DEMOCRACY & JUSTICE

COLLECTED WRITINGS

BRENNAN CENTER FOR JUSTICE

Volume Two

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 2008

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 2008. 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.

Introduction from the Executive Director

2008 was a remarkable year for our democracy, with an explosion of civic engagement and participation. It is a time of thrilling hope and sobering challenges.

This volume offers a sample of the Brennan Center's work on all fronts – in Congress, in federal and state courtrooms, as well as in the court of public opinion. Our work protected the voting rights of hundreds of thousands of citizens in Colorado, Florida, Ohio, and across the country. We won key court victories, from the Supreme Court down, in cases on *habeas corpus*, campaign finance reform, and voting rights. Our reports garnered wide media attention and respect. The *Boston Globe* called us "indispensible," and *Time* magazine published a cover story based on our presentation on voting. Never before have we had such impact—and now we are poised to do even more.

We at the Brennan Center believe that this is a rare and fleeting opportunity to make deep, lasting change in the way our government works. We are committed to making sure that the surge of citizen engagement we see now is translated into new laws – for voter registration modernization that would add up to 65 million to the rolls, for campaign finance laws that boost the power of small donors, for a restoration of core checks and balances in the fight against terrorism, for a justice system that serves all Americans.

To translate the civic energy of 2008 into lasting change in 2018, we need more than discrete policy victories, no matter how vital. Our country can meet its challenges only if we renew the institutions of democracy and return to the enduring values of our Constitution. In times of turmoil, it is our duty to think big again. There is much work to be done.

Michael Waldman
Executive Director

RENEWING AMERICAN INSTITUTIONS

VOTING RIGHTS

- Lawsuits we brought before the 2008 election protected the rights of 200,000 voters in Ohio, 27,000 voters in Colorado, and thousands more in Florida.
- We coordinated over 40 amicus briefs in *Crawford v. Marion County*, the case in which the U.S. Supreme Court considered (and, unfortunately, upheld) Indiana's strict voter ID law.
- Voter registration groups in Florida registered hundreds of thousands of new voters in 2008 as a result of Brennan Center lawsuit challenging onerous restrictions on their work.
- Our landmark study, released on the CBS Evening News, exposed the world of secret voter purges.
- 250,000 voters had their rights restored thanks to our decade-long drive to end felony disenfranchisement.
- In Wisconsin, the Brennan Center helped ensure that 200,000 people voted on regular, rather than provisional ballots, only 30% of which have been counted in past elections.
- Our fifty-state study, *Is America Ready to Vote*, showed which states were best positioned to handle voting machine and other problems on Election Day and motivated Kentucky and North Carolina to implement post-election audits. The Ohio Secretary of State has since asked the Brennan Center to chair the non-partisan Commission on Ohio election practices.
- Our study on ballot design showed that poor design costs hundreds of thousands of votes; our Ballot Design Task Force trained officials in Missouri, Ohio, Pennsylvania, Florida, and California on design best practices.

CAMPAIGN FINANCE REFORM

- Our litigators successfully defended existing campaign finance laws from attack in North Carolina and Arizona, and lead ongoing efforts to defend Connecticut's campaign finance laws.

The past year has been one of real achievement for the Brennan Center. We work to bring the fundamental American values of democracy and justice back to the center of our politics.

PROTECTING THE CONSTITUTION

- We coordinated more than twenty amicus briefs for the Supreme Court case *Boumediene v. Bush,* in which the Court ruled that Guantanamo Bay detainees have a right to *habeas corpus* and may challenge their detention in court.

- We won our case challenging the president's ability to indefinitely detain an enemy combatant on U.S. soil before the 4th Circuit, and have taken the case up to the Supreme Court.

- In *Munaf v. Geren* and *Geren v. Omar,* we argued before the Supreme Court on behalf of U.S. citizens who had been detained in Iraq. Though the Court affirmed their rights to challenge their detention, it nonetheless decided to allow their transfer to the Iraqi government, despite evidence that they would be tortured and killed.

- We organized liberal and conservative legal groups to successfully argue for Congress's right to subpoena senior presidential aides Harriet Miers and Josh Bolten in connection with the forced resignations of U.S. Attorneys in 2006.

- In Congressional testimony, we proposed an independent commission to investigate executive abuses – a proposal that continues to win wide support.

CLOSING THE JUSTICE GAP

- Our study and proposal on racial disparity in prosecutions led to the "Justice Integrity Act" proposed by then-Senator Joseph Biden.

- We organized liberal and conservative legal groups and major corporations to successfully urge the Supreme Court to hear a key case on corrupt judicial elections.

- We successfully argued in federal court that sweeping speech restrictions on non-profit HIV/AIDS groups violate the First Amendment. This latest ruling expands relief to most major U.S.-based recipients of federal HIV/AIDS funds, and allows them to more effectively educate high-risk groups in HIV prevention. ■

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DEMOCRACY IN TRANSITION

American Democracy: Repair Needed

Michael Waldman

How can the new President advance democracy? The Brennan Center's Executive Director sets forth a concrete reform agenda, one that capitalizes on the tremendous opportunities before us.

The 2008 election cycle was marked by a thrilling upsurge of civic participation and citizen engagement, with millions of new voters, the explosion of small dollar contributions, and a sharp rise in participation. All this could add up to a transformative moment. And yet the basic institutions of American democracy are broken. Voter registration laws are among the most restrictive in the democratic world, even before the recent conservative push to disenfranchise minority, poor, and young voters. Members of Congress are still overwhelmingly funded by large contributions from special interests, and the number of corporate lobbyists in Washington, D.C., has tripled in a decade.

Then there's the legacy of President George W. Bush, who used 9/11 as the pretext for a long hoped-for executive power grab in ways that will take years to unravel. Public trust in government during conservatives' control of the White House and Capitol Hill plunged to its lowest level since Watergate. In all these ways, the very institutions that we will rely on to translate public discontent into lasting progressive change badly need repair.

With imagination and verve, the new president must not only focus on short-term, tangible policy "deliverables" but also on renewing the systems of democracy that empower ordinary citizens and make all other changes possible. If he exerts this leadership, then he will help permanently enlarge the constituency and coalition for progressive politics. Such steps would also make it far easier to enact vital change—combating global warming, enacting health care reform, creating a fairer tax system—all of which will force us to over-come entrenched and well-funded interests that now dominate the system.

Today's new wave of government reform, however, should not try to purify the messy, inevitably rambunctious world of politics. Money will always play a role. Rather, the new administration should seek changes to catalyze the participation of wider numbers of citizens in informed engagement in the political life of the country. We cannot eliminate "special interests," but we can fix the jammed mechanisms of govern-

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ment so that policies once again can be enacted that broadly benefit the public interest. And we can seek to use new digital technologies to boost democracy.

A shift toward wider participation will push politicians and parties to focus on what matters to ordinary people, and will change the realm of what is possible. In short, changing the process of our system will by definition change the power dynamic within it.

An Inclusive Voting System

Voting is the heart of democracy. America's voting system remains decrepit, prone to error, and rife with barriers to full participation. In 2000, the country learned to its surprise that the way we cast and count ballots is far from neutral or precise. According to the best estimate, between 4 million and 6 million votes were lost in that year's presidential election due to faulty lists, disenfranchisement, and other problems at the polls. The federal Help America Vote Act, enacted in 2002, was a partial solution. The number of "residual votes," or votes cast but not counted, fell sharply. But substantial problems remain.

The new president must renew the systems of democracy that empower ordinary citizens and make all other changes possible.

Millions of eligible Americans still cannot vote because they are not on the voter rolls—sometimes because they never registered, but just as often because they fell off the rolls when they moved or have found it difficult to get and stay on the rolls. Election administration remains largely an afterthought. Ballot design varies from county to county. Officials operate under inadequate conflict-of-interest rules. Some are openly partisan. Katherine Harris of Florida and J. Kenneth Blackwell of Ohio chaired their state party presidential drives while supposedly refereeing the contests as secretaries of state. Blackwell oversaw elections while he himself ran for governor.

Or consider that officials routinely purge voters from the rolls with no public notice, no standards, and no accountability. One consequential result: the multiple purges in Florida that prevented thousands of eligible voters from casting ballots in 2000. The 13,000 separate jurisdictions that administer elections vary wildly in skill and neutrality. Information and voter lists must be parceled out to at least 200,000 separate polling places across the country.

Faced with this welter of laws, our government should have found ways to expand voter registration and improve election administration. Instead, conservatives mounted a fierce campaign against imaginary "voter fraud," despite the sheer absence of evidence for in-person voter impersonation (the only kind of fraud that would be prevented by voter ID requirements). Statistically, an individual is more likely to be killed by lightning than to commit voter fraud.

Yet every two years, a rash of new rules threatens to spread, requiring that voters produce a government-issued photo ID, or, worse, a birth

certificate or passport. In 2008, in *Crawford v. Marion County*, the U.S. Supreme Court upheld the nation's strictest voter ID law, in Indiana. The Court agreed there was little, if any, evidence of fraud, but then said, in effect, "so what?" The justices did leave a path open for further litigation when more facts are developed.

It would be unfortunate if the contentious issue of voter ID blocks the opportunity for transformative voting change. Many Americans simply lack various kinds of ID—up to 15 percent lack a driver's license, for example, and they are overwhelmingly the urban poor, elderly, and students. The true concern should be to assure that every eligible citizen has any ID that is required, either by accepting many different types of ID, or by assuring that government-provided free ID is genuinely widely available.

The Help America Vote Act recognizes up to a dozen forms of identification. In Michigan, citizens must produce ID, but if none is available, then they can sign sworn affidavits confirming their identity. No eligible citizen should be denied the right to vote due to an absence of proper paperwork. The new president should take as a staring point an 11th commandment: thou shalt not disenfranchise.

He also should recognize that expanding the vote is central both to the country's promise and to progressive strategy. A series of bold policy reforms could change American democracy, beginning with universal voter registration. The most important single step the new president could take would be enactment of a national universal voter registration law. The voter registration systems in the United States were first implemented a century and a half ago to make it harder for newly arrived European immigrants to vote. By one estimate, requiring the government to keep and update accurate voter lists could add as many as 50 million eligible voters to the rolls.

Universal voter registration could transform the practice and outcomes of American politics. It would push campaigns toward mobilizing the maximum number of voters rather than competing for slivers of the electorate. While voter registration is conducted by the states, the prod of a federal law is needed. It should require states to phase in universal registration. There are several ways this could happen. States could compile existing lists such as driver's license databases and state income tax records, or conduct a census, as Massachusetts does now. Part of any state reform should be permanent registration; when voters sign up, they stay on the rolls even if they move (as one in six Americans do every two years). This federal mandate would be accompanied by federal funding to help states make the transition.

At the very least, federal law should institute election-day registration. Why cut off registration in the immediate weeks before an election just when debates, newspaper endorsements, and water-cooler conversations heat up? Already, Minnesota, Maine, Wisconsin, Idaho, New Hampshire, Wyoming, Montana, and Iowa have election-day registration. In 2006 nearly 4,000 Montanans registered on election day, more than the margin of victory for the state's new Sen. Jon Tester (D-MT).

In 2007, North Carolina instituted "same day" registration. Voters can register any day during the early voting period two weeks before election day, but not that day itself. Election-day registration turbocharges turnout. Most estimates show it boosts voting by 5 to 7 percent. States with election-day registration have fewer problems with registration lists on election day than is typical. There is no evidence of increased fraud or chicanery.

The new president also needs to get behind efforts to improve electronic voting. Since 2000, 49 states have moved to electronic voting. These machines have numerous advantages over the old system of paper ballots and "hanging chads," especially for the millions of voters with disabilities. But myriad studies warn these electronic systems are woefully insecure, prone to error, and vulnerable to hacking. Fortunately, protective measures can markedly improve the security of electronic systems, among them: a paper record, verified by the voter, which is technically known as an audit trail; a ban on wireless components; and a requirement for random audits, conducted at the polling site, to make sure that the paper trails actually match the votes recorded in the machines.

Many states have banned the use of touchscreen machines without a paper trail, yet so far no state has enacted all the steps that experts believe are needed to secure the vote. In the 110th Congress, bipartisan legislation introduced by Rep. Rush Holt (D-NJ) and Tom Davis (R-VA) would have required paper trails and taken other needed steps. Despite wide support, it was derailed by a combination of concerns from the disability rights community and disgruntled local officials worried about tight deadlines and new requirements. A new version of federal legislation endorsed by the new president should smooth these political wrinkles.

A national universal voter registration law could add as many as 50 million eligible voters to the rolls and transform American politics.

Federal law is also needed to strike down one last remnant of Jim Crow. Today 5 million American citizens still are legally barred from voting due to a felony conviction. Four out of five of those disenfranchised are out of prison or never served a day of time. Some state officials have moved to reform the practice, such as Florida's Republican governor Charlie Crist, who moved to end felony disenfranchisement by executive action. The next step is a federal law to restore voting rights upon release from prison. Law enforcement and religious communities concur this will help reweave those released from prison into the wider, law-abiding community.

Finally, the new administration should work with the new Congress to strengthen the Election Assistance Commission. The Help America Vote Act created this tiny new federal agency in 2002 to guide states toward improved voting. Unfortunately, the EAC is hobbled by weak laws and politicization of its work. At its birth, Congress neglected to fund the panel, and commissioners had to meet in a Starbucks.

Since then, EAC has taken some good steps, such as offering states useful help in setting up voter databases. Less effective has been its work overseeing the transition to electronic voting, where the agency has allowed voting machine vendors to choose the labs that certify their products for use. Part of the problem is resources. The entire EAC, charged with helping all 50 states and the District of Columbia administer voting, has a budget of $15 million and only 30 employees. The new president's first budget must substantially increase this support.

Campaign Finance Reform

Perhaps the greatest obstacle to change is the political culture of Washington, D.C., itself. No factor is more profound, or pernicious, than the system of financing congressional campaigns.

Of course, the fact that money shouts is hardly news. Mark Twain, not Jon Stewart, quipped, "There is no distinctly native criminal class except Congress." But over the past decade, the system lurched badly in the wrong direction. Congress became mired in crass corruption, as the conservative congressional majority's "K Street Project" made the link between lobbying, fundraising, and policy more explicit than at any time since the Gilded Age of the 1800s. Jack Abramoff and former Majority Leader Tom Delay are gone, and Congress quickly moved forward on reform, passing strong ethics measures in 2007. But the broader gridlock and special interest stasis remains.

No factor is more profound, or pernicious, than the system of financing congressional campaigns.

Today lawmakers spend much of their time fundraising—often, most of their time. Funds overwhelmingly flow to incumbents. The presidential campaigns this past election year were transformed by small contributors. But in the halls of Congress, the small donor revolution is just a rumor. As of June 2008, less than 10 percent of contributions to congressional campaigns were $200 or less. Meanwhile, the lobbying industry continues to grow in size and impact, tripling over the past decade.

Stale debates on campaign reform long have pitted those who regard campaign contributions as a robust expression of free speech against those who seek to limit the size of gifts. The 2002 Bipartisan Campaign Finance Reform Act, the product of a decade's effort, curbed the worst excesses and helped point presidential candidates and political parties toward raising more money from small donors. But it did not try to grapple with the most common and endemic ways that big money dominates politics.

The 44th president can cut this Gordian knot, slicing through the arguments that have tied up reform for decades. He should insist on robust voluntary public financing. And he should propose that any public funding system boost the power of small individual contributors to Congress, too. The goal cannot be hygienic, to "clean up Congress." Rather, the goal of campaign finance reform (as with voter registration measures) should be to amplify the voice, and thus the power, of ordinary citizens.

The best way to achieve this goal would be to enact the Fair Elections Now Act, which would provide voluntary public financing for congressional elections. This most important step, and most difficult, has eluded success for decades. In 1994, proposals passed both houses but failed to reach President Bill Clinton's desk. Since then, states such as Arizona and Maine have enacted successful public funding systems.

Now Sens. Dick Durbin (D-IL) and Arlen Specter (R-PA) have revived a public funding plan for congressional races, the Fair Elections Now Act.

This strong measure needs to be improved in one key way—to encourage a small donor revolution for Congress. Consider New York City's bold 20-year old election law, under which small contributions receive a multiple public financing match (originally 1:1, then 4:1, now up to 6:1). City politicians rely on networks of small donors, and the system boosts grassroots organizing. A similar innovative approach would revitalize Congress; public funding systems should allow unlimited contributions of $100 or less. We cannot expect to get "big money" out of politics, but we can create incentives to get ordinary citizens and "small money" into politics.

This also needs to happen in future presidential races. An easy first step may be to restore the presidential public funding system, put in place after Water-gate in 1974. It worked well for three decades. In the first five elections, three challengers beat incumbents—a level of competitiveness found in no congressional district in America. Now, only less wealthy candidates participate because the amount of public funding is too low. Early in 2009, the new president should prod Congress to increase the tax checkoff to $10, increase the spending limits, and make other changes. This approach already has bipartisan congressional support, including the two candidates for president.

A final but pivotal piece of reform is the need to strengthen the Federal Election Commission. This agency, at least, works as intended: it was designed to fail. The panel, split evenly between Democrats and Republicans, poked open the loopholes for the soft money system of the 1990s. The commission should be replaced by a far more independent body, with a strong chair or at least an empowered professional staff. In the meantime, the new president should break the decades-long pattern of appointing commissioners for loyalty to party rather than fealty to law.

Use the Bully Pulpit

A democracy movement, sparked by visible change in Washington and led by the words of a new president, can spread most effectively at the state level, where many of the rules governing democracy are crafted. The 44th president can use the bully pulpit to endorse and push two major local reforms that would make citizens' votes count.

The new president could help restore electoral competitiveness by curbing gerrymandering while presiding over the decennial census—and thus the redistricting that will redraw electoral lines in all 50 states. Congress is so riven by stark partisanship in part because few lawmakers face a competitive general election, fearing only a primary challenge. Gerrymandering, of course, is as old as the republic. In the very first election, Patrick Henry tried to draw the electoral map to keep James Madison from getting elected to Congress.

Today, however, computer software helps politicians draw surgically precise district lines to minimize competition and maximize advantage. And the courts refuse to intervene. The U.S. Supreme Court several years ago declined to overturn the crass mid-decade redistricting in Texas, admittedly undertaken solely to squeeze a few more seats in for the political party controlling the legislature. The first election after the last census was the least competitive in American history. A true electoral tide may still swamp incumbents, but it would have to be at S.S. Poseidon strength. Routinely, voters don't choose lawmakers—lawmakers choose voters.

Redistricting reform proposals would give some neutral body—say a bipartisan or nonpartisan panel—the task of drawing district lines.Such a system works well in Iowa and Washington state, and one has just been launched in Arizona. Reform efforts have focused on states, yet several federal bills have proposed a national standard. With the 2010 census looming, it is hard to imagine a new president muscling such a bill through Congress with enough time.

Instead, he can use his executive authority to make fairer redistricting far easier in the states by changing the way the next census counts prisoners. Current census rules count prisoners as living in the communities where they reside, rather than where they come from. Yet those prisoners cannot vote. The result, in states such as New York, is that rural districts have far more clout than they would otherwise because the population of prisoners is counted for redistricting. The new president could change that by executive order.

The presidential bully pulpit would be especially effective to create a national popular vote. The Electoral College was a constitutional afterthought that has proven the exploding cigar of American democracy. Four times, the person who got the most votes lost, most recently, of course, in 2000. (That is not a partisan point: if Sen. John Kerry (D-MA) had won 60,000 more votes in Ohio in 2004, he would have won the presidency despite losing the popular vote by two million). Even when the biggest vote-getter actually wins, the Electoral College often forces campaigns to focus on a few swing states rather than campaigning throughout the country.

According to a study by FairVote, in the five weeks before the 2004 general election, both major party candidates spent more on TV advertising in Florida than in 45 states combined. "More than half of all campaign resources were dedicated to just three states—Florida, Ohio and Pennsylvania." Voters in 18 states saw neither a candidate visit nor a TV ad. A creative way to bypass the Electoral College without resorting to a constitutional amendment is gathering momentum. States sign up for a multistate compact pledging to vote their electors for whoever wins the popular vote—so long as enough other states adding up to 270 electors do so, too. Five states, so far, have agreed to do this. The new president could endorse an end to the Electoral College—as Presidents Lyndon Johnson and Richard Nixon both did the last time it came for a vote in Congress in 1969.

Democracy as a Strategy

For the new president and his administration, a push for government reform and a renewed democracy must be more than a set of issues on a laundry list. It must be central to governing strategy. If it is, then the president can catalyze a broader movement and transformative changes in the country at large. A focus on democracy reforms has several strategic advantages.

First, it serves as a way for the new president to display early mastery of powerful arrayed interests that threaten a progressive agenda. Any chief executive faces such tests from the "permanent government." Successful ones show their ability to overcome such established power centers. President Franklin D. Roosevelt closed the banks on his second day in office—not recommended for all new presidents—but also shocked Congress by vetoing the veterans' pension, the prime special interest bill of its day. Ronald Reagan fired the striking air traffic controllers.

Bill Clinton, by contrast, acceded to congressional complaints about grazing fees and other moves, showing the massed lobbyists and their congressional allies that the new president could be pushed around. A democracy push can instead help "brand" the new president's program as populist, nonpartisan, and attuned to the massive surge in voter engagement. It would signal to young voters, especially, that their exertions had produced change.

The new president must also avoid the mistake made by Bill Clinton in the early 1990s. After Ross Perot won 19 percent of the vote in 1992 on a platform of reform, Clinton and his allies in Congress failed to ruthlessly co-opt Perot's vote and issues. Those independent-minded swing voters have decided nearly every election since. This time, the new president can focus on appealing to the angry sentiments of the "radical middle," which is sick of partisanship and yearning for effective government.

More broadly, and more fundamentally, democracy reforms can form part of a larger political strategy for the new administration. Transformative presidencies succeed, in part, by widening the electorate and altering the political balance of power. Andrew Jackson, for example, massively increased the pool of voting citizens, first by attracting votes, and then by passing laws to repeal the property requirement for voting. Reform spurred more reform.

Transformative presidencies succeed by widening the electorate and altering the political balance of power.

Lyndon Johnson's support for the Voting Rights Act transformed Southern politics and made possible the election of Jimmy Carter, though the white backlash vote proved more formidable over the long run, moving the South into the Republican column for a generation, as Johnson also predicted. Roosevelt's steps in the first New Deal, such as encouraging unionization through the National Recovery Administration, gave activists tools for organizing, which in turn built pressure for more profound changes such as Social Security.

The new president has always played a unique role in the struggle for political reform. Great presidents find a way to use their singular voice and role as a prod to create a revolution of rising expectations, thus setting in motion forces that push the political system further. The 44th president must avoid over-promising, and many issues inevitably will crowd the agenda. It may make sense to forge a quick bipartisan compact on key reforms, acting even during the transition to reach agreement with legislative leaders. The next president must follow through with an agenda of election reform. If he does, he will put democracy at the center of American politics again—just where it belongs. ■

Legal Aid: Let's Make it Work

Rebekah Diller

The new administration has a chance to revitalize the Legal Services Corporation, the country's most important way to provide legal help for the poor.

Thirty years ago, President Jimmy Carter observed: "Ninety percent of our lawyers serve 10 percent of our people. We are overlawyered and underrepresented." Due to persistent attacks on the Legal Services Corporation, the cornerstone of the nation's efforts to promote equal justice, this statement rings truer than ever today. Every year, 1 million cases are turned away from LSC-funded offices due to funding shortages. Study after study finds that 80 percent of the civil legal needs of low-income people go unmet.

The United States suffers from a severe justice gap that prevents families from moving out of poverty and threatens the stability of our court system. The inability to obtain legal help has devastating consequences. Seniors lose homes to subprime mortgage lenders after a lifetime of payments. Domestic violence victims are unable to obtain protection from the courts. Children become homeless because their families are evicted. The justice gap persists and grows worse because of chronic underfunding of the Legal Services Corporation and extreme and ill-conceived federal restrictions placed on the legal aid programs that receive LSC funds.

The crisis traces back to a concerted effort by the Heritage Foundation and other conservative bastions to deny low-income people access to the courts by destroying LSC. In *Mandate for Leadership*, the conservative agenda published on the eve of Ronald Reagan's first term in 1981, the Heritage Foundation called for LSC's wholesale destruction. Barring its complete demise, Heritage argued for steep budget cuts and the imposition of broad restrictions through LSC appropriations riders. Today, the justice gap persists in large part due to the success of these efforts.

The value in real dollars of LSC's appropriation has declined dramatically since its high-water mark in 1980. In fiscal year 1980, Congress allocated $300 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. To keep up with that level, LSC would need to receive about $765 million today. To begin to reverse this decline, LSC

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should receive, at least, the $495.5 million it is expected to request for fiscal 2010.

The capacity of people to secure meaningful access to the courts is also impeded by extreme and ill-conceived funding restrictions imposed on LSC-funded legal aid programs in 1996. First, Congress restricted LSC clients from using the full range of legal tools available to clients of all other lawyers, such as participating in class actions and seeking court-ordered attorneys' fee awards. Second, Congress made all undocumented immigrants, certain categories of legal immigrants, and people in prison ineligible for LSC-funded services. Finally, Congress imposed an extraordinarily harsh poison pill restriction on LSC-funded programs that extends the federal funding restrictions to the non-LSC funded activities of LSC recipients.

The justice gap persists because of chronic underfunding and ill-conceived restrictions on the Legal Services Corporation.

As a result, more than $450 million from state and local governments, private donation and other non-LSC sources is restricted under the same terms as the LSC funds. All of these restrictions should be removed, starting with the poison pill "restriction on state, local, and private funds" that encumbers all the money possessed by LSC recipient programs from all sources other than LSC. The restriction on state, local, and private funds is virtually unprecedented, and immediately should be excised from the next LSC appropriations rider.

Although government commonly restricts the activities it finances with its own funds, it almost never restricts the activities that private organizations conduct with their own non-federal dollars. This poison pill restriction deprives countless Americans of needed legal services, including those Americans who live in communities that could obtain urgently needed protection from widespread predatory lending practices if legal services lawyers could bring class actions that are needed to stop the patterns of abuse. By encumbering the money contributed by state and local governments, the poison pill goes even further, preventing these important institutional bodies from becoming full partners in the effort to close the justice gap. ■

Change Comes to Washington

The Brennan Center website invites a wide array of writers and thinkers to share their thoughts and hopes for a new Administration. What projects and initiatives would show that America is truly headed in a new direction?

BOB HERBERT
Columnist, The New York Times

Barack Obama's primary task as president will be to give the national government back to the people. He has an obligation to take the government out of the greedy clutches of the very rich and well-connected, who have looted the Treasury, ruined the most powerful economy on earth, and inflicted extraordinary hardships on families struggling to make it from day to day.

Obama can take his cue from Franklin Roosevelt, who said in his first inaugural address, "This is pre-eminently the time to speak the truth, the whole truth, frankly and boldly."

The most direct way for Obama to follow through on the mantra of change, which resonated so powerfully during his campaign, is to be a relentlessly honest voice in the White House, a president who can be trusted to be straight with the American people in good times and bad.

NINA TOTENBERG
Legal Correspondent, National Public Radio

As a reporter and observer of Washington for over three decades, I have some thoughts about governing to benefit both the public interest and the Administration's own interest. I know that Administration's hate to air their dirty laundry publicly, and hate to let people see the messy business of decision-making. But believe me, a little openness will save a lot of grief.

I was reminded of that last August when I interviewed former Attorney General Griffin Bell for what we both knew would be his obituary. "Trust is the coin of the realm," he observed. "If the public doesn't trust the Justice Department, we're in trouble…so you need to let people know what's going on, and who you meet with, and who's influenced you, and who's had a chance to influence you." In pursuit of that, everyday Bell published his Justice Department phone and meeting logs, so reporters could see who he met with and who he spoke to on the phone. "I'm quite surprised nobody else has done it," he said. " I don't think it hurt me at all. In fact, he added with a chuckle, it helped me in a lot of ways because it cut down on the number of calls he got from Congressmen!"

Bell did something else that furthered openness and, I think, protected him

and his administration from criticism. Whenever he overruled the career lawyers in the Justice Department, he offered them the opportunity to have their disagreement publicly disclosed. Few took him up on the offer; it raised his stock enormously within the Department; and it meant that there was little grumbling and leaking when he made a decision. It is one thing to be overruled for what one thinks are nefarious or political reasons; it is another to be overruled because the AG disagrees on the merits, and to have the opportunity to have your disagreement noted publicly.

There have been reams written about secrecy and the Office of Legal Counsel opinions. Suffice to say that they should be made public whenever possible. If they have to be sanitized to protect secrets, fine. If they can only be disclosed to the Judiciary and Intelligence Committees, fine. But any time the basic thrust of a legal decision is kept secret, it means the Administration is out there on its own when and if there are public consequences.

"Believe me, a little openness will save a lot of grief. Openess shields you from your natural political instincts."

Also remember that openness shields you from your natural political instincts. Joseph Califano, who served in the White House, the Defense Department, and as head of the then department of Health Education and Welfare, once told me with a wry laugh, " Thank God for the press. It's not that I loved them. I didn't. But without them there, we all probably would have done a lot of stupid things."

ERIC ALTERMAN
Columnist, The Nation.

First, close Gitmo. Second, appoint a distinguished bipartisan commission to investigate crimes committed by the members of the Bush administration under the cover of "national security" and forward that report to the United States Attorney General.

After that, I'll leave it to Barack. He seemed to know what he was doing better than anyone else during that whole election thing, after all... Though I would also suggest that he invite Bruce Springsteen to his inauguration to sing "These are Better Days."

STEPHEN CARTER
Nelson Cromwell Professor of Law, Yale University

The question betrays a bias that history rejects. Although the Congress has occasionally adopted landmark legislation, new policy initiatives, from either party, tend overwhelmingly to pay off supporters. I think Presidents, with a few exceptions, do their most important work for America not in what policies they promote but in how they speak of the nation, how they lead, how they inspire.

Most historians, for example, consider Washington and Lincoln the best President's in our history. Washington's greatness came from his ability to create a nation, and Lincoln's from his ability to sustain it. Lincoln in particular spoke and wrote eloquently about America, and his words were published and debated all across the country.

When we think of great initiatives, we might think, perhaps, of Lyndon Johnson. Johnson is certainly remembered for pressing important legislation in the area of civil rights, but he was all but forced from office because of his unpopular war. Whereas Lincoln fought, and won, an unpopular war, in a cause about which most Americans were probably indifferent. (Anybody can fight a popular one.)

So, if America is truly to move in a new direction, the new President will speak of the nation in terms that excite us and join us together; will genuinely care about the views of those who disagree (so many have given lip service to listening, and then done what they planned to do all along); and will truly inspire us to attempt great things.

"America is burdened by the hardened tendency, across the political spectrum, for most of us to put ourselves and our desires first, and to call that a politics."

I am not saying that policy initiatives make no difference; of course they do. I am suggesting that it is an error to judge the greatness of a President by the legislation he supports: by that measure, no President can be great unless we happen to agree with his policies.

America today is burdened by the hardened tendency, across the political spectrum, for most of us to put ourselves and our desires first, and to call that a politics; and by the tendency to demonize those who disagree with us, and call that rationality. If President Obama can lead us away from these tendencies, he will go down in history as one of the truly great ones.

RICHARD THOMPSON FORD

George E. Osborne Professor of Law, Stanford University

Dear Mr. President-Elect Obama (or can I call you Barack? I've gotten so many personal emails from you, Michelle and Joe that I feel we're sort of buddies now.)

I hope you will be the first President to seriously confront racial segregation and urban poverty—the most glaring hangover from the Jim Crow era of overt, state sanctioned race discrimination.

You've done a great job already by setting the right tone for black America—for all of America?—by emphasizing the need for industriousness, education and responsible behavior. Far from talking down to black people, you've been willing to treat your black constituents like adults and citizens capable of changing their bad habits managing their own affairs.

But personally responsibility is not enough: the tragedy of inner city isolation is that it locks people into an environment in which both lack of incentives and lack of good examples undermine those who would act responsibly. People need a realistic chance to escape such environments and they need the socialization to allow them to thrive in the (relatively) prosperous mainstream.

Given the economy it shouldn't be as politically difficult as it otherwise would have been to create for the poor and unemployed jobs fixing the

nation's crumbling infrastructure and improving our public services. Such a works program needn't be and shouldn't be race based, but it will disproportionately benefit poor blacks and inner cities because they are disproportionately unemployed and in need of improved infrastructure. It appears your team has announced plans to do something like this—I very much hope they don't let the partisans of a demonstrably failed laissez faire ideology derail this vital initiative.

The government should also encourage states, local governments and private parties help to undo residential segregation. This would include a serious effort to discourage local exclusionary zoning practices that keep the poor out of more affluent areas where jobs are more plentiful and public services are well funded. And we need greater incentives for public schools to seek race and class integrated student bodies (this will, unfortunately, be more difficult to do because of the Supreme Court's misguided decision in *Parents Involved in Community Schools v. Seattle School District*—an opinion that turns the 14th Amendment's equal protection clause on its head effectively prohibits racial integration. And while we're on the topic of the courts, now that you will have some influence over the selection of federal judges, I hope you'll stop the tide of reckless judicial activists such as Justices Roberts and Alito and bring in some people who will be faithful to the true meaning of the Constitution as it has evolved through decades of fruitful interaction between the people and the judiciary.)

THEODORE C. SORENSEN
Special Counsel, Advisor, and Primary Speechwriter to President John F. Kennedy

My first order of business suggestion (besides the economy) would be to void the Executive Orders, some of them secret, which have violated the Constitution or international law or statutory law.

ELIZABETH KOLBERT
Staff Writer, The New Yorker

Barack Obama should direct the Environmental Protection Agency to take the first steps toward regulating CO_2 as a pollutant. This would send a signal to Congress that the Administration is serious about dealing with global warming, and would provide a strong incentive for legislative action.

The U.S. Supreme Court invited the EPA to regulate carbon dioxide last year, when it found, in the case of *Massachusetts v. EPA*, that the agency already had the power to do so under the Clean Air Act. The Bush Administration ignored—or really rejected—the invitation, by refusing to classify CO_2 as a danger. Obama should direct the agency to issue a so-called "endangerment" finding; this, in turn, would initiate the rule-making process.

While everyone agrees that the best way to limit carbon emissions is through legislation, there just isn't any time to waste any more. Obama needs to make it clear that one way or another, he intends to bring emissions down.

MICHAEL MASSING
Journalist, Contributing Editor to the Columbia Journalism Review

When, back in November, the Brennan Center first asked me to jot down thoughts about new initiatives for the Obama administration, Israel had not yet launched its offensive against Gaza. Even then, I was going to single out the Israeli-Palestinian issue as a critical one for the new administration; the events of the last few weeks have only reinforced that idea. When it comes to repairing America's pummeled image in the world, nothing could do more than for the US government to push for a genuine and lasting solution to that festering mess.

Success would require both a more competent brand of diplomacy and a more even-handed approach than we've seen over the last eight years. There's little doubt about the Obama team's ability to provide the former. But taking a more balanced stand toward Israel and the Palestinians, and pressing Israel to put an immediate halt to all settlement expansion—a sine qua non for any progress toward a solution—would require a real show of political nerve.

During the transition, Barack Obama ostentatiously refrained from revealing his intentions on this issue. Once he takes office, though, he will no doubt quickly do so. Whether he decides to embrace the status quo or to make an audacious bid for a settlement will reveal much about the direction of his foreign policy, and about the prospects for America to win back the world's favor.

KATHA POLLITT
Columnist, The Nation.

In the morning of his first day, the president should close Guantanamo and ban torture. Then, after lunch, he should spend a pleasant afternoon reversing—with a stroke of his pen—Bush's roughly 200 executive orders: the "gag rule" on abortion, limits on stem-cell research, permission to drill for oil and gas on federal lands, allowances for religious discrimination in hiring for government-funded faith-based programs and on and on.

GEOFFREY R. STONE
Edward H. Levi Distinguished Service Professor of Law, University of Chicago

As one of his first acts of office, President Barack Obama should call for federal legislation ensuring equal rights for all persons in the United States regardless of sexual orientation.

As a candidate for United States senator from Illinois, Mr. Obama announced that, as "an African-American man" and "a child of an interracial marriage," I have "taken on the issue of civil rights for the LGBT community as if they were my own struggle because I believe strongly that the infringement of rights for any one group eventually endangers the rights enjoyed under law by the entire population." He proclaimed that he had worked for more than a decade "to expand civil liberties for the LGBT community including hate-crimes legislation, adoption rights and the extension of basic civil rights to protect LGBT persons from discrimination in housing, public accommodations, employment and credit," and promised that he would continue to "be an unapologetic voice for civil rights."

Now is the time for Mr. Obama to fulfill that promise—boldly, proudly and in the spirit of this nation's continuing struggle for equal justice for all persons. Specifically, he should call upon Congress immediately to enact the Employment Non-Discrimination Act and the Matthew Shepard National Law Enforcement Hate Crimes Prevention Act, and to repeal the military's discriminatory "don't ask, don't tell" policy and the 1996 Defense of Marriage Act, which he once rightly described as "abhorrent."

Mr. Obama should further call upon Congress to enact federal legislation recognizing equal rights for all persons, without regard to sexual orientation, in the fundamental realm of family rights, including equal treatment under federal law of all persons who are in a legally-recognized marriage, civil union, or domestic partnership.

Mr. Obama wanted to lead. Now, let him lead. ■

RESTORING FAITH IN OUR ELECTIONS

Fixing the Vote

Michael Waldman

Let's make sure the rare level of public engagement engendered by the Presidential campaign survives the 2008 election.

The primaries have been thrilling, marked by surging voter participation. States without Electoral College clout that have traditionally been ignored by candidates—from Indiana and Texas to North Carolina and even South Dakota—have hosted vibrant campaigns. But as the excitement and suspense of the primary season fades and the reality of a general election sets in, how can we make sure this moment of rare public engagement is not just an aberration?

Major change comes when a widely felt public need collides with dysfunctional public institutions. Today, government is broken. The answer must be more than a simple changing of the guard; we know there will be a new president, after all. But there must also be changes in the way our democracy functions. If we want to end the special-interest stasis that paralyzes Congress, for example, we should move to public financing of congressional campaigns. If we worry that Congress is endlessly partisan, we should reform redistricting rules so that lawmakers can't simply carve themselves one-party districts. If we liked the 50-state frenzy that made every vote matter, we should end the Electoral College (which, intriguingly, could be bypassed by states even without a constitutional amendment).

But no improvement would have a more hopeful impact than to craft a modern and inclusive voting system. Turnout in the Democratic primary, at least, has been double that of the last election cycle, and it will likely rise higher in November. But this rising tide may swamp the ramshackle system by which we cast and count votes. With luck, this year won't be a mess. But we can tap this energy to fix voting, for good. Starting next year, the country should move to a system of universal voter registration, in which every eligible citizen can vote. We should end voter registration as we know it.

The United States is one of the few industrialized democracies that erects barriers to registration, making individuals sign themselves up and bear the burden of keeping their registration up to date. The system leaves gaps and inaccuracies in voter rolls, causes voters to fall through the cracks when they move, and creates opportunities for partisan mischief. Former presidents Gerald Ford and Jimmy Carter chaired a commission that concluded, "The registration laws in force throughout the United States are among the world's most demanding … [and are] one reason why voter turnout in the United States is near the bottom of the developed world." Today, some 50 million eligible American citizens are not on the rolls.

Yes, voting is a responsibility. But the government should not put up obstacles to registration, either through bureaucratic mistakes or misguided laws. We don't privatize most other key roles in our functioning democracy. We don't tell people to organize themselves to show up for the census, or to collect taxes. We don't ask litigants to rustle up a jury pool. We see all these as government's natural, obvious obligation. We should also see government as having the prime role in creating an accurate list of who can vote. This primary season showed a yearning to participate. Government shouldn't stand in the way.

Originally published by *Newsweek* on June 6, 2008.

There are many creative ways to achieve universal voter registration. States could piece together a list from existing tallies, such as drivers' licenses and jury rolls. Or states could do what Massachusetts has done for two centuries, which is conduct an annual census to find out who lives there. A new, universal voting list could be updated yearly with mass mailings, tax returns, auto registrations, and forms from the post office that people could fill out when they change their addresses. The federal government could set a national standard, then give states funds to help them make sure the voters are on the rolls.

How can we make sure this moment of rare public engagement is not just an abberation?

Whatever method we decide upon, Election Day registration should be a part of the plan in every state. Already, eight states allow citizens to register when they vote. The system boosts turnout by five to seven points, reduces confusion, and makes it possible for "people power" to overturn the political establishment.

A change like universal voter registration would help create a fully modern and participatory election system. Even more, such democracy reforms make other reforms possible. If politicians knew that tens of millions more voters would go to the polls, they might be more likely to act with alacrity on pocketbook issues such as health care. If campaign funding laws are changed so that K Street no longer provides the bulk of funding for members of Congress, complex measures like climate change legislation might come unstuck. If we want to solve our problems, we'd better fix our systems.

The next president should not regard the increase in voter turnout as a personal achievement but rather as a signal that it is time to rebuild the structures of American democracy. The 2008 election will definitely be historic. But it can also be the election that forever changes the way Americans participate in politics. ■

Barriers to the Vote

Wendy Weiser

Technical trip-ups block the 21st century voter's path to the polling place.

Last week, the Ohio Supreme Court reversed a decision by the Secretary of State to reject thousands of absentee ballot applications from registered voters whose eligibility was not in serious doubt. This dispute illustrates the kinds of problems we're seeing nationwide.

The rejected voters used an absentee ballot request form created by the McCain campaign, but did not check an unnecessary box on the form. The box in question, which looks like a bullet point, appears at the top of the form next to a bold-face statement that reads: "I am a qualified elector and would like to receive an Absentee Ballot for the November 4, 2008 General Election." Most readers would interpret this as meaning that if they filled out and signed the form, they would be affirming that statement. And that's how thousands of Ohio voters, mostly elderly, interpreted it.

If states can use technical requirements as a barrier to voting, then we have a system that can be gamed.

But not the Secretary of State. According to her, if an applicant didn't check the box, then he didn't affirm that he is qualified and his application had to be rejected. Putting aside the fact that the voters who filled out the form clearly intended to indicate that they are qualified, such a statement is plainly unnecessary for election officials to make eligibility determinations.

For one thing, the applicants included their voter registration information on the form. For another, election officials can look up each applicant on the state's voter registration database, which includes all qualified voters who are registered in the state. This was nothing more than a game of gotcha!

Fortunately, the Ohio Supreme Court stepped in and ordered these applications processed. But courts aren't always there to overturn every technical hurdle put up before voters. This is not an anomaly.

Florida and several other states currently have similar rules in place for processing voter registration forms. They reject forms if the applicants don't check boxes at the top indicating that they are citizens over 18—even though later in the form, the applicants provide their birthdates (which should give election officials enough information to determine if they are over 18), and they sign a sworn statement that they're eligible citizens (which should suffice to affirm their citizenship). Since 2004, thousands of citizens in Florida alone didn't make it on the rolls on time, and lost their ability to vote, because of this technical rule.

Excerpted from Wendy Weiser's remarks at the Federalist Society Election Law Conference on October 7, 2008.

As another example, four states currently require election officials to reject voter registrations if they can't electronically match the voters' information with drivers' license or Social Security databases. And there are currently lawsuits trying to impose similar requirements in three other states. The problem is that there are lots of errors in these state databases, and the match process states use is widely recognized—including by the National Academies of Science—as error prone, to say the least. To give a sense of the magnitude of the errors, Florida recently started reviewing more than 20,000 failed matches, and it has already found that more than ¾ were the result of typos. They're still investigating the others, though they are not likely to get through them all on time. And in Wisconsin, matching failed for 22% of people on the voter rolls, including four of the six members of their election board. Working with information technology efforts, we have studied match failure problems and found that they affect minorities, married women, and people with foreign-sounding names at much higher rates.

These examples highlight a vulnerability in our election administration system. If states and election officials can use technical requirements as a barrier to voting or voter registration, then we have a system that can be gamed to keep out disfavored voters, and that in fact does keep out eligible voters, typically through no fault of their own.

This isn't new to electoral politics. Back in the Jim Crow days, technical barriers to voter registration and voting were common—and typically ill-intentioned. Regardless of intentions, these kinds of barriers are still unfair and, frankly, un-American. In the 60's, Congress tried to put an end to these shenanigans, prohibiting officials from denying the right to vote based on any immaterial "error or omission" on voting-related paperwork or records.

This is under-enforced. We need a renewed commitment to this principle. But getting rid of paperwork obstacles is not enough. We still have a system in which 30% of Americans are not registered to vote, according to the 2006 Census, and application rejections account for only a fraction of the problem.

Bad list maintenance practices is another problem. We recently released a study showing that millions of voters are purged from the rolls each year without any notice, using ad hoc and non-transparent procedures that are similarly prone to error and manipulation. (For example, this year, a local Mississippi election official discovered that one of his colleagues erroneously purged 10,000 voters using her home computer.)

We have access problems as well. The Department of Veterans' Affairs, for example, has refused to allow election officials or civic groups to provide voter registration services to the 5.2 million veterans who are residents and patients of its facilities. Nor has the agency made voter registration available itself, except to a few hundred of its patients. (It's true that the agency recently agreed to consider requests by election officials and civic groups, but only a small number of requests were granted.)

All this points to the need to modernize our voter registration system—a system that's remained fundamentally unchanged since it was put in place in the late nineteenth century. We all agree on the ultimate goal—a system that includes every eligible voter once, and only eligible voters, and a system that is not vulnerable to manipulation for partisan or other purposes.

And I am hopeful that we can all agree on a way forward—moving toward a system of universal voter registration in which election officials are responsible for building a list of all eligible—and only eligible—voters. That can be done by automatically registering citizens included on other government lists that are more complete, like state tax, social service, and drivers' license lists, and by regularly checking for and removing duplicates and people who move or die. Registration would be permanent

within states, automatically updating based on changes of residence, as is currently done in 8 states. And there would be fail-safe procedures, like Election Day registration or traditional voter registration, for the 5% or so of voters who would be missed or mistakenly purged. This kind of system—which is used in most other advanced democracies—is within reach now that we have new technological tools like statewide voter databases.

And it has a number of advantages:

When Florida reviewed 20,000 voters who did not match government databases, three quarters had failed because of of typos.

- It would include far more eligible voters than the current system.
- It would dramatically reduce opportunities for imposing technical barriers on voters or manipulating the list of who gets to vote.
- It would reduce the need for a huge administrative infrastructure to provide and process voter registration applications.
- It would streamline and rationalize the system, taking out the middlemen and ensuring that election officials don't have to process hundreds of thousands of registrations in the weeks before an election.
- And it would eliminate opportunities for voter registration fraud, which at least some of my co-panelists believe create the risk of voter fraud.
- And it is wildly supported by Americans.

Whether or not we pursue universal voter registration, we need reforms that eliminate the ability to game the system. An electoral system in which each side tries to knock out the others' voters is one in which voters lose. Voters win, and democracy wins, when each side focuses exclusively on winning them over. ■

Disenfranchisement by Typo

Adam Skaggs

Do Florida's new laws protect – or disenfranchise – voters?

When a reporter asked Gov. Charlie Crist about the controversial "no match-no vote" law that Secretary of State Kurt Browning started enforcing mere weeks before the registration deadline, Crist responded, "You have to be who you are, in order to vote . . . . I don't want election fraud. I want people who are voting to be who they purport to be."

Every Floridian should wholeheartedly agree. The problem is the law doesn't do what the governor says it does.

The law doesn't guarantee voters are who they say they are. It actually prevents ballots from being counted even after voters produce irrefutable proof of identity — like military identification or U.S. passports. Provisional ballots will also be thrown out if voters don't give officials a copy of their driver's license within two days after the election — even though they already showed their license at the polls.

That's because the law isn't about verifying identity, it's about verifying a record-keeping number — either your driver's license number or four digits of your Social Security number. If the state doesn't verify your number, your vote won't count — even though you verified your identity by showing photo identification at the polls.

Here's how it happens. When an applicant registers to vote, she gives her Florida driver's license number. Nondrivers provide the last four digits of their Social Security numbers. The state tries to verify those numbers by comparing voter applications with records in the motor vehicle or Social Security database. If the data matches, the voter is registered.

If the state doesn't find a "match," the applicant isn't registered. That's a problem, because matches fail all the time for reasons that have nothing to do with voters being who they say they are, like typographical errors made when applications are processed, or women registering in their married names when the Social Security database lists their maiden names. The Social Security Administration says that matching voter data with its database fails 46.2 percent of the time — about the same odds as flipping a coin.

Florida's law prevents ballots from being counted even after voters produce proof of identity.

These problems prevent matches and stop voters from being registered. And while unmatched voters may get provisional ballots, those provisional ballots often won't be counted, because showing a reliable photo ID at the polls isn't enough.

Provisional ballots will count only if voters provide officials with a copy of their driver's license or Social Security card within two days after the election. Even military ID and U.S. passports aren't accepted. So, after casting a provisional ballot, if a voter doesn't have her original Social Security card, can't access a fax machine to submit it, can't drive to the county election offices to drop it off, or doesn't receive clear instructions from poll workers on any of the above, the provisional ballot won't count.

As a result, even though — in the governor's words — the voter proved she is who she purports

Originally published in *The St. Petersburg Times* on October 2, 2008.

to be by showing up at the polls with ID, a failed "match" by the state spawns a tailspin that ends with an eligible voter not being able to cast a vote that counts.

Fortunately, there's a simple solution: If a voter shows her driver's license at the polls, count the vote. If a voter verifies that she is who she says she is by showing a passport or military ID at the polls, count the vote — don't throw out the vote because the voter can't fax in a copy of her Social Security card the day after the election.

When a federal court struck down the original version of the law in December, the measure was blocking 16,000 voters from the registration rolls. In the month between the time the secretary of state started enforcing this policy and the registration deadline, hundreds of thousands of voters will register. Tens of thousands of them will be at great risk of having their ballots go uncounted. These voters' provisional ballots may well be the hanging chad of 2008. ■

A Citizen's Guide to Redistricting

Justin Levitt

At least once per decade, legislative district lines are redrawn. This process can curb or boost accountability, and citizens should understand what is at stake.

Our representatives in local, state, and federal government set the rules by which we live. In ways large and small, they affect the taxes we pay, the food we eat, the air we breathe, the ways in which we make each other safer and more secure. Periodically, we hold elections to make sure that these representatives continue to listen to us.

All of our legislators in state government, many of our legislators in local government, and most of our legislators in Congress, are elected from districts, which divide a state and its voters into geographical territories. In most of these districts, all of the voters are ultimately represented by the candidate who wins the most votes in the district. The way that voters are grouped into districts therefore has an enormous influence on who our representatives are, and what policies they fight for. For example, a district composed mostly of farmers is likely to elect a representative who will fight for farmers' interests, but a district composed mostly of city dwellers may elect a representative with different priorities. Similarly, districts drawn with large populations of the same race, or ethnicity, or language, or political party are more likely to elect representatives with the same characteristics.

Every so often, a state's district lines — for both Congress and the state legislature — are redrawn, grouping different sets of voters together in new ways. Sometimes, the way that a particular district is redrawn directly affects who can win the next election. And together, the way that the districts are redrawn can affect the composition of the legislative delegation or legislature as a whole. Many believe that we would have different representatives, federal and state, if the district lines were drawn differently.

In addition to affecting large political trends, the way that district lines are drawn can have very specific consequences. For instance, in some cases, new lines may be redrawn to leave an incumbent's house out of the district she used to represent, making it difficult or impossible for her to run for re-election to represent most of her old constituents unless she moves. Other times, lines may be drawn to include the homes of two incumbents in the same party, forcing them to run against each other or retire, and in either case, knocking one of them out of the legislature. Often, sitting legislators from the party controlling the legislature are also in control of drawing new lines, leaving them free to target challengers, or legislators from an opposing party.

Excerpted from the Brennan Center's publication *A Citizen's Guide to Redistricting*, released June 2008.

Occasionally, the process of redrawing district lines gets a lot of attention. In 2003, there was a big controversy in Texas; one party tried to redraw the district lines for Congress after a court had already redrawn the lines just a few years before, and legislators in the other party actually fled the state — twice — to try to stop the redrawing.

More often, this "redistricting" gets much less attention in the press. But even when it does not make the front page, it is extremely important in determining which communities are represented and how vigorously – which is in turn extremely important to determining which laws get made.

Even when it does not make the front page, redistricting is extremely important in determining which communities are represented, and how vigorously.

There are many different ways to figure out which voters are grouped together to elect a representative. Whether the way that districts are currently drawn in any given state is good or bad depends on what you believe the goals of the process to be. Some stress objectivity; some independence; some transparency, or equality, or regularity, or other goals entirely. There is ample debate among scholars, activists, and practitioners about the role of political insiders, the nature of protection for minority rights, the degree of partisan competition or partisan inequity, and the ability to preserve established or burgeoning communities. But to date, this discussion has been inaccessible to most of the people directly affected.

This publication is intended to present the redistricting process for state and federal government, and for many local governments, in digestible parts. There are many moving components, complex issues that we attempt to describe in simple and straightforward fashion, piece by piece. This is a guide to the rules for drawing district lines – a description of how it works today, how it could work in the future, and what it all means. Consider it an owners' manual, for those who should own the process: we, the people.

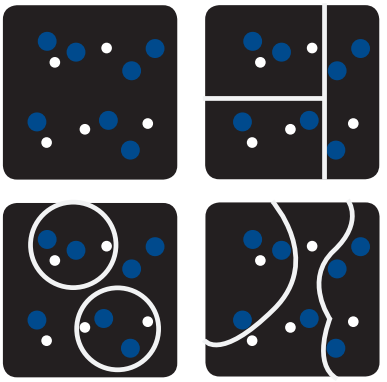
WHY DOES REDISTRICTING MATTER?

The way that district lines are drawn puts voters together in groups — some voters are kept together in one district and others are separated and placed into other districts. The lines can keep people with common interests together or split them apart. Depending on which voters are bundled together in a district, the district lines can make it much easier or much harder to elect any given representative, or to elect a representative responsive to any given community. And together, the district lines have the potential to change the composition of the legislative delegation as a whole.

Letting Politicians Choose Their Voters

After the 2000 census, when it came time to redraw district lines in California, state Democrats controlled the state legislature and the Governor's mansion. Under California's rules, this let the party, and particularly the sitting Democratic legislators, control the redistricting process for both the state legislature and for California's Congressional delegation. However, Republicans threatened to put an initiative on the ballot, leaving the redistricting process to an uncertain public vote, if the

DIFFERENT REDISTRICTING PLANS



District lines group voters into districts, with each district electing a different representative. District lines can be drawn in many different ways.

Democrats got too greedy. Democrats also faced a threat that litigation over a redistricting plan would drive the process to the courts, potentially allowing the state supreme court — with six Republican appointees and only one Democratic appointee — to draw the lines. Ultimately, the two parties effectively decided to call a truce, and to keep the incumbents — of both parties — as safe from effective challenge as they could.

Democrats paid Michael Berman, a redistricting consultant, more than $1.3 million to create the resulting redistricting plan. In addition, thirty of California's 32 Democratic members of Congress each gave Berman $20,000 in order to custom-design their individual districts for safety. As Rep. Loretta Sanchez explained: "Twenty thousand is nothing to keep your seat. I spend $2 million (campaigning) every year. If my colleagues are smart, they'll pay their $20,000, and Michael will draw the district they can win in. Those who have refused to pay? God help them."

Eliminating Incumbents

After the 2000 elections, just as Democrats controlled the redistricting process in California, Republicans controlled the redistricting process in Virginia. The Virginia Republicans used the redistricting pen to target Democratic Minority Leader Richard Cranwell, a 29-year veteran of the state legislature. They surgically carved his house, and 20 neighboring homes along the same street, out of the district he had represented, and placed them into the district of his 22-year colleague, Democrat Chip Woodrum. The resulting district crossed both county and town lines, and with what fittingly looked like a tiny grasping hand, reached out to grab Cranwell's residence. Rather than run against Woodrum in what was essentially Woodrum's home district, Cranwell decided not to run for re-election in 2001.

Eliminating Challengers

In the 2000 Democratic primary for a Brooklyn, NY, state legislative seat, newcomer Hakeem Jeffries challenged long-time incumbent Roger Green, and won more than 40% of the vote. Jeffries' strong showing set the stage for a potential rematch.

In the meantime, however, New York redrew its state legislative districts, in a process controlled by sitting legislators — including Roger Green. The redistricting process took the block where Jeffries' house was located and carved it out of Green's district. With Jeffries out of the picture, no

candidate ran against Green in the 2004 primary, and he won the general election in November with 95% of the vote. Two years later, Hakeem Jeffries was able to move to a house within the redrawn district in order to run for the seat; he won the district's primary election with 65% of the vote, and as the Democratic nominee in an overwhelmingly Democratic district, won the general election with 97% of the vote.

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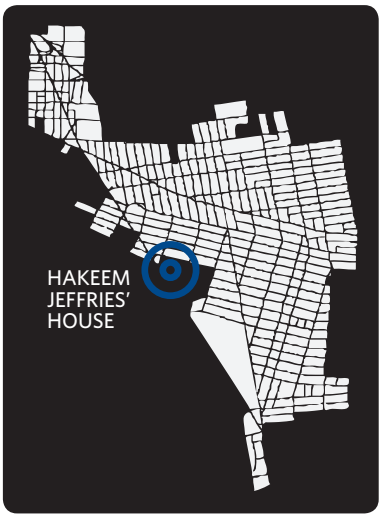

SOURCE: NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT

Packing Partisans

Just like they can be drawn around particular politicians, districts can be drawn around particular voters. There are many tools available to try to predict which voters will support a favored candidate, and those who draw the lines may try to put as many of those voters as possible within a given district, to protect incumbent legislators or give challengers a better chance, or to drain support for the opposition from neighboring districts. In so doing, the districts may split communities or stretch across vast swaths of a state.

In 1991, for example, Texas's 6th Congressional District was designed to include as many loyal Republicans as possible, in part so that Democrats could control adjacent districts. As Supreme Court Justice John Paul Stevens described the district lines:

> To the extent that it "begins" anywhere, it is probably near the home of incumbent Rep. Barton in Ennis, located almost 40 miles southwest of downtown Dallas. . . . It skips across two arms of Joe Pool Lake, noses its way into Dallas County, and then travels through predominantly Republican suburbs of Fort Worth. Nearing the central city, the borders dart into the downtown area, then retreat to curl around the city's northern edge, picking up the airport and growing suburbs north of town. Worn from its travels into the far northwestern corner of the county (almost 70 miles, as the crow flies, from Ennis), the district lines plunge south into Eagle Mountain Lake, traveling along the waterline for miles, with occasional detours to collect voters that have built homes along its shores. Refreshed, the district rediscovers its roots in rural Parker County, then flows back toward Fort Worth from the southwest for another bite at Republican voters near the heart of that city. As it does so, the district narrows in places to not much more than a football field in width. Finally, it heads back into the rural regions of its fifth county — Johnson — where it finally exhausts itself only 50 miles from its origin, but hundreds of "miles apart in distance and worlds apart in culture."

TEXAS CONGRESSIONAL 6

Diluting Minority Votes

When the Texas legislature next drew district lines, in 2003, there were further shenanigans. The redistricting battles were so bitterly fought that Democratic state legislators, then in the minority, fled to Oklahoma and New Mexico to prevent the state legislature from meeting; federal House Majority Leader Tom DeLay drew a formal ethics rebuke for using the FAA to try to track their plane.

Among other things, the Congressional redistricting plan that emerged moved about 100,000 Latino voters from one district (District 23) into an adjacent district (District 25) in order to protect a particular incumbent. The incumbent had lost support among Latinos in every election since 1996, and just before the lines were redrawn, Latinos had grown to a majority of the voting-age citizens in the district. Then the lines were redrawn, splitting off a sizable portion of the Latino community and replacing them in the district with voters more inclined to favor the incumbent. The plan ended up at the Supreme Court, which recognized that, "[i]n essence, the State took away the Latinos' opportunity because Latinos were about to exercise it." The Court forced Texas to redraw District 23, and the following year, the candidate of choice for the Latino community was elected.

Splitting Communities

In 1992, race riots in Los Angeles took a heavy toll on many neighborhoods, including the area known as Koreatown. It is estimated that the city suffered damages of more than $1 billion, much of it concentrated on businesses operated by Koreans and other Asian immigrants.

When residents of these neighborhoods appealed to their local officials for assistance with the cleanup and recovery effort, however, each of their purported representatives — members of the City Council and the state Assembly — passed the buck, claiming that the area was a part of another official's district. The redistricting map, it turned out, fractured Koreatown. The area, barely over one mile square, was split into four City Council districts and five state Assembly districts, with no legislator feeling primarily responsible to the Asian-American community. ■

Voter Purges

Myrna Pérez

Millions of eligible voters are knocked off the rolls every year, often without even knowing it.

Voter registration lists are the gateway to voting. A citizen typically cannot cast a vote that will count unless her name appears on the voter registration rolls. Yet state and local officials regularly remove — or "purge" — citizens from voter rolls. In fact, thirty-nine states and the District of Columbia reported purging more than 13 million voters from registration rolls between 2004 and 2006. Purges, if done properly, are an important way to ensure that voter rolls are dependable, accurate, and up-to-date. Precise and carefully conducted purges can remove duplicate names, and people who have moved, died, or are otherwise ineligible.

Far too frequently, however, eligible, registered citizens show up to vote and discover their names have been removed from the voter lists. States maintain voter rolls in an inconsistent and unaccountable manner. Officials strike voters from the rolls through a process that is shrouded in secrecy, prone to error, and vulnerable to manipulation.

While the lack of transparency in purge practices precludes a precise figure of the number of those erroneously purged, we do know that purges have been conducted improperly before. Over the past several years, every single purge list the Brennan Center has reviewed has been flawed. In 2004, for example, Florida planned to remove 48,000 "suspected felons" from its voter rolls. Many of those identified were in fact eligible to vote. The flawed process generated a list of 22,000 African Americans to be purged, but 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. Under pressure from voting rights groups, Florida ordered officials to stop using the purge list.

In New Jersey in 2005, the Brennan Center worked with a political science professor to analyze a purge list prepared by a political party using "matching" techniques. We found that the list was compiled using a number of faulty assumptions and that it would have harmed eligible voters if used as the basis for a purge. In 2006, the Secretary of State of Kentucky attempted to purge the state's rolls based on a flawed attempt to identify voters who had moved from Kentucky to neighboring South Carolina and Tennessee. A resulting lawsuit uncovered the fact that eligible voters who had not, in fact,

Excerpted from the Brennan Center's report, *Voter Purges*, released September, 2008.

moved out of the state of Kentucky were caught up in the purge; a state court ordered the state to reverse the purge.

The purges reviewed for this report give no greater grounds for comfort. While the reasons vary from state to state, no state reviewed in this report uses purge practices or procedures that are free from risk of error or manipulation, that have sufficient voter protections, or that have adequate procedures to catch and correct errors.

The secret and inconsistent manner in which purges are conducted make it difficult, if not impossible, to know exactly how many voters are stricken from voting lists erroneously. And when purges are made public, they often reveal serious problems. Here are a few examples recent examples:

When purges are made public, they often reveal serious problems.

• In Mississippi earlier this year, a local election official discovered that another official had wrongly purged 10,000 voters from her home computer just a week before the presidential primary.

• In Muscogee, Georgia this year, a county official purged 700 people from the voter lists, supposedly because they were ineligible to vote due to criminal convictions. The list included people who had never even received a parking ticket.

• In Louisiana, including areas hit hard by hurricanes, officials purged approximately 21,000 voters, ostensibly for registering to vote in another state. A voter could avoid removal if she provided proof that the registration was cancelled in the other state, documentation not available to voters who never actually registered anywhere else.

This report provides one of the first systematic examinations of the chaotic and largely unseen world of voter purges. In a detailed study focusing on twelve states, we identified four problematic practices with voter purges across the country:

Purges rely on error-ridden lists. States regularly attempt to purge voter lists of ineligible voters or duplicate registration records, but the lists that states use as the basis for purging are often riddled with errors. For example, some states purge their voter lists based on the Social Security Administration's Death Master File, a database that even the Social Security Administration admits includes people who are still alive. Even though Hilde Stafford, a Wappingers Falls, NY resident, was still alive and voted, the master death index lists her date of death as June 15, 1997. As another example, when a member of a household files a change of address for herself in the United States Postal Service's National Change of Address database, it sometimes has the effect of changing the addresses of all members of that household. Voters who are eligible to vote are wrongly stricken from the rolls because of problems with underlying source lists.

Voters are purged secretly and without notice. None of the states investigated in this report statutorily require election officials to provide public notice of

a systematic purge or even individual notice to those voters whose names are removed from the rolls as part of the purge. Additionally, with the exception of registrants believed to have changed addresses, many states do not notify individual voters before purging them. In large part, states that *do* provide individualized notice do not provide such notice for all classes of purge candidates. For example, our research revealed that it is rare for states to provide notice when a registrant is believed to be deceased. Without proper notice to affected individuals, an erroneously purged voter will likely not be able to correct the error before Election Day. Without public notice of an impending purge, the public will not be able to detect improper purges or to hold their election officials accountable for more accurate voter list maintenance.

Bad "matching" criteria leaves voters vulnerable to manipulated purges. Many voter purges are conducted with problematic techniques that leave ample room for abuse and manipulation. State statutes rely on the discretion of election officials to identify registrants for removal. Far too often, election officials believe they have "matched" two voters, when they are actually looking at the records of two distinct individuals with similar identifying information. These cases of mistaken identity cause eligible voters to be wrongly removed from the rolls. The infamous Florida purge of 2000 — conservative estimates place the number of wrongfully purged voters close to 12,000 — was generated in part by bad matching criteria. Florida registrants were purged from the rolls in part if 80 percent of the letters of their last names were the same as those of persons with criminal convictions. Those wrongly purged included Reverend Willie D. Whiting Jr., who, under the matching criteria, was considered the same person as Willie J. Whiting. Without specific guidelines for or limitations on the authority of election officials conducting purges, eligible voters are regularly made unnecessarily vulnerable.

Insufficient oversight leaves voters vulnerable to manipulated purges. Insufficient oversight permeates the purge process beyond just the issue of matching. For example, state statutes often rely on the discretion of election officials to identify registrants for removal and to initiate removal procedures. In Washington, the failure to deliver a number of delineated mailings, including precinct reassignment notices, ballot applications, and registration acknowledgment notices, triggers the mailing of address confirmation notices, which then sets in motion the process for removal on account of change of address. Two Washington counties and the Secretary of State, however, reported that address confirmation notices were sent when any mail was returned as undeliverable, not just those delineated in state statute. Since these statutes rarely tend to specify limitations on the authority of election officials to purge registrants, insufficient oversight leaves room for election officials to deviate from what the state law provides and may make voters vulnerable to poor, lax, or irresponsible decision-making. ■

De Facto Disenfranchisement

Erika Wood & Rachel Bloom

Confusion among election officials about felony disenfranchisement laws effectively keeps thousands of eligible voters from the polls.

Voting is both a fundamental right and a civic duty. However there remains a significant blanket barrier to the franchise: 5.3 million American citizens are not allowed to vote because of criminal convictions. As many as four million of these people live, work, and raise families in our communities, but because of convictions in their past they are still denied the right to vote.

State laws vary widely on when voting rights are restored. Maine and Vermont do not deny the franchise based on a criminal conviction; even prisoners may vote there. Kentucky and Virginia are the last two states to continue to permanently disenfranchise all people with felony convictions unless they receive individual, discretionary clemency from the governor. The remaining 46 states fall somewhere in between, with the varied state laws forming a patchwork across the country. Some states restore voting rights upon release from prison, others upon completion of probation and parole, and others impose waiting periods or other contingencies and categories before restoring voting rights.

Disenfranchisement by law of over 5 million American citizens is only half the story.

This disenfranchisement by law of millions of American citizens is only half the story. Across the country there is persistent confusion among election officials about their state's felony disenfranchisement policies. Election officials receive little or no training on these laws, and there is little or no coordination or communication between election offices and the criminal justice system. These factors, coupled with complex laws and complicated registration procedures, result in the mass dissemination of inaccurate and misleading information, which in turn leads to the de facto disenfranchisement of untold hundreds of thousands of eligible would-be voters throughout the country.

De facto disenfranchisement has devastating long-term effects in communities across the country. Once a single local election official misinforms a citizen that he is not eligible to vote because of a past conviction, it is unlikely that citizen will ever follow up or make a second inquiry. Without further public education or outreach, the citizen will mistakenly believe that he is ineligible to vote for years, decades, or maybe the rest of his life. And that same citizen may pass along that same inaccurate information to his peers, family members and neighbors, creating a lasting ripple of de facto disenfranchisement across his community.

This piece is excerpted from the Brennan Center and ACLU report *Defacto Disenfranchisement*, released in September, 2008.

Between 2003 and 2008, the ACLU and the Brennan Center for Justice, together with our state partners, conducted interviews with election officials in 15 states to determine the level of knowledge of their state's felony disenfranchisement law. This report summarizes the results of telephone interviews conducted in Arizona, Colorado, Kentucky, Louisiana, Mississippi, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee and Washington.

Prior to conducting interviews in each state, the ACLU and the Brennan Center performed a thorough legal analysis of the state's felony disenfranchisement law. A separate set of questions was designed for each state based on the state law and the specific information sought in the state. The same questions were asked of each election official in the state and their answers were carefully documented along with the official's name and the date and time of the interview. Where feasible, we interviewed a representative of every local election office in each state. In states where a large number of localities made this difficult, a representative sample was identified.

The interviews revealed an alarming national trend of de facto disenfranchisement:

- Election officials do not understand the basic voter eligibility rules governing people with criminal convictions;
- Election officials do not understand the basic registration procedures for people with criminal convictions;
- Interviewers experienced various problems communicating with election officials, including repeated unanswered telephone calls and bureaucratic runaround. ■

Who's Defrauding Whom?

Justin Levitt

Is voter fraud real or simply an excuse to disenfranchise particular segments of the population?

We have paid particular attention in recent years to claims of voter fraud. We have collected allegations of fraud cited by state and federal courts, bipartisan federal commissions, political parties, state and local election officials, authors, journalists, and bloggers. We have analyzed these allegations at length, to distinguish those which are supported from those which have been debunked; furthermore, we have created and published a methodology for investigating future claims, to separate the legitimate from the mistaken or overblown. Most recently, we published a monograph reflecting our analysis, entitled "*The Truth About Voter Fraud*," which compiles for the first time the recurring methodological flaws behind the allegations of widespread voter fraud that are frequently cited but often unsupported. We have similarly examined claims of voter fraud in *amicus* briefs filed with courts around the country, including cases currently pending at the appellate level and with the Supreme Court.

It is more likely that an individual will be struck by lightning than that he will impersonate another voter at the polls.

We have also reviewed, in detail, the effect of policies and laws that contribute to the disenfranchisement of eligible citizens. We attempt to bring reliable data to bear on the effort to assess the nature and magnitude of the impact of new election rules, particularly those with the potential to burden eligible citizens' efforts to exercise their right to vote. In helping to quantify the impact of these rules, we have sponsored surveys and sophisticated statistical analyses; we have collected affidavits and anecdotes; and we have conducted in-depth review of voter registration forms and voter registration rolls, line by line.

In my testimony today, I will share some of our findings. Our research suggests that the incidence of fraud by those impersonating others at the polls is strikingly rare. Yet we have seen restrictions proposed to address this perceived or invented threat, often supported by stories about election fraud or abnormalities that the restrictions would not actually prevent. Further empirical research shows that the problems caused by some of these restrictions are far more serious than the problems they allegedly resolve. As we stated in *The Truth About Voter Fraud*, "[t]he voter fraud phantom drives policy that disenfranchises actual legitimate voters, without a corresponding actual benefit."

Excerpted from Justin Levitt's testimony before the Senate Committee on Rules and Administration on March 12, 2008.

I. THE MYTH OF IN-PERSON VOTER FRAUD

I will focus here on a particular type of voter fraud: in-person impersonation fraud, or the attempt to impersonate another voter at the polls. Allegations concerning the incidence of or potential for this sort of fraud have been cited as justification for various restrictions on the exercise of the franchise, including some of the more prominent election law controversies in the country. There has been much assertion concerning the appropriate degree of concern regarding such fraud, but relatively little attention paid to the facts that we know. So it is to this in-person impersonation fraud, and to our extensive research on the topic, that I will direct my testimony today.

We conclude that the incidence of actual in-person impersonation fraud is extraordinarily rare. Though it does occur, there are only a handful of recent accounts, even fewer of which have been substantiated. During this same period, hundreds of millions of ballots have been cast. In the past few years in particular, the priority placed on the issue should have fostered the discovery of any substantial quantity of in-person impersonation fraud; the most notable significance of the incidents that have surfaced, however, is how rare they appear to be.

"Crying wolf" about voter fraud perpetuates the lack of public confidence in the integrity of the election process.

We arrived at our conclusion primarily through a focus on evidence: extensive research of reports, citations, and claims of fraud, in popular and scholarly publications, and in documents provided to and produced by public and private investigations. We have prioritized more recent claims, and particularly claims purporting to reveal in-person impersonation fraud. Our review and analysis spans thousands of accounts, including every single assertion of fraud in the most comprehensive collection of claims of in-person impersonation fraud to date: the citations presented to the Supreme Court in the *Crawford v. Marion County Election Board* case.

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II. THE CONSEQUENCES OF THE MYTH

If perpetrating the myth of in-person impersonation fraud had no consequences, it would likely be of little concern to this Committee. There are consequences, however, and these consequences have been and can be quite serious.

First, "crying wolf" about voter fraud, and particularly in-person impersonation fraud, perpetuates the lack of public confidence in the integrity of the election process. Second, it distracts attention from the real and recurring problems that do commonly undermine our elections, including some of the other forms of fraud or administrative irregularity. Third, it can be used to justify placing undue and improper pressure on impartial prosecutors to bring unwarranted criminal prosecutions.

Claims of Fraud Are Used to Justify Policies that Do Not Correct Real Problems

"Crying wolf" about voter fraud has also been used to justify policies that lead to the disenfranchisement of eligible citizens, including the imposition of overly restrictive voter identification requirements, undue purges of legitimate voters from the rolls, and unwarranted restrictions on the registration process, impacting both individual voters and organizations.

The Milwaukee Police Department report provides another timely example. Though the department's chief disavowed the report's policy recommendations, the report's authors cited their conclusions as a reason to pass legislation requiring photo identification documents as a condition of voting. Over the course of the last week, various individuals have echoed this argument in the press, citing the report's findings as supporting photo ID legislation.

The report itself, however, identifies no confirmed instance of in-person impersonation fraud, despite a thorough search for such evidence. That is, the report *did* identify various deficiencies with the election process, none of which could be solved by requiring government-issued photo ID at the polls, and it did *not* confirm any actual wrongdoing that a poll site identification requirement would correct or prevent. In our experience cataloguing attempts to justify ID requirements with claims of voter fraud, this logical non-sequitur is a common feature.

Claims of Fraud Are Used to Justify Policies that Cause Real Problems

Moreover, not only are restrictive identification requirements poorly tailored to any existing problem of any magnitude, but reliable empirical data demonstrates that they cause problems of their own.

The most prominent restrictive voter identification proposals would require government-issued photo identification as a condition of voting a valid ballot at the polls. Most eligible voting-age citizens have such identification. Studies have repeatedly shown, however, that many eligible voting-age citizens do not.

Furthermore, for those who do not currently have government-issued photo identification, obtaining it can be a burden. In some cases, it takes ID to get ID – for example, a certified birth certificate may be required to obtain government-issued photo identification, but government-issued photo identification may be required to get a certified birth certificate. Even when it is possible to get this underlying documentation, doing so costs time and money, with fees up to $380 for a replacement certificate of naturalization. Bringing the assembled paperwork to the agency that distributes the photo identification costs further time and money, as individuals must travel – without a valid driver's license – to a particular office during government hours. For individuals with disabilities or lower-income or more elderly citizens, these burdens may become particularly acute.

In the two states where government-issued photo identification is required to cast a valid ballot, these laws have already contributed to the disenfranchisement of eligible citizens. In one Indiana county's 2007 elections, for example, 32 voters arriving without acceptable photo identification cast ballots that were not counted, apparently solely because of the voter identification law. Fourteen of these voters had previously voted in at least ten previous elections at these same polling places. More recently, in Georgia's 2008 presidential primary election, 296 voters arriving without acceptable photo identification reportedly cast ballots that were not counted, again apparently solely because of the ID law. It is impossible to know exactly how many additional individuals without identification arrived at the polls but did not cast the futile provisional ballots, or declined to make the futile trip to the polls.

In less than two years, however, there are already reports of far more individuals adversely affected by restrictive photo identification laws than the total cited instances of in-person impersonation fraud reported over the last few decades.

There are also disturbing indications that far more eligible citizens may be affected by such laws in the future. Reliable surveys of registered voters conclude that restrictive identification laws do impact eligible citizens, and that they disproportionately impact minority and elderly populations. Although there is some disagreement over the precise magnitude of the effect, even the studies with more modest results estimate an impact that would reach more than two million registered voters if applied nationwide. Surveys of voting-age citizens – including eligible citizens who have not been engaged in the election process, but whom we should hope to engage – are somewhat less fully developed, but find an even more substantial effect, and similar disproportionate impact.

Some seek to justify these restrictive laws, despite their demonstrated impact on many American citizens, and despite the fact that they do not correct an existing problem with recurring in-person impersonation, by claiming that they will at least increase public confidence in the election process. Even if the unfounded fears of the many were sufficient justification to burden the constitutional rights of the few, however, a careful new study, forthcoming in the *Harvard Law Review*, casts serious doubt on the validity of such assertions. The data show no support for the notion that requiring identification will increase voter confidence; the study found no statistically significant correlation between the rate at which citizens were asked to produce photo ID and their perception that either voter fraud generally, or voter impersonation in particular, exists. Photo identification laws do not, in short, appear to make citizens feel more secure about their elections.

Given the amount of speculation and misinformation in the public sphere concerning in-person impersonation fraud, and restrictions ostensibly intended to address such fraud, we thank the Committee for sponsoring this hearing. This represents a welcome effort to ensure that the serious policy debate around election reform remains grounded in the facts.

The available empirical research shows that although in-person impersonation fraud is an occurrence of extraordinary rarity, it has been used to justify policies that appear to offer little benefit and impose substantial cost. The existing safeguards and deterrents have been successful in preventing in-person impersonation fraud to any significant degree; further measures are not only unnecessary, but risk compromising the integrity of our elections to the extent that they shut out eligible citizens.

In contrast, there remain serious concerns about aspects of our election process where existing safeguards are *not* sufficient, and where remedies would *not* risk harm to eligible voters - including, for example, threats to the security of our voting systems, and concerns with the transparency of purges of the voter rolls. In this election season, we still face substantial challenges in ensuring that all eligible citizens are able to exercise the franchise effectively, and we look forward to assisting in the effort to achieve this common goal. ■

Better Ballots

Lawrence Norden, David Kimball, Whitney Quesenbery, & Margaret Chen

Butterflies, "double bubbles" and other badly designed ballots continue to undermine elections.

The notorious butterfly ballot that Palm Beach County, Florida election officials used in the 2000 election is probably the most infamous of all election design snafus. It was one of many political, legal, and election administration missteps that plunged a presidential election into turmoil and set off a series of events that led to, among other things, a vast overhaul of the country's election administration, including the greatest change in voting technology in United States history.

Eight years after the 2000 election and billions of dollars spent on new voting technology, the problems caused by poor ballot design have still not been fully addressed.

Yet, ironically, eight years after the 2000 election, and billions of dollars spent on new voting technology, the problems caused by poor ballot design have not been fully and effectively addressed on a national level. Year in and year out, we see the same mistakes in ballot design, with the same results: tens, and sometimes hundreds, of thousands of voters disenfranchised by confusing ballot design and instructions, sometimes raising serious questions about whether the intended choice of the voters was certified as the winner.

Problems with voting technology have, rightly, attracted much public attention. Scores of independent reports — including a major study published by the Brennan Center — have documented the vulnerabilities of electronic voting machines. More importantly, voting system failures lead to long lines on Election Day, voters being turned away at the polls, and lost votes. These are serious problems, and we must do what we can to ensure that poor technology and procedures do not continue to disenfranchise voters.

At the same time, when it comes to ensuring that votes are accurately recorded and tallied, there is a respectable argument that poor ballot design and confusing instructions have resulted in far more lost votes than software glitches, programming errors, or machine breakdowns. As this report demonstrates, poor ballot design and instructions have caused the loss of *tens and sometimes hundreds of thousands* of votes in nearly every election year.

While all groups of voters are affected by poorly designed ballots and badly drafted instructions, these problems disproportionately affect low-income voters, new voters, and elderly voters. All too often, the loss of votes and rate

Excerpted from the Brennan Center's report *Better Ballots,* published July 2008.

of errors resulting from these mistakes are greater than the margin of victory between the two leading candidates. As the examples in this report show, problems caused by poor ballot design and instructions recur in American elections, *regardless of the type of voting technology a jurisdiction has used.*

Some have dismissed the degree to which poor ballot design undermines democracy by arguing that voters only have themselves to blame if they fail to properly navigate design flaws. This is unfair. Candidates should win or lose elections based upon whether or not they are preferred by a majority of voters, not on whether they have the largest number of supporters who — as a result of education and experience — have greater facility navigating unnecessarily complicated interfaces or complex instructions, or because fewer of their supporters are elderly or have reading disabilities. Nor should candidates win elections because ballot designs happened to make it more difficult for voters supporting their opponents to accurately cast their votes.

VOTING ON A NEW SYSTEM FOR THE FIRST TIME IN 2008

Many voters will be presented with a new voting system for the first time in 2008. For these voters, in particular, usable ballot designs and instructions will be important.

Registered Voters Living in Counties with New Voting Systems	15,194,476
Number of Voting-Age Persons Moving Annually	29,141,000
Approximate Number of Newly Registered Voters in First Three Months of 2008	3,500,000

Fortunately, avoiding the design blunders that have cost so many votes in the past need not be particularly complicated, time consuming, or expensive. In recent months, there have been several efforts to reexamine how voting technology can be made more usable, to ensure that voters' choices are accurately recorded.

We encourage election officials, policy makers, and concerned members of the public to review these documents and continue to work with experts to help ensure better ballot design in their communities. This report is intended to complement those documents and efforts by providing an easy-to-use guide that will allow state and local election officials to avoid the kinds of design mistakes we have seen in every election year in the last decade, while maximizing the likelihood that voters' intended choices are accurately recorded.

In a few months, our nation will hold what many believe is our most important election in a generation. Millions of Americans will cast their votes for the first time. While there is much that can and should be done prior to the general election to ensure that voting is as secure as possible, it is neither likely nor desirable for many jurisdictions to make major changes to their voting equipment or Election Day procedures in the remaining months before November.

However, in the next few months, every state and county can take simple steps to avoid poorly designed ballots and help prevent another Palm Beach County 2000, Cuyahoga County 2004, Sarasota County 2006, Los Angeles County 2008, or any of the many other ballot design problems detailed in this report, which have disenfranchised hundreds of thousands of voters, and — all too frequently — left citizens wondering whether various elections provided an accurate measure of voters' intentions. ■

Swing State Verges on Bad Law

Amicus Brief in Ohio Republican Party v. Secretary Jennifer Brunner

On the eve of the election, some urged Ohio to challenge 200,000 new voters who had data errors in their records.

HAVA was passed after the 2000 Presidential Election, in large part to ensure that eligible voters would not be left off the voting rolls by mandating certain uniform practices aimed at eliminating bureaucratic barriers to voting. It requires states to attempt to match numbers provided by applicants not as an eligibility requirement, but to facilitate orderly record keeping: one unique number for each voter. Under HAVA, voters need not be successfully matched in order to register and have their ballots counted: new voters without a driver's license or Social Security number, and all of the existing voters on the rolls, are simply assigned a unique number by the state.

As demonstrated below, no provision of HAVA requires a state to reject a voter's ballot if the "match" should fail or the voter's record keeping number is not "verified." In all but a handful of outlier states, matching and number verification are not preconditions to voting. And various states that initially misinterpreted HAVA by making such verification a precondition to registration have since changed their laws, either voluntarily or because of court order.

Under HAVA, Matching Serves an Administrative Record-Keeping Function, Not as an Eligibility Requirement

HAVA seeks to reduce the burdens on voting caused by sloppy and incomplete voter registration lists. For decades, voters were turned away from the polls or discouraged from voting due to neglected and poorly maintained voter registration lists. To remove this bureaucratic barrier to voting requires each state to implement a "single, uniform, official, centralized, interactive computerized statewide voter registration list" that is required to be "the single system for storing and managing the official list of registered voters throughout the State."

To facilitate the orderly maintenance of the new registration lists, Congress required states to "assign[] a unique identifier to each legally registered voter in the State." These unique identifiers help states keep track of voters

This amicus brief was filed with the 6th Circuit Court of Appeals on October 10, 2008 in support of the Secretary's of State request to stay a district court order that subjected 200,000 Ohio voters to challenge. The 6th Circuit declined to stay the order, but the U.S. Supreme Court later vacated the ruling.

who move and re-register in a new location, and reduce the possibility of duplicates. The easiest approach is to use an identifier that the individual already has. Therefore, HAVA states that an applicant for registration must provide her driver's license number, or if she has none, the last four digits of her Social Security number. Applicants without either are simply assigned a number, and are registered and permitted to vote without any further effort.

HAVA also directs states to attempt to "match" the number provided by a voter with records in other state databases, to ensure confidence that the numbers are accurately assigned; otherwise, in the event of a mistake, two records might end up labeled with the same "unique" number.

Ohio's misguided policy, which is not compelled by HAVA, not contemplated by state law, and rejected by virtually everyone other state, would mean the disenfranchisement of thousands of eligible citizens.

This "matching" provision was intended as an administrative safeguard for "storing and managing the official list of registered voters," and not as a restriction on voter eligibility. That is why HAVA was written. It imposes an administrative function on the states: "a unique identifier is assigned to each legally registered voter in the State." It does not, however, provide that the unique identifier must be verified before a voter's ballot may be counted.

If the number provided by an eligible voter cannot be verified, the correct consequence is to assign the voter a different unique number, not to reject the registration. Thus, new registrants with no driver's license or Social Security number are simply assigned a unique number and placed on the computerized list of registered voters, without any subsequent "matching." As the court in *Reed* explained, it is the assignment of a unique identifying number to each new voter — not the match or verification of the number provided on an application — that is required under Section 303(a).

"Legislative history confirms that it is the assignment of some kind of unique identifying number to the voter that is the requirement of § 15483(a)(1)(A)(i), not the 'match.'" Senator Bond, the chief Senate Republican sponsor of HAVA, explained that a unique identifying number is assigned to each new registrant to create dependable lists, not to impose an obstacle to registering or voting:

> The conferees agree that a unique identification number attributed to each registered voter will be an extremely useful tool for State and local election officials in managing and maintaining clean and accurate voter lists. It is the agreement of the conferees that election officials must have such a tool.

Because Congress did not intend to create a new eligibility requirement when it enacted HAVA's statewide registration list provision, the district court's conclusion cannot stand.

HAVA's Identification Requirements Make Clear that It Does Not Mandate Database Matching as an Eligibility Requirement

In addition to its record keeping function, verifying the number on a registration form has another purpose under HAVA that proves it was not intended to be a precondition to counting a voter's ballot. Under Section 303(b) of HAVA, confirming the number provides an alternative means of verifying the identity of certain voters: first-time voters who register by mail. Any reading of HAVA that would make a successful match a precondition to counting a voter's ballot cannot be squared with the identification provisions of Section 303(b).

Section 303(b) requires that in all federal elections, a first-time voter who registers by mail must verify her identity before voting a regular ballot. She may do so by showing some form of identification. Or her identity may be verified if the number on her registration application has been matched to an existing state record — in which case she need not show documentary identification.

Thus, matching "serves as a substitute for voter ID," not a precondition to having a vote counted. Congress understood that some voters will not be matched — but still can cast a regular ballot that is counted by showing their ID. For those who do match, no ID is required. As Senator Bond put it, *"[i]n lieu of* the individual providing proof of identity, States may also electronically verify an individual's identity against existing State databases." If Congress intended that every voter be matched as a prerequisite to counting their ballots, the ID provision would make no sense and would be superfluous — rendering the district court's opinion untenable. Thus, the district court's Order, compelling the Secretary of State to deny voters whose records have not been matched the right to cast a regular ballot that is counted, would result in a violation of the rights of first-time Ohio voters who registered by mail to have votes counted if they show identification.

That the district court's analysis would require a successful match not just from first-time voters who registered by mail, but also from in-person registrants, demonstrates further that it is inconsistent with HAVA. HAVA prescribes a verification requirement (which may be accomplished by matching *or* documentary ID), only for first-time, mail-in registrants. Appellees contend and the district court concluded, however, that HAVA imposes an absolute matching requirement on all registrants, whether they registered by mail or in person. This conclusion finds support nowhere in HAVA's text, confirming again the district court's serious mis-reading of the statute.

There is good reason why Congress chose not to make a successful database match a precondition to casting a ballot that counts, and why virtually all other states have rejected doing so: attempts to match voter data routinely fail — up to 30% of the time — for reasons unrelated to voter qualification. Matches fail even when records corresponding to the same person are present in both data sets being compared because of trivial errors like typos, data entry errors, inconsistent treatment of hyphenated last names, and the use of a married name in one database and a maiden name in another.

Since Florida recently re-implemented its "no match, no vote" policy on September 8th, approximately 15% of all attempted matches have failed, blocking at least 7,469 voters from the registration rolls. In the first six months of 2006, before its "no match, no vote" law was enjoined, Washington had a failed match rate of 16% statewide, and up to 30% in King County, which includes Seattle. Through April of 2006, 18% of applications in Los Angeles County failed to "match." Nearly 20% of an audit sample of 15,000 applications submitted in New York City in September 2004 could not be matched due to typos and other data entry errors.

The district court's Order, by imposing a misguided matching policy in Ohio that is not compelled by HAVA, not contemplated by state law, and rejected by virtually every other state, would mean the disenfranchisement of thousands of eligible citizens as a result of typos and other minor mistakes. ■

Registration for the 21st Century

Wendy Weiser, Michael Waldman, & Renée Paradis

Voter Registration Modernization could bring millions of citizens into the process, permanently. The Brennan Center proposal shows how.

I. INTRODUCTION

Since the Florida election debacle in 2000 laid bare the way Americans cast and count votes, lawmakers and officials at federal, state, and local levels have made fitful progress toward building a modern and democratically inclusive election system. But the promise of a renewed democratic system has not been fully realized. Too often, when it comes to our election system, policymaking has devolved into partisan wrangling or become bogged down in arcane technicalities.

Today we have the opportunity to truly modernize our voter registration process.

Today we have the opportunity for a major breakthrough for effective democracy. The 2008 election saw a record number of new voters. New election technology and the implementation of a recent federal law in the states make it possible to overcome the challenges with our voter registration system – the single greatest cause of voting problems in the United States. We can now truly modernize the voter registration process by upgrading to a system of voter registrtion modernization – a system where every eligible citizen is able to vote because the government has taken the steps to make it possible for them to be on the voter rolls, permanently. Citizens must take responsibility to vote, but government should do its part by clearing away obstacles to their full participation. The current voter registration system – which is governed by a dizzying array of rules and is susceptible to error and manipulation – is the largest source of such obstacles.

In 2001, a task force for a commission chaired by former Presidents Jimmy Carter and Gerald Ford concluded, "The registration laws in force throughout the United States are among the world's most demanding … [and are] one reason why voter turnout in the United States is near the bottom of the developed world." Currently, eligible voters are not placed on electoral rolls unless they first take the initiative to register and satisfy state-imposed requirements for voter registration. State officials must expend substantial resources manually processing each voter registration form, one-by-one, applying rules and procedures that vary from jurisdiction to jurisdiction. Eligible citizens' voter registrations may be rejected if technical requirements are not met or canceled without notice. Political operatives may attempt to block certain citizens from the voter rolls by challenging their registrations or seeking to impose new technical hurdles to registration. Once they have registered, voters must start the process all over again virtually every time they move. The result is a system in which many eligible citizens are unable to vote. They fall off the rolls; they never sign up in the first place; they drift further away from

electoral participation. Some fifty million eligible American citizens are not registered to vote. Most Americans take this system for granted, but it was not always this way, and it does not have to be this way forever.

The United States is one of the few industrialized democracies that places the onus of registration on the voter. In other democracies, the government facilitates voting by taking upon itself the responsibility to build voter rolls of all eligible citizens. Even in the United States, voter-initiated registration did not exist until the late nineteenth century. It was instituted then in many states with the intention of suppressing unpopular voters, especially former slaves and new European immigrants, and it continues to disenfranchise many Americans to this day.

Our current voter registration system is the single greatest source of disputes and litigation over election rules and practices.

Fortunately, in part because of new federal laws, states have made it easier to register to vote over the last several decades. The Voting Rights Act of 1965 struck down racially discriminatory barriers to voter registration, but did not require government to take more affirmative steps to ensure registration. The National Voter Registration Act of 1993 (NVRA), popularly known as "motor voter," required government agencies such as departments of motor vehicles and public assistance offices to make voter registration services available to citizens. After the 2000 election, Congress passed the Help America Vote Act (HAVA), which mandated that states maintain computerized voter databases at the state level, rather than county by county. These databases are now in place in every state and can facilitate more complete and accurate voter rolls.

But despite these advances, our voter-initiated registration system continues to impose significant administrative costs and costs on voters. As long as the government continues to rely on citizens to register themselves, opening up access means ceding more control to voters and those who assist them to determine when and how they register. Elections officials may be overwhelmed by the dual demands of processing the typical surge of registrations that come in at the last minute and planning for elections. If the system cannot keep up, votes inevitably will be lost. The patchwork of state rules and practices that serve a gate-keeping function to registration also keeps out eligible voters and makes the system vulnerable to partisan manipulation and error. Our current voter registration system is the single greatest source of disputes and litigation over election administration rules and practices.

This year, when surging citizen participation underscores the deep desire for a change in national direction, we see with renewed urgency the value in building a modern and fully participatory electoral system. A universal voter registration system creates voter rolls that are as comprehensive as possible well in advance of Election Day and provides a fail-safe mechanism if an eligible voter shows up at the polls but cannot be found on the list. Such a system is routine in other countries, and because of the recent legal and technological advances in voter registration, it is now achievable here.

Federal action can begin to move the country toward this goal in short order. A system of universal registration would build on existing policies and

innovations undertaken by state and local officials. The next Congress can substantially speed up the process by:

- Establishing a national mandate for universal voter registration within each state;
- Providing federal funds for states to take steps toward universal voter registration;
- Requiring "permanent voter registration" systems, so that once voters are registered, they will stay on the rolls when they move; and
- Requiring fail-safe procedures, so that eligible voters whose names do not appear on the voter rolls or whose information is not up to date can correct the rolls and vote on the same day.

II. VOTER REGISTRATION TODAY

Our democracy is a source of pride and strength, and our election system typically works reasonably well in determining outcomes. Even so, the election system is marred by gaps and prone to error and manipulation. Nearly a third of eligible citizens are not registered. Officials, in turn, face a biennial or quadrennial crush of new registrants, with attendant problems with list maintenance, political pressure and general confusion. Voters bear the brunt of these challenges.

A. Registration is a Bureaucratic Obstacle to Voting

Today, the voter registration system is a significant barrier to voting in the United States. In the November 2004 presidential election, fully 28% of eligible Americans simply were not registered to vote. That's over 50 million citizens who were not on the electoral rolls and could not vote on Election Day. In November 2006, 32% of eligible Americans, or more than 65 million citizens, were not registered to vote.

Registration requirements are a barrier to voting for a number of reasons. The current system simply is not designed for a mobile society. In a country where one in six Americans moves in a year, government does not routinely keep such people registered to vote, even if they stay in their own state. Harvard political scientist Thomas Patterson notes that two-thirds of nonvoters in 2000 were ineligible to vote because they hadn't registered. "Of these, one in three was a former registered voter who had moved and hadn't re-registered."

The current system is also prone to error, which can lead to disenfranchisement. For example, in the past few years, some states adopted policies requiring a perfect match between information on a voter registration form and information in other government databases, such as those maintained by motor vehicle authorities or the Social Security Administration, before registering the voter. If a state official made a data entry error, the voter would be disenfranchised by a typo. In jurisdictions with this policy, failures to match information typically barred about 20% of eligible registrants because of typos and similar errors. Typos can also make it difficult to find registered voters on the poll books, which also could lead to mistaken disenfranchisement. Errors in registration processes will not be eliminated by a universal registration system, but that system will substantially reduce errors and will ensure that the burden of those errors do not fall on voters. In a universal registration system, states will have greater ability to ensure more accurate voter rolls since they will be able to regularize their updates to the rolls using more advanced technology instead of processing hundreds of thousands of individual voter registration forms in the weeks before an election. Such a system would also have failsafe procedures like the ability to correct the rolls on Election Day, which means that if the government makes a mistake, it will not become the voter's problem. This will increase the incentive for states not to knock eligible voters off

the rolls, because otherwise they will see increased use of fail-safe procedures, which will require greater resources than just getting it right in the first place.

Placing the burden of registration on the voter also leaves our registration systems open to manipulation. Over the past few election cycles, there have been increased efforts to impose new restrictions on voter registration that fall more harshly on certain groups of voters. The "no match, no vote" rule in some states is one example that especially harms Latinos, Asian Americans, and married women, among others. Several states enacted cumbersome restrictions on voter registration drives, which typically target low-income, minority, and young voters, effectively stopping those drives. In Florida, the risk of huge fines for failure to meet short deadlines long before an election shut down registration efforts by the state League of Women Voters for the first time in 70 years. Several states refuse to register voters who make technical errors on registration paperwork, like failure to check redundant boxes. Purges of the voter rolls, which are meant to remove people who have died, moved, or otherwise become ineligible, are typically done without standards or oversight, using error-prone processes that are vulnerable to manipulation by unscrupulous officials. A number of states have proposed, and one has enacted, documentation requirements for registering that many otherwise qualified registrants are unable to meet. Many of these barriers to registration can also emerge as misguided attempts to respond to surges in registration and bloated voter rolls. With universal registration, officials can respond to these issues without disenfranchising voters.

The inadequacies of voter-initiated registration hit hardest when voters who thought that they successfully navigated the shoals turn up at the polls and find their names missing from the list. In most states, the only remedy is the opportunity to vote a provisional ballot. If the voter is not registered, her provisional ballot will not count. Even when voters submitted their registrations on time, many provisional ballots are not counted. Once again, the brunt of system failure falls on the voter.

To make matters worse, the burdens of registration do not fall equally on all Americans. Voter-initiated registration has a disproportionate impact on low-income citizens and those who are less educated. Such individuals are more likely to move more often and have to re-register with every move, to have unconventional living situations that do not easily meet residency requirements (such as temporary shelters), to lack access to the Internet with its information on how to register and its easily accessible forms, to lack dependable transportation for registering in person or at a motor vehicle office, and to lack substantial leisure time in which to figure out registration requirements in their state and to fulfill them. They should not be prevented by a bureaucratic requirement from exercising their most fundamental civic right.

Not getting on the voter rolls is an obvious barrier to voting—registration is a necessary prerequisite to voting. But not being on the voter rolls in advance of an election also has repercussions that make it less likely an eligible citizen will vote. Such a citizen will not receive a sample ballot, or the location of their polling place, or other official notice from the state than an election is imminent. They will not receive mailings from candidates or be canvassed by volunteers. They will not be called by pollsters or contacted by nonpartisan groups doing voter education. In short, they will not receive any of the individualized contact that we know is the most important spur to voter turnout. Requiring government officials to create a complete list of eligible voters draws disenfranchised citizens into the body politic in multiple ways.

B. Voter-Initiated Registration Impedes Election Administration

When voters are required to register themselves, they may make mistakes, including unnecessarily submitting multiple forms. They may not understand how to complete the forms or inadvertently leave off

information. They may use a different form of their name than appears in motor vehicle or Social Security databases, making it more difficult to verify their information. They may submit new registration forms when they move instead of filing changes of address. They may believe that they need to re-register for each election. Correcting these mistakes adds time to the official processing of forms; refusing to make corrections—or to allow registrants to make them—bars the voter from the polls for errors that have nothing to do with eligibility.

Leaving registration up to individual voters also makes it harder to keep the lists current. Voters rarely cancel their registration when they move. The names of voters who are no longer qualified to vote in a particular location remain on the list, along with those of voters who have died. Although federal law recognizes the need to clean registration rolls, officials first must complete procedures designed to ensure that they do not delete eligible voters from the rolls. In the meantime, bloated rolls fuel fear-mongering about the potential for fraud, which in turn serves as an excuse for voter suppressive legislation or unlawful purges of the voter rolls.

New restrictions on voter registration fall especially hard on certain groups of voters – Latinos, Asian Americans, and married women, among others.

A voter-initiated or "bottom up" registration system creates special difficulties for administrators in the month before Election Day. They may find it difficult to process the large numbers of forms that invariably are submitted at the close of the registration period. The last-minute rush is wholly predictable—the IRS estimates that more than 20% of taxpayers wait until the last minute to file their taxes—but it nevertheless strains the resources of local officials. They may not be able to process all the forms in time for Election Day. Moreover, not knowing well in advance how many forms will come in makes it difficult rationally to allocate among precincts the necessary voting machines, paper ballots, and poll workers. Long lines and disenfranchised voters are the predictable result.

Currently, voter registration drives by civic groups play a vital role in making sure citizens are registered, especially in low-income, minority, and student communities. Yet a system that depends upon millions of applications, on paper, submitted by individuals or community groups is susceptible to error. In the recent election, some expressed strong concern at reports that individuals attempted to register false names. Those problems would be eliminated if the government created and maintained the voter registration list in the first place.

The current voter registration system is costly and inefficient. Although updating the system will take some time and money, once upgraded, a system of universal voter registration will be more efficient and less costly to administer. This will free up resources for states to better manage elections in other respects.

III. A MODERNIZED SYSTEM

New technologies, new understanding of election administration, and a surge in political interest all create an opportunity for reform the likes of which we have not seen for a long time.

A. The Moment for Reform

A move to significant national voter registration legislation makes sense now, for several reasons. Most importantly, the remedy is available, and the potential for political will is strong. Thanks to the Help America Vote Act of 2002, states are now required to maintain computerized statewide voter registration lists. The new databases make it far easier to manage information about voters, including name or address changes that do not affect eligibility. When a person moves within a state, for example, officials can transfer the voter's registration to the appropriate new location with a click of a button. There is no excuse for burdening the voter with responsibility for re-registration, as most states now do.

To strengthen voting and modernize our current voter registration system, we need one fundamental change: responsibility for voter registration must be transferred to the government. That shift would produce two clear improvements over the current process: (1) more eligible citizens would be properly registered and able to vote on Election Day, and (2) election officials could organize the process to avoid last-minute crunches and misallocation of resources. But the shift would have another effect, perhaps less concrete or immediate, but ultimately just as important: because the responsibility would lie with the government, the valence of voter registration would change. It would be the obligation of the government to ensure that every eligible American is able to cast a vote on Election Day if they take responsibility to do so. Rather than a problem the voter herself must solve, the government's obligation to ensure that all eligible voters are registered would become part of the way we think about the right to vote itself.

B. Models for Reform

How would the government fulfill its obligation to ensure that all eligible voters are registered? There are several methods states, municipalities, or even the federal government could use to manage this task, including using existing government lists of eligible citizens, enumeration of citizens, running affirmative voter registration drives, fully implementing and expanding the National Voter Registration Act, or some combination of any or all of these.

Using existing lists. The most likely option draws on other governmental lists to build the voter rolls. Although the United States does not have a residence registry or a national health care system that provides a list of all eligible voters, states have a variety of databases that compile information about their citizens—databases maintained by motor vehicle departments, income tax authorities, and social service agencies, for example. States could use these lists to build and update their voter rolls. Many of these lists already include all the information necessary to determine voter eligibility, and those that do not can easily be modified to include that information. Already, many of these agencies are required under the National Voter Registration Act to provide voter registration services, a duty that has been ignored in many states over the last decade. Building a list with existing data would help ensure every eligible citizen gets added to the rolls. The Selective Service uses a similar method to build its list of male citizens over eighteen. States could also fully implement the National Voter Registration Act to move closer to the goal of universal registration.

Enumeration. Another option is a system of enumeration, like a census. Local officials could begin by sending out mail surveys to each address on record in their jurisdiction, asking citizens over the age of 18 to complete, sign, and return a form. They could follow up with those who do not respond by going door-to-door, making a special effort to enumerate those who are unlikely to be reached by a mailing, such as the homeless or those who do not live at fixed addresses. Currently, Massachusetts runs an annual state census along these lines, which is used primarily for creating jury lists. Because the census is conducted on the local level, city officials are able to use other municipal records to guarantee that they reach every citizen within geographic limits.

Under any system of universal voter registration, newly eligible voters must be added to the rolls and already registered voters must be tracked as they move from place to place. To capture newly eligible voters, registration should be made an automatic part of becoming a citizen, turning voting age, or being discharged from prison, probation, and parole. States can update their data by using change of address information filed with the Post Office or other government agencies, tracking changes to the databases they used to build their list, or running periodic censuses. Specific procedures would be necessary for certain groups of voters, such as military and overseas voters, who present special circumstances. Of course, an "opt-out" from registration must be available for any U.S. citizen who prefers to remain unregistered for whatever reason.

C. A Federal Voter Registration Modernization Act

To move the nation toward universal voter registration, federal legislation will most likely be necessary. Such a system, to achieve genuine universality, will need to have several key elements. It would have as its core a national requirement that states take responsibility for registering all eligible citizens, with some flexibility for states to innovate, and the federal financial support necessary to enable states to achieve the goal of universal registration. But there will be manifest complexities. To cite a single example, states will need to ensure that citizens with more than one residence are registered at the correct one for voting purposes.

The new Congress should be prepared to enact a federal bill that phases in universal voter registration. The bill should have four main components: (1) a mandate for states to enact systems of automatic or affirmative voter registration designed to capture all eligible citizens; (2) a requirement that registration be permanent as long as a voter remains resident within the same state; (3) fail-safe mechanisms for eligible citizens whose names are missing from the voter rolls or whose registration information is inaccurate or out of date to correct these errors or omissions before and on Election Day and to vote; and (4) sufficient funding to enable states to transition effectively to universal voter registration.

1. Automatic or Affirmative Registration

Federal law should require states to establish a program of automatic or affirmative registration of all eligible citizens, phased in over a number of years. While the mandate could be flexible to enable states to experiment with new ways of registering voters, it should ensure that the government assumes the responsibility for building a complete and accurate voter list so that every eligible citizen is able to vote and to have her vote counted. Unless a state devises an alternative program that meets federal standards, the law should require states automatically to include all eligible citizens found on selected other government lists on the voter rolls. Government lists appropriate for automatic registration include the databases maintained by motor vehicle authorities, public assistance agencies, disability agencies, and state tax authorities, as well as lists of newly eligible citizens provided by schools, the U.S. Bureau of Citizenship and Immigration Services, and corrections authorities. Voters should have the ability to opt-out of the system, but opt-in should not be required. Because the list would be automatically generated from

a variety of sources, there should be a robust process for purging duplicate records, along with robust protections against erroneous purges.

2. Permanent Registration

The second component of a voter registration reform bill is a requirement that states institute statewide permanent registration. Under such a system, once a voter is on the rolls, she would be permanently registered within the state and able to vote without re-registering even if she moved within the state or changed her name. This could be accomplished by automatic address updates using changes of address filed with the Post Office and other government agencies, as is currently done in some form in a number of states. Special registration and address update procedures would be available for military and overseas voters, students, and others whose voting residence may be different from their mailing address. If the state has not tracked the address or name change in the statewide voter registration database before Election Day, the voter would be able to update her registration record at the polling place associated with her current address when she goes to vote. One in six Americans moves every year, most within the state, and now that voter registration databases are maintained at the state level, there is no reason to require voters to reregister every time they cross county or other internal lines.

3. Fail-Safe Registration and Correction of the Voter Rolls

Even under the most aggressive list-building and address update systems administered with the best care, some voters are bound to fall through the cracks. To ensure that eligible voters are not deprived of the franchise simply because of government mistakes, any system of universal registration must include fail-safe procedures to ensure that eligible citizens can correct the voter rolls both before and on Election Day. Allowing registration and voting on the same day, as nine states already do, ensures that voters do not bear the brunt of government mistakes and significantly boosts turnout without imposing major costs. A state with a well-functioning system of automatic and permanent registration will see little use of these fail-safe mechanisms. Because these fail-safes provide a corrective to problems with any voter registration system, they should be implemented immediately.

4. Federal Funding for Voter Registration

Such a bold national goal must be accompanied by ample national resources to help states complete the transition. Congress provided funds to help states make the technology improvements required under the Help America Vote Act, and a generous federal investment also is essential to the success of voter registration reform. Federal financial support for state universal registration systems should cover all elements of the reform, including automatic, permanent, and fail-safe registration. It should include support for upgrading and making necessary changes to state voter registration databases as well as other state databases used for voter registration purposes. It could also include postage rebates, free access to the National Change of Address database for use in updating registration records, support for efforts to build Internet and telephone portals for checking and updating registration records, and support for any additional staffing needs on Election Day.

States should have latitude to use federal funds for innovative programs that improve voter registration systems. What might work in an area with a predominantly urban population might be less effective in a rural area and vice versa. Congress must appropriate sufficient funding to enable states to devise creative solutions, while requiring that any funded programs demonstrably expand the voter rolls, especially in areas with historically low registration rates. ■

JUSTICE & THE COURTS

Justice for Sale

James Sample

Giant campaign donations threaten the integrity, impartiality and independence of the Judiciary.

Certain American values transcend partisan divisions. One is that money should not influence the courts. But with record sums pouring into judicial elections, the ideal of due process is giving way to a perception of pay-to-play justice.

This is not a matter of red versus blue. Seventy-six percent of Americans believe that campaign contributions influence judicial decisions, according to a 2001-2002 survey by Greenberg Quinlan Rosner Research and American Viewpoint; 46% of state court judges agree, according to a written survey by the same organizations. Separate recent empirical studies in the New York Times and the Tulane Law Review support the proposition that contributions not only correlate with decisions, but alter them.

John Grisham's latest bestseller, "The Appeal," is a shadowy tale of a chemical company that buys a favorable legal ruling by funding the election of the judge who makes it. Farfetched? Not according to West Virginia Supreme Court Justice Larry Starcher. In a scathing opinion last month, he decried a "cancer" of moneyed influence in his court, asserting that "John Grisham got it right when he said that he simply had to read The Charleston Gazette to get an idea for his next novel."

The citizens of 39 states elect some or all of their judges. These contests have become costly arms races. An investigation by the Los Angeles Times, "In Las Vegas, They're Playing with a Stacked Judicial Deck," revealed that even Nevada judges running unopposed collected hundreds of thousands of dollars in contributions from litigants. The report noted that donations were "frequently" dated "within days of when a judge took action in the contributor's case."

Business interests and trial lawyers both lay out campaign cash to ensure that sympathetic judges are elected. Both sides attempt to manipulate courts; business just happens to be better at winning. The U.S. Chamber of Commerce got involved in 13 judicial races in 2004 and won 12. Nationwide in 2006, business donors contributed twice as much to state supreme court candidates as attorneys, according to the National Institute on Money in State Politics.

Consider three recent episodes in light of the American Bar Association's requirement that judges disqualify themselves whenever their "impartiality might reasonably be questioned."

We all lose when a decision reinforces suspicions that the biggest donor, not the best case, wins.

Lloyd Karmeier, the winner of a $9.3 million campaign for the Illinois Supreme Court in 2004, was supported by $350,000 in direct contributions from employees, lawyers and others directly involved with the insurer State Farm and/or its then pending appeal, and by an additional $1 million from larger groups of

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which State Farm was a member, or to which it contributed. Almost immediately upon taking the bench, he cast a vote ending proceedings on a $456 million claim against State Farm. A St. Louis Post-Dispatch editorial put it this way: "Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt over every vote he casts in a business case."

Wisconsin Justice Annette Ziegler declined, in December, to recuse herself from a case involving Wisconsin Manufacturers & Commerce, which spent $2 million -- more than her Ziegler's own campaign -- supporting her 2007 win. In light of that decision, as well as additional revelations that Justice Ziegler had ruled on 11 cases involving a company for which her husband was a director, editorials around the state called for her to step down from the case, and even from the bench. Not coincidentally, all seven of Wisconsin's Supreme Court justices, a broad majority of Wisconsin's public, and even a plurality of self-identified "very conservative" Wisconsin voters support public financing of judicial elections.

In November, West Virginia Chief Justice Elliot Maynard voted in a 3-2 majority to overturn a $76 million judgment against the companies of coal executive Don Blankenship. In January, photos surfaced depicting Messrs. Maynard and Blankenship vacationing in the French Riviera while the appeal was before the court.

The court is now reconsidering the case -- a dispute with mining companies on both sides. Justice Starcher, who criticized Mr. Blankenship's influence, disqualified himself and urged still a third justice, Brent Benjamin, to do the same. Justice Benjamin, whose 2004 campaign benefited from over $3 million of Blankenship's support, has refused to step down.

Justice Starcher (who asserts the actual amount of Blankenship's support for Justice Benjamin was $4 million) wrote bluntly: "Just think about it -- $4 million! I know hardly a soul who could believe that a justice who benefited to this extent from a litigant could rule fairly on cases involving that litigant or his companies."

In the long term, we all lose when any decision reinforces suspicions that the biggest donor, not the best case, wins. Reforms range from commission-based appointment systems, to publicly financed campaigns, to more rigorous recusal rules. Without such measures, stories like "The Appeal" will fill non-fiction shelves. ■

Due Process Under Attack

Amicus brief in Caperton v. Massey

A case involving a state Supreme Court Justice, a CEO, and a $3 million campaign contribution gives the U.S. Supreme Court an opportunity to answer the question: can American justice be bought?

This case involves an egregious instance of a broader national trend: (1) a litigant faces a $50 million judgment in a business dispute between mining companies; (2) a sole individual, the litigant's CEO, individually spends $3 million to help elect a judge; (3) the $3 million spent by the sole individual amounts to more than all other expenditures in support of that judge *combined;* (4) the judge, after his election, declines to recuse himself from the litigant's appeal; and (5) the same judge casts an outcome-determinative vote reversing the judgment against the litigant. These extraordinary facts war-rant reversal as a manifest affront to due process.

This case offers the Court the ideal opportunity to reinforce one of the most fundamental rights in any system based on the rule of law. The nation is watching closely.

While the facts of this case are egregious, the underlying question of due process is raised in an increasing number of cases nationally. The last decade has witnessed an explosion in campaign expenditures in judicial elections. Lawyers and litigants, unsurprisingly, are the principal sources of funds. Increasingly, as Justice Sandra Day O'Connor has observed, such contributions "threaten the integrity of judicial selection and compromise the public perception of judicial decisions."

This Court should make clear that the Fourteenth Amendment's Due Process Clause compels recusal where, as in this case, the facts and circumstances create the overwhelming perception that objectively massive campaign expenditures can purchase a favorable outcome in a specific pending case. Such a decision would establish the need for state courts to tread with proper concern for constitutional values in an area that has so far been characterized by doubt, uncertainty, and variable enforcement.

If the Court does not speak decisively in this bellwether case, which is being closely watched across the country, the message will be clear: Litigants, lawyers, and judges will understand that the Due Process Clause imposes no meaningful constraints on attempts to buy influence, even in pending cases. A decision lacking an unequivocal statement that the facts of this case, taken together, fall beneath the floor of due process, will unfortunately – but inevitably – be interpreted as license by future actors in the shoes of Mr. Blankenship and Justice Benjamin. The resulting race to the bottom will severely

This amicus brief was filed on behalf of the Brennan Center, The Campaign Legal Center and the Reform Institute in support of certiorari on January 5, 2009. The Supreme Court is scheduled to hear the case in Spring, 2009.

corrode both the quality and perception of American justice. Conversely, reversal would convey to litigants, lawyers, and judges that disqualification standards – and their due process underpinnings – must be taken seriously. The Court would thereby thwart, or at least mitigate, a damaging national trend.

In 2002, Justice Kennedy made clear that states "may adopt recusal standards more rigorous than due process requires." Justice Kennedy thus appropriately invited states to consider measures aimed at due process *plus.* This case however, calls on this Court to reinforce the predicate implicit in Justice Kennedy's statement in *White:* that there is a floor of due process *simpliciter* – a point at which the facts are so egregious as to cross over "the outer boundaries" of judicial qualification such that the Due Process Clause of the Fourteenth Amendment requires recusal.

The national profile of this bellwether case makes it all the more important that this Court unequivocally reverse and remand for reconsideration without Justice Benjamin. The nation is watching closely what the Court does in this case. Litigants and their lawyers would interpret a decision to affirm as an indication that even a blatant appearance of partiality does not lead to correction, and that, in effect, there are no real due process constraints on recusal. Such a ruling may well trigger a rapid race to the bottom, as litigants, particularly those in the position of Petitioners in this case, are forced to come to terms with the possibility that, at least in certain instances, justice may actually be for sale.

Only if this Court reverses and remands to the West Virginia Supreme Court of Appeals for further proceedings without any involvement by Justice Benjamin can it put appropriate muscle in the consti¬tutional commitment to judicial impartiality.

The $3 million in expenditures; the fact that those expenditures represented more than all other financial support for Justice Benjamin combined; the sole inter¬ested source of those funds; the timing of the expendi¬tures; and the other facts of this case are so egregious – by today's standards at least – that they offer the Court the ideal opportunity to reinforce one of the most fun¬damental rights in any system based on the rule of law: the right to a fair hearing before an impartial arbiter. ■

Subprime Justice

Laura Abel

The quality of justice for Americans facing foreclosure is abominably poor.

In the next two years, 2 million families who took out subprime loans will face losing those homes to foreclosure. Their families will suffer, neighborhoods will be devastated and local governments will lose significant tax revenue. Economists trace the problems back to careless and sometimes fraudulent mortgage lending practices. Some lenders coaxed first-time low-income home-buyers to take out mortgages, or long-time homeowners to take out second mortgages, without disclosing the high monthly rates they eventually would have to pay. Not surprisingly, the homeowners cannot afford the monthly payments, and when they fall too far behind foreclosure proceedings start.

Now policy-makers are asking how we could have allowed such a widespread financial disaster to occur. They point to lax federal and state regulators, irresponsible mortgage companies and a financial sector too reliant on the housing bubble to examine the mortgages in which it invests. There's another cause, though, which is largely ignored: restrictions that have prevented federally funded civil legal aid lawyers from fully addressing the problem from its inception.

Civil legal aid lawyers, who work for non-profit organizations around the country, represent low-income people in the sorts of civil cases most important to their daily lives: housing issues, child custody, wage and hour law violations and consumer fraud. They are an essential part of our nation's law enforcement apparatus, because they ensure that the businesses and government agencies that operate in low-income communities do so according to the rule of law. Civil legal aid attorneys also serve as a detection and warning system for problems plaguing low-income communities. As the people most familiar with the legal problems of the communities in which they work, often they are the first to learn of new legal abuses occurring in those communities. Over the years, civil legal aid lawyers have spoken out and prompted change when the police refuse to respond to domestic violence calls, when foster care agencies place children in unsafe foster homes and when local employers repeatedly fail to pay the minimum wage.

But since 1996, civil legal aid attorneys have been muzzled. Congress has barred them from using some of the legal tactics that are most effective at enforcing the law for entire communities. Civil legal aid lawyers who receive any Congressional funding through the federal Legal Services Corporation cannot call legislators to warn of new problems facing their communities and suggest legislative fixes. They cannot represent clients seeking to use the class action mechanism to compel repeat offenders to obey the law. They cannot use statutorily available fee awards to make it too expensive for repeat offenders to continue breaking the law. They cannot use private funds, donated by private foundations or individuals, to provide client communities with any of these services. And because their funding has eroded over the years, they cannot represent millions of people who seek help every year.

These restrictions and inadequate funding have allowed the mortgage crisis to fester since the mid-nineties. Since then, civil legal aid lawyers have watched as predatory lenders targeted the communities they serve. They have successfully represented homeowners seeking compensation

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from law-violating lenders. But because they are barred by Congress from bringing a class action to require a lender to compensate all affected community members, they have watched helplessly as the same lender continues to strip equity from the homes of hundreds or thousands of other community members. The Legal Assistance Foundation of Metropolitan Chicago, for example, helped a 75-year-old woman keep the home she had lived in for thirty years, after a contractor took out a fraudulent loan in her name. Now they watch as the same contractor sends out mailings seeking new victims.

Restrictions on Legal Services and inadequate funding have allowed the mortgage crisis to fester.

They, and other civil legal aid lawyers, have represented countless homeowners fighting foreclosure. But their foreclosure cases have dragged on for years, taking up valuable attorney hours, because legal aid attorneys cannot use the attorneys' fee award mechanism Congress intended clients to use to persuade lenders to settle cases earlier rather than later. And they have turned away thousands of other homeowners seeking help, because they lack the funding to help. In September, with foreclosures in New York City at twice the level they were at in 2005, South Brooklyn Legal Services stopped taking any new foreclosure cases. In March, Jacksonville Area Legal Aid did the same.

The lawyers have hoped and prayed that legislators would finally understand the gravity of the situation and take action. But they haven't been able to call those legislators to warn them and suggest legislation to fix the problem, because they are Congressionally barred from lobbying. Now that the markets are affected, and Congress is taking note, legislators are calling civil legal aid attorneys to testify at hearings examining the mess. What a shame the attorneys couldn't call the legislators to warn them, years ago.

While policy-makers hold hearings, draft legislation, and tighten regulations, they should consider a cost-free measure: lifting the restrictions on civil legal aid lawyers handling foreclosure cases. And while they consider bailing out financial institutions suffering from the subprime scandal, or homeowners fighting foreclosure, they should consider taking the preventive measure of funding civil legal aid programs to fight predatory lenders. ■

Court Fees as Revenue?

Rebekah Diller

Courts across the country are levying fees and fines on defendants in order to generate revenue, leaving many saddled with spiraling debts.

Along with gas and food, another staple is getting more expensive this summer: justice.

Court fees around the country are on the rise. In some states, including Florida and Kentucky, the increases are prompted by state fiscal crises. In Colorado and other states, the increases are being used to fund new court buildings.

Filing fees are often appropriate and valuable tools for funding critical parts of the justice system. But the integrity and independence of the courts are jeopardized when legislatures regard the courts as revenue-generators. Without proper safeguards, the increases make it harder for low-income litigants to get their fair day in court.

State judiciary systems take up a tiny proportion of total state budgets, between 1% and 3%, on average. Yet many legislatures assume that the judiciary should be largely self-sustaining. When times are tight, they expect the courts to raise funds through civil filing fees, surcharges, and mandatory assessments heaped on largely indigent criminal defendants. Worse, states increasingly look to courts not just to fund themselves but also to boost revenue for other government functions.

Consider Florida's new court fees, which went in effect July 1. Faced with a budget crisis, Florida has raised its filing fees to among the highest in the country: $300 for most civil cases, $397.50 for divorce and $270 for eviction actions. Florida does not, as do other states, waive civil filing fees for indigent litigants. Instead, court clerks negotiate payment plans with those unable to pay up front — and add a surcharge for paying over time.

Florida is also putting the squeeze on criminal defendants, most of whom are indigent. Those who cannot afford their own lawyer must pay $50 to apply for a constitutionally mandated public defender. If convicted, they face assessments for the costs of prosecution and defense regardless of their ability to pay. These charges are added to other assessments.

When the defendant can't pay, the court often takes away his driver's license, ensuring he won't be able to do the one thing necessary to pay the debt: work.

Courts should be forums for justice, not vehicles for tax collection.

Perhaps the worst feature of Florida's court fees is the fact that only 61% of the new fee collections will go toward funding courts, prosecutors and public defenders, according to a recent news report. The rest will go to the state's general revenue fund.

Across the country, legislatures and courts should affirm basic principles to preserve access to justice. Fairness requires that court fees be waived for the indigent. Fee waivers also ensure that scarce resources aren't spent chasing down those who can't pay.

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Legislatures and courts should also perform an impact analysis of all new fees to determine how access to justice will be affected. For criminal fees, policymakers should consider the amount of sanctions already paid by criminal defendants and the effect on public safety of heaping debt on those who can't pay.

Such measures won't eliminate appropriate fees but will ensure that courts remain forums for justice, not vehicles for tax collection. ■

Eligible for Justice

The Access to Justice Project

A lack of standards for appointing defense counsel means that many people are wrongly left without an attorney.

For more than four decades, the Supreme Court has been clear: the Constitution requires states to provide a lawyer to people facing criminal charges who are unable to afford their own counsel. Unfortunately, neither the Supreme Court, nor any other source, has detailed how communities should determine who can afford counsel and who cannot. As a result, eligibility is determined differently almost wherever one looks: some communities don't have any official screening processes at all, while others apply widely varying criteria and procedures.

Eligibility for defense counsel is determined differently almost everywhere one looks. The result is a policy disaster.

The result has been a policy disaster.

Without fair standards for assessing eligibility, some people who truly cannot afford counsel without undue hardship are turned away. This may be because a relative posted bond for them, or they have a house or a car that they could sell to pay for a lawyer. Yet these arbitrary assumptions about who can pay and who cannot are devastating to families and communities. Families that truly cannot afford to pay for counsel may have to go without food, in order to pay legal fees. Wage-earners forced to sell the vehicle they use to commute to work, in order to pay for counsel, may lose their jobs. People who simply cannot come up with the necessary resources end up trying to represent themselves, often pleading guilty because they are not aware of their rights.

On the other hand, some individuals receive counsel who should not. In these times of fiscal austerity, every dollar spent representing someone who *can* afford to pay for counsel robs resource-poor indigent defense systems of money that could be better spent representing people who are truly in need. The result is that indigent defense systems already stretched to their breaking points – with enormous caseloads for each attorney, and no funding for essential functions such as investigators and experts – are stretched further. This, too, results in constitutional violations, as people entitled to adequate representation end up getting a lawyer who cannot provide them with a meaningful defense.

Finally, without clear guidelines for how to determine who should be appointed counsel, decisions whether to appoint counsel hang on the

Excerpted from the Brennan Center report *Eligible for Justice*, released September, 2008.

serendipity of where an individual lives, the personal characteristics of the decision-maker, institutional conflicts of interest, or any of the other improper factors that substitute for more reliable standards and procedures.

In this report, the Brennan Center for Justice at New York University School of Law presents information about best practices for determining financial eligibility for free counsel. The report gathers in one place existing standards and procedures, relevant judicial precedent, and the specific views of many defenders in communities around the country. The report then make six recommendations:

- First, screening—determining who can and who cannot afford private counsel—is a critical step for almost every jurisdiction. Well-designed screening can save money by ensuring that communities provide counsel only to individuals who are unable to afford their own lawyers. It can also raise the quality of defense services by concentrating communities' limited resources where they are truly needed. And it can usefully reduce the risk of backlash against the public defense system fueled by perceptions that taxpayer money is used to represent wealthy defendants.

- Second, communities should establish uniform screening criteria, in writing. Uniform, written requirements would greatly reduce the dramatically inconsistent treatment of individuals that we found in our investigation.

- Third, communities should protect screening from conflicts of interest. Prosecutors, defense attorneys, and presiding judges all have interests – for example, in controlling their workloads by resolving cases -- which conflict with their need to be objective when deciding who should receive free counsel. Decisions about eligibility should be made by those who are not involved with the merits of individuals' cases.

- Fourth, to evaluate genuine financial need, screening must compare the individual's available income and resources to the actual price of retaining a private attorney. Non-liquid assets, income needed for living expenses, and income and assets of family and friends should not be considered available for purposes of this determination.

- Fifth, people who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or have incomes below a fixed multiple of the federal poverty guidelines should be presumed eligible for state-appointed counsel. Such presumptions are useful shortcuts that can save money by streamlining the screening process. Each should be subject to rebuttal upon evidence that a defendant can in fact afford a private attorney.

- Finally, screening processes must provide procedural protections, including a guarantee of confidentiality, the right to appeal determinations of ineligibility, and a promise not to re-examine determinations of eligibility absent compelling reason. Existing systems give useful examples of these protections and offer helpful guidance for jurisdictions looking to improve their screening processes.

None of these recommendations is expensive to implement. And, once in place, these recommended practices can save money, improve the quality of public defense services, and promote compliance with the Constitution. We invite policymakers and other public defense system stakeholders to take advantage of these practical recommendations to preserve taxpayer money and protect constitutional rights in an equitable and consistent way. ■

LIBERTY & NATIONAL SECURITY

Restoring the Rule of Law

Frederick A.O. Schwarz, Jr.

The case for an independent investigatory commission on U.S. counter-terrorism and the rule of law.

The title of this hearing cuts to the heart of the matter. The current Administration has ignored, defied, and defiled the Rule of Law. In so doing, it has undermined America's greatest strength. And that has not only left Americans less free, it has also made us less safe. It is vital to our country's future that we do indeed restore the Rule of Law. In my testimony, I draw on my experience as Chief Counsel to the Church Committee to suggest how a new Congress and President in 2009 could start this immense and important task, especially in the context of counter-terrorism policy.

We must resolve to confront our mistakes so that we do not repeat them.

In the almost eight years that have passed under the current Administration, and especially in the seven years since the tragedy of 9/11, the White House arrogated to itself unprecedented powers of coercion, detention, and surveillance. All the while, it has tried to use a patina of legal and constitutional justifications to disguise the degree to which it has abandoned the core American values in whose defense these tactics have been deployed. The result has been a distortion of the Constitution, an evisceration of the rights and liberties of individuals, and a perversion of American values. All of this has done grave harm to our nation's reputation and has reduced our security here and abroad.

It is of the utmost importance to review our policies and practices, and to make changes where we find unseemly and illegal programs or inefficient and counterproductive policies. The time to act is at hand. The members of the 111th Congress will take their seats in early January, and a new administration will enter the White House on January 20, 2009. They, and the nation as a whole, have the opportunity to return to our values, check the overextension of the executive branch in recent years, and renew our national commitment to the constitutional framework under the rule of law.

The urgent need to restore checks and balances under the rule of law is far more important than the controversies that divide us. Instead, understanding the importance of righting the separation-of-powers imbalance and restoring respect for the rule of law should bring *all* Americans together. If today's President hails from one party and the congressional majority from another, in the future these affiliations will surely change. But the core principle—that the preservation of the Constitution's checks and balances, and respect

Excerpted from Schwarz's testimony before the Senate Judiciary Committee on September 16, 2008.

for the rule of law, is essential to effective governance—endures regardless of what party controls either branch. If we turn a blind eye to this truth, the nation will feel the consequences far into the future.

Therefore, I am grateful to have the chance to share with you some thoughts on specific measures aimed at restoring the proper constitutional balance between the branches of government, reinvigorating the separation of powers, and restoring respect for American values. Broadly speaking, I make two sorts of suggestions:

> **(i)** a bipartisan independent investigatory Commission should be established by the next Congress and President, first to determine what has gone wrong (and right) with our policies and practices in confronting terrorists since September 11, 2001, and then to recommend lasting solutions to address past mistakes; and
>
> **(ii)** a series of specific reforms should be adopted aimed at reforming the executive branch and ensuring no repetition of recent abuses. Among the topics I touch on are the need for a clear rejection of the "monarchial" presidency theory; improved oversight and accountability mechanisms; responses to the pathological secrecy that today characterizes executive branch operations; and coercive interrogations.

We must resolve to confront our mistakes so that we do not repeat them. Throughout American history, in times of crisis, presidents have accumulated significant new powers, and the executive branch has often engaged in abusive conduct. Crisis always makes it tempting to ignore the wise restraints that both keep us free and reduce the likelihood of foolish mistakes. This nation has, at times, admirably set about correcting its course—realizing, as the dust settles, or as previously secret facts are revealed, that constitutional and legal norms have been breached, shaming and harming our nation.

One such moment, in which I was involved, came in 1975-1976, when an investigation conducted by a Senate Select Committee, known as the Church Committee for its Chair, Senator Frank Church of Idaho, revealed intelligence agencies' excesses during the Cold War. The Church Committee's investigation of the intelligence agencies, most importantly the FBI, the CIA, and the NSA and other components of the Defense Department, found that these agencies had exceeded their authority through abusive surveillance and disruption of political activity at home (*e.g.*, trying to provoke Martin Luther King, Jr. to commit suicide), and unwise overseas covert action (*e.g.*, hiring the Mafia to try to assassinate Cuba's Fidel Castro, and supporting the overthrow of Chile's democratically elected government). While men and women of the intelligence agencies directly committed abuses, the most serious breaches of duty were those of presidents and other senior executive branch officials who, the Church Committee determined, had the "responsib[ility] for controlling intelligence activities and generally failed to assure compliance with the law."

The Church Committee's investigation illuminated what had been going wrong with our intelligence agencies. Exposing the truth strengthened both our democracy and our ability to defend the country without waste or abuse, confirming that America's ability to self-correct is one of the great strengths of our democracy. It is time for such a searching assessment and self-correction again.

I. Create an Investigatory Commission to Conduct a Thorough Accounting of National Security Policy and Its Systemic Flaws

The new Congress and new President should by law create an independent, bipartisan Investigatory Commission charged with determining what has gone wrong (and right) with our policies in confronting terrorism, and to recommend solutions.

This is my first and most fundamental recommendation. Without full knowledge of all the facts, we

cannot know why wrong steps were taken. We cannot take the necessary steps to repair the damage. Even with a new Administration in January 2009, if we fail to understand fully what went wrong or why we strayed so far, we risk repetition. We will instead proceed in ignorance, blindly trusting claims about what has made us safer without really knowing what has worked and what has rather harmed our country.

I know from my Church Committee experience that making the case for reform requires full knowledge and responsible exposure of the facts. I also know that accountability is not easy. Plenty of those who have made mistakes will push to ensure their errors are never revealed. But without accountability, it is the nation's security and its liberties that will suffer.

We Know Enough To Conclude There Is a Serious Problem

Based on what we know now—about torture, about extraordinary rendition to torture, about permanent detention, about warrantless wiretapping, and about the Administration's "monarchical" theory of presidential power—it seems clear that the course we have charted over the last seven years has in fact made us less safe, as well as less free:

Plenty of those who have made mistakes will push to ensure that their errors are never revealed. But without accountability, the nation's security and liberty will suffer.

- We have squandered one of our greatest assets—respect for our values.
- By abandoning our values and choosing instead to adopt tactics of the enemy, we have given enemy recruiters powerful tools to stir up passions in the Muslim world.
- After the rush of support and emotional bonding with America immediately after 9/11, we are met with disappointment, caution and resistance even from our closest allies. We have lost much crucial support from our allies, as admiration and respect for America has dropped substantially. This is not a hypothetical risk. It is already happening with many nations, including our closest ally. Thus, the British Parliament's Intelligence and Security Committee undertook an investigation of "extraordinary rendition." Its July 2007 report frankly describes British intelligence agencies' increasing reluctance to share information with their American counterparts, due in large part to concerns that the U.S. will utilize such information in "extraordinary rendition" operations notwithstanding Britain's "caveats" prohibiting such use. Among the "serious implications" for the relationship between the two nations is a "greater caution in working with the U.S., including withdrawing from some planned operations, following these cases."

Things have indeed gone awry. On the matter of torture alone:

- Former Secretary of State Colin Powell warned that "The world is beginning to doubt the moral basis of our fight against terrorism." And, as Marine General P.X. Kelley

and my co-panelist today Robert F. Turner have explained, torture has "compromised our national honor and ... place[d] at risk the welfare of captured American military forces for generations to come."

- President George W. Bush correctly states that "the values of this country are such that torture is not part of our soul and our being," while at the same time he contradicts himself by insisting that the CIA should be permitted to use "enhanced interrogation techniques" that go far beyond what the American military believes is proper and which conflict with any fair reading of the torture treaties and laws to which we are subject.
- Attorney General Michael Mukasey cannot bring himself to prohibit as torture the practice of waterboarding—a torture measure that dates back to the medieval Inquisition; and Vice President Dick Cheney positively embraces it, even though the United States prosecuted Japanese soldiers as war criminals for using waterboarding on American soldiers in World War II.
- Similarly, President Bush and Secretary of State Condoleezza Rice defend "extraordinary rendition" to send prisoners to Egypt and Syria for questioning despite the fact that our State Department repeatedly issues human rights reports that condemn Egypt and Syria for regularly using torture on prisoners. The excuse of the President and the Secretary: they promised not to torture "our prisoners." Not believable. Particularly not believable given that there is proof that "our prisoners" have been tortured.

For America to adopt tactics of the enemy—such as torture—saps our moral and public strength. It is all the worse when our leaders' public positions are manifestly hypocritical.

The Administration's legal justification for its conduct is almost as troubling as the conduct itself. Other moments in history have seen abuse that cannot be squared with our values or traditions. But the constitutional and legal theory under which this Administration has acted is unprecedented because it purports to justify breaking the law and neutering checks and balances. Thus, the Administration presents a remarkably troubling theory of presidential power that flies in the face of our own Revolution's core values, that is inconsistent with the language and history of our Constitution, and that ignores crucial Supreme Court decisions.

The Administration's post-9/11 position is simply that the President—like a seventeenth century British monarch—is above the law when it comes to security. Surprisingly, this theory is not a post-9/11 beast. It was first raised twenty years ago by then-Congressman Dick Cheney when he dissented in 1987 from Congress's Iran-Contra Report by saying the President will "on occasion feel duty-bound to assert monarchial notions of prerogative that will permit him to exceed the laws." The attacks of 9/11 allowed the Vice President—supported by compliant lawyers in the Justice Department's Office of Legal Counsel—to put into effect this dangerous, erroneous and unprecedented reading of America's history and America's Constitution.

Although A Lot is Known, This Country Still Needs An In-Depth Investigation To Learn the Whole Truth, and To Decide What Needs To Be Done To Remain True to Our Values and Better Protect Ourselves

To avoid repeating history requires understanding history. As the Framers recognized, openness and transparency in government are prerequisites to democratic legitimacy and lawful government. As James Madison famously observed:

> "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

While some of our recent history has dribbled or leaked out, the Administration itself has denied a free people knowledge of many of the actions it has taken in their name. Excessive secrecy smothers the popular judgment that gives life to democracy.

Many details of the programs we know about have been suppressed, or glossed over with generalities, or misrepresented. What are described as successes often turn out to be nothing of the kind. Still other programs remain unknown. In addition, we do not know the extent to which the Administration was told (or understood) that a departure from America's ideals actually risked undermining the battle against terrorists. The executive branch insists the truth about what it has done—and how it decided what to do—must remain secret. But without access to these facts, even for those with security clearance, the public can never know the full story and judge whether the United States conducted itself appropriately.

The fundamental message of this part of my testimony is this: The abuses that have taken place must be accounted for. We need to know what went wrong, how it is that mistakes and illegal actions were allowed to occur, and how they have harmed us. When there are allegations that ultimately are proven wrong, they should be aired and names cleared. When the United States has conducted its anti-terrorism policy forthrightly and wisely, it should be commended for doing so. But given the ample evidence that the Administration's unchecked policy is out of balance, it is far more likely that the greatest need is institutional repair and restoration of the rule of law.

I should note that this is not about placing blame on those on the front lines. Too often, for example, illegal torture has been blamed on a "few bad apples" while those in political offices who directed and set conditions for the abuse have washed their hands of the matter. Accountability ultimately lies more with those elected officials and senior appointed officials than with the men and women on the front lines.

A Commission would serve several vital functions. It would reveal the many as-yet-unknown aspects of what our government has done and how it evaluated or rationalized its actions. And there is much we do not know. We still do not know, for example, the legal justifications advanced for the so-called "extraordinary rendition" or "terrorist surveillance" programs. We do not know with sufficient detail who was responsible for advocating and implementing the troubling policies based on these legal opinions. Nor do we know whether there are other secret programs that have not yet been revealed. But, as former Attorney General Nicholas deB. Katzenbach and I have argued elsewhere, in a country whose government is premised on the rule of law, there is never a justification for keeping binding legal decisions secret.

Documenting violations of the public commitments that the United States has made also fulfills a moral imperative. Officially, our leaders have made statements that renounce the use of torture and degrading treatment. In practice, they have not lived up to this pledge. Indeed, they have recently sought new legal opinions from the OLC that allegedly would allow for new combinations and packages of torture. Renewing our commitment to the rule of law by confronting and acknowledging our recent failings gives substance to our national moral commitment, and thus can help begin to restore our international reputation.

The findings of a Commission also would play the important role of holding accountable those who are responsible for wrongdoing and for legal and constitutional violations. Justice is not served when our

leaders piously wash their hands and blame those at the bottom. Democratic government demands that public officials—particularly those at the highest level—are held accountable for their actions. Aiming to avoid accountability, government officials who authorized and carried out improper or illegal actions attempt to ensure that their deeds remain forever secret. The public revelations made by a Commission would lodge accountability for those deeds where it belongs and serve as a warning to future government officials that they should take no action for which they would not like to be held publicly responsible.

Finally, and indeed most importantly, the Commission's work would play an instrumental role in preventing future abuses. Its findings would form the factual basis for informed public debate on the role of governmental activities in a free society during an extended time of crisis. Charting a new course is impossible without knowing first how we found ourselves where we are now. Rather than dooming ourselves to the repetition of past mistakes, we must studiously commit ourselves to the avoidance of error and abuse. Determining what legislative and executive action is appropriate to prevent the recurrence of past abuses requires an understanding of how those abuses came about.

While the revelations of a new Commission charged with rooting out the truth of this most recent period of government failures might prove embarrassing to some individuals, and perhaps even to the country as a whole. That embarrassment is a price that must be paid. For, as the Church Committee concluded:

> "We must remain a people who confront our mistakes and resolve not to repeat them. If we do not, we will decline; but if we do, our future will be worthy of the best of our past."

Essential Qualities of a Commission

To accomplish this, I urge Congress and the next president to establish by law an Investigatory Commission that would document what went wrong—the abuses of power; the violations of law; the distortions of the constitutional structure, including the sweeping assertions of executive power and the undermining of checks and balances—as well as who was responsible, and how it has harmed us. The Commission should also make recommendations for reform within both the executive and legislative branches to prevent similar abuses in the future. An investigation should be as open as possible. And it must be comprehensive.

I want to emphasize only three detailed points that are based on my experience with the Church Committee:

First, a successful Commission must be independent, bi-partisan in membership and non-partisan in approach. Its members should understand our Constitution and how our government works. They should know American history—including prior occasions when crisis made it tempting to ignore the wise restraints that keep us free.

Second, without detailed facts, oversight and investigation will necessarily be empty. Only with a record that is comprehensive and covers a wide range can one be sure that one understands patterns, be confident of conclusions, and make a powerful and convincing case for change. Without detailed facts, it is simply not possible to make a creditable case that something is wrong and needs fixing.

Testimony is important, often essential, and can be dramatic. Documents often provide the best key to the truth and to developing good testimony. A good investigatory commission involves much time and much hard work—to secure testimony and the necessary documents and to put a huge record together in a comprehensive and understandable fashion.

A Commission must therefore have the investigative tools—most importantly the power to subpoena—that are essential for an effective investigation. It must have access to all relevant information in all agencies and the White House—as well as that held by relevant private contractors. All of this information should be obtained by agreement if possible and by subpoena if necessary.

Third, investigating secret government programs requires access to secrets. It forces analysis of the overuse of secrecy stamps, and of the harm caused by excessive secrecy. All concerned within the intelligence community must understand and accept that those tasked with ensuring accountability are entitled to any and all secrets.

A Commission must handle secrecy issues responsibly. But ultimately, the investigation may require the describing and revealing of some secrets. Nonetheless, there are obviously also legitimate secrets. Oversight, or an investigation that is heedless of that, is doomed as well as irresponsible. But it is the responsibility of the investigators—and not the investigated—to decide (after a fair exchange of views) on what must remain hidden.

A Commission's findings would form the factual basis for informed public debate on the role of government in a free society during an extended time of crisis.

Throughout the history of the nation, independent commissions have been used to serve these purposes. At the start, President Washington appointed a commission to investigate the causes of the Whiskey Rebellion in 1794. There have been many commissions since, some successful, some not so. The 9/11 Commission (which is largely reckoned to be a success) sought to determine how we found ourselves so unprepared for the events of that day and how to reduce the likelihood of recurrence.

The Church Committee's and the 9/11 Commission's investigations remain a model for how comprehensive investigations can clarify what has gone wrong and provide guidance going forward. One was a congressional committee, while the other was an independent entity created by statute. So long as an investigatory committee has the features I have listed above, I do not believe it is crucial whether Congress chooses to create an internal body (like the Church Committee), or an independent entity. In my view, however, an independent body such as the 9/11 Commission would be better suited at this moment in history. ■

Controlling Executive Privilege

Amicus Brief in House Judiciary Committee v. Harriet Miers, et al.

Executive Privilege does not immunize Administration officials from Congressional subpoena power.

This case concerns Congress's ability to investigate effectively grave charges that the White House misused the federal criminal justice system to influence prosecutions for partisan purposes and to disadvantage political opponents. It raises questions about Congress's powers to obtain information necessary to restore public confidence in the administration of justice and to assess the need for legislation to prevent recurrence of wrongdoing. The issue presented by Defendants' motion to dismiss is whether the federal judiciary has a role in determining whether the President can frustrate such a congressional investigation. Amici insist that it does.

On a motion to dismiss, the Committee's allegations are accepted as true. Independently, however, substantial evidence already suggests that the criminal justice system may have been perverted for the purpose of securing partisan political advantage. Yet to date Congress's important investigation has been blocked by an unprecedented White House refusal to negotiate access to critical information about the ultimate source of possible improprieties. By insisting on conditioning access to Defendants in ways that thwart further investigation into alleged wrongdoing, the White House has broken sharply with a tradition of interbranch cooperation and left a cloud over the administration of federal justice. Its actions create a troubling precedent that future Administrations of either party may follow.

Congress's invocation of federal court jurisdiction to enforce a subpoena is thus particularly appropriate in this case. If Congress cannot test the legality of Defendants' executive privilege claims here—when it has already explored reasonable alternatives, when it faces unprecedented executive intransigence, and when the credibility of federal criminal law enforcement hangs in the balance—the Constitution's Separation of Powers stands in grave peril.

Amici curiae agree with the Committee that this Court should adjudicate the controversy raised by Defendants' refusal to comply with its subpoenas. Plaintiff demonstrates that this suit constitutes an Article III "case or controversy" in which the Committee has a direct, personal, and concrete stake; that the absence of a statutory cause of action does not preclude the

This amicus brief was filed in the U.S. District Court for the District of Columbia on behalf of the Brennan Center, The Rutherford Institute, Judicial Watch, and Citizens for Responsibility and Ethics in Washington, on May 29, 2008. In crucial respects, Judge Bates accepted the Brennan Center's argument and granted the plaintiff's motion for summary judgement.

Committee's suit; that equitable considerations weigh overwhelmingly in favor of the exercise of jurisdiction; and that Defendants have no absolute immunity from compulsory disclosure. Amici submit this brief to address an argument that runs throughout Defendants' motion to dismiss: the proposition that our system of Separation of Powers requires this Court to abdicate its Article III and statutory jurisdiction to resolve this case. To the contrary, a decision by this Court to decline to entertain this dispute would severely undermine the Constitution's system of checks and balances as well as the rule of law.

Specifically, dismissal at this juncture is inappropriate for three reasons. *First*, this Cour tmust act to preserve the Constitution's checks and balances. Contrary to Defendants' claims, it would be this Court's *refusal* to adjudicate this case that would harm the Separation of Powers.

If Congress cannot test the legality of executive privilege claims here, the Constitution's Separation of Powers stands in grave peril.

The Committee's inquiry is at the core of Congress's power to investigate for purposes of legislating and overseeing execution of its legislative acts. Judicial refusal to enforce properly sanctioned congressional subpoenas issued in the course of this investigation would impermissibly invade Congress's constitutional prerogatives; it would destabilize the incentives that foster interbranch negotiations; and it would perversely reward the White House for discarding the tradition of negotiation in favor of a new and worrying disrespect for a coordinate branch. Past judicial involvement in interbranch disputes demonstrates that Defendants are plainly wrong to claim that exercise of such jurisdiction reduces the political branches' incentives to negotiate. To the contrary, the prospect of involvement by the federal courts hastens equitable resolution of interbranch conflict.

Second, this Court's exercise of jurisdiction is warranted in light of both historical and judicial precedent. History shows that Congress and the Executive each have understood that congressional subpoenas of executive branch officials may be enforced by civil actions.

Negotiating with the safety net of eventual judicial resolution, Congress has been successful in securing access to necessary information when serious claims of wrongdoing are at issue such that only a minority of disputes concerning executive privilege has ended in litigation. This history should not, however, count against Congress. Rather, history suggests that what is unprecedented here is White House stonewalling to prevent a full investigation into allegations of partisan corruption of the Department of Justice.

Finally, the merits questions to be settled here are no different in character from legal issues routinely raised in and resolved by federal courts. They are questions of law fully fit for judicial resolution.

In sum, the fact that this case involves "a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict." Principle, history, and binding precedent all confirm that this suit should proceed to resolution on the merits. ■

Dismantling the Imperial Presidency

Aziz Huq

Restoring constitutional order in the post-Bush era

President-elect Obama's first appointments to the Justice, State and Defense Departments mark no radical change. Rather, they return to a centrist consensus familiar from the Clinton years. But pragmatic incrementalism and studied bipartisanship will do little to undo the centerpiece of the Bush/Cheney era's legacy. At its heart, that regime was intent on forcing the Constitution into a new mold of executive dominance.

At first blush, Obama's victory is cause for optimism. As a senator he roundly rejected the signature Bush/Cheney national security policies: torture, "extraordinary rendition," Guantánamo and–until July–warrantless surveillance. Obama appointees like Eric Holder as attorney general speak unequivocally against these violations of constitutional and human rights (to be sure, in Holder's case it was after early equivocation).

The most significant Bush/Cheney innovation was planted at the taproot of our Constitution. It was the insistence that the president can exercise what Cheney in 1987 called "monarchical notions of prerogative." That he can, in other words, override validly enacted statutes and treaties simply by invoking national security. This monarchical claim underwrote not only the expansion of torture, extraordinary rendition and warrantless surveillance but also the stonewalling of Congressional and judicial inquiries in the name of "executive privilege" and "state secrets."

The Bush/Cheney White House leveraged pervasive post-9/11 fears to reverse what Cheney called "the erosion of presidential power" since Watergate. Relying on pliant Justice Department lawyers for legal cover, it put into practice a vision of executive power unconstrained by Congress or the courts. It achieved what James Madison once called the "accumulation of all powers, legislative, executive and judiciary, in the same hands," which he condemned as "the very definition of tyranny."

Radical change is needed to reestablish legitimate bounds to executive power. We must again place beyond the pale Nixon's famous aphorism that "when the president does it, that means it's not illegal." But radical change--as early appointments and policy signals from the Obama transition team suggest – comes easier as campaign slogan than governing practice. And there are many reasons to fear a go-slow approach from Obama when it comes to restoring the constitutional equilibrium.

No matter how decent, any new president is tempted by the tools and trappings of executive authority. However tainted the Oval Office is now, Obama's perspective will change dramatically on entering the White House. He is already reading more daily security briefs than Bush and beginning each day with a barrage of fearful intelligence, hinting at dangers that largely never materialize. Submersion in that flow of intelligence will wrenchingly change his sense of the world's risks.

So Obama will be tempted to maintain Bush's innovations in executive power. While the terror threat remains substantial, as the Mumbai attack shows, the Bush administration has left counterterrorism policy in tatters. We have no rational strategy for terrorist interdiction and prevention. Obama's nominations of Robert Gates as defense secretary and Gen. James Jones

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as national security adviser suggest he is acutely aware of these deficits and of the Democrats' perceived vulnerability on national security. Nor are terrorists the only threat that might lead Obama to reach for emergency powers: credit crunches and fiscal meltdowns can also prompt unilateral executive action, with consequences as sweeping as any national security initiative.

Internal pressure for changing the White House position on executive power will thus wane as the new administration settles in. And pressure from the other two branches is unlikely to swell. The Obama White House will at first face a friendly Congress eager to show results on the economy and healthcare. Unlike the recently oppositional Congress, legislators in the majority have little incentive to make constitutional waves (expect some stalwarts, such as Senator Russ Feingold, to buck this trend). Matters are not helped by the turn from the feckless to the competent. Legislators and the public care most about the constitutional restraints on executive power when the occupant of the White House raises concerns about abuses of power. A more capable leader's entrance saps immediate pressure for reform, even when openings for such limits can be glimpsed.

Nor will the judiciary, listing rightward with President Bush's 324 appointments, provide much constraint. In his appointments to the Supreme Court and the District of Columbia Circuit Court of Appeals (which hears many key constitutional cases), Bush seems to have selected executive-power mavens, including Chief Justice John Roberts, Justice Samuel Alito and Judge Janice Rogers Brown. Their opinions already evince strong deference to executive claims of secrecy and expediency. Paradoxically, then, one of Bush's key legacies will be a judiciary that instinctually hews to an executive controlled by a Democratic president.

I am thus not optimistic that the Obama administration will of its own volition restore the constitutional balance, even if it gives up some of Bush/Cheney's most extravagant and offensive policies. With formidable forces arrayed against them, advocates for the Constitution's original equilibrium of powers must choose their battles carefully.

Three areas are particularly important in the administration's early days: torture, the law that the executive follows and accountability. In each case, measures can be taken that would correct a policy the Obama administration clearly disagrees with and simultaneously help dismantle the Bush/Cheney constitutional revolution. (The other pressing issue to face the incoming administration--detention policy--is so complex and difficult, largely thanks to the outgoing administration's compounded mistakes, that it needs to be looked at separately.)

Begin with torture. President Bush's repeated disavowals of government-sanctioned torture have created cognitive dissonance: White House protestations that "we don't torture" are no longer believed. An Obama administration dedicated to restoring America's tarnished international reputation must do more than talk. The best way to begin is for Congress to enact and President Obama to sign already introduced legislation that would limit the intelligence community to the specific interrogation tactics listed in the recently revised Army Field Manual. This law would make it clear that the CIA in particular cannot use what it euphemistically calls "enhanced interrogation techniques." In signing the law, Obama should eschew the weaseling signing provisos favored by Bush and instead forthrightly recognize that there is no presidential override when it comes to torture. This bill is a golden opportunity to restore international credibility *and* repudiate the monarchical presidency. So it is unfortunate that Democratic Senators Dianne Feinstein and Ron Wyden have already begun backsliding on it.

Also on the torture front, the Obama administration should candidly acknowledge past wrongs, thereby abandoning the Bush/Cheney demand for absolute secrecy. In legal cases filed by torture victims such as Maher Arar, Khaled el-Masri and Shafiq Rasul, the Bush administration has parried demands for acknowledgment or restitution with a sweeping constitutional theory of "state secrets." Rejecting this theory would be a significant step in dismantling the Bush/

Cheney view of executive unilateralism. It would be the smallest measure of justice to abandon this theory as ill founded and also to offer profound apologies and restitution to victims. It would be a public acknowledgment that our fears are never an excuse for anyone's suffering.

Torture is only one aspect of a larger distortion of the Constitution. Changing the executive's operating definitions of the law will be critical to rolling back the Bush/Cheney vision. Now this vision is largely memorialized in Justice Department opinions, many still secret. Some of them directly address presidential prerogatives to override laws. Others deal with specific constitutional rights, such as Fourth Amendment privacy rights and the freedom from indefinite detention without trial.

Radical change is needed to reestablish legitimate bounds to executive power. But radical change comes easier as campaign slogan than governing practice.

While there is not much general public pressure to change these positions, many constitutional scholars and advocacy groups have protested these opinions. Consistent pressure is required to ensure that the Obama Justice Department cleans house. All department opinions on executive power should be revealed, and troubling ones should be red-flagged so officials will know they can no longer rely on them. The Justice Department should then develop opinions that systematically repudiate the most offensive positions, in particular the idea of monarchical prerogatives to override the law.

Traditionally, opinions have been prepared by the Office of Legal Counsel in secret and then closely held within the administration. Given executive-branch lawyers' habitual pro-presidential tilt, this process should be refashioned. Not only should opinions be made public after publication; the OLC should invite comment and criticism from the public and scholars during drafting, much as other federal regulations are subject to pre-publication "notice and comment."

Finally, there is the thorny matter of accountability. Absent accountability, the lesson of the Bush/Cheney era would be that those who violate the law can, if brazen enough, get away with it. Yet the Obama transition team has signaled no appetite for criminal proceedings. And in any case, indictments might be pre-empted by a blanket pardon before January 20. Many others have made a compelling case for prosecutions. But what if they don't happen? Paradoxically, blanket presidential pardons may be the least bad alternative. If prosecutions proceed, they may not be edifying. Admissible evidence will be sparse, given secrecy rules. Officials will protest at being sandbagged after having relied on (flawed) OLC opinions. And there is the danger of a repeat of the Iran/Contra trials, where Oliver North used the dock as a soapbox. Given these risks, a blanket pardon perversely might send the clearest signal that the malaise of the Bush/Cheney era was endemic.

Yet this is no reason to renounce accountability. Several commentators have urged a commission to establish full documentation of what was done and its legal justifications. An investigative commission could be less amenable to manipulation than trials. If it could carry out its work in a bipartisan spirit, while insisting on the investigative tools needed to cut through secrecy, such as subpoena power, it could establish a definitive historical record of Bush/Cheney's extraordinary power grab. Bringing to public scrutiny the imperial presidency's infractions will, I suspect, be as good a way as any of thoroughly discrediting that constitutional vision.

No one should assume that the end of the Bush presidency marks the end of the imperial presidency. The Obama administration faces a geostrategic environment of growing uncertainty, with treasury, reputation and military depleted by eight feckless years. It would be foolhardy simply to assume that the worst will be swept away. Yet the opportunities exist for progressives to insist that Obama stay true to his message of hope and his promise of restoring America's tarnished Constitution. ■

CAMPAIGN FINANCE REFORM

Money in Politics: The Good, The Bad, & The Ugly

Governor Janet Napolitano, AZ

The nation's only governor elected using full public funding discusses the next wave of campaign finance reforms and answers questions from New York Times editorial page editor Andrew Rosenthal.

I'd like to speak tonight both as an attorney and as a person who has run for office. I want to address a constitutional issue that is both timely and dynamic: money in politics, and the public financing of elections. When you talk about a "Living Constitution," it hardly gets more alive than this. It's an issue that stands at the heart of the American people's concern with our political system today.

It is also an issue on which the Constitution is largely silent. The Founders devised an ingenious system of government for the new nation. But, for better or for worse, the Constitution did not seem to anticipate at all what an American political system - as opposed to a government system - might look like. The rules for partisan politics, campaigns, and elections were left for the people to figure out later.

Reading the Constitution or the Federalist papers, it's clear the Framers saw the Republic as subject to a few big threats: the tyranny of a strong central government; the tyranny of the majority; or the menace of a foreign enemy.

But if you ask Americans today what most threatens our democratic values, many will say that it is the special interests or the high-dollar donors - those who can play king- or queen-maker, can rent time at a candidate's ear, or can buy their ticket into an expensive fundraiser.

People worry that their votes are less important than someone's money. They hear, for instance, about pharmaceutical lobbies donating to campaigns, and then they see nothing getting done on health care. They observe powerful oil interests bankrolling candidates, and then see America make insufficient progress on energy.

I have seen the political process close up, and I can tell you that it's more complicated than that. But I can also tell you that there are real drawbacks to the current interplay between money and politics. Perhaps more than overt corruption, the current system breeds cynicism and apathy - two enemies of participatory democracy. If Americans feel like they don't have a voice, then all sorts of people - potential voters and potential candidates

Excerpted from Gov. Napolitano's remarks at the Brennan Center's first annual Living Constitution Lecture, April 10, 2008.

alike - don't get involved because they don't think they can matter. Important policy differences are obscured by the patina of campaign contributions. And candidates are forced into a never-ending cycle of fundraisers and chicken dinners, which, especially at the federal level, greatly favors incumbents over even the most worthy challengers.

You're never going to get money completely out of politics - but there is a better way to do it.

The voters of Arizona helped move in the right direction by voting for an initiative known as "Clean Elections" ten years ago. Under Clean Elections, Arizona is one of 14 states that have a form of direct public financing for candidates in some elections - and is one of only two that has a comprehensive funding, fundraising and matching formula.

Arizona is a place of tremendous growth and dynamism, which gives us big challenges, but even bigger opportunities. These elements of Arizona are on display in our Clean Elections law.

It is a good example of the tremendous success, frustrating shortcomings, and intense acrimony - the good, the bad, and the ugly - that come with any good frontier.

Let's start tonight with the good. I strongly believe in the principle of public financing. It's opened up the political process for thousands of voters and encouraged more people to get involved as candidates.

To look at the upside of public financing, you have to be realistic about what it can do. Public financing does not - and cannot - get the money completely out of campaigns. You need money to reach voters and inform them of where you stand. Try doing that on a shoestring.

Apart from this basic necessity, there's this fact: When it comes down to it, people who want to contribute lots of money to causes they care about will find some way to do it. Our Clean Elections system in Arizona, for instance, effectively limits individual contributions to campaigns to $5. But a Clean Elections candidate always runs the risk of an opponent who can simply self-fund at an unlimited level. Moreover, anyone can give a lot of money to political causes simply by donating to the state political party, an advocacy organization, or an independent expenditure committee. Everyone should be familiar with this phenomenon: In 2004, we saw it on a national level, when donors responded to new campaign finance laws by funding 527 groups, which are much less regulated than campaigns or political action committees.

I strongly believe that these types of organizations should be held to strict and more timely reporting requirements for income and expenditures, so that voters can see what's going on. These would be positive steps, considering the fact that independent expenditure committees and 527s are going to be with us for a very long time.

Public financing will not rid politics of money. What public financing can do is make the role of money in politics more equitable and more transparent. Public financing helps erase the big mysteries about campaign funding - it takes away the question of who the big donors are, and requires clear reporting of expenditures and incomes. It also levels the field for candidates in a way that breathes life into grassroots democracy.

Clean Elections has led to a different type of campaign: As a candidate, you focus on meeting voters, instead of dialing for dollars.

I ran for Attorney General in 1998, before the Clean Elections system was passed. I've successfully run for Governor twice - in 2002 and 2006 - as a Clean Elections candidate, choosing a clean campaign over a traditionally financed run. I can tell you: The system makes a world of difference.

In my Attorney General campaign, I spent a lot of time talking to donors just so I could have the resources to get my name out there. Running for Governor, I spent a lot less time doing that, and a lot more time talking to voters. In 2006, I collected 10,000 of the $5 contributions I needed to qualify for public funds. Compare that to the fewer than 3,000 donors I had while running for Attorney General without public financing.

Talk about opening the process up to more people. It gives voters a sense of ownership in the campaign - and they know their portion isn't bigger or smaller than anyone else's.

In this way, people giving their $5 have a lot in common with the everyday people who've formed the base of recent presidential campaigns built on small donors - such as Barack Obama's campaign. Everyone can play, and Obama's supporters know that their support lets the candidate bypass the influences that make many people cynical about politics. People can take ownership in the campaign and know their voices matter.

You're never going to get money completely out of politics, but there is a better way to do it.

But you shouldn't have the benefit from a once-in-a-generation presidential candidates armed with a world-class Internet fundraising operation to foster this kind of democratic participation. Public financing allows a similar sense of citizen ownership - the feeling that everyone can play - across all levels of campaigning, even without the public limelight surrounding Obama.

As a candidate, I vastly prefer the Clean Elections model. I get to spend a lot more time talking to everyday Arizonans about the issues facing them during "$5 parties," which are common in clean campaigns. These events range from neighborhood dessert parties held in someone's living room to a hike put together by grassroots supporters and led by the candidate. To me, this is what campaigns are really about - bringing together the people you want to represent, talking about important issues, and rallying behind common cause.

Public financing is also a good way to rein in expensive contests. In Arizona, Clean Elections has kept the cost of running way down. Candidates' ideas aren't inhibited by the obstacles of a big-money campaign, and instead compete on level ground.

Just look at the numbers. My 2006 campaign received $1.3 million in public funds, and my opponent got about the same amounts. So, together, we spent about two and a half million dollars in that Governors' race. Now look at another statewide contest in Arizona that wasn't eligible for public financing - the race for U.S. Senate. Combined, the two candidates spent nearly $30 million. Same year, same voters - but Clean Elections cut the cost of running by more than 90 percent. When you make it cheaper to run, you democratize the process. This is also true of what kind of people end up running with public financing in place.

Clean Elections has opened the doors for many more people to run for office in Arizona, because you don't have to worry about a money advantage. We've seen a 35 percent increase in the number of candidates running for

Clean Elections-eligible offices from 1998 to 2006. Clean Elections, combined with term limits, has brought us a 140 percent increase in the number of contested state Senate races. Only 10 of our 30 state Senate districts were contested in 1998 - 24 of them were in 2006. This kind of competition is a sign of a robust democracy.

And better yet, Clean Elections candidates are winning. Forty-seven percent of all state and legislative offices are now held by candidates who ran clean, including 9 of 11 statewide office. In 2006, 38 of the 90 legislators elected were Clean Elections candidates - including nearly half the House of Representatives.

And clean candidates come from both major parties. Of the 47 clean candidates elected in 2006, 21 were Republicans and 26 were Democrats. In 2004, it was 28 Republicans and 18 Democrats. So public financing is far from a Democratic Party plot: It's a boon for all sorts of candidates.

In public financing, Arizona has done its job as a laboratory of democracy. We've seen enough positive results to broaden the experiment. In my state, you have a real-life public financing system that has changed the landscape of politics.

My suggestion to the students and scholars here today is: Use the Arizona example to create a model code for public financing, which could be used by other states and the federal government Like I said earlier, Americans are worried about money in politics. Yet too few states have public financing, and presidential candidates are stepping away from using public money in their elections.

In our Arizona test case, you can see what has worked and what hasn't, and you can move forward from there. When discussing a "Living Constitution," it can be easy to talk in just terms of big principles. But particulars matter. The details are often at the heart of putting those big ideas to work - and this is very true in public financing.

If we can work through these particulars, we can give candidates a way to run for office that's equitable and transparent. Greater use of public financing can give citizens a greater voice, and greater confidence, in our democratic system. I urge you to go forward, take a realistic approach to the problem of money in politics, and to contribute in this meaningful way to our nation's evolving campaign finance laws - and to do so in real time.

Aim to have a model code for states to emulate before the election of 2012 - the next presidential election and the first general election after the next census and reapportionment.

If you do this, and if states and the federal government adopt your recommendations, you will have contributed in a meaningful way to the electoral framework underlying our democracy.

QUESTION AND ANSWER

Moderated by New York Times Editorial Page Editor Andrew Rosenthal

ANDREW ROSENTHAL: Well over half a billion dollars was spent this year on the presidential election, right? Does it really matter if that kind of sum is collected in big chunks or little chunks; isn't the *total* corrupting.?

GOV. NAPOLITANO: Media consultants make their money on how much television they sell, so there is an interesting symbiosis there. Also, television stations charge their highest

dollar time to political candidates. In other words, companies that advertise regularly get a much better deal for thirty seconds of advertising than political candidates do. This would be something to take a look at, with any eye towards changing the phenomenon.

R: Do you think it is possible to control that, under the Constitution?

N: Yes. What we have seen in Arizona is suggests we need to figure out how to reach voters without relying exclusively on television ads. This is particularly true in races in which both candidates opt into the clean elections system.

The internet is an amazing technological development that democratizes the process. But, in the current system, dollar amounts are too low and the free-for-all that we have is too high. There is a middle ground. And forcing candidates – and campaigns – to find a way to win without relying totally on television ads, would be a healthy development.

With Clean Elections, candidates can focus on meeting voters, rather than dialing for dollars.

R: Can that work on a national level?

N: Yes.

R: People say, "Well, it's one thing in Arizona but …"

N: California tried to adopt a public financing model a couple of years ago, and it failed at the polls. But when I travel around, I sense there are seeds of this all over the country, particularly at the state level. At the federal level, it's a somewhat different dynamic. (And I would separate Presidential elections from Senate and Congressional races) But, in terms of a democratizing campaign, that's why I mentioned the Obama campaign – now I will say, for those who don't know, I am an Obama supporter – adding the internet to the political mix has been very, very important because, as we've seen, the internet works to democratize the fundraising apparatus and brings in lots of money from small donors. This relieves candidates of the burden of having to focus on big dollar events and donors. The Obama campaign's success with this kind of fundraising enhances the sense that Obama has strong grassroots support.

R: Didn't Sen. Barack Obama miss a moment here? At the start, he was the one who was talking about public financing, but he appears to have backed away from that.

N: You have to look at the cost of these campaigns. A national media campaign for the president costs more than the public financing at the federal level permits.

Audience: With respect to the Obama campaign, at least the influence of large donors has been diluted by widespread Internet fundraising, which his advocates have said comes in five, ten, and twenty dollar donations. It's at least conceivable that if candidates were to raise large amounts of money over the Internet, it would be a successful parallel system with no administration at all.

N: That's true. Obama is unique because of his own personal charisma which, I think, is central to the success of his internet campaign. I'm not sure the average state legislator can raise money on the internet the same way Obama has. Relying on the internet for salvation isn't going to work for most candidates.

R: Part of the problem here is that people expect something back after they've collected five hundred thousand dollars from their law firm and donated it to a political campaign. The other part of the problem involves getting the candidates off of the television and actually talking to voters. And even if you've collected seventy-five million dollars from seventy-five million different people and then you spend it all on TV ads – maybe it's less corrupt at the source, but the result is the same. On television, there is no campaign, except what's on television.

N: In the clean election system, you can't depend on TV, because you can't buy enough TV to make a difference. But nationally, we have to set the amounts so that television can be used, because it's the only way to reach everybody.

R: This resonates with the rich guys. We have had one run for office here in New York, Michael Bloomberg, and I think people think he's been a pretty good mayor. When he won his first election, he came into *The Times* and said that he had spent seventy or eighty million dollars – he couldn't remember. I'd love to have a ten million dollar margin of error in *my* checkbook! Do you say to this guy, "Hey you just can't dot that?"

N: No. You can't. Under *Buckley v. Valeo*, you cannot limit what individuals can spend on their own campaigns.

Audience: Can you talk about some of the things that have changed in Arizona, as a result of clean money? Legislation passed? Budget differences? Money coming in?

N: On my first day in office as governor, I put in place a prescription discount card for any Arizonan over the age of sixty-five. This card is now available for any Arizonan, period. Our legislature hadn't been able to get this card through, though they had tried for years. I think the public made the connection between the fact that I wasn't raising money from pharmaceutical companies to the introduction of the prescription discount card right away and this helped make passage possible.

Audience: As Democrats or Republicans frame their agendas for this election and next year, do you think the public cares about this? How does campaign finance reform fit within the broad strategies for your party or for the country? Is it more important to address issues, like health care, that affect voters in more tangible ways?

N: I think the latter. Campaigning about electoral process is difficult. Unless people are already engrossed in the subject, people's eyes glaze over when you take about electoral process

issues. Campaign messages about special interests, about not relying on large donors or PACs, are good, resonant messages – especially if you establish a connection to something tangible – like a prescription discount card – that people care about. But in general campaigning on an – "Elect-me- I want-to-reform-the-electoral-system" is not likely to be a winning strategy.

Audience: A turning point in the last presidential election involved money from a 527, the "Swift Boat Veterans for Truth." Since there is no way the Supreme Court is going to overrule the ability of people to spend whatever they want on an election, clean campaigns are good up to the point where somebody gets help from a 527, whether it be on the far-right or the far-left. How good can a clean campaign system be if we have special-interest money in the system?

N: Right. That's why we're never going to get money out of politics and campaigns. But we can re-channel – and redirect – the flow.

The Brennan Center could contribute something in this area: a reporting code for those groups. One of the key issues in campaign finance is immediate, real-time knowledge of who's giving what money, and into what area; some truth in organizational advertising would be useful. This could include a label of some kind that identified who's on the organization's board, who are it donors. The internet would make it easy for groups to report donations as they are received. The federal system is archaic in this regard. We've lost all transparency there. At a minimum, we ought to have more real-time transparency with respect to how money comes into campaigns.

Audience: If you look at state legislatures, they are still about seventy-five percent male. Do you have an opinion on whether privately-funded elections reinforce gender disparities? Was having a publically-funded election particularly helpful for you?

N: It wasn't particularly helpful for me because I would have been the lead Democrat either way. I would have raised money as the leading Democratic candidate, in 2002, when I had my first race for governor, in part because I had already run and won a state-wide race as a Democrat. In donor's minds, this was the initial hurdle: it showed that I a Democrat could actually win a state-wide race in a state like Arizona. I chose to run the clean elections way because I like it better and also because people of Arizona said, this is the way we prefer and I deferred to their preference. It's not a perfect system. It does not, as you say, get money out of politics. It does change the focus of campaigns. It is more transparent. It does broaden, both for candidates and voters, the ability to participate. Anybody can do a five-dollar party. You don't have to be able to go to a hundred or a two hundred fifty dollar dinner to go to a five dollar party, and that, in and of itself, generates a lot more grassroots movement within the democracy.

With respect to the state legislature and getting women into office, yes, clean elections help. On the money side, anything that lessens the fear of having enough to campaign on a competitive level, is a democratizing, with a small "d," process. ■

Let's Get This Straight: Money is Not Speech

Ciara Torres-Spelliscey

Campaign contributions and the First Amendment.

Whenever I admit to fellow guests at a dinner party that I work as a campaign finance lawyer, the following happens. Either their eyes glaze over, hoping for a rapid change of topic, or they launch into a heated discussion of why the case that decided "money is speech" is so wrongheaded -- since after all, money is, well, money, and speech is something else entirely. Sad to say, the justices on the U.S. Supreme Court seem to be losing their grasp on this simple point.

Contrary to popular opinion, the landmark case, *Buckley v. Valeo*, never actually equated money with speech. Instead, the opinion analyzed political campaigns and concluded that lots of money is needed to get a candidate's message to voters. Buckley used gasoline as a metaphor for campaign cash. The fuel of contributions makes the campaign car go.

As Justice Stephen Breyer once wrote, "a decision to contribute money to a campaign is a matter of First Amendment concern not because money is speech (it is not); but because it enables speech." Despite this truth, the bumper sticker version – "money is speech" – has seeped into our collective unconscious.

Buckley held that contributions could be regulated but expenditures could not, a holding that produced two striking consequences. First, candidates now spend an inordinate amount of time trying to win a fundraising arms race since the supply of campaign dollars is limited but the demand for it is not. Second, rich, self-financed candidates retain an enormous advantage if they can put their own money on the line.

In 2006, the Supreme Court had an opportunity to re-balance the scales in *Randall v. Sorrell*, a case challenging Vermont's contribution and expenditure limits. As *Randall* was winding its way up from the district court, there was reason for hope that the court would discard *Buckley's* misaligned structure. After all, in 2003, the court affirmed the Bipartisan Campaign Reform Act (BCRA) in a 5-4 decision. Those same justices were on the court. But before the *Randall* case was decided, Justice Sandra Day O'Connor stepped down, and Chief Justice William Rehnquist died.

Their replacements, Justices Samuel Alito and John Roberts, brought with them hostility to campaign finance reform and little interest in remediating *Buckley*. *Randall* instead revitalized the old junker of a car metaphor, opining that "a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."

The new majority on the court also oversimplified matters during the recent oral argument for *Davis v. FEC*, a case about the constitutionality of the so-called Millionaires' Amendment. This provision of BCRA attempts to assist candidates who are facing an opponent willing to lavish $350,000 or more of their money on their own campaign.

Attorney Andrew Herman, representing the allegedly aggrieved millionaire and twice-failed candidate for Congress, Jack Davis, argued, "money and speech are synonymous in an electoral context." The Millionaire's

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Amendment does not limit the amount that Davis could contribute to his own campaign, but by assisting his opponents, Herman argued that the law discouraged Davis from spending his own money and thus was stifling his freedom of speech. Roberts, the chief justice, appeared to have thoroughly internalized the old slogan, stating mid-sentence an assumption "that money is speech," without missing a beat.

During another part of the *Davis* oral argument, Justice Anthony Kennedy followed the money-is-speech line to its illogical extreme. He observed, "It's not just money. It's the quality and kind of speech .... I know of no precedents of this Court that says one party is entitled to assistance from a certain segment and another is not, based on the – the content of the speech. And that's exactly what (the Millionaires' Amendment) is."

The "money is speech" slogan empowers the rich at the expense of everyone else in our democracy.

Kennedy's statement is a bit hyperbolic given that the Millionaires' Amendment doesn't say a solitary word about the content of anyone's speech. Every candidate is allowed to spend as much money as he or she has on whatever types of speech he or she desires. In taking the money-is-speech incantation literally, Kennedy leads us into a bizarre backward world, in which an attempt to level the playing field between a candidate legally constrained by contribution limits and a self-financed candidate free to spend millions is a form of "content"-based discrimination against the rich.

A reconceptualization of this issue is sorely needed. As Burt Neuborne pointed out, *Buckley's* (and now by extension *Randall's*) car metaphor is misconceived.

An election campaign is not a drive in the country, a race between two or more contestants. If money is gasoline, how can you have a fair race when only one car has enough fuel? And when that fuel must be obtained from interested suppliers, who is it that really decides where the car ultimately goes?

Realizing that a campaign is a dynamic competition of many self-interested players might lead us to different approaches.

Most important, *Buckley's* central metaphor may have made sense in the mid-1970s, when communicating with the masses required huge amounts of advertising on the three major TV networks or in national newspapers. But in 2008, campaigns can e-mail millions of contributors with the touch of a button (instead of franking millions of pieces of snail mail), campaigns can link to a speech on the Internet for practically nothing (instead of paying millions for broadcast time). Presidential candidate Barack Obama's 37-minute speech on race has been viewed more than 5 million times on YouTube. This forum provides for more nuance, and is far more useful to democratic discourse than the classic 30-second political ad.

It's clear that the cost of campaigning for national office is still astronomically high, as evidenced by the price tag for the presidential primaries this year. Yet we can and should be grateful that, today, speech is not nearly as dependent on money as it once was because of technologies that allow expanded reach with little additional marginal cost. A reflexive money-as-speech metaphor misses out on some of this new reality. Vast sums of money are not the only, or perhaps even the preferable, way to get out a political message. Our political campaigns are now driving hybrids.

The final reason we should leave the money-is-speech slogan behind is that it empowers the rich at the expense of everyone else in our democracy. When millionaires may become a protected class in our jurisprudence, that should be a clear signal that we collectively misstepped.

The laws intended to support our democratic experiment should take equality of opportunity

in the electoral context more seriously. It impoverishes our politics when only the richest of the rich can ever dream of running for political office. Since the Supremes seem, at least in the short term, to be unlikely to approve expenditure limits, establishing robust systems of voluntary public financing for candidates at the state and federal levels is all the more urgent.

Public financing provides a meaningful respite from the chase for dollars. Money is harnessed in the service of our democracy, and not the other way around. Under public financing, it becomes clear that political speech is actually just speech – sometimes eloquent, sometimes stumbling, and sometimes downloadable for free. ■

Barack Obama and the Small Donor Revolution

Laura MacCleery

The election saw a flood of small donations. What does this mean for public funding?

Sen. Barack Obama's comments last week provided grist for renewed speculation about whether or not he will accept public financing for the general election. With no apparent sense of irony, he said to a roomful of donors at a high-ticket fundraiser that "we have created a parallel public financing system" of free-flowing Internet donations.

This remark may be a signal that Obama is considering using private money for the general election, which would make him the first candidate to do so since the election of President Nixon (before public funding was an option). It certainly is a clear sign that the explosion of small donors will require us to take a fresh look at the structures of campaign finance law.

But it will not help us move forward if enthusiasm for this influx of small donors obscures the facts. Money from large donors is not exactly going the way of the dinosaurs – 79 bundlers for Obama have hit up their friends for aggregate contributions of $200,000 each. Still, it is certainly indisputable that having more small donations and less reliance on a tiny pool of wealthy people is a happy development in a democracy.

A true public financing system allows candidates to avoid $2,300-a-person fundraisers like Tuesday's event. But it could look quite different from what we have now, which forecloses any private fundraising in the general election if a candidate accepts a public grant. Indeed, the development of a "parallel" system suggests a way to update the moribund presidential public funding program.

Coupling a substantial grant of public funds with the opportunity to raise contributions of $100 per person, perhaps up to a pre-set cap, would enhance debate and combat corruption, while encouraging participation by throngs of small donors. Public funding could further magnify the impact of small donors, as it does in New York City, which provides a 6-to-1 match for every dollar up to $175 of each matchable contribution to a local candidate. This program pushes candidates to focus on grassroots fundraising, house parties, and potlucks -- thus boosting civic engagement while making it possible for

Public funding could magnify the impact of small donors, and push candidates to focus on grassroots fundraising.

neighborhood leaders to seek office. It hasn't ended corruption, of course. And the success of billionaire mayor Mike Bloomberg shows it hasn't ended the role of wealth in politics, either. But it has boosted competition and improved the independence of those in office.

Either option also would enable candidates facing independent expenditures to raise funds for response. There has been much talk already in this election of the collection efforts by outside groups that intend to spend millions of dollars to "frame" the opposing candidate or protect their

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own. With small donor fundraising, candidates would have a chance to compete with the unlimited spending by special interests.

The current system addresses the problem by allowing the presidential candidates to accept public money in the general election, while their parties "independently" raise and spend still more cash using their names. It would be far preferable to move on from this wink-wink system to one in which candidates will have enough funding of their own to respond to the predictable attacks.

A handful of large grassroots organizations, from environmental organizations to the National Rifle Association, would likely benefit by acting as Internet-based "bundlers" for these contributions, so we should also take another look at the disclosures required for this kind of activity. Bundling activity on the Internet should be the subject of simple transparency rules similar to those passed by the Congress last year for federal lobbyists, in order to allow voters to see which entities are seeking to influence candidates.

This year, with its wide-open presidential race, is highly unusual, and Obama's ability to inspire small donors may not be an elixir available to other candidates, or in other races. On the other hand, Sen. Hillary Clinton also has raised a large number of small contributions, and it does seem clear that the more we keep this going, the better off we all will be.

In this fast-changing landscape, the future of campaign finance is now. The best of all possible worlds would be to combine the energy and enthusiasm of small donors with a public funding system that ensures that, in the end, the voices of those donors are the ones that will matter most to candidates. ■

THE LIVING CONSTITUTION

America 101

Eric Lane

America needs a crash course in the Constitution.

Starting this October, the United States Citizenship and Immigration Service will administer a new test for immigrants seeking American citizenship. The test is intended to be harder and more relevant than its predecessors. Replacing many of the more easily learned (and senseless) fact questions—"What are the colors of the flag?" "What colors are the stars on our flag?"—is a more meaningful series of questions about America's constitutional democracy. Heralded as a real measure of "what makes an American citizen," this new test asks, for example, "What is the supreme law of the land?" "What does the Constitution do?" "The idea of self-government is in the first three words of the Constitution. What are these words?" and "What is the rule of law?"

We have to understand the fragility of our democracy and our obligation to maintain it.

From the Framers onward, Americans have always considered civic literacy critical for a thriving democracy. "[A] well-instructed people alone can be permanently a free people," noted James Madison, the father of the Constitution and fourth president, in 1810. Americans continue to agree. A 1997 survey by the National Constitution Center (NCC) found that 84 percent of Americans believed that for the government to work as intended, citizens needed to be informed and active. Three-quarters of those polled claimed that the Constitution mattered in their daily lives, and almost as many people thought the Constitution impacted events in America today.

Yet, despite this nod to civic literacy, too few Americans could answer the questions on the citizenship test or similar questions. Forty-one percent of respondents to the NCC national survey were not aware that there were three branches of government, and 62 percent couldn't name them; 33 percent couldn't even name one. Over half of all those answering the NCC survey did not know the length of a term for a member of the Senate or House of Representatives. And another NCC study found that while 71 percent of teens knew that "www" starts an online web address, only 35 percent knew that "We the People" are the opening words of the Constitution. A study by the Intercollegiate Studies Institute found that "the average college senior knows astoundingly little about America's history, government, international relations and market economy, earning an 'F' on the American civic literacy exam with a score of 54.2 percent."

Things weren't always this way; civics and current events courses were once common, even required, in American schools. But since the late 1960s, civic education in the country has declined. The main culprit in this sad tale is

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our educational system. "Civic education in the public schools has been almost totally eclipsed by a preoccupation with preparing the workforce of a global economy," writes former Harvard University President Derek Bok. "Most universities no longer treat the preparation of citizens as an explicit goal of their curriculum."

The congressionally required National Assessments of Educational Progress confirms Bok's point. A 1988 report found significant drops in civic knowledge since 1976; another in 2002 found "that the nation's citizenry is woefully undereducated about the fundamentals of our American Democracy." And while some have questioned the continuousness of the decline, there is little dispute with the troubling, perhaps ironic, conclusion: As the role of government has enormously expanded over the last 80 years, and as our voting rolls have opened to more and more groups of people, efforts to prepare our citizens for their civic responsibilities have fallen precipitously.

A good civic education teaches that losing an election is not an excuse to disengage, and that compromise is the currency of the system.

And this only addresses our basic civic literacy. Citizens still need a deeper understanding of the Constitution, an advanced set of knowledge to evaluate the operation of our government and weigh its successes and failures. A more advanced set of questions might ask: What is the vision of human nature that underlies the Constitution? What is the primary task of American government? Does the Constitution favor process over product and, if so, why? What is a special interest group? How does the Constitution define the common good?

Our civic ignorance is putting our constitutional democracy at risk. It is a significant part of the willingness of Congress and the public to defer to executive claims of authority since 9/11, with little understanding of its negative constitutional consequences. More generally, as the government continues to expand into our daily lives, our very freedom depends upon every citizen's ability to understand and respond to it. Civic education, retired Supreme Court Justice Sandra Day O'Connor recently noted, is our only hope for "preserving a robust constitutional democracy . . . The better educated our citizens are, the better equipped they will be to preserve the system of government we have." The only answer, then, is to reinject civic literacy into our educational system.

Reviving Civic Literacy

The goal of civic literacy is to continuously reinvigorate our democracy through the promotion of meaningful civic engagement. It requires knowledge of the Constitution, its history, and its values, as they have evolved. We have to understand the fragility of our democracy and our obligation to maintain it. The only place to start is with the public schools. Public schools have an obligation to teach children about our history and civic institutions including the Constitution.

This obligation trumps even math and science education: After all, what is the value of either math or science, if we don't have our democracy? Or as

Amy Gutmann, the President of the University of Pennsylvania, asserted, "'political preparation'—the cultivation of virtues, knowledge, and skills necessary for political participation—has moral primacy over other purposes of public education in a democratic society."

What would an effective civic literacy program look like? This is not a road untraveled. Many groups have spent considerable time exploring the question and have offered a variety of very good proposals. One area of agreement in all the studies is that civic education must start early. Many of the lessons we need to learn from the Constitution—participation, compromise, tolerance—must become part of our attitudes and conscience to have real impact. And the sooner the effort begins and the more often it is repeated, the better it works.

Accordingly, sometime in fourth or fifth grade students should take their first civics-oriented course. This course should also include some basics of American history; call it the American Constitution I. It should introduce the structural details of the Constitution and their significance, as well as the basics of the Declaration of Independence. Students should start to learn about the various visions that inspired them and how they changed.

Certainly students at this age can appreciate the important story about how addressing self-interest and passion became the focus of the Constitution. And they can follow why compromise and consensus is so important. After all, they are exploring these very same conflicts within themselves, a platform that could be used for these lessons. The course should also reference relevant current events to capture students' attention (for example, if it is in a presidential year, a lesson could start by a teacher asking whether the students know what the president does and what an election is and work from that into the Constitution).

More sophisticated versions of this same course, which would also be required, should be offered again in middle school and high school—American Constitution II and III. The essential goal is a deep understanding and appreciation of our Constitution, but the courses should also provide students with capacity for the critical examination of the system. A line of discussion might be the value of the electoral college today, or the relationship between the First Amendment and campaign finance reform.

Starting in middle school and continuing through high school, students should also be required to take classes in current events, at least four semesters over this six-year period. Here the goal is not just (or merely) a discussion of today's events, but to use current events as a means of giving life to the Constitution. A discussion of the Iraq War could be used to talk about war powers, executive powers, legislative powers, separation of powers, decision-making processes, and the role of the courts. Schools should also encourage and aid student participation in extracurricular campus or outside organizations, such as internships and service clubs. We need far greater emphasis throughout our society on community and national service. The vigor of our democracy requires this understanding of appreciation of our constitutional values, and while they must be taught in the classroom, they can be experienced better outside it. Moreover, these classes should not be limited to the academically gifted. As professors Constance Flanagan, Peter Levine, and Richard Settersten demonstrate in a forthcoming work, the non-college-bound have the highest unemployment rates and the lowest voting rates among our population, and their departure from school marks the onset of their adulthood, diminishing their potential for civic engagement.

A Presidential Opportunity

The implementation of this or any such program will take hard work. Complacency about our democracy is its greatest enemy and, ironically, overcoming this complacency requires the very commitment to civic literacy that our complacency obstructs. This presidential election provides a great opportunity.

Both candidates have demonstrated in their service and in their commitment to public service a unique understanding of the demands (bipartisan compromises, respect for the ideas of others, respect for our governing institutions) of our democracy. And both can translate their own learning and experience in these matters into a national discussion on civic literacy. If they don't, things probably will get worse. By all accounts, turnout among young voters is expected to be high, particularly for Barack Obama.

That said, high participation as a result of the appeal of a particular candidate can provide a platform for change, but is not change itself. In fact, it can have a negative effect. The candidate can lose, or he can win and then have to govern, making all the compromises necessary for an effective presidency. From either of these results, new voters will become disillusioned. Civic literacy pushes back against this response. A good civic education teaches that losing an election is not an excuse to disengage from the political system, that compromise is the currency of the system, that you have an obligation to remain involved, that you have to keep pushing to succeed, and that you have to accept a decision resulting from a legitimate process, even if you don't like it.

America, unlike most of world's nations, is not a country defined by blood or belief. Rather, it is an idea, or a set of ideas, about freedom and opportunity. It is this set of ideas that binds us together as Americans. That's why these ideas have to be taught. Our understanding and appreciation of them is how we grade our civic literacy. We are now failing, and heading toward what the philosopher Michael Sandel has called a "story-less condition," in which "there is no continuity between present and past, and therefore no responsibility, and therefore no possibility for acting together to govern ourselves." We need civic education to reverse this course. ■

A National Popular Vote

Michael Waldman

The Constitution creates the Electoral College. Is there a way to fix it without a constitutional amendment?

It was the end of a long, sweltering summer at the Constitutional Convention in Philadelphia in 1787. Delegates were anxious to finish, but a looming question remained: How would the new office of president be filled? Some delegates wanted Congress to choose. Others wanted popular elections. That idea was overwhelmingly voted down—it would be "unnatural," warned one foe. Southern states had extra representation in Congress because slaves were counted in the population, under the grand compromise that allowed the Constitution to move forward; a popular vote would wipe out that advantage, since slaves didn't vote.

The Electoral College is the exploding cigar of American politics. Every so often, it blows up in our faces.

The delegates referred the mess to the Committee on Detail, which wrote a draft of the Constitution with the Electoral College as a rather convoluted solution. The states would each choose electors, with one electoral vote per senator and House member. That way small states, especially slave states, would have extra clout. If no one got an electoral vote majority, the House of Representatives would decide. Anyway, everyone knew George Washington would be the first president. With a shrug, the Founding Fathers moved on to other matters.

The Electoral College is the exploding cigar of American politics. For long periods of time, it has seemed to work well enough, and so we have treated it like a quaint anachronism with little real impact, little more than a question on the citizenship test and a subject for political thriller novels. Then, every so often, it blows up in our faces, throwing whole elections in doubt and making a mockery of the popular will. On these occasions, most recently the 2000 elections, the foolishness of the system becomes apparent, and demands for reform sweep the land. But the demands always peter out, because the Electoral College is written into the Constitution, and trying to amend the Constitution is just too daunting, and perhaps not even advisable. And so we live with the thing, like an old soldier with a bullet lodged in his spine. It's too dangerous to remove, the experts say, but it's capable, under the right circumstances, of crippling us.

Fortunately, politics advances just as medicine does, and there is now a new procedure that could remove the Electoral College without having to amend the Constitution. It's called the National Popular Vote. It's a clever, subtle,

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and nonpartisan fix, one that's beginning to catch on in a number of states. But before I explain the solution in detail, it's important to understand just how big a problem the Electoral College really is.

Four times in American history, the candidate who won fewer votes nonetheless became president. (Political scientists, with rare concision, call this the "wrong winner" problem.) In 1824, Andrew Jackson won the most total votes, but not enough states to win the Electoral College. The House of Representatives picked John Quincy Adams instead, after an alleged "corrupt bargain" with another candidate. Then, in 1876, Democrat Samuel J. Tilden won more votes than Republican Rutherford B. Hayes, but not an Electoral College majority. The deadlocked election went to Congress. The deal: Republicans got the White House, but Democrats got federal troops pulled out of the South, ending Reconstruction and ushering in more than eighty years of repression of former slaves and their descendants. In 1888, Benjamin Harrison lost the popular vote but won the Electoral College.

And then there was the 2000 election. That year, Al Gore won half a million votes more than George W. Bush. This was a wider popular vote margin than the one by which Kennedy bested Nixon—but Bush won the Electoral College by 271 to 266.

Near misses are even more common. In 2004, Bush won the popular vote, but a switch of sixty thousand votes in Ohio would have elected John Kerry. In 1976, the election would have been thrown into the House of Representatives with the shift of a few thousand votes in Delaware and Ohio. Any race could turn on such flukes. And when the House chooses, each state gets one vote, giving empty Idaho the same weight as crowded California. Massive pressure would push lawmakers to back the candidate of their party, not the one chosen by the voters. The resulting political fracas would dwarf anything seen in a century.

But that's what would happen if the system doesn't work—when the runner-up gets the gold medal. The truth is, the Electoral College warps competition and subverts political equality even when it *does* work.

Because most states are reliably "red" or "blue," candidates focus nearly all their efforts on a few swing states. As a result, many voters never see a campaign ad, receive more than a perfunctory candidate visit, or experience the mass mobilization of a real campaign. As late as 1976, forty states were tightly contested, including all the big ones. More recently, though, only about seventeen states were in play by November.

According to FairVote, "more money was spent on television advertising in Florida ... than in 45 states and the District of Columbia combined. More than half of all campaign resources were dedicated to just three states—Florida, Ohio and Pennsylvania." Voters in eighteen states, meanwhile, didn't get a candidate visit or a cent of spending on TV advertisements.

In 2004, ardent campaign boosters from New York never even contemplated going door to door in their own neighborhoods. Instead, they packed buses bound for Pennsylvania or even Ohio, where they canvassed neighborhoods exactly like their own. Imagine, by contrast, a system in which every vote counted equally. Candidates would be forced to appeal to the broadest groups of voters, to campaign where people actually live, and to focus on nationwide turnout.

The Electoral College is such an obvious affront to basic democracy that even its backers have a hard time finding persuasive rationalizations for it. The political scientist Norman Ornstein has argued that "[T]hree (or four) crises out of more than 50 presidential elections is remarkably small." Few of these

defenses, even if true, outweigh the fact that the winning candidate can lose. For example, proponents of the Electoral College say that the system protects the power of states with smaller populations. In a technical sense, this may be true. More accurately, though, the system protects swing states, not small states. Candidates do little campaigning in reliably Republican Idaho or Democratic Rhode Island. Moreover, the focus on states risks confusing legal jurisdictions with actual people. It is far more important for citizens to have their voices heard than that states do. Gun owners or women or students or evangelical Christians live all over the country, but only the ones in Ohio or Florida get wooed and get organized. Supporters also note that the Electoral College helps to create consensus and confer legitimacy by making narrow victories seem wider than they are. That's true, except for when the system demolishes legitimacy by picking the wrong candidate.

Change the Constitution

Why not change the Constitution? That solution is obvious, elegant, and very hard. The greatest strides toward democracy have often been achieved through amendments. In fact, five of the constitutional amendments have changed who can vote and how. But to change our founding document, first the House and Senate must both pass the amendment by two-thirds votes, then three-fourths of the states must approve. The machinery of the Constitution is calibrated to discourage a change like this.

We came close in recent memory. The 1968 election scared many voters away from both parties, because the racist independent candidate George Wallace came close to denying an Electoral College victory to the winner—and could have bargained for the presidency with civil rights laws as a chip. In 1969, the House overwhelmingly voted to end the Electoral College system. The two most recent winners of the presidency, Lyndon Johnson and Richard Nixon, supported the move. Only seventy lawmakers voted no. But the measure was filibustered to death in the Senate by senators from low-turnout, mostly southern, states, who worried that their interests would be overwhelmed by black urban voting blocs. A few years later, a similar plan was stymied by new opposition from blacks and Jews, concentrated in large states, who believed that the current system forced candidates to pay attention to them. Logically, it's hard for both arguments to be right. But even if Congress had been able to pass such a measure, it would then face hurdles in the states, especially the smaller ones, which would lose power in a popular vote.

Since it's so hard to pass an amendment, people have searched for creative ways to fix things without changing the Constitution. As is often the case, such a meandering route to change can be hard.

A bad idea: district-by-district voting

In nearly every state, the winner takes all the state's electoral votes. Democrats are especially strong in California, and thus its fifty-five electoral votes are key to their electoral equations. In 2007, a petition drive sought to put the Presidential Election Reform Act on the California ballot as an initiative. Under its terms, the winner in each congressional district gets that district's electoral vote. It sounds reasonable at first, but on closer look the arguments for it crumble like a mummy hitting air.

Most simply, to take this step in only one big state would simply siphon off votes from one party, in this case the Democrats. (Hence the GOP lawyers behind the effort.) Columnist Bob Herbert estimates that if this scheme had been adopted in 2004, twenty of the electoral votes that Kerry received would have gone to Bush instead. To make this change in only one state guarantees a partisan imbalance. (North Carolina Democrats were poised to try something similar, but national leaders yanked them back.)

Even worse, a district-by-district vote would put the entire presidential poll at the mercy of creative gerrymandering. Only three of California's congressional districts are remotely competitive. *Newsweek*'s Jonathan Alter has observed that "if the idea was somehow adopted nationally, it would mean competing for votes in only about 60 far-flung congressional districts—roughly seven percent of the country. Everyone else's vote would not 'count,' if you want to look at it that way." The federal Voting Rights Act also mandates that district lines be drawn in a way that gives African Americans and other minorities a reasonable chance of winning seats in Congress. But if presidential votes were also allotted according to the congressional map, this would dilute the influence of minority voters, who tend to be concentrated in congressional districts in order to satisfy the Voting Rights Act requirement.

A better idea: the National Popular Vote

There is a way to circumvent the Electoral College and create a popular vote without a constitutional amendment. It's called the National Popular Vote, and it takes a little explaining.

The Constitution gives states the power to decide how to allocate the electors who cast the vote for the president. The National Popular Vote is a campaign to get each state to pass a law entering into a binding agreement to award all their electors to the candidate who wins the national popular vote in all fifty states and Washington, D.C. This provision would only go into effect when states whose electoral votes total a majority of the Electoral College—currently, 270 votes—sign the compact. When that happens, whichever candidate wins the popular vote will automatically garner a majority of the electoral votes. While this arrangement is rather complex, it has the advantage of being fair and utterly nonpartisan—and could take effect as soon as enough large states agree to participate. If that happens, it would force public officials to represent a much broader segment of the populace out of electoral self-interest.

Devised by computer scientist and entrepreneur John Koza and two law professors, the brother Akhil and Vikram Amar, the plan is being promoted by a coalition of election reform advocates including the groups National Popular Vote and Common Cause, and by a collection of former lawmakers of both parties. Last April, Maryland became the first state to sign the compact. New Jersey followed suit in January of this year, as did Illinois in April. The measure has passed one house in seven states and, as of this writing, had passed both legislative houses in Illinois and was awaiting the governor's signature. It is being actively debated in more than a dozen other states. (The plan would seem tailor-made for a postpartisan leader such as Arnold Schwarzenegger, but the California governor vetoed this measure in 2006.)

Changing the Constitution through state laws may seem like a meandering path toward fundamental reform, but there is a precedent. For most of the country's history, state legislators, not voters, chose U.S. senators. When Abraham Lincoln debated Stephen Douglas, citizens couldn't vote for them directly—they voted for legislators who then chose the man to send to Washington. The system was prone to corruption and served as a bulwark against popular will at the polls. In 1906, a muckraking magazine called *Cosmopolitan* (not that *Cosmo*) published a series called "The Treason of the Senate," which exposed the flaws of the system and generated public pressure to change it. The Progressives began to agitate for direct election of senators. Then as now, however, changing the Constitution was a slow, hard process. So legislators ran for office pledging to vote for whoever won nonbinding "beauty contest" elections. By the time the Constitution actually was revised, many senators already were effectively elected directly by the voters.

With the National Popular Vote, the Electoral College may never need to be stricken from the Constitution. But for practical purposes, it would be rendered a formality, a charming relic of a time when lawmakers took snuff and democracy was the furthest thing from their minds. ■

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