

BRENNAN
CENTER
FOR JUSTICE

15 EXECUTIVE ACTIONS

Edited by Michael Waldman and Inimai Chettiar

ABOUT THE BRENNAN CENTER FOR JUSTICE

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

ABOUT THE BRENNAN CENTER'S PUBLICATIONS

Red cover | Research reports offer in-depth empirical findings.

Blue cover | Policy proposals offer innovative, concrete reform solutions.

White cover | White papers offer a compelling analysis of a pressing legal or policy issue.

ABOUT THE EDITORS

Michael Waldman is President of the Brennan Center for Justice.

Inimai Chettiar is Director of the Justice Program at the Brennan Center for Justice.

ABOUT THE AUTHORS

Action to Protect the Constitution:

John Kowal is Vice President for Programs at the Brennan Center for Justice.

Action to Strengthen Democracy:

Wendy Weiser is Director of the Democracy Program at the Brennan Center for Justice.

Lawrence Norden is Deputy Director of the Democracy Program.

David Earley is Counsel for the Democracy Program.

Jonathan Brater is Counsel for the Democracy Program.

Avram Billig is a Research Associate for the Democracy Program.

Action to Secure Justice:

Inimai Chettiar is Director of the Justice Program at the Brennan Center for Justice.

Nicole Fortier is Counsel for the Justice Program.

Abigail Finkelman is the Program Assistant for the Justice Program.

Action to Further the Rule of Law:

Elizabeth Goitein is Co-Director of the Liberty & National Security Program at the Brennan Center for Justice.

Faiza Patel is Co-Director of the Liberty & National Security Program.

Mike German is a Fellow in the Liberty & National Security Program.

Michael Price is Counsel for the Liberty & National Security Program.

ACKNOWLEDGEMENTS

We are grateful to the Democracy Alliance Partners, Open Society Foundations, and all of our contributors for their generous support of the Brennan Center.

The editors and authors thank Abigail Finkelman for her editing and coordination of this report, as well as John Kowal for his editing, and Nicole Austin-Hillery and Myrna Pérez for their input. We thank Jonathan Brater, Amanda Melillo, Carson Whitelemons, Syed Zaidi, Lucy Zhou, Jessica Eaglin, Lauren-Brooke Eisen, Julia Bowling, Thereza Osias, Victoria Volpe, Rachel Levinson-Waldman, Jeremy Carp, and Shannon Parker for their research and drafting contributions. We also thank Jeanine Plant-Chirlin, Desiree Ramos Reiner, Jim Lyons, Erik Opsal, Naren Daniel, Kimberly Lubrano, Lena Glaser, Dan Kaplan, Danyelle Solomon, Sophia Kerby, Kate Brennan, Amanda Evans, and Amy-Lee Goodman for their assistance. Finally, we thank Brennan Center Board Members James Johnson, Christine Varney, and Richard Revesz for their insights.

TABLE OF CONTENTS

Foreword by Michael Waldman	1
I. Action to Protect the Constitution	5
1. Commission a Justice Department report, <i>The Constitution in 2025</i> , modeled after <i>The Constitution in the Year 2000</i> .	5
II. Action to Strengthen Democracy	7
2. Direct federal agencies to find ways to increase voter participation nationwide.	7
3. Direct federal agencies to accept designation as NVRA agencies.	8
4. Enlist the private sector to assure free and fair elections.	9
5. Appoint Republicans and Democrats to the Election Assistance and Federal Election Commissions.	10
6. Sign an executive order requiring disclosure of political spending by entities awarded government contracts.	12
7. Request that the Securities and Exchange Commission issue regulations requiring disclosure of corporate political spending.	13
8. Request that the Federal Communications Commission require more thorough disclaimers of outside spending on political advertisements.	14
III. Action to Secure Justice	15
9. Create a Presidential Commission on Mass Incarceration, modeled after the “Kerner Commission.”	15
10. Issue an executive order directing federal agencies to recast their criminal justice grants in a Success-Oriented Funding model.	17

11.	Direct the Justice Department to identify federal prisoners to whom the Fair Sentencing Act would retroactively apply, and recommend commutations for all those eligible, barring exceptional circumstances.	19
12.	Issue an executive order to “ban the box” on federal agency job applications, except for law enforcement positions.	20
IV.	Action to Further the Rule of Law	21
13.	Direct the attorney general to issue new guidance banning discriminatory law enforcement techniques.	21
14.	Request that the attorney general survey the use of “secret law” in the federal government and develop procedures to make the law public.	22
15.	Issue an executive order applying key federal information-sharing restrictions to “suspicious activity reports” provided by state and local law enforcement.	23
	Endnotes	24

FOREWORD

Michael Waldman

In January 2014, President Barack Obama met with his Cabinet and vowed a program of strong executive action. Congress remained gridlocked, he noted. But “I’ve got a pen and I’ve got a phone.”¹ Obama’s pert phrase neatly encapsulated a president’s power to take executive actions and to convene citizens toward public goals. When Congress is paralyzed, and the law allows, a president need not wait to act.

So far this year, the Obama administration has set aside 1,600 acres of California land as a national monument.² It boosted the minimum wage for employees of federal contractors.³ It gathered 100 college presidents to discuss ways to make higher education more affordable, and publicly released new data on racial disparities in schools. The president announced a bid to change overtime labor rules, and he ordered a review of deportation policy.⁴ Such executive actions can palpably advance the public good.

But the Obama administration also has a broad opportunity to make significant progress in another realm: taking steps to help fix the broken systems by which public decisions get made. Individual policies, no matter how valuable, will achieve little if we do not fix our broken democratic systems. Bold executive action can help unstick some of the very gridlock that plagues government.

This report sets out 15 steps the administration could take to strengthen democracy, secure justice, and further the rule of law. None require congressional approval. All are explicitly within the legal authority of the president or other executive branch officials. Taken together, they would help address the quiet crisis of American democracy.

An essential tool for governance

Predictably, the administration’s new focus on executive action has ignited controversy. Congressional opponents have held hearings on “the President’s Constitutional duty to faithfully execute the laws.”⁵ Media commentators hyperventilated on cue. “Executive Order tyranny – Obama plans to rule America with pen, phone,” warned Fox News commentator Andrew Napolitano.⁶

Is the president’s new strategy a euphemism for overreach? Hardly. President Obama has issued executive orders at a slower pace than all recent predecessors. Obama issued 147 such orders in his first term. By comparison, Harry Truman issued 504 in his first term; Dwight Eisenhower, 266; John F. Kennedy, 214; Lyndon Johnson, 325; Richard Nixon, 247; Gerald Ford, 169; Jimmy Carter, 320; Ronald Reagan, 213; George H.W. Bush, 166; Bill Clinton, 200; and George W. Bush, 173.⁷

There is no little irony here. In recent years, it has been progressives who worried most about the overreach of presidential power, while conservatives celebrated robust chief executives. The parties sometimes seem to be swapping clothes. But there is a difference between strong executive action to protect the environment or advance open government, and actions carried out in secret that stretch the bounds of the law.

A strong presidency was first envisioned by those who wanted an activist government, which would come, predicted Alexander Hamilton, only from “energy in the executive.”⁸ Whether it was Thomas Jefferson buying Louisiana without consulting Congress, or Abraham Lincoln freeing the slaves by proclamation, the rise of a powerful presidency was central to a growing federal presence.

But Cold War abuses, Vietnam, and Watergate scarred liberals. In the 1940s and 1950s, historian Arthur M. Schlesinger, Jr. wrote “The Age of Jackson” and “The Age of Roosevelt” trilogy to celebrate strong chiefs. By the 1970s, however, he warned of excessive executive authority in “The Imperial Presidency.”⁹

Meanwhile, conservatives grew enamored of presidential might. Vice President Dick Cheney waged a decades-long crusade to recover what he saw as neutered executive power. He proudly pointed to his 1987 statement that the president at times will feel “duty bound to assert monarchical notions of prerogative.”¹⁰ By the end of the Bush years, among many Republicans, it seemed that support for a strong presidency had become a euphemism for “I back waterboarding.”

Yes, there is plenty of hypocrisy to go around. But it does not require torture — or torturing the Constitution — to see that presidents have developed many legitimate tools to advance their agenda that go beyond waiting meekly for Congress to act.

That is as it should be. We have had a divided federal government for all but 13 of the past 42 years. Senators have staged more filibusters in the past decade than in the rest of the country’s history put together. Congress seems institutionally frozen. The 112th Congress was the least productive in at least six decades.¹¹ The current Congress may beat that record.

Little wonder that presidents have found ways to push policy and prod the bureaucracy without waiting for congressional action or approval that may never come. This power is especially used by modern presidents to advance policy changes in their second terms, as the end of their tenure nears and their ability to sway Congress recedes.

U.S. Supreme Court Justice Elena Kagan, writing in the *Harvard Law Review* as a young professor, identified Ronald Reagan as the pioneer of the current trend. Reagan sought to exert control over both executive branch and independent agencies, which he believed to be too prone to excessive regulation.¹² He established formal review of agency decision making through the White House’s Office of Management and Budget and other means. His goal was to serve as a brake on agency action.

Bill Clinton extended the president’s role as originator of creative executive policymaking. Kagan wrote:

By the close of the Clinton Presidency, a distinctive form of administration and administrative control – call it “presidential administration” – had emerged. . . . Triggered mainly by the re-emergence of divided government and built on the foundations of President Reagan’s regulatory review process, President Clinton’s articulation and use of directive authority over regulatory agencies, as well as his assertion of personal ownership over regulatory products, pervaded crucial areas of administration.¹³

Clinton learned to use these tools creatively to catalyze major policy change. In 1996, he announced that the Department of Health and Human Services (HHS) would grant a waiver to Wisconsin to enable it to implement new rules requiring welfare recipients to work. This allowed what Clinton regarded as a significant policy innovation, and also prodded Congress to pass welfare reform legislation. Kagan also noted a dizzying array of presidential announcements and directives in 1999, from new food safety standards to a directive to the attorney general to collect data on hate crimes to the announcement of litigation against the tobacco industry.¹⁴

Clinton also attempted, with less success, to advance political and legal reform as part of his agenda. Consider the intractable challenge of how to curb big money's destructive role in politics. In 1994, Congress failed to pass the comprehensive campaign finance reform bill proposed by President Clinton. His aides set out to find ways to use executive action to advance the bill's goals, in a disaggregated fashion. The White House worked with the Federal Communications Commission (FCC) to start a rulemaking to require broadcasters to offer candidates free television time. The president wrote to the Federal Election Commission (FEC), asking it to use its existing legal authority to ban unregulated "soft money" contributions to political parties. And the Department of Justice (DOJ) switched its position and resolved to argue that *Buckley v. Valeo*'s prohibition on spending limits was misguided, and should be overturned.¹⁵

In the end, none of these panned out. The free TV proposal died when lawmakers led by Sen. John McCain and Rep. John Dingell threatened the FCC's funding if it proceeded. The FEC, then as now, stalemated along party lines. DOJ never found an appropriate case in which to make its new argument.¹⁶ But the effort to use executive action to advance reform goals helped to keep the issue alive during an otherwise fallow period. And it gave momentum to the legislative push that culminated in 2002 with the Bipartisan Campaign Reform Act, which enacted the "soft money" rules of the Clinton proposal.¹⁷

Even if a president cannot fully change the law through executive action, he can set a tone for future reform. He can also signal an issue's importance not only through words, but also with action.

President George W. Bush, too, relied heavily on executive action.¹⁸ In 2001, he publicly agonized through the summer and announced that federal funds would not be used for research on embryonic stem cells. His HHS quietly issued a regulation allowing employees of health care facilities to refuse to provide contraception and other medical care. Bush also issued orders ranging from the establishment of the Department of Homeland Security to revising rules for detention and interrogation of suspected "enemy combatants."¹⁹ Of course, since World War II, especially during the Cold War and again during the "War on Terror," presidents acted unilaterally in the name of national security. Many of Bush's most controversial policies were undertaken unilaterally, often in secret.²⁰

The proper place for executive action

Any ambitious path of executive action must be conducted in a manner consistent with the law and the appropriate role of coordinate branches. While the president's power to act, as set out in myriad Supreme Court rulings, is at its peak when Congress has explicitly or implicitly authorized the action, the president also has significant leeway to act when the legislature is silent.²¹ Presidents must have sufficient latitude to meet their obligation of faithfully executing the law. Executive branch officials often have no choice but to engage in creative policymaking to "fill in the gaps" of complex, often contradictory, statutory commands.

But we certainly have seen recent examples of times where executive actions have contravened statutory laws, and presidents have acted to advance their own self-interest or ideological predilections. This administration should refrain from the overreach practiced by President Bush, who claimed vast powers without congressional authority in the fight against terrorism — and saw its actions struck down by the Supreme Court in cases such as *Hamdan* and *Boumediene*.²²

Presidents must resist the temptation to conflate executive action with secrecy. Bush and now Obama have sanctioned broad expansions of executive authority in the national security sphere that were concealed from the public and even, in some instances, members of Congress.

While the operational details of national security activities often must remain secret, the very concept of democratic self-governance demands a level of transparency when it comes to legal principles and broad policies. The executive branch must be no less accountable to the people in its actions than the legislature.

A signal to catalyze change

The president's tools include not only a pen and a phone, but a microphone. The bully pulpit can be used to amplify action. Even a president facing political difficulty can change the terrain of issues, create controversy, and stir discussion. With surprising bold public addresses, President Obama will find that his speeches attain new impact when they use executive action to punctuate visionary explanation. Throughout the year, the president has several set-piece speeches that can be high profile venues to announce action. Upcoming commencement addresses, for example, offer a distinct opportunity. Even in this fractured, hyperkinetic media environment, today's White House communications capacity can widely convey a president's words. But the president cannot merely repeat arguments or recite talking points by rote. He must have something to say.

Executive action can take many forms. Not only executive orders and speeches, but also through convenings, use of regulatory power, changing government litigation stances, or releasing government data. A full menu of executive branch steps can be part of a larger effort to engage the public and media to press for congressional action.

Ultimately, the most significant reforms require congressional enactment. The Voter Empowerment Act, for example, would modernize registration and add tens of millions to the rolls. The Democracy Restoration Act would end felony disenfranchisement. Legislation to require disclosure of campaign spending and to introduce small donor public financing in federal elections have been introduced. The USA FREEDOM Act would ensure that surveillance respects civil liberties while maintaining security. The Smarter Sentencing Act would assure prison sentences are more proportional to the crimes committed. Appropriations measures could provide bonus funds for states that adopt success-oriented criminal justice policies.²³ Today's political divide makes such measures implausible in the short run. But effective and ambitious executive action can help put pressure on sluggish lawmakers to act, too. The president should speak out forcefully to urge Congress to step up to its responsibility.

The 15 steps outlined in this report will not themselves transform American government. But they would help President Obama fulfill his pledge, outlined in his inaugural address, to “make [the] values of life and liberty and the pursuit of happiness real for every American. . . . We must act, knowing that today's victories will be only partial.”²⁴

At a time when Congress is unable or unwilling to act, there can be no substitute for what Alexander Hamilton long ago identified as one of the key elements of successful American government: “energy in the executive.”²⁵

I. ACTION TO PROTECT THE CONSTITUTION

1. Commission a Justice Department report, *The Constitution in 2025*, modeled after *The Constitution in the Year 2000*.

Over the past quarter century, constitutional interpretation has moved steadily to the right, upending long-settled law in cases involving campaign finance, gun ownership, affirmative action, and the power of Congress to protect workers and the environment.

Much of this change was anticipated by the U.S. Department of Justice (DOJ) under the leadership of Attorney General Edwin Meese. In 1988, the final year of the Reagan administration, he directed the Office of Legal Policy (OLP) to publish a report entitled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*. This influential report set out 15 legal questions likely to come before the Supreme Court by the new millennium.²⁶ The report anticipated many of the key constitutional flashpoints of the past 25 years: Will the constitutional right to abortion be restricted? Can the 14th Amendment be used to invalidate laws that disadvantage gay and lesbian Americans? Will the Supreme Court ensure affirmative action policies based on race or gender? Will the Takings and Contracts Clauses be revitalized? Can the 10th Amendment protect states from federal control?

For each legal question, the report provided general background, weighed possible developments, and previewed potential controversies that might come before the Court. Scholars and practitioners contributed to the report, mapping out ways jurisprudence needed to change — in that case, in response to what the authors perceived to be the overreach of the legal “liberalism” of the 1960s and 1970s.

The “Meese memo” is credited with raising awareness about the importance of judicial selection and articulating the path forward for conservative legal advocacy. In significant ways, it mapped the path the Supreme Court has taken on constitutional law since 1988.

The Obama administration can follow this precedent by providing a roadmap for the next stage of constitutional change. Now that it has the opportunity to make appointments to the federal judiciary with less risk of the obstruction posed by judicial filibusters, there is an opportunity to think more deeply about the crucial judicial controversies that will emerge over the next decade. How can we revitalize the Voting Rights Act after *Shelby County v. Holder*? Can the democratically accountable branches of government enact reasonable laws to curb the excessive power of big money after *Citizens United v. FEC*? Will the Court continue to allow affirmative action remedies after *Fisher v. Texas*? Can governments enact sensible gun regulations to protect public safety after *D.C. v. Heller*? Can a strong proportionality requirement for prison sentences be incorporated into the Eighth Amendment? Will Congress’s power to enact legislation under the Commerce Clause face new constraints after the Affordable Care Act decision?

The president should request the attorney general to direct OLP to issue a new report, *The Constitution in 2025*, to focus attention on the importance of judicial nominations and better prepare the media, legal advocates, and the public to anticipate the great constitutional questions that will come to the federal courts over the next decade. To further OLP’s capacity to issue such a report, the president should nominate a strong candidate as the assistant attorney general for the office, a post which has been vacant since 2012.

The authors of *The Constitution in the Year 2000* recognized that “the Constitution that reigns as the ‘Supreme Law of the Land’ in the year 2000 will be affected enormously by the decisions and interpretations of the next dozen years.”²⁷ The stakes are no less high today. A new report — *The Constitution in 2025* — can help steer the development of constitutional law over the next decade, filling a need for long-term planning and strategy in constitutional jurisprudence. It can preview the momentous constitutional questions likely to arise in the next decade. Constitutional jurisprudence needs a new path forward. To lead the way, the president can and should order the creation of such a plan.

II. ACTION TO STRENGTHEN DEMOCRACY

2. Direct federal agencies to find ways to increase voter participation nationwide.

The United States has one of the lowest voter participation rates among industrial democracies.²⁸ One principal reason: our ramshackle systems of registering voters and running elections. One in four eligible voters is not registered.²⁹ And the system is rife with error. According to a federal report, 16 million people have invalid or inaccurate voter registration records.³⁰ By another account, that number is as high as one in eight registrations.³¹ Mobility, administrative obstacles, lack of access to information, and unsatisfactory voting experiences act as barriers to participation. Military and overseas voters face particular obstacles. Election administrators have insufficient resources, including insufficient poll workers, making it difficult for them to serve voters.³²

Voting systems are first and foremost a state responsibility, but the federal government could do much more to help. Improving our democracy should be a central federal mandate. Today it is not. Federal agencies, in particular, could do far more to help voters, increase participation, and improve state and local election administration. No single federal agency or official has been charged with the task of encouraging voter participation and registration. Responsibilities are split among the Departments of Justice and Defense (DOD), the Election Assistance Commission (EAC), and many others.

Federal agencies employ and interact with millions of Americans. They have access to citizens, data, and tracking systems that would provide tremendous benefits to voters and election administrators. For example, the Department of Veterans Affairs (VA) provides more than 3.5 million veterans with disability benefits.³³ The Social Security Administration (SSA) connects with more than 1.3 million new beneficiaries each year.³⁴ DOD recruits 180,000 members into the armed forces annually³⁵ and tracks military personnel deployed across the globe. The Department of Education sets policies for 15 million students who attend public high school each year.³⁶ Medicare and Medicaid, run by the Department of Health and Human Services (HHS), provide health care insurance for one in four Americans.³⁷ This vast reach could be used to help enhance American democracy.

The president should convene Cabinet-level agencies and direct them to develop plans, within the spheres of their jurisdictions, to promote voter participation and help states improve the functioning of elections. He should charge agency leadership with reporting back to the White House within 60 days on the steps they plan to execute this mission.³⁸ Where appropriate, the president should issue an executive order, memorandum, or other directive instructing agencies to implement new programs and initiatives identified through this process.³⁹

What could agencies do to promote voting if energized by presidential leadership? They could provide voter registration forms to those who use their services. They could also use their constituent access to boost civic participation and awareness. For example, DOD could help facilitate better ballot delivery to deployed military personnel and ensure that their voter registrations are kept up to date. The Education Department could provide voter education and registration services to 15 million public high school students. Agencies could propose simpler fixes, such as offering their facilities as polling locations. The world's leading democracy should have a first-rate voting system. By issuing such a directive, the president can help breathe life into the right to vote for all Americans.

3. Direct federal agencies to accept designation as NVRA agencies.

Federal agencies could immediately take one significant step to increase voter registration rates across the United States.

Today at least 50 million eligible Americans are not registered to vote.⁴⁰ Some citizens may not want to vote, but many others are daunted by a confusing process and multiple paperwork demands. Many people fall off the registration rolls when they move. The National Voter Registration Act of 1993 (NVRA) was designed to simplify the process by requiring certain government agencies to provide voter registration services.⁴¹ It is popularly known as the “Motor Voter” law because it let Americans register at state departments of motor vehicles.

Already, the law has dramatically boosted registration. In its first year, more than 30 million people registered to vote under the law’s new methods of registration. More than 18 million of these were registrations at government offices.⁴² In the two decades since the law took effect, 141 million Americans have registered through government agencies.⁴³ Registration through public assistance agencies has proven especially valuable for those with low incomes. In recent years, the Motor Voter law has increased voter registration rates among the lowest-earning Americans from 43.5 to 52.7 percent.⁴⁴

But the law has fallen short of its full promise. Compliance failures by states are partly to blame, but the federal government bears responsibility as well. The law requires *state* agencies providing public assistance to provide voter registration services. These offices must assist eligible citizens (who use their services) to register to vote and then transmit registrations to election officials.⁴⁵ But *federal* offices, with the exception of Armed Forces recruitment services, can serve as voter registration agencies only “with the agreement of such [federal] offices.”⁴⁶ Federal agencies must choose to exercise the option provided by the law. Several states have requested federal agencies to serve as NVRA agencies, but none has yet agreed to do so.⁴⁷ For example, the VA has repeatedly refused to allow voter registration services at its offices in California, Connecticut, Kansas, North Carolina, Ohio, and Vermont.⁴⁸ Despite the urgent and obvious need, federal agencies have consistently refused to provide voter registration services, even though they are allowed by law to do so.

The president can remedy this failure. He should issue a presidential memorandum directing federal agencies to accept designation as voter registration agencies under the NVRA. He can direct executive branch agencies, including the VA, DOD, Indian Health Service (IHS, part of HHS), and United States Citizenship and Immigration Services (USCIS, part of the Department of Homeland Security), to agree to serve as voter registration agencies.

The memorandum should also request that independent agencies, such as the SSA, accept designation. The president has authority to make such requests.⁴⁹ The president should likewise ensure that all newly-created health care exchanges are fully compliant with the NVRA.

This action would have a powerful long-term impact. State agency involvement in voter registration has sharply boosted registration rates.⁵⁰ Registration at federal agencies would be similarly effective. Millions of Americans interact with federal agencies, including many whose information may not be captured elsewhere. For example, only 60 percent of American Indians and Alaskan Natives are registered. Designating IHS could reach more than 1.9 million members of these populations. More than 21 million veterans could benefit from registration opportunities to the extent they interact with the VA.⁵¹ Designation of USCIS could expand registration opportunities to the approximately 700,000 new Americans who naturalize each year.⁵² Federal agency-assisted registration would also provide an opportunity to modernize voter registration — improving volume, accuracy, and efficiency by using electronic transfer of voter registration information.

4. Enlist the private sector to assure free and fair elections.

In 2013, the U.S. Supreme Court significantly weakened the protections offered by the Voting Rights Act in *Shelby County v. Holder*.⁵³ Previously, all or parts of 15 states with histories of discrimination were required to submit voting law changes to the Justice Department or a federal court.⁵⁴ This went beyond state statutes instituting new voter ID requirements. The biggest impact, in fact, often came in decisions made in hundreds of local communities. State and local decisions that seem mundane, like changing polling place locations, can significantly undermine participation. In the past 15 years, the Department found it necessary to block 86 local and state election changes. It blocked 17 such changes in 2012 alone.⁵⁵

Since the Court's decision, a number of states and localities have pressed forward with discriminatory voting changes. As elections approach, we can expect the changes and challenges to multiply.

At the same time, on a more optimistic note, many states have begun to implement reforms to modernize registration and streamline voting. In 2014 thus far, 190 bills to expand voting rights and improve access have been introduced in state legislatures.⁵⁶ Momentum is building for more affirmative steps. The Presidential Commission on Election Administration, chaired by former Obama White House Counsel Robert Bauer and Romney for President National Counsel Benjamin Ginsberg, issued strong recommendations in January 2014.⁵⁷ Their menu of sensible steps requiring action from state and local officials could significantly improve the voting experience for millions of Americans.

The president should convene and enlist the full private sector to assure that every eligible American has the ability to vote. A White House Conference on Free and Fair Elections could bring together leaders of the bar, business, clergy, and education to encourage active participation in ensuring that all eligible Americans are able to vote. Protecting voting rights ought not be a job just for the government, but rather a nonpartisan cause for civil society. The conference could discuss the different ways these leaders could encourage increased voting. They could recruit poll workers to bolster today's under-resourced Election Day volunteers, staff voter assistance hotlines, or enlist volunteers to help citizens register and vote, and help voters obtain necessary identification under new laws. They could also help election officials upgrade aging systems.

There is, at least, a partial precedent: In 1963, President John F. Kennedy summoned the leaders of business, education, clergy, and the legal profession and asked them to help protect civil rights.

His "Call to the Bar" spurred formation of the Lawyers' Committee for Civil Rights Under Law, still one of the nation's leading organizations, which enlists thousands of attorneys every year to protect voting rights.⁵⁸ Today this work could be augmented by a similar recruitment drive among businesspeople and other communities. Encouraging civic and voluntary organizations to enlist in a drive for "free and fair elections" would help shift presumptions: Elections ought not be simply a source for partisan combat, but a unifying national civic ritual.

What impact would such a conference have? Ongoing problems with voter registration lists and polling place chaos likely cost millions of people the chance to vote in 2012.⁵⁹ Enlisting 20,000 poll-watchers, attorneys, technology consultants, and others to safeguard democratic rights would mitigate that risk in 2014, 2016, and beyond. It would help lift voting issues out of the partisan crossfire and restore it to the status of shared civic obligation.

5. Appoint Republicans and Democrats to the Election Assistance and Federal Election Commissions.

The agencies entrusted with protecting our national electoral process cannot act. Four of the six commissioners at the Federal Election Commission (FEC) still serve although their terms have expired.⁶⁰ The Election Assistance Commission (EAC) has had no commissioners since 2011.⁶¹ Both agencies are hamstrung.

The FEC routinely deadlocks on major decisions. In 2013, 40.9 percent of FEC votes were deadlocked, almost four times the 2005 total.⁶² As a result, the Commission has not adequately addressed violations of the rule prohibiting “coordination” between candidates and super PACs.⁶³ The Republican commissioners have all voted that candidate appearances in super PAC ads and fundraising at super PAC events do not constitute coordination (even when, in one instance, the PAC’s legal adviser called their activity “fully coordinated”).⁶⁴ Commissioners have also declined to investigate allegations of illegal coordination⁶⁵ and declined to levy fines even when their staff attorneys encouraged them to do so.⁶⁶ Not enforcing campaign finance laws undermines their effectiveness and encourages noncompliance.

The less-visible EAC serves a vital function. In 2002, the Help America Vote Act (HAVA) established the panel to test and certify voting machines and other election equipment to ensure accuracy. It also distributes funds to the states to implement changes in voting technology, and produces a simple federal registration form for wide national use.⁶⁷ It states that congressional leaders of each party “shall each submit to the President a candidate recommendation” “before the appointment of any individual to fill a vacancy.”⁶⁸ Under President George W. Bush, a full slate of commissioners was nominated and confirmed.⁶⁹

President Obama has nominated two Democrats to the EAC.⁷⁰ The Senate took no action on their nominations last Congress or this one, awaiting a slate of Republican nominees. Congressional Republicans have refused to recommend commissioners. As a result, the Commission sits vacant. The Presidential Commission on Election Administration found that without a functioning body to certify election equipment, the country faces an “impending crisis” in voting technology.⁷¹

The president has the power to cut this Gordian Knot. He should nominate commissioners who will enforce the law to replace the four FEC commissioners whose terms have expired. He should also nominate two Republicans to serve on the EAC.

The president is well within his legal authority to make appointments without waiting for congressional names that will never come. There is no requirement that the president wait for or appoint only candidates recommended by Congress. Such a rule would be unconstitutional. The Supreme Court ruled in *Buckley v. Valeo* that the Constitution’s appointments clause provides that the president, not members of Congress, appoint executive officers.⁷² *Buckley* struck down a law that allowed the House and Senate to appoint members of the FEC. If the president could appoint only EAC commissioners pre-selected by Congress, it would create the same constitutional infirmity. This understanding of the Constitution was reaffirmed in 2002 by President Bush, who upon signing a law that purported to create a border security commission nominated from a pool picked by Congress, noted that the Constitution allows only “appointment by the President with Senate consent, or by the President alone,” but not “from a pool of persons selected by the congressional leadership.”⁷³ Congress can only appoint members of advisory bodies.⁷⁴ Deference to Congress is understandable, but the president’s constitutional and statutory obligations should take precedence, especially in light of the urgent needs at these commissions. With the reform of the filibuster earlier this year, such nominations have a greater likelihood of proceeding to a final majority vote.

These nominations would have a powerful effect. If confirmed they would allow the EAC and FEC to become functional agencies working to keep our elections running properly. As the bipartisan presidential commission made clear, the EAC can help stave off the looming crisis in voting technology. It also plays a critical role, as recent court cases have made clear, in assuring that state voter registration law changes do not undermine the federal form. The FEC can resume administering and enforcing the nation's campaign finance laws. It will be catastrophic to approach the 2014 and 2015 elections with an election cop pulled off the beat. Though the commissioners can and should disagree whenever the correct outcome is unclear, such disagreement should stem from sound legal precedents and principles, rather than partisan objections to the law.

6. Sign an executive order requiring disclosure of political spending by entities awarded government contracts.

In 2011, the Obama administration drafted an executive order requiring companies and organizations bidding for federal contracts to increase their disclosure of political contributions. The draft required disclosure of bidders' contributions to nonprofit groups that shield donors' identities but conduct explicitly political campaigning.⁷⁵ This type of spending has come to be known as "dark money."

The putative order boasted clear logic: When a politically active corporation does business with the government, it raises concerns that it may win contracts based on favoritism rather than merit. A draft of the plan was leaked. This brought vigorous opposition from Republicans in Congress. The White House tabled it.⁷⁶ In 2013, Congress passed legislation prohibiting federal funds from being used to recommend or require that entities applying for government contracts provide additional disclosure.⁷⁷ This provision expires at the end of fiscal year 2014. In any event, the provision did not preclude spending funds to require federal contractors to disclose their political spending once a contract has been awarded.

Since 2011, the need for robust disclosure of the political activity of government contractors has only grown. More than \$300 million in spending on the 2012 elections was dark money.⁷⁸ Much of this dark money is believed to have flowed from corporations to nonprofits and trade associations. Through these intermediaries, firms are now able to spend without limit to influence elections, so long as that spending is uncoordinated with candidates. Some of these big political spenders could be seeking improper influence with elected officials outside the public's knowledge or scrutiny. Without adequate disclosure, it is nearly impossible to monitor for improper relationships between elected officials and their political benefactors.

The president should renew the push for contractor disclosure. He should issue an executive order requiring companies with government contracts to make their political spending public including dark money spending. The order should be modeled on the 2011 draft, but limit its application to firms already awarded contracts.

This is clearly within presidential authority, and within the bounds of the 2013 law. In *Citizens United v. FEC*, the Supreme Court upheld the constitutionality of disclosure provisions, explaining that they provide vital information to the public and corporate shareholders: "[D]isclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."⁷⁹

By increasing the transparency of contractor donations to outside groups, the White House would take a much-needed stand against the proliferation of dark money in elections. More immediately, an executive order would help ensure that Americans' tax dollars are used efficiently, and not as a currency to trade political favors.⁸⁰ It would place a check on this now \$300 million of undisclosed political spending to influence our elections.

7. Request that the Securities and Exchange Commission issue regulations requiring disclosure of corporate political spending.

As noted, more than \$300 million was spent in the 2012 election by undisclosed donors.⁸¹ How much of this money came from the treasuries of publicly traded corporations? It is unknown. Firms can use intermediaries to spend without limit to influence elections, as long as they do not coordinate that spending with candidates. These expenditures affect the governance and bottom line of corporations, as well as the decisions of policymakers.

When the Supreme Court removed all limits on corporate independent election spending in *Citizens United*, the Court praised shareholder access to spending records as a counterargument to fears of unaccountable corporate spending.⁸² It also acknowledged, however, that “[a] campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today.”⁸³ Unfortunately, the Court’s vision of prompt disclosure and accountability to shareholders and the public has not become a reality. With firms able to funnel spending through groups that do not disclose, shareholders are left unaware of the political activity their money is being used to support, and citizens are left unaware of how corporate funds are used to influence government.

The Securities and Exchange Commission (SEC) could shed light on much of this secret spending. It could require that publicly traded companies disclose all of their political spending, including spending through intermediaries. A 2011 petition filed by corporate law professors requested such a rulemaking.⁸⁴ That petition attracted more than 644,000 public comments, breaking the record for total comments received by the agency.⁸⁵ In response, the SEC agreed to consider the petition in 2013.⁸⁶ But later that year, the agency removed the item from its agenda, maintaining the *status quo* of secret corporate spending.⁸⁷

The president should request that the SEC issue such rulemaking requiring disclosure of corporations’ political spending. Presidents have the power to request independent agencies, like the SEC, to take action. And President Obama has done so before. In 2011, for example, he encouraged the SEC chair to begin collecting information on the presence of women in corporate boardrooms.⁸⁸

The SEC clearly has the statutory authority to add political spending to the disclosures required of publicly held corporations. The Securities Exchange Act of 1934 created the SEC and gave it “complete discretion . . . to require in corporate reports . . . such information as it deems necessary or appropriate in the public interest or to protect investors.”⁸⁹ That Act recognized that its “fundamental purpose” was a “philosophy of full disclosure” and disclosure is necessary “to achieve a high standard of business ethics in the securities industry.”⁹⁰

President Obama has been vocal about the adverse effects secret political spending has on American democracy.⁹¹ In a 2010 speech, he stated, “The American people deserve to know who’s trying to sway their elections” and called undisclosed spending “a threat to our democracy.”⁹² By pushing the SEC to move, his administration would set an important precedent in favor of disclosure. Agency action would make it possible to identify when companies leverage political influence to earn policy outcomes. It would also allow investors in these companies to make more informed decisions about where to put their own money.

8. Request that the Federal Communications Commission require more thorough disclaimers of outside spending on political advertisements.

American voters are inundated with political advertisements from organizations that hide their identities behind vague names to avoid public scrutiny. Ads must include the sponsoring group's name, but need not disclose the sources of their funds. In practice, this shields the identities of political ad backers, depriving the public of accurate information about who is attempting to affect their vote.⁹³ The Supreme Court has deemed the disclosure of political spending to be crucial. In *Doe v. Reed*, Justice Antonin Scalia wrote that “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”⁹⁴ Yet, misleading disclaimers prevent Americans from identifying the true sponsors of advertisements.

The Federal Communications Commission (FCC), which regulates mass communications, oversees the creation of disclaimers in both commercial and political messaging. FCC regulations provide that political ads must “fully and fairly disclose the true identity of the person or persons or corporation, committee, association, or other unincorporated group or entity” paying for them.⁹⁵ With regard to organizations serving as fronts for the spending of others, the regulations state that, “where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence...could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent.”⁹⁶ The FCC has authority under statutes dating back to the 1934 Communications Act to look beyond the disingenuous names of these political organizations and require disclosure of the true identities of the ads' funders.⁹⁷ The agency need only adapt their rules to the modern political landscape to ensure they reach independent political spending. While some FCC commissioners have signaled support for such an action, the agency as a whole has not moved on it.⁹⁸

To encourage action, the president should join the members of Congress who have called upon the FCC to exercise its statutory authority and require that groups airing mass political ads provide additional disclosure, such as the identity of the largest donors, in those ads.⁹⁹ The president can request the FCC to take action, as he can for any independent agency. Presidents have urged the FCC to take action before. For example, President Clinton called on the FCC to alter its rules to require that broadcasters provide political candidates with free television time.¹⁰⁰ And in 2013, the Obama administration called on the FCC to modernize its school programs to provide more students with access to high-speed Internet.¹⁰¹

Mandating more thorough disclaimer requirements could dramatically alter the deceptive nature of much of today's campaign advertising. Television still dominates campaign spending, and ad spending made up a significant portion of \$1 billion in independent money spent on the 2012 elections.¹⁰² If the president made it a priority to unmask the sources of these funds, he would clear the way for more prompt disclosure of election spending, while taking an important step to regulate outside money. The result would be a more informed electorate and a healthier electoral process.

III. ACTION TO SECURE JUSTICE

9. Create a Presidential Commission on Mass Incarceration, modeled after the “Kerner Commission.”

With only 5 percent of the world’s population, the United States has 25 percent of its prisoners. More than 2 million Americans are behind bars. A quarter of the nation’s adult population has a criminal record. The prison population has increased sevenfold since 1970.¹⁰³ The country spends a quarter of a trillion dollars a year on criminal justice,¹⁰⁴ but true costs are wider: Economic and social impacts on families and children can continue for generations. The explosion in our correctional population extends far beyond prison: pre-trial detention, parole and probation supervision, and those with arrest records.

Public safety does not compel incarceration of this scope. More than half of prisoners are serving time for drug or nonviolent crimes.¹⁰⁵ One in four new prison admissions are for violations of parole.¹⁰⁶ One in five people behind bars are simply awaiting trial.¹⁰⁷

Yet, the epidemic of mass incarceration hides in plain sight. Most Americans are unaware of it. Those who are aware are not mobilized to act.

Progressives and conservatives have begun to seek action. Several states have taken up reforms in recent years. Momentum is increasing in Washington. Last year, Attorney General Eric Holder announced the “Smart on Crime” initiative, calling for federal prosecutors to seek harsh sentences only for the most serious drug traffickers and other reforms.¹⁰⁸

These federal and states fixes, however, have been piecemeal rather than systemic. Full change is not possible without wide public support. Mass incarceration must be identified as a national problem requiring national attention. Though jurisdictions vary in the minutia of their justice systems, the overall drivers of the incarceration explosion are similar across the country.

Federal legislation to create a national commission on criminal justice has failed to pass repeatedly.¹⁰⁹ This year, Congress created the Chuck Colson Task Force,¹¹⁰ named after the founder of Prison Fellowship. It will aim to study the federal prison system to alleviate overcrowding.¹¹¹ A similar assessment should be made of the far broader problem.

The president can help make mass incarceration visible by creating a National Commission on Mass Incarceration of leading bipartisan policymakers and civic leaders. He can do so through an executive order or a presidential memorandum. And he can avail himself of a high profile venue, such as a commencement address, to announce the commission.

Such a panel could be modeled after the National Advisory Commission on Civil Disorders (chaired by Illinois Governor Otto Kerner, Jr.). President Lyndon B. Johnson created the “Kerner Commission” to study the causes of urban riots.¹¹² The National Commission on Mass Incarceration should similarly study the current drivers of the growth in federal and state prison and jail populations. It should examine the accompanying economic and societal toll. And, it should issue concrete policy recommendations to achieve a measureable goal — for example, cutting the nationwide incarcerated population by 25 percent by 2025.¹¹³

Proposals should focus on “front-end” changes that help stem the influx of people into the pipeline to prison.

The Kerner Commission's members included New York City Mayor John Lindsay, Sen. Edward Brooke of Massachusetts, Litton Industry founder Charles Thornton, NAACP head Roy Wilkins, and Atlanta police chief Herbert Turner Jenkins. These prominent public figures helped bring national attention to the issue of race. The National Commission on Mass Incarceration should include similar public and civic leaders. Such a commission would draw the nation's attention to this overlooked issue and, most importantly, catalyze action.

10. Issue an executive order directing federal agencies to recast their criminal justice grants in a Success-Oriented Funding model.

Government funding has often helped fuel mass incarceration, either directly or inadvertently. Federal grants have been particularly influential. Most notably, a 1994 federal crime law granted states \$9 billion in prison construction funds if they passed laws severely limiting parole eligibility. After this federal law, 20 states enacted or increased laws limiting parole eligibility, dramatically increasing their prison populations.¹¹⁴

The federal government spends at least \$3 billion in grant dollars each year to subsidize the country's overused criminal justice system.¹¹⁵ These grants, spread across several federal agencies, contain incentives that can encourage punishment and incarceration without public safety benefit.

The largest federal criminal justice grant, the Edward Byrne Memorial Justice Assistance Grant (JAG) Program, exemplifies this phenomenon. Each year JAG sends \$300-500 million to states and localities across the country. The Justice Department requires recipients to report how they spend JAG funds. But DOJ's articulated goals incentivize pulling more people into the pipeline to prison. It asks recipients how many people were arrested, but not whether crime dropped. It asks how many pounds of cocaine were seized, but not how many people were sent to drug treatment. Measuring the wrong practices promotes the wrong practices.¹¹⁶ Such perverse incentives also pervade other federal grant programs.¹¹⁷

The president has the power to correct this problem. He should issue an executive order to implement a "Success-Oriented Funding" (SOF) model for all federal criminal justice grants administered by executive agencies.¹¹⁸ The president has authority to do this under his power to direct executive officers and clarify existing laws.¹¹⁹

SOF strictly ties government dollars to concrete, measurable goals. The concept is simple: Fund what works. What works in criminal justice are practices that drive toward the twin goals of reducing crime and reducing unnecessary punishment. Agencies should evaluate grant recipients to see whether they successfully achieve these goals and base funding on this data. This evidence-based policy applies proven private sector "social finance" models to public dollars.¹²⁰

Grant-specific goals would vary depending on the grant's target recipients. For example, grants for police could focus on reducing violent crime or diverting drug addicted arrestees to treatment. Grants for re-entry programs could focus on reducing recidivism. Agencies can directly condition dollars on meeting such goals, or provide bonus dollars for meeting them. If agencies do not have statutory authority to do so, they can provide goals alongside dollars as signals rather than mandates.

The order should direct the Office of Management and Budget (OMB) to identify, within 60 days, all federal agencies with criminal justice grants that would be candidates for SOF. Agencies that could benefit from SOF include the Department of Education (e.g. Promoting Reentry Success through Continuity of Educational Opportunities grant), Justice Department (e.g. JAG), and Department of Transportation (e.g. Distracted Driving Grant).¹²¹

Identified agencies should be directed to submit plans to OMB, within 120 days, to recast their grants in an SOF model to the extent allowed by their agency authority. Plans should include proposals to implement SOF into identified grants as part of the president's 2016 budget. (As an alternative, the executive order could create a Task Force on Federal Criminal Justice Grants headed by the attorney general to spearhead this reform with the assistance of OMB.)

By signing this order, the president will provide incentives to modernize the nation's criminal justice system. Recasting federal grants, disbursed to all states and thousands of localities, can spur nationwide change. When federal dollars for police are tied to the goals of reducing violent crime and solving murders, local police are more likely to focus on these goals. When dollars reward parole offices that reduce recidivism, those offices are more likely to focus on this goal.

Weaving together dollars, incentives, and policy goals can serve as a potent lever for change. The result: a web of sturdy funding structures that outlasts the current fiscal crisis and ensures that mass incarceration does not revive in more prosperous times.

11. Direct the Justice Department to identify federal prisoners to whom the Fair Sentencing Act would retroactively apply, and recommend commutations for all those eligible, barring exceptional circumstances.

Harsh federal sentencing laws enacted in the 1980s and 1990s are a large driver of mass incarceration. Today, nearly 100,000 federal prisoners, roughly half the federal prison population, are incarcerated for drug convictions.¹²²

Many were sentenced under outdated mandatory minimum penalties now considered unnecessary for public safety and unjust. Perhaps most egregiously, these laws punished drug crimes involving crack cocaine more seriously than those involving powder cocaine, though the two drugs are chemically the same. This disparity resulted in thousands of disproportionately long prison sentences for crack convictions, particularly for African-American men. Today, more than 17,000 federal prisoners are serving sentences for crack convictions.¹²³

In 2010, Congress passed the Fair Sentencing Act (FSA). It significantly reduced the sentencing disparity for crack and powder crimes from 100 to 1 to 18 to 1. The FSA also reduced the maximum prison time for simple possession of any amount of crack cocaine to one year, making it a misdemeanor.¹²⁴

However, the FSA did not apply to prisoners already serving time for crack crimes. Federal courts have not mandated blanket retroactivity of the FSA, and the U.S. Supreme Court has declined involvement in a recent case. Families Against Mandatory Minimums estimates that there are currently 8,800 prisoners eligible for resentencing under the FSA. Based on data from the U.S. Sentencing Commission, it is estimated that 5,000 individuals would likely receive reduced sentences if the FSA were applied retroactively.¹²⁵

The administration has taken steps to help these prisoners. In December, the president commuted the sentences of eight inmates convicted of crack offenses. Under Article II of the Constitution, the president has the unreviewable power to pardon and commute federal prison sentences, broadly referred to as the “clemency” power. In January, Deputy Attorney General James Cole announced the administration is encouraging clemency petitions from drug prisoners.¹²⁶ In response, advocacy organizations formed the “Clemency Project 2014” to help prisoners file clemency petitions.¹²⁷

The administration can take immediate action to go further. The president should direct DOJ to take a harder-hitting approach to retroactively apply the FSA. Instead of waiting for prisoners to initiate commutations themselves, DOJ should actively search out and identify all federal prisoners whose sentences would be reduced if the FSA were retroactively applied, and encourage these prisoners to file clemency petitions. DOJ should expedite review of these petitions, so they are considered first. The Department should also implement a presumption to recommend reductions in sentences for all such prisoners to align with the new law — barring exceptional circumstances.¹²⁸ DOJ should start by reviewing the estimated 5,000 people calculated as left behind by the FSA.

This step would complete the reform begun by the FSA. At a time when the federal Bureau of Prisons faces severe overcrowding and soaring spending, this change could lead to the release of thousands of federal prisoners at cost savings of \$30,000 per year per prisoner.¹²⁹

DOJ could also consider systematically identifying, reviewing, and recommending pardons for prisoners who were convicted of felonies that would today be misdemeanors under the FSA. Pardons, unlike commutations, can reduce the collateral consequences and stigma of a conviction no longer just under the new law.¹³⁰ To ensure public safety is served, pardons could focus on prisoners who have already served the new one year maximum or those who have already been released.

12. Issue an executive order to “ban the box” on federal agency job applications, except for law enforcement positions.

Today, 68 million Americans have criminal records. And 600,000 people exit prisons each year.¹³¹

For the formerly incarcerated, the stigma of a criminal record presents a significant obstacle to gaining stable employment and re-entering society. Often, employers eliminate candidates who “check the box”¹³² on job applications stating they have a criminal record. One definitive study found that employers are 50 percent less likely to offer interviews to white applicants with criminal records than those without records. The effect is even more significant for African Americans, who were 64 percent less likely to be interviewed when they had criminal records.¹³³

Studies reveal that formerly incarcerated people with stable employment are far less likely to reoffend than those who are unemployed.¹³⁴ The loss of so many potential workers has a significant negative impact on the economy at large.¹³⁵ Recognizing this, more than 50 cities and 10 states have already “banned the box” in public employee hiring processes.¹³⁶

Some federal agencies have removed this question on an ad-hoc basis, preferring to conduct a background check later in the hiring process.¹³⁷ Other agencies have not. There is not a government-wide policy to “ban the box” on applications, even though in 2012 the U.S. Equal Employment Opportunity Commission issued a guidance endorsing “ban the box” as a best practice.¹³⁸

The president should issue an executive order to “ban the box” for executive branch employment. Application forms for executive agency positions can be standard, agency-specific, or position-specific. The order should direct the White House Office of Personnel Management (OPM) and all executive agencies to remove questions about criminal records from initial employment application forms — except for law enforcement or national security positions. The president has authority to take this action as head of the executive branch.¹³⁹ OPM has full authority to change these forms as it is tasked to set policy on federal hiring procedures.¹⁴⁰

Of course, agencies can still appropriately inquire about criminal history later in the hiring process. They can do so through background checks and inquiries after initial interviews. An agency can conduct further screening if an applicant’s disclosed conviction could directly affect the ability to perform the position’s required duties. Postponing this inquiry would guard against inappropriate denials of interviews based on checked boxes in initial application forms, and allow an applicant the opportunity to explain a criminal record.

Such a reform would increase federal employment opportunities for the formerly incarcerated, increasing the chances of rehabilitation and reintegration. And it could build momentum for states, localities, and other federal branches to follow suit.

IV. ACTION TO FURTHER THE RULE OF LAW

13. Direct the attorney general to issue new guidance banning discriminatory law enforcement techniques.

In 2003, acting on President George W. Bush's directive, the Justice Department issued Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.¹⁴¹ The guidance banned racial and ethnic profiling in federal law enforcement. Yet it contained no enforcement mechanisms to hold agencies accountable for violations. It allowed broad exemptions for national security and border integrity investigations. It did not prohibit profiling based on religion, national origin, sexual orientation, or gender identification. Nor did it prohibit profiling by state and local law enforcement agencies receiving federal funds.

As a result, unlawful profiling by federal, state, and local law enforcement remains a persistent problem. For example, the Federal Bureau of Investigation initiated a nationwide racial and ethnic mapping program to identify and map ethnic communities and religious facilities based on racial stereotypes of the potential criminal or national security threats posed by such groups. It infiltrated American mosques with informants and exploited community outreach programs to gather information about the religious activities of Muslim Americans.¹⁴² Similarly, the Central Intelligence Agency assisted a New York City Police Department program of widespread surveillance of Muslim neighborhoods and community organizations throughout the Northeast. "Suspicious Activity Reporting" (SAR) programs, implemented by state and local intelligence fusion centers, disproportionately target people of color for intelligence collection and investigation.¹⁴³ And local enforcement of federal immigration law has led to the racial profiling of Latinos in Maricopa County, Arizona, and elsewhere.¹⁴⁴ Trust between diverse communities and law enforcement, which is critical to public safety, has been undermined.

President Obama should now direct Attorney General Eric Holder to promulgate an updated Guidance Regarding the Use of Race in Law Enforcement. That guidance should fix the above-mentioned deficiencies. Additionally, because transparency is the lynchpin of accountability, the reformed guidance should require the Department to collect and publish demographic data regarding the perceived race, ethnicity, religion, national origin, and sexual orientation of individuals subjected to all law enforcement investigations, assessments, intelligence collection operations, and spontaneous law enforcement activities, such as police stops and suspicious activity reports.

Discriminatory profiling is an ineffective police technique that undermines community trust in law enforcement, violates the rights of innocent Americans, and erroneously stigmatizes entire communities. In turn, it perpetuates discrimination and bias among the general public. As a congressional candidate and state legislator, President Obama called racial profiling "wrong and degrading," and warned of the potential danger created by "unexpected confrontations" it created.¹⁴⁵ Those risks have been realized far too often during his presidency. Reforming the guidance to ban all forms of discriminatory policing by federal, state, and local law enforcement will improve the security and liberty of all Americans. By holding law enforcement agencies accountable, the Justice Department can restore public confidence that the law is enforced fairly and equally in all American communities.

14. Request that the attorney general survey the use of “secret law” in the federal government and develop procedures to make the law public.

Since the attacks of September 11, 2001, domestic counterterrorism activities increasingly rest on “secret law” — authoritative legal interpretations and directives, issued by federal courts and agencies, that are not made available to the public.¹⁴⁶

Secret law is antithetical to accountability and democratic self-governance. Without knowing what the law says, Americans cannot make their wishes known to their elected officials, hold their representatives accountable at the ballot box, or hold the government accountable in court for violations of the law. Moreover, when a legal interpretation diverges from the public’s understanding of the published law, it creates a pernicious dynamic in which the law on the books diverges from the law under which the government operates.

This dynamic played out recently when Americans learned that a secret opinion of the Foreign Intelligence Surveillance Court (FISC) authorized the government’s bulk collection of Americans’ telephone records, despite the fact that the Patriot Act permits collection of such records only where they are “relevant” to an authorized foreign intelligence investigation.¹⁴⁷ President Obama, recognizing that secret FISC opinions can be problematic, ordered the attorney general and the director of national intelligence to consider whether they can declassify important FISC decisions going forward.¹⁴⁸ In 2010, however, executive branch officials undertook a declassification review of FISC opinions and concluded after three years that they were unable to declassify any information.¹⁴⁹ This suggests that future declassification reviews are unlikely to result in extensive disclosure. Moreover, incrementally increasing the transparency of FISC opinions is at best a partial solution. Secret law includes not only FISC decisions, but unpublished opinions of the Justice Department’s Office of Legal Counsel, presidential policy directives, international agreements, and an untold number of other manifestations.

The president should openly support the principle that there must be a public version of any authoritative statement of the law on which executive action relies. He should direct the attorney general to conduct an internal, government-wide survey to identify existing categories of secret law operating within federal agencies and departments. And he should convene an interagency working group, presided over by the attorney general, to propose institutional mechanisms that will ensure publication of relevant legal analyses while protecting classified operational details.

Simply by stating the principle that the law should never be secret, the president can win back some of the public trust lost in the wake of revelations about the bulk collection of Americans’ telephone records and other wide-ranging surveillance activities conducted by the National Security Agency. If Americans are reassured that their government is not playing by a hidden rule book, they are more likely to accept the resulting decisions. More fundamentally, making counterterrorism laws transparent will empower Americans to have a say in whether these laws strike the right balance between our liberties and our security. Oversight by legislative and judicial bodies, too — such as the congressional intelligence committees and the FISC — will be more rigorous, and therefore more effective, if the public is watching.

15. Issue an executive order applying key federal information-sharing restrictions to “suspicious activity reports” provided by state and local law enforcement.

Since September 11, 2001, the federal government has spent billions to improve information sharing between federal, state, and local law enforcement agencies through Suspicious Activity Reporting (SAR) programs.¹⁵⁰ But the rush to create these programs has led to a patchwork of rules and procedures that does not adequately ensure the data’s usefulness or protect our liberties. In particular, the SAR programs do not adhere to the Criminal Intelligence Systems Operating Policies. Known by their citation, 28 C.F.R. Part 23, these federal privacy rules prohibit law enforcement from collecting or retaining intelligence information when there is no reasonable suspicion of criminal activity.¹⁵¹ Their purpose is to ensure that resources are appropriately deployed against actual threats, and do not target individuals based on impermissible racial or political profiling. However, Justice Department guidance asserts that they do not apply to “tips and leads” such as SARs generated by state and local law enforcement.

Operating outside these rules, agencies routinely collect and share personal information about law-abiding Americans without proper justification, damaging our constitutional values and amassing a mountain of data with little or no counterterrorism value. Recent suspicious activity reports collected by fusion centers in Boston,¹⁵² California,¹⁵³ and Washington, D.C.,¹⁵⁴ demonstrate a propensity to report on innocent First Amendment activity and single out Middle Eastern men for scrutiny without suspicion of criminal behavior. Moreover, a 2012 bipartisan Senate report reviewed 13 months of fusion center reporting and concluded that such reporting has yielded little, if any, counterterrorism benefit.¹⁵⁵

The president should issue an executive order directing federal agencies to apply 28 C.F.R. Part 23 to *all* information collected and shared through SAR programs.

Requiring law enforcement to have reasonable suspicion of criminal activity before collecting and sharing personal information about Americans will lead to better data quality and stronger protection of liberties. It will reduce false alarms and help ensure that scarce resources are not wasted on coordinating and disseminating information that is vague, incomplete, or conjectural. It will also secure Americans’ rights by requiring intelligence information to be tied to criminal activity and not collected based on bias or in violation of the First Amendment.

ENDNOTES

- ¹ See Press Release, White House, Remarks by the President Before Cabinet Meeting, (Jan. 14, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/01/14/remarks-president-cabinet-meeting>.
- ² See Press Release, White House, Remarks by the President Designating the Point Arena-Stornetta Public Lands as a National Monument (Mar. 11, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/03/11/remarks-president-designating-point-arena-stornetta-public-lands-nationa>.
- ³ See Press Release, White House, Executive Order: Minimum Wage for Contractors (Feb. 12, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors>.
- ⁴ David Jackson, *Obama Orders Overtime Rule Changes*, USA TODAY, Mar. 14, 2014, *available at* <http://www.usatoday.com/story/news/politics/2014/03/13/obama-overtime-rules-boehner-mcconnell/6373841/>; Michael D. Shear & Julia Preston, *Deportation Policy Shift is Signaled by Obama*, N.Y. TIMES, Mar. 14, 2014, *available at* http://www.nytimes.com/2014/03/15/us/politics/deportation-policy-shift-is-signaled-by-obama.html?_r=0; Caitlin Emma, Stephanie Simon & Maggie Severns, *New Data: Even 4-Year-Olds Get Suspended*, POLITICO, Mar. 21, 2014, *available at* <http://www.politico.com/story/2014/03/civil-rights-education-race-equity-104879.html>.
- ⁵ David A. Farenthold, *Congress Urged to Challenge Obama's Executive Actions*, WASH. POST, Feb. 26, 2014, *available at* http://www.washingtonpost.com/politics/congress-urged-to-challenge-obamas-executive-actions/2014/02/26/e7f5766e-9f13-11e3-9ba6-800d1192d08b_story.html.
- ⁶ Andrew Napolitano, *Executive Order Tyranny – Obama Plans to Rule America with Pen, Phone*, FOXNEWS.COM, Feb. 4, 2014, *available at* <http://www.foxnews.com/opinion/2014/02/06/executive-order-tyranny-obama-plans-to-rule-america-with-pen-phone/>.
- ⁷ *Executive Orders: Washington – Obama*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/data/orders.php> (last visited Mar. 24, 2014).
- ⁸ THE FEDERALIST NO. 70, at 471-80 (Alexander Hamilton), *available at* http://press-pubs.uchicago.edu/founders/documents/a2_1_1s13.html.
- ⁹ See generally ARTHUR MEIER SCHLESINGER, JR., THE AGE OF JACKSON (1945); ARTHUR MEIER SCHLESINGER, JR., THE CRISIS OF THE OLD ORDER 1919-33: THE AGE OF ROOSEVELT VOL. I (1957); ARTHUR MEIER SCHLESINGER, JR., THE COMING OF THE NEW DEAL 1933-35: THE AGE OF ROOSEVELT VOL. II (1958); ARTHUR MEIER SCHLESINGER, JR., THE POLITICS OF UPHEAVAL 1925-36: THE AGE OF ROOSEVELT VOL. III (1960); ARTHUR MEIER SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).
- ¹⁰ RICHARD CHENEY ET AL., IRAN-CONTRA MINORITY REPORT 465 (1987), *available at* http://calvert.wustl.edu/PolSci3255/IranContraMinRpt_chs1to4.ocr.pdf.
- ¹¹ NORMAN J. ORNSTEIN ET AL., BROOKINGS INST. VITAL STATISTICS ON CONGRESS (2013), *available at* www.brookings.edu/vitalstats; Chris Cillizza, *The Least Productive Congress Ever*, WASH. POST, July 17, 2013, *available at* <http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/17/the-least-productive-congress-ever/>.
- ¹² Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277 (2001).
- ¹³ *Id.* at 2250.
- ¹⁴ *Id.* at 2295.
- ¹⁵ James Bennett, *Justice Department Seeks Review of Spending Limits Ban*, N.Y. TIMES, June 16, 1997, *available at* <http://www.nytimes.com/ref/membercenter/nytarchive.html> (search Article Archive “1851 – Present” for “Justice Department Seeks Review of Spending Limits Ban”).
- ¹⁶ Richard L. Berke, *F.E.C. May Be Little Help in Clinton's Efforts to Change Campaign Finance*, N.Y. TIMES, June 9, 1997, *available at* <http://www.nytimes.com/ref/membercenter/nytarchive.html> (search Article Archive “1851 – Present” for “F.E.C. May Be Little Help in Clinton's Effort to Change Campaign Finance”).

- ¹⁷ See Bipartisan Campaign Reform Act of 2002 (BCRA) 2 USCA §§ 438a, 441a–1, 441i, 441k; 36 USCA § 510.
- ¹⁸ See *Executive Orders Issued by President George W. Bush*, THE WHITE HOUSE, January 16, 2009, <http://georgewbush-whitehouse.archives.gov/news/orders/> (last visited Mar. 24, 2014).
- ¹⁹ Exec. Order No. 13,435, 3 C.F.R. §222 (2007), available at <http://www.gpo.gov/fdsys/pkg/FR-2007-06-22/pdf/07-3112.pdf> (providing strict guidelines for future stem cell research); Exec. Order 13,228, 3 C.F.R. §796 (2001), available at <http://www.gpo.gov/fdsys/pkg/FR-2001-10-10/pdf/01-25677.pdf> (establishing the Office of Homeland Security, now called the Department of Homeland Security); Provider Conscience Regulation, 73 Fed. Reg. 166 (proposed Aug. 26, 2008) (to be codified as 45 C.F.R. §88), available at <http://www.gpo.gov/fdsys/pkg/FR-2008-08-26/html/E8-19744.htm> (proposing physicians' conscience rule); Exec. Order No. 13,425, 72 Fed. Reg. 7737 (2007) (establishing military commissions to try alien unlawful enemy combatants).
- ²⁰ See generally VINCENT WARREN, CENTER FOR CONSTITUTIONAL RIGHTS, THE 9/11 DECADE AND THE DECLINE OF U.S. DEMOCRACY (2011), available at <http://ccrjustice.org/the911decade/declineofdemocracy>.
- ²¹ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
- ²² *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006); *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007). See also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- ²³ See generally Voter Empowerment Act of 2013, H.R. 12, 113th Cong. (2013) (S. 123, 113th Cong. (2013)); Democracy Restoration Act of 2011, H.R. 2212, 112th Cong. (2011) (S. 2017, 112th Cong. (2011)); USA FREEDOM Act, H.R. 3361, 113th Cong. (2013) (S. 1599, 113th Cong. (2013)); Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2013); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2015 104 (2014) (proposing allocated budget for the Byrne Incentive and Byrne Competitive grant programs that provide incentives to federal grant recipients who achieve certain goals).
- ²⁴ See Press Release, White House, Inaugural Address President Barack Obama (Jan. 21, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.
- ²⁵ THE FEDERALIST NO. 70, *supra* note 8, at 471-80.
- ²⁶ OFF. OF LEGAL POL'Y, DEP'T. OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988), available at <http://www.scribd.com/doc/7888685/The-Constitution-in-the-year-2000-choices-ahead-in-constitutional-interpretation>.
- ²⁷ *Id.* at iii.
- ²⁸ JENNIFER ROSENBERG WITH MARGARET CHEN, BRENNAN CTR. FOR JUSTICE, EXPANDING DEMOCRACY: VOTER REGISTRATION AROUND THE WORLD 3 (2009), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/ExpandingDemocracy.pdf>.
- ²⁹ THE PEW CTR. ON THE STATES, INACCURATE, COSTLY AND INEFFICIENT 2 (2012), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/Pew_Upgrading_Voter_Regist ration.pdf.
- ³⁰ THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 23 (2014), <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.
- ³¹ THE PEW CTR. ON THE STATES, INACCURATE, COSTLY AND INEFFICIENT, *supra* note 29, at 3.
- ³² THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, *supra* note 30, at 10.

³³ U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL BENEFITS REPORT (2012), http://www.vba.va.gov/REPORTS/abr/2012_abr.pdf.

³⁴ SOCIAL SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 2 (2013), <http://www.ssa.gov/policy/docs/statcomps/supplement/2013/supplement13.pdf>.

³⁵ JOHN T. WARNER, U.S. DEP'T OF DEF., REPORT OF THE ELEVENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION 72 (2012), http://militarypay.defense.gov/reports/qrmc/11th_QRMC_Supporting_Research_Papers_Files/SR05_Chapter_2.pdf.

³⁶ *Fast Facts: Back to School Statistics*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=372> (last visited Mar. 19, 2014).

³⁷ *HHS Programs and Services*, U.S. DEP'T OF HEALTH AND HUMAN SERV., <http://www.hhs.gov/about/programs/index.html> (last visited Mar. 19, 2014).

³⁸ The administration has given agencies comparable deadlines, as in Executive Order 13563, which gave agency heads 120 days to develop and submit plans to review and improve the regulatory process. *See* Press Release, The White House, Executive Order 13563: Improving Regulation and Regulatory Review, (Jan. 18, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.

³⁹ *See, e.g.*, Memorandum from the White House Office of the Press Sec. to the Heads of Executive Departments and Agencies on Scientific Integrity (Mar. 9, 2009), *available at* <http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09>; Memorandum from the White House Office of the Press Sec. to the Heads of Executive Departments and Agencies on Energy Management (Dec. 5, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/12/05/presidential-memorandum-federal-leadership-energy-management>.

⁴⁰ THE PEW CTR. ON THE STATES, INACCURATE, COSTLY AND INEFFICIENT 2 (2012), *supra* note 29, at 2.

⁴¹ 42 U.S.C. § 1973gg-5.

⁴² *See* J. MIJIN CHA, DEMOS, REGISTERING MILLIONS: CELEBRATING THE SUCCESS AND POTENTIAL OF THE NATIONAL VOTER REGISTRATION ACT AT 20 5 (2013).

⁴³ PROJECT VOTE, NATIONAL VOTER REGISTRATION ACT TURNS 20, FACES CHALLENGES TODAY <http://www.projectvote.org/blog/2013/05/national-voter-registration-act-turns-20-faces-challenges-today>.

⁴⁴ J. MIJIN CHA, *supra* note 42, at 5.

⁴⁵ 42 U.S.C. § 1973gg-5(a)(4).

⁴⁶ 42 U.S.C. § 1973gg-5(a)(3)(B)(ii).

⁴⁷ Health care exchanges serve as NVRA agencies because they provide state public assistance. LISA J. DANETZ, DEMOS, BUILDING A HEALTHY DEMOCRACY: REGISTERING 68 MILLION PEOPLE TO VOTE THROUGH HEALTH BENEFIT EXCHANGES 7 (2013), *available at* <http://www.demos.org/sites/default/files/publications/NVRAHealthExchange.pdf>.

⁴⁸ Adam Skaggs, *Help Vets Vote, They Deserve No Less*, BRENNAN CTR. FOR JUSTICE (Aug. 1, 2008), <http://www.brennancenter.org/blog/help-vets-vote-they-deserve-no-less>.

⁴⁹ *See* Exec. Order No. 12926, 59 Fed. Reg. 47,227 (Sept. 14, 1994), *available at* <http://www.gpo.gov/fdsys/pkg/FR-1994-09-14/html/94-22969.htm>.

⁵⁰ J. MIJIN CHA, *supra* note 42, at 5.

⁵¹ TOVA WANG, DEMOS, ENSURING ACCESS TO THE BALLOT FOR AMERICAN INDIANS & ALASKA NATIVES : NEW SOLUTIONS TO STRENGTHEN AMERICAN DEMOCRACY 14 & n. 43-44, (2012), *available at* <http://files.ncai.org/nativevote/NV%20Attachments/IHS%20Report-Final.pdf>. *Veteran Population*, U.S. DEP'T OF VET. AFFAIRS, http://www1.va.gov/vetdata/Veteran_Population.asp (last visited Mar. 19, 2014).

⁵² JAMES LEE, U.S. DEP'T OF HOMELAND SECURITY, U.S. NATURALIZATIONS 1 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/ois_natz_fr_2012.pdf.

⁵³ *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

⁵⁴ *Jurisdictions previously covered by Section 5*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Mar. 21, 2014).

⁵⁵ MYRNA PEREZ AND VISHAL AGRAHARKAR, BRENNAN CTR. FOR JUSTICE, IF SECTION 5 FALLS: NEW VOTING IMPLICATIONS 3 (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/Section_5_New_Voting_Implications.pdf.

⁵⁶ BRENNAN CTR. FOR JUSTICE, VOTING LAWS ROUNDUP 2014 (2014), *available at* http://www.brennancenter.org/sites/default/files/analysis/Voting_Laws_Roundup_2014.pdf.

⁵⁷ THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, *supra* note 30, at 10.

⁵⁸ *Lawyers' Committee Formed at Height of Civil Rights Movement*, LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, <http://www.lawyerscommittee.org/about/letter?id=0004> (last visited Mar. 21, 2014); Tom Huddleston Jr., *Am Law Firms Commit Time, Space to Effort Aimed at Ensuring Orderly Voting*, THE AM. LAWYER, Oct. 25, 2012, *available at* http://www.lawyerscommittee.org/projects/voting_rights/clips?id=0643.

⁵⁹ CHARLES STEWART III, 2012 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS, FINAL REPORT 63 (2013), *available at* <http://dvn.iq.harvard.edu/dvn/dv/measuringelections>.

⁶⁰ Dave Levinthal, *How Washington starves its election watchdog*, THE CTR. FOR PUB. INTEGRITY, Dec. 17, 2013, *available at* <http://www.publicintegrity.org/2013/12/17/13996/how-washington-starves-its-election-watchdog> (Members are permitted to serve past the expiration of their terms until a successor has taken office. *See* 2 U.S.C. § 437c(a)(1)(C)).

⁶¹ Dave Levinthal, *Kill the Election Assistance Commission?*, THE CTR. FOR PUB. INTEGRITY, Dec. 12, 2013, *available at* <http://www.publicintegrity.org/2013/12/12/13993/kill-election-assistance-commission>.

⁶² Levinthal, *How Washington starves its election watchdog*, *supra* note 60.

⁶³ Super PAC spending would be considered a contribution unless it is spent in the “absence of prearrangement and coordination of an expenditure with the candidate or his agent.” *Buckley v. Valeo* 424 U.S. 1, 47 (1976).

⁶⁴ Memorandum from Commission Secretary Steven Walther to Federal Election Commission Staff on Advisory Opinion 2011-23 (American Crossroads) (Dec. 1, 2011), *available at* http://www.fec.gov/members/walther/statements/Walther_Statement_AO_2011-23_American_Crossroads.pdf (quoting American Crossroads officials as stating that ads “would be fully coordinated” with candidates); Marian Wang, *FEC Deadlocks (Again) on Guidance for Big-Money Super PACs*, PROPUBLICA (Dec. 2, 2011), <http://www.propublica.org/article/deadlocks-again-on-guidance-for-big-money-super-pacs>; FEC Advisory Opinion 2011-12, June 30, 2011, *available at* http://www.citizensforethics.org/page/-/PDFs/Legal/Letters/4-16-13_FEC_Comments.pdf?nocdn=1.

⁶⁵ This includes one instance in which a super PAC run by a candidate’s brother shared staff members with, and produced materials similar to, the official campaign. The Office of General Counsel recommended that the FEC conduct an investigation, but it deadlocked on the matter and never investigated. Memorandum from Melanie Sloan, Exec. Dir., Citizens for Responsibility and Ethics in Washington, to Stephen A. Gura, Deputy Associate General Counsel for Enforcement, Federal Election Commission 2 (Apr. 16, 2013), *available at* http://www.citizensforethics.org/page/-/PDFs/Legal/Letters/4-16-13_FEC_Comments.pdf?nocdn=1.)

⁶⁶ Three commissioners recently rejected the urging of staff attorneys and decided not to fine Representative Steve Stockman's campaign for failing to provide mandatory advertising disclaimers. *See* Dave Levinthal, *How Washington starves its election watchdog*, *supra* note 60.

⁶⁷ Help America Vote Act of 2002, Pub. L. No. 107-252, §203(b)(3)(A), 116 Stat 1666. (the Commission to be made within 120 days of enactment, and vacancies to be filled).

⁶⁸ *Id.*, § 203(a)(2), 116 Stat 1666.

⁶⁹ *Former Commissioners*, ELECTION ASSISTANCE COMM'N, http://www.eac.gov/about_the_eac/former_commissioners.aspx (last visited Mar. 21, 2014) (showing all commissioners nominated and confirmed between the years of 2003 and 2008).

⁷⁰ Press Release, The White House, Presidential Nominations Sent to the Senate (June 7, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/06/07/presidential-nominations-sent-senate-0>.

⁷¹ THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, *supra* note 30, at 10.

⁷² *Buckley v. Valeo*, 421 U.S. at 135.

⁷³ WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 38, No. 20, STATEMENT ON SIGNING THE ENHANCED BORDER SECURITY AND VISA ENTRY REFORM ACT OF 2002, 822 (May 20, 2002), *available at* <http://www.gpo.gov/fdsys/pkg/WCPD-2002-05-20/pdf/WCPD-2002-05-20.pdf>.

⁷⁴ *See* MATTHEW ERIC GLASSMAN, CONG. RESEARCH SERV., CONGRESSIONAL MEMBERSHIP AND APPOINTMENT AUTHORITY TO ADVISORY COMMISSIONS, BOARDS, AND GROUPS (2013), *available at* <https://www.fas.org/sgp/crs/misc/RL33313.pdf> (listing advisory bodies filled by Congressional appointment).

⁷⁵ Dave Levinthal, *Obama executive order gets push from interest groups*, POLITICO, Sep. 1, 2011, *available at* <http://www.politico.com/news/stories/0911/62517.html>.

⁷⁶ Debbie Siegelbaum, *Republican leaders blast disclosure order as 'blatant' assault on free speech*, THE HILL, May 6, 2011, *available at* <http://thehill.com/homenews/house/159709-gop-leaders-blast-disclosure-order-as-assault-on-free-speech>.

⁷⁷ The Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, § 735. The Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, § 735. This type of limitation in a budget bill is called a "limitation rider," and will expire along with the rest of the Consolidated Appropriations Act at the end of FY2014. *See* SANDY STREETER, CONG. RESEARCH SERV., EARMARKS AND LIMITATIONS IN APPROPRIATIONS BILLS 1 (2004), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26*2%3C4Q\ 3%0A ("Under Senate and House rules, limitations, as well as other language in the text of appropriations legislation, cannot change existing law (paragraphs 2 and 4 of Senate Rule XVI and clause 2(b) and (c) of House Rule XXI). That is, they cannot amend or repeal existing law nor create new law (referred to as *legislation* or *legislation on an appropriations bill*). Limitations also may not extend beyond the fiscal year for which an appropriation is provided."); *see also* Jennifer Mason McAward, *Congress's Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. 1319, 1336 (2008) (discussing limitations on appropriations riders). A review of the current house rules confirms that this is still the case. *See* KAREN L. HAAS, CLERK OF THE HOUSE OF REPRESENTATIVES, RULES OF THE HOUSE OF REPRESENTATIVES: ONE HUNDRED THIRTEENTH CONGRESS 34 (2013), *available at* <http://clerk.house.gov/legislative/house-rules.pdf>.

⁷⁸ The Center for Responsive Politics reports that over \$300 million was spent by groups that did not disclose any of their donors. Another \$300 million was spent by groups that disclose only some donors or receive money from groups that did not disclose donors, leaving the ultimate source of the funds secret. Social welfare nonprofits that disclose their donors are not included in the Center for Responsive Politics' \$300 million dark money total. *See 2012 Outside Spending*, by Group, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=D&disp=O&type=A> (last visited Mar. 20, 2014).

⁷⁹ *Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 259 (2003) (Scalia, J., dissenting)).

⁸⁰ The Consolidated Appropriations Act, *supra* note 77.

⁸¹ *2012 Outside Spending, by Group*, *supra* note 78.

⁸² *Citizens United*, 558 U.S. at 370.

⁸³ *Id.*

⁸⁴ Committee on Disclosure of Corporate Political Spending Petition for Rulemaking (Aug. 3, 2011), <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf>.

⁸⁵ Ciara Torres-Spelliscy, *Not Because it is Easy*, SEC, BRENNAN CTR. FOR JUSTICE (Dec. 4, 2013), <https://www.brennancenter.org/blog/not-because-it-easy-sec>.

⁸⁶ Matea Gold, *Advocates cheer SEC consideration of corporate disclosure rule*, L.A. TIMES, Jan. 8, 2013, *available at* <http://articles.latimes.com/2013/jan/08/news/la-pn-sec-campaign-spending-disclosure-20130108>.

⁸⁷ Dina ElBoghady, *SEC drops disclosure of corporate political spending from its priority list*, WASH. POST, Nov. 30, 2013, *available at* http://www.washingtonpost.com/business/economy/sec-drops-disclosure-of-corporate-political-spending-from-its-priority-list/2013/11/30/f2e92166-5a07-11e3-8304-caf30787c0a9_story.html.

⁸⁸ Press Release, The White House, Presidential Memorandum: Enhanced Collection of Relevant Data and Statistics Relating to Women (Mar. 4, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/04/presidential-memorandum-enhanced-collection-relevant-data-and-statistics>.

⁸⁹ *Nat'l Resources Def. Council v. SEC*, 606 F.2d 1031, 1051 (D.C. Cir. 1979); *see also, e.g.*, Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). Generally, the SEC has the power to “make such rules and regulations as may be necessary or appropriate to implement the provisions” of the Act. 15 U.S.C. § 78w(a)(1).

⁹⁰ *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988); *see also* DAVID EARLEY & IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, TRANSPARENCY FOR CORPORATE POLITICAL SPENDING: A FEDERAL SOLUTION (2012), *available at* <http://www.brennancenter.org/publication/transparency-corporate-political-spending-federal-solution>.

⁹¹ Byron Tau, *Obama: Big money helps cause Washington gridlock*, POLITICO, Oct. 8, 2013, *available at* <http://www.politico.com/story/2013/10/obama-big-money-politics-washington-gridlock-97999.html>.

⁹² Peter Baker, *Obama Ratchets up Tone Against G.O.P.*, N.Y. TIMES, Oct. 10, 2010, *available at* <http://www.nytimes.com/2010/10/11/us/politics/11obama.html>.

⁹³ Meredith McGehee, *Listeners Are Entitled to Know by Whom They Are Being Persuaded*, THE HUFFINGTON POST, Jan. 14, 2014, *available at* http://www.huffingtonpost.com/meredith-mcgehee/listeners-are-entitled-political-advertising_b_4591415.html.

⁹⁴ *Doe v. Reed*, 561 U.S. 186, 2837 (2010) (Scalia, J., concurring).

⁹⁵ 47 C.F.R. § 73.1212(e) (2012).

⁹⁶ *Id.*

⁹⁷ Communications Act of 1934, 47 U.S.C. § 317.

⁹⁸ *Oversight of the Federal Communications Commission: Hearing before the S. Comm. on Commerce, Sci., & Transp.*, 113th Cong. 61-63 (2013), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-113shrg86057/html/CHRG-113shrg86057.htm>.

⁹⁹ Brendan Sasso, *Democrats Turn to FCC to Unveil Secret Donors Behind Political Ads*, THE HILL, Mar. 2, 2013, available at <http://thehill.com/blogs/hillcon-valley/technology/285791-democrats-turn-to-fcc-to-unveil-big-political-donors>. Sponsor identification requirements for top donors could be limited to only very large donations by setting a spending ceiling above which donors' names would have to be included in advertisements, or by limiting the number of donors that must be identified to those who provided the most money for the creation of the advertisement. The proposed DISCLOSE Act introduced in Congress in 2010, for example, included a provision requiring that independent expenditure communications by certain covered organizations (corporations, unions, section 501(c)(4) or (6) organizations, section 527 organizations) include within their advertisements a list of their top five donors, along with the donation amounts (*see* H.R. 5175, 111th Cong. § 214(b)(2), amending 2 U.S.C. § 441d by adding (e)(5) (2010)). A Media Access Project petition for rulemaking to the FCC included language that would have required that only natural persons who provided or promised to provide 25 percent of the funds used to create covered television advertisements have their names displayed (*See* Media Access Project, Petition for Rulemaking Before the Federal Communications Commission at i (Mar. 22, 2011), available at <http://apps.fcc.gov/ecfs/document/view;jsessionid=Q23IP2MJnLG6NLR1wZtjyvJkI3XWwmPrpp2GPp1bTXN0221zLd2r!1471562840!-321460796?id=7021236093>).

¹⁰⁰ Remarks to the Conference on Free TV and Political Reform and an Exchange With Reporters, 1 PUB. PAPERS 277-281 (Mar. 11, 1997), available at <http://www.gpo.gov/fdsys/pkg/PPP-1997-book1/html/PPP-1997-book1-doc-pg277.htm>; Elizabeth Shogren, *Clinton Proposes Free TV Time for Candidates*, L.A. TIMES, Mar. 12, 1997, available at http://articles.latimes.com/1997-03-12/news/mn-37451_1_candidates-free-air-time.

¹⁰¹ Press Release, The White House, President Obama Unveils ConnectED Initiative to Bring America's Students into Digital Age (June 6, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/06/president-obama-unveils-connected-initiative-bring-america-s-students-di>.

¹⁰² Meredith McGehee, *Listeners Are Entitled to Know by Whom They Are Being Persuaded*, *supra* note 93 ("In 2012, spending by non-candidate outside groups exploded, with television serving as the tool of choice for outside groups."); Kevin Quealy & Derek Willis, *Independent Spending Totals*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance/independent-expenditures/totals> (last visited Mar. 21, 2014) (showing 2012 outside spending of \$524 million on advertisements and candidate focused efforts); *Outside Spending by cycle, excluding party committees*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/> (last visited Mar. 24, 2014) (showing 2012 outside spending total of \$1 billion).

¹⁰³ *See* ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 (9th ed. 2011), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf> (showing that, as of May 2011, the United States incarcerates 2.29 million of the 10.1 million prisoners around the world). *See* PEW CHARITABLE TRUSTS, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf (finding that the American penal system holds 2.3 million people in jails and prisons); INIMAI CHETTIAR ET AL., BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION 49 n.5 (2013), available at http://www.brennancenter.org/sites/default/files/publications/REFORM_FUND_MASS_INCARC_web_0.pdf (updating the 2011 calculation of 65 million Americans with criminal records from the National Employment Law Project cited in *infra* note 134) [hereinafter BRENNAN CENTER, REFORMING FUNDING]; PEW CHARITABLE TRUSTS, PUBLIC SAFETY PERFORMANCE PROJECT, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007–2011 i (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based_policy/PSPP_prison_projections_0207.pdf (stating that the prison population grew by 700 percent between 1970 and 2005).

¹⁰⁴ *See* TRACEY KYCKELHAHN & TARA MARTIN, U.S. BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT SERIES, NCJ 237912, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2010 — PRELIMINARY, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4679> (showing that the correctional costs amount to \$79 billion). Total criminal justice system spending, federal and state, is \$260,533,129,000. This number is the sum of judicial and legal costs (\$56.1 billion), police protection costs (\$124.2 billion), and corrections costs (\$80.24 billion).

¹⁰⁵ *See* E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 10 tbl.10-11 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf> (showing that 52% of state and federal prisoners were incarcerated for drug or nonviolent/nondrug crimes).

¹⁰⁶ See E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991-2012 3 tbl. 1 (2013) (finding that of the total 609,781 prison admissions documented in 2012, 152,780 were for federal and state parole violations) [hereinafter BJS, PRISONERS IN 2012].

¹⁰⁷ *United States of America, World Prison Brief*, INT'L CTR. FOR PRISON STUDIES, <http://www.prisonstudies.org/country/united-states-america> (last visited Mar. 24, 2014) (estimating that in 2012, the U.S. pretrial detainee population represented 21.6% of the country's total prison population).

¹⁰⁸ See DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 2-4 (Aug. 2013), available at <http://www.justice.gov/ag/smart-on-crime.pdf>.

¹⁰⁹ See, e.g., National Criminal Justice Commission Act of 2013, H.R. 446, 113th Cong. (2013).

¹¹⁰ In the alternative, the President can encourage the Colson Task Force to broaden its mandate to study the drivers of the entire criminal justice system growth. Currently, the task force's mandate is to address challenges in the federal corrections system. However, in its appropriations language, Congress has required that the task force undertake a comprehensive analysis of relevant criminal justice data; identify factors driving the growth in prison populations; and evaluate current and potential criminal justice policies. This analysis is equally applicable to the growth in state and federal corrections populations and the President can encourage the Task Force to take a broad view of its mandate, within its permissible boundaries.

¹¹¹ See *Review of Federal Prison System Approved*, CONGRESSMAN FRANK WOLF, <http://wolf.house.gov/media-center/press-releases/prison-reform-task-force-established-in-omnibus#.UynD7YV1Apo> (last visited Mar. 24, 2014).

¹¹² See generally REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968), available at <http://www.eisenhowerfoundation.org/docs/kerner.pdf>. President Johnson created the panel by executive order. See Lyndon B. Johnson, *Remarks of the President Upon Signing Order Establishing the National Advisory Commission on Civil Disorders* (July 29, 1967), available at <http://www.presidency.ucsb.edu/ws/?pid=28369> (last visited Mar. 20, 2014).

¹¹³ While the federal government does not have authority to implement state policies, it can devise and bring attention to practical solutions that states can implement.

¹¹⁴ Violent Crime Control and Law Enforcement, Pub. L. No. 103–322, 108 Stat. 1786 (codified as amended in scattered sections of 42 U.S.C.) (1994). See also WILLIAM J. SABOL ET AL., URBAN INSTITUTE JUSTICE POLICY CTR., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 17 (2002), available at http://www.urban.org/uploadedpdf/410470_finalisrpt.pdf (collecting data on state truth-in-sentencing laws after 1994).

¹¹⁵ Data on file at Brennan Center for Justice.

¹¹⁶ See *History of Byrne JAG Funding*, NATIONAL CRIMINAL JUSTICE ORGANIZATION, <http://www.ncja.org/history-of-byrne-jag-funding#sthash.vpid9kep.dpuf> (last visited Mar. 24, 2014); see also *Appropriations*, NATIONAL CRIMINAL JUSTICE ORGANIZATION, <http://www.ncja.org/issues-and-legislation/legislation/appropriations> (last visited Mar. 24, 2014); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM ACCOUNTABILITY MEASURES 11, 14, 17 (2014), available at <https://www.bjaperformancetools.org/help/JAGMeasuresQuestionnaire.pdf>.

¹¹⁷ See generally BRENNAN CENTER, REFORMING FUNDING, *supra* note 103.

¹¹⁸ For more information on Success-Oriented Funding, see generally *id.* at Part One.

¹¹⁹ See U.S. CONST. art. II, §3; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (finding Executive Order 10340 invalid because it attempted to make law, rather than clarify or act to further a law put forth by the Congress or the Constitution).

¹²⁰ See SONAL SHAH & KRISTINA COSTA, CENTER FOR AMERICAN PROGRESS, SOCIAL FINANCE: A PRIMER 1 (2013) (describing “social finance” as an approach “where evidence, evaluation, and scale capital are brought to bear on intractable social issues” which combines federal and private funds).

¹²¹ See Omnibus Crime and Control and Safe Streets Act, 42 U.S.C. § 3797dd(a)(3) (1968). For more information on PRSCEO, see PRSCEO 2012 Solicitation, available at <https://www.federalregister.gov/articles/2012/11/20/2012-28068/applications-for-new-awards-model-demonstration-projects-on-promoting-reentry-success-through>; Violence Against Women Act Reauthorization, 42 U.S.C. §§ 3750- 3758 (2005); Moving Ahead for Progress in the 21st Century Act, 23 U.S.C. § 405(e). For more information on the Distracted Driver grants, see the Distracted Driver Grant Program's 2013 Notice of Funding Availability, available at http://www.distraction.gov/download/research-pdf/DD_NOFA.pdf.

¹²² See BJS, PRISONERS IN 2012, *supra* note 106, at 43 tbl.10 (finding that 99,426 prisoners incarcerated in federal prisons on a drug conviction compared to the total federal prison population of 196,574 in 2012).

¹²³ In 2010, 78.5 percent of sentenced crack offenders in federal prisons were African American, versus 7.3 percent who were Caucasian and 13.1 percent who were Hispanic. See *Race of Drug Offenders in Each Drug Type*, U.S. SENT'G COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 34, available at [http://www.ussc.gov/Research and Statistics/Annual Reports and Sourcebooks/2010/Table34.pdf](http://www.ussc.gov/Research%20and%20Statistics/Annual%20Reports%20and%20Sourcebooks/2010/Table34.pdf). See also *United States v. Blewett*, 719 F.3d 482, 486 (6th Cir. 2013), *vacated en banc*, 2013 WL 6231727 (6th Cir. 2013), *cert. denied*, (U.S. Mar. 31, 2014) (No. 13-8947). While 17,000 prisoners are serving crack sentences in the federal system, the majority of these offenders are not eligible for resentencing due to interplay with other sentencing laws. *Id.* (citing to mandatory minimum penalties and the career offender guidelines).

¹²⁴ The Fair Sentencing Act, 21 U.S.C. §#844(a) (2010).

¹²⁵ See *Dorsey v. United States*, 567 U.S. (2012) (holding FSA's Crack Amendment applies to defendants who committed a crack cocaine offense before the Act went into effect but were sentenced after its effective date in 2010). See also discussion of *Blewett* in *supra* note 123. Between 1991 and 2009 alone, an estimated 12,835 offenders received sentences eligible for reduced sentences under the FSA Crack Amendment. See Memorandum from Office of Research and Data and Office of General Counsel to U.S. Sent'g Comm'n Chair Patti Saris *et. al.* on Analysis of the Impact of Amendment to the Statutory Penalties for Crack Cocaine Offenses Made By the Fair Sentencing Act of 2010 13 (Jan. 28, 2011), available at [http://www.ussc.gov/Research/Retroactivity Analyses/Fair Sentencing Act/20110128 Crack Retroactivity Analysis.pdf](http://www.ussc.gov/Research/Retroactivity%20Analyses/Fair%20Sentencing%20Act/20110128%20Crack%20Retroactivity%20Analysis.pdf) [hereinafter Memo to U.S. Sent'g Comm'n, RE: FSA]. By 2013, only 7,460 applications for retroactive application of the crack cocaine amendment were granted. See U.S. SENT'G COMM'N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT tbl. 3 (2014), available at [http://www.ussc.gov/Research and Statistics/Federal Sentencing Statistics/FSA Amendment/2014-01 USSC Prelim Crack Retro Data Report FSA.pdf](http://www.ussc.gov/Research%20and%20Statistics/Federal%20Sentencing%20Statistics/FSA%20Amendment/2014-01%20USSC%20Prelim%20Crack%20Retro%20Data%20Report%20FSA.pdf) [hereinafter U.S. SENT'G COMM'N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT]. This leaves an estimated 5,375 offenders who, even under the narrowest analysis possible, continue to suffer from the harsh effects of the pre-FSA sentencing structure despite qualification for resentencing. Because this is based on a 2010 estimate, some of these offenders may have since been released from prison. Based on this data from the Sentencing Commission, we estimate that up to 5,000 crack offenders *would likely receive reduced sentences* if the FSA were applied retroactively. As a separate calculation, Families Against Mandatory Minimums estimates that 8,800 federal prisoners currently imprisoned for crack offenses *could return to court to seek resentencing* if the FSA were applied retroactively. See Families Against Mandatory Minimums, S. 1410, The Smarter Sentencing Act, <http://famm.org/s-1410-the-smarter-sentencing-act/> (last visited Apr. 7, 2014).

¹²⁶ See James Cole, Dep. Att'y Gen., Remarks at the New York State Bar Association Annual Meeting, (Jan. 30 2014), available at <http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140130.html>; Am. Civil Liberties Union, Statement of Groups Participating in Clemency Project 2014, (Mar. 4, 2014), available at <https://www.aclu.org/prisoners-rights/statement-groups-participating-clemency-project-2014>. The Department plans to focus on prisoners who have non-violent history both before and in prison, no significant ties to organized crime, and are currently serving very lengthy sentences for relatively low-level drug offenses. *Id.*

¹²⁷ See Am. Civil Liberties Union, Statement of Groups Participating in Clemency Project 2014 (Mar. 4, 2014), available at <https://www.aclu.org/prisoners-rights/statement-groups-participating-clemency-project-2014>.

¹²⁸ While the grant of clemency has fallen out of favor in recent years, the executive power was once a standard practice exercised by all presidents to maintain a functioning and balanced criminal justice system. President Ford issued executive orders establishing a Clemency Board to review particular convictions for draft evasion during the Vietnam War, and allowed individuals who were affected by particular statutes between certain dates to apply for conditional amnesty by a particular date. See generally Mark William Osler, *The Ford Approach and Real Fairness for Crack Convicts*, 23 FED. SENT'G REP. 228 (2011).

¹²⁹ Annual Determination of Average Cost of Incarceration Notice, 78 Fed. Reg. 16711 (Mar. 18, 2011) (finding the average cost of incarceration in 2011 at \$28,893.40). Given the possible eligibility of 5,375 offenders for FSA retroactivity, the federal government could potentially save approximately \$155,302,025 per year if FSA retroactively applied. *See* Memo to U.S. Sent’g Comm’n, RE: FSA, *supra* note 125, at 13. *See also* U.S. SENT’G COMM’N., PRELIMINARY CRACK RETROACTIVITY DATA REPORT, *supra* note 125, at tbl. 3.

¹³⁰ Eric Holder, Att’y Gen., Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140211.html>.

¹³¹ *See* BRENNAN CENTER, REFORMING FUNDING, *supra* note 103 at 49 n.5 (updating existing calculation); BJS, PRISONERS IN 2012, *supra* note 106, at 4 tbl.2.

¹³² The “box” refers to the box on job applications asking if the applicant has been arrested and/or convicted of a crime. The exact language varies.

¹³³ Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955, 958 (2003), *available at* https://www.princeton.edu/~pager/pager_ajs.pdf.

¹³⁴ *See e.g.* U.S. SENT’G COMM’N., MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 12 (May 2004), *available at* <http://www.lb5.uscourts.gov/ArchivedURLs/Files/08-10643%281%29.pdf>.

¹³⁵ *See* MICHELLE N. RODRIGUEZ & MAURICE Emsellem, NATIONAL EMPLOYMENT LAW PROJECT, 65 MILLION ‘NEED NOT APPLY’: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3-4 (2011), *available at* http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf (explaining the loss of labor and employment resulting from criminal background checks). *See also* Press Release, U.S. Dep’t of Labor Announces Grant Competition to Help Former Offenders Gain Career Skills and Rejoin community Life (Feb. 10, 2011), *available at* <http://www.dol.gov/opa/media/press/eta/ETA20110185.htm> (explaining that the formerly incarcerated have difficulty securing employment and this affects the economy at large).

¹³⁶ *See generally* NAT’L EMP’T LAW PROJECT, BAN THE BOX RESOURCE GUIDE (2014), *available at* http://nelp.3cdn.net/cebc75246d6b12f887_skm6bsijp.pdf (listing localities that have adopted ban-the-box policies, including Chicago, Philadelphia, San Francisco, and Baltimore); *see generally* NAT’L EMP’T LAW PROJECT, STATEWIDE BAN THE BOX (2013), *available at* http://nelp.3cdn.net/3c0ae798a3c30d354e_jgm6beq1q.pdf (listing states that have adopted ban-the-box policies, including California, Illinois, and Massachusetts).

¹³⁷ *See More Governments Banning the Criminal History Box from Job Apps*, GOVERNING MAG., Nov. 13, 2013, *available at* <http://www.governing.com/news/headlines/gov-governments-reducing-job-discrimination-against-convicts.html>; *see also* NAT’L EMP’T LAW PROJECT, PRESENTATION AT NATIONAL EEO DIRECTORS’ MEETING 8–10 (2010), *available at* http://nelp.3cdn.net/84ae5094313d8eebf7_xnm6ynedi.pdf.

¹³⁸ *See* EEOC Enforcement Guidance, No. 915.002, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, 42 U.S.C. § 2000e et seq., *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

¹³⁹ The President is authorized to prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service and may prescribe rules governing the competitive service. *See* 5 U.S.C. §§3301-3302 (2014). Further, the President may delegate this authority to executive agency heads. *See* 3 U.S.C. §301 (2014). President Obama has used this authority to promote hiring practices for veterans, students, and recent graduates in the federal government. *See* Exec. Order No. 13,518, 74 Fed. Reg. 58533 (2009). *See also* Exec. Order No. 13,562 75 Fed. Reg. 82585 (2010).

¹⁴⁰ *See Our Agency*, OFFICE OF PERSONNEL AND MANAGEMENT, <http://www.opm.gov/about-us> (last visited Mar. 24, 2014).

¹⁴¹ CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), *available at* http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

¹⁴² See Trevor Aaronson, *The Informants*, MOTHER JONES, Sept./Oct., 2011, available at <http://www.motherjones.com/politics/2011/08/fbi-terrorist-informants>; *Eye on the FBI: Exposing Misconduct and Abuse of Authority*, ACLU <http://www.aclu.org/national-security/eye-fbi-exposing-misconduct-and-abuse-authority> (last visited Mar. 24, 2014).

¹⁴³ See Daniel Zwerdling *et al.*, *Mall Counterterrorism Files ID Mostly Minorities*, NPR, Sept. 8, 2011, available at <http://www.npr.org/2011/09/08/140262005/mall-counterterrorism-files-id-mostly-minorities>; Julia Harumi Mass & Michael German, *The Government is Spying on You: ACLU Releases New Evidence of Overly Broad Surveillance of Everyday Activities*, ACLU BLOG OF RIGHTS (Sept. 19, 2013), <https://www.aclu.org/blog/national-security-technology-and-liberty/government-spying-you-aclu-releases-new-evidence>.

¹⁴⁴ Susan Capelouto, *Racial Profiling Costs Arizona County \$22 Million*, CNN, Jan. 3, 2014, available at <http://www.cnn.com/2014/01/03/us/racial-profiling-payments/>.

¹⁴⁵ Edward McClelland, *Barack Obama and Racial Profiling*, NBC CHICAGO, Jul. 18, 2013, available at <http://www.nbcchicago.com/blogs/ward-room/Barack-Obama-and-Racial-Profiling-215986531.html>.

¹⁴⁶ See generally *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 2 (2008).

¹⁴⁷ See President Barack Obama, Remarks on Review of Signals Intelligence (Jan. 17, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>.

¹⁴⁸ See *id.*

¹⁴⁹ See Steven Aftergood, *Surveillance Court Orders Prove Hard to Declassify*, SECRECY NEWS, Jan. 8, 2013, available at http://blogs.fas.org/secretcy/2013/01/fisc_declassify/.

¹⁵⁰ See generally MICHAEL PRICE, BRENNAN CTR. FOR JUSTICE, NATIONAL SECURITY AND LOCAL POLICE (2013), available at https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf.

¹⁵¹ See 28 C.F.R. § 23.20(a)-(b) (prohibiting, e.g., the collection or retention of data “about the political, religious or social views, associations, or activities of any individual or any group . . . unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity”).

¹⁵² AM. CIVIL LIBERTIES UNION OF MASS. & NAT’L LAWYERS GUILD, MASS. CHAPTER, POLICING DISSIDENT: POLITICAL SURVEILLANCE OF LAWFUL POLITICAL ACTIVITY IN BOSTON 6-9 (2012), available at http://www.aclum.org/sites/all/files/policing_dissent.pdf.

¹⁵³ Julia Harumi Mass & Michael German, *supra* note 143.

¹⁵⁴ Jason Leopold, *Exclusive: How DC police use citizens as spies*, Al Jazeera AMERICA, Dec. 17, 2013, available at <http://america.aljazeera.com/articles/2013/12/17/exclusive-how-dcpoliceusecitizensaspies.html>.

¹⁵⁵ STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 112TH CONG., FEDERAL SUPPORT FOR AND INVOLVEMENT IN STATE AND LOCAL FUSION CENTERS 27 (2012), available at <http://www.hsgac.senate.gov/download/?id=49139e81-1dd7-4788-a3bb-d6e7d97dde04>.

STAY CONNECTED TO THE BRENNAN CENTER

Visit our website at www.brennancenter.org.
Sign up for our electronic newsletters at www.brennancenter.org/signup.

Latest News | Up-to-the-minute info on our work, publications, events and more.

Voting Newsletter | Latest developments, state updates, new research, and media roundup.

Justice Update | Snapshot of our justice work and latest developments in the field.

Fair Courts | Comprehensive news roundup spotlighting judges and the courts.

Twitter | www.twitter.com/BrennanCenter

Facebook | www.facebook.com/BrennanCenter

NEW AND FORTHCOMING BRENNAN CENTER PUBLICATIONS

How to Fix the Voting System

Wendy Weiser, Jonathan Brater, Diana Kasdan, and Lawrence Norden

Early Voting: What Works

Diana Kasdan

The Case for Voter Registration Modernization

Brennan Center for Justice

Democracy & Justice: Collected Writings, Vol. VII

Brennan Center for Justice

How to Fix Long Lines

Lawrence Norden

Federal Judicial Vacancies: The Trial Courts

Alicia Bannon

What the Government Does with Americans' Data

Rachel Levinson-Waldman

A Proposal for an NYPD Inspector General

Faiza Patel and Andrew Sullivan

Domestic Intelligence: Our Rights and Our Safety

Faiza Patel, editor

National Security and Local Police

Michael Price

Reforming Funding To Reduce Mass Incarceration

Inimai Chettiar, Lauren-Brooke Eisen, and Nicole Fortier

For more information, please visit www.brennancenter.org.

BRENNAN

CENTER

FOR JUSTICE

at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
646-292-8310
www.brennancenter.org