether it is wise to specifically prohibit the "advanced interrogation techniques" that the Administration reportedly uses. All interrogations, conducted by the CIA or the military, must be videotaped. The role of doctors as safeguards in interrogations should be carefully examined. Absolute and unyielding prohibitions must apply to all agents, employees, and contractors of the federal government regardless of whether they are inside or outside the United States. These prohibitions should also apply to individuals who work alongside the federal government. Moreover, Congress should prohibit, without caveat, the transfer of suspected terrorists to other countries known to use torture. Reliance on another country's assurance that it will not torture is patently hypocritical and inadequate.

V. RESTORE HABEAS CORPUS AND BRING AMERICA'S DETENTION SYSTEM UNDER THE RULE OF LAW

Congress should restore the federal courts' traditional authority under the name of "habeas corpus" to hear challenges to unlawful detention wherever it occurs and to ensure that transfers to other sovereigns comply with the rule of law.

The United States has seized hundreds of individuals in counterterrorism operations on and (increasingly) off battlefields. It has held

these individuals without the elementary process granted wartime detainees as a matter of international law. The net consequence has been a global detention network that has produced international distrust and disdain for the United States, as well as considerable violations of fundamental human rights.

CONGRESS MUST LEGISLATE TO BRING THE GLOBAL DETENTION SYSTEM UNDER THE RULE OF LAW. THIS MEANS OUTLAWING ALL DETENTIONS THAT ARE INCONSISTENT WITH U.S. LAW AND INTERNATIONAL HUMANITARIAN LAW.

The executive branch has resisted challenges to this global detention system on the ground that some detainees present a real danger to the United States and can be held lawfully pursuant to the laws of war. This may well be true, but there is an easy way to address the executive's security concern while respecting human rights and the reputational costs of America's global detention system. It has long been the role of the federal courts to test executive branch detention authority. This power, called habeas corpus, "allows the Judicial Branch to play a role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the [e]xecutive's discretion in the realm of detentions." However, in the Detainee Treatment Act and the Military Commissions Act, Congress regrettably singled out one group of current detainees and denied them access to the courts to challenge the lawfulness of their detentions.

As the Brennan Center explained in *Ten Things You Should Know About Habeas Corpus*, habeas corpus has a "rightful, historic, and fundamental place in American law." Congress must also legislate to bring the global detention system under the rule of law. This means outlawing all detentions that are inconsistent with U.S. law and international humanitarian law. The International Committee of the Red Cross must have access to all detainees immediately upon their seizure. It entails ending funding for all CIA "black sites" and other proxy detention programs designed to permit covert detention of terrorism suspects. And it means banning extralegal transfers to countries that routinely engage in torture, even if the country provides "diplomatic assurances" that it will not torture.

VI. LEGISLATE TO REDUCE EXCESSIVE SECRECY AND CLASSIFICATION

Congress should hold hearings on the abuse of secrecy and enact comprehensive rules to guard against the misuse of security-related classification and declassification. It must strengthen internal mechanisms that control oversight of classification.

Excessive secrecy affects the Constitution's checks and balances in three ways. First, it prevents Congress and the public from knowing what problems exist or how best to regulate them. Second, it shifts power to the executive, which can and does selectively release information in order to promote its political or policy agendas. Third,

excessive secrecy limits the flow of information within the executive branch – in some instances handicapping inter-agency processes of policy formation and yielding bad decisions. For these reasons, Congress must promptly address this excess secrecy.

Excessive government secrecy is an immense problem. The problem's scale dramatically increased after 9/11. Classification actions doubled from 2001 to 2004 alone. "The problem of over-classification is apparent to nearly everyone who reviews classified information," wrote Governor Thomas H. Kean and Lee H. Hamilton after chairing the 9/11 Commission: "The core of the problem is the fact that people in government can get in trouble for revealing something that is secret, but they cannot get in trouble for stamping SECRET on a document." Furthermore, in the national security arena, Congress lacks the tools to gather information and formulate informed responses.

Congress should carefully review the regulations that now structure classification and declassification efforts. Such reviews might be done in the first instance by an expert, non-partisan panel. Based on this review, Congress should enact a comprehensive law limiting classification and installing checks to guard against the political manipulation of either classification or declassification. Further, it should strengthen both inter-branch and intrabranch oversight mechanisms. The General Accounting Office should be given a clear mandate over security agencies. Internal bodies such as the Information Security Oversight Office and the Public Interest Declassification Board should be strengthened and vested with greater disclosureforcing powers, such as subpoena authority.

VII. ENACT A LAW THAT REGULATES THE INVOCATION OF EXECUTIVE PRIVILEGE

Congress should limit and regulate the use of executive privilege, particularly in cases involving potential wrongdoing within the executive branch.

"Executive privilege," – the president's claimed right to resist disclosure to Congress of documents and communications – keeps legislators from investigating potential wrongdoing, assigning blame, or devising reforms. Since the 2006 election, "executive privilege" has become an important executive-branch tool to prevent the discovery of wrongdoing and error, to preserve flawed and failing policies, and to preclude accountability.

Congressional action is warranted in this area because executive privilege is a vague concept already stretched far beyond plausible bounds. The Constitution makes no mention of executive privilege.

To the contrary, the First Amendment's protection of public discourse tilts the Constitution toward an endorsement of democratic transparency. Although presidents have long claimed an extra-textual right to keep some material secret, the Supreme Court has recognized that executive privilege cannot be used when there are allegations of wrongdoing. Breaking from tradition, the present Administration has applied executive privilege aggressively despite such credible allegations. This fundamentally destabilizes the constitutional architecture.

If the executive branch does not respect the spirit of transparency, an effective law on executive privilege must define and limit the privilege. It would clarify which communications are covered, and also when Congress can overcome the privilege. Credible allegations of criminal wrongdoing or other serious violations of law would be sufficient to dissolve non-disclosure claims. The law could then create mechanisms for threshold disclosure to a limited pool of legislators and staff. For disputes that persist, it would expedite a right of judicial appeal for both sides. It would ensure that the courts reached and resolved the dispute in a timely fashion, rather than letting disputes stagnate even as the issue fades from public attention. Clear sanctions, moreover, would be imposed on the privilege's abuse. In this manner, Congress could proceed with full investigations when instances of executive wrongdoing come to light in the press.

VIII. LEGISLATE TO LIMIT THE STATE SECRETS PRIVILEGE

Congress should confirm the federal courts' power and duty to adjudicate cases in which the executive branch is alleged to have used national security powers to impinge on constitutional liberties or human rights.

The state secrets privilege is "a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security." After 9/11 , the executive branch asserted the state secrets privilege vigorously in cases said to concern national security in order to block judicial scrutiny of wrongdoing. In two cases concerning the extraordinary rendition and subsequent torture of clearly innocent individuals, for example, the executive invoked the privilege to prevent the involved individuals from obtaining justice. And, in another unprecedented invocation of "state secrets," the government argued that a detainee at the Guantánamo Bay Naval Base should not be permitted access to his lawyers because he would divulge state secrets – namely, information about the "alternative interrogation methods" used to torture him.

Post-9/11 usage of the state secrets privilege is different in kind from

pre-9/11 usage. Between 1953 and 1976, the government invoked the privilege in four lawsuits; between 1977 and 2001, the courts were asked to adjudicate claims of "state secrets" fifty-one times. Since 2001, however, the government has invoked the privilege in more than a dozen cases largely to bar judicial oversight of allegations of civil liberties violations. Moreover, "the Bush Administration's recent assertion of the privilege differs from past practice in that it is seeking blanket dismissal of cases challenging the constitutionality of specific, ongoing government programs." By blocking plaintiffs from even entering the courtroom in national security-related litigation, the "state secrets" privilege undermines the judicial branch's constitutional checking function.

Legislation is required to preserve courts' essential functions as protectors of individual rights and as watchdogs against executive branch aggrandizement. The federal courts have their own independent authority to limit and control the state secrets privilege, but they have been unduly wary of exercising this power. Congressional intervention now would strengthen the resolve of judges facing a recalcitrant executive branch.

A new law would make clear how claims to state secrets would be handled. In particular, the law would require the government to claim the privilege on a case-by-case basis with respect to specific evidence. Further, the government would have to show that the privilege was valid with respect to each piece of evidence submitted. Congress can further strengthen courts' willingness to confront excessive use of the state secrets privilege by explicitly extending procedural mechanisms used in the criminal law context (such as the Classified Information Procedures Act) and in the context of the Freedom of Information Act to the civil litigation context. This would balance a litigant's need to secure justice with the professed concerns about national security.

IX. STRENGTHEN CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES

Congress should review and strengthen the present statutory disclosure and reporting requirements concerning intelligence and national security activities.

Limiting excessive classification and reining in executive privilege alone will not ensure that Congress gets the information it needs to fulfill its constitutional role. There must be an affirmative obligation on the executive branch to disclose information. Statutory disclosure obligations are especially important in the national security arena because Congress, in the absence of leaks to the press, will not always know what information it seeks.

Congress thus needs to strengthen reporting requirements for intelligence oversight that have been historically weak. The 1947 National Security Act regulates and mandates disclosures of intelligence activities to Congress. But its disclosure provisions contain loopholes. These invitations to executive branch gamesmanship should be repudiated.

In addition, Congress should look closely at its own oversight committees, which are supposed to facilitate accountability. Statutory disclosure obligations fulfill their function only if the congressional committees that receive the resulting disclosures work properly. In particular, Congress should reconsider the use of "gang of eight" briefings, which create the impression of accountability without its substance. In briefing the "gang of eight" alone, the Administration only briefs the leaders of the House and Senate and of their respective intelligence committees. No congressional staff members are allowed to attend, despite the fact that both the House and the Senate have rules to ensure staff properly clear security. Furthermore, legislators cannot take notes or discuss matters with their colleagues. The result is the appearance of disclosure without real oversight.

According to federal statutes, briefings limited to the "gang of eight" are permitted for covert actions, but not for other intelligence activities such as electronic surveillance programs, and even then only in "extraordinary circumstances affecting vital interests of the United States." But "gang of eight" briefings have become increasingly common, for example with respect to the NSA's warrantless surveillance, beyond the occasions permitted by statute.

This practice disables effective oversight. There is no way that such a small group – without staff or other aid – can examine or critique intelligence activities, determine whether additional facts are needed, or whether laws are being violated. As Senator Jay Rockefeller (D-WV) has explained, "gang of eight" briefings "hardly amoun[t] to briefings, particularly in contrast to details that [President] Bush and top aides publicly released [about security programs]." Congress should therefore affirmatively restrict by statute the use of "gang of eight" briefings and require instead more effective oversight.

Congress should further consider whether the limitations of congressional oversight bodies during periods of unified government (i.e., when the same party holds power on Capitol Hill and in Congress) suggests the need for more radical change. Congress should consider whether to improve oversight by giving equal control of the intelligence committees' information-forcing powers to the party not in the Oval Office, whether or not they are in the majority in Congress. Although this idea is at odds with a tradition of majoritarian control in Congress, it has received serious attention from major legal schol-

ars recently, such as Professor Neal Kumar Katyal of Georgetown University and Professor Bruce Ackerman of Yale Law School.

X. STRENGTHEN THE INSPECTOR GENERAL SYSTEM AND OTHER INTERNAL CHECKS AND BALANCES

Congress should review and strengthen by law the "internal checks and balances" of the executive branch, in particular the system of inspectors general for agencies and departments engaged in national security policy.

Congress by itself cannot ensure that the law is followed all the time. The federal government, and in particular the national security apparatus, has swollen far beyond anything predicted or envisaged by the Framers, and far beyond the capacity of Congress and the courts to supervise. As the current Administration acknowledges, there is a consequent need for "strong measures to improve compliance [with the law] in … national security mechanisms."

Checks and balances cannot depend on external mechanisms alone. We need investigative and oversight mechanisms within the executive branch that Congress and the courts can leverage to ensure accountability. Professor Kaytal calls these "the internal separation of powers: a set of mechanisms that create checks and balances within the executive branch." Such internal checks and balances "help the Congress to hold the [e]xecutive [b]ranch accountable by rooting out waste, fraud, and abuse, and by shedding light on issues in need of attention."

Many of the internal investigative and oversight mechanisms are familiar: a stronger system of inspectors general (or "IGs," the statutory office responsible for internal auditing of executive branch activity); better protection for whistleblowers; separate and overlapping cabinet officers to ensure that the President hears competing opinions; agency "stovepipes" to ensure that there are internal channels to raise challenges to actions of questionable legality; mandatory review of government action by different agencies; civil-service protections for agency workers; reporting requirements to Congress; and an impartial decision-maker to resolve inter-agency conflicts to replace the now fatally compromised OLC. Many of these internal institutions exist in some form today but are too weak to be wholly effective and should be strengthened.

Congress has begun this process by examining the inspectors-general system established by statute in 1978. IGs are responsible for investigations and audits related to the functioning of a particular government department, and deal with the abuse of government power,

fraud, and mismanagement. They report both to the agency head and to Congress, a dual reporting obligation that preserves independence and integrity. There are now fifty-seven statutory IGs. The work of intelligence agency IGs, however, often remains classified, thereby undermining accountability. The Project on Government Oversight has suggested worthwhile reforms for all government inspectors general. These include a more professionalized selection process, dedicated legal staff, an office term of more than four years to secure independence from a given Administration, budgetary reporting directly to Congress, and better pay.

XI. REFORM THE OFFICE OF LEGAL COUNSEL

Congress should legislate to strengthen the independence of the Office of Legal Counsel (OLC) by insulating it from improper White House influence. It also should legislate to ensure maximum transparency for OLC opinions.

The Justice Department's OLC provides written and oral legal opinions to others in the executive branch, including the President, the Attorney General, and heads of departments. It stands at the front line of executive branch legal interpretation. It has played a central role in sanctioning the dangerous theory of monarchical executive power that has corroded the checks and balances of constitutional government. Congress should act today to guard against this deviation in the OLC's role, and also to promote that institution's transparency.

In legal opinions sanctioning torture, rendition, and warrantless surveillance, the OLC failed to check flagrant governmental disregard of the law. Rather than fulfilling its "special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers," the OLC fell into an "advocacy model," i.e. simply signing off on what the President wanted. As a distinguished group of OLC alumni have explained: "The advocacy model of lawyering, in which lawyers merely craft plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action." Optimally, the OLC provides "thorough and forthright" advice that "reflect[s] all legal constraints, including the constitutional authorities of the coordinate branches of the federal government – the courts and Congress – and constitutional limits on the exercise of governmental power."

Congress must address the OLC's institutional drift by strengthening its capacity to resist political pressures and to provide neutral and impartial advice that accounts for all relevant constitutional concerns. To implement this, Professor Neal Kumar Katyal has

suggested splitting the OLC into distinct adjudicative and advisory divisions. Judge Patricia Wald and Professor Neil Kinkopf argue that OLC should shift to a wholly "judicial model" that is distinct from the "advocacy model." Whatever the exact approach taken, the OLC's counseling function would be split from its duty to provide binding interpretations. To promote OLC independence in the latter task, Congress could require guidelines to ensure "appropriate executive branch respect for the coordinate branches of the federal government" and for individual constitutional and international human rights. Further, Congress could direct OLC to "seek the views of all affected agencies [as well as other] components of the Department of Justice before rendering final advice."

THE CHURCH COMMITTEE IS A MODEL FOR HOW COMPREHENSIVE OVERSIGHT CAN CLARIFY WHAT HAS GONE WRONG AND PROVIDE FORWARD-LOOKING GUIDANCE.

Further, Congress should require transparency to promote integrity in OLC work product. In Recommendation 3, we argued that past OLC opinions should be disclosed. Correlatively, Congress should also require as much transparency as possible for OLC opinions. To the maximum extent feasible, OLC opinions also should be made publicly available through an easily searchable public website. Congress should also require that "absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, [the OLC] should publicly release a clear statement explaining its deviation." Even when there is a clear situation-specific need for secrecy, the opinion should be released as soon as that situation ends. As Harvard Law Professor and former Director of the Justice Department's Criminal Division Philip Heymann has argued, making the "processes, opinions, and standards" of the department "more transparent" would also help restore the Justice Department's tarnished credibility.

XII. CREATE A NEW 'CHURCH COMMITTEE' TO CONDUCT A THOROUGH ACCOUNTING OF NATIONAL SECURITY POLICY AND ITS SYSTEMIC FLAWS

Congress should conduct a thorough diagnostic investigation of national security policy, looking in particular at the effects of the "monarchical prerogatives" theory of executive power and the consequent departures from American values and the harm thereby done to America's reputation. It should conduct this inquiry with an eye to crafting new oversight mechanisms, embodied in a comprehensive set of accountability legislation covering the national security state.

The White House has grasped new and unprecedented powers of coercion, surveillance, and detention. Intelligence agencies dismiss as absurd the idea that they might be held accountable for their failures

and self-dealing. Unbridled power is coupled with freedom from responsibility. This is not a sustainable situation – either in terms of liberty or security.

We have been here before: after the Watergate crisis and revelations of widespread abuse of surveillance powers during the Cold War, there was a clear need for a thorough examination of domestic and international intelligence agencies, and a carefully developed reform agenda. On January 27, 1975, the United States Senate created a Select Committee to investigate the intelligence agencies of the United States, including the FBI and the CIA. The Committee examined and documented how intelligence agencies in the executive branch, principally the FBI, the CIA, the NSA, and other intelligence components of the Defense Department, had violated the public trust with excessive and abusive surveillance, disruption of political activity at home, and overseas covert action. Its final reports contained the most comprehensive accounting of intelligence abuses ever produced. They also contained eighty-seven recommendations on "Foreign and Military Intelligence" and ninety-six on "Intelligence and the Rights of Americans." The Committee accomplished this without a single leak of classified information.

The Church Committee is a model for how comprehensive oversight can clarify what has gone wrong and provide forward-looking guidance. It demonstrates that bipartisan oversight is possible.

Today, Congress could achieve the same results via a committee of designated members of the Intelligence, Judiciary, and Homeland Security Committees. Or it could establish a Select Committee modeled on the Church Committee. Whatever the model, transparency should be maximized. The public should know as much as possible as soon as possible. A comprehensive and detailed public report should be released at the end of the inquiry. The committee should issue interim reports, as the 9/11 Commission did, and hold public hearings.

Like the Church Committee, a new investigation would make recommendations for changes to promote accountable, morally defensible, and sustainable national security policy. In particular, it would focus on clarifying the bounds of intelligence agency authority and on the precise path of chains of command and responsibility. As the Church Committee explained:

> Establishing a legal framework for agencies engaged in domestic security investigations is the most fundamental reform needed to end the long history of violating and ignoring the law …. The legal framework can be created by a two-stage process of enabling legislation and administrative regulations promulgated

> to implement the legislation. However, the Committee proposes that the Congress, in developing this mix of legislative and administrative charters, make clear to the [e]xecutive branch that it will not condone, and does not accept, any theory of inherent or implied authority to violate the Constitution, the proposed new charters, or any other statutes.

There is no reason to delay this investigation. The intelligence community is already reorganizing itself. Director of National Intelligence Mike McConnell recently won White House approval for a radical overhaul of the powers and relationships between intelligence agencies. In getting its house in order, the national security agencies have no justification for ignoring the checks and balances of constitutional governance, just as Congress has no excuse for abdicating its constitutional role by providing guidance as to those checks and balances.

CONCLUSION

The United States will have a large and powerful executive branch for the foreseeable future. But it needs to find effective ways to ensure that the powers of the presidency are used wisely and fairly. During the past six years, oversight of the executive branch, in particular its formidable national security powers, has withered. Now, as the public catalog of erroneous, harmful, and unwise policies grows, the case for comprehensive reform is undeniable and urgent. Bringing the checks and balances of constitutional government to national security policy need not involve an exchange of liberty for security. The two are not in tension. To establish accountability is to ensure that security powers are targeted correctly and wisely. It is to ensure that government officials do not claim victory when none is at hand, hide their mistakes, or turn security into a partisan game. The Framers knew well the temptation to ignore our own errors, to presume ourselves infallible, and to stifle evidence to the contrary. That is why they installed constitutional checks and balances to resist such natural and human tendencies. We have forgotten the Framers' wisdom. But if we are to prevail in the "war of ideas" at the heart of contemporary counterterrorism, if we are to convince others that America stands on solid moral ground, that the United States remains committed to the "inalienable rights" of all, then we must find our way back to Original Wisdom, and to a government that functions according to checks and balances. ■

CAMPAIGN FINANCE REFORM

A Testing Ground for Progress

Suzanne Novak, Bethany Foster, and Maneesh Sharma

In February, the Brennan Center releases a comprehensive report on Campaign Finance in Ohio, part of a five-state series examining campaign finance laws and the way they've worked—or haven't worked—to limit the influence of money on politics.

CAMPAIGN FINANCE REFORM: WHY DOES IT MATTER?

Campaign finance laws seek to make government more honest and accountable to ordinary people, so that bread-and-butter issues—such as education, taxes, and health care—are not held hostage to moneyed interests. By placing limits on the influence of money on elections, campaign finance laws make it easier for elected officials in Ohio to respond to their constituents' concerns, rather than those of wealthy political supporters.

While all voters are equal in the voting booth, all voters are not equal in their ability to influence elections and policy. In states with inadequately regulated campaign finance systems, only wealthy individuals and special interests can make the substantial political contributions and advertising expenditures that move public debate and affect electoral outcomes. And although a $5 contribution from a low-income constituent may represent a much greater commitment than a $10,000 contribution from a millionaire, the latter usually has more power to influence the outcome of the election and to secure access to the candidate, once elected to office.

Suppose, for example, that the coal industry wants the Ohio legislature to reduce corporate taxes. If contributions from that industry, its executives, and its lobbyists represent a large proportion of a candidate's campaign funds, that candidate may risk her political future if she resists industry pressure. She may find it hard to keep a promise to deliver tax relief for the middle class if small donations from moderate-income supporters cannot compensate for the loss of corporate largesse. The temptation to support industry rather than relieve ordinary taxpayers will be even greater if there is no way for the public to learn exactly who is financing the candidate's campaign and to connect the dots between corporate contributions and corporate tax breaks.

When wooing wealthy supporters is the key to political success, honest government is difficult to sustain. Although many candidates and officeholders are people of high integrity, political corruption is a chronic problem. Money has been at the heart of political scandals throughout American history, from Teapot Dome to the indictment of Jack Abramoff. Recent scandals in the states have also involved campaign contributions made in exchange for political favors.

WHEN WOOING WEALTHY SUPPORTERS IS THE KEY TO POLITICAL SUCCESS, HONEST GOVERNMENT IS DIFFICULT TO SUSTAIN.

Combating corruption is crucial to ensuring that the government's policies on everything from the economy to the environment serve the public interest, not special interests.

Campaign finance laws can have other benefits as well. Public funding helps to ensure that whether a citizen can run for public office and conduct an effective campaign is determined more by the force of his ideas in the public arena than by his personal fortune or access to wealthy supporters. Such laws also free candidates and government officials from the rigors of fundraising so they can spend more time listening to their constituents and formulating the best policies for the State. Regulations that reduce this influence of money help voters hold their representatives accountable for policy-making that serves the common good.

HOW DO CAMPAIGN FINANCE LAWS PROMOTE HONEST GOVERNMENT?

One of the most important and least controversial elements of campaign finance law is a requirement that certain political contributions and expenditures be reported to regulatory agencies for disclosure to the public. Reports of the sources and amounts of contributions to candidates from lobbyists, political action committees, and others give the public clues to the candidates' likely political leanings on key issues and flag the interest groups to which the candidates are likely to be responsive. Voters may also glean such information from reports of large independent expenditures made in support of or opposition to candidates. The objective information in the official reports can provide a badly needed supplement to campaign advertising, especially if the reported information is easily accessible to the media and interested citizens in searchable, web-based databases. With more information, voters are better able to choose candidates who share their values and to hold politicians accountable for failures to represent their constituents' interests. Reporting requirements open contributions and expenditures to public scrutiny, making it easier to detect exchanges of political favors for political donations.

Contribution limits also help to protect governmental integrity. A large donation presents a much greater temptation to stray from

campaign promises than a small contribution. Limiting the potential benefits of corruption may help to keep candidates and elected officials honest. Public financing also helps in this respect, by ensuring that candidates will be able to run effective campaigns without becoming beholden to private donors.

Of course, none of the campaign finance tools will keep government honest without consistent and vigorous enforcement of the law. If candidates and contributors know that they can break campaign finance rules with impunity, they will have no incentive to follow legal requirements. An agency that is able and willing to enforce the law without regard to the partisanship of any candidate is essential to protecting the integrity of government.

HOW DO CAMPAIGN FINANCE LAWS KEEP OFFICIALS RESPONSIVE AND ACCOUNTABLE?

A variety of campaign finance measures can be crafted to ensure that elected representatives are accountable to their constituents, not wealthy interests. Disclosure requirements identify candidates' financial supporters and allow voters to call elected officials to account if the policies they enact bear a suspiciously close resemblance to the policies favored by special interest contributors.

Contribution limits of various kinds also promote accountability. Limits on the size of contributions to candidates, and of contributions to entities (such as political action committees or political parties) that may serve as conduits to candidates, reduce the potential influence of particular wealthy donors on particular cash-hungry candidates. Aggregate limits on contributions may prevent such donors from purchasing influence by spreading largesse across entire legislatures. Low contribution limits also encourage candidates to reach out to a broader base of supporters, including low- and moderate-income constituents. A candidate who needs widespread support from ordinary people is more likely to respond to their needs.

In addition, generous public funding systems break the ties between access to wealth and electoral success, allowing candidates to respond to the full spectrum of voters. Arizona Governor Janet Napolitano, twice elected under Arizona's full public financing program, has explained how public financing was connected to her executive order creating a discount prescription drug program for the people of Arizona:

> If I had not run [under the public funding program], I would surely have been paid visits by numerous campaign contributors representing pharmaceutical interests and the like, urging me either to shelve that idea or to create it in their image. . . All the

while, they would be wielding the implied threat to yank their support and shop for an opponent in four years.

With public financing in place, government officials need not worry that honoring campaign promises popular with ordinary voters will translate to a lack of funds for their next campaign. Public financing programs, which provide partial or full grants for a candidate's campaign in exchange for limited spending, also permit candidates and officeholders to spend time on tasks more valuable than fundraising, such as studying and attempting to find the solutions to public policy problems and listening and responding to the concerns of ordinary citizens. Moreover, many qualified, dedicated individuals will not run for office if doing so forces them to dial for dollars all day. By lifting that burden, public funding encourages public service by people who care about constituents, not contributors.

Finally, public funding opens doors to public service for individuals of modest means who cannot self-finance their candidacies and do not have wealthy friends to bankroll their campaigns. For example, Deborah Simpson, now in her fourth term in the Maine State Legislature, was a politically active single mother and waitress, who never considered running for office before Maine implemented public financing for its elections beginning in 2000. But she realized that with public funding she could run for office "without having to figure out how to ask for money from donors when [she] really didn't live in that world." Because the public holds the campaign purse-strings, Rep. Simpson's constituents can keep her accountable for her legislative record and turn her out of office if she fails to respond to public needs. ■

We Need Campaign Finance Reform

Michael Waldman and Bethany Foster

New York's Governor Elliot Spitzer proposes campaign finance reform laws in May, 2007. Michael Waldman and Bethany Foster take a critical look at the arguments made against the Governor's proposals.

New York State has some of the weakest campaign finance laws in the nation. Gov. Elliot Spitzer recently proposed a plan that would close loopholes in the law, strengthen enforcement and lower New York's sky high contribution limits. His plan is a good first step.

Whenever campaign reform is suggested, incumbents panic, flinging argument after argument to discredit any changes. New Yorkers are now being treated to one of the oldest, and more misguided, pleas against reform: that it somehow will help incumbents and rich people.

"The governor's proposals would favor the wealthy and be an elitist kind of approach," Senate Majority Leader Joseph Bruno (R-Brunswick) said in a recent statement.

Joseph Mondell, chairman of the Republican State Committee, invoked the spirit of Teddy Roosevelt, opining that Spitzer's proposal has probably offended the former president "who took on the rich and powerful to enact reforms that improved the quality of life enjoyed by average, hard-working Americans."

Even Assembly speaker Sheldon Silver (D-Manhattan), despite his statement of support for Spitzer's proposal, has complained that lowering contribution limits could give wealthy candidates a leg up. "What's compounded a lot of the issues to my members," Silver said, "is the sudden emergence of very wealthy people as governors and mayors and candidates."

Let's be serious: If the proposed reforms really benefited incumbents and the wealthy, they would have been enacted long ago. In fact, the current proposal does just the opposite.

The governor's plan would reduce the amount of money a candidate could collect from a campaign contributor by 25 percent – with the smaller reductions slated for contributions to candidate for the State Senate and Assembly. As it stands, an individual can contribute up to $55,800 to a candidate for statewide office, if he or she runs in both a primary and general election. Spitzer would cap individual and political action committee contributions to statewide candidates at $15,000, State Senate candidates at $11, 500, and Assembly candidates at $4,600.

Bruno's and Mondello's argument against Spitzer's modest limits basically boils down to this: Politicians need to be permitted to continue to raise huge sums from special interests so that they are able to mount a

This piece was originally published in Newsday *on May 9, 2007.*

defense against a theoretical millionaire billionaire spending his or her own money to run against them.

Bruno and Co. are right on one count. We should be concerned about the impact on democracy of wealthy "self-financed" candidates buying elections. But a provision in Spitzer's plan would keep a free-spending candidate from simply swamping his opponent. To stay competitive, any politician faced with an opponent who spends substantial sums of his own money would get to raise larger contributions than would otherwise be permissible.

WHEN LONGTIME INCUMBENTS SUDDENLY START SOUNDING LIKE WILLIAM JENNINGS BRYAN, WATCH YOUR WALLET.

That seems fair: For example, when Sen. Barack Obama (D-Ill.) was facing a millionaire opponent in his Senate race, he was allowed under federal campaign laws to raise money in bigger chunks than would otherwise have been permitted. Problem solved.

It is hardly plausible that the real reason Bruno opposes reform is because of his fear of free-spending opponents. How many millionaires are running in State Senate and Assembly races, and how many would realistically be lured into the race simply by the prospect of their opponents' inability to accept huge donations?

When longtime incumbents, especially conservatives, suddenly start sounding like William Jennings Bryan, watch your wallet. Fear of millionaires is not an argument against reform: it's an excuse.

As long as we allow private money to be contributed, prudent contribution limits are important. They make it harder for wealthy interests with legislative goals to influence policy through big gifts. They force candidates to widen their fundraising nets, bringing more people with diverse backgrounds into the political process. Our sitting legislators may not like competition, but they are not entitled to the almost 100 percent reelection rates that incumbents in New York currently enjoy.

Of course, the most important ultimate goal must be public financing of campaigns. That's the only real way to make sure that neither millionaires nor special interests dominate elections. Spitzer has made clear that, after the current loopholes are plugged, he will turn to broader reform. In the meantime, these contribution limits are vital.

Four decades ago, New York Sen. Robert F. Kennedy warned, "We are in danger of creating a situation in which our candidates must be chosen from among the rich… or those willing to be beholden to others." We are perilously closer to that moment. Spitzer's proposal won't worsen the problem. Rather, it's a key part of the solution. ■

ACCESS TO JUSTICE

Opening the Courthouse Door

David Udell and Rebekah Diller

Increasing numbers of Americans are closed out of the justice system. The Brennan Center proposes a way to close the nation's growing justice gap.

Our nation's promise of "equal justice for all" is among its proudest traditions. American courts promise a forum for individuals to settle disputes in a civil manner, under the rule of law. Courts are supposed to ensure predictability so that individuals and businesses can tailor their actions accordingly; contracts, for example, are binding because courts exist to enforce them. In our tripartite system of government, courts act as a check on the ability of the legislative and executive branches to accumulate excessive power. They protect the most vulnerable among us and curb the excesses of majoritarianism. Finally, courts reaffirm the citizenry's faith in the equal application of the laws and thus in the legitimacy of government in general.

To be sure, resort to the courts is not always a desirable end. Anyone who has ever been involved in litigation is aware of its limitations—the expense, the complexity, the delay, and the ways in which human concerns can be filtered out of the process. Yet, the opportunity to resolve disputes within a court pursuant to the rule of law remains essential in a broad range of matters involving the concerns of low-income individuals. Just as a person with substantial means would never dream of buying a home or seeking a divorce without consulting a lawyer, persons of modest means likewise enter into life-altering transactions for which consultation with counsel is essential. For people of limited financial means, access to an attorney can be the difference between losing a home or keeping it, suffering from domestic violence or finding refuge, languishing in prison or reuniting with family and community. And as decisions related to the War on Terror have demonstrated yet again, the courts can and do function as an essential bulwark of liberty—affording those accused of the worst crimes their only opportunity to establish their innocence and acting as a check on overreaching by the executive branch.

In order for "equal justice for all" to be more than a hollow promise, people require access to the courts that is meaningful, with representation by qualified counsel, the opportunity to physically enter the court and to understand and to participate in the proceedings, and the assurance that their claims will be heard by a fair and capable decision-maker and decided pursuant to the rule of law. In this

white paper, we describe how these features of meaningful access to the courts are increasingly absent. We conclude by offering a series of proposals to bridge the gap between the lofty promise of equal justice and the often disappointing reality of justice on the ground.

I. MOST LOW-INCOME INDIVIDUALS CANNOT OBTAIN COUNSEL TO REPRESENT THEM IN CIVIL MATTERS

Nearly three decades ago, President Jimmy Carter observed: "Ninety percent of our lawyers serve ten percent of our people. We are over-lawyered and underrepresented." Concern for equal justice is shared across the political spectrum. In 1995, Senator Peter Domenici (R-NM) declared on the Senate floor, "I do not know what is wrong with the United States of America saying to the needy people of this country that the judicial system is not only for the rich. What is wrong with that? . . . That is what America is all about." A decade later, the National Association of Evangelicals, the nation's largest association of evangelical Christians, echoed these concerns in a letter to several congressional leaders: "Without a helping hand from legal aid programs and the shared blessings of others, low-income families too often have no place else to turn for help. . . . God measures societies by how they treat the people at the bottom, and He teaches us to care for the poor and oppressed among us."

AS A RESULT OF MONEY SHORTFALLS, LSC TURNED AWAY AT LEAST ONE PERSON SEEKING HELP FOR EACH PERSON SERVED, MEANING ONE MILLON CASES ARE TURNED AWAY EACH YEAR.

Yet notwithstanding widespread acknowledgment of the problem, the crisis of representation for low-income people in civil cases persists, and grows worse, because of chronic funding shortages, state and federal restrictions, shortfalls in pro bono help, and a rollback of financial incentives for attorneys in private practice to bring critical cases.

The major source of funding in the United States for legal aid in civil matters is the federal Legal Services Corporation (LSC), established by federal law in 1974. The value in real dollars of the funding appropriated by Congress to LSC has declined dramatically over the last twenty-five years. In fiscal year 1981, Congress allocated $321.3 million to LSC, which at the time was seen as the level sufficient to provide a minimum level of access to legal aid in every county, although not enough to actually meet all the serious legal needs of low-income people. Adjusted for inflation this "minimum access" level of funding would need to be about $687.1 million in 2005 dollars; yet Congress's LSC allocation for fiscal 2007 was a mere $348.5 million. On average, every legal aid attorney, funded by LSC and other sources, serves 6861 people. In contrast, there is one private attorney for every 525 people in the general population.

The dramatic nature of the funding shortfall becomes even more

apparent when U.S. legal aid funding is compared to that of other industrial democracies, many of which spend at least twice as much per capita on legal aid, if not more. For example, during fiscal year 1998, combined federal, state, and local government funding for civil legal services for the poor in the United States was $600 million, or $2.25 per capita. In contrast, England spends eleven times as much per capita on civil legal services, at $26.00 per person; the Netherlands spends four times as much, at $9.70 per person; and Germany and France spend at least twice as much, at $4.86 and $4.50 per person, respectively.

As a result of money shortfalls, in 2004 LSC-funded programs turned away at least one person seeking help for each person served. This means that approximately one million cases per year are turned away due to lack of funding. As striking as these figures are, they understate the real number of low-income people who go unserved because they do not include those who do not seek out help, those who were turned away from non-LSC-funded legal aid providers, or those who received limited advice but required full representation.

In addition to these consequences of funding shortages, the ability of legal aid programs to serve the poor is further impeded by harsh and wasteful federal restrictions imposed by Congress in 1996. These restrictions cut deeply into low-income people's capacity to secure meaningful access to the courts. First, Congress restricted the legal tools that LSC-funded lawyers could use to represent their clients, prohibiting them from: representing clients in bringing class actions; seeking court-ordered attorneys' fee awards; educating potential clients about their rights and then offering to represent them; and communicating with policymakers or legislators on a client's behalf, except under very narrow circumstances.

Second, Congress limited the categories of clients whom LSC-funded programs could represent, prohibiting representation of certain categories of legal immigrants as well as all undocumented immigrants, people in prison, and those charged with illegal drug possession in public housing eviction proceedings.

Finally, Congress imposed an extraordinarily harsh and largely unprecedented limitation on LSC-funded programs: it extended these prohibitions to the non-LSC-funded activities of legal aid programs. As a result, nearly $390 million in state, local, and private funding for legal aid is restricted under the same terms as the LSC funds. Faced with a court ruling that such a sweeping restriction on private funds violates the First Amendment, LSC issued a regulation that theoretically provides an opportunity for non-profits receiving LSC funds to spend their private money free of these substantive restric-

tions. Under LSC's "program integrity" regulation, the only way a legal aid non-profit and its private donors may free themselves of the federal restrictions is to divert private funds from direct client service in order to establish a separate program—with physically separate staff, offices, and equipment. However, this physical separation requirement is so burdensome and wasteful that virtually no program in the country has been able to comply.

Apart from the restrictions and funding shortages, the reach of LSC-funded programs is inherently limited by their mandate to serve those in the most dire need. To be eligible for assistance from LSC recipient programs, clients must earn less than 125% of the Federal Poverty Guidelines. In real terms, a family of four living in the forty-eight contiguous states with a household income that exceeds $25,000 is ineligible for assistance from LSC-funded programs. Asset ceilings also apply.

Thus, many working poor and middle-income families find themselves in a bind when they have a legal problem. A study commissioned by the American Bar Association (ABA) and issued in 1994 found that about one-half of moderate-income households at any given time face a problem that could be addressed by the courts. However, with the exception of family law matters such as divorce, the usual course of action for such households was to try to handle the situation on their own, without a lawyer. Middle-income families also lack one of the advantages businesses have in being able to afford lawyers: while legal fees are tax deductible when incurred as a business expense, they are not when incurred for personal reasons.

Pro bono—free or reduced-fee legal assistance by private law firms—provides some relief. Yet notwithstanding the considerable resources of major law firms and the sheer number of attorneys in the United States, pro bono practice falls far short of meeting the legal needs of America's low- and middle-income families. Pro bono participation is quite low. The average attorney donates less than a half-hour per week to pro bono service, and financial contributions average less than fifty cents per day. Less than one-third of the nation's major law firms meet the ABA's pro bono challenge of donating three to five percent of total revenues. Moreover, a substantial proportion of pro bono service is done for family or friends, not for low-income communities. Fewer than one in ten attorneys accepts referrals from legal services programs or other organizations that serve the legal needs of low-income communities.

The shortage of legal assistance that results from all these factors can have devastating consequences for low-income people. Perhaps nowhere can the impact of legal assistance be seen more dramatically than in the context of domestic violence cases. Take, for example,

the case of Mariella Batista, a Cuban immigrant who had suffered for years from domestic violence by an abusive partner. Ten years ago, Batista sought help from a local legal services program. Even though she feared for her life, the program had to turn her away due to the 1996 LSC restriction that prohibited representation of most immigrants. The next week, Batista was killed by her abuser outside the family court building.

Although Congress has since amended the LSC restrictions to allow for representation of domestic violence victims regardless of immigration status, the lesson persists: denial of access to a lawyer can have tragic consequences. In contrast, when legal services are made available, survivors of domestic violence have assistance obtaining protective orders, custody of their children, child support, and sometimes public assistance. Legal services programs help women achieve physical safety and financial security and thus empower them to leave their abusers. In fact, one recent study found that access to legal services was one of the primary factors contributing to a twenty-one percent decrease nationally in the reported incidence of domestic violence between 1993 and 1998.

The consequences of inadequate access to the courts affect not just the individuals directly involved, but also society at large. When families are evicted from their homes because they cannot obtain counsel in a housing proceeding, for example, their resultant homelessness costs taxpayers in the form of public services. In New York City, the average cost of sheltering a single homeless adult is $23,000 annually—far more than providing counsel to prevent an eviction. Medical and other costs rise, too, when individuals, particularly senior citizens, lose their homes because they lack access to a lawyer. When victims of domestic violence are unable to obtain help, the health care, criminal justice, and social welfare systems bear the strain. Employers, too, suffer from decreased productivity and increased absenteeism. Many of these societal costs could be ameliorated if low-income individuals had access to counsel to assist them in resolving their legal problems.

II. THE PROMISE OF *GIDEON V. WAINWRIGHT*—LEGAL REPRESENTATION FOR LOW-INCOME PERSONS IN CRIMINAL MATTERS—IS LARGELY UNFULFILLED

In the 1963 landmark case of *Gideon v. Wainwright*, the Supreme Court established that indigent criminal defendants have the right to an attorney, under the Sixth and Fourteenth Amendments to the Constitution, regardless of their ability to pay. Yet notwithstanding the promise of *Gideon*, more than forty years later the criminal

justice system in many states is largely broken due to inadequate funding of indigent defense services, crushing caseloads, and a lack of oversight, supervision, and training of court-appointed defense counsel.

In 2003, in recognition of the fortieth anniversary of the *Gideon* decision, the ABA conducted four hearings across the country over the course of a year to examine the quality and consequences of indigent defense services in the nation. The ABA received testimony from a broad range of experts, documenting a stunning array of obstacles to enforcement of the *Gideon* right. The ABA's investigation culminated in publication of a report in 2004 titled *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*. Among the obstacles identified by the experts were the following:

• **The lack of adequate funding for indigent defense services**, leading to inadequate attorney compensation; lack of essential resources (including expert, investigative, and support services); lack of training; reliance on various cost cutting measures; and resource disparity between prosecution and indigent defense.

• **"Inadequate legal representation,"** including "meet 'em and plead 'em" lawyers; incompetent and inexperienced lawyers; excessive caseloads; lack of contact between defense counsel and clients (and lack of continuity in representation of clients); lack of investigation, research, and zealous advocacy by defense counsel; lack of conflict-free representation; and other ethical violations by defense counsel.

• **"Structural defects in indigent defense systems,"** including insufficient independence of counsel from courts and prosecutors and an absence of oversight sufficient to ensure the provision of uni form, quality legal services.

• **Complete failure to provide counsel to those entitled to counsel:** people detained in jail without a lawyer; people encouraged to waive their right to counsel and enter pleas of guilty; and counsel provided too late or not at all.

• **A diverse range of additional problems**, including inordinate delays in the criminal justice process; a lack of full-time public defenders and of participation by the private bar; and a lack of data regarding indigent defense systems.

Problems virtually identical to those identified in the ABA report have been the subject of numerous reports in many jurisdictions across the country, extending back decades in time. Most recently, the Chief Judge of the State of New York, Judith S. Kaye, appointed a blue ribbon commission that, after receiving testimony in a series

of hearings, called for substantial reform of the defense services provided in New York State. As described in *The New York Times*, the commission identified "such problems as overburdened defenders who, in one county, average 1,000 misdemeanors and 175 felony cases in a year, and 'grossly inadequate' financing." The Commission further described "wide disparities in counties' spending and in the resources available to prosecutors and defenders," and noted that "[t]he state lacks standards to define what it means to provide adequate indigent defense and has no system for enforcing such standards."

The ABA report explains that inadequate defense lawyering is a cause of wrongful convictions: "Although there undoubtedly are a variety of causes of wrongful convictions—including police and prosecutorial misconduct, coerced false confessions, eyewitness identification errors, lying informants—inadequate representation often is cited as a significant contributing factor." The report further quotes former Attorney General Janet Reno stating that,

> [a] competent lawyer will skillfully cross-examine a witness and identify and disclose a lie or a mistake. A competent lawyer will pursue weaknesses in the prosecutor's case, both to test the basis for the prosecution and to challenge the prosecutor's ability to meet the standard of proof beyond a reasonable doubt.
>
> A competent lawyer will force a prosecutor to take a hard, hard look at the gaps in the evidence. . . .
>
> A competent lawyer will know how to conduct the necessary investigation so that an innocent defendant is not convicted . . . . . .
>
> In the end, a good lawyer is the best defense against wrongful conviction . . . .

The problem of wrongful convictions cannot be ignored. As of December 2006, the Innocence Project, a legal clinic at the Benjamin N. Cardozo School of Law, had identified 188 persons as having been wrongfully convicted of crimes, and of having served more than 1000 years in prison as a result. The discovery of additional wrongful convictions has become an almost daily occurrence.

One example is Eddie Joe Lloyd, a mentally ill Michigan man who was convicted of the 1984 rape and murder of a teenage girl. While residing in a psychiatric hospital, Lloyd, who suffered from paranoid schizophrenia and mild retardation, contacted police and made suggestions on how to solve this case and others. The police interrogated Lloyd and told him that, if he confessed to the murder, he woul help

them "smoke out" the real murderer. Lloyd then confessed to the crime in horrific detail by recounting facts fed to him by the police. Lloyd's court-appointed attorney failed to challenge the coerced confession in court. As a result, Lloyd spent seventeen years in prison before being exonerated by DNA evidence. Tragically, he died two years after his release from prison.

When access to counsel in the criminal justice system is inadequate, society suffers as well. Convicting Eddie Joe Lloyd and others of crimes they did not commit enables the real perpetrators to remain at large. Moreover, taxpayers must foot the bill for lengthy appeals processes and the high costs associated with unnecessary and excessive incarceration.

Against a backdrop of rampant noncompliance with *Gideon* and the attendant costs and consequences, it is encouraging to note that there are some signs of real change. Across the country, reform initiatives are beginning to hold states accountable under *Gideon*. The ABA report cites examples of successful initiatives in Georgia, Texas, and Virginia that have led to the creation of new statewide defender systems with increased state funding and state oversight. Additional reform efforts succeeded in Montana in 2005 and are underway in Louisiana, Michigan, New York, and Pennsylvania.

III. COURTS OFTEN ARE UNABLE TO PROVIDE ACCESS TO PEOPLE WITH PHYSICAL AND PSYCHIATRIC DISABILITIES

If the courts are to fulfill their essential role of protecting the most vulnerable people in our society, then the most vulnerable people must be able to get into court. People with physical and psychological impairments face unique challenges when attempting to vindicate their rights in court. Although the federal Americans with Disabilities Act (ADA) aims to eradicate disability-based discrimination in a variety of settings, one threshold question is whether the courts themselves are sufficiently accessible to enable individuals with disabilities to enter courthouses and to participate in court proceedings.

Noncompliance with the ADA in state judicial systems has been widely documented. Surveys have found inaccessible courtrooms in California, Washington, Texas, New York, Tennessee, Missouri, and Florida. And, in some jurisdictions, inaccessible courtrooms are the norm.

IV. COURTS OFTEN DO NOT PROVIDE TRANSLATION AND INTERPRETING SERVICES TO PEOPLE WHO HAVE A LIMITED ABILITY TO SPEAK AND UNDERSTAND ENGLISH

There is another particularly vulnerable segment of society—those people with limited proficiency in English (often known as LEP individuals)—that is frequently confronted with virtually insurmountable obstacles to accessing the courts. LEP individuals often are unable to communicate with court personnel, to conduct legal research, to read their opponents' legal papers, and to understand and participate in court proceedings.

A recent California study found that "courtroom language services [i.e. interpreters] are virtually unavailable to many Californians." Most court documents, such as standard pleadings, legal opinions, and self-help materials, are written in English only, making them incomprehensible to LEP individuals.

In California alone, there are seven million people who cannot access the courts without language assistance. The practical consequences for the court system are enormous. In Los Angeles County, approximately 10,000 proceedings each year are postponed because there is no interpreter available. These problems are particularly acute in rural areas, where often there is no certified interpreter available to speak the necessary language. When no interpreter can be found at all, judges must attempt to reach a fair and accurate decision knowing that they cannot communicate with one or more of the litigants. For this reason, the Judicial Council of California recently called the participation of interpreters in domestic violence proceedings "a fundamental factor contributing to the quality of justice."

IN LOS ANGELES COUNTY, APPROXIMATELY 10,000 COURT PROCEEDINGS EACH YEAR ARE POSTPONED BECAUSE THERE IS NO INTERPRETER AVAILABLE.

These problems generally stem from the courts' inadequate resources. Although the California Access to Justice Commission reported in 2005 that many litigants in California's court are forced to proceed without necessary interpreters, in 2006 California Governor Arnold Schwarzenegger vetoed a bill that would have allocated $10 million for interpreter services in the courts. The complicated logistics of providing language access contributes to the problem. In New York State alone, litigants speak 168 different languages and many more dialects. Courts must ensure that the interpreters appearing in their courts are competent. Court interpreters must be proficient not only in the two languages they are translating between, but also in the legal terminology of each language. Unfortunately, in many instances, even when court interpreters are available they lack the requisite proficiency and provide incorrect translations.

V. RECENT LEGISLATION AND COURT DECISIONS HAVE MADE COURTS LESS AVAILABLE THAN EVER TO HEAR CERTAIN CATEGORY CASES

The last two decades have witnessed a substantial narrowing of the scope of the courts' authority to enforce laws when individual litigants raise claims of unlawful conduct by the government. The effects of this eroded jurisdiction are widespread and long lasting. Principles and expectations are established that can affect the development of the law in related areas for years to come.

Some of the retrenchment is a product of the Supreme Court's own decisions. Under the banner of the so-called "new federalism," the Court has declared that the federal government lacks sufficient constitutional power to authorize some suits against the states for civil rights violations. These decisions have limited the ability of the disabled and senior citizens to seek redress against state employers for discrimination and provide a rationale that more broadly threatens the continued enforcement of federal civil rights against the states. Other Supreme Court decisions have ruled that individuals may not bring claims to enforce civil rights either because the statute did not explicitly authorize such a claim or because such claims were not sufficiently related to Congress's constitutional power to regulate interstate commerce.

Other limitations result from actions of the executive or legislative branches. In several contexts, the executive or legislative branches have stripped courts of the power to hear claims: the War on Terror and limitations on immigrants' access to the courts among them. The ultimate effects of these limitations reach further than the immigrants and terror suspects directly affected. The judicial branch is charged with protecting the most vulnerable in our society who often cannot assert their rights through the political process. Consequently, the weakening of the Judiciary through the War on Terror and the assault on immigrants' rights threatens not only the direct targets of each action, but also everyone who turns to the Judiciary to protect their rights when the political process fails to do so.

VI. THE INCREASED RELIANCE ON ALTERNATIVE DISPUTE RESOLUTION METHODS RAISES NEW CONCERNS

The courts need not be understood as the exclusive forum for the enforcement of laws or resolution of disputes. Litigation can be prohibitively expensive, complex, and time-consuming. Presumably, there could and should be less expensive, faster, and no less fair

systems for resolving disputes pursuant to the rule of law. At the very least, there is a need to simplify litigation. Alternative dispute resolution systems, such as mediation and arbitration, appear to offer one such opportunity.

In fact, courts offer litigants the opportunity to participate in mediation proceedings as an option prior to proceeding with full litigation, and some also offer binding arbitration as an alternative to litigation. But the private nature of these proceedings, compared to litigation which is public in nature and creates a public record, has generated concern. Decisions are made without the sanitizing effects of public scrutiny. Moreover, the law itself, which in the normal course would evolve to reflect the decisions made in litigation, does not have opportunity to change and develop in response to outcomes and insights developed off the record.

Distinct from these court-affiliated alternatives to litigation is the increased inclusion of binding arbitration clauses—promises made by individuals that they will not sue in court but rather submit any dispute for resolution by a private arbitration organization—in a broad range of contracts. In many contexts, including consumer contracts and employment agreements, binding arbitration clauses prohibit recourse to the courts.

Such arbitration requirements have been shown to be problematic for a variety of reasons. First, low-income people typically have little negotiating leverage when entering into agreements with employers, credit card companies, and many other entities. They cannot realistically expect to alter the terms of such clauses or decline to agree to them. Second, the substantial administrative costs of arbitration processes may and generally do exceed those of the civil court system. Third, arbitration agreements increasingly include mandatory collective action waivers. These provisions prohibit individuals from joining forces to advance their claims together through class action litigation, even though such collective action sometimes offers the best and most efficient option for recovery (particularly if the sum due is not so substantial as to induce any individual to proceed alone). Fourth, in many contexts, arbitrators have been show to develop a bias in favor of so-called repeat players. Finally, as noted above, arbitration clauses are designed to preclude appeal to the courts.

When binding arbitration agreements lead to unjust results, there is little opportunity to set them aside. Under the Supreme Court's interpretation of the Federal Arbitration Act, the scope of a court's review of such agreements is generally restricted to the narrow question of whether the arbitration provision itself, as contrasted with the broader substantive contract terms, was obtained by fraud, duress,

or unconscionability. This is an extremely high threshold for a party seeking court review to meet.

RECOMMENDATIONS

To stabilize our courts, assure their independence, and secure meaningful access so that all the members of our society can resolve their critical legal needs, a commitment is required by all of us. Inadequate access to the courts harms the court system itself and the citizenry's respect for the rule of law. When segments of the public believe that the courts are unfair to the poor, or that the courts treat communities of color with hostility, the courts lose legitimacy. Not only do courts suffer as institutions, but the nation's promise of "equal justice for all" is broken. As the Supreme Court has stated, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." ■

Justice at Stake

James Sample, Lauren Jones, and Rachel Weiss

Increasingly, economic interests pour millions of dollars into election campaigns for (or against) the very judges who will rule on their cases. This flood of funds threatens judicial impartiality.

Special interest pressure is metastasizing into a permanent national campaign against impartial justice: High court elections featured broadcast television advertisements in more than 91 percent of states with contested campaigns, median candidate fundraising hit an all-time high, special interests began to pour money into lower court campaigns, and pushy questionnaires sought to make judges accountable to special interests instead of the law and the Constitution. Defenders of fair and impartial courts are fighting back. More states are considering reforms to insulate their courts from special-interest excesses by reforming their judicial elections or advancing proposals to scrap them entirely.

Many of America's judges used the 2006 campaigns to stand up to special interest bullying tactics. Civic and legal organizations are stepping up their efforts to educate Americans about the threat to impartial justice. And when Americans understand the threat, they want to protect the courts that protect their rights: A series of ballot measures that sought to politicize the courts all met defeat at the hands of voters.

TV ADS CONTINUE TO DOMINATE STATE SUPREME COURT RACES

TV Ads Appear in 10 of 11 States. In 2006 television advertisements ran in 10 of 11 states with contested Supreme Court elections, compared to four of 18 states in 2000.

Average State Spending on TV Ads Sets Record. In 2006 average spending on TV airtime per state surpassed $1.6 million, up from $1.5 million two years ago.

Television Advertising in Primary Elections is Increasingly the Norm. In 2006 television ads appeared during primary elections in seven

This piece is excerpted from the The New Politics of Judicial Elections, *authored with Rachel Weiss of the National Institute of Money in State Politics and released in May 2007.*

of the 10 states in which advertising occurred. Nearly one third of all spots throughout the campaign cycle were in primary campaigns, totaling more than $4.6 million.

Pro-Business Groups Dominate the Airwaves. Business and pro-Republican television advertisements dominated the airwaves in 2006. Pro-business groups were responsible for more than 90 percent of all spending on special interest television advertisements.

Candidates Go Negative. In 2006 the candidates themselves went on the attack, sponsoring 60 percent of all negative ads; two years earlier, they had sponsored only 10 percent of the attack ads, leaving the dirty work to interest groups and political parties.

Candidates Return to Traditional Themes—Sometimes. Slightly more than half of all television ads in 2006 had traditional themes—that is, they focused on the candidate's qualifications, experience or temperament.

Changing Channels? The Power of Television Advertising Drops in 2006. The candidate with the most on-air support won 67 percent of the time, a modest drop from 85 percent in 2004.

THE JUDICIAL MONEY CHASE SPREADS TO MORE STATES

2006 Brings the Priciest Race Ever to Five States. Of the 10 states that had entirely privately financed contested Supreme Court campaigns in 2006, five set fundraising records. Candidates in Alabama combined to raise $13.4 million, smashing the previous state record by more than a million dollars.

Business Interests Donate Twice as Much as Lawyers. Donors from the business community gave $15.3 million to high court candidates—more than twice the $7.4 million given by attorneys.

Interest Groups Bring Their Checkbooks. Third-party interest groups pumped at least $8.5 million more into independent expenditure campaigns to support or oppose their candidates. About $2.7 million of that was spent in Washington state alone.

Big Money No Longer Guarantees Success at the Ballot Box. In 2006 the candidate raising more money won 68 percent of the time, down from 85 percent in 2004.

Watch Out Below! Big Money Seeps Down-Ballot. Trial lawyers and corporate interests in a southern Illinois race combined to give more than $3.3 million to two candidates for a seat on the state court of

appeals, quadrupling the state record. Madison County witnessed a $500,000 trial court campaign, and a Missouri trial court judge was defeated after an out-of-state group poured $175,000 into a campaign to defeat him.

WHEN JUDICIAL CANDIDATES SPEAK OUT, WHO WINS?

Interest Groups Ratchet Up High-Pressure Questionnaires—But Many Judges Refuse to Play Along. Special interests tried to pressure candidates into making statements on the campaign trail that could appear to bias the judges before they take their seats on the bench. A backlash is underway, with many judges and judicial candidates refusing to be trapped by special interest questionnaires.

When Judicial Candidates Speak Out, Who Wins? In 2006 judicial candidates who sought to put disputed political and legal issues at the center of their candidacy lost more often than they won. In state after state, when judicial campaigns began to sound like politics as usual, many voters seemed wary.

GROWING INTEREST IN REFORMS TO KEEP COURTS FAIR AND IMPARTIAL

SPECIAL INTERESTS TRIED TO PRESSURE CANDIDATES INTO MAKING STATEMENTS ON THE CAMPAIGN TRAIL THAT COULD APPEAR TO BIAS JUDGES BEFORE THEY TAKE THEIR SEATS ON THE BENCH.

Public Financing of Judicial Campaigns. North Carolina's innovative approach to public campaign financing has been a success, and in April 2007 New Mexico passed legislation to become the second state to offer full public financing.

Defense of Merit Selection. In states that use merit selection and retention elections to choose high court judges, two Justice at Stake partners—the Committee for Economic Development and the American Judicature Society—have helped lead the fight to preserve the systems from special-interest and partisan attacks.

Defining Proper Judicial Accountability. The Institute for the Advancement of the American Legal System at the University of Denver recently released two publications that provide the tools to establish or improve judicial performance standards and metrics. If voters have access to the output of a comprehensive and fair evaluation process, everyone wins. And when voters better understand their judges' records, special interests will have less clout to distort them.

Moving Towards Merit Selection. Former Minnesota Governor Al Quie recently led a policy review commission examining how to protect the state's courts from growing special interest pressure. In

early 2007, the "Quie Commission" released a report suggesting the state move to a modified "Missouri Plan" system of merit selection with retention elections.

Stronger Recusal Standards. In order to reduce the potential link between interest group pressure and case decisions, many observers believe that the time has come for judges to recuse themselves from at least some cases where contributors argue before them in court—or when campaign trail speech calls their impartiality into question.

VOTERS REJECT POLITICAL TAMPERING WITH COURTS

Colorado: *Amendment 40*. Two sides combined to spend over $2.5 million on a citizen ballot initiative that would have limited the number of terms that appellate judges can serve. The measure was defeated.

Hawaii: *Measure 3*. Voters rejected a constitutional amendment passed by the Democratic-controlled legislature to lift the mandatory retirement age of state judges in order to deny the Republican governor open slots to fill.

Montana: *Constitutional Initiative 98*. After a pervasive pattern of fraudulent signature gathering was found, a judicial recall measure was thrown off the Montana ballot.

Oregon: *Constitutional Amendment 40*. For the second time in four years, voters rejected a proposal to move from statewide to district-based judicial elections for their appellate courts.

South Dakota: *Amendment E*. By a landslide vote of 89-11, voters dealt a body blow to the "J.A.I.L. 4 Judges " movement that proposed to strip immunity from judges and other public officials. ■

Challenging the Patronage System

Frederick A. O. Schwarz, Jr.

New York's corrupt system for selecting trial court judges effectively allows party leaders, not voters, to pick judges. Lead counsel Fritz Schwarz successfully persuades a trial court and federal court of appeals to overturn the system. Nevertheless, in Lopez Torres v. NYS Board of Elections*, the U.S. Supreme Court disagrees. Two justices write emphatically that the law is, nonetheless, "stupid."*

This testimony concerns questions before the Legislature as a consequence of holdings that New York State's judicial convention system is unconstitutional.

Both the Second Circuit and the District Court repeatedly noted that the constitutional deficiency is not in the details of the convention system, but in its failure to give "the people," "rank and file members," "voters," "participants," their rightful role. The United States is the world's oldest constitutional democracy. Our nation has survived and succeeded on the principle that sovereignty resides in the People. The People exercise that sovereignty by voting.

On the facts, the Lopez Torres case was not even close. The convention system imposed so many different kinds of burdens that even the witnesses for the defense admiited that the system was designed to exclude voters from participating in the electoral process. Indeed, in reaching their decision that the convention system unconstitutionally denied voters their rights, both Courts relied on the admission of defendants' own expert that having individual candidates recruit delegates "is not the system and it twists the design of the system on its head."

Some proposals for enacting a new convention system were made before the Court decisions. Those proposals were not conceived with the idea of bringing the conventions into compliance with the law. Some of these proposals were promoted (and are still being promoted) by the defendants in the case who denied that there was anything

This testimony is excerpted from Schwarz's appearance before the Standing Committee on the Judiciary of the Senate of the State of New York on January 8, 2007.

wrong with the convention system as it existed before the Courts struck it down. These proposals suggest that the Legislature re-enact the convention system which has been held unconstitutional—and which experience has shown to be corrupt. Re-enact it by tinkering; to add a thin veneer of cosmetic changes relating to matters such as the number of delegates and the number of signatures needed to become a delegate.

The tinkering proposals fail the threshold test. They do not cure the constitutional wrong. It would be one thing for the Legislature to try to fix an existing system. It would be a far worse thing for the Legislature to enact a new unconstitutional system. Those who contend that cosmetic changes will satisfy the Courts have seized on a few details but ignore the profound and most fundamental constitutional infirmity of the convention system they are promoting: it does not envision a meaningful opportunity for voters to actually cast a vote for the candidate they support. Without such an opportunity, no convention system can stand. Thus, in any system proposed to you, ask yourselves whether it erects a fence between the candidates and the voters. If there is such a fence, then the system will be subject to strict constitutional scrutiny. It is as simple as that. The constitutional analysis is not technical. It is practical.

THE CONSTITUTIONAL DEFICIENCY IS NOT IN THE DETAILS OF THE CONVENTION SYSTEM, BUT IN ITS FAILURE TO GIVE "THE PEOPLE" THEIR RIGHTFUL ROLE.

When witnesses come before you asking you to tinker with the judicial convention system, ask whether they are in favour of a system designed to exclude voters from participating in the selection of judges. If asked, the answer to that question will universally be "yes."

Other proposals are being floated by advocates who express concern about the quality of Supreme Court candidates. Their core idea is the establishment of Judicial Qualifications Commissions. This is interesting, and indeed could, if properly structured, be a helpful step. However, it is irrelevant to the constitutional problem.

No court has held, and the plaintiffs did not argue, that the convention system was unconstitutional because of concerns about quality. Indeed, as the District Court observed:

> The issue in this case is whether the voters are accorded their rightful role in the selection of Supreme Court justices. If they are not, that constitutional defect cannot be remedied by a screening panel, even if it has integrity and plays a meaningful role in the quality of judges selected.

Moreover, unless there is some opportunity for voters to consider judicial candidates lacking party leader support, many well qualified lawyers will never bother to throw their hats into the ring of a screening panel. ■

A Fair Day in Court

Laura Abel and David Pedulla

Low-income people who cannot afford an attorney are often forced to represent themselves in high-stakes civil cases. Laura Abel and David Pedulla propose policy reforms to fix this fundamentally unfair aspect of our justice system.

In November, the voters called for a different approach to national policy. With the New Year, it is time for Congress to make that new approach happen. These are some policy reforms that would help fix one fundamentally flawed aspect of our government – the inability of low-income people with pressing civil legal needs to get a fair day in court.

1. Allocate more funding to the Legal Services Corporation.

Every county of every state is served by civil legal aid lawyers receiving federal funding through the Legal Services Corporation ("LSC"). Those lawyers provide representation in cases regarding the daily, crucial legal needs of low-income people, in matters such as child custody, evictions, and subsistence-level public benefits. Repeated studies show that about 80% of those legal needs go unmet because LSC lacks adequate funding. Pro bono and other palliative measures are unable to fill the gap. The minimum Congress should allocate is $411 million – the amount called for by LSC and the American Bar Association. Even that amount will leave many dire legal needs unmet, but it will be an improvement over the current LSC funding level of $330 million.

2. Ensure that Interest on Lawyers' Trust Accounts accrue the same level of interest as other bank accounts.

Interest on Lawyers' Trust Accounts ("IOLTA") – a program in which attorneys bundle client funds in order to generate interest revenue where no interest would otherwise be generated – is one of the nation's largest funding sources for civil legal aid. Unfortunately, banks sometimes pay less interest on IOLTA accounts than they do on other similar bank accounts. Congress should follow the practice of many state legislatures and state court systems by instituting banking reforms to require banks to pay interest at the same rate on IOLTA accounts as they do on comparable accounts.

3. Remove the LSC "physical separation requirement."

A holdover policy from the Gingrich-era Congress requires civil legal aid programs receiving LSC funds to waste their scarce resources by establishing two different offices if they want to use their non-LSC funds free of cumbersome restrictions. The restrictions bar the programs from representing clients in class action lawsuits, claiming court-ordered attorneys' fee awards to

This piece was originally published on Tortdeform.com on January 5, 2007.

strengthen clients' cases, and representing many categories of immigrants, among other activities. Congress should remove the wasteful physical separation requirement to allow civil legal aid lawyers to help their clients in the most efficient and effective manner.

4. Examine whether the LSC Inspector General is overstepping his mandate by interfering with the ability of civil legal aid programs to serve their clients.

Civil legal aid programs receiving LSC funding recently have come under attack by LSC's Inspector General ("IG"). The IG claims to be trying to ensure that impact work does not interfere with civil legal aid programs' ability to meet the basic needs of low-income clients. Our fear is that the IG's investigations themselves are interfering with the ability of civil legal aid lawyers to meet the needs of their client communities in the most efficient and effective manner. Congress must investigate whether this is the case.

PEOPLE SUFFERING FROM DISCRIMINATION OFTEN FIND THAT THEY HAVE NO WAY TO ENFORCE THEIR RIGHTS.

5. Reform the Bankruptcy Act.

In 2005, Congress enacted sweeping changes in the bankruptcy laws. One change that went too far was the imposition of personal liability on lawyers representing clients in bankruptcy proceedings. This reform has scared countless lawyers in public interest organizations and in private practice away from representing clients seeking bankruptcy protection. Congress must roll back this provision to increase financial protection for low-income people and to ensure that the bankruptcy system can benefit from the participation of lawyers skilled at counseling and representing clients.

6. Fund student loan forgiveness programs for civil legal aid lawyers.

Another reason low-income people have a hard time finding high-quality legal representation is that few recent law school graduates can afford to take public interest jobs. A recent study found that more than 80% of law students borrow money to pay for law school, with an average loan burden of $78,763 for students attending private schools. For these students, taking a legal aid job paying an average of $35,000 is not an option. Congress should expand a pilot program operated by the Legal Services Corporation, which helps civil legal aid attorneys repay their loans.

7. Pass legislation similar to the Civil Rights Act of 2004 (the FAIRNESS Act).

Over the course of the past decade, the federal courts have stripped themselves of the ability to enforce many important civil rights protections. The result is that people suffering discrimination often find that they have no way to enforce their rights. The FAIRNESS Act would restore access to the courts for seniors seeking to challenge age discrimination, for immigrants seeking to enforce their language access rights, and for many others seeking fair treatment under the law. ■

Supreme Court Decisions Meet the Real World

Kirsten Levingston

In the 2007 term, the United States Supreme Court shifted sharply, often undercutting precedents without quite overturning them. These rulings dwell in the realm of legal theory, but explode with special force in the real world, especially when it comes to race and economics. Kirsten Levingston reflects.

As we consider the Independence Day celebrations that just passed, its worth noting that we're marking the occasion a bit late. The real revolution happened when the U.S. Supreme Court ended a term bound to affect our lives in significant ways in the months ahead. The 68 cases the Court heard this session involved a range of social issues – including campaign finance, school integration, employment discrimination, wage and overtime regulation, and reproductive rights. Two opinions issued last month, in the final hours of the Court session, show how judicial decisions can cause fireworks in the real world.

Fundraising totals for the first quarter of the 2008 presidential race were off the charts. Combined, the presidential candidates raised over $130 million, and the fundraising reports for the second quarter are expected to be as high, or even higher. Presidential candidate Senator Barack Obama announced he had raked in $32.5 million between April and June, even more than he collected the first quarter. By all indications this will be the most expensive presidential race ever. This makes the ruling in *FEC v. Wisconsin Right To Life* all the more significant. There, the Court cut back on the 2002 Bipartisan Campaign Reform Act, which, in an effort to reduce money's influence in elections, required corporations and unions to form PACs to run certain kinds of advertising close to Election Day. Federal law has for decades barred unions and corporations from using funds from their own treasuries to broadcast campaign ads. Before BCRA, unions and corporations were allowed, however, to use their money to bankroll ads that did not expressly tell the public whom to vote for or against ("express advocacy") – on the theory that the ads were merely educating the public about an issue ("issue advocacy"). Congress passed BCRA after finding the "issue advocacy" loophole had led to a sea of advertisements purporting to be about issues, but really focused on supporting or opposing candidates. Three years ago the Supreme Court upheld the law's constitutionality. This time around, in a challenge to the manner in which the statute was applied, the Court said Wisconsin Right to Life has a fundamental right to engage in political speech, and that BCRA cannot restrict ads that could be viewed as issue-focused (even though they mention a candidate, right before an election, and are targeted to the candidate's constituents). The upshot – expect more union and corporate "issue ads" leading up to the '08 election subject to less regulation than other campaign ads.

This piece was originally published on The Huffington Post *on July 7, 2007.*

This term's ruling in *Parents Involved in Community Schools v. Seattle School District No. 1, et al.* struck a mighty blow to a landmark case. A five Justice majority of the Court went old school, stepping back from the 1954 decision in *Brown v. Board of Education* requiring schools to desegregate, and invalidating attempts by democratically elected school boards in Louisville, Kentucky and Seattle, Washington to ensure racial diversity throughout their districts. The school districts, according to the Court, inappropriately considered the race of individual students when placing them in a manner that ensured racial diversity in schools throughout the districts.

HOW WILL THIS YOUTHFUL OPTIMISM ABOUT DEMOCRATIC PARTICIPATION AND OPPORTUNITY SQUARE WITH COURT RULINGS THAT MAKE ACHEIVING THOSE IDEAS MORE DIFFICULT?

Justice John Paul Stevens noted the "cruel irony" of the majority's reliance on the Brown decision to invalidate these integration efforts. All together the five opinions written in the case refer to that decision over 90 times, drawing opposite conclusions as to its meaning. Despite the disappointing result, it could have been worse. In his concurrence, Justice Kennedy sided with the majority to invalidate the integration plans. But he sided with the others – creating a majority – in support of using race in some circumstances to achieve integration and of the school districts' compelling interest in maintaining racial diversity. The trajectory of these desegregation cases was intriguing. When the more moderate Justice Sandra Day O'Connor was on the Court, the justices decided not to review a case challenging a similar desegregation plan in Lynn, Massachusetts. Nothing changed in the law or the land to upset that 2005 ruling upholding the plan – except Justice O'Connor's departure and the arrival of Chief Justice Roberts and Justice Alito. In a critique of his colleagues from the bench Justice Breyer, said "[i]t is not often in the law that so few have so quickly changed so much." By invalidating the Louisville and Seattle plans, the Court imperiled hundreds of voluntary plans across the country. In Massachusetts alone – the site of violent anti-integration protest in the 1970's – twenty such plans are now threatened, if not invalidated, including the one in Lynn. School may be out for summer, but well-meaning school administrators will be working hard in the months ahead to figure out how to achieve or preserve racial diversity without running afoul of the Court's decision.

Both the campaign finance and desegregation decisions erect barriers to justice in our diverse society and impede the ability of people without large treasuries to participate in our democracy. But something else happened during the term that offers a beacon of hope for progressives discontented by the Court's rulings. A New York Times/CBS News/MTV poll found that the majority of young people are "leaning left" on social issues like immigration (allow more of it), gay marriage (legalize it), health care (provide it to everyone and pay for it through tax dollars), and global warming (make it a top policy priority). They are also tuned in to the election and optimistic about democracy in America. Of the 17-29 year olds polled, over half (58%) said they are paying attention to the presidential race and over three-quarters (77%) said people of their generation would influence the outcome of the race. Almost half (49%) of the young people said they were "enthusiastic" about a presidential candidate, with Sen. Obama, an African-American man, and Senator Hillary Clinton, a white woman, garnering the highest plurality among enthusiasts (18% and 17%, respectively).

Two-thirds of those polled (66%) said they thought most people they know would vote for a presidential candidate who is black.

How will this youthful optimism about democratic participation and opportunity for all in our diverse society square with Court rulings that make achieving those ideals more difficult? Despite his failed domestic proposals and international misadventures, President Bush's choices for the Court, in short order, have effectively construed the law to reflect conservative values and world view. What are progressives to do? We can hope for further jurisprudential shifts to the left on the Court, especially by Justice Kennedy. It happens. When the first President Bush nominated Justice Souter, an unknown former prosecutor from New Hampshire with reportedly solid conservative credentials, to replace Justice William J. Brennan, Jr., Senator Ted Kennedy voted against him. Since then, perhaps inspired by the spirit of the man he replaced, Justice Souter has emerged as a passionate and eloquent progressive voice. We can also appeal to law makers of all stripes -- both progressives and conservatives troubled by judicial decisions that undermine the ideals reflected in the polling data.

Declaring our freedom on July 4th was just the start. If we want a just society, we must keep participating in our democracy as well. ■

A Civil Right to Counsel

Amicus Brief Submitted by the Brennan Center in King v. King.

In a brief filed before the Washington Supreme Court, the Brennan Center argues that the Washington constitution requires the appointment of counsel for low-income parents who face losing custody of their children.

STATEMENT OF THE ISSUE

Whether the Washington Constitution requires courts to appoint counsel for litigants unable to afford or obtain pro bono counsel in cases where basic human needs are at stake.

SUMMARY OF ARGUMENT

A core principle of our judicial system is that it should provide equal justice for all. The Washington Constitution gives meaning to this pledge through the guarantee of meaningful access to the courts for all citizens. Yet it is self-evident to judges, practicing attorneys, and thoughtful persons, that in most instances indigent persons without counsel are not receiving the same quality of justice as those with counsel and are effectively deprived of meaningful access to the courts.

INDIGENT LITIGANTS ARE REGULARLY LOSING CASES THAT THEY SHOULD BE WINNING IF THEY HAD COUNSEL.

Studies show that indigent persons without counsel receive less favorable outcomes dramatically more often than those with counsel. The disparity in outcomes is so great that the conclusion is inescapable – indigent *pro se* litigants are regularly losing cases that they should be winning if they had counsel.

Efforts to provide pro bono representation for indigent litigants in civil cases have not come close to meeting the need. Accordingly, if the constitutional guarantee of access to the courts is to have any meaning, courts must appoint counsel at least where basic human needs are at stake and there is no other pro bono representation available.

While we recognize concerns about the cost of appointing counsel for indigent litigants, this does no relieve the courts of their obligation to enforce constitutional guarantees. Further, the significant costs to the judicial system and society that result where litigants

This brief was filed with the assistance of Kirkpatrick &Lockhart Preston Gates Ellis LLP and Paul, Weiss, Rifkind, Wharton &Garrison LLP.

lack counsel cannot be ignored. These costs include, for example, the burden faced by judges to make correct rulings when the record is incomplete or contains material that would have been excluded if an unrepresented party had been represented, the extra time required of judges and judicial staff to guide *pro se* litigants through court proceedings, and the burden of litigating cases that both parties represented by counsel would likely have settled. Equally important, these costs also include the erosion of public confidence in the judicial system when disparate and often unjust outcomes for indigents unable to obtain counsel create an appearance of a wealth-based two-tier judicial system and the costs to the community when litigants or other affected persons are unjustly deprived of basic human needs.

Far too many indigent Washington litigants, like Brenda King, are forced to face legal challenges that threaten the basic necessities of life (such as custody of children, shelter and protection from violence) without the assistance of counsel. Because other efforts to address this problem have proved inadequate, the only solution is the judicial appointment of counsel at least in cases involving basic human needs. ■

Unregulated Work in the Global City

Annette Bernhardt, Siobhán McGrath and James DeFilippis

In April 2007, the Brennan Center publishes a breakthrough report on a heretofore unseen world of unregulated work. Drawing on three years of intensive research, the authors document growing violations of core employment and labor laws in New York City, and analyze the economics and policies driving the trend.

In this report, we describe a world of work that lies outside the experience and imagination of many Americans. It is a world where jobs pay less than the minimum wage, and sometimes nothing at all; where employers do not pay overtime for 60-hour weeks, and deny meal breaks that are required by law; where vital health and safety regulations are routinely ignored, even after injuries occur; and where workers are subject to blatant discrimination, and retaliated against for speaking up or trying to organize.

THE SYSTEMATIC VIOLATION OF OUR COUNTRY'S CORE EMPLOYMENT AND LABOR LAWS IS THREATENING TO BECOME A WAY OF DOING BUSINESS FOR UNSCRUPULOUS EMPLOYERS.

Such conditions exist here in New York City, in occupations and industries that span the breadth of the city's economy. They are not isolated, short-lived cases of exploitation at the fringe of the city's economy. Instead, the systematic violation of our country's core employment and labor laws – what we call "unregulated work" – is threatening to become a way of doing business for unscrupulous employers. And yet from the standpoint of public policy, these jobs (and the workers who hold them) are too often off the radar screen.

THE STUDY

Drawing on intensive research conducted between 2003 and 2006, our report documents for the first time the landscape of unregulated work in New York City, identifying the types of laws that employers are violating, the range of industries that are most deeply involved, the variety of business strategies that result in violations, and the workers who are most affected. Using standard social science protocols, we integrated qualitative, quantitative and archival research: (a) in-depth interviews with 326 individuals, including workers, employers, staff members of regulatory agencies, service providers, unions and community-based organizations; (b) analysis of labor market datasets, as well as data on enforcement efforts by government agencies obtained through the Freedom of Information Act; and (c) analysis of hundreds of documents from newspaper sources, industry publications, business associations, and academic journals.

THE VIOLATIONS

Our fieldwork identified eight broad categories of workplace violations being committed by some employers in New York City:

• **Wage and hour violations:** We documented employers paying less than the minimum wage, failing to pay overtime, not paying at all, forcing employees to work off the clock, not giving breaks, stealing workers' tips, and violating prevailing wage laws on public construction projects.

• **Health and safety violations**: We documented employers failing to provide guards on machinery, allowing extreme temperatures and improper ventilation, requiring employees to work on unsafe scaffolding, exposing them to chemical and airborne toxins, and failing to provide goggles, masks, and other protective equipment.

• **Workers' compensation violations**: We documented employers failing to carry workers' compensation insurance required by law, and preventing injured workers from filing workers' compensation claims.

• **Retaliation and violations of the right to organize**: We documented employers firing or punishing workers who sought to improve working conditions, as well as making pre-emptive threats to report workers to immigration authorities.

• **Independent contractor misclassification**: We documented employers misclassifying their workers as independent contractors in order to evade their legal obligation under employment and labor laws.

• **Employer tax violations:** We documented employers either fully or partially failing to pay required payroll taxes on cash wages.

• **Discrimination**: In our research, discrimination on the basis of race, gender, country of origin and criminal history manifested itself in firing, hiring, promotion, and in the explicit sorting of workers into stereotyped occupations.

• **Trafficking and forced labor**: While not the focus of our research, we documented instances of workers being trafficked and being prevented from leaving their jobs through passport seizure, debt bondage, threats, physical force, or captivity.

THE EMPLOYERS

Based on analysis of our fieldwork as well as secondary data sources,

we identified 13 distinct industry clusters in New York City where unregulated work consistently appears in one or more industry segments (the full report provides detailed data and analysis for each industry).

Scanning across the industries, we found that workplace violations are not limited to small firms, but also occur in medium-sized and even large firms. Nor are violations limited to firms competing on the basis of cost cutting; in a significant number of industries, violations are also found among high-end establishments specializing in quality goods and services. This is also not primarily a story of trade-sensitive industries forced to drive down wages because of global competition; most of the industries listed are domestic service industries that are bound in place and that compete in regional product markets. And while private-sector industries dominate the landscape of unregulated work, publicly-funded industries such as home health care and subsidized child care are not immune.

One consistent finding, however, is that violations of employment and labor laws are much less common in unionized workplaces, especially those that are in an industry (or industry segment) where union density is high. Another consistent finding is that employers who are violating one workplace law are often violating other laws as well – in some industries, these "bundles" of practices have become so routine that they appear to constitute a distinct business strategy.

THE WORKERS

Not surprisingly, the workers most impacted by workplace violations are those with the least power to dictate their terms of employment: undocumented and documented immigrants, and in smaller numbers, people with criminal convictions and those transitioning off welfare. Moreover, unregulated jobs exhibit a high degree of occupational segregation on the basis of race, ethnicity, and especially gender. Long tenures within a particular industry are common, and the jump to better-paid, regulated jobs is difficult. Barriers include lack of legal status, education and fluency in English; criminal records; discrimination; and the structural lack of good jobs in low-wage industries.

THE BROKERS

Various labor market intermediaries help to connect workers to unregulated jobs, most notably "storefront" employment agencies that have multiplied across the city over the past decade, especially in low-income and immigrant neighborhoods. Significant numbers of these agencies violate regulations, often in pernicious ways – by charging workers high fees, sending them to jobs that do not exist,

refusing to refund fees, and screening applicants on the basis of race. Most troubling, they often knowingly place workers in jobs that violate employment and labor laws, in effect becoming part of the problem.

EXPLAINING UNREGULATED WORK

Fully unpacking the causes of unregulated work in New York City requires analysis of political and economic changes far beyond the immediate borders of the city. Our initial inventory of the forces at work includes:

Three Decades of Economic Restructuring: Globalization, deindustrialization, deunionization and a deteriorating social contract have reshaped how and where work is performed, and what it is paid. In our analysis, workplace violations are a logical extension of these restructuring trends, since the same fundamental strategy is at work: competition based first and foremost on cutting labor costs.

For example, global competition has pushed local apparel and food manufacturers to sweatshop conditions commonly associated with the 19th century. In the supermarket industry, it has been a story of large retailers pushing competitors to a low-wage business model. The subcontracting of laundry, janitorial and security services at this point is virtually complete, opening the door to substandard working conditions. And in industries such as restaurants, deunionization has increased the likelihood that some employers will pay below the minimum wage. Finally, growing inequality has swelled the ranks of high-income families purchasing services such as domestic work that lie largely outside the reach of regulation. At the same time, it has generated an entire subeconomy of unregulated work that produces goods and services for low-wage workers and their families.

Inadequate Enforcement: When employers have incentives to cross the line into breaking the law, strong enforcement of those laws serves as a critical brake on violations. Unfortunately, available data indicate considerable weakness in the extent to which federal and state authorities enforce minimum wage, overtime, health and safety, right to organize, and workers' compensation laws. In New York, the incoming Spitzer Administration has signaled that it will move the state Department of Labor towards better enforcement. But during the time when our research was conducted, the record suggests inadequate enforcement by the state agency, both in terms of resources (lack of staffing) and administrative will (for example, multi-year delays in processing cases, and settling claims for far less than what workers were owed).

Inadequate Legal Standards: In the 21st century workplace, traditional definitions of employer and employee are increasingly being challenged by a host of non-standard employment relationships. The ambiguous legal status of independent contractors, temporary workers and day laborers, as well as the growing use of subcontracted workers, have opened the door to working conditions that fall below the standards established by law – even as the standards themselves are being weakened.

Dysfunctional Immigration Policy: The labor market power of immigrant workers is profoundly shaped by U.S. immigration law, which at this point is widely recognized as outdated and dysfunctional, on the one hand allowing workers into the country while on the other denying many of them legal status. On paper, undocumented workers are covered by most employment and labor laws. But in practice, they are effectively disenfranchised in the workplace, by lack of documentation, fear of discovery, and employers' willingness to exploit that vulnerability.

PRINCIPLES FOR PUBLIC POLICY

Everyone has a stake in addressing the problem of unregulated work. When workers and their families struggle in poverty, the strength and resiliency of local communities suffer. When unscrupulous employers evade or violate core laws governing the workplace, responsible employers are forced to compete against subminimum wages or cut corners on worker safety, setting off a race to the bottom that erodes standards throughout the labor market. And when significant numbers of workers are underpaid, vital tax revenues are lost. In short, public policy has a fundamental role to play in protecting the rights and lives of workers. Three principles should drive the development of a strong reform agenda at the federal, state and local level:

1. Strengthen Government Enforcement of Employment and Labor Laws.

Significant resources and power reside with the agencies responsible for enforcing wage and hour, health and safety, prevailing wage, anti-discrimination, taxation, and right-to-organize laws. Tapping the often unrealized potential of these agencies will require increased staffing, but even more importantly, aggressive enforcement in low-wage industries, coordination with stakeholders on the ground, and stronger penalties so that violations carry high costs.

2. Update Legal Standards for the 21st Century Workplace

Raising the minimum wage, updating health and safety standards, expanding overtime coverage, and restoring the right of workers to organize – all are key improvements that will improve compliance in the workplace and boost the competitive position of employers who play by the rules. Employment and labor laws must also be updated to address new strategies by employers to evade responsibility for their workers, such as subcontracting and independent contractor misclassification. And historical exclusions of occupations such as home care workers from legal protection must be ended once and for all.

3. Establish Equal Status for Immigrants in the Workplace

The best defense against workplace violations is workers who know their rights, have full status under the law to assert them, have access to legal services, and do not fear retaliation when bringing claims against their employers. Therefore, a guiding principle for national immigration reform must be that immigrant workers have equal protection and equal status in the workplace. In addition, agencies enforcing employment and labor laws must create a firewall between themselves and immigration agencies, so that workers do not fear deportation when bringing a wage claim. And all workers, regardless of immigration status, must be entitled to the full remedies available under law.

THE BEST DEFENSE AGAINST WORKPLACE VIOLATIONS IS WORKERS WHO KNOW THEIR RIGHTS, HAVE FULL STATUS UNDER THE LAW TO ASSERT THEM, HAVE ACCESS TO LEGAL SERVICES, AND DO NOT FEAR RETALIATION.

GOING LOCAL

New York City is home to a broad array of local organizations that have deep relationships in impacted communities and that can help address the problem of workplace violations. In particular, immigrant worker centers and unions should be a key resource for government enforcement efforts, providing much-needed information about industry dynamics and employer evasion tactics. At the same time, city government has an array of tools that it should use to send the signal that unregulated work will not be tolerated in New York. The City can harness its extensive network of service providers to deliver outreach and education about rights in the workplace. It can commit funds to increase the legal services available to workers with wage claims. It can support the creation of more day labor centers; crack down on exploitative employment agencies; educate employers about their legal responsibilities; ensure safety at construction sites; and rigorously enforce the prevailing wage and living wage laws under its jurisdiction.

After a decades-long struggle to emerge from the fiscal crisis of the 1970s, New York City now sits at the cusp of sustained growth. Yet the working conditions described in this report force the question: will the city's resurgence be built on a set of workplace practices that violate not only the letter of the law, but also our most basic principles of dignity and justice? In the voices of the workers, legal advocates and other stakeholders that we interviewed over the past three years, we heard the hope and conviction that our city can, and must, do better. ■

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