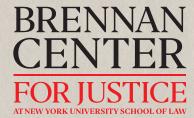
# For the People

2020 ANNUAL REPORT



# The framers knew that liberty is a fragile thing, and so should we."

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# -Justice William J. Brennan Jr.

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# Dear Friends,

e are pleased to share with you this report on the truly extraordinary year that was. As we reflect on the Brennan Center's accomplishments in 2020, we can say with great pride and relief that in the end, democracy prevailed — against brazen assaults on our electoral processes, against lies intended to equate ballot access with stolen elections, and against naked attempts to delegitimize the votes and voices of Black and brown people.

The events of the past year brought into sharp focus the deepening cracks in our systems of democracy and justice. We can no longer take for granted that they will endure in the face of relentless, and increasingly dangerous, attacks.

What is also clear: the mission of the Brennan Center for Justice at NYU School of Law — to defend, restore, and renew those systems — has never been more vital to our country's future.

Since its inception 25 years ago, our organization has been at the center of these fights. The Brennan Center is nonpartisan and fiercely independent. We lead with facts — backed by rigorous research, top-notch legal advocacy, and expert communications — to solve the most pressing issues facing our democracy. We work to hold our institutions accountable to the promise of liberty and justice for all.

In 2020, we prioritized protecting the election — countering disinformation, misinformation, and attempts at further suppressing the vote under the pretext of a pandemic. Those efforts — publishing the slate of proposals relied on by national leaders to ensure safe and secure voting, advising election officials and amplifying their trusted voices, partnering with broad coalitions and crafting campaigns to increase voter participation, going to court to protect ballot access, expanding our public reach, and ensuring a strong, well-funded institutional structure and spine — are detailed in the pages that follow.

We enter the new year deeply committed to seizing the opportunities and confronting the challenges ahead. We are ready to usher in an era of renewal and to fully reinforce the values of participatory democracy, equal justice, and the rule of law.

Our charge in 2021: To advance much-needed reforms that have been made possible by new leadership in the White House and Congress. To restore the balance of power among our three branches of government and call out executive overreach. And to craft the next generation of solutions that will revitalize our systems of democracy and justice.

At this pivotal moment, we know that we have a once-in-a-lifetime chance to win the change our nation so urgently needs, and that the only way to defend our democracy is to strengthen it.

The Brennan Center is extraordinarily grateful to its community of supporters — people like you, who have long partnered with us, encouraged us, and enabled our efforts to protect our shared, treasured values. As we celebrate every success, learn from every challenge, and look ahead to the promise of all that is to come, we thank you for your steadfast commitment. Here's to a better, more democratic, and more just America — for all.

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Patueia Bauman

Robert Atkins Co-chair, Board of Directors

Patricia Bauman Co-chair. Board of Directors

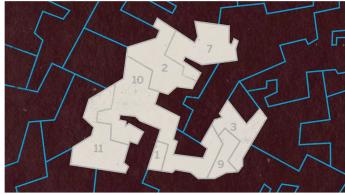


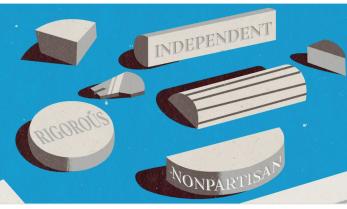


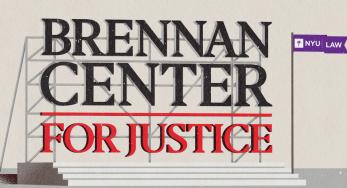




















# For the People

After years of threats to democracy, the moment for reform is now.



e're in a great fight for the future of American democracy. Over the past year, we saw a historic turnout for the 2020 election, even amid an ongoing pandemic and frenetic efforts to restrict the vote. Then we watched aghast as the defeated former president tried to overturn the election and foment an insurrection. Now his supporters are pushing restrictive voting laws across the country — laws aimed squarely at Black and brown citizens, using the same Big Lie peddled by Trump and the Proud Boys.

History teaches that after abuse of power, a season of reform often follows. But such change is far from automatic. The best response to attacks on democracy is to strengthen democracy. The best response to the Big Lie is to tell the truth.

This year — and the years to come — offer a remarkable chance to advance bold reforms that will help ensure that our government works for all Americans. It's a fight the Brennan Center is waging nationally and in states across the country.

I've worked on these issues for the better part of four decades — in the White House, teaching, practicing law, and leading the Brennan Center for the past 15 years. Never have I seen so much urgency, so much focus, so great a recognition of the need to repair and defend our frayed democracy.

So, in 2021, the Brennan Center has thrown itself fully into the fight for reform. We are focusing our resources on five key fights:

#### 1. The For the People Act (H.R. 1 and S. 1).

This landmark bill passed the House in March 2021. If enacted, it would be the most sweeping democracy reform in more than half a century — the next great civil rights law. It would make government more responsive and less corrupt. And it would meet the urgent demand for racial justice by advancing a more representative democracy.

What would it do? Automatic voter registration is already in effect in 19 states and D.C. If fully implemented nationwide, it could add tens of millions to the rolls permanently. The bill would also set a national standard for voter access in every state — requiring the opportunity to vote by mail, ensuring adequate early in-person voting, and curbing voter suppression. It would reform campaign finance and curb the role of big money by establishing a system of small donor public financing, which would give ordinary citizens a louder voice, even in an era of dark money and

### "The best response to attacks on democracy is to strengthen democracy. The best response to the Big Lie is to tell the truth."

super PACs. It would bar partisan gerrymandering, setting up independent redistricting commissions to draw fair maps. It would strengthen federal ethics laws. And it would end a shameful legacy of the Jim Crow era by restoring the right to vote for people with past criminal convictions.

This measure marks a milestone for the Brennan Center. Many of its provisions — such as automatic voter registration and small donor public financing — were first proposed and advanced by our experts over the past decade and a half. Now we can make them the law of the land.

#### 2. The John Lewis Voting Rights Advancement

**Act.** The Voting Rights Act of 1965 was the nation's most effective civil rights law, but the Supreme Court gutted it in its 2013 *Shelby County v. Holder* ruling. Ever since, voter suppression laws have proliferated. This vital legislation would restore the Act to full strength and apply new rules throughout the country.

**3. The Protecting Our Democracy Act.** Trump's presidency showed the importance of the unwritten norms of self-governance — the often invisible guardrails that protect against abuse of power. The Brennan Center's Task Force on Democracy and the Rule of Law, co-chaired

by Preet Bharara and Christine Todd Whitman, set out reforms to codify many of them. Their recommendations are reflected in legislation to strengthen checks and balances and restore accountability to the presidency.

**4.** *Curbing the imperial presidency.* Trump's declaration of a national emergency to fund his border wall with Mexico revealed the potential for abuse of executive powers. The answer is to reset the skewed balance of power between the president and Congress. Strengthening the National Emergencies Act would preserve the president's ability to act in true emergencies while respecting the Constitution.

**5. The fight in the states.** Trump's Big Lie continues to drive efforts to restrict the vote in states across the country. According to our research, four times as many voter suppression measures were introduced in 2021 as had been proposed two years before, disproportionately targeting Black and brown voters. And they aim to roll back vital gains achieved in the past year — attacking vote by mail and early voting. We will expose and fight these moves. And we'll make clear that Congress can stop this voter suppression wave, cold, with reform legislation.

It has the constitutional and legal authority. Now it must have the political will.

I'm so proud of my Brennan Center colleagues. They're passionate, rigorous, and committed. They have poured themselves into the fight for our country's ideals and to strengthen our institutions. Now we can see these innovative ideas written into law. For us, that is the great purpose of the year ahead.

Michel Wald

Michael Waldman President





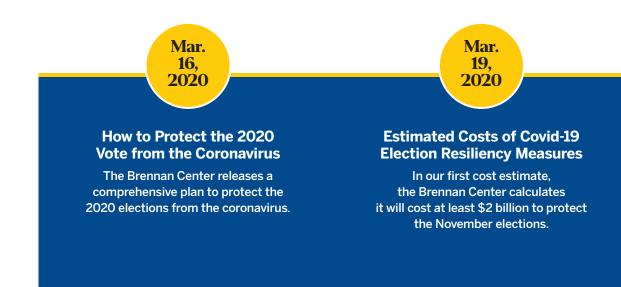


# The Good Fight

The 2020 election held amid a pandemic and lies — was an extraordinary civic achievement. The question now: how do we sustain and build on those advances?

In 2020, despite the Covid-19 pandemic, voter suppression, and presidential lies, we saw the highest turnout since 1900. An astonishing 108 million voters — two-thirds of the total — cast their ballots early or by mail. In November 2020, American democracy triumphed.

All of this might have seemed impossible earlier in the year. When the pandemic hit, it seemed inconceivable that a free, fair, secure, and safe election could take place in just eight months. Achieving it required a surge of commitment from across the political spectrum. Civic groups, voting rights advocates, election officials, and businesses mobilized. Improved election systems, upgraded infrastructure, and investment in training, technical support, and backup measures prevented the debilitating attack from foreign actors that many had feared. Most states expanded access to voting and made major changes to ensure secure and safe elections.



The result: an election that the federal government concluded was the "most secure" in U.S. history.

The Brennan Center played a crucial role in these successes — fighting disinformation and voter suppression, working to ensure that proper election security procedures were in place, and responding to the new threats posed by Covid-19:

- In March, the very same week we abandoned our offices because of the shutdown, we outlined a plan of action in *How to Protect the 2020 Vote from the Coronavirus*, arguing for access to vote by mail, expanded early voting, and safe polling places. It was embraced by more than 200 civil rights, good government, and civic groups, as well as by 1,000 political scientists, state election officials, and members of Congress.
- Also in March, we published a preliminary estimate of how much it would cost to protect the November election from the virus. Our estimate:

approximately \$2 billion. A month later, we released another estimate of how much money it would cost to protect all elections — including primaries — throughout 2020. The total price tag: at least \$4 billion.

- We persuaded Congress to provide \$400 million for states to run safe elections as part of the first coronavirus relief bill. All told, our staff experts testified before Congress six times in 2020.
- By April, we were in constant communication with our coast-to-coast network of hundreds of election officials.
- By June, we had produced 14 policy papers. One major area of focus was defending the security and necessity of expanded vote by mail. We noted that many states, both Democratic and Republican, already had made mail balloting the primary method of voting.

- In August, we teamed up with the Infectious
  Diseases Society of America and issued joint
  guidelines to minimize the risk of transmitting
  Covid-19 at the polls. The document provided
  solutions such as where to locate polling sites
  and how to configure and supply them to ensure
  the safety of voters and poll workers alike.
- Also in August, we released tool kits for activists in all 50 states. In each tool kit, we identified the voting reforms needed in each state. Activists could then use this information to pressure their legislators to implement the right policies to make voting as safe and accessible as possible.
- By September, we were working with local groups in Florida, Georgia, Pennsylvania, and Texas on state-specific voter education and protection efforts. In Pennsylvania, we teamed up with Hall of Famer Franco Harris of the Pittsburgh Steelers, who taped a public service announcement



reminding voters to put their mail ballots into the mandated security envelopes, in order to ensure their votes would be counted.

- Our attorneys filed or intervened in lawsuits in Michigan, Pennsylvania, and Texas — either to defend necessary voting changes that protected voters from the virus, or to stop voting changes that would put voters in harm's way or suppress the vote. In October, we successfully blocked an attempt by the Trump campaign to ban the use of secure drop boxes for Pennsylvania voters who chose to vote by mail.
- As the election approached, we conducted high-level media briefings on how the pandemic could impact voters and the count. Our experts spoke to the news corps at ABC, NBC/MSNBC, and Univision. And we partnered with ABC News in the run-up to Election Day. Our goal was to ensure that the media explained that delays in

counting votes were to be expected amid a pandemic.

After the election, we traveled to Georgia to help election officials conduct a recount of the presidential vote as President Trump attacked the integrity of the state's election officials and alleged foul play. We provided training that helped officials perform a risk-limiting audit — under unprecedented national scrutiny — that confirmed Joe Biden had won the state of Georgia.

In the face of this remarkable election, Donald Trump and his allies promoted a Big Lie: that it was stolen and that he really won. He attempted to throw out the votes of majority-Black cities, such as Philadelphia, Milwaukee, and Atlanta. He tried to overturn the results of the election while waging a constant disinformation campaign claiming that widespread voter fraud had robbed him of a second term. Sixty courts rejected his claims, finding no evidence of voter fraud. Even so, tens of millions of Americans wrongly believed the election was stolen. This fantasy then inspired an insurrection that aimed to stop the counting of electoral votes, leaving six dead, hundreds injured, and the Capitol ransacked.

The Big Lie did not end on January 6. It still drives the move to restrict the vote across the United States. Legislators across the country are trying to roll back the improvements that led to record turnout in 2020 and a successful election that might have ended in disaster. The Brennan Center will continue to fight back against these racist and antidemocratic voter-suppression bills. The struggle to protect the vote never ends, and our vigilance will not waver. ■



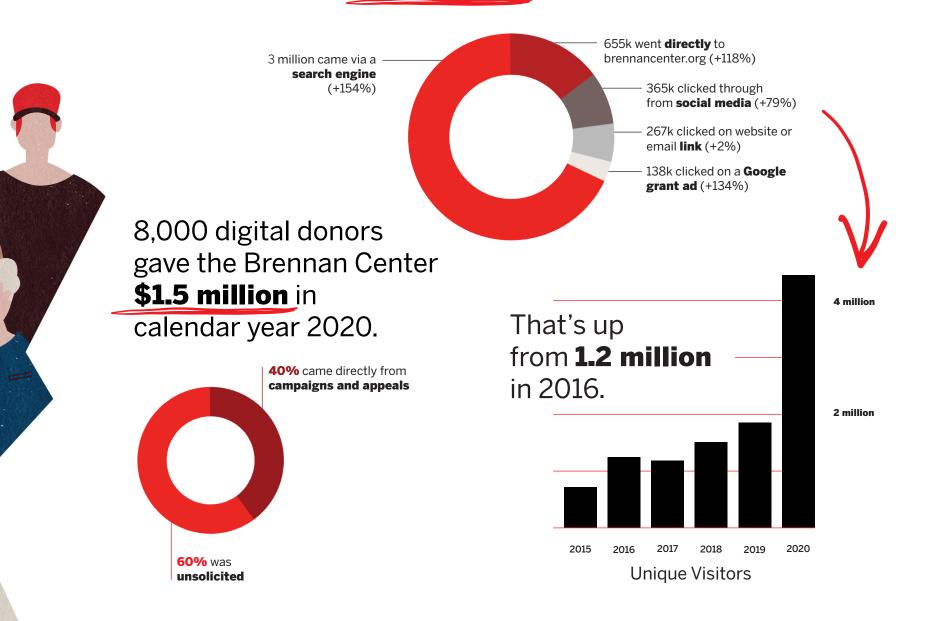
# **Getting the Word Out**

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Since the last presidential election, the Brennan Center's website traffic has increased



# Here's how **4.5 million** people got to our website.





**Harsha Panduranga**, counsel in the Liberty and National Security Program, joins NY 1 on March 1, 2020, to discuss the Trump administration's Muslim ban.



Brennan Center President **Michael Waldman** joins ABC's *Good Morning America* on October 22, 2020, to discuss the likelihood of voter fraud in the 2020 presidential election.

In 2020, the Brennan Center earned **67,502** media mentions.



Brennan Center Fellow **Michael German** joins MSNBC's All In with Chris Hayes on August 28, 2020, to discuss far-right militant groups and their ties with law enforcement.



**Elizabeth Goitein**, director of the Liberty and National Security Program, joins *CBS Sunday Morning*'s Ted Koppel on August 16, 2020, to discuss secret presidential powers.



Vice President for Democracy **Wendy Weiser** joins *MSNBC Live* on September 13, 2020, to discuss why voters should trust our election system.

That's up over the last presidential election year by **182%**.

ALJAZEERA



**Theodore R. Johnson**, director of the Fellows Program, joins *CNN Newsroom Live* on November 8, 2020, to discuss the role of voters of color during the presidential election.



Director of the Election Reform Program **Lawrence Norden** joins Fox News on October 21, 2020, to discuss election security.

FAIZA PATEL BRENNAN CENTER FOR JUSTICE CORONAVIRUS PANDEMIC

**Faiza Patel**, director of the Liberty and National Security Program, joins Al Jazeera on April 25, 2020, to discuss pandemic-related surveillance.



# Partnering with the Business Community

The private sector stepped up in meaningful ways to make voting safe and accessible in 2020. Here's how those efforts played out and paid off.

dynamic coalition of private-sector and nonprofit leaders stepped up in extraordinary ways to protect the 2020 elections. The Brennan Center worked side by side with an array of law firms, philanthropists, and businesses to ensure that all eligible voters could safely cast their ballots.

We are particularly proud to be a primary partner of the nonpartisan Time to Vote movement, spearheaded by Levi Strauss & Co., Patagonia, and PayPal. After honoring the coalition with a 2019 Brennan Legacy Award, we went on in 2020 to present a series of strategy briefings to the Time to Vote membership, provide it with policy expertise and support, and publicly advocate on behalf of its mission, penning op-eds in *Newsweek* and the *Miami Herald*.

In the lead-up to the election, the *New York Times* featured Brennan Center Board member and Time to Vote principal Franz Paasche in an article about the effort, "Paid Time Off, Free Fries: How Corporate America Is Getting Out the Vote." The *Times* reported: "Corporate America is having a civic awakening, with thousands of companies encouraging voter participation by offering their workers paid time off, voter-education tools and interactive sessions on how elections work." Time to Vote also played a vital role in recruiting a new generation of poll workers — a role traditionally filled by older adults, who faced grave health risks this year due to the pandemic.

In normal times, a functional democracy should not have to rely on the private sector to provide the very basics for its elections. This vear, however, our national leaders failed to provide adequate financial resources. Even as we fought to hold them accountable, we doubled down to ensure that any interventions to help fill the breach were legal and sound. We published explainers about the appropriate guardrails for monetary contributions or donations of items like personal protective equipment to election officials. And we spoke out in support of the major sports franchises that converted their supersized arenas into polling places by making the case that these sites met the guidelines we published in conjunction with the Infectious Diseases Society of America for healthy, in-person voting.

# The Work Ahead

Brennan Center staff are publishing books, developing research, and creating new policy — all aimed at building a more perfect union.



Court Reform: Back on the Agenda

ecades after President Donald Trump and Sen. Mitch McConnell have left the political scene, their imprint on American life will be felt through the rulings of more than 230 new federal judges. But this stark remaking of the courts has only heightened a crisis long in progress, says Alicia Bannon, managing director of the Democracy Program. The changing of the guard in Washington brings an opportunity to ensure that the judiciary delivers justice and is seen as legitimate.

### Why should Supreme Court reform be a priority?

The Court is supposed to be the last line of defense for holding our government accountable to the Constitution, protecting our rights, and

making sure our democracy functions. In 2020, though, the Court made it harder to vote amid the pandemic — one of many instances in which it has rolled back rights.

These decisions come against the backdrop of a judicial confirmation process that has descended to the rawest kind of partisan constitutional hardball. Amy Coney Barrett was confirmed just about a week before Election Day, even though Senate Republicans had refused to consider filling Justice Scalia's seat when it opened nearly nine months before the 2016 election.

This is more than just hypocrisy. It's a crisis for the rule of law and for our democracy. Courts don't have an army. What they have is their public legitimacy — the fact that people are willing to



# "There is a democratic legitimacy deficit on the Supreme Court."



Alicia Bannon

accept judicial decisions even when they vehemently disagree with them.

There is also a broader democratic legitimacy deficit on the Court. We appoint our judges through a political process so that there is a link between the Court and the values of our country. But this means that democracy deficits in our political system reverberate in the judiciary. For example, among the six conservative justices, all but Chief Justice Roberts were confirmed by senators who won their most recent elections with fewer votes in sum than the senators who voted against confirmation. This affects the Court in substantive ways; it is ideologically extreme and not aligned with either the public or the legal profession.

#### What are some starting points for reform?

It's best to start with the problems we're trying to address. What packages of reforms respond to those concerns and reset the dynamic so we don't have continued escalation around confirmations and so the Court is more stable, more representative, and more legitimate?

One place where reformers could start to address this is through the size of the Court. While expansion is often framed as a partisan move, it could be a component of a broader structural reform. Subsets of justices could hear cases in panels, as courts do in India, Germany, and the United Kingdom. Some uncertainty around who's going to cast the deciding vote in any particular case would discourage the Court from pushing the legal envelope too far, and it would help lower the stakes — and hopefully the temperature — of confirmations.

On a lot of dimensions, the Court does not look like America or even the legal profession, and a

larger court could open up opportunities for greater diversity in terms of education, professional background, geography, race, and ethnicity.

Another thing to look at is how vacancies get created. It's become the norm for justices to time their retirements, waiting for a president who'll appoint a like-minded successor. That doesn't make any sense from the perspective of the Court's legitimacy or the democratic process. Regular appointments — with every president getting two appointments every four years — are one way of introducing predictability into the process and taking away justices' power to shape the Court's future composition. Term limits are also responsive to this concern.

# How should we look at district and circuit courts, where the vast majority of federal cases end?

We need a different approach to the nomination process, and we need pathways to the federal bench other than prosecutors' offices and corporate law firms. Civil rights lawyers and public defenders are virtually absent from the bench right now. There's also a stark lack of demographic diversity; nearly three-quarters of federal judges are white, and more than two-thirds are male.

We should also be thinking about how our system of justice is and isn't working for people. Judge-made doctrines like qualified immunity have slammed the courthouse doors to those looking to hold police accountable for abuses. Laws like the 1996 Prison Litigation Reform Act pose huge barriers to incarcerated people bringing civil rights cases. Congress should open up our courts so people can vindicate their rights.

# What can Biden and Congress accomplish on the courts?

Biden has already signaled that he's going to prioritize judicial nominations — and that he's looking for nominees from diverse backgrounds, including civil rights lawyers. This is urgently needed to bring some balance to a judiciary that Trump has left a tremendous mark on.

The Supreme Court justices are the only judges in the country who don't follow a code of conduct, and it's telling that they have yet to adopt one. The For the People Act would require it. I also expect to see a push in Congress to add seats to the lower courts — something the judiciary says it needs to handle caseloads, which have grown tremendously. This has received bipartisan support in the past.

## How does the judiciary fit into the broader democracy reform agenda?

So many of the problems in our courts come from the fact that our political branches aren't sufficiently representative of and responsive to the public. This makes it harder for the public to advocate for strong judicial nominees. It means that a lot of issues that should be addressed legislatively end up getting booted to the courts. And most consequentially, it means that Congress only rarely uses its power to undo harmful Supreme Court decisions, even though in many instances the Court has left that option open.

Congress will have the chance to consider key legislation — the For the People Act and the Voting Rights Advancement Act. If we have a government that's really by, for, and of the people, that will make the courts less important. That's good news for the courts, and for all of us.

# Decial Justice.

### Racial Justice: Perfecting the American Experiment

**heodore R. Johnson** is the director of the Brennan Center's Fellows Program. His book, When the Stars Begin to Fall: Overcoming Racism and Renewing the Promise of America, will be published in 2021 by Grove Atlantic.

#### You are the first director of the Brennan Center's Fellows Program. What's your vision for the program going forward?

I have two primary goals for the Fellows Program. The first is to bring new and diverse voices and perspectives that expand the reach of the Brennan Center's core mission and look ahead to policy challenges that Americans must confront. For example, we're bringing on a formerly incarcerated fellow to augment our policy work with the perspective of someone with lived experience in our nation's correctional facilities.

The second is to focus on the necessity to reform our democratic culture. We need to ensure

a citizenry that is properly equipped to participate in our democracy. Much of the Brennan Center's work is necessarily aimed at protecting and defending our democracy's systems and processes through executive, legislative, and judicial means. But if systemic reforms are paired with a disengaged or ill-prepared public, our democracy will not fulfill its potential. Our ability to achieve these goals will benefit from the input of a mix of fellows who collectively bring scholarship and an array of lived experiences and nontraditional career paths to bear.

# You've also been a Brennan Center fellow for three years. What makes the program distinct?

There are few places where one can explore complicated topics and ideas, have the freedom to determine how best to pursue and share those ideas, and do so alongside the best legal minds working to reform our systems of democracy and "If we are really serious about tackling structural racism, it's going to require nearly all of us."



justice. You can bring an entrepreneurial spirit and your personal experience to the work, pair it with rigorous scholarship, and build on the Brennan Center's programmatic work to reach new audiences. Our current cohort of fellows have undertaken book projects, organized public events and symposia, conducted applied and theoretical research, written narrative essays, and contributed timely op-eds on current news to complement the organization's work.

When the

**Stars Begin** 

to Fall

**Overcoming Racism** 

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Theodore R. Johnson

The time and space to be curious is invaluable. In my three years here, I've written not only a book, but also essays and op-eds for more than a dozen national newspapers and magazines on Black voting behavior as well as race relations in America writ large. And I've moderated talks with leading scholars, renowned authors and journalists, and politicians from Georgia's Stacey Abrams to South Carolina Sen. Tim Scott. The opportunity that the Fellows Program affords is extraordinary.

#### Your book grapples with racism, arguably the most critical issue facing America, and does so with optimism. Tell us about it.

There are lots of books out that tackle various challenges resulting from structural racism, and the seriousness of the topic often leaves readers feeling pessimistic about our ability to confront them. My book doesn't shy away from the immensity of the challenges, but it seeks to provide a pathway through so that the United States can manage the effects of structural racism.

The argument is pretty straightforward: racism is the primary obstacle to America's living up to its professed ideals, and the only way to get past it is to instill a multiracial solidarity among Americans. It also argues that Black Americans' historical experience in the United States provides lessons for what national solidarity should look like.

The book incorporates a wide reading of history, political science, and sociology as the foundation for its insights on how to create connections among the members of a diverse society. But it also includes deeply personal narratives to pair the scholarship

> with appeals to public sentiment. The book weaves this all together in a way that makes it accessible, engaging, and challenging all at once.

#### A lot of your writing delves into your family's and your own experiences with race and racism. What experiences in your life make you optimistic that national solidarity is possible?

Almost the entirety of my life has required not only that I live and work with different racial and economic

groups, but that I invest in each of them. I grew up in Raleigh, North Carolina, where my family was one of the few Black families in an overwhelmingly white neighborhood. I spent 20 years in the military, where I met, served with, and befriended Americans holding political ideologies across the spectrum. I went to a historically Black university for my undergraduate education and to graduate schools with students from very wealthy families.

All of the experiences and exposures demonstrated how very much the vast majority of Americans have in common. But it also exposed how dangerous it is when we are unable or unwilling to exit our comfort zones and engage the very people we need to create a true multiracial democracy. The American project requires we find ways to create connections with democratic strangers. It is hard and involved and resource intensive, but it is possible. And frankly, it is the only way to ensure that the nation endures.

#### One of the admirable things about your work is you practice what you preach. You've written for very conservative audiences. Can you tell us about the experience and the responses you get?

The only way to make progress on race relations is to engage different audiences with a range of worldviews. So I've never been shy about making my argument for racial equality to whoever is willing to engage. I've written to share aspects of the Black experience in school, the military, politics, and in America writ large. And I rely heavily on personal and historical anecdotes to bring political and sociological research to life.

Some of the reception to my writing in conservative publications has been quite rough, as one might expect. But almost invariably, I receive comments or emails from readers who appreciate how the piece helped them see an issue differently or understand it more comprehensively.

If we are really serious about tackling structural racism, it's going to require nearly all of us — not just across lines of race and ethnicity, but also across partisan and ideological divides. The whole of the American project is contingent on engaging one another and finding common ground. Right now, that isn't happening as people become more and more polarized. But I hope my work can help people of good faith see they aren't so different from one another. ■

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### Fair Votes: Phasing Out the Electoral College

he undemocratic nature of the Electoral College is facing greater scrutiny. In two of the last six presidential elections, the system delivered the presidency to candidates who lost the popular vote. It encourages campaigns to focus on relatively few "battleground" states. And it dilutes the influence of voters of color. There are, however, efforts underway to phase it out. John F. Kowal, the Brennan Center's vice president for programs, and Wilfred U. Codrington III, assistant professor of law at Brooklyn Law School and Brennan Center fellow, explore this movement — and a history of constitutional reforms that have expanded the scope of American democracy — in their book. The People's Constitution. to be published in 2021 by The New Press.

# What did the 2020 election teach us about the Electoral College?

John F. Kowal: Last year, Donald Trump treated the

post–Election Day period as a sudden-death playoff, as if what had happened in the election itself didn't matter. He lobbied state legislatures to disregard their own laws, and the will of the voters in their states, to appoint their own electors. That kind of behavior is made possible by this dangerous, outmoded, and absurd system of electing presidents.

# What makes the Electoral College incompatible with American values?

**Wilfred U. Codrington III:** The Electoral College undermines the fundamental ideal of political equality. That was one of the biggest blights in the Constitution from the start: there just was no ideal of equality. We know that about half of the men who created the Constitution were slave owners. We know that there were no women in the rooms where these decisions were made. It took a civil war to actually enshrine the notion of equality in the Constitution. The Electoral College was built on



Wilfred U. Codrington III



the ideas that 1) it's the states and not the people that matter, and 2) only a certain segment of people have a voice. It was built on a lot of pretty awful compromises to thwart the idea of political equality.

# How do the Electoral College's racist origins continue to manifest today?

**Codrington:** Every time there's been a chance to reform or get rid of the Electoral College, it was race that was in the foreground, stopping change from occurring. After the disastrous 1800 election almost tore the country apart, there was a proposal by a Massachusetts congressman to institute a direct popular vote for president. But even he knew it wouldn't be accepted because the three-fifths compromise gave southern states disproportionate representation. It created a political incentive to expand slavery.

Later, in the 1960s and '70s, when there was a real possibility of getting rid of the Electoral College and 80 percent of the country was behind that reform, it was the southern segregationists, led by Sen. Strom Thurmond, who thwarted that opportunity. He knew the Electoral College gave his bloc more clout in the South, where the majority of the country's Black population resides. In a winner-take-all system, Black votes don't matter, even where they make up a substantial minority.

Trump and his enablers looked to invalidate votes in cities like Detroit and Philadelphia, and in Fulton and Dekalb Counties in Georgia — all places with high concentrations of Black people.

Disenfranchising people of color is not even veiled at this point. But the 2020 election was determined by a popular vote margin of more than 7 million. Without the Electoral College, those schemes to try to overturn the will of the people would have been meaningless. Instead, what the Electoral College does is augment and aggrandize the divisive racial politics in the country.

### Is the National Popular Vote Interstate Compact (NPV) an effective path to reform?

**Codrington:** The ultimate reform would involve eliminating the Electoral College by constitutional amendment. In the meantime, the NPV is an interim reform that will hopefully push the country along.

Under the NPV, the participating states would award their electoral votes to whoever wins the national popular vote. Were 270 electoral votes' worth of states and jurisdictions — the amount required to elect the president — to sign on to the agreement, you would have a de facto popular vote election. Since the NPV was conceived, 16 states and the District of Columbia have joined. That's nearly 75 percent of the needed total.

In short, the NPV uses the current system to advance the ideal system. The idea is that the popular vote does not necessarily help Democrats or Republicans; it helps whoever wins the most votes. It encourages candidates to appeal to people beyond a handful of swing states.

**Kowal:** The NPV would address the pernicious effect of a battleground map in which a few states get all the attention. Under the current system, candidates have no incentive to increase their vote in reliably red or blue states, ignoring large numbers of voters of color in the process. One advantage of the NPV is that it's a lot easier to persuade a number of states equaling 270 electoral votes to join this compact than it is to get two-thirds of Congress to agree to an amendment in the first place. Once the NPV is established, we believe lawmakers will be more willing to devise a more permanent solution. What role does this movement play in broader democracy and constitutional reform efforts?

**Codrington:** The Constitution has become more democratic, more inclusive, and more legitimate over time. That's because the franchise has been expanded and more people have been able to take part in the politics of this country.

For much of American history, Black people weren't even conceived of as people, never mind political beings. But the 15th Amendment ultimately changed that. Women were previously not conceived of as independent persons beyond the property of their fathers and husbands. But the 19th Amendment began to change that. Eighteen-year-olds weren't uniformly able to vote across the country until the 26th Amendment changed that. What we've seen is that people have gotten together and changed the Constitution because of movements to broaden democracy, to include more people, to make the country more legitimate.

These are all examples of the country moving toward the "more perfect union" described in the Constitution's preamble. Electoral College reform is part of the same movement — achieving a more democratic system where everyone gets to have a voice in selecting the single elected official who's supposed to represent everyone.

Kowal: We have to look at Electoral College reform as part of a larger set of remedies for what ails American democracy. There's the continued threat of voter suppression, the outsize role of big money in our elections, the continued repercussions of partisan gerrymandering. Reforms that address these issues share the same goal — making our democracy more responsive to the will of the people. ■ 4

### Criminal Justice Reform: From Protest to Policy

ast summer, millions of Americans took to the streets in the wake of George Floyd's killing to protest police brutality and racial injustice. The national reckoning pushed criminal justice reform squarely to the fore of public debate ahead of the election and culminated in significant victories this past November, ranging from relaxed drug laws to greater police accountability across the country. **Lauren-Brooke Eisen**, director of the Justice Program, outlines the unique opportunities for the Biden administration to seize upon this momentum.

#### During the campaign, Joe Biden conceded that his support for the 1994 Violent Crime Control and Law Enforcement Act was a "mistake." What opportunities will he have as president to truly reform our justice system?

Local jails and state prisons house the majority of our country's incarcerated population — but the

federal government still has a critical role to play in transforming our criminal legal systems. It can spark a paradigm shift in this country. One way the Biden administration can start is to halt federal subsidies for mass incarceration. It can do so by working with Congress to enact the Reverse Mass Incarceration Act (RMIA), a bill that would incentivize states to reduce both crime and incarceration. Under the RMIA, states would be free to choose the best path to achieving these goals, relying both on local expertise and on federal support.

Certainly, both Democrat and Republican leaders would be attracted to a program that improves public safety, reduces our reliance on an expensive and inefficient system, and recognizes the irreparable harms of mass incarceration, particularly on Black and brown people. First proposed by the Brennan Center in 2015, the RMIA was introduced in two previous congressional "Mass incarceration drives and reinforces deep-seated racial inequity. It's time for transformative change."



Lauren-Brooke "L.B." Eisen

sessions and was named by Biden as a key priority during his campaign. If the RMIA is enacted, we predict that it could reduce the national prison population by up to 20 percent over the next 10 years, saving state governments as much as \$12.1 billion and reducing the population of state prisons by 260,000.

Because this legislation would provide muchneeded dollars for states, it offers the chance for immediate and high-impact action on behalf of criminal and racial justice reform.

The administration should also support federal drug law reform. It can also play a greater role in reimagining incarceration itself by limiting the use of solitary confinement, improving access to education, and ensuring that incarcerated people are treated with humanity and dignity.

### What can the federal government do to ensure greater police accountability?

The Biden administration, through the Justice Department, should mandate use-of-force reporting by all law enforcement agencies and build a comprehensive database. The administration can convey its seriousness by making compliance a condition of federal aid.

Additionally, the DOJ should resume "pattern or practice" investigations that focus on systemic problematic behavior by a police department and should support legislation that would provide subpoena power for these investigations. This would be a 180-degree turn from the previous administration's approach to local police departments that violate civil rights, which opened only one of these investigations in four years.

The events of 2020 highlighted how police departments are often called on to respond to situations and problems better addressed by social workers and mental health professionals. The new administration should work with Congress to provide more funding to help counties and states implement co-responder models where social workers or therapists arrive on the scene together with police, allowing behavioral health specialists to offer assistance in crisis situations.

This administration should also prohibit the transfer of military-grade weapons to state and local law enforcement agencies. These militarygrade weapons and armored vehicles belong in combat zones, not American streets.

### In response to Trump's controversial pardons, critics have argued that the president's clemency power needs to be revoked or limited. You take the opposite view. Why should this practice be expanded?

Clemency is an important but seldom-used tool for checking the unjust outcomes produced by the criminal legal systems. In fact, as of October 2020, more than 13,000 federal clemency petitions still sat awaiting action.

But the current process is not transparent. Fact-finding takes place behind closed doors and requires seven layers of review. Reasons for grants or denials are neither explained nor subject to judicial review.

Given that there are possibly thousands of people who are appropriate clemency candidates sitting in federal prison, the new administration should increase the number of pardons and clemency grants. A new process, independent of the Department of Justice, should be adopted to better routinize its use. Clear standards and written decisions should be made accessible to the public to help demystify how clemency operates and secure public confidence.

#### With the pandemic surging among incarcerated populations, what measures can the new administration prioritize to improve conditions in federal prisons?

To date, there have been outbreaks at more than 850 jails and prisons in the country. At least 372,583 incarcerated people in prison have tested positive for Covid-19, and more than 2,359 have died. And these are just the people we know about.

The Biden administration should urge all 50 state governors, many of whom possess the power to grant clemency, to cut prison sentences short or pardon offenses outright. The administration should encourage governors and directors of correction to expand their states' "good time credit" or equivalent programs to reduce overall incarceration. And it should work with state prosecutors to keep people who have been convicted of crimes, but not yet sentenced, out of prison for the duration of this health crisis. Essentially, we're asking for the broadest relief for the largest group of people possible.

At the federal level, the administration must direct the federal Bureau of Prisons to proactively identify and release those who are medically vulnerable, or older, or who may be otherwise eligible for early release under the federal compassionate release provision.

For years the Brennan Center has pushed to reduce the size and scope of our correctional system. We saw some reduction in jail populations and number of arrests at the beginning of the pandemic, but we've since seen a huge uptick in jail populations. I hope this public health crisis will spark a true rethinking of who we can keep away from our vast incarceration infrastructure.

#### We've just witnessed a dramatic uptick in federal executions. What should this administration do to expedite the eradication of the federal death penalty?

The president should implement a moratorium on federal executions. If the Department of Justice refuses to pursue death penalty sentences, the Supreme Court may be encouraged to strike it down for good; the president's and Department of Justice's view that the death penalty is unconstitutional may convince the Court that our "standards of decency" have evolved beyond this cruel and unusual practice.

The administration should also work with Congress to pass legislation to immediately and permanently abolish the federal death penalty and commute existing federal death sentences to life without parole.

# What's the broader/longer-term outlook for the fight to end mass incarceration?

We have 2.2 million people in our prisons and jails, more than 5 million on probation or parole, and 12 million admissions cycling through county and city jails every year. I hope we can continue to educate policymakers and the public that this level of incarceration has massive societal consequences. It drives and reinforces deep-seated racial inequity and disproportionately punishes both poor and Black Americans. It ruins people's lives and breaks up families. It's time for transformative change. We must work locally and nationally to reinvest in communities we've historically divested from, reduce unnecessary contact with law enforcement, shorten our overly long and punitive sentences, and ultimately, not mete out more harm through our criminal legal systems.



# **Onstage to Online**

The pandemic forced a pivot to virtual events and brought thousands of new viewers to Brennan Center programs.



#### ▲ Journalist Adam Cohen on Injustice at the Supreme Court

Adam Cohen joins Melissa Murray, NYU law professor and Brennan Center Board member, to discuss his book *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America*. Cohen discusses how the judiciary has become a driver of income inequality by failing to protect the interests of the working poor. ▼ Pandemic Propaganda: A New Electoral Crisis In partnership with *Foreign Affairs* magazine, experts discuss how Covid-19 misinformation and conspiracy theories could impact the elections, and how to ensure safe, free, and fair access to the ballot. Clockwise from top left, Ángel Díaz, counsel, Liberty and National Security Program, Brennan Center; Daniel Kurtz-Phelan, executive editor, *Foreign Affairs*; Ian Vandewalker, senior counsel, Democracy Program, Brennan Center; and Laura Rosenberger, director, Alliance for Securing Democracy.



Brennan Center for Justice 27



# Why Fixing Democracy Is Easier Than You Think

Former Obama speechwriter David Litt speaks with Valerie Jarrett — his White House boss and former senior adviser to the president — about his book *Democracy in One Book or Less: How It Works, Why It Doesn't, and Why Fixing It Is Easier Than You Think.* Litt explains our political dysfunction and how to restore the balance of power.



#### Election Expert Richard L. Hasen on Voters' Distrust

Richard L. Hasen, professor of law and political science at the University of California, Irvine, joins Brennan Center Fellow Victoria Bassetti to discuss his book *Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy.* Hasen identifies why voters increasingly distrust our electoral systems and offers proposals to boost public confidence.



• Dirty Tricks: 9 Falsehoods That Could Undermine the Election As part of the Public Theater's "Creative Activism: A Day of Art, Ideas, and Action," Brennan Center experts join moderator Angelique Roché to outline the lies, misconceptions, and false arguments that voters will contend with in the 2020 elections. Clockwise from top left, Angelique Roché, journalist; Sean Morales-Doyle, deputy director, Voting Rights and Elections, Brennan Center; Elizabeth Howard, senior counsel, Democracy Program, Brennan Center; and Myrna Pérez, director, Voting Rights and Elections, Brennan Center.



### ▲ Historian Anne Applebaum on the "Seductive Lure of Authoritarianism"

Pulitzer Prize-winning historian Anne Applebaum joins *Washington Post* columnist Max Boot to to discuss her book *Twilight of Democracy: The Seductive Lure of Authoritarianism.* Applebaum observes patterns among weakening democracies from Poland to the United States, and she describes how the cultural elite can enable autocracy.

#### Incarceration and Inequality

Panelists discuss a groundbreaking Brennan Center report that shows how involvement with the criminal justice system lowers individuals' earnings and compounds economic and racial disparities. Clockwise from top left, Nicole Austin-Hillery, executive director, U.S. Program, Human Rights Watch; Lauren-Brooke Eisen, director, Justice Program, Brennan Center; Ames Grawert, senior counsel and John L. Neu Justice Counsel, Justice Program, Brennan Center; and Wes Moore, CEO, Robin Hood.





#### ✓ Voting and Representation Symposium: New Issues and Challenges (Day 1)

Four panels over the course of two days bring together legal experts and practitioners to discuss obstacles to voting, fair representation, and inclusive democracy. Clockwise from top left, Justin Levitt, associate dean for research and law professor, Loyola Law School; Eliza Sweren-Becker, counsel, Democracy Program, Brennan Center; Guy-Uriel Charles, Edward and Ellen Schwarzman Professor of Law, Duke Law School; and Janai Nelson, associate director-counsel, NAACP Legal Defense and Educational Fund.



Brennan Center President **Michael Waldman** kicked off the evening with Board member and 2015 Legacy Award honoree **Kimberley D. Harris**.



Fair Fight Action founder **Stacey Abrams** shared words of inspiration from her work in Georgia and the movement to stamp out voter suppression.

# A Virtual Celebration

Like so many others, we had to reimagine our annual in-person gala. This year we held the Brennan Legacy Awards Dinner on October 20 and convened online with our supporters and partners — a fitting call to action in the urgent weeks leading up to the November election.

A dynamic evening video program highlighted an array of leaders for democracy and justice — past Legacy Award honorees, grassroots allies, civic and business voices — in conversation with Brennan Center experts. The event reached its largest audience yet and, more important, allowed our community to coalesce.



**Kathy Behrens**, president of Social Responsibility and Player Programs at the NBA, in conversation with former NBA player **Caron Butler** on his activism for justice reform.



Microsoft's Brad Smith (2014 honoree, not pictured) and Ginny Badanes joined Brennan Center senior counsel Liz Howard to highlight our election security partnership.



**Desmond Meade**, president of the Florida Rights Restoration Coalition and 2019 honoree, spoke with **Myrna Pérez**, the Center's director of Voting Rights and Elections.



Former N.J. Gov. **Christine Todd Whitman** and former U.S. Attorney **Preet Bharara** (2018 honorees) discussed their leadership of the Center's Task Force on Rule of Law and Democracy.



Sandra Phillips Rogers, chief legal and diversity officer of Toyota Motor North America and 2016 honoree, shared how corporate legal teams can join the fight for justice.

Playwright and actor Anna Deavere Smith (2005 honoree) gave a touching memorial tribute to Rep. John Lewis, heroic voting rights champion and 2006 honoree.



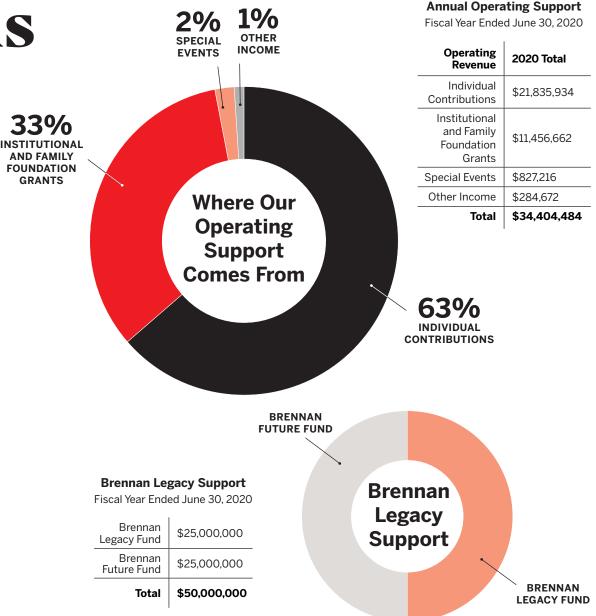


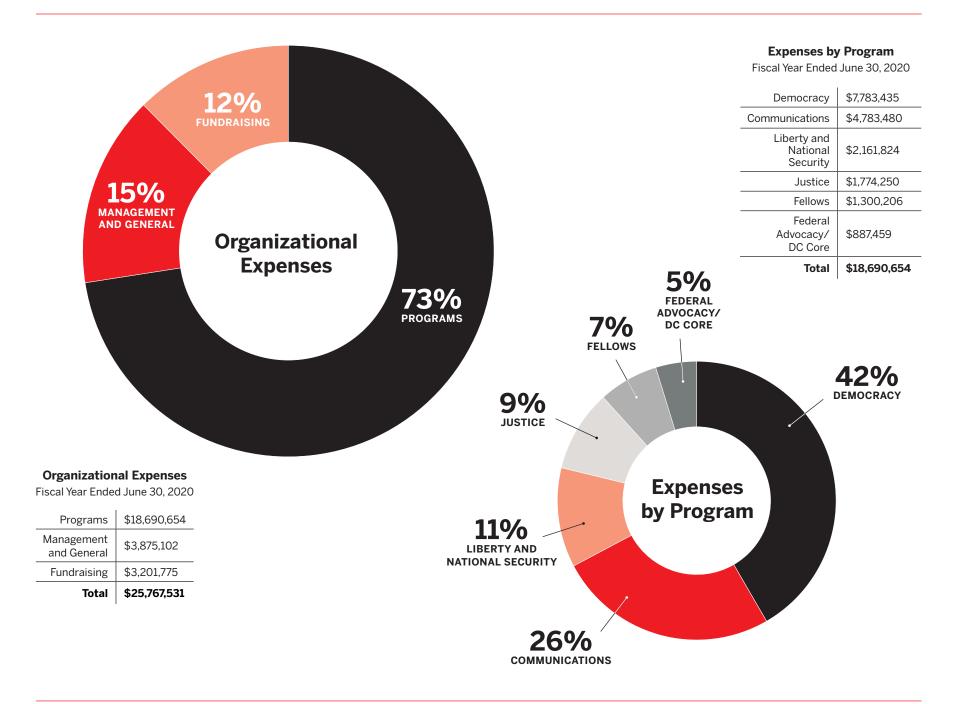
Laura Arnold, cofounder of Arnold Ventures, delivered an urgent call for criminal justice reform and an end to mass incarceration.

# Financials

The unprecedented crises of 2020 garnered extraordinary interest in and commitment to our work. We are proud to have built a diverse base of support for our independent, nonpartisan approach and solutions. We deepened the Center's long-term strength, as well, by raising dedicated funding for Brennan Legacy initiatives, which are described in detail on page 44.

The Brennan Center is grateful for the pro bono support provided by the law firm community; the monetary value of those services is not included in these charts.





# **Our Supporters**

The Brennan Center's work is made possible through the generous financial support of more than 25,000 individuals and families, charitable foundations, law firms, and businesses. We are pleased to recognize the following leaders for their partnership in 2020:\*

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