

**THE NATIONAL SECURITY STATE AND OTHER DANGERS  
TO DEMOCRACY IN AMERICA**

**November 11, 2010, Lecture at The John F. Kennedy Institute  
for North American Studies at The Free University of Berlin<sup>1</sup>**

**Introduction.**

America is by far the longest-lasting democracy in history. While there have been flaws, American democracy has shown the capacity to change, grow and improve. Who in the eighteenth century could have possibly imagined that a black man could be elected as president, or that his fiercest competitor would be a woman?

Nonetheless, today there are some new challenges to American democracy.

Crisis and its cousin fear always make it tempting to ignore the wise restraints that keep us free. That is not new. But America has been living in an atmosphere of crisis for an unusually long time. The crisis atmosphere has lasted since World War II, broken only by the end of the Cold War, symbolized by the fall of the wall that divided this city. But then the 9/11 terror attacks brought back crisis and fear.

With crisis and fear, America has become a National Security State. This brings with it many threats to democracy—including a secrecy culture. Excessive secrecy saps democracy's strength because it deprives citizens of the information needed to fulfill their role as "the primary control on the government."

In addition, the yeast of democracy—how the voting process actually works—is increasingly being burdened by barriers to participation.

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<sup>1</sup> Retyped after the speech to reflect changes made that day.

Finally, the most basic test for American democracy is whether becoming an unparalleled economic giant, with an enormous military and intelligence establishment eyeing security fears and obligations around the world, will drain democracy in America—just as those factors ruined Rome centuries ago.

Later, I assess these threats and dangers. But first let's review how American democracy grew from the Revolution to today.

## **I. The Expansion of Democracy in America.**

### **A. The Founding Documents.**

The Declaration of Independence planted the seed of democracy. As Thomas Jefferson put it in the Declaration, governments “deriv[e] their just power from the consent of the governed.” Beneath Jefferson’s simple eloquence lie two profound questions. First, how should the consent of the “governed” be determined? By a vote it was assumed. And, second, who are the “governed” entitled to express their “consent” by voting? In eighteenth century America, most assumed the answer would be white males—and many believed only white males with property.

The Constitution came eleven years after the Declaration. Except for its soaring preamble, the Constitution falls short of the Declaration’s eloquence, and has little bearing on democracy. While the Constitution assumes elections of some sort, its innovations were controlling power (through checks and balances), and dividing power (through federalism). Indeed, part of the impetus for the Constitution was concern about possible irresponsibility, or even tyranny, of temporary majorities. Moreover, in making the compromises needed to win consensus, the Constitutional Convention limited democracy. For example, the Senate’s composition vastly overweighs the power of states with small populations.

Although the Declaration and the Constitution are both revered in America, it is fitting that two of our greatest speeches are rooted not in the Constitution's rules and compromises, but in the Declaration's soaring democratic promise.

Thus, the first words of Abraham Lincoln's Gettysburg Address are:

“Fourscore and seven years ago, our fathers brought forth on this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.”

It was the Declaration that was four score and seven years before Gettysburg. So, while a war was being fought to hold the country together, Lincoln *rededicated* the country not to the rules of the Constitution, but to the Declaration's vision of equal opportunity and democracy. Then, in closing his short Gettysburg speech with reverence for government “by the people,” Lincoln called for a “new birth of freedom”: so that:

“government of the people, by the people, for the people, shall not perish from the earth.”

One hundred years later, speaking on the steps of the Lincoln Memorial, Martin Luther King, Jr., in his “I Have a Dream” speech, also harked back to the Declaration. It was a promissory note covering “inalienable rights of life, liberty and the pursuit of happiness.” This promissory note was payable to “all men, yes, black men as well as white men.” But, America, as King said in 1963, had “defaulted on this promissory note as far as her citizens of color are concerned.”

Just three years after King spoke, Congress passed the Voting Rights Act that helped make real the promise of black voting. And then, forty-five years after King's speech, Barack Obama was elected as America's forty-fourth President.

Some of you may have seen on television the huge rally in Chicago where Barack Obama spoke the night he won the election. Tears were streaming down the face

of Jesse Jackson—who had been with King the night he was shot. It is sad that Dr. King was killed long before he also could have cried tears of joy.

**B. The Growth of Democracy After the Founding.**

Winning the vote for blacks was one of a series of struggles that widened the franchise, and deepened our democracy.

Earlier, right after the Constitution was ratified, there had been a sharp divide over whether America should be a “republic,” or also a democracy. Should well born, rich, and well educated gentlemen control? Should British aristocratic, and hierarchical, political habits continue to be the norm? Or should the new nation be more open with much greater political participation?

Jefferson and his supporters favored a wider, more open democracy.

However, the Federalists, who led the new nation for its first twelve years, generally supported the more hierarchical view. (They often derided democracy as “mobocracy.”) Thus, Gouverneur Morris—the man who actually wrote the words of the Constitution—contended that only people with property should vote. Why? Morris’ argument was if you “give the votes to people who have no property . . . they will sell them to the rich.” While Morris’ proposal did not make it into the federal constitution, most states in America’s early years did have property qualifications for voting.

The development of democracy in America’s early years went far beyond legal questions such as qualifications for voting. As one founder observed, while the Revolution had “changed the *forms*” of government, the new nation still needed “a revolution in our principles, opinions and manners, so as to accommodate them to the forms of government we have adopted.”

As the new nation developed, there was, in fact, such a revolution. That second revolution came in the form of an information revolution in the early Nineteenth Century—when newspapers, post offices, schooling, and voluntary societies all exploded.

This information revolution was strengthened by democracy, and was a democratizing force in itself.

By the time the young French aristocrat Alexis de Tocqueville wrote his *Democracy in America* in the mid-1830s, property qualifications for voting were gone. Despite noting that blacks, Indians and women did not have the vote, Tocqueville still expressed wonder at the vitality of American democracy. Tocqueville found the most powerful explanation for that vitality rested on customs and institutions outside of government. Of these, Tocqueville singled out, as essential to American democracy, the number of newspapers and of voluntary associations, adding that “newspapers make associations, and associations make newspapers.”

Tocqueville’s book is widely known. Scarcely known at all is a similarly magisterial book, written in 1837, by a *German* diplomat, Frances J. Grund, who had lived in America for fifteen years.<sup>1</sup> According to Grund, Americans were “the most reading people on the face of the earth.” As had Tocqueville, Grund emphasized newspapers’ importance to American democracy, saying: “it baffles all attempts at computation,” for “there is hardly a village” “without a printing establishment and a paper.” Grund also emphasized the importance of voluntary associations.

I stress the significance of newspapers and voluntary associations to American democracy in the 1830s because in *today’s* America, both newspapers and voluntary associations are faring less well.

Returning now to democracy's growth, Lincoln's hope for a "new birth of freedom" was carried forth by the Fifteenth Amendment which protected citizens' right to vote free from discrimination based on "race, color, or previous condition of servitude."

For a few years thereafter, during what was called Reconstruction, the Fifteenth Amendment's promise was realized even in the former slave states of the South. Former slaves voted and blacks were elected to office including the United States Senate. However, Reconstruction ended as part of a compromise of the disputed 1876 presidential election—a dispute even more drawn out than the Bush-Gore contest in 2000. Thereafter, violence, coupled with legal trickery, and abetted by regressive decisions by the Supreme Court, suppressed—indeed almost totally extinguished—black voting in the south. It took ninety years, until protests, picketing, marching, and dying, by the Civil Rights Movement, coupled with leadership by a southern President (Lyndon Johnson), and action by a relatively bipartisan Congress led to the Voting Rights Act that implemented the Fifteenth Amendment's promise.

In the meantime, women pressed for and won the right to vote.

From the beginning, women were influential in America. Among many examples, two different kinds of women stand out: Abigail Adams, who was a powerful influence upon her husband John throughout his long and varied career, including as our second president; and Harriet Beecher Stowe, who wrote the widely read *Uncle Tom's Cabin*. (President Lincoln later greeted her at the White House as "the little woman who wrote the book that made this big war").

But, however strong women's *influence*, the *vote* was not theirs.

After the Civil War, women hoped their right to vote would be linked with blacks. But this was not to be.

Women then began to band together to press for the vote. Success came quickly in a few states. For example, Wyoming gave the vote to women in 1869. Then after women suffragettes—as they were known—suffered injury and insult while protesting from across the country to the gates of the White House, the Constitution in 1920 was finally amended to protect women’s right to vote in every state.

American democracy expanded again in 1971 when the Constitution was amended to lower the voting age from twenty-one to eighteen.

America’s long effort to widen the franchise was far from steady. As I mentioned, hard-won voting rights were snatched away from blacks for ninety years, starting in the 1870s. Similarly, when waves of immigrants came to America in the late 1800s, nativists changed voting laws to hinder their voting. But despite such setbacks, the story of America has generally been a story of a widening circle of participation.

Nonetheless, we now face new challenges.

### **C. The Growth of the National Security State—And Its Threat to Democracy.**

In the second half of the twentieth century—roughly at the time when America took major steps forward to widen democratic participation—democracy began to be challenged by the development of a national security state.

To understand this we have to go back to the beginning again.

Throughout American history, crisis and fear have often temporarily shifted power to presidents who have ignored the Constitution’s wise restraints. But because earlier presidents generally acted openly, they did not tarnish democracy at the same time. Now,

however, executive acts in response to crisis and fear *are* debasing democracy. They do so most importantly because the actions are carried out without public knowledge. At the same time, the permanent national security apparatus has grown exponentially.

The first example of overriding the Constitution's wise restraints was in 1798 when President John Adams and his Federalist allies in Congress passed the Sedition Act which criminalized speech critical of the government. Then, during the Civil War, President Abraham Lincoln unilaterally suspended habeas corpus—although he sought and obtained congressional ratification when Congress next met. In World War I, President Woodrow Wilson prosecuted war critics, resulting in, for example, a fifteen year prison sentence for a Vermont minister who cited Jesus as a proponent of pacifism. Then, after the war, Wilson's Attorney General launched dragnet raids against immigrants, arresting and deporting thousands of innocent people without warrants or access to counsel. Finally, during World War II, President Franklin Delano Roosevelt ordered the internment in "relocation camps" of 117 thousand Japanese-American citizens without evidence of a single act of espionage, sabotage, or treasonable activity.

All of these actions—however wrong—were taken in the open. Therefore, voters had the ability to judge the actions. And courts had the power to stop them, if they had the will.

But then during the Cold War, and again after 9/11, similar actions were taken. But this time they were hidden. While some secrets are legitimate, many actions during the Cold War and after the 9/11 attacks were kept secret not to protect America but to keep embarrassing and improper information from Americans. For example, among the secrets I helped bring to light as Chief Counsel for a Senate Committee, the



FBI tried to coerce Martin Luther King to commit suicide; the CIA hired the Mafia to kill Cuba's Fidel Castro; and, for thirty years, the National Security Agency obtained copies of every telegram leaving the United States. And then, during the Bush-Cheney Administration, many policies, such as torture, were adopted and implemented in secret.

Today, as part of our national security state, we have a secrecy culture. More and more is made secret. And what is made secret is kept secret for far too long.

Excessive secrecy is inconsistent with democracy's premise. How can voters judge their leaders' character and their country's conduct when so much is hidden?

America is becoming, I fear, a democracy in the dark.

Our most analytical founder, James Madison, foresaw this danger when he perceptively wrote:

“A popular government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. ... a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

Becoming a National Security State has incubated and supported another rising threat to democracy: excessive secret money dominating politics.

In his farewell address in January 1961, President Dwight Eisenhower warned of dangers from the newly powerful “military-industrial complex.” He worried that the “conjunction of an immense military establishment and a large arms industry” with huge influence in the country might “endanger our liberties or democratic processes.” Echoing Madison, Eisenhower reminded us that “only an alert and knowledgeable citizenry” can counter that risk.

The dangers to democracy that Eisenhower foresaw have grown greater in the past fifty years. Corporations have become much bigger, much richer, much more powerful, and much more involved in politics than ever before.

A subheading to that danger is the increasingly dominant role of money in politics in America today.

**D. Other Threats to Democracy Today.**

**1. Money in Politics.**

Today, billions of dollars are being spent in American elections—in this past election (with no presidential race), some \$4 billion. Some of this money is garnered the old-fashioned way by individual donations to candidates or political parties. While dialing for those dollars occupies far too much time of legislators and potential legislators, at least the names of the donors must be made known to the public, and the law limits the size of individual contributions.

But there are also hundreds of millions of dollars being poured into political advertising where the donors' names are kept secret, and the amounts they can give are unlimited. Most of these big-money ad campaigns support negative, sound bite advertising—ugly assaults on the character of candidates.

Earlier this year, the Supreme Court helped release this flood of money by ruling in a 5-4 decision that corporations (and labor unions) have the same rights in politics as living, breathing human beings. (The Court's decision overruled several of its prior decisions, and overturned laws that dated back to the 1940s and, really, to a statute pushed by Theodore Roosevelt in 1907.) And, then Congress compounded the problem created by the Court by failing to require disclosure of the sources of the secret money.

59 out of 100 Senators voted to require disclosure—but that was one vote short of the amount needed to break a filibuster by the minority party. So the measure died.

Money does affect elections. And, clearly, politicians believe it does. Therefore, lobbyists representing powerful corporations and other wealthy donors are increasingly able to influence legislation—indeed all too often those lobbyists control legislation.

The long-term result of the flood of money, and its influence, is to dilute the voice of the average citizen who votes. In turn, this adds to corrosive cynicism, which is likely to result in reducing citizen participation.

## 2. **The Radical Change in How Citizens Obtain Information.**

Another threat to American democracy can be seen in the sharp decline of newspapers, and of objective journalism that once helped citizens sort through the many messages coming at them, especially during elections. Today, the news cycle in America, as all over the world, is non-stop: no time for reflection or analysis; fewer and fewer journalists who can offer a longer term perspective on the meaning of unfolding events; everything boiled down to catchy, supposedly “newsworthy,” crises and accusations.

In this climate, secrecy, and its friend falsity, flourish. The internet could be a useful tool for disclosure, but to date, that has seldom been the case. Even when formerly secret information is revealed on the internet, it needs to be analyzed to be understood. Old fashioned muckraking reporting, that digs deep enough to reveal secrets and then explains them, will need to return if our democracy is to fulfill its promise.

### 3. **Changes in How Citizens Relate to Each Other.**

Democracy has also suffered from a decline in civic engagement. In the mid-1990s, a book called *Bowling Alone* showed there are fewer organizations which bring people together, a significant change from the American past as highlighted by Tocqueville. Places of worship, community organizations, and labor union halls—to give a few examples—served those purposes, but now seem less important as more people turn to individual computer screens to communicate. This weakening of the fabric of social networks will bring many changes to democracy. On the one hand, internet communications make it easier to rally supporters, alert people to come to events, and even to raise money for campaigns. On the other hand, internet interactions all too often can be misinterpreted; the screen and keyboard are no substitute for looking into the face of a fellow citizen and grappling with a tough issue. The screen and keyboard also make it easier to fling falsehoods; person-to-person that's tougher.

### 4. **Barriers to Voting.**

Amazingly, even after centuries of struggle for voting rights for all Americans, there are still many barriers to voting. Many of you may recall the Florida fiasco which ultimately led to the Supreme Court deciding the presidential election of 2000. That fiasco reflected flaws in how votes were counted. But there are much more profound problems with voting in America. Indeed, in some ways our rules are making it harder, not easier, to vote.

This starts with voter registration. In America, voters have the burden to place themselves on the voting rolls. About 65 million Americans who meet all the criteria for voting are not registered. (And, according to a study by MIT and Harvard, in

the 2008 election, three million citizens, who *were* registered to vote, were barred from voting because of problems with their registration.)

Many citizens do not become interested in elections until the eve of voting. If registration were automatic, they could vote. In many countries, including Germany, the government automatically places voters on the rolls when they are old enough to be eligible.

Revealingly, America did not have registration requirements until after blacks got the vote and immigrants began flooding our cities. The cause and effect relationship is strongly suggested by the fact that the first registration law in my state (New York) covered only New York City, but not the rest of the State.

Moreover, in a disturbing new trend, political operatives are starting to *police* the voting process and challenge voters they suspect of being ineligible. As one court recently found, this inevitably leads to voter intimidation and vote suppression at the polls. In many cases, these challenger laws were originally intended to provide an alternative means of disenfranchising newly-enfranchised blacks. While states have eliminated overt racial bias from their statutes, the challenge process is still susceptible to discriminatory targeting and application.

Other recent malign tactics designed to suppress voting include: misleading advertisements of the date of the election, deceptive threats of fines and imprisonment for voting in the wrong place, and even placing intimidating people in front of polling places.

In another disturbing new trend, several states are beginning to require onerous identification at the polls before a registered voter can actually cast a vote. The

supposed justification for these laws is prevention of voter fraud. Surprisingly, some courts have upheld these restrictive laws even though there is virtually no evidence of voter fraud. The theory is that people might *think* there is voter fraud and thus be discouraged from voting if there were not onerous requirements. This should not hold water. But the Supreme Court said it did.

Finally, there is another little known reality that prevents people from voting. In many states, after a person has served time for a criminal conviction, that person is not entitled to vote unless he or she makes extraordinary efforts to be allowed to register again. A disproportionate number of these Americans are black men. These disenfranchisement laws have been on the books since after the Civil War when blacks—in theory at least—won the right to vote.

#### **5. Making it Hard to Legislate.**

Also, as I mentioned earlier, the compromises necessary to produce the Constitution diluted majority votes. Thus, today, Wyoming, with a population of 544 thousand, has the same two Senators as California, with its population of 37 million. This is exacerbated by a long-standing Senate Rule that requires 60 (of 100) votes to cut off debate in order to allow legislation to pass or nominees to be confirmed. This rule regularly allows the political minority to control. (At its most extreme, it would allow about 10 percent of the country to control the Senate.)

#### **E. Should We Be Optimists, Pessimists, or Reformers?**

##### **1. Foolish Optimism.**

American democracy has generally been resilient. Often, “the system works”—as President Gerry Ford said about the end of the “long national nightmare” caused by his predecessor, Richard Nixon, writhing to escape Watergate.

But given all the dangers to our democracy, it will not do—indeed, it is feckless—to indulge in ancestor worship about our founders, or to rely on historical examples showing that “the system works.” History does not automatically repeat itself.

There are clear and present danger signals—and not only the things I have already mentioned. Two other trends harming democracy are new to America.

For the first time in American history, the gap between rich and poor has been widening. But, as Justice Brandeis once warned, “we can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can’t have both.” The combination of this growing gap with high unemployment, and with big money dominating elections, is indeed toxic.

Second, America’s long-standing lead in education is drifting away. A vibrant democracy depends on education—all the more so when the airwaves are flooded with demagogic and misleading political ads masquerading as the truth.

Yes, American democracy has made comebacks before. But, take care, particularly when the forces on the other side are so powerful, so well financed, and so determined. Many Americans worry that our system, so flexible and capable of renewal before, may have less resilience now, particularly with the growth of poisonous partisanship.

## **2. Helpless Pessimism.**

But helpless pessimism is equally as feckless as foolish optimism. It will not do to follow Achilles and just go sulk in our tents.

## **3. Practical Reform.**

America still has the potential for positive change. Here are some keys to rebuilding American democracy.

We must start by recognizing our problems. Not turning a blind eye to them. Or naively wishing them away.

Having recognized the problems, we need a sustained and effective campaign to convince the public that their freedoms and America's democracy are at risk.

Then, we must conceive and implement practical solutions.

The Brennan Center for Justice at NYU Law School, where I now work, is deeply involved in seeking these solutions. Here are some of them.

- First, we need to count our population accurately. The Census, required by the Constitution to be taken every ten years, is used to apportion representatives among the states and within the states. The problem: the Census systematically undercounts the poor, the less well-educated, city dwellers, and minorities. For example, more than forty percent of young black men in cities are missed.

There is a simple solution, easy in the 21st Century. Just use a statistical adjustment of the scientifically valid kind that is used by businesses all over the world.

The Census Bureau now says this can be done. Politicians have refused to let it be done.

- Second, follow the lead of other countries, including Germany, and modernize our registration systems to have the government automatically register people. This would add more than 60 million to those eligible to vote.

Some states are doing this. But the Congress has been too partisan or too scared to require it for all states.



- Third, even without automatic registration, we should make voting easier by allowing anyone still not on the election rolls to register on election day. Eight states have done this, leading to an increase in participation of about five percent.

- Fourth, remove political operatives from polling places, and be tough in investigating and prosecuting attempts at voter suppression.

- Fifth, America must confront the problems caused by money in politics.

While the Supreme Court might, with the change of just one member, reverse itself again and squish the idea that corporations and labor unions have the same rights to spend on elections as living, breathing people, this cannot be counted on; nor would it solve all the problems.

But there are other available reforms.

Congress should pass the Disclose Act, which would end the practice of million dollar donations being kept secret.

Moreover, following the lead of New York City, and a few states, governments should provide candidates a multiple match for small donor contributions. This frees candidates from relying on big money, and has the side benefit of engaging more people in campaigns.

- Finally, to return to the subject of excessive secrecy, we must start with the recognition that there is far too much secrecy, and that that harms democracy.

Then, we should take on the tough job of reducing the secrecy, resolving that:

Instead of the silence of secrecy, let freedom ring; and

Instead of the darkness of secrecy, let the light shine.

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And now let me close with a Lincoln speech directed to German immigrants.

Abraham Lincoln gave one of his most famous speeches in July 1858. He was running for the Senate in Illinois and spoke to the immigrant voters of his day—including a crowd of German-American citizens (like my great-grandfather), who had recently immigrated to the United States after the Revolution of 1848. Lincoln harked back to the “glorious epoch” of our country’s Revolutionary generation, saying that while the German immigrants had no ties of “blood” to that earlier epoch, still they could find that in the Declaration “those old men” had said ‘we hold these truths to be self-evident that all men are created equal.’” This truth, Lincoln said, the immigrants:

“have a right to claim .... as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration. And so they are.

“That is the electric cord in that Declaration that links the hearts of patriotic and liberty-loving men together, that will link those patriotic hearts as long as the love of freedom exists in the minds of men throughout the world.”

Today, fifteen decades after Lincoln spoke those words to the German immigrants, the electricity of American democracy is being short circuited by too much secrecy and by barriers to voting.

Let us all now go forth hoping that we Americans repair the “electric cord” that ties us to the soaring idealism of the Declaration of Independence.

### **End Notes**

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<sup>1</sup> See, Frances J. Grund, *The Americans in their Moral, Social and Political Relations*, (Marsh, Capen and Lyon, 1837).