APPENDIX A

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Testimony of

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Hearing on H.R. 1, The For the People Act
The Committee on House Administration, U.S. House of Representatives

February 14, 2019

Chairperson Lofgren, Ranking Member Davis, and members of the Committee:

Thank you for the opportunity to submit this statement in support of House Resolution 1, the *For the People Act* ("H.R. 1" or "the Act"), a sweeping set of much-needed reforms to revitalize and restore faith in American democracy.

The Brennan Center for Justice enthusiastically supports H.R. 1. It is historic legislation. We cherish our democracy, the world's oldest. But for far too long, public trust has declined, as longstanding problems with our system of self-government have worsened. In this past election, we saw the result: some of the most brazen and widespread voter suppression in the modern era; super PACs and dark money groups spending well over $1 billion, raised mostly from a tiny class of megadonors; the ongoing effects of extreme gerrymandering; large-scale purges of the voter rolls; and a foreign adversary exploiting at-risk election technology in an attempt to meddle with our elections.

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[1] The Brennan Center for Justice at NYU Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice. I direct the Center's Democracy Program, which focuses on voting rights and election administration, money in politics and ethics, redistricting, and fair courts. Over more than two decades, the Brennan Center has built up a large body of nationally-respected research and work on these issues. This work has been widely cited by legislators, government agencies, courts, academic journals, and the media. The Brennan Center's experts have testified dozens of times before Congress and state legislatures around the country. Public officials across the political spectrum have relied on the Brennan Center's research in crafting innovative policies. Indeed, a number of the Center's signature policy proposals have been incorporated into the Act. I thank the staff of the Center's Democracy Program, and especially Senior Counsel Daniel I. Weiner, for assistance with this testimony. Michael Waldman, Max Feldman, Sidni Frederick and Natalie Giotta also provided important assistance.

But in 2018, we also saw citizens awaken to the urgent need for action. This Congress was elected with the highest voter turnout since 1914. Many of you took office with a pledge to reform democracy. And in states across the country, voters approved ballot measures aimed at unrigging the political process, tackling redistricting, voting, and money in politics, often by large bipartisan majorities.[2] Voters sent a clear message: the best way to respond to attacks on democracy is to strengthen it.

The public hunger for change demands a strong response. This legislation includes the key reforms to revitalize American democracy—including automatic voter registration, small donor public financing, redistricting reform, and a commitment to restore the Voting Rights Act. It is fitting that this bill is designated as the very first introduced in this Congress. Democracy reform must be a central project for our politics now and going forward.

This testimony focuses on what we view as the most critical provisions of H.R.1. It is based on years of research and advocacy in states across the country. Every single major provision of this legislation draws on strong and successful models already in use. These carefully honed proposals meet a specific, urgent need. We commend the House for taking up the entire Act and look forward to working with members to ensure its passage.

I. Voting Rights

In the Federalist Papers, Alexander Hamilton and James Madison laid down a standard for our democracy: "Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States."[3] For over two centuries, we have worked, but not fully succeeded, to live up to that ideal. Many have struggled, and continue to struggle, for the franchise. The right to vote is at the heart of effective self-government.

A. Voter Registration Modernization (Title I, Subtitle A, Parts 1, 2, and 3 & Title 2, Subtitle F)

One of the most important parts of H.R. 1 is a package to modernize registration. The centerpiece of that proposal is a plan for automatic voter registration (AVR). This bold, paradigm-shifting approach would add tens of millions to the rolls, cost less, and bolster security and accuracy. It is now the law in fifteen states and the District of Columbia.[4] It should be the law of the land.

Outdated Voter Registration Systems. More than many realize, an outdated registration system poses an obstacle to free and fair elections. One in four eligible Americans is not

[2] *See, e.g.*, Lee Drutman, "One Big Winner Last Night: Political Reform," *Vox*, Nov.7, 2018, https://www.vox.com/polyarchy/2018/11/7/18072204/2018-midterms-political-reform-winner.
[3] The Avalon Project: Documents in Law, History and Diplomacy, "Federalist No. 57," accessed Feb. 11, 2019, http://avalon.law.yale.edu/18th_century/fed57.asp.
[4] Thirteen states and D.C. enacted AVR legislatively or via ballot initiative; two states (Colorado and Georgia) adopted it administratively. *See* Brennan Center for Justice, "History of AVR & Implementation Dates," last updated Nov. 7, 2018, https://www.brennancenter.org/analysis/history-avr-implementation-dates.

registered to vote.[5] This quiet disenfranchisement is partly due to an out-of-date, and in some places ramshackle, voter registration system. The United States is the only major democracy in the world that requires individual citizens to shoulder the onus of registering to vote (and re-registering when they move).[6] In much of the country, voter registration still largely relies on error-prone pen and paper. In 2012, the Pew Center on the States estimated that roughly one in eight registrations in America is invalid or significantly inaccurate.[7]

These problems contribute to low voter turnout.[8] Each Election Day, millions of Americans go to the polls only to have trouble voting because of registration flaws.[9] Some find their names wrongly deleted from the rolls.[10] Others fall out of the system when they move.[11] One-quarter of American voters wrongly believe their registration is updated when they change their address with the U.S. Postal Service.[12] Election Protection, the nonpartisan voter assistance hotline, reported that registration issues were the second most common problem voters faced in both the 2018 and 2016 elections.[13] Registration errors affect more than those voters who are not

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[5] Pew Center on the States, *Inaccurate, Costly and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade*, 2012, 1; *see also* U.S. Census Bureau, *Voting and Registration in the Election of 2016*, 2017, Tbl. 1, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

[6] Jennifer S. Rosenberg, *Expanding Democracy: Voter Registration Around the World*, Brennan Center for Justice, 2009, 2-3, *available at* https://www.brennancenter.org/publication/expanding-democracy-voter-registration-around-world.

[7] Pew Center on the States, *Inaccurate, Costly and Inefficient*, 2012.

[8] According to a 2001 commission chaired by former Presidents Ford and Carter, "[t]he registration laws in the United States are among the most demanding in the democratic world … [and are] one reason why voter turnout in the United States is near the bottom of the developed world." *See* Carter and Ford: National Commission on Election Reform, *Reports of the Task Force on the Federal Election System*, 2001, 1-3. In too many parts of America this is still true.

[9] A Caltech/MIT study found that in 2008, approximately 3 million people tried to vote but could not because of registration problems, and millions more were thwarted by other issues. *See* R. Michael Alvarez, Stephen Ansolabehere, *et al.*, 2008 Survey of the Performance of American Elections, (2009), 59, https://elections.delaware.gov/pdfs/SPAE_2008.pdf; *see also* Stephen Ansolabehere, Testimony Before the U.S. Senate Rules Committee 19 (Mar. 11, 2009); Data from 2012 similarly demonstrates that millions of voters experienced registration problems at the polls. Charles Stewart III, *2012 Survey of the Performance of American Elections: Final Report*, 2013, 70, http://dvn.iq.harvard.edu/dvn/dv/measuringelections.

[10] Approximately 2.5 million voters experienced voter registration problems at the polls in the 2012 election. Charles Stewart III, *2012 Survey of the Performance of American Elections: Final Report*, Harvard Dataverse, 2013, ii, http://dvn.iq.harvard.edu/dvn/dv/measuringelections; U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey*, 2013, 8-10, https://www.eac.gov/assets/1/6/2012ElectionAdministrationandVoterSurvey.pdf. Stewart found 2.8% of 2012 voters experienced registration problems when they tried to vote. The Election Administration and Voting Survey found that 131,590,825 people voted in 2012 and that 65.5% percent voted in person on election day (56.5%) or early (9%). 65.5% of 131,590,825 voters. multiplied by the 2.8% figure from Stewart's study, yields 2,413,375.73 voters with registration problems at the polls in the 2012 election).

[11] Thomas Patterson, The Vanishing Voter: Public Involvement in an Age of Uncertainty (New York: Vintage Books, 2002), 178.

[12] Pew Center on the States, *Inaccurate, Costly and Inefficient*, 7.

[13] Laura Grace and Morgan Conley, *Election Protection 2018 Midterm Elections Preliminary Report*, Lawyers' Committee for Civil Rights Under Law, 2018, 4, https://lawyerscommittee.org/wp-content/uploads/2018/12/Election-Protection-Preliminary-Report-on-the-2018-Midterm-Elections.pdf; *see also* Wendy Weiser and Alicia Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, 6, *available at* https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_DEmocracy_FINALpdf.pdf; Walter Shapiro, Brennan Center for Justice, "Election Day Registration Could Cut Through many of the Arguments

on the rolls. As the bipartisan Presidential Commission on Election Administration found in 2014, registration problems cause delays at the polls and are a principal cause of long lines.[14]

Outdated registration systems also undermine election integrity. Incomplete and error-laden voter lists create opportunities for malefactors to defraud the system or disenfranchise eligible citizens. And they are far more expensive to maintain than more modern systems. Arizona's Maricopa County, for example, found that processing a paper registration cost 83 cents, compared to 3 cents for applications processed electronically.[15]

1. Automatic Voter Registration (Title I, Subtitle A, Part 2)

Automatic voter registration ("AVR") is a simple but transformative policy that could bring millions into the electoral process and energize our democracy. Under AVR, every eligible citizen who interacts with designated government agencies is automatically registered to vote, unless they decline registration. If adopted nationwide, it could add as many as 50 million new eligible voters to the rolls.[16]

AVR shifts registration from an "opt-in" to an "opt-out" approach. When eligible citizens give information to the government—for example, to get a driver's license, receive Social Security benefits, apply for public services, register for classes at a public university, or become naturalized citizens—they are automatically signed up to vote unless they decline. This reflects how the human brain works; behavioral scientists have shown that we are hard-wired to choose the default option presented to us.[17]

The policy also requires that voter registration information be electronically transferred to election officials, rejecting paper forms and snail mail. This significantly increases the accuracy of the rolls and drives down the costs of maintaining them.[18]

AVR Works. Oregon and California became the first states to adopt AVR in 2015.[19] Since then, thirteen more states and the District of Columbia followed—many with strong

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in the Voting Wars," last modified Oct. 16, 2018, https://www.brennancenter.org/blog/election-day-registration-could-cut-through-many-arguments-voting-wars.

[14] *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, 2014, http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.

[15] Christopher Ponoroff, *Voter Registration in a Digital Age*, Brennan Center for Justice, 2010, 12, *available at* https://www.brennancenter.org/publication/voter-registration-digital-age.

[16] Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf.

[17] *Id.* 6-7. Opt-out systems have led to increased program-participation rates across a variety of fields. *See, e.g.*, Alberto Abadie and Sebastian Gay, "The impact of presumed consent legislation on cadaveric organ donation: a cross-country study," *Journal of Health Economics* 25 (2006): 599–620, http://www.sciencedirect.com/science/article/pii/S016762960600004X (25-30% higher participation in organ donation programs); James J. Choi et al., "Defined Contribution Pensions: Plan Rules, Participant Decisions, and the Path of Least Resistance," *Tax Policy and the Economy* 16 (2002): 67-114, http://www.nber.org/papers/w8655.pdf (401(k) participation over 30 percentage points higher with automatic enrollment).

[18] Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, 11.

[19] Brennan Center for Justice, "History of AVR & Implementation Dates," last updated Nov. 7, 2018, https://www.brennancenter.org/analysis/history-avr-implementation-dates.

bipartisan support.[20] In Illinois, for example, the state legislature passed AVR unanimously, and a Republican Governor signed it into law.

The new system has proven extraordinarily successful. In nine states and the District of Columbia, AVR is already up and running. In Oregon, registration rates quadrupled at DMV offices.[21] In Vermont, registrations jumped 62 percent in the six months after AVR was put in place compared to the same period in the previous year.[22] One state, California, experienced minor glitches at first, because of a computer programming design flaw. But that error was quickly caught and contained, and according to the state's motor vehicle office has since been fixed.[23] California too has seen dramatic increases in voter registration. As the Brennan Center finds in a forthcoming report, AVR has dramatically increased registration rates in nearly every state.

There is strong reason to believe that the reform also boosts turnout.[24] Oregon saw the nation's largest turnout increase after it adopted AVR.[25] It had no competitive statewide races, and yet the state's turnout increased by 4 percent in 2016, which was 2.5 percentage points higher than the national average.[26] Other registration reforms have measurably improved turnout.[27] When voters are automatically registered, they not only are relieved of an obstacle to voting but also are exposed to direct outreach from election officials and others.[28] AVR sends a strong message that all eligible citizens are welcome and expected to participate in our democracy.

Election officials enthusiastically back AVR because it improves administration and saves money. Virtually every state to have transitioned to electronic transfer of registration information has reported substantial savings from reduced staff hours processing paper, and

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[20] Brennan Center for Justice, *Automatic Voter Registration*, last updated Nov. 7, 2018, https://www.brennancenter.org/analysis/automatic-voter-registration.

[21] Jonathan Brater, Brennan Center for Justice, "Update: Oregon Keeps Adding New Voters at Torrid Pace," last modified Aug. 19, 2016, https://www.brennancenter.org/analysis/update-oregon-keeps-adding-new-voters-torrid-pace.

[22] Christopher Famighetti, Brennan Center for Justice, "First Look Shows Automatic Voter Registration Was a Success in Vermont," last updated Aug. 17, 2017, https://www.brennancenter.org/blog/first-look-shows-automatic-voter-registration-was-success-vermont.

[23] Furthermore, this programming error was completely unrelated to the state's AVR policy. Rather, it resulted from the rollout of the state's new internal electronic interface. The state is engaging in ongoing audits of its system to make sure there are no further problems.

[24] Wendy Weiser, "Automatic Voter Registration Boosts Political Participation," *Stanford Social Innovation Review*, Jan. 28, 2016, https://ssir.org/articles/entry/automatic_voter_registration_boosts_political_participation#.

[25] Rob Griffin et al., *Who Votes with Automatic Voter Registration?*, Center for American Progress, 2017, https://www.americanprogress.org/issues/democracy/reports/2017/06/07/433677/votes-automatic-voter-registration/.

[26] United States Elections Project, "2016 November General Election Turnout Rates," last accessed Apr. 23, 2018, http://www.electproject.org/2016g; United States Election Project, "2012 November General Election Turnout Rates," last modified September 3, 2014, http://www.electproject.org/2012g.

[27] For example, one study found that simply making registration portable can boost turnout by more than 2 percent. Michael McDonald, "Portable Voter Registration," *Political Behavior* 30 (2008): 491-501, https://www.jstor.org/stable/40213330?seq=1#page_scan_tab_contents.

[28] Donald Green et al., "Field Experiments and the Study of Voter Turnout," Journal of Elections Public Opinion and Parties 23 (2013): 27-48, https://www.researchgate.net/publication/271937319_Field_Experiments_and_the_Study_of_Voter_Turnout.

lower printing and mailing expenses.[29] Eliminating paper forms improves accuracy, reduces voter complaints about registration problems, and reduces the need for the use of provisional ballots.[30]

Voters strongly support the reform. According to recent polling, 65 percent of Americans favor it.[31] Michigan and Nevada adopted AVR this past election by popular referendum, with overwhelming support from voters, including Democrats, Republicans, and Independents.[32] Alaska voters passed AVR in 2016 with nearly 64 percent of the vote—at the same time they voted to put Donald Trump in the White House.

AVR Should be the National Standard. H.R. 1 sensibly makes AVR a national standard, building on past federal reforms to the voter registration system.[33] Critically, the Act requires states to put AVR in place at a wide variety of government agencies beyond state motor vehicle agencies, including those that administer Social Security or provide social services, as well as higher education institutions. It also requires a one-time "look back" at agency records to register individuals who have previously interacted with government agencies. And it protects voters' sensitive information from public disclosure.

The Act includes multiple safeguards to ensure that ineligible voters are not registered. The government agencies designated for AVR regularly collect information about individuals' citizenship and age, and they must obtain an additional affirmation of U.S. citizenship during the registration transaction. Before anyone is registered, agencies must inform individuals of eligibility requirements and the penalties for illegal registration and offer them the opportunity to opt out. Election officials too are required to send individuals a follow up notice by mail. In light of these checks, there is no basis for critics' alarmist speculation that AVR would result in an increase in the registration of ineligible persons. Indeed, election officials report that AVR's elimination of paper forms *enhances* the accuracy of the rolls. As a precaution, H.R.1 also includes protections in the unlikely event that an ineligible person is inadvertently registered, to ensure that they are not harmed as a result. We strongly urge Congress to pass AVR.

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[29] Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, 11.
[30] *Id.* 10-11.
[31] Pew Research Center, "Elections in America: Concerns Over Security, Divisions Over Expanding Access to Voting," last modified Oct. 29, 2018, http://www.people-press.org/2018/10/29/elections-in-america-concerns-over-security-divisions-over-expanding-access-to-voting/
[32] New York Times, "Michigan Election Results," last modified Jan. 28, 2019, https://www.nytimes.com/interactive/2018/11/06/us/elections/results-michigan-elections.html; New York Times "Nevada Election Results," last modified Jan. 29, 2019, https://www.nytimes.com/interactive/2018/11/06/us/elections/results-nevada-elections.html; New York Times "Alaska Ballot Measure 1—Allow Qualified Individuals to Register to Vote When Applying for a Permanent Fund Dividend—Results: Approved," last modified Aug. 1, 2017, https://www.nytimes.com/elections/2016/results/alaska-ballot-measure-1-pfd-application-voter-reg.
[33] The National Voter Registration Act of 1993 required states to offer voter registration at their motor vehicle, public assistance, and disabilities agencies, among other things. 52. U.S.C. §§ 20504-20506. H.R.1's AVR provisions build on this by expanding the agencies that offer voter registration and by making the registration process paperless at those agencies. The Help America Vote Act of 2002 pushed states into the digital age, by requiring them to create a centralized, computerized voter registration list. 52 U.S.C. § 21083. H.R.1 extends the benefits of that legislation by seamlessly transmitting voter information between registration agencies and the election officials that control the computerized voter list.

2. Same-Day Registration (Title I, Subtitle A, Part 3)

Same-day registration (SDR) allows eligible citizens to register and vote on the same day. It is a strong complement to AVR, available to those eligible voters who have not interacted with government agencies or whose information has changed since they did. Because it provides eligible Americans an opportunity to vote even if their names are not on the voter rolls, SDR safeguards against improper purges, registration system errors, and cybersecurity attacks.

SDR has been used successfully in several states since the 1970s. Today, seventeen states and the District of Columbia offer some form of same day registration, either on election day, during early voting, or both.[34] Studies indicate that SDR boosts voter turnout by 5 to 7 percent.[35] And it is highly popular with voters. This past November, supermajorities of voters in Michigan and Maryland passed ballot measures that, respectively, implemented and expanded same day registration. According to recent polls, more than 60 percent of Americans support SDR.[36] As part of the full package of reforms, SDR's use would be limited, since AVR would capture the vast majority of voters well before Election Day. Taken together, AVR and SDR would ensure that no eligible voter is left out.

3. Online Registration (Title I, Subtitle A, Part 1)

H.R.1 also requires states to offer secure and accessible online registration. At a time when many Americans do everything from banking to reviewing medical records online, voters want this convenient method of registration. The online registration provisions in H.R. 1 would let all voters register, update registration information, and check registrations online. They also would ensure that these benefits are available to citizens who do not have driver's licenses.

In addition to offering voter convenience, online registration saves money and improves voter roll accuracy. Washington State reported savings of 25 cents with each online registration (for a total of about $176,000 in savings) in the first two years of the program, and its local officials save between 50 cents and two dollars per online transaction.[37] Election officials also

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[34] National Conference of State Legislatures, "Same Day Voter Registration," last modified Jan. 25, 2019, http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx.

[35] Michael McDonald, "Portable Voter Registration," *Political Behavior* 30 (2008): 499, 495-96, https://www.jstor.org/stable/40213330?seq=1#page_scan_tab_contents; *see also* Jacob R. Neisheisel and Barry C. Burden, "The Impact of Election Day Registration On Voter Turnout and Election Outcomes," *American Politics Research* 40 (2012): 636, 638-39 (citing studies finding that same-day registration increases turnout by 3 to 6 percent, and by as much as 14 percent). In the 2016 election, voter turnout was, on average, 7 percent higher in states with SDR than in those without. *See* George Pillsbury and Julian Johannesen, *America Goes to the Polls 2016: A Report on Voter Turnout in the 2016 Election*, Nonprofit Vote, 2016, *available at* https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf/; Mijin Cha and Liz Kennedy, *Millions to the Polls: Same Day Registration*, Demos, 2014.

[36] Pew Research Center, "Elections in America"; "PRRI/The Atlantic 2018 Voter Engagement Survey," *The Atlantic*, July 17, 2018, https://www.prri.org/wp-content/uploads/2018/07/PRRI-The-Atlantic-2018-Voter-Engagement-Survey-Topline.pdf?utm_source=Democracy+Collaborative+at+ReThink+Media&utm_campaign=774f203b91-EMAIL_CAMPAIGN_2019_02_01_09_27&utm_medium=email&utm_term=0_3e305aa083-774f203b91-391816881.

[37] *See* Holly Maluk et al., *Voter Registration in a Digital Age: 2015 Update*, Brennan Center for Justice, 2015, 6.

report that letting voters enter their own information significantly reduces the likelihood of incomplete applications and mistakes.[38]

It is not surprising, therefore, that online registration is incredibly popular and has spread rapidly. In 2010, only six states offered online voter registration. Now, thirty-eight states do.[39] It is time to bring the reform to the whole country.

4. Voter Purge Protections (Title I, Subtitle A; Title II, Subtitle F)

The Act curbs illegal efforts to purge eligible voters from the rolls, addressing one of the biggest problems we saw in the last election.

Voter purges—the large-scale deletion of voters' names from the rolls—are on the rise.[40] The Brennan Center has calculated that almost 4 million more names were purged from the rolls between 2014 and 2016 than between 2006 and 2008.[41] Purge activity has increased at a substantially greater rate in states that were subject to federal oversight under the Voting Rights Act prior to the Supreme Court's decision in *Shelby County v. Holder*.[42] Georgia, for example, purged 1.5 million voters between the 2012 and 2016 elections—double its rate between 2008 and 2012. Texas purged 363,000 more voters between 2012 and 2014 than it did between 2008 and 2010. We found that *2 million fewer voters* would have been purged between 2012 and 2016 if jurisdictions previously subject to pre-clearance had purged at the same rate as other jurisdictions.[43]

Purges that are implemented incorrectly disenfranchise legitimate voters and cause confusion and delay at the polls. Last month, for example, the Texas Secretary of State sent lists of approximately 95,000 alleged non-citizens to county officials for purging—but within days, the state was forced to retreat, once it became clear that the lists were rife with inaccuracies.[44] In 2016, New York election officials erroneously deleted hundreds of thousands from the voter rolls, with no public warning and little notice to those who had been purged.[45] The same year, thousands of Arkansas voters were purged because of supposed felony convictions—but the lists

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[38] *Id.* 8.
[39] Brennan Center for Justice, "VRM in the States: Online Registration," last modified Feb. 3, 2017, https://www.brennancenter.org/analysis/vrm-states-online-registration.
[40] Myrna Pérez, "How the Midterm Elections May Be Compromised," *New York Times*, July 19, 2018, https://www.nytimes.com/2018/07/19/opinion/midterms-voting-purges-elections-registration.html; *see also* Kevin Morris and Myrna Pérez, Brennan Center for Justice, "Florida, Georgia, North Carolina Still Purging Voters at High Rates," last modified Oct. 1, 2018, https://www.brennancenter.org/blog/florida-georgia-north-carolina-still-purging-voters-high-rates.
[41] Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice, 2018, 3, *available at* https://www.brennancenter.org/publication/purges-growing-threat-right-vote; *see also* Kevin Morris, Brennan Center for Justice, "How Purges Threaten to Disenfranchise Voters Under the Radar," last modified July 20, 2018, https://www.brennancenter.org/blog/how-purges-threaten-disenfranchise-voters-under-radar.
[42] Brater et al., *Purges,* 3-5.
[43] *Id.* 1.
[44] Sean Morales-Doyle and Rebecca Ayala, Brennan Center for Justice, "There's Good Reason to Question Texas' Voter Fraud Claims," last modified Jan. 29, 2019, https://www.brennancenter.org/blog/theres-good-reason-question-texas-voter-fraud-claims.
[45] Brater et al., *Purges,* 5-6.

that were used were highly inaccurate, and included many voters who had never committed a felony or had had their voting rights restored.[46]

Purge practices can be applied in a discriminatory manner that disproportionately affects minority voters.[47] In particular, matching voter lists with other government databases to ferret out ineligible voters can generate discriminatory results if the matching is done without adequate safeguards. African-American, Asian-American, and Latino voters are much more likely than Caucasians to have one of the most common 100 last names in the United States, resulting in a higher rate of false positives.[48]

The Act puts strong protections in place to prevent improper purges. First, it puts new guardrails on the use of inter-state databases that purport to identify voters that have re-registered in a new state, but that have been proven to produce deeply flawed data. Second, it prohibits election officials from relying on a citizen's failure to vote in an election as evidence of ineligibility to vote. The Brennan Center supports these protections and urges states to provide additional notice to voters prior to purging them so eligible voters can intervene before they are removed from the rolls.

B. Commitment to Restore the Voting Rights Act (Title II, Subtitle A)

As recent experience makes clear, Congress must restore the full protections of the Voting Rights Act of 1965 ("VRA"), which the U.S. Supreme Court hobbled in 2013 in *Shelby County*.[49] Thanks in part to *Shelby County*, the recent midterm elections were marred by some of the worst voter suppression of the modern era,[50] including large-scale voter purges;[51] polling place and early voting site closures, especially in minority neighborhoods; burdensome voter ID requirements that excluded IDs possessed by minority citizens;[52] unnecessarily strict registration rules like Georgia's "exact match" policy, under which 53,000 voter registrations—the overwhelming majority of which belonged to African-Americans, Latinos, and Asian-Americans—were put on hold;[53] and suspicious rejections of absentee ballots;[54] among other

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[46] *Id.* 5.
[47] Myrna Pérez, *Voter Purges*, Brennan Center for Justice, 2008, 31-32, *available at* https://www.brennancenter.org/publication/voter-purges.
[48] Brater et al., *Purges*,7.
[49] Shelby County v. Holder, 570 U.S. 529 (2013).
[50] Zachary Roth and Wendy Weiser, Brennan Center for Justice, "This Is the Worst Voter Suppression We've Seen in the Modern Era," last modified Nov. 2, 2018, http://www.brennancenter.org/blog/worst-voter-suppression-weve-seen-modern-era; *see also* Rebecca Ayala, Brennan Center for Justice "Voting Problems 2018," Brennan Center for Justice, last modified Nov. 5, 2018, https://www.brennancenter.org/blog/voting-problems-2018.
[51] Morris and Pérez, "Florida, Georgia, North Carolina Still Purging Voters at High Rates"; Brater et al., *Purges*, 3-5; Ayala, "Voting Problems 2018."
[52] Perhaps the most striking example was a North Dakota law that required voters to show IDs with a residential street address, despite the fact that the state's Native American communities often do not have such addresses. Although this requirement was briefly halted by a federal district court, the Eighth Circuit Court of Appeals ultimately upheld the requirement for the 2018 election. *See* Brakebill v. Jaeger, 905 F.3d 553, 558 (8th Cir. 2018).
[53] Jonathan Brater and Rebecca Ayala, Brennan Center for Justice, "What's the Matter with Georgia?," Oct. 12, 2018, https://www.brennancenter.org/blog/whats-matter-georgia.
[54] Christopher Ingraham, "Signature Mismatches, Missing Birthdays and Errant Spouses: Why Thousands of Absentee Ballots Were Tossed Out in Georgia," *Washington Post*, Nov. 16, 2018,

things.[55] We are therefore pleased that H.R. 1 affirms a strong commitment to restore the full protections of the Voting Rights Act.

The VRA is widely regarded as the single most effective piece of civil rights legislation in our nation's history.[56] As recently as 2006 it won reauthorization with overwhelming bipartisan support.[57] For nearly five decades, the linchpin of the VRA's success was the Section 5 pre-clearance provision, which required certain states with a history of discriminatory voting practices to obtain approval from the federal government for any voting rules changes before putting them into effect. Section 5 deterred and prevented discriminatory changes to voting rules right up until the time the Supreme Court halted its operation. Between 1998 and 2013, Section 5 blocked 86 discriminatory changes (13 in the final 18 months before the *Shelby County* ruling), caused hundreds more to be withdrawn after Justice Department inquiry, and prevented still more from being put forward because policymakers knew they would not pass muster.[58]

Shelby County eviscerated Section 5 by striking down the "coverage formula" that determined which states were subject to pre-clearance. That resulted in a predictable flood of discriminatory voting rules, contributing to a now decade-long trend in the states of restrictive voting laws, which the Brennan Center has documented extensively.[59] Within hours of the Court's decision, Texas announced that it would implement what was then the nation's strictest voter identification law—a law that had previously been denied preclearance because of its discriminatory impact. Shortly afterward, Alabama, Arizona, Florida, Mississippi, North Carolina, and Virginia also moved ahead with restrictive voting laws or practices that previously would have been subject to pre-clearance.[60] In the years since, federal courts have repeatedly found that new laws passed after *Shelby* made it harder for minorities to vote, some intentionally so.[61] Our research regarding last year's election confirmed the persistence of voter suppression

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https://www.washingtonpost.com/business/2018/11/16/signature-mismatches-missing-birthdays-errant-spouses-why-thousands-absentee-ballots-were-tossed-out-georgia/?utm_term=.e43b354ee61b.

[55] Ayala, "Voting Problems 2018"; *see also* Peter Dunphy, Brennan Center for Justice, "When It Comes to Voter Suppression, Don't Forget About Alabama," Nov. 5, 2018, https://www.brennancenter.org/blog/when-it-comes-voter-suppression-dont-forget-about-alabama.

[56] *See* U.S. Dep't of Justice, "The Effect of the Voting Rights Act," last updated June 19, 2009, https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0.

[57] The vote was unanimous in the Senate and 390-33 in the House. *See* U.S. Senate, "H.R.9 Vote Summary," July 20, 2006, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212; U.S. House of Representatives, "Final Vote Results for Roll Call 374," July 13, 2006, http://clerk.house.gov/evs/2006/roll374.xml. The reauthorization was signed into law by President George W. Bush. *See* The White House, Press Release, "Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006," July 27, 2006, https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html.

[58] Tomas Lopez, Shelby County*: One Year Later*, Brennan Center for Justice, 2014, https://www.brennancenter.org/analysis/shelby-county-one-year-later.

[59] Wendy Weiser and Max Feldman, *The State of Voting 2018*, Brennan Center for Justice, 2018; Brennan Center for Justice, "New Voting Restrictions in America," accessed Jan. 1, 2019, https://www.brennancenter.org/new-voting-restrictions-america; Brennan Center for Justice, "Voting Laws Roundup 2019," last modified Jan. 23, 2019, https://www.brennancenter.org/analysis/voting-laws-roundup-2019; Wendy Weiser and Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice, 2011, http://www.brennancenter.org/publication/voting-law-changes-2012.

[60] Lopez, Shelby County.

[61] Danielle Lang and J. Gerald Hebert, "A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation," *Yale Law Journal Forum* 127 (2017 – 2018): 780 n.4. For example, the Fourth Circuit Court of Appeals

and the willingness of too many state officials to continue developing new tactics to keep people from voting.[62]

Section 2 of the VRA—which prohibits discriminatory voting practices nationwide and permits private parties and the Justice Department to challenge those practices in court—remains an important bulwark against discrimination. But Section 2 lawsuits are not a substitute for pre-clearance. They are far more lengthy and expensive, and often do not yield remedies for impacted voters until after an election (or several) is over.[63] Our case against Texas's 2011 voter ID law illustrates this point.[64] The law initially did not go into effect because a three-judge federal court refused to preclear it under Section 5. But that decision was vacated after *Shelby County*, spurring multi-year litigation under Section 2. Despite the fact that every court that has considered the law found it discriminatory (and a federal district court found it intentionally so), the law remained in effect until a temporary remedy was ordered for the November 2016 election. In the interim, Texans voted in 3 federal and 4 statewide elections and numerous local elections under discriminatory rules.

Congress has the power to address these problems, by updating the VRA's coverage formula, examining its coverage, and restoring the VRA to its full power. As this Committee recognizes, any new coverage formula must be supported by a thorough legislative record. We commend the commitment to restoring the VRA reflected in H.R.1, and we urge Congress to make development of this record and passage of a renewed VRA a top priority.

C. Nationwide Early Voting (Title I, Subtitle H)

H.R.1 also provides all voters with the flexibility to vote early during the two weeks before Election Day, which will boost turnout and make it easier for hard-working Americans to vote.

Holding elections on a single workday in mid-November is a relic of the nineteenth century; it was done for the convenience of farmers who had to ride a horse and buggy to the county seat in order to cast a ballot.[65] This no longer works for many Americans, who must find time to cast a ballot between jobs, childcare, and the everyday obligations of modern life.

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found that a 2013 voting law passed by North Carolina targeted African-American voters with "surgical precision." N. Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

[62] Roth and Weiser, "This Is the Worst Voter Suppression We've Seen in the Modern Era"; Ayala, "Voting Problems 2018"; Makeda Yohannes, Brennan Center for Justice, "New Hampshire's New Voting Law Threatens Student Voters," last modified July 18, 2018, https://www.brennancenter.org/blog/new-hampshires-new-voting-law-threatens-student-voters; Brater and Ayala, "What's the Matter with Georgia?".

[63] Lopez, Shelby County.

[64] The Brennan Center represented the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives, along with the Lawyers' Committee for Civil Rights Under Law and other co-counsel. The case was consolidated with several others. For more information, see https://www.brennancenter.org/legal-work/naacp-v-steen.

[65] Weiser and Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, 7.

Early voting works well. Thirty-nine states offer some opportunity to vote in person before Election Day.[66] And more than a dozen of those states offer early voting for a period comparable to or greater than the two-week period leading to Election Day required by H.R. 1.[67]

Despite the popularity of early voting, the absence of a national standard means that some states have few or inconsistent early voting hours, and others have been able to engage in politicized cutbacks to early voting.[68] Over the past decade, multiple states have reduced early voting days or sites used disproportionately by African-American voters (such as the elimination of early voting on the Sunday before Election Day), and federal courts have struck down early voting cutbacks in North Carolina and Wisconsin because they were intentionally discriminatory.[69]

H.R.1 will make voting more manageable by requiring that states provide two weeks of early voting and equitable geographic distribution of early voting sites. A guaranteed early voting period will reduce long lines at the polls and ease the pressure on election officials and poll workers on Election Day, by spreading out the days on which people cast their ballots. For this reason, it was one of the principal recommendations of the bipartisan Presidential Commission of Election Administration for reducing long lines.[70] It will also make it easier for election officials to spot and solve problems like registration errors or voting machine glitches before they impact most voters.[71] For these reasons, election officials report high satisfaction with early voting. The Brennan Center's research indicates that two weeks is an effective minimum time period for generating the benefits of early voting.[72]

Early voting is popular with voters too, with study after study showing a significant positive effective on voter satisfaction.[73] It is a critical element of a convenient and modern voting system.

D. Voting Rights Restoration (Title I, Subtitle E)

The Democracy Restoration Act in Title I, Subtitle E of H.R. 1 would restore federal voting rights to citizens with past criminal convictions living in our communities, strengthening those communities, offering a second chance to those who have paid their debts to society, and removing the stain of a policy born out of Jim Crow.

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[66] National Conference of State Legislatures, "Early and Absentee Voting," last modified Jan. 25, 2019, http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx
[67] National Conference of State Legislatures, "State Laws Governing Early Voting," last modified Jan. 25, 2019, http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx.
[68] Brennan Center for Justice, "New Voting Restrictions in America."
[69] NC State Conference of NAACP v. McCrory, 831 F.3d 204, 219; One Wisconsin Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016).
[70] *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, 2014, http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.
[71] Diana Kasdan, *Early Voting: What Works*, Brennan Center for Justice, 2013, 5-6, *available at* https://www.brennancenter.org/publication/early-voting-what-works.
[72] *Id.* 12
[73] *Id.* 7-8.

Harms of Current Disenfranchisement Laws. A confusing patchwork of discriminatory disenfranchisement laws cause profound harm across the country. Nationally, state laws deny more than 4.7 million citizens the right to vote because of a criminal conviction.[74] 3.3 million of these citizens are no longer incarcerated; they live in our communities, work, pay taxes, and raise families.[75]

Disenfranchisement laws vary dramatically from state to state. They range from permanent disenfranchisement for everyone convicted of a felony in Iowa and Kentucky, to no disenfranchisement at all in Vermont and Maine. In between these extremes there are states that distinguish between different types of felonies, states that treat repeat offenders differently, and varying rules on what parts of a sentence must be completed before rights are restored.[76] Navigating this patchwork of state laws causes confusion for everyone—including election officials and prospective voters—about who is eligible to vote. The result is large-scale *de facto* disenfranchisement of voters who are eligible but do not know it.[77]

Regardless of these particulars, disenfranchisement laws are discriminatory and especially impact African Americans. In 2016, one in 13 voting-age Black citizens could not vote, a disenfranchisement rate more than 4 times that of all other Americans.[78] In three states the ratio was one in five.[79] This unequal impact is no accident—many states' criminal disenfranchisement laws are rooted in nineteenth-century attempts to evade the Fifteenth Amendment's mandate that Black men be given the right to vote.[80]

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[74] Scholars previously estimated that about 6.1 million citizens were disenfranchised nationwide. *See* Christopher Uggen et al., *6 Million Lost Voters: State-level Estimates of Felony Disenfranchisement*, The Sentencing Project, 2016, 4. Florida accounted for approximately 1.5 million of these because its constitution permanently disenfranchised everyone convicted of a felony. *See id.* Since then, in November 2018, Florida voters approved the Voting Restoration Amendment, which restores voting rights to anyone who has completed all terms of their sentence. *See* Fl. Const. Art. VI, § 4 (2019). Unless otherwise noted, all of the numbers cited in this testimony adjust for the estimated 1.4 million voters whose rights were or should be restored by that change. *See* Lori Rozsa, "'A Joyous Day' Ahead as 1.4 Million Florida Ex-Felons Have Voting Rights Restored," *Washington Post*, Jan. 5, 2019, https://www.washingtonpost.com/national/a-joyous-day-ahead-as-14-million-florida-ex-felons-have-voting-rights-restored/2019/01/05/58650ee2-106f-11e9-8938-5898adc28fa2_story.html?noredirect=on&utm_term=.b1dbaea9c4a0.

[75] Brennan Center for Justice, "Restoring Voting Rights," https://www.brennancenter.org/issues/restoring-voting-rights.

[76] "Criminal Disenfranchisement Laws Across the United States," Brennan Center for Justice, last modified December 7, 2018, accessed February 8, 2019, https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states.

[77] Erika Wood and Rachel Bloom, *De Facto Disenfranchisement*, American Civil Liberties Union and Brennan Center for Justice, 2008, http://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf. The ACLU found that many elections officials misunderstand their state's felony disenfranchisement laws, meaning that "untold hundreds of thousands of eligible, would-be voters throughout the country" may be getting turned away by misinformation.

[78] Uggen et al., *6 Million Lost Voters*, 3. This number has not been adjusted for the passage of the Voting Restoration Amendment in Florida.

[79] *Id.* These states are Kentucky, Tennessee, and Virginia. The ratio in Florida was one in five as well but has likely improved as a result of the passage of the Voting Restoration Amendment.

[80] Erin Kelley, *Racism and Felony Disenfranchisement*, Brennan Center for Justice, 2017, 2, *available at* https://www.brennancenter.org/publication/racism-felony-disenfranchisement-intertwined-history.

This disproportionate impact on people of color means that all too often entire communities are shut out of our democracy. Disenfranchisement laws have a negative ripple effect beyond those people within their direct reach. Research suggest that these laws may affect turnout in neighborhoods with high incarceration rates, even among citizens who are eligible to vote.[81] This is not surprising. Children learn civic engagement habits from their parents. Neighbors encourage each other's political participation. And when a significant portion of a community is disenfranchised, it sends a damaging message to others about the legitimacy of democracy and the respect given to their voices.

The Promise of Voting Rights Restoration. H.R. 1 adopts a simple and fair rule: if you are out of prison and living in the community, you get to vote in federal elections. It also requires states to provide written notice to individuals with criminal convictions when their voting rights are restored.

These changes would have a profoundly positive impact on affected citizens and society. We all benefit from the successful reentry of formerly incarcerated citizens into our communities. Restoring their voting rights sends the message that they are truly welcome to participate and are entitled to the respect, dignity and responsibility of full citizenship. That message pays concrete dividends. One study found "consistent differences between voters and non-voters in rates of subsequent arrests, incarceration, and self-reported criminal behavior."[82] For this reason, criminal justice professionals support automatic restoration of voting rights upon release from prison.[83]

Voting rights restoration also benefits the electoral process, by reducing confusion and easing the burdens on elections officials to determine who is eligible to vote. If every citizen living in the community can vote, officials have a bright line rule to apply. This clear rule also eliminates one of the principal bases for erroneous purges of eligible citizens from the voting rolls.

For these reasons, rights restoration is immensely popular among Americans of all political stripes. This past November, 65 percent of Florida voters passed a ballot initiative restoring voting rights to 1.4 million of their fellow residents, with a massive groundswell of bipartisan support.[84] Governor Kim Reynolds, Republican of Iowa, recently endorsed a similar

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[81] Erika Wood, *Restoring the Right to Vote*, Brennan Center for Justice, 2009, 12, *available at* https://www.brennancenter.org/publication/restoring-right-vote.

[82] Christopher Uggen & Jeff Manza, "Voting and Subsequent Crime and Arrest: Evidence from a Community Sample," *Columbia Human Rights Law Review* 36 (2004): 193.

[83] *See, e.g.*, *Resolution Supporting Restoration of Voting Rights Released*, American Probation and Parole Association, 2007, https://appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IE_NewsRelease&wps_key=a587deaf-9cbf-4efd-bd8d-025c14143f65; *Resolution on Restoring Voting Rights*, Association of Paroling Authorities International, 2008, http://www.apaintl.org/about/resolutions.html.

[84] *See, e.g.*, "Voting Rights Restoration Efforts in Florida," Brennan Center for Justice, last modified November 7, 2018, accessed February 8, 2019, https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida; Kevin Morris, "A Transformative Step for Democracy in Florida," Brennan Center for Justice, last modified November 6, 2018, accessed February 8, 2019, https://www.brennancenter.org/blog/transformative-step-democracy-florida; Myrna P*érez*, "What Victory in Florida Means to Me," Brennan Center for Justice, last modified November 7, 2018, accessed February 8, 2019, https://www.brennancenter.org/blog/what-victory-florida-means-me; "Florida

constitutional amendment in her state.[85] And over the past two decades, fourteen states have restored voting rights to segments of the population.[86]

Congress has the authority to act. The Supreme Court has previously upheld congressional expansion of the pool of voters qualified for federal elections when Congress lowered the voting age to 18.[87] Here, there are three sources of congressional power: the Elections Clause of Article I, section 4, the Fourteenth Amendment, and the Fifteenth Amendment. As detailed below, Congress has very broad powers to regulate federal elections under the Elections Clause.[88] Because many state criminal disenfranchisement laws were enacted with a racially discriminatory intent and have a racially discriminatory impact, Congress can also act under its powers to enforce the Fourteenth and Fifteenth Amendments, which guarantee equal protection of the laws and prohibit denial of the right to vote on the basis of race, respectively. The Supreme Court has described this enforcement power as "a broad power indeed," one that gives Congress a "wide berth" to devise appropriate remedial and preventative measures for discriminatory actions.[89]

E. Prohibiting Deceptive Practices (Title I, Subtitle D)

The Act increases protections against, and remedies for, efforts to use deception or intimidation to prevent people from voting or registering to vote. Unfortunately, attempts to suppress votes through deception and intimidation remain all too widespread. Every election cycle, journalists and non-partisan Election Protection volunteers document attempts at voter deception and intimidation.[90] This is not a new problem, but now social media platforms make the mass dissemination of misleading information easy and allow for perpetrators to target particular audiences with precision. In a recent analysis for the Brennan Center, for example, University of Wisconsin Professor Young Mie Kim documented hundreds of messages on Facebook and Twitter designed to discourage or prevent people from voting in the 2018 election.[91]

Amendment 4, Voting Rights Restoration for Felon Initiative (2018)," Ballotpedia, accessed February 8, 2019, https://ballotpedia.org/Florida_Amendment_4,_Voting_Rights_Restoration_for_Felons_Initiative_(2018).

[85] "Reynolds Releases Bill to Restore Felon Voting Rights," *Associated Press*, January 22, 2019, https://www.apnews.com/c2e817c35d6e48a1b7d678c6f5c69843.

[86] Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, The Sentencing Project, 2018, 3.

[87] Oregon v. Mitchell, 400 U.S. 112 (1970).

[88] *See* Part VI.

[89] Tennessee v. Lane, 541 U.S. 509, 518, 520 (2004).

[90] *See e.g*\Ayala, "Voting Problems 2018"; Sean Morales-Doyle and Sidni Frederick, "Intentionally Deceiving Voters Should Be a Crime," *The Hill*, Aug. 8, 2018, https://thehill.com/opinion/civil-rights/400941-intentionally-deceiving-voters-should-be-a-crime; Wendy Weiser and Adam Gitlin, *Dangers of "Ballot Security" Operations: Preventing Intimidation, Discrimination, and Disruption*, Brennan Center for Justice, 2016, *available at* https://www.brennancenter.org/analysis/dangers-ballot-security-operations-preventing-intimidation-discrimination-and-disruption. Wendy Weiser and Vishal Agraharkar, *Ballot Security and Voter Suppression: What It Is And What the Law Says*, Brennan Center for Justice, 2012, *available at* https://www.brennancenter.org/publication/ballot-security-and-voter-suppression.

[91] Young Mie Kim, Brennan Center for Justice, "Voter Suppression Has Gone Digital," last modified Nov. 20, 2018, https://www.brennancenter.org/blog/voter-suppression-has-gone-digital.

While federal law already prohibits voter intimidation, fraud, and intentional efforts to deprive others of their right to vote,[92] existing laws have not been strong enough to deter misconduct. Moreover, no law specifically targets deceptive practices, nor is there any authority charged with investigating such practices and providing voters with corrected information.

H.R.1 protects voters from deception and intimidation in three ways. First, it increases criminal penalties for false and misleading statements and intimidation aimed at impeding or preventing a person from voting or registering to vote. Second, it empowers citizens to go to court to stop voter deception. Third, it blunts the effect of deceptive information by requiring designated government officials to disseminate accurate, corrective information to voters. These provisions will give federal law enforcement agencies and private citizens the opportunity to stop bad actors from undermining our elections. We encourage Congress to enact them.

II. Campaign Finance

A. Small Donor Public Financing (Title V, Subtitles B and C)

H.R.1 also dramatically overhauls federal campaign finance law. The centerpiece of these reforms is small-donor public financing, which has the potential to fundamentally transform political campaigns and counteract the worst effects of the Supreme Court's now-infamous decision in *Citizens United*.[93]

Big Money Undermines American Democracy. Thanks to *Citizens United* and related cases, a small class of wealthy donors has achieved unprecedented clout in American politics.[94] Super PACs, political committees that can raise and spend unlimited funds, poured more than $3 billion into federal elections last year; of that total, roughly a third can come from a mere 11 donors.[95] Another $1 billion has come from dark money groups that keep their donors secret, but which we know are funded by many of the same donors who back super PACs.[96] While all of these groups are supposed to operate independently of candidates and parties, many actually

[92] Weiser and Gitlin, *Dangers of "Ballot Security Operations*.
[93] *See* Adam Skaggs and Fred Wertheimer, *Empowering Small Donors in Federal Elections*, Brennan Center for Justice, 2012, *available at* https://www.brennancenter.org/publication/empowering-small-donors-federal-elections.
[94] Ian Vandewalker and Lawrence Norden, "Small Donors Still Aren't as Important as Wealthy Ones," *The Atlantic*, Oct. 18, 2016, https://www.theatlantic.com/politics/archive/2016/10/campaign-finance-fundraising-citizens-united/504425/ (showing the portion of contributions from donors of $100,000 or more increasing in presidential cycles since 2010); Daniel I. Weiner, Citizens United *Five Years Later*, Brennan Center for Justice, 2015, 3 (explaining how *Citizens United* changed the legal landscape for campaign finance), *available at* https://www.brennancenter.org/sites/default/files/analysis/Citzens_United_%20Five_Years_Later.pdf.
[95] Michelle Ye Hee Lee, "Eleven donors have plowed $1 billion into super PACs since they were created," *Washington Post*, Oct. 26, 2018, https://www.washingtonpost.com/politics/eleven-donors-plowed-1-billion-into-super-pacs-since-2010/2018/10/26/31a07510-d70a-11e8-aeb7-ddcad4a0a54e_story.html.
[96] Center for Responsive Politics, "Dark Money Basics," https://www.opensecrets.org/dark-money/basics; Ashley Balcerzak, "How Democrats Use Dark Money – and Win Elections," *NBC*, Feb. 20, 2018, https://www.nbcnews.com/politics/congress/how-democrats-use-dark-money-win-elections-n849391; Maggie Haberman, "Ad by Pro-Trump Group Attacks the Club for Growth," *New York Times*, Apr. 18, 2017, https://www.nytimes.com/2017/04/18/us/politics/attack-ad-sheldon-adelson-club-for-growth.html.

have close ties to elected officials, to the point where they basically function as a campaign arm.[97] This creates an unacceptable risk of corruption and its appearance.

Recent election cycles have also seen a surge in giving by small donors (donors who give $200 or less),[98] but they still account for less than a fifth of the total raised and spent on campaigns.[99] In the two most recent midterm election cycles, the top 100 super PAC donors gave almost as much as all the millions of small donors combined.[100] In 2018, the top five individuals or couples who gave to super PACs alone contributed almost $350 million.[101]

The dominance of wealthy elites and special interests has a direct impact on policy. Studies have repeatedly shown that campaign donors have far more clout than voters,[102] which they often use to pursue objectives most Americans do not share.[103] The last Congress, for

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[97] See generally Ian Vandewalker, Brennan Center for Justice, "The Rise of Shadow Parties," Oct. 22, 2018, https://www.brennancenter.org/blog/rise-shadow-parties; Ian Vandewalker, Eric Petry, *Shadow Campaigns: The Shift in Presidential Campaign Funding to Outside Groups*, Brennan Center for Justice, 2015, *available at* https://www.brennancenter.org/publication/shadow-campaigns-shift-presidential-campaign-funding-outside-groups; Daniel P. Tokaji and Renata E.B. Strause, *The New Soft Money: Outside Spending in Congressional Elections*, Election Law @ Moritz, 2014, 76-79 (quoting members of Congress and staff about the influence of outside spending on elected officials), *available at* https://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf.

[98] See Peter Overby, "Democrats Built a Small-Donor Money Machine. Now, Republicans Want Their Own," *NPR*, Nov. 23, 2018, https://www.npr.org/2018/11/23/670084581/democrats-built-a-small-donor-money-machine-now-republicans-want-their-own; Max Greenwood, "Small-dollar Donations Explode in the Trump Era," *The Hill*, Oct. 19, 2018, https://thehill.com/homenews/campaign/412231-small-dollar-donations-explode-in-the-trump-era; Kenneth P. Vogel and Rachel Shorey, "Eyeing 2020, Trump Fund-Raisers Return to a Familiar Well: Small Donors," *New York Times*, Apr. 15, 2018, https://www.nytimes.com/2018/04/15/us/politics/trump-campaign-fec-financial-reports.html.

[99] The total price tag for the 2018 midterms was roughly $5.7 billion. Roughly $1.1 billion of that total came from small donors. Center for Responsive Politics, "Most Expensive Midterm Ever: Cost of 2018 Election Surpasses $5.7 Billion," Feb. 6, 2019, https://www.opensecrets.org/news/2019/02/cost-of-2018-election-5pnt7bil/. That was a substantial increase relative to the 2014 midterm, but comparable to other types of donations. *Id*.

[100] Center for Responsive Politics, "2018 Super PACs: How Many Donors Give," last updated Feb. 1, 2019, https://www.opensecrets.org/outside-spending/donor-stats?cycle=2018&type=B; Center for Responsive Politics, "2014 Super PACs: How Many Donors Give," last updated Mar. 9, 2015, https://www.opensecrets.org/outside-spending/donor-stats?cycle=2014&type=B. The 2018 midterms were also notable for how many wealthy self-funders won office. "Most expensive midterm ever: Cost of 2018 election surpasses $5.7 billion," Center for Responsive Politics, "Most Expensive Midterm Ever."

[101] Center for Responsive Politics, "2018 Top Donors to Outside Spending Groups," last updated Feb. 1, 2019, https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&disp=D&type=V&superonly=S.

[102] Chris Tausanovitch, "Income, Ideology and Representation," *Russell Sage Foundation Journal of the Social Sciences* 2 (2016): 33, 49; Martin Gilens and Benjamin I. Page, "Testing Theories of American Politics: Elites, Interest Groups, and American Citizens," *Perspectives on Politics* 12 (2014): 564, 575; Christopher Ellis, "Social Context and Economic Biases in Representation," *Journal of Politics* 75 (2013): 773, 779; Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton: Princeton University Press, 2012), 84; Larry Bartels, *Unequal Democracy: The Political Economic of the New Gilded Age* (Princeton: Princeton University Press, 2010), 285.

[103] As Connecticut Senator Chris Murphy said of the daily calls he has had to make to wealthy donors: "I talked a lot more about carried interest inside of that call room than I did at the supermarket." Wealthy donors "have fundamentally different problems than other people…And so you're hearing a lot about problems that bankers have and not a lot of problems that people who work in the mill in Thomaston, Conn., have." Paul Blumenthal, "Chris Murphy: 'Soul-Crushing' Fundraising Is Bad for Congress," *Huffington Post*, May 7, 2013, https://www.huffingtonpost.com/2013/05/07/chris-murphy-fundraising_n_3232143.html.

example, was dominated by the push for Obamacare repeal and a $1.5 trillion tax overhaul, avowedly donor-driven initiatives that were consistently unpopular with the general public.[104] The disconnect between elite priorities and those of everyday Americans has profoundly undermined faith in our democracy. Overwhelming majorities across the political spectrum feel their voices are not being heard because of our dysfunctional campaign finance system. [105]

Big money politics especially harms people of color. The donor class has long been overwhelmingly white.[106] Major corporate and individual donors have helped to drive policies that disproportionately hurt poor and minority communities, from mass incarceration to the failure to rein in subprime lending.[107] Barriers related to fundraising also disproportionately keep people of color from running, especially women, who still face persistent discrimination and are less likely to have wealthy networks they can tap for support.[108]

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[104] See Daniel I. Weiner, Brennan Center for Justice, "The Tax Overhaul is Proof that Money in Politics Affects All of Us," Dec. 4, 2017, https://www.brennancenter.org/blog/tax-overhaul-proof-money-politics-affects-all-us; Carl Hulse, "Behind New Obamacare Repeal Vote: 'Furious' G.O.P. Donors," *New York Times*, Sept. 22, 2017, https://www.nytimes.com/2017/09/22/us/politics/republican-donors-obamacare-repeal.html; Alex Isanstadt and Gabriel Debenedetti, "Angry GOP Donors Close Their Wallets," *Politico*, Oct. 5, 2017, https://www.politico.com/story/2017/10/05/republican-donors-trump-mcconnell-anger-243449;

[105] Bradley Jones, "Most Americans want to limit campaign spending, say big donors have greater political influence," *Pew Research Center*, May 8, 2018, http://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/; Michael W. Traugott, "Americans: Major Donors Sway Congress More Than Constituents," *Gallup*, Jul. 6, 2016, https://news.gallup.com/poll/193484/americans-major-donors-sway-congress-constituents.aspx; "Voters Say Money, Media Have Too Much Political Clout," *Rasmussen Reports*, Feb. 16, 2016, http://www.rasmussenreports.com/public_content/politics/general_politics/february_2016/voters_say_money_media_have_too_much_political_clout.

[106] Among elite donors giving more $5,000, 93 percent were white in 2012 and 94 percent were white in 2014. Sean McElwee, Brian Schaffner, Jesse Rhodes, *Whose Voice, Whose Choice?* Demos, 2016, 2, *available at* https://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf. Since 2009, only one Black American donor has appeared in the top 100 political spenders list. Lateshia Beachum, "There are Many Rich Minorities. So Why Are There No Black Koch Brothers?" *Center for Public Integrity*, Jul. 23, 2018, https://www.pri.org/stories/2018-07-18/there-are-many-rich-minorities-so-why-are-there-no-black-koch-brothers.

[107] Adam Lioz, *Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and our Economy*, Demos, 2013, 43, 51, *available at* https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf.

[108] Women of color are approximately 20 percent of the U.S. population but despite historic gains still make up less than ten percent of the voting membership of the House of Representatives and only four percent of the Senate. "Women of Color in Elective Office 2019," Center for American Women and Politics, last accessed Feb. 12, 2019, http://cawp.rutgers.edu/women-color-elective-office-2019. According to one scholar, "[t]he support infrastructure available to women of color has historically not been as strong, particularly when it comes to things like campaign trainings, recruitments, and financial support." Linda Kramer Jenning, "Women of Color Face Significant Barriers When Running for Office. But They're Finding Support," *Yes! Magazine*, Jul. 31, 2018, https://www.yesmagazine.org/people-power/women-of-color-face-significant-barriers-when-running-for-office-but-theyre-finding-support-20180731. The founder of Collective PAC, which raises money for candidates of color, notes that "especially for black women, raising money is oftentimes a major deterrent to why they don't get into politics or run for election." Kate Ackley, "Women – and the Power of the Purse – Will Be Key in 2018," *Roll Call*, Oct. 26, 2017, https://www.rollcall.com/news/politics/99810-2. See also Asha DuMonthier, Chandra Childers, Jessica Milli, *The Status of Black Women in the United States*, Institute for Women's Policy Research, 2017, 4-5, *available at* https://www.domesticworkers.org/sites/default/files/SOBW_report2017_compressed.pdf (finding that fundraising pressure is disproportionately discouraging to potential candidates who are female, African American, or represent less-affluent districts).

1. Small-Donor Matching for Congressional Races (Title V, Subtitle B, Part 2)

The Government by the People Act of 2019 in Title V, Subtitle B, Part 2 of H.R.1 establishes a small donor matching system for congressional races. Small donor matching is a transformative solution to the problem of big money. While its potential may be profound, the basics of this system are simple. Candidates opt into the system by raising enough small start-up donations to qualify and accepting certain conditions such as lower contribution limits. Donors who give to participating candidates in small amounts will then see their contributions matched by public money.[109] The Act matches donations of $1-$200 to participating congressional candidates at a six-to-one ratio, the same ratio used until recently in New York City's highly successful program.[110]

Small Donor Matching is a Tried and True Solution. Small donor matching has a long and successful history in American elections. It was first proposed more than a century ago by President Theodore Roosevelt.[111] Congress incorporated a one-to-one small donor match for primaries into the presidential public financing system enacted in 1971. The vast majority of major party presidential candidates from 1976 to 2008 used matching funds in their primary campaigns.[112] Thanks to the presidential public financing system, Ronald Reagan was reelected by a landslide in 1984 without holding a single fundraiser.[113] Two years later, the bipartisan Commission on National Elections concluded that: "Public financing of presidential elections has clearly proved its worth in opening up the process, reducing the influence of individuals and groups, and virtually ending corruption in presidential election finance."[114]

Small donor matching has also found success at the state level, where it has been adopted in a wide variety of jurisdictions.[115] The system that has been studied the most is New York

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[109] Brent Ferguson, *State Options for Reform*, Brennan Center for Justice, 2015, 1, *available at* https://www.brennancenter.org/sites/default/files/publications/State_Options_for_Reform_FINAL.pdf.
[110] Last year the city voted overwhelmingly to raise the match to an 8-to-1 ratio.
[111] Skaggs and Wertheimer, *Empowering Small Donors*, 8.
[112] *Id.* 10.
[113] *Id.* 11.
[114] *Id.* 10 (quoting Fred Wertheimer, *Testimony to DNC Commission on Presidential Nomination Riming and Scheduling*, Sept. 30, 2005).
[115] A number of states, including Florida, Michigan, and New Jersey, provide matching funds in governor races. See Juhem Navarro-Rivera, Emmanuel Caicedo, *Public Funding for Electoral Campaigns: How 27 States, Countries, and Municipalities Empower Small Donors and Curb the Power of Big Money in Politics*, Demos, 2017, *available at* https://www.demos.org/sites/default/files/publications/Public_Financing_Factsheet_FA[5].pdf. New York State is poised to pass small donor matching for all state races this year. Andrea Sears, "2019 Could Be the Year for NY Election Reform," *Public News Service*, Jan. 14, 2019, https://www.publicnewsservice.org/2019-01-14/civic-engagement/2019-could-be-the-year-for-ny-election-reform/a65199-1. Comprehensive matching already exists in many other large, diverse municipalities besides New York City, including Los Angeles, Tucson, Washington, D.C., Montgomery County, Maryland, Prince George's County, Maryland, and others. See Navarro-Rivera and Caicedo, *Public Funding for Electoral Campaigns*; Martin Austermuhle, "Bowser Signs Bill Creating Public Financing Program For Political Campaigns – And Will Fund It," *WAMU*, Mar. 13, 2018, https://wamu.org/story/18/03/13/bowser-signs-bill-creating-public-financing-program-political-campaigns-will-fund/#.XFzEYmfsZaQ; Rachel Chason, "Prince George's Approves Matching Funds for Local Candidates – Starting in 2026," *Washington Post*, Oct. 24, 2018, https://www.washingtonpost.com/local/md-politics/prince-georges-approves-public-finance-system-for-local-candidates/2018/10/24/47f7b75a-d738-11e8-a10f-b51546b10756_story.html.

City's, which has existed since the 1980s and currently matches donations of up to $175.[116] The vast majority of city candidates participate.[117] Studies of the 2009 and 2013 city elections found that participating candidates took in more than 60 percent of their funds from small donors and the public match.[118]

The central role small donors play in funding New York City campaigns has many benefits. Most notably, the system has increased the diversity of viewpoints influencing officeholders. Small donors are far more representative of the real makeup of New York than big donors in terms of race, income, education level, and where they live, and officeholders who court these campaign contributions spend more time talking to everyday New Yorkers.[119] The comparison to state races that do not have small donor matching is remarkable. One study the Brennan Center conducted found that participating city candidates raised money from 90 percent of the city's census blocs, as compared to roughly 30 percent for state assembly candidates (who do not receive public matching dollars) running in the same areas.[120] The city's system has also helped more diverse candidates run, including the city's first African-American mayor and New York State's first female and first African-American elected attorney general, who began her career on the city council.[121]

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[116] "How It Works," New York City Campaign Finance Board, last accessed Feb. 11, 2019, https://www.nyccfb.info/program/how-it-works/; Angela Migally, Susan M. Liss, Frederick A.O. Schwartz, Jr., *Small Donor Matching Funds: The NYC Election Experience*, Brennan Center for Justice, 2010, *available at* https://www.brennancenter.org/publication/small-donor-matching-funds-nyc-election-experience.

[117] In 2017, 84 percent of candidates in New York City primaries opted to accept public funds; in 2013 it was 91 percent. *Keeping Democracy Strong: New York City's Campaign Finance Program in the 2017 Citywide Elections*, New York City Campaign Finance Board, 2018, 45-46, *available at* https://www.nyccfb.info/pdf/2017_Post-Election_Report_2.pdf.

[118] Michael Malbin, *Testimony before the New York City Campaign Finance Board*, Campaign Finance Institute, Feb. 13, 2013, http://www.cfinst.org/Press/PReleases/14-02-13/Testimony_before_the_New_York_City_Campaign_Finance_Board_Says_Small_Donor_Matching_Funds_a_Success_but_the_City_Should_Look_at_Changes_Moving_Forward.aspx. Candidates who did not participate in the public financing system raised most of their money from donors of $1,000 or more. Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *What Is and What Could Be: The Potential Impact of Small-Donor Matching Funds in New York State Elections*, Campaign Finance Institute, 2013, 3, *available at* http://www.cfinst.org/pdf/state/NY/CFI_Impact-Matching-on-NYS.pdf.

[119] As New York State Senator (and former City Council Member) Jose Serrano explained: "Imagine if you could spend a little less time [making fundraising calls], and a little more time in someone's living room, listening to conversations that they have, hearing the ideas that they may have. You can become a much more engaged and responsive candidate and hopefully elected official." DeNora Getachew and Ava Mehta, eds., *Breaking Down Barriers: The Faces of Small Donor Public Financing*, Brennan Center for Justice, 2016, 29, https://www.brennancenter.org/sites/default/files/publications/Faces_of_Public_Financing.pdf. Councilmember Eric Ulrich, a Queens Republican, makes a similar point: "[t]he matching funds program has allowed for the voice of small donors and regular people to have a greater say in outcomes . . .. That has helped us transform how we serve our constituents. I have no choice but to listen to and engage the [constituents] in an overall discussion about what direction the city should go." *Id.* at 34.

[120] Elisabeth Genn, Michael J. Malbin, Sundeep Iyer, Brendan Glavin, *Donor Diversity Through Public Matching Funds*, Brennan Center for Justice and Campaign Finance Institute, 2012, 4, *available at* www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

[121] As New York State Attorney General Letitia James put it after being elected New York City Public Advocate: "The public financing system in New York City gave me the opportunity to compete and succeed, allowing me to represent individuals whose voices are historically ignored." Getachew and Mehta, *Breaking Down Barriers*, 7.

Conserving Taxpayer Funds. Small donor matching for congressional races would transform how they are funded in a cost-effective manner. While critics claim this reform will squeeze taxpayers,[122] the actual price tag is modest. A reasonable estimate for congressional races comes out to less than $1 per citizen per year over a ten year period.[123] There are many ways to come up with this sum that do not necessitate an increased burden on taxpayers.[124] There are also numerous safeguards in the Act against waste or other misuse of taxpayer funds, including detailed reporting obligations, a requirement that candidates spend available privately-raised funds at the same rate as they spend public funds, and a requirement that candidates remit unused public funds to the program.[125]

Ultimately, *someone* pays for candidates to run for office. Whether those sponsors are a handful of wealthy special-interest donors or everyday Americans boosted by public dollars is up to Congress.[126] Small donor matching stands on firm constitutional ground.[127] No reform has the potential to be more transformative. The time to pass this system is now.

2. My Voice Vouchers (Title V, Subtitle B, Part 1)

H.R.1 also creates a pilot program to provide eligible donors with $25 in "my voice vouchers" to give to congressional candidates of their choice in increments of $5. While less common, vouchers are another promising type of small donor public financing, one that is

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[122] Mitch McConnell, "Behold the Democrat Politician Protection Act," *Washington Post*, Jan. 17, 2019, https://www.washingtonpost.com/opinions/call-hr-1-what-it-is-the-democrat-politician-protection-act/2019/01/17/dcc957be-19cb-11e9-9ebf-c5fed1b7a081_story.html.

[123] Lee Drutman, "Democrats' Small-Donor Campaign Finance Proposal Is a Great Deal for Taxpayers," *Vox*, Jan. 14, 2019, https://www.vox.com/polyarchy/2019/1/14/18182579/democrats-hr1-donor-campaign-finance-proposal-taxpayers.

[124] See Skaggs and Wertheimer, *Empowering Small Donors*, 23; *see generally Public Financing of Elections: Where to Get the Money?* Center for Governmental Studies, 2003, *available at* www.policyarchive.org/handle/10207/bitstreams/232.pdf.

[125] One witness before a hearing conducted last week by the Committee on Oversight and Reform suggested that public financing programs "have a history of corrupt actors exploiting the system for personal gain" at taxpayers' expense. Bradley A. Smith, *Testimony of Bradley A. Smith Before the U.S. House Oversight and Reform Committee: H.R. 1: Strengthening Ethics Rules of the Executive Branch*, Institute for Free Speech, Feb. 6, 2019, 11, *available at* https://www.ifs.org/expert-analysis/testimony-of-bradley-a-smith-before-the-u-s-house-oversight-and-reform-committee/ ("*Smith Testimony*"). This is simply false. In New York City, for example, most instances of "corruption" that critics have tried to link to the small donor matching system involved no misuse of public matching funds or an attempted violation that was caught. Lawrence Norden, Brennan Center for Justice, "New York Senate Committee Denies Testimony from Campaign Finance Experts," May 7, 2013, https://www.brennancenter.org/analysis/ny-senate-committee-denies-testimony-campaign-finance-experts. Ultimately, bad actors exist in every system. The key question is whether a public financing program is well-run, with good enforcement mechanisms that will find and stop misuse of public funds. The Act contains extensive provisions to do exactly that.

[126] As one political scientist recently put it: "There are no free lunches. If the public doesn't foot the cost of political campaigns, wealthy donors and lobbyists will. And they will get something in return. And it will be far more than what they paid in. That's how the system works. If we enact public financing through a small-donor matching system, the public will also get something in return. And it will be far more than what they paid in. That's how the system works." Drutman, "Democrats' Small-Donor Campaign Finance Proposal Is a Great Deal for Taxpayers."

[127] As the Supreme Court observed in upholding the presidential system: "Public financing is an effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [it] furthers, not abridges, pertinent constitutional values." Buckley v. Valeo, 424 U.S. 1, 92-93 (1976).

especially beneficial for less wealthy Americans who cannot afford to make even small donations. Voters in the city of Seattle overwhelmingly passed a voucher program in 2015. In the first election where they were used, 18,000 Seattle residents contributed nearly 70,000 vouchers—more than double the total number of contributors in the 2013 election. Most of these donors had not contributed to any candidate in the two previous election cycles.[128] Voucher donors were much more representative of the city's population, including women, people of color, younger residents, and less affluent residents.[129] The Brennan Center strongly supports piloting vouchers for federal elections.

3. Presidential Public Financing (Title V, Subtitle C)

Finally, H.R.1 revamps the presidential public financing system, which provides matching funds to primary candidates and block grants to general election nominees. Despite its success, that system ultimately failed because it did not afford candidates sufficient funds to compete in light of the dramatic growth in campaign costs.[130] The Act addresses this problem by increasing the primary match to a six-to-one ratio, increasing the block grant for nominees in the general election, and repealing burdensome limits on how much participating candidates can spend. The Brennan Center supports all of these changes.

B. Improving Federal Disclosure Law (Title IV, Subtitles B and C)

H.R. 1 also updates federal campaign disclosure rules, including by closing the main loopholes in federal disclosure law that have given rise to dark money and extending basic transparency requirements to online political ads.

The Rise of Dark Money. Over the last decade, the prevalence of secret money has become one of the biggest challenges for our campaign finance system. As recently as 2006, almost all federal campaign spending was transparent. But *Citizens United* made it possible for new types of entities to spend limitless funds on electoral advocacy—including 501(c)(4) and (c)(6) nonprofit corporations that are not required to make their sources of funding public.[131] These dark money groups have spent almost $1 billion on federal elections since 2010.[132] And they have given millions more to super PACs, in a manner that allows those entities (which in theory do have to disclose their donors) to keep major underlying funders anonymous.[133] All of this secret spending tends to be concentrated in the closest races. One Brennan Center study of

[128] *First Look: Seattle's Democracy Voucher Program*, Win Win Network and Every Voice Center, 2017, 2, *available at* https://everyvoice.org/wp-content/uploads/2018/08/2017-11-15-Seattle-Post-Election-Report-FINAL.pdf.
[129] *Id.* 3-5.
[130] Skaggs and Wertheimer, *Empowering Small Donors*, 11.
[131] Weiner, Citizens United *Five Years Later*, 7.
[132] Center for Responsive Politics, "Political Nonprofits (Dark Money)," last visited Jan. 24, 2019, https://www.opensecrets.org/outsidespending/nonprof_summ.php.
[133] Chisun Lee and Douglas Keith, "How Semi-Secret Spending Took Over Politics," *The Atlantic*, Jun. 28, 2016, https://www.theatlantic.com/politics/archive/2016/06/the-rise-of-gray-money-in-politics/489002/.

the 2014 midterms, for instance, showed that more than 90 percent of dark money spending in Senate contests was concentrated in the eleven most competitive contests.[134]

Dark money deprives voters of critical information needed to make informed decisions.[135] Voters are entitled to know who is trying influence them, and what those spenders want from the government. It is donor disclosure, as the *Citizens United* court itself pointed out, that allows voters to determine whether elected leaders "are in the pocket of so-called 'moneyed interests.'"[136] Dark money also harms shareholders in many publicly-traded companies, which frequently use dark money groups as conduits for political spending.[137] Researchers have shown that the corporate managers who drive this giving sometimes do so for their own reasons, and not to maximize shareholder value.[138] Shareholders need transparency so they can monitor how their money is being spent.[139]

The New Threat of Foreign Interference. More recently, it has come to light that lack of transparency is also providing multiple avenues for foreign governments and nationals to meddle in the American political system. In 2016, for example, the Russian government donated millions to the National Rifle Association, a 501(c)(4) nonprofit that does not disclose its donors. This money was allegedly intended to influence the presidential race.[140]

Russia's efforts to inject money into the 2016 election did not stop with dark money. Russian operatives also took advantage of weak disclosure rules for paid Internet ads. Overall, political advertisers spent $1.4 billion online in the 2016 election, almost eight times what they spent in 2012.[141] Online ads are cheap to produce and disseminate instantly to vast potential audiences across great distances without regard for political boundaries.[142] Moreover, sophisticated micro-targeting tools have given rise to the "dark ad," which is seen only by a narrowly targeted audience, threatening to remove much of the political debate around elections from public view.[143] Russian operatives exploited these capabilities to purchase millions of

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[134] Ian Vandewalker, *Election Spending 2014: Outside Spending in Senate Races Since* Citizens United, Brennan Center for Justice, 2015, 4, *available at* https://www.brennancenter.org/sites/default/files/analysis/Outside%20Spending%20Since%20Citizens%20United.pdf.

[135] *Buckley*, 424 U.S. at 66-67 (explaining voters' interest in knowing the sources of political money "to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.").

[136] 558 U.S. at 370.

[137] Weiner, Citizens United *Five Years Later*, 10.

[138] John C. Coates IV, "Corporate Politics, Governance, and Value Before and After Citizens United," *Journal of Empirical Legal Studies* 9 (2012): 657.

[139] David Earley and Ian Vandewalker, *Transparency for Corporate Political Spending: A Federal Solution*, Brennan Center for Justice, 2012, 5-6, *available at* https://www.brennancenter.org/publication/transparency-corporate-political-spending-federal-solution.

[140] Peter Stone and Greg Gordon, "FBI Investigating Whether Russian Money Went to NRA to Help Trump," *McClatchy*, Jan. 18, 2018, https://www.mcclatchydc.com/news/nation-world/national/article195231139.html.

[141] Sean J. Miller, "Digital Ad Spending Tops Estimates," *Campaigns & Elections*, Jan. 4, 2017, https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates.

[142] Nathaniel Persily, "Can Democracy Survive the Internet?" *Journal of Democracy* 28 (2017): 72.

[143] Christopher S. Elmendorf, Ann Ravel and Abby Wood, "Open up the black box of political advertising," *San Francisco Chronicle*, Sept. 22, 2017, http://www.sfchronicle.com/opinion/openforum/article/Open-up-the-black-box-of-political-advertising-12221372.php.

targeted ads in an attempt to influence and foment discord around the 2016 election.[144] And Moscow's efforts in 2016 may serve as a blueprint for other malefactors. As former Homeland Security Secretary Jeh Johnson put it, "the Russians will be back, and possibly other state actors, and possibly other bad cyber actors."[145]

Common Sense Reforms. H.R. 1 takes several key steps to deal with these problems. The DISCLOSE Act in Title IV, Subtitle B closes legal loopholes that have allowed dark money groups to refrain from disclosing their donors.[146] The Honest Ads Act in Title IV, Subtitle C expands disclosure and disclaimer requirements for "electioneering communications"[147]—campaign ads that mention a candidate during the time leading up to an election—to include paid Internet or digital communications. And it requires the largest online platforms, with over 50 million unique visitors per month, to establish a public file of requests to purchase political ads akin to the file broadcasters have long been required to maintain.[148]

These changes will make U.S. campaigns significantly more transparent. But critics have charged they will require large numbers of Americans to disclose their political activities to the government.[149] That is not true. The Act places no additional requirements on individual contributors. Moreover, research has shown that dark money campaign spending is funded almost entirely by wealthy corporations and individuals; there is no evidence that large numbers of small donors will be impacted.[150]

The Act does require relatively modest purchases of paid Internet ads to be included in platforms' public files, which is necessary because such ads can have a wide impact at relatively low cost. Russia's 2016 ads reached tens of millions of people, at a cost of roughly $400,000.[151] But these provisions are limited to those who purchase paid ads; the Act does not (as critics have wrongly implied)[152] cover unpaid postings to an individual's personal website, social media account, or email.

Disclosure continues to stand on firm constitutional ground, with the Supreme Court repeatedly affirming that robust transparency is a permissible—and often preferred—means to

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[144] For a more complete discussion of Russia's use of Internet ads in 2016, see Ian Vandewalker, *Oversight of Federal Political Advertisement Laws and Regulations: Statement before the Committee on House Oversight and Government Reform, Subcommittee on Information Technology*, Brennan Center for Justice, Oct. 24, 2017, *available at* https://www.brennancenter.org/analysis/oversight-federal-political-advertisement-laws-and-regulations.
[145] Andrew Rafferty, "Former DHS Chief Warns Russians Will Continue to Target U.S. Elections," *NBC News*, June 21, 2017, https://www.nbcnews.com/politics/politics-news/former-dhs-chief-warns-russians-will-continue-target-u-s-n775116.
[146] The Act amends statutory text that had been interpreted to require dark money groups to disclose only those donors who earmark their contributions to pay for a specific ad, which virtually never happens. It also prevents donors from funneling contributions through front groups to hide their true origin.
[147] 52 U.S.C. § 30104(f)(3).
[148] 47 C.F.R. 73.3526(e)(6), 73.3527(e)(5).
[149] *Smith Testimony*, 8; McConnell, "Behold the Democrat Politician Protection Plan."
[150] Derek Willis, "Shedding Some Light on Dark Money Political Donors," *ProPublica*, Sept. 12, 2018, https://www.propublica.org/nerds/shedding-some-light-on-dark-money-political-donors.
[151] Ian Vandewalker and Lawrence Norden, *Getting Foreign Funds Out of America's Elections*, Brennan Center for Justice, 2018, 7, https://www.brennancenter.org/publication/getting-foreign-funds-out-americas-elections.
[152] *Smith Testimony*, 8.

prevent "abuse of the campaign finance system."[153] And while transparency has become a subject of heated debate inside the Beltway, it remains overwhelmingly popular with the general public.[154] These are valuable reforms that, like small donor public financing, will help blunt the worst effects of *Citizens United*. Congress should pass these reforms without delay.

C. FEC Overhaul (Title VI, Subtitle A)

H.R.1 also overhauls the dysfunctional Federal Election Commission, which has failed to meaningfully enforce existing rules and would almost certainly struggle to implement the other campaign finance reforms in the Act.

A Deadlocked and Dysfunctional Commission. The FEC's mission is to interpret and enforce federal campaign finance laws.[155] No more than three of its six members can be affiliated with any one party, and at least four votes are required to enact regulations, issue guidance, or even investigate alleged violations of the law.[156] By longstanding tradition, each of the two major parties takes half the FEC's seats.[157] This has resulted in pervasive gridlock. The Commission routinely deadlocks on whether to pursue significant campaign finance violations—often after sitting on allegations for years without even investigating them.[158] Its process for issuing new regulations has virtually ground to a halt.[159] Increasingly, commissioners cannot

[153] McCutcheon v. FEC, 134 S.Ct. 1434, 1459 (2014) (plurality opinion)
[154] "A New York Times/CBS News Poll on Money in Politics," *New York Times*, Jun. 2, 2015, https://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html.
[155] 52 U.S.C. § 30106(b)(1).
[156] 52 U.S.C. §§ 30106(c), 30106(f), 30107.
[157] Thomas E. Mann, "The FEC: Administering and Enforcing Campaign Finance Law," in Anthony Corrado, et al., eds., *The New Campaign Finance Sourcebook*, Brookings Institute, 2005, 233, *available at* https://www.brookings.edu/book/the-new-campaign-finance-sourcebook/.
[158] *See Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, Office of FEC Commissioner Ann M. Ravel, 2017, 2, 4, *available at* https://classic.fec.gov/members/ravel/ravelreport_feb2017.pdf. In one notorious case, in which a donor admitted that he had formed an LLC solely for the purpose of hiding a $1 million contribution to a super PAC, the Commission delayed more than four years before deadlocking on whether to proceed, notwithstanding that all six commissioners appear to have agreed that the donor broke the law. *See* Certification (Feb. 23, 2016), MUR 6485 (W Spann LLC *et al.*), *available at* https://www.fec.gov/files/legal/murs/6485/16044390516.pdf; Statement of Reasons, Comm'rs. Walther, Ravel & Weintraub, MUR 6485 (W Spann LLC, *et al.*), *available at* https://www.fec.gov/files/legal/murs/6485/16044391123.pdf; Statement of Reasons, Comm'rs. Petersen, Hunter & Lee, MUR 6485 (W Spann LLC, *et al.*), *available at* http://eqs.fec.gov/eqsdocsMUR/16044393039.pdf.
[159] Among other things, the Commission has repeatedly deadlocked on proposals for a comprehensive rulemaking to address the effects of *Citizens United*. Minutes of an Open Meeting of the Federal Election Commission, Wednesday Jun. 15, 2011 (approved Jun. 30, 2011 as Agenda Document No. 11-39), *available at* https://www.fec.gov/resources/updates/agendas/2011/approved2011_39.pdf; Minutes of an Open Meeting of the Federal Election Commission, Thursday Dec. 15, 2011 (approved Jan. 12, 2012 as Agenda Document No. 12-02), *available at* https://www.fec.gov/resources/updates/agendas/2012/approved2012_02.pdf; Minutes of an Open Meeting of the Federal Election Commission, Thursday Mar. 7, 2013 (approved Apr. 11, 2013, as Agenda Document No. 13-11), *available at* https://www.fec.gov/resources/updates/agendas/2013/approved_1311.pdf. See *also* Statement of Commissioner Ellen L. Weintraub on the 2014 *Citizens United Rulemaking*, Oct. 9, 2014, *available at* http://www.fec.gov/members/weintraub/statements/2014-10-09_Statement_of_Commissioner_Weintraub_on_2014_CU_Rulemaking.pdf.

even agree on how to answer requests for interim guidance they receive through the Commission's advisory opinion process.[160]

The Commission is also beset with management problems. It has not had a permanent general counsel (its chief legal officer and one of the two most important staff members) in more than five years.[161] Morale among its rank-and-file staff consistently ranks nears the bottom of the federal government.[162]

FEC dysfunction has exacerbated many problems with our campaign finance system, including dark money,[163] rampant coordination between candidates and outside groups,[164] and vulnerability to foreign interference in our campaigns.[165] As a bipartisan group of lawmakers wrote President Trump last year, a dysfunctional FEC "hurts honest candidates who are trying to follow the letter of the law and robs the American people of an electoral process with integrity."[166] If not addressed, the Commission's problems could stymie implementation of the other ambitious reforms in the Act. Moreover, the agency's inability to enforce campaign finance laws contributes to a broader culture of impunity at a time of eroding respect for the rule of law and democratic values more generally.[167]

A Necessary Overhaul. The Act addresses the FEC's main flaws through several targeted changes. It curtails gridlock by reducing the number of commissioners from six to five, with no more than two affiliated with any party (effectively requiring one commissioner to be an independent). It creates clear lines of accountability for management issues by allowing the president to name a real chair[168] to serve as the FEC's chief administrative officer, with responsibility for the agency's day-to-day management. It helps ensure that commissioners will have the right temperament and qualifications by establishing a bipartisan blue ribbon advisory commission to publicly vet potential nominees. It ensures that the Commission will periodically

[160] See 52 U.S.C. §§ 30107(a)(7), 30108. Deadlocks on advisory opinion requests have increased exponentially, as detailed in a forthcoming Brennan Center white paper. See Daniel I. Weiner, *How to Fix the FEC*, Brennan Center for Justice, forthcoming 2019.
[161] Dave Levinthal and Suhauna Hussain, "Five Years Ago, the Federal Election Commission's Top Lawyer Resigned. No Permanent Replacement Has et been Named." *Center for Public Integrity*, Jul. 4, 2018, https://www.pri.org/stories/2018-07-04/five-years-ago-federal-election-commission-s-top-lawyer-resigned-no-permanent.
[162] Dave Levinthal, "Report: FEC Leaders, Managers Share Blame for Horrid Morale," *Center for Public Integrity*, Jul. 26, 2016 (updated Feb. 11, 2019), https://publicintegrity.org/federal-politics/report-fec-leaders-managers-share-blame-for-horrid-morale/.
[163] Lawrence Norden, Brent Ferguson, Douglas Keith, *Five to Four*, Brennan Center for Justice, 2016, 7, *available at* https://www.brennancenter.org/publication/five-four.
[164] *See* Weiner, Citizens United *Five Years Later*, 8.
[165] Jordan Muller, "FEC Rejects Proposal to Consider New Rules on Foreign Spending in U.S. Elections," *Opensecrets.org*, May 25, 2018, https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/.
[166] Kilmer, Buck Lead Bipartisan Call to President Trump: Fill Vacant Seats on Federal Election Commission Immediately, 2018, https://kilmer.house.gov/news/press-releases/kilmer-buck-lead-bipartisan-call-to-president-trump-fill-vacant-seats-on-federal-election-commission-immediately.
[167] Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law and Democracy, 2018, 16, https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf.
[168] Currently the office rotates annually and is largely symbolic *See* 52 U.S.C. § 30106(a)(5).

have fresh leadership by ending the practice of allowing commissioners to hold over in office indefinitely past the expiration of their terms.[169] And it helps streamline the enforcement process by giving the Commission's nonpartisan staff authority to investigate alleged campaign finance violations and dismiss frivolous complaints—subject to overrule by a majority vote of commissioners.[170]

These changes would bring the FEC's structure more in line with other independent agencies, but with significantly greater safeguards to prevent either party from weaponizing the agency against its opponents. Critics nevertheless charge that H.R.1 would effectuate a partisan takeover of the FEC.[171] They argue that, although the president could only nominate two of five commissioners from their own party, the FEC's new structure would allow presidents to install secret partisans in the third seat reserved for an independent.[172] But as a legal matter, the president already has constitutional authority to nominate whomever they want to serve on the FEC, provided no more than three of the nominees are affiliated with one party at the time they are nominated.[173] The tradition of deferring to party leaders has no force of law.[174] By providing for public bipartisan vetting of nominees, H.R.1 actually establishes stronger safeguards than currently exist. In a similar vein, critics suggest that a presidentially-appointed FEC chair would be tantamount to an "election czar," with vast power to persecute the president's opponents.[175] But the role of chair envisioned by the Act is identical to that which exists at many other independent agencies, except without a working majority of commissioners from the chair's own party.[176]

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[169] All four of the current commissioners (there are two vacancies) have been in office since the George W. Bush administration, notwithstanding that they are theoretically limited to one six-year term. "All Commissioners," Federal Election Commission, accessed Oct. 18, 2018, https://www.fec.gov/about/leadership-and-structure/commissioners/. Before 1997, commissioners could be re-appointed to new terms an unlimited number of times. Congress eliminated reappointment with the goal of ensuring that the agency would periodically have fresh leadership, and to reinforce commissioners' independence in the face of congressional attempts to use the reappointment process as leverage to deter enforcement. Exec. Office Appropriations Act of 1998, 105 Pub. L. No. 61, 111 Stat. 1272 (Oct. 10, 1997). But allowing indefinite holdovers has created the worst of both worlds. There is still very little turnover, and commissioners whose terms have expired are even more beholden to the president and Congress, who can replace them at any time. Weiner, *How to Fix the FEC*.

[170] Under the Commission's present structure, even those wrongfully accused of violations must sometimes wait years for their names to be cleared. See, *e.g.*, Notification with Factual and Legal Analysis, MUR 6896 (Margie Wakefield for Kansas), *available at* https://www.fec.gov/files/legal/murs/6896/15044385209.pdf; Notification with General Counsel's Report, MUR 6904 (Cat Ping for Congress), *available at* https://www.fec.gov/files/legal/murs/6904/16044396706.pdf.

[171] *Smith Testimony*, 2; McConnell, "Behold the Democrat Politician Protection Plan."

[172] *Smith Testimony*, 2.

[173] *Buckley*, 424 U.S. at 140.

[174] Daniel I. Weiner, "FEC's Status Quo is Hazardous—Proposed Legislation Would Help Fix It," *The Hill*, February 10, 2019, https://thehill.com/opinion/campaign/429294-fecs-status-quo-is-hazardous-proposed-legislature-would-help-fix-it.

[175] *Smith Testimony*, 3.

[176] That being said, any concerns about partisan domination of a restructured FEC can easily be addressed through minor changes to Act. For example, the Act could specify that any nominee who has been affiliated with a party at any time in the last five years (including registering as a member of the party or working for or representing the party or its candidates or officeholders) will be deemed affiliated with the party for purposes of determining partisan balance on the Commission. Model language can be found in legislation proposed in the last Congress. *See* H.R. 3953, 115th Congress (2017).

Ultimately, no government institution functions independently from background norms that restrain excessive partisanship and other abuses of power. To insist that any reforms eliminate such risks entirely is to set an impossible standard. The Act makes sensible changes to the FEC's structure that deserve immediate passage.

D. Reforming Coordination Rules (Title V, Subtitle B)

H.R.1 also tightens restrictions on coordination between candidates and outside groups like super PACs that can raise unlimited funds, another important reform.

The Supreme Court has long held that outside campaign expenditures coordinated with a candidate can be "treated as contributions," because "[t]he ultimate effect is the same as if the [spender] had contributed the dollar amount [of the expenditure] to the candidate."[177] *Citizens United* did nothing to change that. When the Supreme Court struck down limits on how much outside groups could spend in federal elections, it did so on the assumption that these groups would operate independently of candidates. The Court reasoned that the absence of "prearrangement and coordination" would "undermine[] the value of the expenditure to the candidate" and alleviate the danger of quid pro quo corruption or its appearance.[178]

Whether or not that was a correct assumption,[179] in reality the independence of much outside spending is illusory. In 2016, most presidential candidates had personal super PACs run by top aides or other close associates, whose only purpose was to get the candidate elected and for which the candidate often personally raised funds or even appeared in ads.[180] These entities are also becoming increasingly common in Senate and House races.[181] Other forms of collaboration are also on the rise, such as the practice of super PACs and other outside groups republishing flattering b-roll footage that campaigns make available online.[182] Even blatant instances of cooperation, like super PAC ads in which a candidate appears, have been excluded from the definition of "coordinated communication" and thus deemed not to count as contributions under federal rules.[183] These developments make it easy to circumvent contribution limits, especially for the class of billionaire mega-donors who have gained unprecedented influence in our elections.

H.R. 1 shores up federal coordination rules in important respects. It specifies that if a candidate and any outside group or individual collaborate on a communication that promotes,

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[177] *Buckley*, 424 U.S. at 36-37.
[178] *Citizens United*, 558 U.S. at 360.
[179] There is evidence to suggest it was not. See Lawrence Norden and Iris Zhang, Brennan Center for Justice, "Fact Check: What the Supreme Court Got Wrong in its Money in Politics Decisions," Jan. 30, 2017, https://www.brennancenter.org/analysis/scotus-fact-check.
[180] Brent Ferguson, *Candidates & Super PACs: The New Model in 2016*, Brennan Center for Justice, 2015, 3, *available at* https://www.brennancenter.org/publication/candidates-super-pacs-new-model-2016.
[181] Soo Rin Kim, Center for Responsive Politics, "Mine, All Mine: Single Candidate Super PACs, Creeping Down-Ballot," Nov. 10, 2016, https://www.opensecrets.org/news/2016/11/mine-all-mine-single-candidate-super-pacs-creeping-down-ballot/.
[182] Paul Blumenthal, "How Super PACs And Campaigns Are Coordinating In 2016," *Huffington Post*, Nov. 14, 2015, https://www.huffingtonpost.com/entry/super-pac-coordination_us_56463f85e4b045bf3def0273.
[183] Comment of Brennan Center for Justice at NYU School of Law (Nov. 15, 2011), AO 2011-23 (American Crossroads), *available at* https://www.fec.gov/data/legal/advisory-opinions/2011-23/.

attacks, supports, or opposes that candidate (the so-called PASO standard), the communication will be deemed a contribution. It also clarifies that any reproduction of campaign footage or materials also constitutes a contribution. And it creates a new category of "coordinated spenders," groups whose actual ties to a candidate are so close that it is simply not plausible to think that the group's spending in support of the candidate is truly independent.

Critics have attacked the constitutionality of these provisions on a number of grounds that do not withstanding scrutiny.[184] Far from being unconstitutional, the Act's strengthening of federal coordination rules is in line with regulatory trends in the states.[185] These changes are necessary to restore the integrity of campaign contribution limits and we strongly support their passage.

E. Helping Diverse Candidates Run (Title V, Subtitle D)

Finally, the Help America Run Act in Title V, Subtitle D of H.R.1 establishes an innovative reform to help middle- and working-class candidates run for office. Campaigning for federal office is a demanding job, one that can require successful candidates to take months or even years away from paid work or full-time care of loved ones. That is simply not an option for many middle- and working-class Americans.[186] FEC regulations allow non-incumbents to pay themselves a salary out of campaign funds, but doing so is relatively rare, and can open a candidate up to criticism.[187] The Act provides a new option for non-wealthy candidates who do

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[184] For, example, the Supreme Court has never held that strong coordination rules may only be applied to political committees. See *Smith Testimony*, 5. Doing so would create an enormous loophole given how active non-PAC dark money groups are in federal races. See Part II(B). Equally unfounded are criticisms of the PASO (promote support attack oppose) standard the Act uses to determine which communications can be coordinated. *See Smith Testimony*, 5. As the Supreme Court noted when it upheld the standard in McConnell v. FEC, "'[p]ublic communications' that promote or attack a candidate for federal office … undoubtably have a dramatic effect on federal elections." McConnell v. FEC, 540 U.S. 93, 169-70 (2003). The Court has repeatedly declined to revisit this aspect of McConnell, most recently in 2017. See Republican Party of Louisiana v. FEC, 137 S.Ct. 2178 (2017). In light of this benefit, when such communications are made in collaboration with a candidate it is entirely reasonable to treat them as contributions. Finally, designating certain groups as "coordinated spenders" does not impermissibly presume coordination based solely on a group's identity, as the Supreme Court has disallowed. *See Smith Testimony*, 5; Colorado Republic Federal Campaign Committee v. FEC, 518 U.S. 604 (1996). The case cited by opponents of the Act. rejected an absolute presumption of coordination for party communications based on the supposed nature of political parties. *Colorado Republican*, 518 U.S. at 621 (Breyer, J., lead op.). The Act, in contrast, provides that groups will be deemed "coordinated spenders" based on specific facts that make any assertion of independence implausible.

[185] *See, e.g.*, Conn. Gen. Stat. § 9-601c (2013), Cal. Code Regs. tit. 2, § 18225.7 (2015); Chisun Lee, et al., *After* Citizens United: *The Story in the States*, Brennan Center for Justice, 2014, *available at* https://www.brennancenter.org/publication/after-citizens-united-story-states.

[186] Geoff Williams, "Can You Afford to Be a Politician?," *U.S. News*, July 16, 2013, https://money.usnews.com/money/personal-finance/articles/2013/07/16/can-you-afford-to-be-a-politician

[187] *See* Ashley Balcerzak, "You're Young and Broke. Here's How to Still Win a Congressional Seat," *Center for Public Integrity*, Dec. 10, 2018, https://publicintegrity.org/federal-politics/young-broke-money-win-congress-election/ ("Most candidates [for federal office] don't take advantage of this provision [allowing them to draw a salary. At least 22 candidates running in the 2017-2018 election cycle that together paid themselves about $155,000 from campaign funds. None of the candidates the Center for Public Integrity identified this cycle appeared to collect a $174,000 salary."); Sam Janesch, "Jess King is the only Pennsylvania candidate for Congress drawing a salary from her campaign," *Lancaster Online*, Jul. 20, 2018, https://lancasteronline.com/news/politics/jess-king-is-the-only-pennsylvania-candidate-for-congress-drawing/article_86c5de3c-8b96-11e8-bc8f-3f9a023379f9.html; Michelle

not want to pay themselves a salary, allowing them to instead use campaign funds to cover specific expenses like child, elder, or other dependent care, health insurance premiums, and professional dues. Giving non-wealthy candidates more ways to make ends meet so they can run for office is another step towards truly representative government, one that we strongly support.

III. Redistricting Reform (Title II, Subtitle E)

The Redistricting Reform Act of 2019 in Title II, Subtitle E of H.R. 1 would end extreme partisan gerrymandering by requiring states to use independent citizen commissions for congressional redistricting, in a way that respects the Voting Rights Act and preserves communities of interest.

The need for reform is urgent. Extreme gerrymandering has reached levels unseen in the last 50 years. As Brennan Center research has shown, this decade's skewed maps have consistently given Republicans 15-17 extra congressional seats over the course of the whole decade.[188] Shifts in political winds have virtually no electoral impact in gerrymandered states. In 2018, for example, a political tsunami year for Democrats, no districts changed parties in Ohio and North Carolina, two states with extremely biased maps. Despite the fact that Democrats earned nearly half the vote in both states, they won only a quarter of the seats. The overwhelming majority of the seats that did change parties in 2018—72 percent—were drawn by commissions and courts.[189]

To be clear, Republicans are not alone in rigging districts to their advantage. A Democratic gerrymander in Maryland was proven to be just as unbreakable in the Republican wave of 2014.[190] Both parties are more than capable and willing to draw districts that primarily serve their partisan ends if given the opportunity, and both have done so this decade with devastating consequences for American democracy.

Many of this decade's redistricting abuses have come at the expense of communities of color. When Republican-drawn maps in Virginia, North Carolina, and Texas were successfully challenged on the grounds that they discriminated against minority voters, the states defended the maps by arguing that politics, rather than race, had been the driving force behind their maps.[191] Democrats in Maryland, likewise, rejected a congressional map that would have given African-Americans additional electoral opportunities because that would have created an additional

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Tsai, "Take the Money and Run?" *Slate*, Dec. 20, 2007, https://slate.com/news-and-politics/2007/12/do-presidential-candidates-receive-a-salary.html ("[I]t's almost considered bad form for someone seeking the presidency [to accept a salary]").

[188] Laura Royden and Michael Li, *Extreme Maps*, Brennan Center for Justice, 2017, 6-13, *available at* https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf.

[189] Annie Lo, "How Did Democrats Flip the House? Fairer Maps," *Brennan Center for Justice*, Dec. 7, 2018, https://www.brennancenter.org/blog/how-did-democrats-flip-house-fairer-maps.

[190] *Benisek v. Lamone*, __ F. Supp. 3d __ (2018).

[191] Guy-Uriel E. Charles & Luis Fuentes-Rohwer, "Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA," *William and Mary Law Review* 59, no. 5 (2018): 1559-1600.

Republican seat.[192] Without a rule that makes disadvantaging minority voters for partisan gain illegal, this type of discrimination will continue and grow.

Congressional action is necessary to stop partisan and racial gerrymandering. If not reined in, the problem will only get worse next cycle. Increasingly sophisticated technologies and voter data enable modern line-drawers to lock in a durable partisan advantage with shocking accuracy. And in light of the successful gerrymanders of this past decade, political operatives will have a strong incentive (and little disincentive) to manipulate these tools for their advantage.

The courts alone will not and cannot solve the problem. Even if the United States Supreme Court develops a manageable standard for partisan gerrymandering, judicial intervention would likely be limited to the most egregious cases. It will also require aggrieved voters to resort to expensive, time-consuming, and complicated litigation in order to obtain a remedy years later. Maps drawn in 2011 are still being challenged in nearly half a dozen states even though the next round of redistricting is only two years away. The burden that this places on communities that are the most affected by gerrymandering is unacceptable.

Congress has the authority to fix congressional redistricting.[193] As the Supreme Court has recognized, "the Framers provided a remedy" in the Constitution for redistricting abuses through the "power bestowed on Congress to regulate elections, and . . . to restrain the practice of political gerrymandering."[194] Over the years, Congress has repeatedly exercised its power under article I, section 4 to do just that.[195] In 1967, for example, Congress required all states to use single member congressional districts to end the drawing of racially discriminatory multimember districts, a practice adopted to defy the call of the Voting Rights Act.[196]

H.R. 1 Offers Bold Solutions for Congressional Redistricting. These abuses require strong solutions. The Redistricting Reform Act would be the boldest and most comprehensive exercise of this congressional authority. It would require states to use independent redistricting commissions to draw congressional maps and impose a uniform set of rules for how districts should be drawn, prioritizing criteria like keeping communities together, and expressly ban partisan gerrymandering. It would also open the process to public oversight and participation.

The experience of states like California and Arizona show that independent commissions work. California went from having a congressional map that was one of the least responsive to electoral changes in the nation to one of the most.[197] California's maps did not just improve

[192] Aaron C. Davis, "Redistricting in Md. has element of racial friction," *Washington Post*, July 24, 2011, https://www.washingtonpost.com/local/dc-politics/redistricting-in-md-has-element-of-racial-friction/2011/07/23/gIQAU86MXI_story.html?utm_term=.b84f2191878d.
[193] Arizona v. Intertribal Council of Arizona, Inc., 570 U.S. 1 (2013).
[194] Vieth v. Jubelirer, 541 U.S. 267 (2004).
[195] 55 STAT. 761 (1941), 2 U.S.C. §2a (Supp. 1950); 54 STAT. 162 (1940); 46 STAT. 21 (1929); 37 STAT. 13 (1911); 31 STAT. 733 (1901); 26 STAT. 735 (1891); 22 STAT. 5 (1882); 17 STAT. 28 (1872); 12 STAT. 353 (1862); 10 STAT. 25 (1852); 9 STAT. 432(1850); 5 STAT. 491 (1842); 4 STAT. 516 (1832); 3 STAT. 651 (1822); 2 STAT. 669 (1811); 2 STAT. 128 (1802); 1 STAT. 253 (1792).
[196] 2 U.S.C. § 2c
[197] Royden and Li, *Extreme Maps*, 23, 26, 29; Laura Royden, Michael Li, and Yurij Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice (2018), 17-19, *available at* https://www.brennancenter.org/sites/default/files/publications/Extreme%20Gerrymandering%204.24.18.pdf.

political fairness. They also kept communities of interest together, increased representation for communities of color, and enhanced the opportunity for competition.[198]

It is little wonder that independent commissions are popular among voters. Last year, a record five states passed redistricting reform for congressional and/or legislative districts. The Ohio proposal carried every single congressional district in the state by a supermajority.[199] Reforms in Colorado and Michigan also passed overwhelmingly, with more than 60 percent of the vote statewide.[200]

H.R. 1 builds on what has been proven to work. Commissions would contain equal numbers of Republican, Democratic, and unaffiliated commissioners, with voting rules that ensure that no one party would be able to dominate the redistricting process. Additionally, all potential commissioners would be screened for conflicts of interest to ensure that they do not have a personal stake in the outcome.

The Act's establishment of a clear set of mapdrawing rules, listed in the order in which they are to be applied,[201] is an important and ground-breaking change. Federal law currently has next to no rules governing how districts are to be drawn.[202] Likewise, most states, with a handful of exceptions, have few rules governing congressional redistricting. This has allowed abuses to run rampant. Left unchanged, this is a situation that will only get worse in coming years. The Act's ban on partisan gerrymandering and enhanced protections for communities of color and communities of interest would further stem the kinds of abuses we saw this decade.

Finally, the Act would transform what has historically been an opaque process into one that is transparent and participatory. Commission business would be done in open public meetings and subject to oversight. Data and other information would be made available and all official communications would be subject to disclosure. Community groups and members would get a say through testimony and other feedback mechanisms. Each commission would be required to show its work and assure fairness by issuing a detailed report before taking a final vote on a plan. In short, redistricting would no longer be done in backroom deals.

These changes would dramatically improve congressional representation for all Americans, combining best practices for assuring fair, effective, and accountable representation. We urge Congress to enact them.

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[198] Royden and Li¸ *Extreme Maps*, 23, 26, 29; Royden, Li, and Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, 17-19.

[199] Peter Miller and Annie Lo, "Support for Ohio's Issue 1 Ballot Measure in the 2018 Primary Election," *Brennan Center for Justice*, Nov. 7, 2018, https://www.brennancenter.org/blog/support-ohio-issue-1-ballot-measure-2018-primary-election.

[200] Peter Miller and Brianna Cea, Brennan Center for Justice, "Everybody Loves Redistricting Reform," Dec. 5, 2018, https://www.brennancenter.org/blog/everybody-loves-redistricting-reform.

[201] The criteria are based on best practices as developed by a number of civil rights and good government groups that study redistricting. See "Redistricting Principles for a More Perfect Union," Common Cause, accessed Feb. 12, 2019, https://www.commoncause.org/redistricting-principles-for-a-more-perfect-union/#.

[202] There are no federal redistricting-specific regulations beyond the requirement that districts be single member and equally populated. For racial and language minorities, there are also protections available under the Equal Protection Clause and the Voting Rights Act.

IV. Election Security

The Elections Security Act, in Titles I and III of H.R. 1, would take critical steps to dramatically improve security and reliability of our election infrastructure.

In the last two years, we learned disturbing details about attacks against American election infrastructure. Foreign adversaries and cyber criminals are alleged to have successfully breached state voter registration systems[203] and election night results reporting websites.[204] Attacks against election systems across the globe give us reason to fear this could be the tip of the iceberg, and that we must guard against even more ambitious efforts in the future.[205] Our intelligence community continues to warn that "numerous actors are regularly targeting election infrastructure."[206] Although we may have escaped a serious cyber breach in the 2018 midterms, as Christopher Krebs of the Department of Homeland Security put it, "the big game we think for the adversaries is probably 2020."[207]

Despite these clear threats, thirteen states continue to use voting machines that have no paper backup (which security experts have consistently argued is a minimum defense necessary to detect and recover from cyberattacks);[208] few states regularly review their paper backups to audit their election results;[209] private voting system vendors are not required to report security breaches which often leaves our election administrators and the public in the dark;[210] and election officials across the country say they lack the resources to implement critical election

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[203] Rick Pearson, "State Officials Say Russian Hackers Stole 76k Illinois Voters' Info in 2016, not 500K," *Chicago Tribune*, August 8, 2018, https://www.chicagotribune.com/news/local/politics/ct-met-illinois-elections-board-russia-2016-election-hacking-20180808-story.html.

[204] Tyler Whetstone, "Knox County election night cyberattack was smokescreen for another attack," *Knox News*, May 17, 2018, https://www.knoxnews.com/story/news/local/2018/05/17/knox-county-election-cyberattack-smokescreen-another-attack/620921002/.

[205] Lawrence Norden and Ian Vandewalker, *Securing Elections from Foreign Interference*, Brennan Center for Justice, 2017, 7, *available at* https://www.brennancenter.org/publication/securing-elections-foreign-interference.

[206] Pete Williams and Pete Dilanian, "DHS Finds Increasing Attempts to Hack U.S. Election Systems Ahead of Midterms," *NBC News*, Oct. 15, 2018, https://www.nbcnews.com/politics/national-security/dhs-finds-increasing-attempts-hack-u-s-election-systems-ahead-n920336.

[207] Colleen Long and Michael Balsamo, "Cybersecurity Officials Start Focusing on the 2020 elections," *Associated Press*, November 8, 2018, https://www.apnews.com/cfaa16f6a86349bebc16e0633d6214dd.

[208] Lawrence Norden and Wilfred U. Codrington III, Brennan Center for Justice, "America's Voting Machines at Risk – An Update," Mar. 8, 2018, https://www.brennancenter.org/analysis/americas-voting-machines-risk-an-update; *see also* Dustin Volz and Patricia Zengerle, "Inability to Audit U.S. elections a 'National security Concern': Homeland Chief," *Reuters*, Mar. 21, 2018, https://www.reuters.com/article/us-usa-trump-russia-security/inability-to-audit-u-s-elections-a-national-security-concern-homeland-chief-idUSKBN1GX200; *see also Securing the Vote: Protecting American Democracy*, National Academies of Sciences, Engineering, and Medicine, 2018.

[209] Chris Deluzio, Brennan Center for Justice, "A Smart and Effective Way to Safeguard Elections," last modified July 25, 2018, https://www.brennancenter.org/blog/smart-and-effective-way-safeguard-elections; Lawrence Norden, Aaron Burstein, Joseph Lorenzo Hall, and Margaret Chen, *Post-Election Audits: Restoring Trust in Elections*, Brennan Center for Justice and Samuelson Law, Technology & Public Policy Clinic, 2007, *available at* https://www.brennancenter.org/publication/post-election-audits-restoring-trust-elections.

[210] Nicole Perlroth, Michael Wines and Matthew Rosenberg, "Russian Election Hacking Efforts, Wider Than Previously Known, Draw Little Scrutiny," *New York Times*, Sept. 1, 2017, https://www.nytimes.com/2017/09/01/us/politics/russia-election-hacking.html.

security measures.[211] Unfortunately, our election security is only as strong as our weakest link.

This Act would dramatically improve the security and resilience of our nation's election administration infrastructure by replacing paperless voting systems; promoting the use of risk-limiting audits; adding electronic poll books to the list of voting systems subject to security standards; regulating election system vendors; and ensuring a consistent stream of dedicated election security funding.

A. Replacing Paperless Voting Systems (Title I, Subtitle F)

First and foremost, the Act would mandate the replacement of all paperless electronic voting machines with machines that require an individual paper record of each vote. Top security experts—from the National Academies of Sciences, Engineering and Medicine, the national intelligence community, academia and industry—agree that replacing paperless voting systems is a top priority.[212] This step is critical to improving election security because, as the National Academies put it, "[p]aper ballots form a body of evidence that is not subject to manipulation by faulty software or hardware and … can be used to audit and verify the results of an election." Without that record and check, software manipulation or a bug could change an election result without detection. Further, as Virginia showed in 2017 when it was forced to replace paperless systems just months before a high-profile gubernatorial election after learning of serious security vulnerabilities in its systems, this transition can easily be accomplished in the timeframe provided in this Act.[213]

B. Supporting Risk Limiting Audits (Title III, Part 2)

The Act would also provide funds for states to implement risk-limiting audits of their elections. Risk-liming audits are considered the "gold standard" of post-election audits because they efficiently provide a high level of statistical confidence in the reported election outcome.[214] While paper records will not prevent programming errors, software bugs, or the insertion of corrupt software into voting systems, risk-limiting audits use these paper records and are

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[211] Lawrence Norden and Christopher Famighetti, *America's Voting Machines at Risk*, Brennan Center for Justice, 2015, 5, *available at* https://www.brennancenter.org/publication/americas-voting-machines-risk.

[212] *Securing the Vote: Protecting American Democracy*, 5; Lawrence Norden, *The Machinery of Democracy: Protecting Elections In An Electronic World*, Brennan Center for Justice, 2006, *available at* https://www.brennancenter.org/publication/machinery-democracy-protecting-elections-electronic-world-0; *Russian Targeting of Election Infrastructure During the 2016 Election: Summary of Initial Findings and Recommendations*, U.S. Senate Select Committee on Intelligence, 2018; Olivia Beavers, "DHS Chief Calls on Officials in all 50 States to Have 'Verifiable' Ballots by 2020 Election," *The Hill*, August 22, 2018, https://thehill.com/policy/cybersecurity/403148-dhs-chief-calls-on-election-officials-in-all-50-states-to-have; *see also* Norden and Famighetti, *America's Voting Machines at Risk*.

[213] Jenny Portnoy, "Va. Board of Elections Votes to Decertify Some Voting Machines," *Washington Post*, April 14, 2015, https://www.washingtonpost.com/local/virginia-politics/va-board-of-elections-votes-to-decertify-some-voting-machines/2015/04/14/46bce444-e2a6-11e4-81ea-0649268f729e_story.html?utm_term=.7e6be4bfcc0a; Laura Vozzella, "Virginia Scraps Touch-screen Voting as Election for Governor Looms," *Washington Post*, Sept. 8, 2017, https://www.washingtonpost.com/local/virginia-politics/virginia-scraps-touch-screen-voting-machines-as-election-for-governor-looms/2017/09/08/e266ead6-94fe-11e7-89fa-bb822a46da5b_story.html.

[214] Mark Lindeman and Philip B. Stark, "A Gentle Introduction to Risk-Limiting Audits," *IEEE Security and Privacy, Special Issue on Electronic Voting* (2012): 1, *available at* https://www.stat.berkeley.edu/~stark/Preprints/gentle12.pdf.

designed to detect and correct any election outcomes impacted by such abnormalities. They are quickly growing in popularity. Two states already mandate them for use in the 2020 election,[215] and election officials in over a dozen jurisdictions across the country have either piloted them in the last year or will do so in 2019.[216]

C. Expanding Definition of Voting Systems to Include Electronic Poll Books (Title III, Part 3)

Also important, the Act would expand the existing voting equipment testing and certification process to include electronic poll books. Although poll books handle some of our most sensitive information, they have not been subject to even voluntary federal certification standards. As multiple states with substantive election IT divisions already have state electronic pollbook certification standards,[217] a voluntary federal certification standard is sorely needed.

D. Regulating Election System Vendors (Title III, Part 8)

Currently, there is almost no federal oversight of private vendors that design and maintain the election systems that store our personal information, tabulate our votes, and communicate important election information to the public. The Brennan Center has documented numerous instances of voting system failures that could have been prevented had vendors notified their clients of previous failures in other jurisdictions using the same voting equipment.[218] Among other things, the Act would require that any vendors who receive payment from grants made under the Act (1) certify that the infrastructure they sell to local election jurisdictions is developed and maintained in accordance with cybersecurity best practices, (2) certify that their own information technology is maintained in accordance with cybersecurity best practices, and (3) promptly report any suspected cybersecurity incident directed against the goods and services they provide under these grants.

E. Ensuring a Consistent Stream of Federal Funding to Secure our Election Infrastructure.

The Act provides funds for critical security measures, both to secure our elections ahead of 2020, and also to cover maintenance and upgrades to voting systems for years to come. These resources are necessary since the race to secure our elections is one without a finish line, and our

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[215] *Securing the Nation's Voting Machines A Toolkit for Advocates and Election Officials*, Brennan Center for Justice, *available at* https://www.brennancenter.org/sites/default/files/publications/Securing%20the%20Nation%27s%20Voting%20Machines_.pdf.

[216] Making Every Vote Count: A Practical Guide to Risk-Limiting Audits, https://youtu.be/gMbz0_dizoA.

[217] See, *e.g.*, Cameron Glenn Sasnett, *Electronic Pollbook Certification Procedures & System Requirements*, Virginia State Board of Elections Election Administration and Compliance Division, 2015, *available at* https://www.eac.gov/assets/1/28/Virginia%20EPB%20Certification%20Procedures%20and%20System%20Requirements%20REV-05151.pdf; *Standards Governing the Examination and Certification of Electronic Poll Books in Use in Ohio*, Ohio Board of Voting Machine Examiners, Feb. 6, 2014, https://www.eac.gov/assets/1/28/Final%20-%20Standards%20for%20the%20Examination%20and%20Certification%20of%20Electronic%20Pollbooks%20for%20Use%20in%20Ohio%20Elections1.pdf.

[218] Lawrence Norden, *Voting System Failures: A Database Solution*, Brennan Center for Justice, 2010, *available at* https://www.brennancenter.org/publication/voting-system-failures-database-solution.

adversaries will undoubtedly change and advance their methods of attack. The responsibility for funding elections must be shared among local, state, and federal governments, and the Act ensures that the federal government pays its fair share of the ongoing cost of voting systems, with a consistent stream of federal funding for states to procure and maintain secure equipment and implement state-of-the-art security measures to ensure the integrity of our elections.

The election security measures in H.R. 1 would not only make our election infrastructure more secure, but it would also help reduce the unconscionably long lines that so many voters experience every election. That would go a long way toward restoring Americans' confidence in our elections. We look forward to continuing to work with Congress to ensure sufficient federal resources for state and local election officials and sufficient national standards to ensure that funding is spent effectively.

V. Ethics (Titles VII-X)

H.R. 1 would establish stronger ethics rules for all three branches of government. Its policies are essential first steps toward strengthening ethics and accountability. The values that undergird our system of representative government are being tested like never before. Ethical constraints on self-dealing at the highest levels of government are eroding.[219] To reverse this process, it is vital that Congress put forward bold reforms to help ensure that officials act for the public good rather than private gain.

As detailed in the testimony of Brennan Center Senior Counsel and Spitzer Fellow Rudy Mehrbani before the House Committee on Oversight and Reform, the Brennan Center strongly supports all the Act's ethics reforms, especially its measures to increase the independence and authority of the Office of Government Ethics, provide better transparency for top officials, and slow the "revolving door" between government and industry. These are especially valuable changes.[220] We also strongly support the Act's requirement that the Judicial Conference of the United States develop a code of conduct that includes Supreme Court justices, as explained in more detail in a letter my colleagues and I sent to the House Judiciary Committee on January 29, 2019.[221] We look forward to continuing to work with Congress on other much-needed reforms.[222]

VI. Authority of Congress

Finally, Congress unequivocally has the authority to enact all the democracy reforms set forth in Act, especially under Article I, Section 4 of Constitution—known as the Elections

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[219] Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law and Democracy, 2018, 2.
[220] Rudy Mehrbani, *For the People Act of 2019: Hearing on H.R. 1, "Strengthening Ethics Rules for the Executive Branch," Before the House Comm. On Oversight and Reform*, Feb. 6, 2019, *available at* https://www.brennancenter.org/analysis/testimony-support-people-act ("*Mehrbani Testimony*").
[221] *H.R. 1, The For the People Act: Letter to the Committee on the Judiciary*, 116th Cong. (2019) (letter from Wendy R. Weiser, Myrna Pérez, Daniel I. Weiner, Max Feldman), *available at* https://www.brennancenter.org/analysis/letter-house-judiciary-committee-support-hr-1-people-act.
[222] *Mehrbani Testimony*, 14-15.

Clause. The Elections Clause empowers Congress, "at any time," to "make or alter" any regulations for federal elections.[223]

With the exception of a 1921 case that has since been overturned, the Supreme Court has consistently interpreted the Elections Clause to endow Congress with sweeping power to regulate the time, place, and manner of elections.[224] As recently as 2013, the Court said, in an opinion by Justice Scalia, that Congress's power under the Elections Clause is so broad that it includes "authority to provide a complete code for congressional elections[.]'"[225] Accordingly, the Supreme Court has found that the Elections Clause authorizes legislation related to voter registration,[226] redistricting,[227] campaign finance,[228] and corruption in presidential elections.[229]

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[223] The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. Const. art. I, § 4, cl. 1

[224] See, *e.g.*, *Inter Tribal Council*, 570 U.S. at 9 ("The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'") (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1879)); *Ex parte Yarbrough*, 110 U.S. 651, 661–62 (1884) ("it is not doubted" "that congress can, by law, protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud"); *United States v. Mosley*, 238 U.S. 383, 386 (1915) ("We regard it as . . . unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."); *Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."); *United States v. Classic*, 313 U.S. 299, 319–20 (1941) ("Unless the constitutional protection of the integrity of 'elections' extends to primary elections, Congress is left powerless to effect the constitutional purpose. . . . Words, especially those of a constitution, are not to be read with such stultifying narrowness. The words of ss 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it."); *Buckley*, 424 U.S. at 13 n.16 (recognizing that *Classic* overturned *Newberry v. United States*, 256 U.S. 232 (1921), which had held that the Elections Clause did not apply to primary elections); *Oregon v. Mitchell*, 400 U.S. 112, 121 (1970) ("The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts."); *Foster v. Love*, 522 U.S. 67, 72 n.2 (1997) ("The [Elections] Clause gives Congress 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'") (quoting *Smiley*, 285 U.S. at 366).

[225] *Inter Tribal Council*, 570 U.S. at 8–9 (quoting *Smiley*, 285 U.S. at 366).

[226] *Id*.

[227] *Vieth*, 541 U.S. at 275 (stating that the Elections Clause "permit[s] Congress to 'make or alter'" the "districts for federal elections"); *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964) ("Speakers at the ratifying conventions emphasized that the House of Representatives was meant to be free of the malapportionment then existing in some of the State legislatures . . . and argued that the power given Congress in Art. I, s 4, was meant to be used to vindicate the people's right to equality of representation in the House.") (citations omitted).

[228] *Buckley*, 424 U.S. at 13 ("The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case.").

[229] *Id.* 132 ("This Court has also held that it has very broad authority to prevent corruption in national Presidential elections.") (citing *Burroughs v. United States*, 290 U.S. 534 (1934)).

There is thus no question that most of the Act's provisions fall squarely within Congress's authority over federal elections. Some, such as Congress's power to strengthen the Voting Rights Act and to restore voting rights to individuals with past convictions under Title I, Subtitle E, are also rooted in authority granted to it under the Fourteenth and Fifteenth Amendments.[230]

In fact, the Act embodies the Framers' central goal in establishing the Elections Clause—ensuring that Congress can override efforts by states to manipulate the federal voting process.[231] As they drafted the Constitution, the Framers were concerned that states, left to their own devices, would suppress or skew the vote. For example, at the Constitutional Convention, James Madison urged that, without the Elections Clause, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed."[232] The Framers therefore designed the Elections Clause to prevent states from manipulating election outcomes and to prevent the development of factions within states that might "entrench themselves or place their interests over those of the electorate."[233] The Framers deliberately granted wide-ranging authority under the Elections Clause to ensure that Congress would be able to combat even those state abuses of power that were unforeseeable at the time.[234] Thus, as Justice Scalia recognized, the states' power to regulate federal elections has always been subject to federal law.[235]

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Voters sent a clear message in 2018: they want to see Congress tackle these problems with bold solutions to ensure that all Americans can participate in the political process and have their voices heard in the halls of government. Now it is up to elected leaders to deliver. H.R. 1 is a down-payment on the promise of a democracy that works for everyone. We urge its prompt passage.

Thank you.

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[230] *Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); *Mitchell*, 400 U.S. at 121, 124 (1970).
[231] The Avalon Project: Documents in Law, History and Diplomacy, "Federalist No. 59," accessed Feb. 11, 2019, http://avalon.law.yale.edu/18th_century/fed57.asp.
[232] Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1941), 2:241.
[233] *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015).
[234] At the Constitutional Convention, James Madison explained that the Elections Clause uses "words of great latitude" because "it was impossible to foresee all the abuses that might be made of the [states'] discretionary power." Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1941), 2: 240.
[235] *Inter Tribal Council*, 570 U.S. at 14–15 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)).

APPENDIX B

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Supplemental Written Testimony of the

Brennan Center for Justice at NYU School of Law

Hearing on H.R. 1, The For the People Act
The Committee on House Administration, U.S. House of Representatives

March 5, 2019

Chairperson Lofgren, Ranking Member Davis, and members of the Committee:

Thank you for the opportunity to submit this supplemental statement in support of House Resolution 1, the *For the People Act*, and in particular, in support of the subtitle E, the Democracy Restoration Act of 2019 ("the DRA").

As Wendy Weiser, the Director of the Brennan Center's Democracy Program, noted in her previous testimony on February 14, 2019, Congress has the authority to pass the DRA under the Elections Clause of Article I, Section 4, the Fourteenth Amendment, and the Fifteenth Amendment. This supplement is directed specifically at laying out the record of discrimination that justifies congressional action to enforce the Fourteenth and Fifteenth Amendments. As set forth below, there is ample evidence that: 1) many of the states' criminal disenfranchisement laws were intended to disenfranchise African Americans at the time of their enactment; and 2) these criminal disenfranchisement laws have a racially discriminatory impact today. Much of this evidence has been previously considered by Congress in testimony, hearings, and related submissions. For these reasons, it is well within the power of Congress to pass the DRA to remedy this harm.

Historians have documented two corresponding trends in the aftermath of the Civil War that reveal concerted efforts to use these laws to disenfranchise African Americans and evade the mandate of the Fifteenth Amendment. First, there was a trend among the States to enact so-called "Black Codes" aimed at restricting the freedom of newly emancipated African Americans by, among other things, criminalizing conduct that would likely ensnare them. Second there was a trend of passing and extending criminal disenfranchisement laws. Together, these efforts ensured, and were intended to ensure, that criminal disenfranchisement laws would work to circumvent the Fifteenth Amendment and deprive significant numbers of African Americans of

the right to vote. The following sources[1] lay out and provide context for these Reconstruction Era trends:

MICHELLE ALEXANDER, THE NEW JIM CROW 28 (2012)

DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2008)

ERIC FONER, RECONSTRUCTION 199-205 (2002)

ERIN KELLEY, BRENNAN CTR. FOR JUSTICE, RACISM AND FELONY DISENFRANCHISEMENT (2017), https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf

ALEXANDER KEYSSAR, THE RIGHT TO VOTE 162 and Table A.15 (2000)

JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 55–58 (2006)

Shadman Zaman, Note, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 233 (2015)

It was no accident that these trends developed side-by-side. There is significant evidence from a number of states, from Alabama and Virginia to New York and Florida, that criminal disenfranchisement provisions were intended to disenfranchise African Americans and that they were often designed with "Black Codes" in mind. That is, states often tailored the list of disenfranchising crimes to correspond to the crimes that they believed African Americans were more likely to be convicted of under the discriminatory criminal justice systems developed during this time. A number of researchers have chronicled this evidence, in some cases in state-specific reports:

Benno Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 Colum. L. Rev. 835 (1982)

Angela Behrens, Christopher Uggen, and Jeff Manza, *"Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disfranchisement in the United States, 1850-2002,"* 109 AM. J. SOC. 559 (2003)

Helen Gibson, Felons and the Right to Vote in Virginia: A Historical Overview, 91 VA. NEWSL., Jan. 2015, at 1

[1] For the convenience of the reader, we divide these sources roughly according to the type of evidence they contain, but it is worth noting that many of these sources provide research and support that is relevant to a number of the themes we describe.

https://vig.coopercenter.org/sites/vig/files/VirginiaNewsLetter_2015_V91-N1.pdf

PIPPA HOLLOWAY, LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP 21 (2013)

Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, 31 HUMAN RIGHTS, Winter 2004, at 16 (2004)

Andrew L. Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993)

ERIKA L. WOOD, BRENNAN CTR. FOR JUSTICE, FLORIDA: AN OUTLIER IN DENYING VOTING RIGHTS (2016), http://www.brennancenter.org/sites/default/files/publications/Florida_Voting_Rights_Outlier.pdf

ERIKA L. WOOD ET AL., JIM CROW IN NEW YORK (2010), http://www.brennancenter.org/sites/default/files/legacy/publications/JIMCROWNY_2010.pdf

Felony disenfranchisement continues to this day to have the intended effect of disproportionately disenfranchising people of color, largely because our nation's criminal justice system is still racially discriminatory. The research below demonstrates both the structural inequality of the criminal justice system and the disparity it causes in the impact of felony disenfranchisement. The disparity is seen across the country and has persisted since the eras of Reconstruction and Jim Crow. In some states, such as Kentucky, Tennessee, Kansas, and Wyoming, and among some demographic sub-groups, such as Black men, the numbers are even more stark.

ACLU, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 3 (2006), http://www.aclu.org/images/asset_upload_file825_25663.pdf

Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743 (1993)

JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998), http://www.sentencingproject.org/tmp/File/FVR/fd_losingthevote.pdf

HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 19 (2008), http://www.hrw.org/reports/2008/us0508/us0508webwcover.pdf

R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004)

MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007), http://www.sentencingproject.org/Admin/Documents/publicatins/rd_stateratesofincbyraceandethnicity.pdf

THE SENTENCING PROJECT, IOWA AND FELONY DISENFRANCHISEMENT (2005), https://web.archive.org/web/20131019085622/http://www.sentencingproject.org/doc/publications/fd_iowa.pdf

Christopher Uggen et al., The Sentencing Project, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf

Finally, not only does this burden fall more heavily on people of color in the first instance, it diminishes the political voices of entire communities. The research below suggests that criminal disenfranchisement laws decrease turnout in affected communities even among people not formally disenfranchised. The article by Eric Plutzer explains that people's voting behavior is learned from an influenced by that of their parents, which may be one of the reasons for this ripple effect.

Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons*, 90 SOC. SCI. Q. 722 (2009)

Aman McLeod et al., *The Locked Ballot Box: The Impact of State Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL'Y & L. 66, 77-78 (2003)

Eric Plutzer, *Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood*, 96 AM. POL. SCI. REV. 41, 43 (Mar. 2002)

In addition to the published historical and quantitative research described above, a number of courts have examined evidence and made findings consistent with this record of race discrimination. A non-exhaustive list of these decisions is below. Most of these cases concern challenges to felon disenfranchisement laws (although one, *Ratliff v. Beale*, is a disgraceful nineteenth century endorsement of Mississippi's intentional race discrimination).

Hunter v. Underwood, 471 U.S. 222 (1985)

Johnson v. Governor of State of Fla., 353 F.3d 1287, 1296 (11th Cir. 2003), *vacated*, 405 F.3d 1214 (11th Cir. 2003) (en banc)

Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *6 (E.D. Wash. 2009), *rev'd on other grounds*, 623 F.3d 990 (9th Cir. 2010) (en banc)

Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896)

In short, there is a significant record before Congress demonstrating that criminal disenfranchisement laws are motivated by and cause race discrimination. It is time that our nation reject the shameful history of discrimination that led to the criminal disenfranchisement laws in states across the country and remove the remaining barriers to full and equal access to the ballot. We urge Congress to take a step in that direction by ensuring that all American citizens living the community can vote in federal elections by passing the DRA, and H.R.1 in its entirety.

APPENDIX C

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Written Testimony of

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Hearing on H.R. 1: Strengthening Ethics Rules for the Executive Branch

Committee on Oversight and Reform
United States House of Representatives

Wednesday, February 6, 2019

I would like to thank Chairman Cummings, Ranking Member Jordan, and the entire Committee for the opportunity to submit this statement for the record in support of House Resolution 1, the *For the People Act* ("the Act") – a sweeping set of sorely needed reforms to revitalize and restore faith in our democracy.

This testimony is based on my years of service in government – as a policy advisor at the Department of Housing and Urban Development; as an associate counsel and special assistant to the president, as general counsel for the Peace Corps, an executive branch agency; as an assistant to the president and director of the Presidential Personnel Office in the White House; and as a member of the 2016 White House Transition Coordinating Council.

It is also based on my work since leaving government at the Brennan Center, a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice. The Brennan Center's experts have testified dozens of times over the last decade before Congress and state legislatures around the country. Officials across the political spectrum have relied on the Brennan Center's research in crafting innovative policies. Indeed, a number of the Center's signature policy proposals have been incorporated into the Act.

The Brennan Center enthusiastically supports H.R. 1. It would be historic legislation. For far too long, public trust in government has declined, as longstanding problems with our system of self-government have worsened. In this past election, we witnessed the result. Long lines. Vast sums of dark money, thanks to *Citizens United* and other misguided rulings. Harmful rules and practices that made it harder for many, especially voters of color, to cast their ballot. The ongoing challenges of gerrymandering, inadequate election administration, and at-risk technology.

But in the 2018 election, we also saw the awakening of citizens to the urgent need for action. This Congress was elected with the highest voter turnout since 1914. Many of you were elected with a pledge to reform democracy. And in states across the country, major ballot measures were passed by large bipartisan margins to implement bold and creative reform. Voters spoke clearly: the best way to respond to attacks on democracy is to strengthen it.

If we cherish American democracy, the world's oldest such system, we must acknowledge that it urgently needs repair. It is, thus, fitting that this bill is designated as the very first introduced in this Congress. Democracy reform must be a central challenge for our politics now and going forward.

Protecting the Right to Vote. Among other things, the Act will bring automatic, online, and same-day voter registration to voters across the country, which we know from the experience of more than a dozen states will lead to big gains in voter registration and participation, as well as decreases in errors and voter disenfranchisement. It affirms a strong commitment to restoring the full protections of the 1965 Voting Rights Act, which was hobbled by the Supreme Court's 2013 decision in *Shelby County v. Holder*, resulting in a wave of discriminatory and restrictive voting measures across the country. It provides all voters with the flexibility to vote early during the two weeks before Election Day, which will boost turnout and make it easier for hard-working Americans to vote. And it will restore voting rights to citizens with past criminal convictions

living in our communities, strengthening those communities, offering a second chance to those who have paid their debts to society, and removing the stain of a policy born out of Jim Crow.

Empowering Citizens. The Act creates a small-donor matching system for congressional elections to amplify the voices of average Americans. A similar system has existed for decades in New York City, where it has diversified the pool of voters donating to candidates, helped candidates of modest means run for office, and allowed elected officials to spend more time speaking with their constituents rather than dialing for dollars from big donors. It gives ordinary citizens a louder voice, even in the face of Super PACs and dark money. The Act also revamps the presidential public financing system, closes the "dark money" loophole in existing campaign finance disclosure laws, extends transparency requirements to online political ads, and overhauls the dysfunctional Federal Election Commission. These reforms will reduce public corruption, make elected leaders more accountable to the public, allow voters to better detect who is trying to influence them and whether elected leaders are in the pocket of "moneyed interests,"[1] and help keep foreign money out of our campaigns.

Ensuring Fair, Effective, and Accountable Representation. The Act curbs extreme partisan gerrymandering by ensuring that states draw congressional districts using independent redistricting commissions, follow fair criteria for line-drawing, and increase transparency in the redistricting process, while ensuring fair representation for diverse communities. In addition to stemming anti-democratic gerrymandering practices, these reforms will ensure that the electoral system is more responsive and accountable to the voters and includes more competitive races, as we know from the experience of states that currently use similar practices.

Securing Elections from Interference. The Act contains a number of provisions for making America's elections more secure and less susceptible to foreign cyber-attacks. It requires states to replace old paperless machines and provides new resources to states to enhance their security efforts and develop auditing processes. Upgrading our aging voting infrastructure will also help reduce the unconscionably long lines that so many voters experience every election.

Strengthening Government Ethics and Transparency. Finally, the Act shores up ethics rules in the executive branch by increasing transparency about senior officials' conduct, strengthens enforcement of ethics rules, and slows the "revolving door." It also adopts stronger ethics rules for the legislative and judicial branches, helping make clear that Congress and the courts should also follow a set of ethics standards like the rest of the federal government.

This testimony focuses on this last point – ethics in government.

I. Background

We are facing a crisis of confidence in American democracy today – a crisis that existed long before the recent government shutdown. A recent poll showed only a third of Americans trust their government "to do what is right" — a decline of 14 percent from 2017.[2] More than three-

[1] Citizens United v. FEC, 558 U.S. 310, 369 (2010) (quoting McConnell v. FEC, 540 U.S. 93, 259 (2003)).
[2] Uri Friedman, "Trust Is Collapsing in America," *The Atlantic*, Jan. 21, 2018, https://www.theatlantic.com/international/archive/2018/01/trust-trump-america-world/550964/.

quarters of voters ranked corruption in government as a top issue in the 2018 election, with almost a third calling it the most important issue.[3] I believe two factors are to blame: (1) the pervasive sentiment that people are not adequately or equally represented in government; and (2) the belief that public officials put their own best interest ahead of the public's.

These views are not unfounded. In the most recent election, we witnessed some of the most troubling attempts at voter suppression in years.[4] We saw malfunctioning of voting machines that caused long lines at the polls and voter registration problems.[5] We also saw the impact of big money in politics, which gives the very wealthiest donors a far greater say than other Americans,[6] and the ongoing prevalence of extreme partisan gerrymandering that distorts the political process.[7]

At the same time, with each passing day, we read another story about alleged or real ethics abuses by sitting government officials, ranging from senior officials utilizing their official positions for their own personal financial benefit[8] to selective or lax enforcement of ethics rules when senior or well-connected officials run afoul of them.[9]

Americans are yearning for solutions to these problems — and real action on those solutions. The 2018 election featured record-breaking turnout,[10] with many voters motivated by democracy

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[3] Ashley Kirzinger, Bryan We, Cailey Muñana, and Mollyann Brodie, "Kaiser Health Tracking Poll – Late Summer 2018: The Election, Pre-Existing Conditions, and Surprises on Medical Bills," *Henry J. Kaiser Family Foundation*, Sept. 5, 2018, https://www.kff.org/health-costs/poll-finding/kaiser-health-tracking-poll-late-summer-2018-the-election-pre-existing-conditions-and-surprises-on-medical-bills/.

[4] Wendy R. Weiser and Max Feldman, *The State of Voting 2018,* Brennan Center for Justice, 2018, *available at* https://www.brennancenter.org/publication/state-voting-2018; Rebecca Ayala, "Voting Problems 2018," *Brennan Center for Justice*, Nov. 5, 2018, https://www.brennancenter.org/blog/voting-problems-2018.

[5] Edgardo Cortés and Lawrence Norden, "Paper Trails for All," *Brennan Center for Justice*, Nov. 13, 2018, https://www.brennancenter.org/blog/paper-trails-all.

[6] Anu Narayanswamy, Christ Alcantara, and Michelle Ye Hee Lee, "Meet the Wealthy Donors Pouring Millions into the 2018 Elections," *Washington Post*, Oct. 26, 2018, https://www.washingtonpost.com/graphics/2018/politics/superpac-donors-2018/?utm_term=.68bcdbe7c951.

[7] Laura Royden, Michael Li, and Yurij Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice, 2018, *available at* https://www.brennancenter.org/publication/extreme-gerrymandering-2018-midterm.

[8] See, *e.g.*, Lisa Friedman, "Scott Pruitt Sought 'Business Opportunity,' With Chik-fil-A While Leading E.P.A." *New York Times*, June 5, 2018, https://www.nytimes.com/2018/06/05/climate/pruitt-epa-chick-fil-a.html; Brad Plumer and Eric Lipton, "Scott Pruitt, E.P.A. Chief, Rented Residence from Wife of Energy Lobbyist," *New York Times*, March 30, 2018, https://www.nytimes.com/2018/03/30/climate/scott-pruitt-epa-rental.html; Dan Alexander, "Wilbur Ross Scheduled Meetings with Chevron, Boeing Despite Conflicts of Interest," *Forbes*, Oct. 25, 2018, https://www.forbes.com/sites/danalexander/2018/10/25/wilbur-ross-scheduled-meetings-with-chevron-boeing-despite-conflicts-of-interest/; Juliet Eilperin, Josh Dawsey, and Lisa Rein, "White House Concerned Interior Secretary Zinke Violated Federal Rules," *Washington Post*, Nov. 1, 2018, https://www.washingtonpost.com/national/health-science/white-house-concerned-interior-secretary-ryan-zinke-violated-federal-rules/2018/11/01/e5e4d2f4-dddc-11e8-b3f0-62607289efee_story.html.

[9] See, e.g., Richard Pérez-Peña and Rachel Abrams, "Kellyanne Conway Promotes Ivanka Trump Brand, Raising Ethics Concerns," *New York Times*, Feb. 9, 2017, https://www.nytimes.com/2017/02/09/us/politics/kellyanne-conway-ivanka-trump-ethics.html; Michelle Ye Hee Lee, "White House Adviser Kellyanne Conway Violated Hatch Act, Federal Investigator Says," *Washington Post*, Mar. 6, 2018, https://www.washingtonpost.com/politics/white-house-adviser-kellyanne-conway-violated-hatch-act-federal-investigator-says/2018/03/06/28995c06-2162-11e8-94da-ebf9d112159c_story.html.

[10] Camila Domonske, "A Boatload of Ballots: Midterm Voter Turnout Hit 50-Year High," *NPR*, Nov. 8, 2018, https://www.npr.org/2018/11/08/665197690/a-boatload-of-ballots-midterm-voter-turnout-hit-50-year-high.

reforms appearing on ballot measures around the country and the commitment by candidates from both parties to address these defining challenges.[11] The message from voters was loud and clear — they want reform — and all of us at the Brennan Center for Justice are pleased to see this Congress respond by moving forward with a bold and transformative package of reforms as the first legislative initiative, in H.R. 1.

II. Ethics in Government

For a number of years, we have been witnessing an erosion of the ethical guardrails that generally prevented abuse by public officials. The recent spate of allegations focusing on ethical transgressions by public officials has further undermined faith in our democratic institutions and highlights the urgent need for Congress to respond with effective reforms.

I hope to convey four points in this testimony:

1. Ethics practices followed by past administrations – Republican and Democratic – are consistent with and bolster fundamental democratic principles. But they are not required by law, though many long assumed that they were.

2. Legislative reform is needed to fill the gaps. Without binding regulation, ethics in the executive branch depends primarily on leadership— namely, a commitment to visible and sustained leadership on ethics issues, which is not guaranteed. We need to shore up the guardrails that exist to ensure consistent ethical behavior from senior political leaders.

3. A robust and transparent ethics program supports the goals of the political appointments process. Though some argue that common-sense ethics rules deter talent from federal government service, in my experience, the opposite is true. In fact, a commitment by an administration to ethical conduct in government can result in more interest from quality candidates from a diversity of backgrounds who are willing to serve longer.

4. H.R. 1 contains common-sense reform proposals that are strong first steps for addressing existing gaps in government ethics rules. These proposals warrant strong bipartisan support from all Members of Congress.

A. Observed Gaps in Existing Rules

[11] Wendy Weiser and Daniel Weiner, "Voters are Hungry for Reform: Congress Must Deliver," *The Hill*, Nov. 11, 2018, https://thehill.com/opinion/campaign/415842-voters-are-hungry-for-reform-congress-must-deliver. See also *Elections in America: Concerns Over Security, Divisions Over Expanding Access to Voting*, Pew Research Center, Oct. 29, 2018, *available at* http://www.people-press.org/2018/10/29/elections-in-america-concerns-over-security-divisions-over-expanding-access-to-voting/ (showing bipartisan support among Americans for, among other things, streamlining the way people register to vote and cast ballots, restoring voting rights to felons who have completed their sentences, and making Election Day a national holiday).

Our democracy is rooted in the idea that government officials should serve the public and not themselves. Government power derives from the people and is intended to be used for the people. So central is this idea that it is expressly supported by our founding documents, including in specific provisions in the Constitution.[12] Periods of real and perceived increases in corruption in public life previously resulted in a bipartisan recommitment to this idea.

1. Ethics Reforms Consistently Received Bipartisan Support in Congress

Prohibitions on conflicts of interest by government employees have been in place for more than a century.[13] More recently, in the wake of Watergate, Congress strengthened existing conflict of interest laws by passing the Ethics in Government Act of 1978 (EGA). Its purposes were to renew a sense of trust in government and to promote a general philosophy of ethics in public service by mandating, in part, a public financial disclosure requirement, the establishment of the Office of Government Ethics to promote and lead the administration of an ethics program in the executive branch, and prohibitions to slow the "revolving door" between public service and private business.[14]

At the time, there were several arguments against these reforms: that they would deter potential nominees and candidates for federal office; that they would overly burden senior officials; that the rules would be difficult to administer; and that disclosure in particular would slow down the appointment process.[15] In spite of these objections, the EGA was passed with bipartisan support and signed by President Jimmy Carter.

In 1989, when President George H. W. Bush signed into law amendments to strengthen key provisions of the EGA,[16] similar arguments were made against reform.[17] Yet the bill was passed with bipartisan support.[18] Further bipartisan action was taken in 1995 to prevent undue influence by the private sector over governmental activities with the passage of the Lobbying Disclosure Act, which strengthened the transparency and disclosure requirements for defined activities of lobbyists and lobbying firms.[19]

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[12] U.S. Const. Art. 1 § 9 cl. 8; U.S. Const. art. II, § 1, cl. 7.
[13] Olivia B. Waxman, "Questions of Profit in Politics Raised by Trump Administration Are Older than You May Think," *TIME*, Mar. 10, 2017, http://time.com/4669729/conflict-of-interest-history/.
[14] S. Rep. No. 95-170 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216. The EGA also established the rules and procedures for the appointment of independent counsels, which I omit from discussion because it is not the subject of today's hearing.
[15] Charles R. Babcock, "Hill Leaders Agree on Plan to Soften Federal Ethics Code," *Washington Post*, Mar. 30, 1979; James D. Carroll and Robert N. Roberts, "If Men Were Angels: Assessing the Ethics in Government Act of 1978," *Policy Studies Journal* 17 (Winter 1988-89): 444.
[16] The Ethics Reform Act of 1989 extended the "revolving door" restrictions to the legislative branch, increased the financial disclosure requirements, imposed greater limits on gifts and travel, and imposed additional restrictions on outside earned income for high-salaried, non-career employees in all branches. U.S. President George H. W. Bush, "Statement on Signing the Ethics Reform Act of 1989," *Weekly Complication of Presidential Documents*, vol. 25, no. 48 (Nov. 30, 1989), 1855.
[17] See, *e.g.*, "New Ethics Law Will Squeeze Federal Employees," *Associated Press*, Dec. 27, 1990, *available at* https://www.nytimes.com/1990/12/27/us/new-ethics-law-will-squeeze-federal-employees.html.
[18] 135 Cong. Rec. S15964-02, 1989 WL 189219.
[19] Under the LDA, individuals are required to register and disclose their activities if they are employed or retained by a client for financial or other compensation, and for services that include more than one lobbying contact, and

2. Presidents from Both Major Parties Filled the Gaps

Separate from these laws, Republican and Democratic presidents have taken additional steps to promote a culture of ethics in their administrations that have proven critical. One prominent example is the practice of presidential candidates disclosing certain personal tax information to the public. After President Richard Nixon released his personal tax returns in 1973,[20] all major party presidential nominees voluntarily disclosed their returns to the public.[21] This practice provided the public with more information about candidates' personal finances and confirmed that candidates were paying their fair share in taxes.

Presidents and vice presidents also chose to comply with conflict of interest laws that do not technically apply to them. Since the passage of the EGA, the public could count on presidents and vice presidents to divest from potentially conflicting assets or to keep their investments in a blind trust whose contents were hidden from them.[22] This practice reinforced the general view that our most senior leaders should only take official action in the public's best interest, without consideration of their own personal financial interest.

Presidents also issued executive orders and memoranda supplementing the ethics rules applicable to personnel in their administrations.[23] Three of those orders – issued by Presidents Clinton, Obama, and Trump – contained an "ethics pledge" that appointees were required to sign as a condition of their employment.[24] The orders contained significant and meaningful rules to further reduce the influence of private sector and other actors on government activities, that is, to slow the "revolving door."[25] The orders specifically adopted restrictions on lobbyists entering

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lobbying activities for that client must amount to twenty percent or more of the time that the individual expends on services to that client over a six-month period. 2 U.S.C. § 1603.

[20] Revelations that President Nixon had sought to evade his federal income tax obligations in the early 1970s using dubious charitable deductions seriously damaged his credibility with the public and arguably set the stage for his resignation from office. Stephen Mihm, "Nixon's Failed Effort to Withhold His Tax Returns," *Bloomberg*, Aug. 2, 2016, https://www.bloomberg.com/view/articles/2016-08-02/nixon-s-failed-effort-to-withhold-his-tax-returns.

[21] See "Presidential Tax Returns," *Tax History Project*, accessed Feb. 1, 2019, http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns.

[22] Matt O'Brien, "Donald Trump Won't Do What Ronald Reagan, George H. W. Bush, Bill Clinton and George W. Bush Did," *Washington Post*, Nov. 15, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/11/15/ronald-reagan-did-it-george-h-w-bush-did-it-bill-clinton-did-it-george-w-bush-did-it-donald-trump-wont-do-it/.

[23] See Jacob R. Straus, *Ethics Pledges and Other Executive Branch Appointee Restrictions Since 1993: Historical Perspective, Current Practices, and Options for Change*, CRS Report No. R44974 (Washington, D.C.: Congressional Research Service, 2017), 7, https://fas.org/sgp/crs/misc/R44974.pdf.

[24] Each pledge defined "appointee" in a slightly different manner but generally applied to full-time, non-career presidential appointees, non-career appointees in the Senior Executive Service, and appointees to confidential or policymaking positions. Straus, *Ethics Pledges*, 18-25. Note that President Clinton revoked his ethics pledge prior to leaving office, Exec. Order No. 13,184, 66 Fed. Reg. (Dec. 28, 2000) (Revocation of Executive Order 12,834), and President Trump's order revoked President Obama's pledge. Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Jan. 28, 2017), § 6.

[25] Perhaps unsurprisingly, public detractors claimed these orders would deter exceptional candidates from pursuing positions in these administrations and harm employment prospects when appointees departed government. See, *e.g.*, *Collateral Damage: How the Obama Administration's Ethics Restrictions on Public Service Have Harmed Nonprofit Advocacy and the Public Interest*, Center for Lobbying in the Public Interest, 2011, https://opensocietypolicycenter.org/wp-content/uploads/CollateralDamageCLPI1020111.pdf; Ryan Grim, "Obama's Anti-Lobbyist Policy Causing Unintended Harm," *Huffington Post*, Apr. 5, 2009, https://www.huffingtonpost.com/2009/03/05/obamas-anti-lobbyist-poli_n_172244.html. Some reports indicate that

government and appointees leaving government to lobby. President Trump's and President Clinton's orders also contained prohibitions on appointees representing foreign principals, as defined by the Foreign Agents Registration Act, upon leaving office.[26]

3. The Commitment to Unwritten Rules Is Eroding

The fact that these presidential practices were not legally required was not seen as a major problem by members of the public or Congress because our leaders generally committed to them and aimed to foster an ethical and accountable government. Today, we can no longer assume administrations will follow these unwritten rules.

As we have seen, President Trump's resistance to publicly disclosing his personal or business tax returns raises serious doubts among many in the public about his financial ties and whether he is paying his fair share. Even more concerning are the questions about President Trump's conflicts of interest following his decision to keep ownership and control of his global business empire.[27] The public outcry and reaction to the president's departure from these longstanding unwritten rules serve as validation of the rules' importance. Doubts about a president's interests can sap his legitimacy and the legitimacy of his actions, even when they are not actually motivated by self-interest.

The implementation of President Trump's ethics pledge has also raised questions about how thoroughly it is being followed. The efficacy of such pledges in promoting public trust depends, in part, on how they are administered. For example, President Obama's included important

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these arguments persuaded President Clinton to revoke his executive order prior to leaving office. John Mintz, "Clinton Reverses 5-Year Ban on Lobbying by Appointees," *Washington Post*, Dec. 29, 2000, https://www.washingtonpost.com/archive/politics/2000/12/29/clinton-reverses-5-year-ban-on-lobbying-by-appointees/e5a0571f-5c54-4988-adc6-5571a7557e83/?utm_term=.0a70ab32c85e; Jason Peckenpaugh, "Clinton Lifts Lobbying Restrictions on Appointees," *Government Executive*, Jan. 2, 2001, https://www.govexec.com/federal-news/2001/01/clinton-lifts-lobbying-restrictions-on-appointees/8217/.

[26] Exec. Order No. 13,770, § 1 ¶ 4; Exec. Order No. 12,834, 58 Fed. Reg. 5911 (Jan. 20, 1993), § 1 ¶ 3.

[27] Numerous situations have arisen where it is hard to discern whether the president is acting in support of his personal financial interest or the public's interest. For example, the Trump administration's reversal of long-pending plans to sell and relocate the Federal Bureau of Investigation's headquarters after the president reportedly showed an interest in the decision has led some to believe the course correction was influenced by the president's desire to eliminate potential competition with the Trump International Hotel, operating out of the Old Post Office Building across the street from the FBI's current headquarters. Thomas Kaplan, "Trump's Focus on a Washington Building Draws Scrutiny," *New York Times*, Oct. 18, 2018, https://www.nytimes.com/2018/10/18/us/politics/fbi-headquarters-building-trump.html; Niels Lesniewski, "IG Confirms Trump's Involvement in FBI Headquarters Project Across from His Hotel," *Roll Call*, Aug. 27, 2018, https://www.rollcall.com/news/politics/ig-confirms-trumps-involvement-fbi-headquarters-project-across-hotel. The Inspector General of the General Services Administration (GSA) recently concluded that GSA, in analyzing the validity of the lease of the Old Post Office Building, improperly excluded issues raised under the Constitution's Emoluments Clauses in its analysis. The IG found that this omission affected GSA's conclusion that the lease remains valid. U.S. General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease* (Washington, D.C.: U.S. General Services Administration Office of Inspector General, 2019): 4-6, https://www.gsaig.gov/sites/default/files/ipa-reports/JE19-002%20OIG%20EVALUATION%20REPORT-GSA%27s%20Management%20%26%20Administration%20of%20OPO%20Building%20Lease_January%2016%202019_Redacted.pdf. The report raises significant questions about whether improper influence or motivation contributed to GSA's decision-making, which might have been avoided if the president had followed precedent and divested.

transparency requirements, including a provision that OGE publish an annual report on the administration of the ethics order and a list of appointees entering and exiting public service who received waivers from the pledge's requirements. It also included a criterion for issuing waivers, which provided some consistency in their authorization. President Trump's, on the other hand, does not.[28] In fact, the current administration made unprecedented claims about the applicability of OGE's rules and regulations, initially balking at OGE's request to review and disclose waivers issued to White House staff.[29] And the lack of a criterion for evaluating and issuing waivers has made the process susceptible to abuse.[30]

In short, we can no longer assume that presidents will follow the norms and practices of their predecessors. Presidents may simply not show the same commitment to ethics rules as we have come to expect. And as we have seen, past erosion will lead to future abuse. We need a broader set of reforms to ensure our leaders remain committed to using their powers to advance the people's interests. That begins with enshrining transparency requirements in law so the public is able to identify improper influences, providing a mechanism for ensuring accountability when abuse occurs, and eliminating avenues for personnel to handle matters involving their personal or financial interests.

B. Filling the Gaps Is Essential

Without additional regulation, the effectiveness of the executive branch ethics program will depend entirely on future presidents' and agency heads' willingness to voluntarily adopt effective accountability and ethics mechanisms.

In the administration in which I happened to work, the president's steadfast commitment to ethics filtered down throughout government and drove many related processes. For example, when I ran the Presidential Personnel Office in the White House, we followed certain processes not just because my staff and I were committed to the ethics rules but because President Obama demanded that we follow strong ethics practices in administering the personnel process. Among

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[28] Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009) §§ 3-4.

[29] Eric Lipton, "Top Ethics Officer Challenges Trump Over Secret Waivers for Ex-Lobbyists," *New York Times*, May 1, 2017, https://www.nytimes.com/2017/05/01/us/politics/top-ethics-officer-challenges-trump-over-secret-waivers-for-ex-lobbyists.html; Eric Lipton and Steve Eder, "White House Details Ethics Waivers for Ex-Lobbyists and Corporate Lawyers," *New York Times*, May 31, 2017, https://www.nytimes.com/2017/05/31/us/politics/lobbyist-ethics-waivers-trump-administration.html. Four of the fourteen waivers initially released in May of 2017 did not indicate the dates on which they were approved. Of those four, three were initialed, and one was signed. Sara Swann, "Release of Ethics Waivers Still Problematic," *Center for Responsive Politics*, June 5, 2017, https://www.opensecrets.org/news/2017/06/release-ethics-waivers-still-problematic/. Experts have speculated that the waiver disclosure seems insufficient in light of other known issues in executive branch staffing. Marilyn Geewax, "Trump Administration Names More Former Lobbyists with Ethics Waivers," *NPR*, June 7, 2017, https://www.npr.org/2017/06/07/531093101/trump-administration-names-more-former-lobbyists-with-ethics-waivers.

[30] President Trump's executive order allows for waivers of any provisions of the ethics pledge, but without specific conditions (for example, matters of national security) that may warrant the grant of a waiver. Compare Exec. Order 13,770, § 3 and Exec. Order No. 13,490, § 3. One statistic shows that President Trump issued around the same number of waivers to White House staff in the first four months of his administration as President Obama did over his entire eight years. Daniel Van Schooten and Laura Peterson, "Trump's Ethics Pledge Is Paper-Thin," *Project on Government Oversight*, June 6, 2017, https://www.pogo.org/investigation/2017/06/trumps-ethics-pledge-is-paper-thin/.

other things, this meant collaboratively working with the Office of Government Ethics to pre-clear candidates in advance of their nominations,[31] though no law required us to do so. In reviewing financial disclosures, we worked with career ethics professionals to ensure we were not cutting corners or holding our appointees to different standards. And our standard procedure was to have the Federal Bureau of Investigation complete background investigations before nominating individuals to positions requiring Senate confirmation.

To members of small and large organizations alike, it goes without saying that leadership starts at the top. It's no different when it comes to ethics in government. There is no substitute for the president, vice president, and agency heads demonstrating and articulating a steadfast commitment to a vigorous ethics program and the expectation that appointees act ethically and with integrity. As a result, other senior officials are: more likely to set time aside in their busy schedules to attend mandatory ethics trainings; more likely to encourage and remind their subordinates to attend trainings; more likely to meet deadlines pertaining to the sometimes burdensome financial disclosure filing process; and more likely to work collaboratively with Designated Agency Ethics Officials and other ethics officers. These seemingly mundane tasks are critically important to maintaining public support and confidence in government actions.

But when this commitment is lacking, and without appropriate safeguards in place, it can result in real ethical lapses and actions that run afoul of laws and regulations, not to mention incredible waste of taxpayer resources. And when there is an insufficient disciplinary or other response to initial lapses, then the problem compounds itself, signaling to others that the rules don't matter.

The past two years provide ample examples, including:

- **Improper Use of Government Position**. During a television appearance from the White House briefing room, the counselor to the president promoted Ivanka Trump's product line, despite ethics rules that prohibit federal employees from using their official positions to promote commercial products.[32] In another instance, the same counselor was found by the Office of Special Counsel to have violated the Hatch Act when she weighed in on the Alabama special election for U.S. Senate during interviews from the White House lawn.[33]

[31] Witnessing the Trump administration nominate individuals before OGE and the FBI have completed their reviews has been troubling enough, but much worse has been witnessing the Senate take the unprecedented step of advancing nominees without the benefit of these critical reviews. See Ed O'Keefe and Sean Sullivan, "Ethics Official Warns Against Confirmations Before Reviews Are Complete," *Washington Post*, Jan. 7, 2017, https://www.washingtonpost.com/politics/ethics-official-warns-against-confirmations-before-reviews-are-complete/2017/01/07/e85a97ee-d348-11e6-9cb0-54ab630851e8_story.html.

[32] Richard Pérez-Peña, "Ethics Watchdog Denounces Conway's Endorsement of Ivanka Trump Products," *New York Times*, Feb. 14, 2017, https://www.nytimes.com/2017/02/14/us/politics/Kellyanne-Conway-ivanka-trump-ethics.html.

[33] Letter from Henry J. Kerner, Special Counsel, to Donald J. Trump, President (Mar. 6, 2018), *available at* https://osc.gov/Resources/Conway%20HA-18-0966%20Final%20Report.pdf.

The former secretary of the Interior was also alleged to have violated the Hatch Act in connection with his participation in an event with the governor of Florida and his use of social media.[34] There are multiple inquiries into other alleged acts of impropriety by the former secretary, including whether he used his official position to personally benefit from a Montana development deal linked to the energy giant Halliburton.[35]

- **Violating Appropriations Law and Improperly Using Government Resources.** The former administrator of the Environmental Protection Agency resigned under a cloud of scandal after a variety of ethics allegations were levied against him. They related to: EPA's violation of federal spending laws to install an approximately $43,000 soundproof booth in the administrator's office;[36] rental of one or more rooms in a condo owned by a campaign contributor who was lobbying his agency;[37] extensive use of first-class flights and taxpayer-funded trips to Morocco, Italy, and other destinations; [38] use of his security detail to run odd errands;[39] and his use of official resources to pursue a Chik-fil-A franchise opportunity for his wife.[40]

- **Violating Ethics Agreement and Possibly Conflict of Interest Rules.** The secretary of Commerce's alleged participation in matters related to his family's financial interests and non-compliance with his ethics agreement, whether intentional or unintentional, have significantly harmed the public trust. His failure to timely divest from potentially conflicting assets pursuant to his ethics agreement and other reported errors and omissions on his public financial disclosure raise the possibility that he used his official position for personal financial gain.[41] There are numerous allegations that he continues to involve himself in matters that would reportedly benefit his family's financial interests.[42]

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[34] Lisa Friedman, "A Guide to the Ryan Zinke Investigations," *New York Times*, Oct. 31, 2018, updated Dec. 15, 2018, https://www.nytimes.com/2018/10/31/climate/ryan-zinke-investigations.html?module=inline.
[35] *Id.*
[36] Thomas H. Armstrong, General Counsel, Government Accountability Office, "B-329603, U.S. Environmental Protection Agency — Installation of Soundproof Privacy Booth" (memorandum, Washington, D.C.: Government Accountability Office, 2018), *available at* https://www.gao.gov/assets/700/691272.pdf.
[37] Plumer and Lipton, "Scott Pruitt, E.P.A. Chief, Rented Residence from Wife of Energy Lobbyist."
[38] Eric Lipton, Lisa Friedman, and Kenneth P. Vogel, "A Lobbyist Helped Scott Pruitt Plan a Morocco Trip. Then Morocco Hired the Lobbyist." *New York Times*, May 1, 2018, https://www.nytimes.com/2018/05/01/us/pruitt-epa-trips-lobbyists.html.
[39] Juliet Eilperin, Josh Dawsey, and Brady Dennis, "Pruitt Enlisted Security Detail in Picking up Dry Cleaning, Moisturizing Lotion," *Washington Post*, June 8, 2018, https://www.washingtonpost.com/news/energy-environment/wp/2018/06/07/pruitt-enlisted-security-detail-in-picking-up-dry-cleaning-moisturizing-lotion/?utm_term=.1f04c83a2e41.
[40] Friedman, "Scott Pruitt Sought 'Business Opportunity' with Chick-fil-A While Leading E.P.A."
[41] Ana Swanson, "Wilbur Ross Says He Will Sell Stock After Watchdog Warns of Potential for Criminal Violation," *New York Times*, July 13, 2018, https://www.nytimes.com/2018/07/13/us/politics/wilbur-ross-stocks.html.
[42] He has reportedly conducted official meetings with executives from an oil company in which his wife holds a financial interest. Dan Alexander, "Wilbur Ross Scheduled Meetings with Chevron, Boeing Despite Conflicts of Interest." He is also leading trade negotiations with China and Russia, despite knowing that the assets he transferred to his family members apparently include interests in China and Russia. And he is leading an investigation into imports of car parts at a time when his family is believed to own an interest in one of the largest manufacturers of car parts in the world. Dan Alexander, "Lies, China and Putin: Solving the Mystery of Wilbur Ross' Missing

- **Possible "Revolving Door" Violations.** Apart from Cabinet members and senior White House staff, there have also been many examples of lower-level political appointees working on specific regulatory matters on which they previously lobbied the government for industry, creating at least an appearance of biased decision-making.[43]

Ethics challenges exist in every administration. But without effective rules and regulations, one can only hope for visible and sustained leadership, including accountability when ethics lapses do occur. Unfortunately, when leaders do not exhibit the requisite leadership, other officials are less likely to take ethics rules and their official duties seriously. This can result in intentional or unintentional violations of ethics rules, which undermine public trust and confidence that government is acting in the public's best interest.

C. Strong Ethics Rules Support the Personnel Process

Presidential administrations should aim to fill political appointments with the most qualified, competent, and experienced candidates. A common refrain whenever stronger ethics rules or post-employment restrictions are proposed is that they hinder recruitment efforts for bringing talent into government. It was an argument against the EGA, the 1989 amendments to the Act, the LDA, and the Obama Ethics Pledge. My experience and available data demonstrate that a commitment to government ethics advances personnel goals rather than hinders them.

First, when President Obama announced his intent to have "the strictest, and most far reaching ethics rules of any transition team in history,"[44] it did not slow down the incredible national interest by Americans to serve in his administration. After President Obama won the 2008 election, the administration received at least 130,000 completed applications.[45] The interest in serving in the administration did not wane during the president's two terms. Even in the last months and weeks of President Obama's administration, his Presidential Personnel Office continued to receive new applications for consideration. In short, interest in serving remained strong throughout the president's term, even with the administration's ethics standards widely known.

Fortune," *Forbes*, June 18, 2018, https://www.forbes.com/sites/danalexander/2018/06/18/lies-china-and-putin-solving-the-mystery-of-wilbur-ross-missing-fortune-trump-commerce-secretary-cabinet-conflicts-of-interest/#2b595d537e87. See also *Complaint Regarding Commerce Secretary Wilbur L. Ross Jr. from the Campaign Legal Center to the Inspector General for the U.S. Department of Commerce*, Campaign Legal Center, Aug. 13, 2018, *available at* https://campaignlegal.org/sites/default/files/2018-08/Hon%20Wilbur%20L%20Ross%20Jr%20Complaint%20%2813%20Aug%202018%29.pdf.

[43] See, *e.g.*, David Pittman, "Former Drug Industry Lobbyist Helps Steer Trump Drug Plan," *Politico*, May 27, 2018, https://www.politico.com/story/2018/05/27/trump-drug-plan-lobbyist-joe-grogan-609170; Laura Peterson, "The Snack Food and Corn Syrup Lobbyist Shaping Trump's Dietary Guidelines for Americans," *Project on Government Oversight*, Aug. 23, 2018, https://www.pogo.org/investigation/2018/08/the-snack-food-and-corn-syrup-lobbyist-shaping-trumps-dietary-guidelines-for-americans/.

[44] Jeanne Cummings, "Obama's Ethics Rules for Lobbyists," *Politico*, Nov. 11, 2008, https://www.politico.com/story/2008/11/obamas-ethics-rules-for-lobbyists-015515.

[45] Neil A. Lewis, "300,000 Apply for 3,300 Obama Jobs," *New York Times*, Dec. 15, 2008, https://www.nytimes.com/2008/12/06/us/politics/06seek.html.

Second, according to data from the Office of Personnel Management, appointees serving in the Obama administration stayed in their positions longer than appointees in the prior two administrations.[46] Retention is frequently cited as a significant challenge in administrations, with associated high turnover costs. Steep learning curves also mean new appointees are not as impactful and effective as experienced ones. The Obama administration's retention numbers tell me that its ethics and personnel standards served to identify individuals who wanted to serve for the right reasons. The administration's ethics and personnel standards, combined with concerted professional development, training, and advancement opportunities, helped improve retention.

Third, the Obama administration was able to recruit appointees who were from as diverse backgrounds as, if not more diverse than, any presidential administration in history.[47] The president was able to recruit candidates from underrepresented backgrounds so that appointees in his administration reflected the diversity of the country they served. This is significantly consequential. Study after study demonstrates ways that diversity improves workplaces and fosters innovation and productivity.[48] This tells me that the administration's standards promoted personnel goals. Indicative of this success are: the administration's recruitment and appointment of the first woman to serve as chair of the Federal Reserve Board of Governors; the first African American to serve as Attorney General; the first Latina and Hispanic Supreme Court Justice; the first openly gay Secretary of the Army; the first woman and African American to serve as Librarian of Congress; and the first openly transgender White House staff member, among many other firsts.

Requesting a commitment from candidates that they will follow common-sense ethics rules and not use their prospective positions to enrich themselves is consistent with the aims of the holistic evaluation candidates undergo prior to appointment. The evaluation process looks to confirm that candidates have generally conducted themselves with professionalism, honesty, and integrity. Information from a candidate's personal, professional, and financial life is considered, which generally includes information contained in a financial disclosure and a background investigation. At its core, this process is meant to provide confidence in a candidate's qualifications and abilities, but it is also meant to confirm that a candidate will serve in a manner that is consistent with agency rules and is not likely to bring unnecessary embarrassment or distraction to an administration, which a commitment to government ethics helps ensure.

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[46] See Attachment A, "Average Length of Service by Appointees in a Presidential Administration," White House, released Jan. 19, 2017 (based on data from the Office of Personnel Management).
[47] "Obama Ups Diversity in Appointees," *Washington Post*, Sept. 20, 2015, https://www.washingtonpost.com/politics/obama-ups-diversity-in-appointees/2015/09/20/5b042aac-5ffb-11e5-8e9e-dce8a2a2a679_graphic.html?noredirect=on&utm_term=.df7e743bb55c (citing data collected by Professor Anne Joseph O'Connell, University of California, Berkeley School of Law).
[48] See, *e.g.*, Sylvia Ann Hewlett, Melinda Marshall, and Laura Sherbin, "How Diversity Can Drive Innovation," *Harvard Business Review*, Dec. 2013, *available at* https://hbr.org/2013/12/how-diversity-can-drive-innovation; Vivian Hunt, Dennis Layton, and Sara Prince, "Why Diversity Matters," *McKinsey*, Jan. 2015, https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters; Roger C. Mayer, Richard S. Warr, and Jing Zhao, "Do Pro-Diversity Policies Improve Corporate Innovation?" *Financial Management* 47 (Fall 2018): 618.

Financial disclosure obligations, "revolving door" prohibitions, and other post-employment restrictions can dissuade some talented candidates from serving. But we should try to solve this problem by means other than allowing existing loopholes and weaknesses in our federal ethics regime to remain. We can reduce the burden of the financial disclosure process and streamline the paperwork and other requirements for presidential nominees. In my experience, the benefits of a strong ethics program far outweigh the potential for it to negatively affect recruitment. I suspect many more talented applicants are dissuaded from serving in an administration without a commitment to government ethics, when scandals plague the headlines and reported violations go unpunished, and there is a real risk of reputational harm to that administration's appointees. Rather than creating a hurdle for recruitment to government service overall, a strong federal ethics program helps avoid scandal and ensures we are recruiting the right people for these critical roles of public trust.

D. Congress Should Support the Ethics Reforms in the Act

The ethics reforms set forth in the Act warrant strong bipartisan support from all Members. The values that undergird our system of representative government are being tested like never before. Ethical constraints on self-dealing at the highest levels of government are eroding. To reverse this process, Congress must put forward bold reforms to help ensure that officials act for the public good rather than private gain. The reforms proposed in the Act are a strong first step.

Of particular note, the Brennan Center supports the increases in independence and authority of OGE. With these reforms, OGE will be better positioned to prevent ethics violations before they occur, investigate allegations that harm public trust, and more effectively hold violators accountable to deter future ethical transgressions.[49]

The Brennan Center looks forward to continuing to work with Congress on these and other reforms to promote government ethics. The Brennan Center's recently-launched bipartisan National Task Force on Rule of Law and Democracy has put forward additional reforms to rein in ethical abuses in government that are ripe for your consideration. These reforms are supported by the Task Force's co-chairs, former New Jersey Governor and Environmental Protection Agency Administrator Christine Todd Whitman and former U.S. Attorney Preet Bharara, and its diverse members from Republican and Democratic administrations. They include former U.S. attorneys, Members of Congress, Cabinet members, and agency heads who hope their leadership and expertise in developing and supporting concrete, implementable solutions will serve as an impetus for further reform. I include their first report, *Proposals for Reform*, as an attachment to my testimony.[50]

These are not partisan issues. Not long ago, these were issues that members of both parties would have stood behind. And we need bipartisan support for them again now. If we allow these essential ethical guardrails to continue to erode, it will provide a very dangerous precedent for future administrations and potentially threaten the underpinnings of our democracy.

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[49] See Daniel I. Weiner, *Strengthening Presidential Ethics Law*, Brennan Center for Justice, 2017, 11-12, *available at* http://www.brennancenter.org/publication/strengthening-presidential-ethics-law.
[50] See Attachment B.

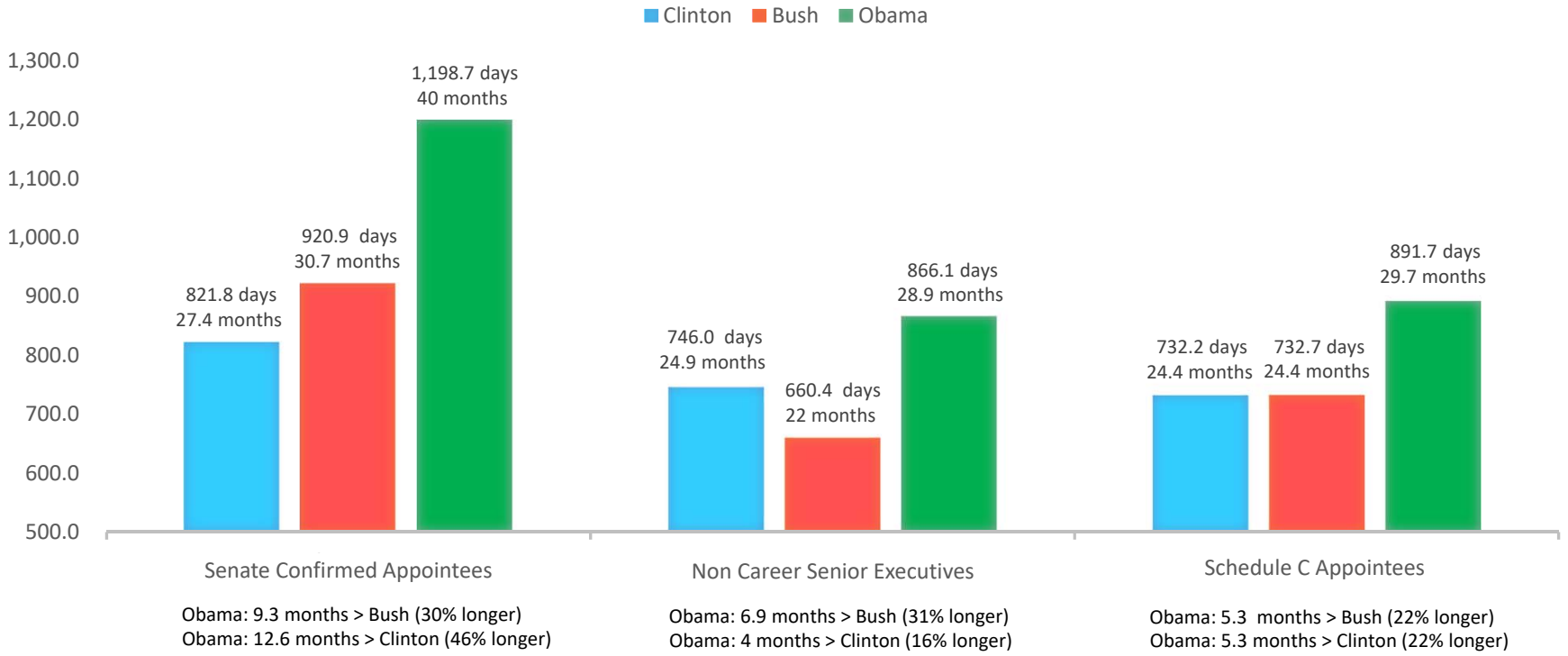
III. Voting and Transparency Provisions

This committee is also considering creating an Election Day holiday as one of myriad provisions designed to increase access to voting. The Brennan Center applauds this Committee for considering measures to make the voting process more convenient and accessible for all Americans. An Election Day holiday will increase the ability of many voters to cast ballots. That said, it will not help many eligible citizens whose employers will not give them time off during a holiday, including citizens who work in the food service industry. We therefore strongly urge Congress to promote other ways to ensure all Americans are able to vote, including nation-wide early voting, which is included in the Act and is flexible enough to make it convenient for all Americans to vote.

Finally, the Brennan Center supports the public disclosure of congressionally-mandated reports so that the public can more easily access the critical data and information that underpin official policy.

Attachment A

AVERAGE LENGTH OF SERVICE (DAYS/MONTHS) BY APPOINTEES IN A PRESIDENTIAL ADMINISTRATION



Obama: 9.3 months > Bush (30% longer)
Obama: 12.6 months > Clinton (46% longer)

Obama: 6.9 months > Bush (31% longer)
Obama: 4 months > Clinton (16% longer)

Obama: 5.3 months > Bush (22% longer)
Obama: 5.3 months > Clinton (22% longer)

Data is through June of Year 8 for each Administration

Attachment B

Preet Bharara, Co-Chair
Christine Todd Whitman, Co-Chair
Mike Castle
Christopher Edley, Jr.
Chuck Hagel
David Iglesias
Amy Comstock Rick
Donald B. Verrilli, Jr.

NATIONAL TASK FORCE ON
RULE OF LAW &
DEMOCRACY

Proposals for Reform

The National Task Force on the Rule of Law & Democracy (www.democracytaskforce.org) is a nonpartisan group of former government officials and policy experts housed at the Brennan Center for Justice at NYU School of Law.

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Proposals for Reform

FROM THE NATIONAL TASK FORCE ON RULE OF LAW & DEMOCRACY

Table of Contents

The values that undergird American democracy are being tested. As has become increasingly clear, our republic has long relied not just on formal laws and the Constitution, but also on unwritten rules and norms that constrain the behavior of public officials. These guardrails, often invisible, curb abuses of power. They ensure that officials act for the public good, not for personal financial gain. They protect nonpartisan public servants in law enforcement and elsewhere from improper political influence. They protect businesspeople from corrupting favoritism and graft. And they protect citizens from arbitrary and unfair government action. These practices have long held the allegiance of public officials from all political parties. Without them, government becomes a chaotic grab for power and self-interest.

Lately, the nation has learned again just how important those protections are — and how flimsy they can prove to be. For years, many assumed that presidents had to release their tax returns. It turns out they don't. We assumed presidents would refrain from interfering in criminal investigations. In fact, little prevents them from doing so. Respect for expertise, for the role of the free press, for the proper independent role of the judiciary, seemed firmly embedded practices. Until they weren't.

Presidents have overreached before. When they did so, the system reacted. George Washington's decision to limit himself to two terms was as solid a precedent as ever existed in American political life. Then Franklin D. Roosevelt ran for and won a third and then a fourth term. So, we amended the Constitution to formally enshrine the two-term norm. After John F. Kennedy appointed his brother to lead the Justice Department and other elected officials sought patronage positions for their family members, Congress passed an anti-nepotism law. Richard Nixon's many abuses prompted a wide array of new laws, ranging from the special prosecutor law (now expired) to the Budget and Impoundment Control Act and the War Powers Act. Some of these were enacted after he left office. Others, such as the federal campaign finance law, were passed while he was still serving, with broad bipartisan support, over his veto. In the wake of Watergate, a full-fledged accountability system — often unspoken — constrained the executive branch from lawless activity. This held for nearly half a century.

In short, time and again abuse produced a response. Reform follows abuse — but not automatically, and not always. Today the country is living through another such moment. Once again, it is time to act. It is time to turn soft norms into hard law. A new wave of reform solutions is essential to restore public trust. And as in other eras, the task of advancing reform cannot be for one or another party alone.

Hence the National Task Force on Rule of Law and Democracy. The Task Force is a nonpartisan group of former public servants and policy experts. We have worked at the highest levels in federal and state government, as prosecutors, members of the military, senior advisers in the White House, members of Congress, heads of federal agencies, and state executives. We come from across the country and reflect varying political views. We have come together to develop solutions to repair and revitalize our democracy. Our focus is not on the current political moment but on the future. Our system of government has long depended on leaders following basic norms and ground rules designed to prevent abuse of power. Unless those guardrails are restored, they risk being destroyed permanently — or being replaced with new antidemocratic norms that future leaders can exploit.

We have examined norms and practices surrounding financial conflicts, political interference with law enforcement, the use of government data and science, the appointment of public officials, and many other related issues. We have consulted other experts and former officials from both parties. Despite our differences, we have identified concrete ways to fix what has been broken.

We begin with those norms. What are they? And why do they matter?

Checks and balances. The phrase appears nowhere in the Constitution, but it is central to blunt arbitrary power and the potential for tyranny.[1] It's more than the clockwork mechanism of three separate but coequal branches. Checks have evolved within each branch as well. Congressional ethics committees police improper conduct.[2] Courts operate under a self-imposed code of conduct. Chief judges, circuit judicial councils, or the Judicial Conference investigate allegations of wrongdoing.[3] The executive branch has standards of ethical conduct, as well as inspectors general, internal auditors, and the Justice Department's special counsel regulations. These overlapping safeguards check the conduct of the powerful.

An evenhanded and unbiased administration of the law. The awesome power of prosecution must be wielded without consideration of individuals' political or financial status, or their personal relationships. This precept has deep roots. It draws from British law. Its violation formed a chief complaint in the Declaration of Independence. And it was woven into America's Constitution in the Fifth and Fourteenth Amendments, with their promise of "equal protection" and "due process of law."

Public ethics. Officials are obliged to seek the public good, not private gain. The Constitution includes key anti-corruption provisions, such as the Emoluments Clauses that prevent a president from receiving funds from foreign governments or states. The Framers had a broad view of corruption. To them, it meant a public official serving some other master — whether pecuniary or political — rather than the public.

Respect for science and the free flow of information. In a modern economy, data — whether environmental, demographic, or financial — must be trustworthy. Beginning especially in the 1970s, an expectation of government transparency — and transparency of government data — became standard. And throughout the nation's history, the accountability provided by a sometimes ferocious free press has been regarded as crucial.

We believe these values are more than fussy political etiquette. They are, in fact, vital to our democratic institutions and necessary to restore public trust. We hope that the reflexive partisanship of our age does not pose an insurmountable obstacle. At other times of reform, Americans from across the ideological spectrum, including members of both parties, have come together to restore and repair public institutions. Despite today's intense partisan polarization, we believe that our great nation can and should similarly achieve consensus for reform. In fact, we believe these values still command deep allegiance from Americans across the political spectrum. Our nonpartisan work has reinforced this view. It is up to patriots from all parties to work together on behalf of what we believe to be core precepts of our democracy.

"We the People" gave our government its power. That notion made American democracy, imperfect as it was, truly revolutionary from the start. Restoring these principles is central to the task of revitalizing democracy itself.

With these values in mind, the Task Force examined some of the most significant current areas of concern where our democratic system is most under pressure from official overreach.

In this report, we put forward specific proposals in support of two basic principles — the rule of law and ethical conduct in government.

In future reports, we will turn to other areas, including issues related to money in politics, congressional reform, government-sponsored research and data, and the process for appointing qualified professionals to critical government positions. Most of our proposals reflect a decision to make previously longstanding practices legally required. They reflect, we believe, an existing consensus across both parties.

Ethical Conduct and Government Accountability

To ensure transparency in government officials' financial dealings:

- Congress should pass legislation to create an ethics task force to modernize financial disclosure requirements for government officials, including closing the loophole for family businesses and privately held companies, and reducing the burdens of disclosure.
- Congress should require the president and vice president, and candidates for those offices, to publicly disclose their personal and business tax returns.

- Congress should require a confidential national security financial review for incoming presidents, vice presidents, and other senior officials.

To better ensure that government officials put the interests of the American people first:

- Congress should pass a law to enforce the safeguards in the Constitution's Foreign and Domestic Emoluments Clauses, clearly articulating what payments and benefits are and are not prohibited and providing an enforcement scheme for violations.

- Congress should extend federal safeguards against conflicts of interest to the president and vice president, with specific exemptions that recognize the president's unique role.

To ensure that public officials are held accountable for violations of ethics rules where appropriate:

- Congress should reform the Office of Government Ethics (OGE) so that it can better enforce federal ethics laws, including by:

  – granting OGE the power, under certain circumstances, to conduct confidential investigations of ethics violations in the executive branch,
  – creating a separate enforcement division within OGE,
  – allowing OGE to bring civil enforcement actions in federal court,
  – specifying that the OGE director may not be removed during his or her term except for good cause,
  – providing OGE an opportunity to review and object to conflict of interest waivers, and
  – confirming that White House staff must follow federal ethics rules.

The Rule of Law and Evenhanded Administration of Justice

To safeguard against inappropriate interference in law enforcement for political or personal aims:

- Congress should pass legislation requiring the executive branch to articulate clear standards for, and report on how, the White House interacts with law enforcement, including by:

  – requiring the White House and enforcement agencies to publish policies specifying who should and should not participate in discussions about specific law enforcement matters,
  – requiring law enforcement agencies to maintain a log of covered White House contacts and to provide summary reports to Congress and inspectors general.

- Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.

To ensure that no one is above the law:

- Congress should require written justifications from the president for pardons involving close associates.

- Congress should pass a resolution expressly and categorically condemning self-pardons.

- Congress should pass legislation providing that special counsels may only be removed "for cause" and establishing judicial review for removals.

Ethical Conduct and Government Accountability

Our republic is rooted in the principle that government officials serve the people, not themselves — that government power derives *from* the people and is intended to be used *for* the people.[4]

The Framers recognized that political leaders, being human, will be tempted from time to time to put their own interests ahead of the public's. To restrain abuses of power, they created a system of checks and balances. They also included several provisions in the Constitution to ensure that top public officials are not economically beholden to others. For example, Foreign Emoluments Clause prohibits federal officials from receiving payments or gifts from foreign governments.[5] Its Domestic Emoluments Clause applies a similar rule to the president with respect to U.S. states, and also specifies that Congress may not award the president salary increases during his or her term.[6] And the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit federal and state judges from presiding over cases in which they have a personal interest.[7]

These constitutional provisions provide the foundation and support for a broad range of other rules — written and unwritten — adopted over time to constrain top leaders. Most notably, a set of robust conflict of interest laws, put in place more than a century ago, prohibit many public officials from taking part in government matters involving their own personal financial interests or those of their immediate families. Nearly half a century ago, in the wake of Watergate, Congress strengthened these protections by passing the Ethics in Government Act of 1978. This law created a federal agency, the Office of Government Ethics, dedicated to monitoring government officials' compliance with conflict of interest and other ethics rules. It also requires high-ranking government officials to disclose their financial interests and dealings to the public. (For a summary of ethics and disclosure requirements for elected and appointed officials, please see Appendix on page 28.)

These laws reflect the shared understanding that public officials should not be able to use their power to advance their own personal or financial interests, that transparency is needed to enable the public to identify improper influences, and that some measure of accountability is needed to deter misconduct.

Unfortunately, formal ethics laws exempt most senior government officials — specifically the president and vice president, and, with respect to some laws, members of Congress and federal judges. That the law does not bind these top officials does not mean, however, that they should not follow its principles.

Elected officeholders have long voluntarily adopted ethics practices to reinforce the public's faith in the integrity of our government. For example, while conflict of interest laws do not apply to the president, vice president, or members of Congress, in recent decades many of these officials — including, until recently, every president and vice president in the last four decades — have voluntarily divested from assets that could potentially pose a conflict with their official duties or kept such investments in a blind trust whose contents were hidden from them.[8] Similarly, although not required by law, all presidents since Richard Nixon, and all major party presidential nominees since Jimmy Carter, had, until recently, voluntarily disclosed their personal tax returns to the public to provide more information about their personal finances and to confirm that they were paying their fair share in taxes.[9]

These longstanding practices, or norms, have come to be understood as a critical component of accountable government for the people. Because our leaders have been committed to the tradition of ethics in public service, including financial transparency and independent oversight, the fact that they have been formally exempted from many ethics laws has not posed a major problem.

Unfortunately, that commitment is eroding. This phenomenon is not entirely new. President Bill Clinton, for instance, notoriously issued pardons during his last day in office to a fugitive investor whose ex-wife had made substantial donations to the Clinton Presidential Library and to Hillary Clinton's Senate campaign,[10] and to a businessman who had retained Mrs. Clinton's brother to advocate for a clemency application.[11] Mrs. Clinton herself was later faulted for her many dealings with individuals and entities who donated to the Clinton Foundation, which was still run by her husband and daughter, while she served as President Obama's secretary of state.[12] Recent decades have seen a number of scandals over congressional conflicts of interest and other alleged misconduct.[13]

What is different today is the pervasiveness of breaches in ethical norms, especially at the highest levels of government. These breaches threaten to undermine public trust not only in particular officials but also in the integrity of bedrock governmental institutions.

The starkest example is President Trump's decision to keep ownership and control of his far-flung business

interests — a major departure from the expectations set by his predecessors.[14] It has produced an ever-expanding list of situations where his decisions as president could directly or indirectly affect his personal financial affairs.[15] That circumstance in turn can make it hard to discern where the public interest ends and the president's self-interest begins.[16]

Take, for example, the administration's recent controversial decision to rescue the Chinese tech giant ZTE, which had been sanctioned for violating U.S. law.[17] Critics have suggested that the decision was motivated by the president's personal gratitude for a loan China made to a Trump project in Indonesia.[18] But the move was also consistent with furthering a legitimate policy objective: building goodwill with the Chinese government ahead of the president's summit with North Korean leader Kim Jong-un.[19] If that was the case, the president's personal dealings with China only served to obscure what his administration was trying to accomplish.

Doubts about presidents' interests can sap their legitimacy and the legitimacy of their actions, even when they are not actually motivated by self-interest. That should concern any president's political supporters as much as his or her opponents.[20]

If the ethics precedents set by President Trump are not addressed now, they could also balloon in future administrations. For example, potential contenders for the Democratic nomination in 2020 include: the founder and chief executive of Facebook, a global social media company with more than 2 billion users around the world;[21] the former CEO of Starbucks, which has locations in dozens of countries;[22] and a former Massachusetts governor who now serves as a managing director at Bain Capital, a global hedge fund with offices in 10 countries.[23]

Disregard for longstanding ethical guuidelines is not limited to the presidency. The disregard has also affected other public officials in both the executive branch and Congress. Former Environmental Protection Agency Administrator Scott Pruitt, for instance, attracted bipartisan criticism for his many ethical lapses, like renting a luxury apartment at below-market rates from the wife of an energy lobbyist with business before his agency.[24]

Most Americans would agree that this is not acceptable. Indeed, according to recent polling, more than three-quarters of voters rank corruption in government as a top issue for the 2018 election, with almost a third calling it the most important issue.[25] The principle that government service should not be used to advance one's personal financial interests is one of our political system's bedrock values.[26] To protect it, we must translate some of the traditions and ground rules to which many of our leaders have voluntarily adhered into legal requirements, while updating and revitalizing existing ethics and anticorruption laws.

Ensure Transparency in Government Officials' Financial Dealings

Transparency rules are among the most fundamental ethical safeguards to help ensure that ultimate power remains with the people. Without meaningful disclosure of public officials' financial and personal dealings, it is difficult for the public to detect potential sources of bias and to hold its representatives accountable. Disclosure also empowers journalists, legislators, and law enforcement officials to expose official self-dealing and deter corrupt acts. Of course, government officials do not forfeit their privacy completely, and they have legitimate reasons for maintaining privacy in some areas. But sunlight remains the best disinfectant.[27]

PROPOSAL 1

Congress should pass legislation to create an ethics task force to modernize financial disclosure requirements for public officials.

The Ethics in Government Act of 1978, enacted in response to the Watergate scandal, requires high-ranking federal officials — including the president, vice president, members of Congress, and candidates for those offices — to publicly file a report detailing their financial holdings and personal dealings.[28] These reports help ethics regulators and the voting public identify potential biases that could influence how they will govern.

While the Act's disclosure rules are tremendously valuable, they are also sorely in need of an overhaul. In some cases, the Act allows critical information to remain undisclosed. For example, while the law requires candidates and officials to identify family businesses and other private companies in which they have substantial ownership interests, these provisions have not kept pace with changing financial structures. Unlike in the 1970s, today many wealthy individuals hold most of their assets indirectly through networks of limited liability companies (LLCs) and similar entities that were not common when the Ethics in Government Act was passed.[29] Current law does not generally require candidates and officials to disclose critical information about those entities, including their sources of income, debts, or co-owners.[30] Too often, that deprives the public of the information they need to determine potential conflicts of interest.

Take, for example, a family business that derives substantial income from contracts with foreign governments, owes money to a foreign country's state-run bank, or is even co-owned by a foreign official. Under current ethics law, candidates and government officials would have no legal obligation to disclose any such ties.[31]

In other ways, the ethics disclosure rules enacted four decades ago have become unduly burdensome for public officials. Most notably, they require disclosure of very minor sources of income and small assets unlikely to raise significant ethical questions. That is because the requirements are keyed to dollar values that have not changed since the 1970s. These and other outdated rules can make the filing experience onerous even for candidates and officials with relatively simple finances. This creates the opportunity for inadvertent errors and may even deter qualified people from pursuing public service.[32]

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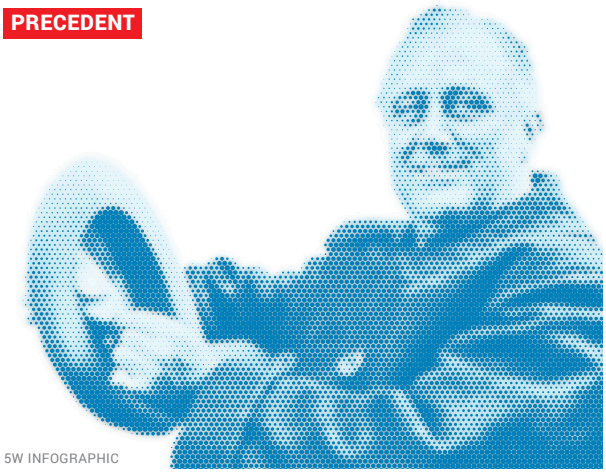

5W INFOGRAPHIC

Limiting Presidential Terms

PRINCIPLE

Following the example of George Washington, presidents should limit themselves to two terms, in order to ensure that the executive branch doesn't become too powerful.

PROBLEM

In 1940, President Franklin Roosevelt ran for and won his third term as president. Four years later, he was elected to a fourth term.

RESPONSE

In 1947, Congress passed an amendment to the Constitution limiting the president to two terms. The amendment was ratified four years later.

The federal ethics disclosure requirements should be updated to address such concerns. To achieve the best outcome, Congress should pass legislation directing the Office of Government Ethics to convene a task force of ethics experts to prepare a detailed proposal for a legislative overhaul of the relevant sections of the Ethics in Government Act. At a minimum, the legislation should require the task force to:

- **Address the disclosure loophole related to family businesses and other privately-held companies.** Specifically, the task force should propose a way to require filers with significant direct or indirect interests in such entities to provide relevant information, including disclosure of the entity's assets, ultimate sources of income, liabilities (including creditors by name), and the identities of other owners.

- **Propose measures to streamline the filer experience and make it less burdensome** by, among other things, substantially raising the monetary thresholds at which particular income and assets need to be disclosed.

Fixing outdated disclosure rules is something on which policymakers on both sides of the aisle should be able to agree. Americans of all ideological stripes overwhelmingly support transparency in politics and governance.[33] Reforming financial disclosure requirements to give the public more information will give the American people greater confidence that our leaders' decisions are guided by the nation's best interests rather than self-dealing or hidden interests. Congress can and should ensure that Americans have the information they need to hold public officials accountable, while reducing unnecessary requirements that burden public service.

PROPOSAL 2

Congress should require the president and vice president, and candidates for those offices, to publicly disclose their personal and business tax returns.

A second important reform is to standardize and codify the longstanding practice of sitting presidents, vice presidents, and candidates for those offices disclosing their tax returns.

In 1973, in the wake of scandal and seeking vindication, President Nixon publicly released his personal tax returns because, as he put it, "People have got to know whether or not their president is a crook."[34] Since then, until 2016, every president, vice president, and major party nominee for those offices has publicly disclosed their personal tax information. Most other serious contenders

for the presidency have also done so.[35] With few exceptions, the practice had until recently become routine and noncontroversial.[36]

Presidential or vice presidential candidates' tax returns provide a snapshot of their income and help to confirm that they are following the same rules that apply to everyone by paying their fair share of taxes. This a real concern. Nixon's returns, which showed that he had paid very little in certain years thanks to dubious deductions, helped to undermine his credibility with the public near the height of the Watergate scandal.[37] His first vice president, Spiro Agnew, resigned in the wake of an investigation into tax evasion, to which he pleaded no contest.[38] Tax returns may also shed additional light on specific conflicts of interest and self-dealing, especially those related to tax policy.

For all of these reasons, codifying the longstanding practice of tax return disclosure would complement other public disclosure requirements in the Ethics in Government Act that assist voters and deter corruption.[39] Congress should therefore pass legislation that:

- **Requires the president, vice president, and candidates for those offices to disclose their personal tax returns** and the tax returns of any privately held businesses in which they have a controlling interest at the same time as they make other mandatory ethics disclosures pursuant to the Ethics in Government Act.[40]

- **Requires disclosure of returns for the three years preceding a candidate's declaration** that they are running for president or vice president and returns for every year a sitting president or vice president is in office for any portion of the year.[41]

Similar proposals have been advanced by public officials and advocates of all political stripes. A number of bills are currently pending before Congress, most notably the Presidential Tax Transparency Act,[42] which has bipartisan support. A growing number of states are also considering legislation that would require candidates to disclose their tax returns prior to appearing on a ballot, although a uniform federal rule would be preferable.[43]

Legislation along these lines is plainly within Congress's constitutional powers. Presidents and vice presidents, like other public officials, have long been required to disclose significant financial information, with no suggestion that such requirements interfere with any constitutional rights or responsibilities. Requiring disclosure of tax returns would be no different.

PROPOSAL 3
Congress should require a national security financial review for incoming presidents, vice presidents, and other senior officials.

Disclosure of financial information is especially vital in the national security arena, where it can help identify potential sources of leverage foreign adversaries or entities might have over our political leaders. In his nuclear treaty negotiations with the Soviet Union, President Reagan famously advised that Americans should "trust, but verify."[44] The same can be said here.

These concerns are particularly resonant in an era when foreign powers are openly seeking to meddle in U.S. elections. As the commander-in-chief of the U.S. military and the face of U.S. foreign policy, the president is a unique target for foreign adversaries. And those efforts are more likely to bear some fruit when a large number of high-ranking officials, including the president and other senior administration officials, have globe-spanning business interests.[45] Indeed, there are already reports that foreign powers sought to use his family's business arrangements around the world as a source of leverage over the president's son-in-law and senior adviser, Jared Kushner.[46] This issue is not unique to the current administration. Several potential future presidential contenders also have wide-ranging international business dealings.[47]

When foreign companies seek to purchase American businesses, the Treasury Department coordinates a government-wide national security review process to examine what effect, if any, the proposed transaction has on U.S. national security.[48] Our political system should have a similar process to evaluate national security vulnerabilities in the portfolios of senior officials, including incoming presidents, vice presidents, and other senior members of the administration who have responsibilities affecting national security.

To that end, Congress should pass legislation to require the following:

- **For incoming presidents, vice presidents, and senior White House staff** who work on national security-related matters, Congress should require the administration of a national security financial risk assessment led by the director of the Office of Government Ethics and the director of National Intelligence. The purpose of the review would be to identify whether an official's financial holdings present potential national security vulnerabilities and

to issue divestment recommendations beyond what may be already required by other laws.

- **Officials subject to the review should be required to provide reviewers with their tax returns and ethics filings**, as well as other information the reviewers request about their holdings (such as business transaction history and records of material holdings or transactions with foreign entities), with a requirement to update filings whenever there is material transaction but at least on a yearly basis. The reviewers should be required to keep any nonpublic information they receive strictly confidential.

- **The reviewers should be empowered to obtain access to all relevant government information** sources and follow-up information from the filers.

- **The review should be undertaken on a confidential basis,** with findings presented to the "Gang of Eight," the bipartisan group of congressional leaders customarily briefed on classified intelligence matters as part of their oversight role.

- **The official in question should be informed of vulnerabilities the review uncovers,** unless doing so would imperil counterintelligence gathering.

There is broad bipartisan consensus on the need to combat foreign interference in our elections and in the workings of our government.[49] A national security review for incoming leaders, building on an effective interagency program, would provide a way to help ensure that those leaders remain accountable to the American people rather than any foreign power. The process would also benefit the officials themselves, who may often be unaware of potential vulnerabilities.

Bolster Safeguards to Ensure Officials Put the Interests of the American People First

Transparency is important, but it is not enough to ensure that all public officials put the interests of the American people ahead of their own. We also need meaningful guardrails to prevent officials from crossing long-established lines meant to prevent abuse of power for personal gain. This is especially important at the highest levels of government because top officials set the tone for the people working under them. Our laws should embody the expectation that public service be treated as a public trust and not as an opportunity for personal enrichment. This means changing the law to ensure that those at the very top are subject to the same broad legal standards as those under them.

PROPOSAL 4

Congress should pass a law to enforce the safeguards in the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.

Two provisions in the Constitution are specifically meant to prevent public officials at all levels from being corrupted by conflicting financial incentives: the Foreign and Domestic Emoluments Clauses. Both of these provisions have been generally respected by every administration since the nation's founding.

The Foreign Emoluments Clause seeks to curb foreign influence by prohibiting federal officials from accepting "any present, emolument, office, or title, of any kind whatsoever, from any king, prince, or foreign state" without the consent of Congress.[50] The Department of Justice has frequently applied this provision, issuing legal opinions on everything from the president's receipt of the Nobel Peace Prize to government workers performing research stints at foreign universities.[51]

The Domestic Emoluments Clause seeks to prevent undue influence over the president by guaranteeing the payment of a salary "which shall neither be increased nor diminished during the Period for which he shall have been elected" and by prohibiting the president from receiving any other "emolument from the United States or any of them."[52] There does not appear to be any historical evidence of any president ever seeking compensation that would violate this prohibition.

As it does in many other contexts,[53] Congress has passed laws over the years to codify and implement both clauses in certain circumstances. These range from the Foreign Gifts and Decorations Act (FGDA), governing when officials may or may not keep ceremonial gifts and honors from foreign governments under the Foreign Emoluments Clause[54] to periodic legislation raising the president's salary as provided by the Domestic Emoluments Clause.[55]

To further reduce the possibility of conflicts and emoluments violations, from the 1970s until 2017, successive presidents and vice presidents voluntarily divested from problematic investments. They generally limited their direct financial holdings to "plain vanilla" assets, like cash and widely distributed mutual funds, and turned any remaining assets over to a blind trust to be sold and replaced by new investments unknown to the beneficiary.[56]

Because public officials have generally adhered to these constitutional safeguards, little attention has been paid to the fact that the law does not specify how they should be

applied in many circumstances. For example, the Constitution says nothing about how either clause should be enforced in the event of a violation. Congress has also not addressed this question except in limited contexts like the FGDA's rules on foreign gifts and decorations. Nor does the Constitution or any federal law specify just how broadly the word "emolument" should be interpreted. For example, does it cover regulatory benefits, as when a foreign government grants a patent to a federal official or a state government awards a tax subsidy to a business owned by the president? Does it cover profits from a business transaction between a federal official and a foreign state?[57]

Some of these questions have come up over the years (though not conclusively resolved) in various House and Senate Ethics Committee investigations of members of Congress for everything from renting property to a foreign diplomat to accepting travel and other gifts from foreign governments beyond what Congress itself has authorized by law.[58] The global reach of President Trump's business holdings (including U.S. hotels that cater to a global client base[59]) — and the prospect that future presidential contenders may have complex business arrangements of their own — has added extra urgency. President Trump has already been sued in three separate lawsuits for alleged violations of both the Foreign and Domestic Emoluments Clauses.[60]

While these lawsuits may set new legal precedent relating to the particulars of the president's business dealings, they will leave many other questions unanswered. But Congress has the authority to implement constitutional safeguards through rules that are more detailed and comprehensive than the bare bones text that the Constitution provides.[61]

To ensure that future public officials adhere to the letter and spirit of the two Emoluments Clauses, Congress should enact legislation that specifies in detail what is and is not prohibited under each clause. The measure should also create a fair and comprehensive scheme for enforcing those expectations. At a minimum, the legislation should:

- **Define which benefits constitute prohibited "emoluments."**
- **Establish categories of foreign emoluments** to which Congress expressly withholds consent (e.g., those worth over $10,000) beyond those covered by existing laws like the FGDA.
- **Create a regulatory scheme for enforcement** of both Emoluments Clauses, which should ideally rely on enforcement agencies like the Department of Justice and possibly the Office of Government Ethics (for civil violations of the law).
- **Establish statutory remedies for violations,** including disgorgement of illegal emoluments and criminal and civil penalties.

The Emoluments Clauses provide clear constitutional authority for these measures. These constitutional provisions reflect the Framers' fundamental concern that public officials, especially the president, should put the interests of the American people first, which resonates just as strongly today. Codifying them more fully would also benefit current and future public officials, who need clear guidance to help them avoid running afoul of these key

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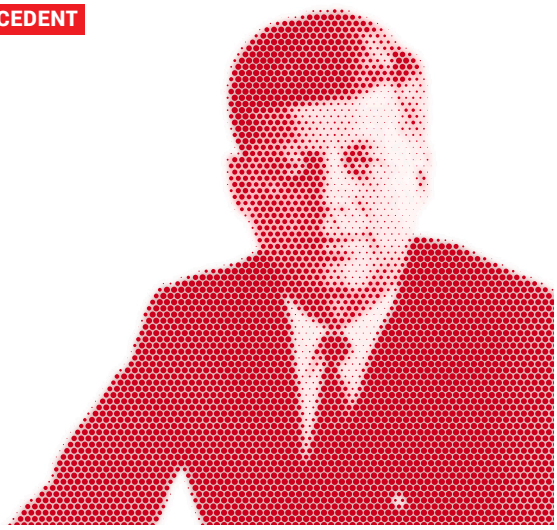

Preventing Nepotism in Government

PRINCIPLE

Presidents should avoid appointing close family members to top posts to help ensure that government officials are loyal to the country rather than to the president personally.

PROBLEM

In 1961, President John F. Kennedy nominated his brother, Robert F. Kennedy, to be attorney general. The period also saw members of Congress give jobs to family members.

RESPONSE

In 1967, Congress passed, and President Lyndon B. Johnson signed, the "anti-nepotism" statute, prohibiting employment of certain relatives, including brothers, in certain government positions.

constitutional constraints. Congress should ensure that the protections both clauses afford are enforced in a clear, concrete and effective manner.

PROPOSAL 5
Congress should extend federal safeguards against conflicts of interest to the president and vice president.

Conflict of interest law bars officers and employees of the federal government from "participating personally and substantially" in specific government matters in which they or their immediate family members have a personal financial interest has existed for more than a century.[62] But those laws do not apply to the president and vice president.[63] They should.

Federal conflict of interest law establishes a *minimum* standard of conduct. The law applies only when government officials are involved in a decision relating to a specific set of persons or entities and only when the decision will have a "direct and predictable" effect on officials' financial interests (or those of their close family members, business partners, or entities with which they are affiliated).[64] The law does not apply to matters that involve broad policymaking.[65] For instance, regulations issued by the Office of Government Ethics specify that government officials typically cannot award a contract to a company in which they have stock (other than through certain types of mutual funds). On the other hand, the officials usually would be able to work on major legislation, like a tax overhaul that would favorably impact their own bottom line, provided it would affect other Americans in the same way.[66]

Few would say that the president and vice president should not follow the same basic rules.[67] Congress exempted them from the formal conflict of interest law based on potential practical and legal concerns related to the presidency's unique role in our system of separation of powers (which, as noted below, we do not ultimately find persuasive).[68] Until recently, most also assumed that the public limelight and accountability of the presidency would be sufficient to ensure that its occupants adhere to the same ethics standards that govern other federal employees and officers. It turns out they are not.

The reason these exemptions from ethics law for the president and vice president have received scant attention is that presidents over the last four decades have voluntarily complied with most of their requirements.[69] Especially in the wake of Watergate, it became common wisdom, as President Reagan's transition team put it, that "even the possibility of an appearance of any conflict of interest in the performance of his duties" could undermine the president's legitimacy.[70]

And not just the president's. When an official as powerful as the president has a personal financial interest in government decisions, there is a risk that officials who report up the chain will be tempted to govern with an eye toward the chief executive's bottom line. Taken to extremes, it can be virtually impossible to discern which decisions have been infected by consideration of a leader's self-interest. Such doubts undermine the basic integrity of democratic governance.[71]

Now, of course, we have a president who has chosen to keep control of his far-flung businesses, raising the

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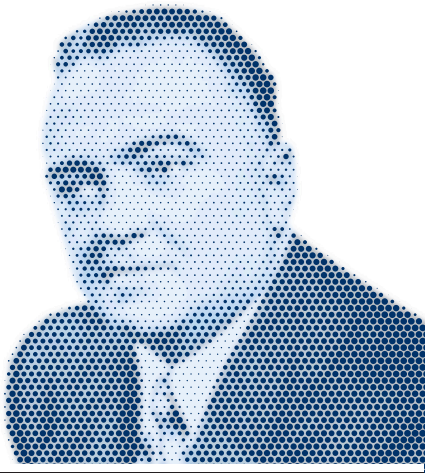


Reining in the FBI

PRINCIPLE

Law enforcement agencies should operate with effective oversight in order to guard against investigative abuses. And those agencies should not be used to advance solely partisan or personal agendas.

PROBLEM

The late 1960s and early 1970s saw a string of revelations about abuses, culminating in 1976 with the Senate's Church Committee report. Among the report's findings was that the FBI wiretapped Martin Luther King, Jr., as part of an effort to portray him as a communist.

RESPONSE

In 1976, Congress set a single 10-year term for the FBI director. The reform built off of a 1968 law that had established the post as a presidentially appointed position requiring Senate confirmation under the general authority of the attorney general.

possibility of numerous conflicts of interest.[72] While voters find this distasteful,[73] his decision may embolden his successors to do the same. As a result, the time has come to extend basic safeguards to the president and vice president by eliminating their exemption from federal conflict of interest law.

This does not mean that we must subject the president and vice president, who occupy a unique constitutional role, to the same legal requirements as other officials. For example, conflict of interest rules can bar an official from working on comparatively narrow legislation, like a bill to regulate a particular industry or to give benefits to a small class of people. But the duties of the chief executive are unique. The Constitution gives the president sole authority to sign or veto legislation passed by Congress,[74] and thousands of measures make their way each year to the president's desk. Rather than impose the unwieldy requirement of an exhaustive conflicts check in each instance, it makes better sense to exempt the president and vice president's participation in the legislative process from conflict of interest regulation. The law should also explicitly exempt any president or vice president who follows the longstanding practice of limiting his or her direct personal holdings to nonconflicting assets and placing remaining investments in a qualified blind trust.[75]

Finally, the law should specify that the only remedy where the president or vice president has a conflict of interest is to sell off his interest in the asset that created the conflict. Typically, an official with a conflict of interest can address the conflict either through such divestiture or through recusal (meaning formally refraining from participation in the matter).[76] But presidential recusal could be disruptive to executive branch operations.[77] A divestiture requirement avoids that risk and is the best approach for addressing the relatively narrow circumstances where the president or vice president have conflicts of interest[78]

The need for reasonable exemptions does not negate the need for the president and vice president to be subject, broadly speaking, to the same laws as the millions of federal employees who work under them.

To that end, Congress should pass legislation that, at a minimum:

- **Eliminates the blanket exemption to existing federal conflict of interest law** for the president and vice president.
- **Sets forth reasonable and appropriate exemptions,** including for conflicts arising from the president's role in proposing, signing, or vetoing legislation, and the vice president's role in presiding over and casting tie-breaking votes in the Senate.
- **Exempts any president or vice president whose holdings are limited** to nonconflicting assets or are placed in a qualified blind trust.
- **Specifies that divestment from the relevant asset is the only remedy** in cases where the president or vice president has a conflict of interest.

Several proposals to subject the president and vice president to conflict of interest law are currently pending before Congress.[79] They follow a long tradition of bipartisanship on ethics law[80] as well as a shared understanding that the president and vice president, despite their unique roles in our system of government, are not above the law.

While Congress in the past has taken the view that there are practical and constitutional hurdles to taking such a step, we do not find this view persuasive. The most common objection raised is that the president cannot be subject to conflict of interest law because it is impossible for him to recuse from any matter under his authority as the head of the executive branch.[81] But even if that is true,[82] the proposal here does not require recusal. Sale of assets is also a common means of managing conflicts of interest in the public sector.[83] Already for decades, presidents have voluntarily divested from most of their assets that could give rise to even the appearance of conflicts. And they aren't the only ones: Many other high-ranking federal officials are also required to divest from assets that would create insurmountable conflicts of interest relating to their core responsibilities.[84] Similarly, it is not unreasonable to require the president to divest in situations where there is a clear risk that the unique powers of his office could be used for personal gain.

Such a requirement would not offend the Constitution, which permits Congress to place restrictions on the president where there is "an overriding need to promote objectives within the constitutional authority of Congress."[85] Guarding against official self-dealing, which the Supreme Court has called "an evil which endangers the very fabric of a democratic society,"[86] is surely one such objective. Congress should prevent the use of the presidency for personal gain, just as it prohibits the chief executive from engaging in other kinds of official misconduct.[87]

Related Issues: Presidential conflicts of interest are not the only area of ethics law in need of reform. Members of Congress are also exempt from federal conflict of interest

law,[88] and congressional conflicts are also an enduring problem. Members of Congress are bound by certain ethics rules, but those have far fewer teeth than the laws governing most federal officers and employees.[89] Many lawmakers take voluntary steps to limit their personal investments and avoid any appearance of bias, but others do not.[90] In recent years, for instance, there have been many reports of members of Congress engaging in inappropriate stock trading involving industries under the jurisdiction of committees on which those members sit.[91] Others have accepted questionable travel and other gifts from foreign governments.[92] Some members have even gone to prison for bribery and other official misconduct spanning many years.[93]

Such scandals suggest that stronger legal safeguards may be needed. That could include making members of Congress subject to conflict of interest law, requiring them to divest from certain assets, or simply providing for better enforcement of existing House and Senate rules.

Congress should also consider ways to lighten the regulatory burden on the many federal officers and employees who must comply with a much stricter regime of restrictions than elected officials. They must follow rules governing everything from who can take them to lunch to whether they can be paid for teaching a class at their local community center.[94] Moreover, absent a waiver, they are subject to the full force of conflict of interest law even if the actual financial interest in question is negligible, like a single share of stock in a regulated industry. Scholars have criticized such heavy regulation as too strict,[95] with real and substantial burdens on ordinary federal employees. A full ethics reform package should include measures to lighten these burdens for the millions of men and women in the rank-and-file federal workforce, where appropriate.

The Task Force expects to take up these and other related issues in its next report.

Ensure that Officials Are Held Accountable Where Appropriate

Along with changes to actual legal requirements, effective enforcement is necessary to prevent official self-dealing and abuse of power. No rule enacted by Congress will have any effect without meaningful action to ensure legal accountability. Any enforcement mechanism should be even-handed and effective. Enforcement actions must be proportional to the offense, and the rights of those alleged to have committed misconduct must be protected. Unfortunately, our current ethics regime is deficient on both counts: there is no independent body dedicated primarily to ethics enforcement, and those wrongfully accused of violations outside of the formal process have no way to clear their names. Congress should rectify this.

PROPOSAL 6
Congress should reform the Office of Government Ethics so that it can better enforce federal ethics laws.

The Office of Government Ethics (OGE) is the only federal agency primarily devoted to government ethics, and the logical choice for an independent body to handle day-to-day enforcement of ethics rules. Created in the wake of Watergate to improve the uniform application of federal ethics rules across the executive branch, OGE's primary function is to interpret and promote compliance with federal conflict of interest laws, gift restrictions, limits on outside employment, and related safeguards.[96] While its director is a presidential appointee, the role has usually been filled by a nonpartisan expert, including under the current administration.[97] No other federal agency similarly combines a tradition of nonpartisanship with comparable expertise in government ethics.

As currently configured, OGE is not equipped to serve as an effective, independent enforcement body. While it has developed an extensive body of regulations and other guidance, its role has been primarily advisery. The office has no authority to investigate alleged violations that come to its attention and very limited ability to compel a remedy for even the most obvious violations.[98]

OGE also is not truly independent. Although its director serves for a fixed five-year term and is usually a nonpartisan expert, there appears to be no statutory safeguard against a president, upset by OGE's pursuit of ethical issues in his or her administration, removing the director without cause.[99] This is less protection than that accorded other important watchdog agencies, including the Securities Exchange Commission and Federal Election Commission, whose leaders the president may generally remove only for good cause (e.g., neglect of duty or misconduct in office).[100] As a further guarantee of independence, such agencies also typically have the ability to communicate directly with Congress, including submitting their own budget requests, rather than going through the White House.[101]

Finally, OGE also lacks the necessary resources to perform an expanded oversight role. With approximately 75 employees and a $12 million budget, OGE would not have the capacity to hire the qualified attorneys, investigators, and other staff needed to effectively enforce ethics rules across the sprawling executive branch.

These shortcomings have not received the attention they deserve. Until recently, voluntary adherence to OGE's guidance has long been the expectation at the highest levels in both Democratic and Republican administrations. Every president since OGE was created has directed cabinet members and other close aides to follow the agency's instructions to recuse, sell property, or take other steps to avoid conflicts of interest, and to direct their subordinates to do the same.[102] Presidents and vice presidents have also sought OGE approval for their own voluntary asset plans, which set the tone for their administrations.[103]

To be sure, there have always been cracks in this façade. At times, OGE has been unable or unwilling to hold officials who were determined to bend or break the rules accountable.[104] But today, the administration does not even make a show of following OGE's guidance in high-profile cases[105] and has publicly questioned whether most federal ethics rules even apply to White House aides, citing an unpersuasive legal technicality.[106]

This is not sustainable. Like any other set of rules, ethics standards will never be truly effective, especially at the highest levels, unless they have real teeth. That means enforcing them consistently and not just in the most egregious cases.

Currently, enforcement of conflict of interest law and ethics standards is left primarily to the president and thousands of other administration officials who have supervisory authority to reprimand or fire subordinates who break ethics rules. This decentralized system is prone to inconsistency[107] and can break down entirely in an administration that simply does not view compliance with these rules as a priority.

Where a conflict of interest is serious enough to warrant criminal or civil penalties, the Department of Justice has the power to pursue enforcement in federal court (including on a referral from OGE).[108] But the department has rarely made such cases a priority. In 2016, for example, it appears to have secured (according to data collected by OGE) only seven criminal convictions and one civil settlement under the federal conflict of interest statute and laws under OGE's purview.[109]

The existing framework for administering and enforcing federal ethics rules in the executive branch does not provide sufficient accountability. A politically sensitive issue like ethics needs a regulator with some independence who has the power to formulate broad policy through regulations and pursue civil enforcement actions in serious cases that do not rise to the level of criminal misconduct but still need to be addressed in the interest of deterrence.[110]

OGE already has primary rulemaking authority for ethics matters in the executive branch. Its expertise is widely acknowledged. The agency's director, while not protected against removal, customarily serves a term of five years,[111] spanning multiple presidential terms, which helps to foster independence. There is also a tradition of professionalism at OGE, evidenced by the appointment of directors with significant ethics experience and nonpartisan credentials.[112] It therefore makes sense for OGE to take on this critically important enforcement role.

To ensure proper accountability for ethical standards at all levels of the executive branch, Congress should pass legislation giving OGE a measure of formal independence from the president akin to that of other independent regulators. The agency should also have the full range of civil enforcement tools that are at the disposal of other watchdog bodies, along with sufficient safeguards to protect against the politicization of investigations and bureaucratic overreach. Finally, Congress should take other steps to ensure more uniform application of ethical standards across the executive branch.

To insulate rulemaking and civil enforcement processes on ethics matters from undue political interference, legislation passed by Congress should:

- **Specify that the president cannot remove OGE's director during his or her statutory term except for good cause,** such as neglect of duty or misconduct in office. Such limitations on removal are the most important way to ensure agency independence. The process of nominating and confirming new directors and ongoing congressional oversight can be used to ensure that the director remains politically accountable to elected leaders.

- **Empower OGE to communicate directly with Congress.** Most agencies must go through the White House to submit budget requests or otherwise communicate with Congress, limiting their ability to pursue goals that do not align with the priorities of the administration. To ensure a measure of autonomy from the president, OGE should, like other independent agencies, be permitted to submit its own budget estimates, substantive reports, and legislative recommendations without White House approval.[113]

To ensure effective enforcement of ethics rules, this legislation should also:

- **Grant OGE power to initiate and conduct investigations of alleged ethics violations** in the executive branch on referral from another government body or on

PROPOSAL

Protecting the Justice Department from Political Interference

PRINCIPLE

The White House shouldn't interfere with investigative and law enforcement decisions made by the Justice Department and other enforcement agencies for personal, financial, or partisan purposes. No one is above the law.

PROBLEM 1

President Richard Nixon's tenure shone a light on the extreme dangers of political interference in law enforcement. In 1969, Nixon appointed his campaign manager, John Mitchell, as attorney general. Two years later, Nixon ordered Mitchell's eventual successor as attorney general, Richard Kleindienst, not to pursue an antitrust suit against a company that had made large political donations to the upcoming Republican National Convention. And in 1973, Nixon ordered the firing of Special Prosecutor Archibald Cox to stop his investigation of the Watergate scandal. In what is known as the "Saturday Night Massacre," Attorney General Elliot Richardson resigned, and Deputy Attorney General William Ruckelshaus was fired, after refusing to carry out the order. Solicitor General and then-Acting Attorney General Robert Bork carried out the order to fire Cox.

RESPONSE

In 1975, President Gerald Ford's White House chief of staff issued the first "limited contacts" policy to reduce opportunities for actual or perceived political interference in DOJ matters, creating a precedent followed by all subsequent administrations. Three years later, Congress passed the Independent Counsel Act, which created a way to investigate high-level executive branch personnel whose prosecution by the administration might give rise to conflicts of interest and insulated the independent counsel from improper firing. Congress also passed the Civil Service Reform Act of 1978, which codified the principle that members of the civil service should be insulated from administrations' political whims.

PROBLEM 2

Three decades later, the pendulum swung back. In 2006, Attorney General Alberto Gonzales relaxed DOJ's "limited contacts" policy, ballooning the number of officials eligible to communicate with the department about specific cases and investigations. The same year, President George W. Bush took the unprecedented step of dismissing nine U.S. attorneys in the middle of his term. Investigations later revealed evidence that the removals were improper and tied to decisions made in politically sensitive cases. Those moves prompted no significant new laws to combat political interference.

PROBLEM 3

In 2016, Attorney General Loretta Lynch had a brief private meeting with former president Bill Clinton on an airport tarmac in the midst of the FBI's ongoing investigation into Hillary Clinton's use of a private email server while serving as secretary of state. The same year, President Barack Obama stated that Hillary Clinton's use of the email server never endangered national security, despite the FBI's ongoing investigation into the issue.

PROBLEM 4

In 2017 and 2018, President Trump took numerous steps to undermine American law enforcement. He issued a stream of public comments seeking to influence the special counsel's investigation into Russian election interference and suggested the investigation played a role in his decision to fire the FBI director. He urged the Justice Department to investigate his political opponents and lamented his attorney general's perceived lack of personal loyalty. And he demanded that DOJ take action against two companies whose owners also control major media outlets whose reporting President Trump frequently criticizes. "I have the absolute right to do what I want to do with the Justice Department," he declared.

TASK FORCE PROPOSED RESPONSE

Congress should require that the White House publish policies on who can participate in discussions with DOJ or other federal agencies with enforcement authority about specific civil or criminal enforcement matters and that it maintain a log of covered White House contacts. In addition, Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.

its own initiative. To prevent abuse in this politically sensitive area, the agency's investigative power should be constrained through best practices used at other independent watchdog bodies. Among other things, the legislation should require the director to sign off on all subpoenas to compel testimony or the production of documents; require agency staff to keep pending investigations strictly confidential (with criminal penalties for violators); and specify that all decisions to investigate must be supported by a written determination approved by the director that there are reasonable grounds to believe a violation may have occurred.[114]

- **Grant the OGE director power to bring civil enforcement actions in federal court and seek other corrective action** where the director has determined in writing that there is probable cause to believe a violation occurred. Almost all independent watchdog agencies have authority to either impose penalties and other sanctions or seek them in court. For an agency to assess major fines or hand out other punishment itself requires the creation of elaborate internal procedures to protect the due process rights of alleged wrongdoers.[115] It makes more sense for an agency of OGE's size to instead bring enforcement actions for civil or injunctive relief in federal court. Cases where the only sanction sought is a personnel action like dismissal could be brought to the Merit Systems Protection Board, the body that adjudicates employment issues for federal workers.

- **Create an OGE Enforcement Division.** Enforcing rules is very different from writing them or providing informal guidance. These functions should not be entrusted to the same staffers. The best approach would be for OGE, like other watchdog agencies, to have a separate enforcement division staffed by lawyers and professional investigators with civil service protection. Given the sensitivity of their role, employees of the new Enforcement Division (and potentially all OGE staff) should be barred under civil service rules from participating in partisan politics.[116] While enforcement staff would do the day-to-day work of investigating alleged violations and pursuing sanctions, major decisions — including whether to launch an investigation or bring an enforcement action once the investigation is done — would require the director's approval.

- **Establish minimum qualifications for the OGE director,** in light of these expanded responsibilities, such as experience in ethics, compliance, law enforcement, or related fields; management experience; and reputation for integrity. This would help guard against abuse and ensure that future directors would meet the standards that have previously been met in practice. Detailed qualifications are not necessary because the director is subject to confirmation by the Senate, providing an additional check.

- **Direct OGE and DOJ to establish a process for confidential referrals of potential criminal violations.** As noted, OGE can refer potential criminal matters to the Department of Justice for investigation and potential prosecution, but the process is informal and possibly subject to leaks. DOJ has no obligation to respond. Congress should require that referrals be kept confidential and that DOJ respond to referrals within 120 days to allow OGE to determine whether to take other action on its own.

Finally, to ensure more uniform application of ethical standards across the executive branch, legislation passed by Congress should:

- **Give OGE authority to review and raise objections to individual conflict of interest exemptions.** Currently, federal law gives officials the power to exempt their subordinates from conflict of interest law in specific cases where they determine that the potential violation is not sufficiently important to justify recusal or other action.[117] OGE not only should be notified of these waivers (as is already the practice)[118] but also should have the ability to formally object within a reasonable period of time. The official who granted the waiver should, in turn, be obligated to respond to OGE's concerns in writing, and the waiver, along with OGE's objections and the official response, should be made public.

- **Confirm that White House staff must follow federal ethics rules.** White House staff are subject to the prohibition on conflicts of interest and most federal ethics laws, and they have also long followed the guidance OGE promulgated via regulation. As noted, however, administration officials recently questioned whether OGE rules actually bind them, based on a legal technicality.[119] Congress should amend the law to remove this ambiguity and make clear that OGE has authority to promulgate rules for all executive branch officers, including White House staff.

The proposals here are modeled on other successful independent agencies. Many have been advanced for years by nonpartisan reform groups.[120] They represent a balanced framework that will give ethics rules real teeth while also protecting alleged violators who may not have committed any wrongdoing. Congress should revamp our ethics enforcement system along these lines.

The Rule of Law and Evenhanded Administration of Justice

The Founders established "a government of laws and not of men."[121] As Thomas Jefferson wrote, "[t]he most sacred of the duties of government [is] to do equal and impartial justice to all its citizens."[122] But the rule of law does not enforce itself. Those in power will always be tempted to favor friends and allies over adversaries. That is why, over the course of American history, we have built up a robust set of laws, practices, and norms to promote the evenhanded application of the law, without bias or political favor.

Conflict of interest law bars officials from involvement in law enforcement matters where they have an actual or perceived bias. Detailed professional responsibility rules guide most career law enforcement officials and, when followed, ensure different cases and investigations proceed according to similar standards and guidelines. Mechanisms within agencies — internal review processes, inspectors general, and auditors — seek to enforce standards and hold officials accountable.

Informal policies matter even more. Every administration since that of President Ford has limited which officials in the White House may communicate with Department of Justice personnel about active investigations or cases and how they may do so.[123] Another norm discourages senior political officials from making premature declarations about the guilt or innocence of a defendant or the outcome of a trial before it is complete.[124] And yet another discourages law enforcement from issuing indictments or taking other public steps that could affect an election in the period directly before the vote.[125] No law requires these policies, but they reduce the risk that politics distorts vital law enforcement processes.

It wasn't always this way. When American government was far less formal, it was assumed that the attorney general would be a close legal adviser to the president. Theodore Roosevelt saw no problem in minutely directing antitrust prosecutions.[126] Robert F. Kennedy was his brother's chief political adviser and was preparing to resign as attorney general to serve as campaign manager in November 1963.[127] When Richard Nixon appointed his campaign manager, John Mitchell, as attorney general in 1969, few eyebrows were raised.[128]

That all changed nearly five decades ago, when Watergate showed the costs of politicized justice — and spurred a national reckoning with the abuse and politicization of law enforcement.

From the outset, White House lawyers carefully monitored and molded the federal investigation of the break-in at the Democratic National Committee headquarters. Then, in the "Saturday Night Massacre," Nixon famously ordered his subordinates to fire the special prosecutor. (His attorney general quit and his deputy attorney general was fired rather than carry out this improper order.[129]) In other abuses, Nixon interfered with an antitrust enforcement action on behalf of a large political donor, IT&T,[130] and his White House counsel provided an "enemies list" to the IRS commissioner, asking that hundreds of people be targeted for investigation during the 1972 election (a request that the IRS did not follow).[131]

In the years afterward, Americans learned that the politicization of law enforcement had extended well beyond the Nixon administration. The 1976 Church Committee report documented decades of FBI abuses, especially under the Kennedy and Lyndon Johnson administrations, including the bureau's blackmailing of high officials.[132] Presidents were revealed to have wielded the FBI for political purposes, as when President Johnson had it spy on civil rights protestors at the 1964 Democratic convention.[133]

Nixon's two immediate successors, Presidents Gerald Ford and Jimmy Carter, made rebuilding public confidence in the Department of Justice and other law enforcement institutions a central goal of their administrations.[134] The White House, Justice Department, and others adopted formal and informal practices that aimed to ensure arm's-length dealings — in public and private — between senior political officials and career law enforcement personnel. At the same time, the FBI was reined in by having its director report to the attorney general as well as directly to the White House.[135] The CIA, too, was required to operate under the Foreign Intelligence Surveillance Act.[136] To fill the gap, the White House counsel's office grew in stature and size.[137]

These new rules had an important practical impact. But even more significant, they helped create a new set of expectations — mostly unspoken but nonetheless powerful — that largely constrained political interference in law enforcement.

This system served the country well. It is now under direct attack.

We are still early in the current administration, but already President Trump has taken numerous steps to

undermine American law enforcement. He has issued a steady stream of public comments seeking to influence the special counsel's investigation into Russian election interference.[138] He has urged the Justice Department to investigate his political opponents.[139] He has fired or prompted the resignations of top FBI officials and has lamented his attorney general's perceived lack of personal loyalty.[140] He has demanded that DOJ take action against two companies, Amazon and Time Warner, whose owners also control major media outlets whose reporting frequently angers him.[141] (See, *e.g.*, DOJ's lawsuit to block Time Warner's merger with AT&T, widely condemned as being at odds with decades of antitrust practice,[142] which was rejected in federal court.)[143] He has threatened to tax Harley Davidson "like never before" after the company announced the trade war is forcing some of its operations overseas and has targeted other companies for retribution in response to personal or policy slights.[144] "I have the absolute right to do what I want to do with the Justice Department," he has said.[145]

Other recent administrations also have at times let political considerations influence law enforcement. During President George W. Bush's tenure, the Justice Department inspector general found evidence that nine U.S. attorneys (including Capt. David Iglesias, a member of this Task Force) were removed for their prosecutorial decisions in politically sensitive cases rather than for "underperformance," as DOJ had claimed in congressional testimony at first, and that officials used political affiliation as a factor in hiring, which is prohibited.[146] The scandal resulted in the resignations of senior officials including Attorney General Alberto Gonzales.[147]

During the Obama administration, Attorney General Loretta Lynch was widely criticized for an airport tarmac encounter with former President Bill Clinton, which came while the FBI was investigating the use of a private email server by Hillary Clinton while she was secretary of state.[148] The episode, combined with President Obama's premature statement that Secretary Clinton's actions never endangered national security, raised fears that the administration was inappropriately seeking to influence the probe.[149]

These departures from long-accepted practices have real and lasting consequences. They distort decision-making. They shield wrongdoing by high officials. They risk converting the fearsome power of the prosecutorial machine into a political weapon. They undermine the fundamental notion that the law applies to everyone equally. They corrode public trust. And ultimately, they cast doubt on a crucial premise of any healthy democracy: that the law not be used to favor or punish anyone based on politics.

In the past, the half-century-old system of de facto independence for much of law enforcement and respect for the role of independent courts was a norm largely — though not always — honored by those in power. But that norm has eroded, with the result that few explicit rules now constrain executive behavior. It is time to put in place more explicit and enforceable restrictions to ensure a return to the proper balance.

Safeguard Against Inappropriate Interference in Law Enforcement for Political or Personal Aims

First, we need to strengthen the guardrails preventing improper political interference in law enforcement by the White House. There is no question that it is appropriate for the president and his staff to set priorities for law enforcement and to weigh in on key decisions. At the same time, it is entirely inappropriate for them — as it is for all government officials — to interfere in specific law enforcement matters for personal, financial, or partisan political gain.

To prevent abuse, most public officials involved in law enforcement are subject to a range of checks on their powers — from detailed procedures that constrain their actions, to formal supervisory systems that can discipline them, to inspectors general who can investigate them, to designated congressional committees that provide regular oversight of them.[150] The same is not true for the president and other White House officials. The White House is mainly checked by political processes. But those processes do not work unless the public and political actors know what is going on.

Our proposals do not seek to impose restrictions on the White House. They simply seek to reinforce longstanding practices designed to prevent abuse in the executive branch by enhancing transparency of political contacts with law enforcement and allowing for more meaningful oversight of potential problems.

PROPOSAL 7

Congress should pass legislation requiring the executive branch to articulate clear standards for and report on how the White House interacts with law enforcement.

To prevent both intentional and inadvertent political interference with law enforcement, the White House, Justice Department, and other law enforcement agencies have for decades voluntarily limited contact between senior political officials and career law enforcement personnel.

These curbs on White House contacts are not required by law. They are found only in written policies, voluntarily adopted by each administration, limiting who from the White House and who from the Department of Justice and other enforcement agencies can discuss ongoing investigations and cases. Typically, these policies restrict conversations to high-level officials on both sides, with the White House counsel's office playing a central role in managing and monitoring White House contacts.[151] They also include special protocols for cases affecting national security[152] or where the Department of Justice is defending an administration policy.[153]

These policies recognize that political actors are, at least in part, motivated by political concerns that should not affect the application of the law and that law enforcement personnel are better situated to make decisions about specific cases or investigations. They guard against overt direction from the White House, or the use of investigative agencies to punish political foes. They also protect against the inadvertent pressure or bias that may result from a call from a White House official about a specific matter. Even a question about a case can lead an official to presume an interest in its outcome; the official then may try to ensure the desired outcome. As former Attorney General Benjamin Civiletti put it, presidents and other top officials "unintentionally can exert pressure by the very nature of their positions."[154]

At the same time, the policies recognize that the president has a unique and personal role in executive branch *policy* determinations, including in how our laws are enforced. For example, presidents have, appropriately, told antitrust enforcers to step up enforcement without directing the prosecution of a specific firm.[155] By contrast, White House influence in *individual* cases risks creating the perception — and potentially the reality — that law enforcement is being used as a political or personal tool.[156]

Every administration since Ford has established such "limited contacts" policies between the White House and the Justice Department.[157] Although less consistent, there have also been similar policies covering other agencies with law enforcement responsibilities, such as the Internal Revenue Service and the Department of Labor.[158] Despite their importance, these policies have received scant public notice. Often, they have not been released until well after the end of a presidency. The Obama administration's most recent internal White House policy still has not been released.

Unfortunately, it has become increasingly clear that these voluntary policies, without formal legal requirements or enforcement mechanisms, cannot prevent political interference in law enforcement activities. For example, President George W. Bush's administration dramatically relaxed its own limited contacts policies, ballooning the number of political officials eligible to have contact with law enforcement personnel to more than 800.[159] After the U.S. attorneys' scandal, Attorney General Michael Mukasey reinvigorated the policy.[160]

The current administration, too, has adopted a limited contacts policy.[161] But reports suggest the policy has not always been followed. For example, the president's then-Chief of Staff Reince Priebus reportedly asked a top FBI official to publicly disclose alleged facts pertaining to the bureau's investigation of Russian interference in the 2016 election in order to refute a news report that senior members of the Trump campaign had frequent contacts with Russian agents.[162]

Trump himself, on several occasions, directly contacted the U.S. attorney in the Southern District of New York, who had jurisdiction over a number of matters involving the president's private and financial interests, ostensibly to develop a personal relationship, before ultimately firing him.[163] (That former U.S. attorney is the co-chair of this Task Force.) Trump also drew criticism for taking the unusual step of personally interviewing candidates for the U.S. attorney's successor.[164] While there is no evidence that the president made inappropriate requests in these conversations, they make clear that it is possible for a president to put inappropriate pressure on prosecutors.

When longstanding norms governing contacts between the White House and law enforcement officials are violated, even for reasons that are not inappropriate, it creates a troubling precedent for future administrations and opens the door to inappropriate breaches.

While Congress should not itself regulate how the executive branch deals with law enforcement, it can take steps to increase transparency and bolster accountability, thereby deterring misconduct. Specifically, Congress should pass legislation to:

- **Require the White House, the Department of Justice, and other law enforcement agencies to issue and publish a White House contacts policy.** The legislation should require each administration to identify specific officials, in both the White House and the relevant enforcement agencies, who are authorized to communicate about individual law enforcement matters. This will send a strong message that Congress believes limitations on White House influence are critical to impartial law enforcement. The public disclosure requirement will enable the public to assess whether the policies are

adequate to ensure that law enforcement is not subject to undue political influence.[165] Disclosure also makes it possible for Congress to use hearings and other oversight powers to address any deficiencies.[166]

- **Require law enforcement agencies to maintain a log of contacts** with the White House pertaining to specific civil or criminal enforcement matters undertaken by the Justice Department or other federal agencies with enforcement authority. The log should be limited to communications about individual cases or investigations, including communications about the litigants, subjects, targets, and witnesses, spelling out the people involved in the communication and the matter discussed.[167] It should not include routine (and necessary) contacts where the White House seeks legal

PROPOSAL

Safeguarding the Pardon Process

PRINCIPLE

Presidents should follow established procedures when using the pardon power and should use it to right clear miscarriages of justice, not to reward political allies.

PROBLEM 1

In 1981, President Ronald Reagan pardoned two FBI officials who had authorized illegal surveillance of the homes of friends of the militant radical organization the Weather Underground. No pardon applications were submitted prior to issuance of the pardons, and the pardons did not go through the pardon attorney's office.

PROBLEM 2

In 1992, President George H.W. Bush pardoned six former government officials, including former Defense Secretary Caspar W. Weinberger, who were prosecuted in the Iran-Contra affair. The pardon request was sent directly to the White House, rather than to the pardon attorney's office.

PROBLEM 3

In 2001, President Bill Clinton issued pardons on his last day in office to a fugitive investor whose ex-wife made substantial donations to the Clinton Presidential Library and to Hillary Clinton's Senate campaign, as well as to a Florida businessman who had retained Hillary Clinton's brother to advocate for his clemency application.

PROBLEM 4

President George W. Bush commuted the prison sentence of Lewis "Scooter" Libby, a former top aide in the Bush White House. Libby had been convicted of lying to federal investigators probing the leak of the name of a CIA operative.

PROBLEM 5

In 2017, President Donald Trump pardoned Joe Arpaio, a former Arizona sheriff and Trump supporter who had been convicted for disobeying a federal judge's order to stop racial profiling in detaining suspected undocumented immigrants. The next year, Trump pardoned Dinesh D'Souza, a conservative pundit who had been convicted of violating campaign finance laws by using a straw donor to contribute to a Republican Senate campaign. Not long afterward, Trump became the first president to publicly declare an absolute right to pardon himself.

TASK FORCE PROPOSED RESPONSE

Congress should require written justifications for pardons involving close associates and should pass a resolution expressly disapproving of self-pardons.

advice from the agency or is participating in legal policy issues; contacts relating to a matter in which the United States or one of its subdivisions is a defendant or a matter concerning national security; and other ordinary contacts that do not concern specific cases or investigations.[168]

- **Require relevant agencies to submit reports based on the above logs to relevant House and Senate committees,** the Department of Justice's Inspector General, and covered agencies' inspectors general. Those reports should omit information that could jeopardize confidential witnesses, undercover operations, or the rights of those under scrutiny. Congress and inspectors general could pose follow-up questions about the propriety of particular White House contacts.

These measures, by allowing for oversight of improper communications, will help deter inappropriate White House conduct. If someone knows there will be a record of their contact, they will likely take care to ensure it is appropriate. White House staffers are already accustomed to making similar judgments because White House emails that would otherwise remain confidential risk being publicly released under the Freedom of Information Act[169] if they are sent to agencies.

Based on our experience serving in government, we do not believe a logging and reporting requirement would be overly burdensome. In fact, we expect that reportable White House contacts about a specific pending case or investigation outside of the interagency coordination process would be rare. The White House and Department of Justice already maintain records of similar types of information; indeed, the Department of Justice electronically tracks all of its communications, including with outside parties.[170]

Nor are these measures likely to raise legitimate constitutional concerns. Congress currently regulates White House contacts with the Internal Revenue Service, preventing officials, including the president, from requesting that IRS employees start or stop an audit.[171] It would be on strong constitutional footing to also require the White House and executive branch enforcement agencies to adopt and publish policies to regulate White House-agency contacts, codifying longstanding practice.[172] Congress has passed other laws that require executive branch documents and records of activities to be retained and disclosed in order to further Congress' oversight functions and the public's interest in transparency and accountability.[173] For instance, most White House documents are publicly released after an administration has concluded, pursuant to the Presidential Records Act.[174] The president does not have an absolute right to protect personal or White House contacts from disclosure.[175]

PROPOSAL 8
Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.

Congress should establish a clear mechanism within the executive branch for investigating instances of inappropriate interference with law enforcement for political or personal ends.

We recommend that Congress utilize an oversight mechanism that already exists: agency inspectors general.

In 1978, Congress established inspectors general as independent, nonpartisan watchdogs housed within the executive branch.[176] Their traditional areas of authority relate to financial integrity, with a mandate to eradicate fraud, waste, and abuse.[177] They are empowered to conduct investigations and issue reports relating to the administration of their agencies' programs and operations, and they have a staff of investigators.[178] Some inspectors general are nominated by the president and confirmed by the Senate "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations,"[179] while others are appointed by agency heads.[180] All inspectors general report to and submit operating budget requests to agency heads.[181] Inspectors general are subject to removal by the president, with the president required to communicate in writing the reasons for the removal to both houses of Congress within 30 days of that action.[182]

Congress should expand the jurisdiction of agency inspectors general to expressly include investigations into improper interference in law enforcement functions. Inspectors general arguably already have that authority under existing law, which empowers them to investigate "abuse" and violations of agency policies.[183] But a clear mandate, subject to clear standards, is needed for such an important and sensitive function.

Under this proposal the inspectors general would investigate whether improper White House contacts influenced a specific law enforcement matter at their agency; it would not install an inspector general in the White House or empower an inspector general to go on open-ended, and potentially partisan, witch hunts. Inspector general investigations are also constrained by DOJ guidelines,[184]

professional standards published by the Council of Inspectors General for Integrity and Efficiency,[185] and other controls in the Inspector General Act.[186] Congress should also direct the attorney general to issue guidelines outlining the standards and procedures by which inspectors general are to investigate improper interference.

This proposal also has the benefit of efficiency. It does not reinvent the wheel. Inspectors general are already familiar with the roles and missions of their own agencies. They already have investigators. They know their way around the building. Therefore, we can add this important feature of democratic accountability without creating — and paying for — a whole new bureaucracy.[187]

Ensure No One Is Above the Law

Political leaders and their powerful allies present a special challenge to impartial enforcement of the law. When those in charge of law enforcement are the subject of law enforcement, there is a risk of abuse. Abuse sends a message that there are two sets of rules: a lenient one for the politically well-connected and a far more unforgiving one for everyone else. That is why our system has built-in safeguards to ensure that no one is above the law, from recusal rules to special prosecutor laws. But when the president is involved, the system has two vulnerabilities that merit attention: the possibility of abuse of the pardon power and the possibility of political interference into investigations of the president, senior political aides, and close personal associates. The following recommendations would help protect against such abuse.

PROPOSAL 9
Congress should require written justifications from the president for pardons involving close associates.

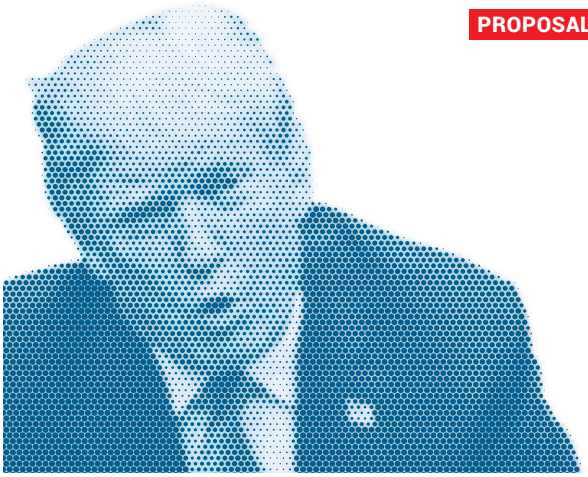
The Constitution endows the president with the "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."[188] This power allows a president to ensure that "inflexible adherence" to the law does not itself become a source of injustice.[189] Presidents have also used pardons to heal national wounds, as George Washington did with the first pardons granted to Whiskey Rebellion participants convicted of treason and as Gerald Ford and Jimmy Carter did by issuing amnesties to draft law violators from the Vietnam era.[190]

By giving the president exclusive authority to exercise the pardon power, the Founders believed it would "naturally inspire scrupulousness and caution."[191] To ensure such "scrupulousness and caution," and to prevent abuse, for over a century, presidents have voluntarily adhered to an established process for considering prospective pardons, overseen by the Department of Justice's Office of the Pardon Attorney.[192] Under this process, the pardon attorney reviews pardon applications and makes written recommendations to the president based on published pardon guidelines.[193] The guidelines reflect the values of mercy and justice, and require consideration of factors including the applicant's post-conviction conduct, the extent to which the applicant accepted responsibility for their crime, how long ago the crime took place, and the seriousness of the offense.[194] Although the president remains free to ignore the pardon attorney's recommendations, this process ensures that all pardon applications are assessed in the same way without regard for the president's personal or partisan political interests.

Controversy has arisen primarily when presidents have deviated from this standard process.[195] There are, unfortunately, several recent examples of such controversial pardons. Some pardons were criticized as inappropriate favors to donors or benefactors, like President Clinton's pardon of financier Marc Rich[196] or President George W. Bush's pardon of real estate developer Isaac Toussie.[197] In fact, President Bush immediately rescinded the pardon following press reports that Toussie's father had donated tens of thousands of dollars to Republicans.[198] Other pardons were criticized as favors for former colleagues, like President George W. Bush's commutation of the prison sentence of Scooter Libby (former chief of staff to his vice president, Dick Cheney),[199] or President George H.W. Bush's pardon of former officials involved in the Iran-Contra affair.[200]

Reports that President Trump has considered pardons for two former members of his campaign, Michael Flynn and Paul Manafort, have also drawn criticism, not only because these are his former associates.[201] Flynn and Manafort are potential witnesses in an investigation that may implicate the president, and the floating of pardons is seen by some as an attempt to lure positive testimony, thereby obstructing justice.[202]

While it is certainly an abuse of the pardon power to use it to advance one's self-interest, that does not mean that Congress can or should try to limit the president's power to make pardon determinations. Nor do we think it wise for Congress to try to restore longstanding safeguards by requiring the president to consult with the pardon attorney before making pardons. Instead, we propose a much more limited measure designed to increase transparency around the exercise of the pardon power in cases raising legitimate questions.



PROPOSAL

Limiting Conflicts of Interest

PRINCIPLE

Presidents and their spouses should limit their direct holdings to assets that pose no risk of a conflict of interest and should use a blind trust for all other investments — as they've all done since the 1970s. In addition, top executive branch officials should refrain from conduct that could create even the appearance of self-interested decision-making.

PROBLEM 1

In 2009, while serving as Secretary of State, Hillary Clinton had dealings with donors to the Clinton Foundation, which was run by President Bill Clinton and Chelsea Clinton at the time.

PROBLEM 2

In 2017, Trump maintained ownership and control of his international business, becoming the first president since Nixon not to comply voluntarily with conflict of interest rules. In addition, the family business of Jared Kushner, Trump's son-in-law and senior adviser, pursued relationships with foreign governments and with foreign companies that have business before the U.S. government. And EPA Administrator Scott Pruitt rented a luxury apartment at below-market rates from the wife of an energy lobbyist with business before the EPA, among other ethical lapses.

TASK FORCE PROPOSED RESPONSE

Congress should pass a law to enforce the Constitution's Emoluments Clauses. And it should extend safeguards against conflicts of interest to the president and vice president, with exemptions that recognize the president's unique role. Congress also should revamp the Office of Government Ethics so it's better able to craft and enforce common-sense ethical standards for the executive branch.

Specifically, Congress should pass legislation requiring the president, in a small subset of cases, to explain his or her decision for pardons or grants of clemency in a written report to the House and Senate Judiciary Committees. To minimize any burden on the president, the reporting requirement should apply only in cases where the individual seeking a pardon has a close personal, professional, or financial relationship to the president — a family member, business partner, current or former employee or professional colleague, or political contributor — or to the president's spouse, close family member, or business associate. In courts, similar relationships typically warrant recusal by a judge.[203] The report should address whether and how the president considered the factors historically used by the pardon attorney in evaluating requests.[204]

This legislation would provide the public with some confidence that the pardon power is being used to further justice, rather than to favor presidential allies or to reduce the president's own criminal liability. At the same time, it would create an avenue for political accountability for abuse of an otherwise unchecked authority. And it would provide Congress with an opportunity to respond to abuse if the president flouts the reporting requirement.

There is ample support and precedent for greater transparency in the pardon process.[205] From 1885 to 1932, presidents submitted detailed reports to Congress about pardons and clemencies they had granted, which included, in many (if not most) instances, some explanation for the grants. These reports even noted if there were disagreements between the president and the pardon attorney or the attorney general and whether the applications did not go through "normal channels."[206] Even without a mandatory reporting requirement, some recent presidents have felt compelled to explain their use of the pardon power.[207] Reporting requirements are also in place in at least 14 states, which require governors to provide reasons for each use of their pardon authority.[208] There are currently at least three bills pending in Congress that aim to increase the transparency and prevent abuse of the pardon power.[209]

We do not believe that this limited reporting requirement would unduly burden the executive branch. There have been on average only 193 acts of clemency a year going back to 1900.[210] Only a minute number of these would be subject to the reporting requirement. Indeed, at least one former U.S. pardon attorney has called for a return to the pre-1933 policy of reporting to Congress on *all* grants of clemency,[211] though we do not believe we need to go that far. In short, the risk of added burden is far outweighed by the accountability that further transparency would bring.

Finally, analogizing from other reporting requirements Congress has imposed on the president, such as reporting to Congress the reasons for removing inspectors general (in the Inspector General Act)[212] or making White House documents available to Congress (in the Presidential Records Act),[213] we believe that such a reporting requirement is within Congress's constitutional authority.[214] Requiring a president to state the reasons for granting pardons in limited instances does not control or limit the president's ability to grant a pardon.[215] And it helps Congress enforce other constitutional provisions and better exercise its powers.[216]

PROPOSAL 10
Congress should pass a resolution expressly and categorically condemning self-pardons.

In recent months, the president has raised the possibility of using the pardon power to absolve himself of criminal liability — an idea that has gone from politically unthinkable to a presidentially asserted "absolute right."[217] For a country born in revolt against a king, it is hard to imagine an act more damaging to the principle that no one is above the law than a self-pardon by the president.

No president has ever pardoned himself, but two have now considered it. In 1974, President Nixon explored the possibility of a "self-pardon" before resigning, prompting the Department of Justice's Office of Legal Counsel (OLC) to opine that the president cannot pardon himself, based on the "fundamental rule that no one may be a judge in his own case."[218]

Rather than waiting to criticize such an act after the fact, Congress should try to prevent this offense to the rule of law by passing a resolution making clear it opposes so-called "self-pardons" and believes they are an unconstitutional exercise of the pardon power. The resolution should also make clear that Congress will initiate impeachment proceedings if the president uses the pardon power to try to pardon himself and could express concern about, and potential responses to, other abuses of the pardon power that suggest public corruption or lack of regard for rule of law and separation of powers principles.[219]

There is precedent for this kind of congressional resolution.[220] At least 33 "sense of" Congress resolutions have been introduced in Congress to disapprove, censure, or condemn a president's actions, with a 1912 resolution condemning President Taft being the latest that was adopted.[221] Some members of Congress have recently argued for a more significant response — like amending the Constitution to expressly limit the president's pardon power[222] — with three bills pending in the current Congress aiming to do so.[223] In fact, Rep. Karen Bass (D-Calif.) proposed a similar resolution in 2017 disapproving of a self-pardon or a pardon for any member of the president's family, but the resolution has not attracted bipartisan support.[224]

A strong bipartisan resolution would send an important message that Congress will hold the president accountable for any attempt at self-pardon.

PROPOSAL 11
Congress should pass legislation to protect special counsels from improper removal.

There is also risk of abuse when a law enforcement investigation implicates high level government officials — especially the president. At minimum, investigators must be secure in the knowledge that their pursuit of justice will not result in their termination. And the American public must be confident that even our highest-ranking officials are subject to the rule of law.

For at least the last several decades, the American public and Congress have consistently supported efforts to insulate prosecutorial decisions from improper partisan or personal considerations. For instance, in the immediate aftermath of the Watergate special prosecutor's firing during the Saturday Night Massacre,[225] public opinion shifted in support of impeaching President Richard Nixon,[226] members of Congress introduced impeachment resolutions,[227] and a federal district court judge ruled that the firing of the special prosecutor was unlawful.[228] A few years later, Congress enacted the now-expired Independent Counsel Law, along with the Civil Service Reform Act of 1978, which codified the principle that federal employees (specifically, members of the civil service) should be insulated from administrations' political whims.[229]

In 1999, after Congress declined to renew the independent counsel statute, the Department of Justice adopted regulations laying out a process for appointing a special counsel to pursue investigations of White House officials or other senior political appointees.[230] The special counsel is appointed by the attorney general and may only be removed for "misconduct, dereliction of duty, incapacity, conflict of interest, or for good cause."[231] These provisions are meant to protect the special counsel from actual or perceived threats that could otherwise influence or impede his or her investigation, while providing a mechanism to hold the special counsel accountable in the event of misconduct.

To be sure, tenure protections have not kept presidents from bristling at investigations by independent or special counsels. President Clinton, for example, famously sparred with Independent Counsel Kenneth Starr during his investigation.[232] Nevertheless, recent statements and actions by President Trump suggest a far more serious threat to Special Counsel Robert Mueller's investigation, reinforcing the importance of the department's protections against removal, while simultaneously demonstrating why Congress should pass a law to protect the special counsel from removal without cause, rather than relying on executive branch regulations that can be amended or rescinded.

To give a partial review: After President Trump fired FBI Director James Comey, at least in part because of "this Russia thing,"[233] Deputy Attorney General Rod Rosenstein appointed Special Counsel Robert Mueller to continue the investigation. Since then, President Trump has repeatedly accused Mueller and his team of having "conflicts of interest" and has regularly referred to the investigation as a "witch hunt."[234] He reportedly ordered Mueller's firing in June of 2017 but walked back the order after White House Counsel Donald F. McGahn threatened to resign.[235] He has also made statements that appear intended to limit the scope of the investigation, stating that if the investigation veers into a review of his personal finances that would cross a "red line."[236] President Trump has also publicly berated those he holds responsible for appointing the special counsel, including threatening to fire Attorney General Jeff Sessions because of Sessions's decision to follow Department of Justice rules and recuse himself from the investigation[237] and publicly attacking Rosenstein over the Mueller appointment.[238]

Notably, of course, the president has not yet removed the special counsel. The critical Department of Justice regulations forbid him from doing so, but they are hardly a guarantee that he will not eventually do so. Because the current protections are merely regulations created by the Department of Justice rather than law, the executive branch can repeal or modify them without involving Congress.[239]

President Trump's aggressive actions and statements against the Russia investigation, as well as Special Counsel Mueller and his team, have left many to fear that his administration will eventually repeal or modify the current DOJ regulations,[240]or that a future president facing a special counsel he or she deems hostile may be emboldened to do so. It is increasingly clear that special counsel protections need to be enshrined in a statute. For these reasons:

- **Congress should pass legislation to shield special counsel investigations from improper political interference.** The legislation should require that the special counsel may only be removed for cause, and it should establish judicial review of any for-cause determination.

The Task Force recommends supporting the bipartisan Special Counsel Independence and Integrity Act (S. 2644),[241] introduced by Sens. Lindsay Graham (R-S.C.), Thom Tillis (R-N.C.), Chris Coons (D-Del.), and Cory Booker (D-N.J.) amid concerns that Special Counsel Mueller would be fired. The bill, which was voted favorably out of the Senate Judiciary Committee,[242] would only allow the special counsel to be removed for cause, and it limits the removal power to the attorney general or the

PROPOSAL

Making Tax Returns Public

PRINCIPLE

Presidents should release their tax returns — as every president since Nixon has done (Ford released a detailed summary of them) — to ensure that they can be fully vetted by the public and the media.

PROBLEM

In 2017, Trump became the first president not to release his tax returns since Lyndon Johnson.

TASK FORCE PROPOSED RESPONSE

Congress should require the president and vice president, and candidates for those offices, to publicly release their personal and business tax returns.

most senior Senate-confirmed Department of Justice official who is not recused from the matter. The bill also allows the special counsel to challenge his or her removal in court, requiring that any such challenge be considered on an expedited basis and that any appeals be directed to the Supreme Court, and provides for the preservation of the special counsel's materials in the event of dismissal. This legislation would not prevent a future president from publicly railing against or even threatening those involved in a special counsel investigation, but it would provide greater assurance that the president cannot unilaterally end an investigation.

Legislation to protect the special counsel from improper removal is within Congress's constitutional authority, as evidenced by similar exercises of its authority in the past that have been found to be constitutional.[243] Congress previously established an independent counsel with jurisdiction to investigate criminal misconduct by high-level executive branch personnel whose prosecution by the administration might give rise to conflicts of interest.[244] Congress insulated the independent counsel from improper removal by superiors.[245] Congress has also enacted legislation protecting numerous other federal officers from arbitrary removal.[246]

About the Task Force Members

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Preet Bharara is an American lawyer who served as U.S. Attorney for the Southern District of New York from 2009 to 2017. His office prosecuted cases involving terrorism, narcotics and arms trafficking, financial and healthcare fraud, cybercrime, public corruption, gang violence, organized crime, and civil rights violations. In 2012, Bharara was featured on TIME's "100 Most Influential People in the World." On April 1, 2017, Mr. Bharara joined the NYU School of Law faculty as a Distinguished Scholar in Residence. He is Executive Vice President at Some Spider Studios where he hosts a CAFE podcast, Stay Tuned, focused on questions of justice and fairness.

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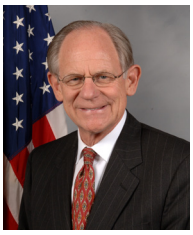
Christine Todd Whitman is president of the Whitman Strategy Group, a consulting firm specializing in environmental and energy issues. She served in the cabinet of President George W. Bush as Administrator of the Environmental Protection Agency from 2001 to 2003, and was the governor of New Jersey from 1994 to 2001. During her time in government, she gained bipartisan support and was widely praised for championing common-sense environmental improvements. Gov. Whitman is involved in numerous national nonprofit organizations focused on legal and environmental causes, including the American Security Project and the O'Connor Judicial Selection Advisory Committee at the Institute for the Advancement of the American Legal System. She is a graduate of Wheaton College in Norton, Massachusetts.



Mike Castle

Mike Castle is a former two-term governor, nine-term member of Congress, lieutenant governor, deputy attorney general, and state senator of his home state of Delaware. Currently a partner at the law firm DLA Piper, Gov. Castle served on the Financial Services, Intelligence, and Education and Workforce Committees during his tenure in the U.S. House of Representatives, and also led a number of Congressional caucuses. Since leaving office in January 2011, he has been honored by the Delaware Chamber of Commerce and the University of Delaware, and politicians of both parties have heralded Gov. Castle as a bipartisan leader. At DLA Piper, he works on financial issues, international trade, legislative affairs, and healthcare. He is the Board Chair for Research!America. He received his B.A. from Hamilton College and his J.D. from Georgetown University.

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Christopher Edley, Jr. is the Honorable William H. Orrick, Jr. Distinguished Professor of Law at UC Berkeley School of Law, after serving as dean from 2004 through 2013. Before Berkeley, he was a professor at Harvard Law for 23 years and co-founded the Harvard Civil Rights Project. Prof. Edley co-chaired the congressionally chartered National Commission on Education Equity and Excellence. He served in policy and budget positions under Presidents Jimmy Carter and Bill Clinton, held senior positions in five presidential campaigns, and worked on two Presidential transitions. He is a fellow or member of: the American

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Chuck Hagel

Chuck Hagel served as the 24th Secretary of Defense from 2013 to 2015. He is the only Vietnam veteran and enlisted combat veteran to serve as Secretary of Defense. He represented the state of Nebraska in the U.S. Senate from 1997 to 2009. In the Senate, Sec. Hagel was a senior member of the Senate Foreign Relations; Banking, Housing and Urban Affairs; and Intelligence Committees. Previously, Sec. Hagel was Co-Chairman of the President's Intelligence Advisory Board, a Distinguished Professor at Georgetown University, Chairman of the Atlantic Council, Chairman of the United States of America Vietnam War Commemoration Advisory Committee, Co-Chairman of the Vietnam Veterans Memorial Fund Corporate Council, President and CEO of the USO, and Deputy Administrator of the Veterans Administration. He currently serves on the RAND Board of Trustees, PBS Board, Corsair Capital Advisory Board, American Security Project Board, and is a Senior Advisor to Gallup. He is a graduate of the University of Nebraska at Omaha.

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David Iglesias is Director of the Wheaton Center for Faith, Politics and Economics and is the Jean & E. Floyd Kvamme Associate Professor of Politics and Law at Wheaton College. Previously, Professor Iglesias served as a prosecutor focusing on national security and terrorism cases. He was the U.S. Attorney for the District of New Mexico from 2001 to 2007. Professor Iglesias was recalled to active duty status between 2008 and 2014 in support of Operation Enduring Freedom. He served as a team leader, senior prosecutor, and spokesman with the U.S. Military Commissions, handling war crimes and terrorism cases. He retired from the U.S. Navy as a Captain. He received his bachelor's from Wheaton College and his J.D. from the University of New Mexico School of Law.

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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 ending mass incarceration to preserving Constitutional protection in the fight against terrorism. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, the courts, and in the court of public opinion.

Appendix: Ethics and Disclosure Requirements

Is the official required to:	President and Vice President	Cabinet members and other senior executive branch officials	Members of Congress	Federal judges	Candidates for federal office
Make annual financial disclosures* using OGE Form 278?	Yes	Yes (including nominees)	Yes	Yes	Yes
Follow federal conflict of interest law and regulations, and related rules?	No	Yes	No	No	No
Abide by the insider trading rules and transaction reporting requirements of the STOCK Act?**	Reporting requirements only	Reporting requirements only	Yes	No	No
Follow other rules to prevent conflicts of interest?	No	Some, depending on the agency	Yes (House and Senate ethics rules)	Yes (Code of Judicial Conduct)	No

*** Form 278 requires disclosure of the filer's compensation, investments, assets, gifts, liabilities, certain employment agreements or arrangements, and similar information regarding their spouse and dependent children.**

**** The STOCK Act forbids members of Congress and their staffs from engaging in insider trading on the basis of information derived from their position. It also requires certain officials to report securities transactions valued above $1,000.**

Endnotes

1 The Federalist No. 51 (James Madison) ("In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments.").

2 S. Res. 338, 88th Cong. (1964) (establishing a Select Committee on Standards and Conduct in the Senate); "Senate Committee Reorganization," *Congressional Record*, vol. 123, Feb. 1, 1977, p. 2886 (creating a permanent Select Committee on Ethics to replace the Select Committee on Standards and Conduct); H.R. Res. 1013, 89th Cong. (1966) (establishing a Select Committee on Standards and Conduct in the House of Representatives); H.R. Res. 418, 90th Cong. (1967) (establishing a Committee on Standards of Official Conduct in the House of Representatives); H.R. Res. 895, 110th Cong. (2008) (establishing an independent Office of Congressional Ethics in the House of Representatives).

3 "Code of Conduct for Judicial Employees," in *Guide to Judiciary Policy*, Administrative Office of the United States Courts, 2013*, available at* http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees.

4 "Governments are instituted among Men, deriving their just powers from the consent of the governed." Declaration of Independence para. 2 (U.S. 1776); "We the People of the United States, . . . do ordain and establish this Constitution for the United States of America." U.S. Const. preamble.; "…Government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, the Gettysburg Address (Gettysburg, PA, Nov. 19, 1863).

5 U.S. Const. art. I, § 9, cl. 8 ("No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.").

6 U.S. Const. art. II, § 1, cl. 7 ("The President shall, at stated times, receive for his service, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.").

7 U.S. Const. amends. V, XIV; Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (finding that a West Virginia Supreme Court of Appeals judge should have recused, as a matter of due process, where defendant contributed $3 million to judge's election campaign).

8 See *infra* at 8 (discussing divestment by past presidents and vice presidents).

9 See *infra* at 6-7 (discussing public disclosure of tax returns by past presidents and presidential candidates).

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11 James V. Grimaldi and Peter Slevin, "Hillary Clinton's Brother Was Paid for Role in 2 Pardons," *Washington Post*, Feb. 22, 2001, https://www.washingtonpost.com/archive/politics/2001/02/22/hillary-clintons-brother-was-paid-for-role-in-2-pardons/c5c94a42-b71c-4fe0-a90e-b6189664a8a4/.

12 Rosalind S. Helderman, Spencer S. Hsu, and Tom Hamburger, "Emails Reveal How Foundation Donors Got Access to Clinton and Her Close Aides at State Dept.," *Washington Post*, Aug. 22, 2016, http://wapo.st/2bxLDlH.

13 See, *e.g.*, Jane Coaston, "GOP Rep. Chris Collins Was Just Charged with Insider Trading," *Vox,* Aug. 8, 2018, https://www.vox.com/2018/8/8/17663938/chris-collins-arrested-insider-trading-immunotherapeutics; Susan Davis, "Senate Ethics Panel Admonishes Sen. Menendez," *NPR,* Apr. 26, 2018, https://www.npr.org/2018/04/26/606165063/senate-ethics-panel-admonishes-sen-menendez; Matt Rourke, "Veteran Pa. Congressman Convicted in Racketeering

Case," *CBS News,* June 21, 2016, https://www.cbsnews.com/news/veteran-pennsylvania-congressman-convicted-in-racketeering-case-chaka-fattah/; Susan Schmidt and James V. Grimaldi, "Ney Sentenced to 30 Months in Prison for Abramoff Deals," *Washington Post,* Jan. 20, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/01/19/AR2007011900162.html; "Abscam Scandal Clouded Congress' Image," *CQ Almanac, 36th ed. (Washington, D.C.: Congressional Quarterly, 1981), 513–21 available at* http://library.cqpress.com/cqalmanac/cqal80-1174797 (several members of Congress convicted of various bribery and conspiracy charges in connection with payments received in exchange for government contracts, promises to introduce legislation, or help obtaining official U.S. residency).

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15 Daniel I. Weiner, *Strengthening Presidential Ethics Law,* Brennan Center for Justice, 2017, 4–5 & nn. 23–41, *available at* https://www.brennancenter.org/sites/default/files/publications/Strengthening%20Presidential%20Ethics%20Law.%20Daniel%20Weiner.pdf.

16 *Id.* at 3.

17 See Mark Sullivan, "Why Trump's Desire to Bail Out Chinese Tech Giant ZTE Is so Alarming," *Fast Company*, May 16, 2018, https://www.fastcompany.com/40573250/why-trumps-desire-to-bail-out-chinese-tech-giant-zte-is-so-alarming.

18 See, *e.g.,* Matthew Yglesias, "Trump Helps Sanctioned Chinese Phone Maker after China Delivers a Big Loan to a Trump Project," *Vox*, May 15, 2018, https://www.vox.com/policy-and-politics/2018/5/15/17355202/trump-zte-indonesia-lido-city.

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25 Ashley Kirzinger et al., *Kaiser Health Tracking Poll — Late Summer 2018: The Election, Pre-existing Conditions, and Surprises on Medical Bills*, Sept. 5, 2018, https://www.kff.org/bca7b93.

26 The Supreme Court called self-dealing of this sort "an evil that endangers the very fabric of a democratic society." United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961). See also Zephyr Teachout, "The Anti-Corruption Principle," *Cornell Law Review* 94 (2009): 342, 345 (arguing that the Constitution "carries within it an anti-corruption principle" and that "power-and-wealth seeking by representatives and elites is a major and constant threat to our democracy"); Philip B. Heymann, "Democracy and Corruption," *Fordham International Law Journal* 20 (1996): 327–28 (discussing impact of corruption on democracy, citing international examples).

27 Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (New York: Frederick A. Stokes Co., 1914), 62.

28 Specifically, the OGE 278 requires that officials disclose their personal sources of income, assets, debts, and other financial information, and employment arrangements and agreements, as well as information for spouses and dependent children. 5 C.F.R. § 2634; Office of Government Ethics, Form 278-e, Public Financial Disclosure (2018); see also Table 1.

29 Most states did not pass laws permitting LLCs until the late 1980s and early 1990s. See Larry Ribstein, "The Emergence of the Limited Liability Company," *Business Lawyer* 51, no. 1 (1995): 1, 2 (noting that between 1977, when Wyoming enacted first LLC statute, and 1995, all U.S. jurisdictions but Vermont and Hawaii had enacted LLC statutes); see also American Bar Association, "LLCs: Is the Future Here? A History and Prognosis," *Law Trends and News* 1 (Oct. 2004), *available at* https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/llc.html (discussing 1977 Wyoming statute and evolution of other states' LLC statutes). According to the IRS, based on tax returns, the number of LLCs went from 17,335 in 1993 to 1,898,178 in 2008. See "Statistics of Income (SOI) Tax Stats — Integrated Business Data 1980–2008," Internal Revenue Service, https://www.irs.gov/pub/irs-soi/80ot1all.xls.

30 Daniel I. Weiner and Lawrence Norden, *Presidential Transparency: Beyond Tax Returns*, Brennan Center for Justice, 2017, 2–3, *available at* https://www.brennancenter.org/sites/default/files/publications/Presidential%20Transparency%20Beyond%20Tax%20Returns.pdf. Ethics officials can request such information from specific filers as a condition for certifying, but they do not have to do so, and the information is not publicly disclosed. See generally *Guide to Drafting Ethics Agreements for PAS Nominees*, Office of Government Ethics, September 2014*, available at* https://www.oge.gov/Web/oge.nsf/Resources/PAS+Nominee+Ethics+Agreement+Guide+(MS+Word).

31 See Ethics in Government Act, 5 U.S.C. App. § 102 (listing disclosure requirements, which do not include reporting for family businesses). In the case of President Trump, for instance, most of his holdings are tied up in a web of approximately 500 LLCs and other closely-held entities, which makes it likely his disclosure reports omit critical information about the president's finances. See Ben Popken, "What Trump's Disclosure of His 500 LLCs Can and Can't Tell Us," *NBC News*, May 16, 2018, https://www.nbcnews.com/business/taxes/what-trump-s-disclosure-his-500-llcs-can-can-t-n874391.

32 Working Group on Streamlining Paperwork for Executive Nominations, *Streamlining Paperwork for Executive Nominations* (Washington, D.C.: Executive Office of the President of the United States, 2012), 4, 48, https://www2.oge.gov/Web/OGE.nsf/0/2CE9B19C0F0ED82A85257EA600655818/$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf (finding that the "two areas particularly ripe for reform are: (1) eliminating the requirement to report investment income…and (2) raising and rationalizing minimum reporting thresholds across reporting categories to exclude the disclosure of financial items too insignificant to raise a concern over conflict of interest" and that implementing these

changes may attract more civic and private-sector leaders to senior government service); Terry Sullivan, "Fabulous Formless Darkness: Presidential Nominees and the Morass of Inquiry," *Brookings*, Mar. 1, 2001, https://www.brookings.edu/articles/fabulous-formless-darkness-presidential-nominees-and-the-morass-of-inquiry/ (calling for simplification of paperwork nominees are required to complete); Memorandum from O'Melveny and Myers, on behalf of the Partnership for Public Service, to Fred Fielding, White House Counsel, "Proposals to Reform the Presidential Appointments Process" (Apr. 10, 2008): 2, 3, 5, *available at* http://presidentialtransition.org/publications/viewcontentdetails.php?id=807 (noting that burdensome process and divestiture requirements may deter qualified people from public service, and recommending that nominees' paperwork be streamlined in order to reduce error).

33 Ninety-six percent of Americans polled this year said that it is important that government be "open and transparent." *The Public, the Political System and American Democracy*, Pew Research Center, 2018, 23, *available at* http://assets.pewresearch.org/wp-content/uploads/sites/5/2018/04/15160829/4-26-2018-Democracy-release1.pdf. Polling shows that large swaths of the American public believe it is possible to "address the problem of political corruption by reforming current ethics and election laws." Jeffrey D. Milyo and David M. Primo, *Public Attitudes and Campaign Finance*, Bipartisan Policy Center, 2017, 17, *available at* https://bipartisanpolicy.org/wp-content/uploads/2018/01/Public-Attitudes-and-Campaign-Finance.-Jeffrey-D.-Milyo-David-M.-Primo.pdf.

34 James Wieghart, "President Nixon Says, 'I'm Not a Crook,' on National Television," *New York Daily News*, Nov. 18, 1973, http://www.nydailynews.com/news/politics/president-nixon-national-television-not-crook-article-1.2876186.

35 See "Presidential Tax Returns," *Tax History Project*, accessed July 27, 2018, http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns; Matt Clary, "DNC Says Presidential Candidates Usually Release Tax Returns but Romney Won't," *Politifact*, Dec. 16, 2011, https://www.politifact.com/truth-o-meter/statements/2011/dec/16/democratic-national-committee/dnc-says-presidential-candidates-usually-release-t/. The completeness of these disclosures has varied over the years. For example, President Obama disclosed all his returns from the eight years before he took office, while President Ford disclosed only summary data about his federal taxes from 1966 to 1975. *Id.* In addition, while every major party nominee for president and vice president between 1976 and 2016, and many other top contenders, disclosed tax information for at least the year prior to the election (and in some cases many years), there have been notable exceptions, including Ross Perot, Ralph Nader, and most other third-party candidates. See Karen Yourish, "Clinton Released Her Taxes. Will Trump Follow This Tradition?" *New York Times*, Aug. 12, 2016, https://www.nytimes.com/interactive/2016/08/05/us/elections/presidential-tax-returns.html; Emily Schultheis and Maggie Haberman, "Rich Pols Play Taxes Hide-and-Seek," *Politico*, July 20, 2012, https://www.politico.com/story/2012/07/rich-candidates-play-hide-and-seek-with-taxes-078747; James Bornemeier, "Candidate Nader Silent on Finances," *L.A. Times*, June 4, 1996, http://articles.latimes.com/1996-06-04/news/mn-11625_1_ralph-nader; Form SF-278 (Ralph Nader addendum), Public Financial Disclosure Form, June 14, 2000, at 21, *available at* http://pfds.opensecrets.org/N00000086_99.pdf.

36 See, *e.g.*, Stephen Gandel, Shawn Tully, and Stacy Jones, "Here's Why Donald Trump 'Not Releasing' His Taxes Could Be Disastrous for his Candidacy," *Fortune*, July 27, 2016, http://fortune.com/2016/07/27/donald-trump-not-releasing-taxes/ (reporting that, since 1980, every party nominee produced a tax return, and all but three released their returns before the nominating conventions); Joshua Gillin, "Which Presidential Candidate Has Released the Most Tax Returns in History?" *Politifact*, July 1, 2015, https://www.politifact.com/florida/statements/2015/jul/01/jeb-bush/which-presidential-candidate-has-released-most-tax/ (reporting on presidential candidates' tax return disclosures). Before President Trump, the last significant controversy over a candidate's tax returns involved Mitt Romney, the 2012 Republican Party nominee. Romney delayed releasing any tax information until after he won the nomination, but bowing to public pressure he eventually disclosed returns for the two prior tax years (2010 and 2011) and summary information for the preceding two decades. See Philip Rucker, Jia Lynn Yang, and Steven Mufson, "Mitt Romney Releases Tax Return for 2011, Showing He Paid 14.1 Percent Tax Rate," *Washington Post*, Sept. 21, 2012, http://wapo.st/UyPfls.

37 Mitchell Zuckoff, "Why We Ask to See Candidates' Tax Returns," *New York Times*, Aug. 5, 2016, https://www.nytimes.com/2016/08/06/opinion/why-we-ask-to-see-candidates-tax-returns.html.

38 James M. Naughton, "Agnew Quits Vice Presidency and Admits to Tax Evasion in '67; Nixon Consults on Successor," *New York Times*, Oct. 10, 1973, https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/1010.html#article.

39 Under current law, candidates are required to file a statement of candidacy once their campaign raises $5,000, see 5 U.S.C. App. § 101(c); 11 CFR § 101.3; this proposal would add tax returns to the list of required disclosures at that point.

40 While disclosure of business tax returns has not been part of the longstanding practice, for the reasons stated above, it makes sense to update our disclosure requirements to include them.

41 Three years is the length of time that the IRS already requires taxpayers to keep their returns. This benchmark creates public accountability without overburdening the candidates. See "How long should I keep records?" Internal Revenue Service, last modified Apr. 23, 2018, https://www.irs.gov/businesses/small-businesses-self-employed/how-long-should-i-keep-records. See generally "Presidential Tax Returns," *Tax History Project*, accessed July 27, 2018, http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns (reflecting that many candidates disclosed three prior years or more).

42 Presidential Tax Transparency Act, S. 26, 115th Cong. (2017); H.R. 305, 115th Cong. (2017).

43 Legislators have introduced bills to require tax return disclosure as a condition for access to the ballot in at least 28 states. Max Rieper, "States Continue to Pursue Legislation on Presidential Tax Return Disclosure," *Multistate Insider*, Sept. 20, 2017, https://www.multistate.us/blog/updated-on-presidential-candidates-to-disclose-tax-returns. See also Alexi McCammond, "The Big Picture: The State Efforts to Keep Trump Off the 2020 Ballot," *Axios*, June 24, 2018, https://www.axios.com/states-tax-return-laws-presidential-2020-trump-88e84cce-7214-409d-b4c7-a24aad919bdb.html. None of the bills has passed into law, but in some states like New Jersey and California, the legislation passed both legislative bodies before being vetoed. See Matt Friedman, "Christie Vetoes Trump-Inspired Bill to Require Tax Returns From Presidential Candidates," *Politico*, May 1, 2017, https://www.politico.com/states/new-jersey/story/2017/05/01/christie-vetoes-bill-to-require-tax-returns-from-presidential-candidates-111677; David Siders, "Jerry Brown Vetoes Bill to Pry Loose Trump's Tax Returns," *Politico*, Oct. 16, 2017, https://www.politico.com/story/2017/10/16/jerry-brown-trump-tax-returns-bill-243799.

44 Ronald Reagan, "Remarks on Signing the Intermediate-Range Nuclear Forces Treaty" (speech, The White House, Washington, D.C., Dec. 8, 1987), *available at* http://www.presidency.ucsb.edu/ws/?pid=33795.

45 See, *e.g.,* James Hill, "A Look Inside Trump's Global Business Interests," *ABC News*, Jan. 10, 2017, https://abcnews.go.com/Politics/inside-trumps-global-business-interests/story?id=44416694; Jesse Drucker and Kate Kelly, "Kushner's Firm Deepens Ties to Those with Business in Washington," *New York Times*, July 11, 2018, https://www.nytimes.com/2018/07/11/business/jared-kushner-business-washington.html; Emma Brown and Danielle Douglas-Gabriel, "Betsy DeVos's Ethics Review Raises Further Questions for Democrats and Watchdogs," *Washington Post*, Jan. 24, 2017, https://wapo.st/2ko1c2M; Dan Alexander, "Lies, China and Putin: Solving the Mystery of Wilbur Ross' Missing Fortune," *Forbes*, June 18, 2018, https://www.forbes.com/sites/danalexander/2018/06/18/lies-china-and-putin-solving-the-mystery-of-wilbur-ross-missing-fortune-trump-commerce-secretary-cabinet-conflicts-of-interest/#-61d760a7e879.

46 See Shane Harris et al., "Kushner's Overseas Contacts Raise Concerns as Foreign Officials Seek Leverage," *Washington Post*, Feb. 27, 2018, http://wapo.st/2EVqm3q.

47 See *supra* at 5 (discussing reported contenders for presidential nomination in 2020). See also Shawn Carter, "More Signs Point to Mark Zuckerberg Possibly Running for President in 2020," *CNBC*, Aug. 15, 2017, https://www.cnbc.com/2017/08/15/mark-zuckerberg-could-be-running-for-president-in-2020.html; Benjamin Hart, "Report: Michael Bloomberg Is, Once Again, Thinking of Running for President," *New York Magazine*, June 26, 2018, http://nymag.com/daily/intelligencer/2018/06/report-bloomberg-is-again-thinking-of-running-for-president.html; Lauren

Dezenski, "Patrick Plans 2020 Decision by End of the Year," *Politico*, June 4, 2018, https://www.politico.com/story/2018/06/04/deval-patrick-2020-elections-622825.

48 The Committee on Foreign Investment in the United States (CFIUS) reviews certain transactions involving foreign investments ("covered transactions") in order to determine the effect of such transactions on the national security of the United States. See Defense Production Act of 1950, 50 U.S.C. § 2170.

49 See, *e.g.*, Secure Elections Act, S. 2261, 115th Cong. (2017) (bipartisan bill that would increase federal support for state and municipal election cybersecurity initiatives with the goal of preventing foreign interference, introduced by Sen. James Lankford (R-Okla.), with three Democratic and two Republican co-sponsors). Seventy-two percent of Americans say they are alarmed about foreign interference in U.S. elections, including 90 percent of Democrats, 68 percent of Independents, and 53 percent of Republicans. Emily Stewart, "Most Americans Are Worried about Russian Election Meddling — And Think Trump Isn't Taking It Seriously," *Vox*, Feb. 27, 2018, https://www.vox.com/policy-and-politics/2018/2/27/17057764/poll-trump-election-meddling-russia-interference (citing a CNN poll conducted by SSRS between February 20 and 23, 2018, among a sample of 1,016 respondents, *available at* http://cdn.cnn.com/cnn/2018/images/02/26/rel3c.-.russia.pdf).

50 U.S. Const. art. I, § 9, cl. 8.

51 See *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1 (2009), *available at* https://www.justice.gov/sites/default/files/olc/opinions/2009/12/31/emoluments-nobel-peace_0.pdf (finding that President Obama's receipt of Nobel Peace Prize did not implicate the Foreign Emoluments Clause because Nobel Committee was not an instrumentality of a foreign government); *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13 (1994), *available at* https://www.justice.gov/file/20391/download (concluding that two scientists on leave from the National Aeronautics and Space Administration could be employed by a public university in Canada without violating the Foreign Emoluments Clause because the public university did not constitute an instrumentality of a foreign government).

52 U.S. Const. art. II, § 1, cl. 7.

53 For example, the Voting Rights Act codifies and implements the protections for voting rights in the Fourteenth and Fifteenth Amendments. See Katzenbach v. Morgan, 384 U.S. 641 (1966). Similarly, the Religious Freedom Restoration Act (RFRA) was passed to codify and expand upon the First Amendment's protections for religious liberty. Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2767 (2014).

54 5 U.S.C. § 7342 (defining statutory terms "gift," "decoration," and "minimal value," and establishing categories of gifts and decorations to federal employees, the receipt of which Congress consents).

55 See, *e.g.*, Treasury and General Government Appropriations Act of 2000, 3 U.S.C. § 102 (1999) (increasing the president's salary from $200,000 to $400,000, effective at noon on January 20, 2001).

56 Matt O'Brien, "Donald Trump Won't Do What Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush Did," *Washington Post*, Nov. 15, 2016, https://wapo.st/2gcbamH; Roger Parloff, "Why Aren't Donald Trump's Epic Conflicts of Interest Illegal?" *Fortune*, Nov. 15, 2016, http://fortune.com/2016/11/15/donald-trump-conflicts-interest-ethics/; Laura Lee, "What Is a Blind Trust? And Why It May Be Donald Trump's Best Option," *Fox Business*, Dec. 13, 2016, https://www.foxbusiness.com/politics/what-is-a-blind-trust-and-why-it-may-be-donald-trumps-best-option.

57 For the first time this year, a federal court interpreted the definition of "emolument" and held that the term "extends to any profit, gain, or advantage, of more than *de minimis* value, received by [the president], directly or indirectly, from foreign, the federal, or domestic governments." D.C. v. Trump, No. 17-1596, 2018 WL 3559027, at 23 (D. Md. July 25, 2018).

58 See Elise Viebeck, "Guam Delegate May Have Violated Emoluments Clause with Lease, Ethics Office Says," *Washington Post*, Sept. 11, 2017, http://wapo.st/2vQQowg; John Bresnahan, "Report: Azerbaijani Oil Company Secretly Funded 2013 Lawmaker Trip," *Politico*, May 13, 2015, https://www.politico.com/story/2015/05/congress-2013-trip-azerbaijan-house-ethics-committee-117907; John Bresnahan, "Taiwan Trip Center of Roskam Probe," *Politico*, July 26, 2013, https://www.politico.com/story/2013/07/peter-roskam-ethics-investigation-taiwan-trip-094808; Scott Armstrong and Charles R. Babcock, "Ex-Director Informs on KCIA Action," *Washington Post*, June 6, 1977, http://www.washingtonpost.com/archive/politics/1977/06/06/ex-director-informs-on-kcia-action/de45d7d6-db72-45d0-a817-5234901db8b8; Associated Press, "Rangel and Four Others in House Investigated over Caribbean Travel," *New York Times*, Jun. 26, 2009, https://www.nytimes.com/2009/06/26/us/politics/26inquiry.html.

59 For instance, foreign diplomats now frequently stay at the president's Washington, D.C., hotel, raising questions about whether they are hoping to curry influence or favor with the president. Jonathan O'Connell and Mary Jordan, "For Foreign Diplomats, Trump Hotel Is Place to Be," *Washington Post*, Nov. 18, 2016, http://wapo.st/2fNSW6E.

60 See *supra* n. 57 (denying President Trump's motion to dismiss Foreign Emoluments Clause suit filed by District of Columbia and Maryland); Citizens for Responsibility & Ethics in Washington (CREW) v. Trump, No. 1:17-cv-00458 (S.D.N.Y. Dec. 21, 2017) (dismissing Foreign Emoluments Clause case due to lack of standing); Richard Blumenthal, et al. v. Donald J. Trump, No. 1:17-cv-01154 (D.D.C. 2017) (pending). See also Peter Overby, "Emoluments Lawsuit against President Trump Allowed to Proceed," *NPR*, Mar. 28, 2018, https://n.pr/2GhzbFL. Task Force member Amy Comstock Rick joined an amicus brief filed on behalf of ten former federal government ethics officers in *CREW v. Trump*.

61 *Hobby Lobby,* 134 S. Ct. at 2760 ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty."); Cf. Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 728 (2003) (recognizing that Congress can go beyond the narrow requirements of the 14th Amendment to enforce that amendment).

62 See 18 U.S.C. § 208(a) (barring most "officers" and "employees" of the federal government from participating "personally and substantially" in specific matters in which they, their spouse or minor child, business partners, or organizations with which they are affiliated have a "financial interest"); see also "18 USC § 208: Acts affecting a personal financial interest," Office of Government Ethics, accessed Nov. 16, 2017, https://www.oge.gov/Web/OGE.nsf/Resources/18+U.S.C.+%C2%A7+208:+Acts+affecting+a+personal+financial+interest (explaining that, under Section 208, an employee has "a disqualifying financial interest . . . if there is a close causal link between a particular Government matter . . . and any effect on the asset or other interest (direct effect) and if there is a real possibility of gain or loss as a result of . . . that matter (predictable effect)").

63 See 18 U.S.C. § 202(c) (exempting the president, vice president, members of Congress and federal judges from the definition of "officer" or "employee" in the conflict of interest statute). Members of Congress and federal judges are also exempt, although they have their own ethics codes that prohibit some of the same conduct. See, *e.g.*, "Code of Conduct for Judicial Employees," at 6–9 (defining conflicts of interest); "Rule XXIII – Code of Official Conduct," included in *Rules of the House of Representatives*, H.R. Doc. No. 114-192 (2017) (regulating, inter alia, receipt of gifts and honoraria); "Rule XXXVII – Conflict of Interest," included in *The Standing Rules of the Senate*, S. Doc. No. 113-18 (2013) (defining conflicts of interest and regulating, inter alia, outside compensation).

64 See 5 C.F.R. § 2635.402(b) note ("If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect[] . . . on a financial interest of the employee in or with a party, such as the employee's interest by virtue of owning stock."); Jack Maskell, *Financial Assets and Conflict of Interest Regulation in the Executive Branch*, CRS Report No. R43365 (Washington, D.C.: Congressional Research Service, 2014), 6–7 (discussing recusal process and waivers).

65 5 C.F.R. § 2635.402(b)(3).

66 See 5 C.F.R. § 2635.402(b)(3) example 1 ("The Internal Revenue Service's amendment of its regulations to change the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants.").

67 For example, then future Supreme Court Justice Antonin Scalia, during his time at the Department of Justice, wrote in a memo on the applicability of an Executive Order on conflicts of interest, that "it would obviously be undesirable as a matter of policy for the President or Vice President to engage in conduct proscribed by" conflict of interest rules even if they did not technically apply. Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, "Applicability of 3 C.F.R. Part 100 to the President and Vice President" (official memorandum, Washington, D.C.: Department of Justice, 1974), https://fas.org/irp/agency/doj/olc/121674.pdf. See also Presidential Conflicts of Interest Act of 2017, S. 65, 115th Cong. (2017) (requiring presidents and vice presidents, as well as their spouses and minor children, to put any potentially conflicting assets into a blind trust).

68 The Department of Justice opined in 1974 that such concerns weighed against finding that Congress had intended to include the president and vice president in the most recent version of the conflict of interest statute, which dates back to 1962. See Letter from Laurence H. Silberman, Acting Attorney General, to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (Sept. 20, 1974), *available at* https://fas.org/irp/agency/doj/olc/092074.pdf ("[T]he conflict of interest problems of the President and the Vice President as individual persons must inevitably be treated separately from the rest of the executive branch." (quoting Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, Association of the Bar of the City of New York (1960): 16–17)). Congress formally codified the exemption in 1989. 18 U.S.C. § 202(c) (amending 18 U.S.C. § 202 (1989)).

69 Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics (remarks, Brookings Institution, Washington, D.C., Jan. 11, 2017), *available at* https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf ("[E]very President in modern times has taken the strong medicine of divestiture. This means OGE Directors could always point to the President as a model. They could also rely on the President's implicit assurance of support if anyone balked at doing what OGE asked them to do.").

70 "Announcement of the Formation of a Blind Trust to Manage the President's Personal Assets," Jan. 30, 1981, in Gerhard Peters and John T. Woolley, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=44168.

71 See Christopher T. Anderson and Yuliya V. Tverdova, "Corruption, Political Allegiances, and Attitudes toward Government in Contemporary Democracies," *American Journal of Political Science* 47 (2003): 91–92 (using survey data and statistical analysis, authors demonstrate that "high levels of corruption reduce citizen support for democratic political institutions across mature and newly established democracies around the globe"); Weiner, *Strengthening Presidential Ethics Law*, 5–6.

72 "Donald Trump's Many, Many Business Dealings in 1 Map," *Time*, Jan. 10, 2017, http://time.com/4629308/donald-trump-business-deals-world-map/; David A. Fahrenthold and Jonathan O'Connell, "Nine Questions about President Trump's Businesses and Possible Conflicts of Interest," *Washington Post*, March 28, 2018, http://wapo.st/2DLYv5f; Emily Stewart, "Trump Is 'Definitely Still Involved' in his Hotel Business, a New Report Says," *Vox*, Dec. 30, 2017, https://www.vox.com/2017/12/30/16832964/trump-business-washington-hotel.

73 For instance, 66 percent of respondents to a Quinnipiac poll said that Donald Trump should place all of his business holdings into a blind trust. Tim Malloy et al., *U.S. Voters Approve of Obama, Disapprove of Trump, Quinnipiac University National Poll Finds; Trump Should Stop Tweeting, Voters Say 2-1,* Quinnipiac University, Jan. 10, 2017, 12, *available at* https://poll.qu.edu/images/polling/us/us01102017_Utb35mky.pdf/.

74 U.S. Const. art. I, § 7.

75 Under OGE rules, mutual funds that track major U.S. indices like the Dow and S&P 500 are not deemed to pose any conflict risk. See 5 C.F.R. § 2634.310. President Barack Obama, for instance, kept much of his wealth in such assets during his time in office, and it makes sense to allow future presidents to do the same. See Michael Galvis, "Barack Obama's Net Worth on his 55th Birthday," *Time*, Aug. 4, 2016, http://time.com/money/4439729/barack-obama-net-worth-55th-birthday/.

76 Typically, recusal is documented in a memo or other communication to an agency's Designated Agency Ethics Official (DAEO) or, for White House staff, a memo to the White House counsel.

77 See Letter from Laurence H. Silberman, Acting Attorney General, to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (endorsing view that applying conflict of interest statute to the president would "disable him from performing some of the functions prescribed by the Constitution").

78 As a practical matter, one way for the president or vice president to avoid having to divest would be to refrain from involvement in matters where they have a financial interest. Under this proposal, the decision as to whether to do so would remain up to them. In the event a president chooses to avoid participation in a matter that raises a possible conflict, divestiture would remain an option if his participation later proved necessary.

79 See, *e.g.*, Presidential Conflicts of Interest Act of 2017, S. 65, 115th Cong. (2017); Presidential Conflicts of Interest Act of 2017, H.R.371, 115th Cong. (2017); We the People Democracy Reform Act of 2017, S. 1880, 115th Cong. (2017).

80 Both the Ethics in Government Act of 1978 and the criminal conflicts of interest statute, 18 U.S.C. § 208, passed with strong bipartisan support. Senate Vote #245, "To Pass S. 555," 95th Cong. (1978), *available at* https://www.govtrack.us/congress/votes/95-1977/s245; House Vote #1500, "To Agree to the Conference Report on S. 555, The Ethics in Government Act of 1978," 95th Cong. (1978), *available at* https://www.govtrack.us/congress/votes/95-1978/h1500. See also "Congress Amends Conflict-of-Interest Laws," *CQ Almanac*, 18th ed. (Washington, D.C.: Congressional Quarterly, 1962) (the Kennedy and Eisenhower administrations both supporting a criminal conflict of interest statute).

81 See Letter from Laurence H. Silberman, Acting Attorney General to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (endorsing the view that applying conflict of interest statute to the president would "disable him from performing some of the functions prescribed by the Constitution"). The other objection that is sometimes raised is that making the president and vice president subject to conflict of interest law would amount to an unconstitutional qualification on their offices. See *id*. The Constitution sets forth specific qualifications for these offices (natural born citizens at least 35 years old), U.S. Const. art. II, § 1, cl. 5, as it does for Congress, U.S. Const. art. I, § 2, cl. 2 (House of Representatives); U.S. Const. art. I, § 3, cl. 3 (Senate); other qualifications are disallowed absent a separate constitutional amendment. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that state constitutional prohibition of the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot, if that candidate has already served three terms in the House of Representatives or two terms in the Senate, violates the Qualifications Clause of the Constitution for members of the House of Representatives). But making the president and vice president subject to the same ethical rules as other officials does not amount to imposition of an additional "qualification" on either office any more than subjecting him or her to other laws barring egregious official misconduct like bribery or obstruction of justice does.

82 There is reason to believe that a president can indeed recuse himself from a particular matter. Recusal means refraining from active involvement in the matter, not giving up all legal responsibility. Stephen D. Potts, Director, "Recusal Obligation and Screening Arrangements" (official memorandum, Washington, D.C.: Office of Government Ethics, 1999), http://webapp1.dlib.indiana.edu/virtual_disk_library/index.cgi/4248912/FID265/DAEOGRAM/99/Do99018.pdf. Given that the president already does not actually participate in the vast majority of executive branch matters, some have argued that there is no constitutional bar to requiring him to recuse in many instances. See, *e.g.,* Weiner, *Strengthening Presidential Ethics Law*; see also Daphna Renan, "Presidential Norms and Article II," *Harvard Law Review* 131 (2018): 2210–15, *available at* https://harvardlawreview.org/wp-content/uploads/2018/06/2187-2282_Online.pdf (discussing practices and norms to which presidents and executive branch agencies have conformed to prevent the president's direct involvement in specific enforcement matters).

83 See *Managing Conflict of Interest in the Public Sector: A Toolkit*, Organization for Economic Cooperation and Development, 2005, *available at* https://www.oecd.org/gov/ethics/49107986.pdf

84 See, *e.g.,* 5 C.F.R § 7501.104(a) (detailing certain prohibited assets and transactions for even high-ranking Department of Housing and Urban Development employees). See also 5 C.F.R § 3501.103(b) (detailing certain prohibited land or natural resource interests and transactions for high-ranking officials in the Department of the Interior).

85 Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977).

86 United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961).

87 For example, most commentators agree that the president can be punished for obstruction of justice, at least once he or she leaves office. See Daniel J. Hemel and Eric A. Posner, "Presidential Obstruction of Justice," *Public Law and Legal Theory Working Papers* 665 (2017): 5, *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2115&context=public_law_and_legal_theory ("[I]f the president interferes with an investigation because he worries that it might bring to light criminal activity by himself, his family, or his top aides—and not for reasons related to national security or faithful execution of federal law—then he acts corruptly, and thus criminally."); Sean Illing, "Trump's Lawyer: The President Can't Obstruct Justice. 13 Legal Experts: Yes, He Can," *Vox*, Jan. 5, 2018, https://www.vox.com/2017/12/4/16733422/donald-trump-new-york-times-sessions-russia-mueller-probe; Benjamin Wittes, "The Flaw in Trump's Obstruction-of-Justice Defense," *The Atlantic*, June 4, 2018, https://www.theatlantic.com/politics/archive/2018/06/even-the-president-can-obstruct-justice/561935/ (arguing that where president's "allegedly obstructive action was taken provably outside the contours of the president's oath office and his take-care clause obligations," obstruction statutes should apply).

88 18 U.S.C. § 202(c)

89 Meredith McGehee and Willian Gray, *The Ethics Blind Spot*, Issue One, 2018, *available at* https://www.issueone.org/wp-content/uploads/2018/02/Ethics-Blind-Spot-Final.pdf (explaining that the Office of Congressional Ethics lacks subpoena power and requires reauthorization every new Congress).

90 Maggie Severns, "Reckless Stock Trading Leaves Congress Rife with Conflicts," *Politico*, May 14, 2017, https://www.politico.com/story/2017/05/14/congress-stock-trading-conflict-of-interest-rules-238033.

91 *Id.* (reporting that 28 House members and six senators each traded more than 100 stocks in the past two years).

92 See Viebeck, "Guam Delegate May Have Violated Emoluments Clause with Lease, Ethics Office Says"; Bresnahan, "Report: Azerbaijani Oil Company Secretly Funded 2013 Lawmaker Trip"; Bresnahan, "Taiwan Trip Center of Roskam Probe"; Armstrong and Babcock, "Ex-Director Informs on KCIA Action"; Associated Press, "Rangel and Four Others in House Investigated Over Caribbean Travel."

93 See, *e.g.*, Jerry Markon, "Ex-Rep Jefferson (D-La.) Gets 13 Years in Freezer Cash Case," *Washington Post*, Nov. 14, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/13/AR2009111301266.html; "Former Ohio Congressman Sentenced to Eight Years in Prison," *PBS News Hour*, July 30, 2002, https://www.pbs.org/newshour/politics/politics-july-dec02-traficant_07-30; Associated Press, "3-year prison term for Rick Renzi," *Politico*, Oct. 28, 2013, https://www.politico.com/story/2013/10/rick-renzi-prison-sentence-098963.

94 See 5 C.F.R. § 2635.807 (preventing federal employees from receiving outside compensation for teaching, speaking or writing that relates to the employee's official duties). See also "Gifts from Outside Sources," Office of Government Ethics, last modified Apr. 11, 2017, accessed Aug. 12, 2018, https://www.oge.gov/web/oge.nsf/Gifts%20and%20Payments/8CEAAC03A29FDE9C85257E96006364F8?opendocument.

95 See, *e.g.*, Kathleen Clark, "Do We Have Enough Ethics in Government Yet? An Answer from the Fiduciary Theory," *University of Illinois Law Review* 57 (1996): 63, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2054648 (concluding that "many executive branch restrictions are too strict"); Alfred S. Neely IV, *Ethics-In-Government Laws: Are They Too "Ethical"?*, American Enterprise Institute, 1984, *available at* http://www.aei.org/publication/ethics-in-government-laws-are-they-too-ethical/ (calling for reforms to, inter alia, rules regarding financial disclosure, divestment, and outside compensation); Thomas D. Morgan, "Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency," *Duke Law Journal* 1980, no. 1 (1980), *available at* https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2730&context=dlj (discussing difficulties and disincentives created by federal employee ethics laws).

96 Ethics in Government Act, 5 U.S.C. App. §§ 401–08 (1978).

97 See Peter Overby, "Trump's Choice for Ethics Chief Wins Praise as 'Somebody Who Plays it by the Book,'" *NPR*, Feb. 9, 2018, https://www.npr.org/2018/02/09/584394977/trumps-choice-for-new-ethics-chief-wins-praise-somebody-who-plays-it-by-the-book. This was a continuation of a long tradition. See, *e.g.,* John A. Rohr, "Bureaucratic Morality in the United States," *International Political Science Review* 9 (1988): 174 (noting that Ronald Reagan kept on his Democratic predecessor's OGE Director to avoid the appearance of political influence).

98 The Ethics in Government Act does give OGE the power to "order corrective action" when it discovers an ethical violation but does not explain what that might look like or how OGE can enforce its own orders. 5 U.S.C. App. § 402(b)(9). There is no record of the agency exercising this authority. See Alex Guillén, "Ethics Office Weighs 'Corrective Action' for Pruitt," *Politico*, June 15, 2018, https://www.politico.com/story/2018/06/15/ethics-office-investigation-scott-pruitt-scandals-1425413.

99 5 U.S.C. App. § 401 (containing appointment procedure and term length for director, but no for-cause removal provision).

100 See Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010) ("The parties agree that the Commissioners cannot themselves be removed by the President except [for] . . . 'inefficiency, neglect of duty, or malfeasance in office,' . . . and we decide the case with that understanding.") (internal citations omitted); Federal Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) *(*"The [Federal Election] Commission suggests that the President can remove the commissioners only for good cause, which limitation is implied by the Commission's structure and mission as well as the commissioners' terms. We think the Commission is likely correct[] . . . .").

101 See Jim Jukes, Assistant Director for Legislative Reference, "Agencies with Legislative and Budget 'Bypass' Authorities – Information," (official memorandum, Washington, D.C.: Office of Management and Budget, 2001), https://www.citizen.org/sites/default/files/ombdocument1.pdf.

102 *Supra* n. 69.

103 *Id.*

104 See, *e.g.*, Clifford D. May, "Washington Talk: Office of Government Ethics; Taking Lots of Heat from and about Meese," *New York Times*, July 8, 1987, *available at* https://www.nytimes.com/1987/07/08/us/washington-talk-office-government-ethics-taking-lots-heat-about-meese.html (OGE came under fire in past decades for its failure to sufficiently scrutinize Attorney General Edwin Meese's financial disclosures, which contained several notable omissions; critics argued that greater scrutiny and stronger enforcement of the rules could have avoided the Wedtech scandal, in which Meese was accused of bringing improper influence to bear on behalf of a contractor to which he had financial ties).

105 In one notable example, after presidential counselor Kellyanne Conway urged Americans to purchase Ivanka Trump-branded products, she was merely "counseled," though the OGE Director recommended more forceful disciplinary action consistent with the norm under prior administrations. Matt Ford, "Ethics Office: 'Disciplinary Action Is Warranted' Against Kellyanne Conway," *The Atlantic*, Feb. 14, 2017, https://www.theatlantic.com/politics/archive/2017/02/kellyanne-conway-ethics-discipline/516729/; see also Matea Gold, "Power Struggle Intensifies between White House and Ethics Office," *Washington Post*, May 22, 2017, http://wapo.st/2qIoGBW.

106 See Letter from Stefan Passantino, Deputy Counsel to the President, Compliance and Ethics, to Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics (Feb. 28, 2017), 1, *available at* https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Oversight%20Response%20to%20Shaub%20re%20KAC.PDF. The Passantino letter notes the OGE is statutorily authorized to issue regulations and other guidance with respect to "agency" employees, and that the Executive Office of the President is not technically an agency.

107 See Letter from Campaign Legal Center, Common Cause, Democracy 21, Public Citizen, U.S. PIRG, to Richard M. Thomas, Associate General Counsel, Office of Government Ethics (Nov. 14, 2011), 5, *available at* https://www.citizen.org/sites/default/files/oge-gift-comments.pdf (discussing inconsistent application of the gift rule throughout the ranks of the civil service).

108 See 18 U.S.C. § 216(b). For a recent example, see "Acting Ethics Chief Flags Trump Financial Disclosure Form for Rod Rosenstein," *CBS News*, May 16, 2018, https://www.cbsnews.com/news/trumps-financial-disclosure-form-released-by-ethics-office-live-updates/.

109 See David J. Apol, "2016 Conflict of Interest Prosecution Survey" (official memorandum, Washington, D.C.: Office of Government Ethics, 2017, https://www.oge.gov/web/OGE.nsf/0/FEB69F94825247F2852581750045FE2B/$FILE/FINAL%202016%20Prosecution%20Survey%20LA.pdf (detailing conflict of interest enforcement actions taken against federal employees in 2016). In 2015 and 2016 combined, there were only 12 prosecutions for violations of the federal conflict of interest statute at all. *Id*. Walter M. Shaub, "2015 Conflict of Interest Prosecution Survey" (official memorandum, Washington, D.C.: Office of Government Ethics, 2016), https://www.oge.gov/Web/OGE.nsf/0/42DCFE53F8D2211F85257FFD0058DB04/$FILE/Clean%20FINAL%202015%20Proseuction%20Survey%207_26_16.pdf.

110 See Nuno Garoupa and Fernando Gomez-Pomar, "Punish Once or Punish Twice: A Theory of the Use of Criminal Sanctions in Addition to Regulatory Penalties," *American Law and Economics Review* 6 (2004): 415 (civil enforcement is often more effective than criminal enforcement given the lower burden of proof and greater likelihood of a sanction); see also Celena Vinson and Julie Countiss, "The Power of Civil Enforcement," *American Journal of Criminal Law* 43 (2015) (discussing the utility of civil injunctions and other enforcement mechanisms to prevent gang activity, prostitution, and the illegal sale of alcohol); V.S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?" *Harvard Law Review* 109 (1996): 1532 – 33 (finding that there are very limited circumstances in which corporate criminal liability is more socially desirable than civil liability). Even with OGE as the primary civil enforcer of ethics laws, the Department of Justice would continue to have sole jurisdiction over criminal matters. Overlapping responsibilities of this sort are common in the federal government. Agencies will typically resolve any conflicts (such as between ongoing criminal and civil investigations) through informal communications or by drafting a formal cooperation agreement, either of which could be used here.

111 5 U.S.C. App. § 401.

112 *Supra* n. 97.

113 For instance, the Federal Election Commission submits its budget to Congress and OMB concurrently, rather than using OMB as an intermediary. See *Fiscal Year 2018 Congressional Budget Justification* (Washington, D.C.: Federal Election Commission, 2017). https://www.fec.gov/resources/cms-content/documents/FEC_FY_2018_Congressional_Budget_Justificiation.pdf.

114 Similar requirements are contained in the statute authorizing the Federal Election Commission to investigate potential violations of campaign finance law. See 52 U.S.C. §§ 30107(a)(3), 30109(a)(2), 30109(a)(12)**.** Of course, the FEC is an evenly-divided commission that is prone to gridlock. These safeguards would be far more important at a watchdog agency headed by a single director.

115 See 5 U.S.C. § 556(d) (outlining the procedural protections in place for those facing sanction in an agency adjudication); see also Richardson v. Perales, 402 U.S. 389, 401 (1971) ("[P]rocedural due process is applicable to the adjudicative administrate proceeding involving 'the differing rules of fair play, which through the years, have become associated with different types of proceedings.'"); Muset v. Ishimaru, 783 F. Supp. 2d 360 (E.D.N.Y. 2011) (holding that due process requires that an agency adjudicator give those being punished notice and an opportunity to be heard before enforcing the punishment).

116 See 5 U.S.C. § 7323(B)(1) (preventing employees of certain agencies from taking an active part in political management or political campaigns).

117 18 U.S.C. § 208(b)(1). One recent waiver, for example, allowed a senior White House economic adviser to work on matters affecting companies whose stock was still in his portfolio (the White House claims he has since divested). See Peter Overby, "Ethics Documents Suggest Conflict of Interest by Trump Adviser," *NPR*, March 14, 2017, https://www.npr.org/sections/thetwo-way/2017/03/14/520121822/ethics-documents-suggest-conflict-of-interest-by-trump-adviser. However, the waiver problem is not new. In one notorious example from the George W. Bush administration, the administration's Medicare chief, Thomas A. Scully, was granted a waiver to seek employment representing private healthcare clients even as he was helping to craft the administration's proposal to expand Medicare coverage to prescription drugs. See Amy Goldstein, "Administration Alters Rules on Ethics Waivers," *Washington Post*, Jan. 14, 2004, https://www.washingtonpost.com/archive/politics/2004/01/14/administration-alters-rules-on-ethics-waivers/b92bb516-b3a0-483f-8e11-58f989318999/?utm_term=.25f4a0a9616f.

118 For a discussion of OGE's various statutory authorities, see Letter from Walter M. Shaub, Director, Office of Government Ethics, to John M. Mulvaney, Director, Office of Management and Budget (May 22, 2017), *available at* https://assets.documentcloud.org/documents/3728657/OGE-Letter-to-OMB-Director-Mulvaney.pdf.

119 See *supra* n. 106.

120 See, *e.g.,* Memorandum from Issue One to Editorial Boards (May 23, 2017), *available at* https://www.issueone.org/wp-content/uploads/2017/08/IO-OGE-Edit-Memo-2017.pdf ("RE: Time to Revisit the Office of Government Ethics (OGE)"); Letter from Liz Hempowicz, Project on Government Oversight, to Honorable Jason Chaffetz, Chairman, and Honorable Elijah Cummings, Ranking Member, House Committee on Oversight and Government Reform (Feb. 14, 2017), *available at* https://www.pogo.org/letter/2017/02/suggested-ethics-reforms-for-2017/ ("Suggested Ethics Reforms for 2017"); *Executive Branch Reform Act of 2007: Hearings on H.R. 984, Before the House Comm. on Oversight and Government Reform*, 110th Cong. 6 (2007) (testimony of Craig Holman, Ph.D., Legislative Representative for Public Citizen), *available at* https://fas.org/sgp/congress/2007/021307holman.pdf.

121 Mass. Const. art. XXX (1780) (John Adams).

122 Thomas Jefferson, "Note," in Antoine Louis Claude Destutt de Tracy, *Treatise on Political Economy*, ed. Thomas Jefferson (1817), 202.

123 See *infra* n. 151.

124 See *infra* 17-21, A generally; see also Andrew McCanse Wright, "Justice Department Independence and White House Control" (Feb. 18, 2018): 51 *available at* http://dx.doi.org/10.2139/ssrn.3125848 ("The White House has traditionally avoided comment on pending criminal investigations because of the perception of presidential control."); Luke M. Milligan, "The 'Ongoing Criminal Investigation' Constraint: Getting away with Silence," *William & Mary Bill of Rights Journal* (2008): 756, *available at* https://scholarship.law.wm.edu/wmborj/vol16/iss3/4/ ("The White House has historically behaved as though it were constrained from commenting on the merits, progress, or information gathered during ongoing federal criminal investigations or prosecutions of which the President is perceived to be at least nominally in control.").

125 In its examination of conduct at the FBI during the 2016 Presidential election, the Department of Justice's Office of the Inspector General conducted interviews with several current and former law enforcement officials who described the existence of an unwritten "Sixty Day Rule," under which prosecutors avoid public disclosure of investigative steps related to electoral matters or the return of indictments against a candidate for office within 60 days of a primary or general election. See Department of Justice Office of the Inspector General, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* (Washington, D.C.: U.S. Department of Justice, 2018), 17–18, https://www.oversight.gov/sites/default/files/oig-reports/2016_election_final_report_06-14-18_0.pdf.

126 Roosevelt directed his attorney general to produce a memo analyzing the legality of J.P. Morgan's Northern Securities Trust and had a hand in choosing the venue for bringing the government's suit to enjoin the combination. Later, he

provided his assurances that other combinations would not be subject to anti-trust complaints. James F. Rill and Stacy L. Turner, "Presidents Practicing Antitrust: Where to Draw the Line?" *Antitrust Law Journal* 79 (2017).

127 "Bobby Kennedy: Is He the 'Assistant President'?" *U.S. News & World Report*, Feb. 19, 1962, https://www.usnews.com/news/articles/2015/06/05/bobby-kennedy-is-he-the-assistant-president.

128 Gerald Caplan, "The Making of the Attorney General: John Mitchell and the Crimes of Watergate Reconsidered," *McGeorge Law Review* 41 (2010).

129 Eventually, Solicitor General and then-Acting Attorney General Robert Bork carried out Nixon's order to fire Watergate Special Prosecutor Archibald Cox. Carroll Kilpatrick, "Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit," *Washington Post*, Oct. 21, 1973, https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm.

130 While the Justice Department evaluated its merger case against IT&T, the corporation donated hundreds of thousands of dollars to the Republican National Convention. White House tapes recorded President Nixon ordering Attorney General Richard Kleindienst to tell the Department's lead antitrust lawyer to "stay the hell out" of "the IT&T thing" or risk being fired. See Impeachment Inquiry Staff for the House Judiciary Committee, 93d Cong., *Transcript of a Recording of a Meeting Among the President, John Ehrlichman and George Shultz on April 19, 1971 from 3:30 to 3:34 P.M.* (1974), *available at* https://www.nixonlibrary.gov/sites/default/files/forresearchers/find/tapes/watergate/wspf/482-017_482-018.pdf; see also J. Anthony Lukas, *Nightmare: The Underside of the Nixon Years* (New York: Viking Press, 1976): 132–34.

131 White House Counsel John Dean gave Commissioner of Internal Revenue Johnnie Mac Walters an "enemies list" of hundreds of prominent Democrats the White House wanted "investigated and some put in jail" during the 1972 election season. Walters and Treasury Secretary George Shultz agreed that neither Treasury nor the IRS would fulfill the White House's request. Walters eventually turned the list over to the executive director of the Joint Tax Committee. Select Committee on Presidential Campaign Activities ("Watergate Committee"), Final Report, S. Rep. No. 93-981, at 130–33 (1974). See also David Dykes, "Former IRS Chief Recalls Defying Nixon," *USA Today*, May 26, 2013, https://www.usatoday.com/story/news/nation/2013/05/26/irs-chief-defied-nixon/2360951/.

132 Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("Church Committee"), Final Report, S. Rep. No. 94-755 (1976), *available at* https://www.intelligence.senate.gov/resources/intelligence-related-commissions.

133 "Johnson Reported to Have Used F.B.I. to Spy on the Democrats," *New York Times*, Aug. 16, 1973, https://www.nytimes.com/1973/08/16/archives/johnson-reported-to-have-used-fbi-to-spy-on-the-democrats.html.

134 Cornell W. Clayton, *The Politics of Justice: The Attorney General and the Making of Government Legal Policy* (New York: Routledge, 2015), 5, 143; David Leonhardt, "The Sense of Justice That We're Losing," *New York Times*, Apr. 29, 2018, https://www.nytimes.com/2018/04/29/opinion/the-sense-of-justice-that-were-losing.html (discussing role Attorneys General Edward Levi and Griffin Bell played in changing the rules for FBI investigations and instituting strict protocols for communication between the White House and the Department of Justice). President Ford later recalled his words to Attorney General Levi upon offering him the post of attorney general in 1975: "I was in no position to offer job security. But I could and did promise Ed that no politician would encroach on the Department. I wanted him to protect the rights of American citizens, not the President who appointed him." Gerald Ford, "In Memoriam: Edward H. Levi (1912–2000)," *University of Chicago Law Review* 67 (2000): 976.

135 Henry B. Hogue, *Nomination and Confirmation of the FBI Director: Process and Recent History,* CRS Report No. RS20963, (Washington, D.C.: Congressional Research Service, 2005), https://fas.org/sgp/crs/natsec/RS20963.pdf.

136 Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq. (1978).

137 Maryanne Borrelli, Karen Hult, and Nancy Kassop, "The White House Counsel's Office," *Presidential Studies Quarterly* 31 (2001): 576–77 (describing the role and growth of the White House counsel's office over time and naming potential reasons for its expansion).

138 See, *e.g.,* Donald J. Trump (@realDonaldTrump), "Attorney General Jeff Sessions should stop this Rigged Witch Hunt right now, before it continues to stain our country any further. Bob Mueller is totally conflicted, and his 17 Angry Democrats that are doing his dirty work are a disgrace to USA!" Twitter, Aug. 1, 2018, 9:24 a.m., https://twitter.com/realDonaldTrump/status/1024646945640525826; Donald J. Trump (@realDonaldTrump), "Looking back on history, who was treated worse, Alfonse Capone, legendary mob boss, killer and 'Public Enemy Number One,' or Paul Manafort, political operative & Reagan/Dole darling, now serving solitary confinement - although convicted of nothing?" Twitter, Aug. 1, 2018, 8:35 a.m., https://twitter.com/realDonaldTrump/status/1024680095343108097.

139 See, *e.g.*, Donald J. Trump (@realDonaldTrump), "Everybody is asking why the Justice Department (and the FBI) isn't looking into all of the dishonesty going on with Crooked Hillary & the Dems..[sic]" Twitter, Nov. 3, 2017, 3:57 a.m., https://twitter.com/realDonaldTrump/status/926403023861141504.

140 Devlin Barrett, John Wagner, and Seung Min Kim, "Trump and Sessions Feud over the Direction of the Justice Department," *Washington Post*, Aug. 23, 2018, https://wapo.st/2PyCIjF; Aaron Rupar, "In Unhinged Tweetstorm, Trump Admits McCabe Firing Was about Politics," *Think Progress*, Mar. 17, 2018, https://thinkprogress.org/trump-unhinged-tweets-about-mccabe-firing-88eb9da60335/ ("Trump . . . repeatedly publicly pressured Sessions to fire McCabe[] . . . ."); Michael D. Shear and Matt Apuzzo, "F.B.I. Director James Comey Is Fired by Trump," *New York Times*, May 9, 2017, https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html.

141 See*, e.g.*, Donald J. Trump (@realDonaldTrump), "In my opinion the Washington Post is nothing more than an expensive (the paper loses a fortune) lobbyist for Amazon. Is it used as protection against antitrust claims which many feel should be brought?" Twitter, July 23, 2018, 6:35 a.m., https://twitter.com/realDonaldTrump/status/1021388295618682881. President Trump stated on the campaign trail, "AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration . . . ." Ryan Knutson, "Trump Says He Would Block AT&T-Time Warner Deal," *Wall Street Journal*, Oct. 22, 2016, https://www.wsj.com/articles/trump-says-he-would-block-att-time-warner-deal-1477162214.

142 The Department of Justice's suit to block the merger was a sharp departure from how the Department has treated such "vertical mergers" for decades. See J. Thomas Rosch, Commissioner, Federal Trade Commission, "The Challenge of Non-Horizontal Merger Enforcement" (prepared remarks, Fordham Competition Law Institute, 34th Annual Conference on International Anti-Trust Law and Policy, Sept. 2007), 11–12, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/challenge-non-horizontal-merger-enforcement/070927-28non-horizontalmerger_1.pdf; James Hohmann, "Analysis: 7 Reasons to Be Suspicious of the DOJ Lawsuit to Stop AT&T from Buying CNN," *Chicago Tribune*, Nov. 21, 2017, http://www.chicagotribune.com/business/ct-biz-doj-lawsit-time-warner-att-20171121-story.html.

143 United States v. AT&T, Inc., No. 17-2511 (D.D.C. June 12, 2018) (denying Department of Justice's request to enjoin the merger), *appeal pending*.

144 Danielle Wiener-Bronner and Julia Horowitz, "Amazon and 16 Other Companies Trump Has Attacked Since his Election," *CNN Money*, Apr. 4, 2018, https://money.cnn.com/2018/04/04/news/companies/trump-companies-attacks/index.html.

145 Michael S. Schmidt and Michael D. Shear, "Trump Says Russia Inquiry Makes U.S. 'Look Very Bad,'" *New York Times*, Dec. 28, 2017, https://www.nytimes.com/2017/12/28/us/politics/trump-interview-mueller-russia-china-north-korea.html?_r=0 (The President asserting that, although he would be within his rights to fire the special counsel, he was choosing not to do so.).

146 U.S. Department of Justice Office of Inspector General and Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (Washington, D.C.: Department of Justice Office of the Inspector General

and Office of Professional Responsibility, 2008): 356–58, https://oig.justice.gov/special/s0809a/final.pdf (concluding that the process used to remove the U.S. Attorneys was "fundamentally flawed"); U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division* (Washington, D.C.: Department of Justice Office of the Inspector General and Office of Professional Responsibility, 2009): 64, https://oig.justice.gov/special/s0901/final.pdf (concluding that Bradley Schlozman, the political official overseeing the Civil Rights Division at the Department of Justice, "considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys in the Civil Rights Division").

147 Dan Eggen and Michael A. Fletcher, "Embattled Gonzales Resigns," *Washington Post*, Aug. 28, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/08/27/AR2007082700372.html (recounting the difficult last months of Attorney General Gonzales' tenure and his eventual resignation).

148 For a summary of bipartisan criticism, see Paula Reid, "AG Loretta Lynch Faces Storm of Criticism over Bill Clinton Meeting," *CBS News*, June 30, 2016, https://www.cbsnews.com/news/loretta-lynch-bill-clinton-meeting-storm-of-criticism/; see also Mark Landler, Matt Apuzzo and Amy Chozick, "Loretta Lynch to Accept F.B.I. Recommendations in Clinton Email Inquiry," *New York Times*, July 1, 2016, https://www.nytimes.com/2016/07/02/us/politics/loretta-lynch-hillary-clinton-email-server.html.

149 Matt Apuzzo and Michael Schmidt, "Obama's Comments about Clinton's Emails Rankle Some in the F.B.I.," *New York Times*, Oct. 16, 2015, https://www.nytimes.com/2015/10/17/us/politics/obamas-comments-on-clinton-emails-collide-with-fbi-inquiry.html.

150 Such checks on prosecutors' power are critical because, as Attorney General Robert H. Jackson explained, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . While the prosecutor at his best is one of the most beneficent force in our society, when he acts from malice or other base motives, he is one of the worst." Attorney General Robert H. Jackson, "The Federal Prosecutor: Address to the Second Annual Conference of the United States Attorneys," *Journal of the American Judicature Society* 24 (1940): 18, https://www.roberthjackson.org/wp-content/uploads/2015/01/The_Federal_Prosecutor.pdf.

151 See, *e.g.*, Jack Quinn, Counsel to the President, "Contacts with Agencies" (official memorandum, Washington, D.C.: The White House, Jan. 16, 1996), 1 ("Unless you are certain that a particular contact is permissible, you should take care before making the contact to consult with the Counsel's Office."); Donald F. McGahn II, Counsel to the President, "Communications Restrictions with Personnel at the Department of Justice" (official memorandum, Washington, D.C.: The White House, Jan. 27, 2017), 1 ("Communications with DOJ about individual cases or investigations should be routed through the Attorney General, Deputy Attorney General, Associate Attorney General, or Solicitor General, unless the Counsel's Office approves different procedures for the specific case at issue.").

152 See, *e.g.*, Eric Holder, Attorney General, "Communications with the White House and Congress" (official memorandum, Washington, D.C.: Department of Justice, May 11, 2009), 2, https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download (exempting communications relating to national security from limited contacts policies because "[i]t is critically important to have frequent and expeditious communications relating to national security matters").

153 See, *e.g.*, Benjamin Civiletti, Attorney General, "Communication from the White House and Congress" (official memorandum, Washington, D.C.: Department of Justice, Oct. 18, 1979), 2 ("White House or Congressional inquiries concerning policy decisions or legislation are different from those directed at specific investigations and cases. The positions of the Administration on those kinds of matters often must be coordinated. Additionally, there is less chance for improper influences in this area. Consequently, different considerations for communication result."); Quinn, "Contacts with Agencies," 2; Holder, "Communications with the White House and Congress," 3 (allowing for "distinctive arrangements" for "[m]atters in which the Solicitor General's Office is involved" because those "often raise questions about which contact with the Office of the Counsel to the President is appropriate").

154 Civiletti, "Communication from the White House and Congress," 1 (outlining Department of Justice policy limiting contacts with the White House).

155 For instance, in 2009, Christine Varney, head of the Antitrust Division at the Department of Justice, stated publicly, "The recent developments in the marketplace should make it clear that we can no longer rely upon the marketplace alone to ensure that competition and consumers will be protected." Cecilia Kang, "U.S. Clears the Way for Antitrust Crackdown," *Washington Post*, May 12, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/05/11/AR2009051101189.html. The White House could also direct the Department of Justice to crack down on white collar crime, even on bankers, but it is generally frowned upon for the White House to direct the prosecution of an individual controversial CEO. A recent example of the White House setting enforcement policy is when the Obama administration announced a policy to no longer initiate the deportation of young undocumented immigrants meeting certain qualifications. In response, Homeland Security Secretary Janet Napolitano instructed immigration enforcement agents to "immediately exercise their discretion, on an individual basis, in order to prevent low-priority individuals from being placed into removal proceedings." Julia Preston and John H. Cushman, Jr., "Obama to Permit Young Migrants to Remain in U.S.," *New York Times*, June 15, 2012, https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html.

156 See, *e.g.*, Renan, "Presidential Norms and Article II," 2207 (discussing "the norm of investigatory independence" for the presidency, which "prohibits presidential direction in individual investigatory matters"), 2236–39 (discussing the president's political control over policymaking through the administrative process).

157 See, *e.g.*, Donald Rumsfeld, White House Chief of Staff, "Standards of Conduct: Contacts with Regulatory Agencies and Procurement Officers" (official memorandum, Washington, D.C.: The White House, Oct. 10, 1975); Fred F. Fielding, Counsel to the President, "Communications with the Department of Justice" (official memorandum, Washington, D.C.: The White House, Feb. 10, 1981); C. Boyden Gray, Counsel to the President, "Prohibited Contacts with Agencies" (official memorandum, Washington, D.C.: The White House, Feb. 1989); Quinn, "Contacts with Agencies"; Michael Mukasey, Attorney General, "Communications with the White House" (official memorandum, Washington, D.C.: Department of Justice, Dec. 19, 2007), *available at* https://www.justsecurity.org/wp-content/uploads/2017/06/AG-2007-Memo-Communications-with-White-House.pdf; Holder, "Communications with the White House and Congress"; McGahn, "Communications Restrictions with Personnel at the Department of Justice."

158 See, *e.g.*, Quinn, "Contacts with Agencies" (Clinton Administration); Kathryn Ruemmler, Counsel to the President, "Prohibited Contacts with Agencies and Departments" (official memorandum, Washington, D.C.: The White House, Mar. 23, 2012).

159 See *supra* n. 157; see also *Report: The Security from Political Interference in Justice Act of 2007*, S. Rep. No. 110-203, at 3 (2007), *available at* https://www.congress.gov/110/crpt/srpt203/CRPT-110srpt203.pdf (stating that Attorney General Gonzales implemented a limited contacts policy permitting "at least 895 people in the executive branch to communicate with at least 42 people at the Department of Justice on non-national security related matters."). The policy shift was opposed by members of Congress and became a key focus of the nomination process of Gonzales' successor, Attorney General Michael Mukasey. Dan Eggen, "Mukasey Limits Agency's Contacts with White House," *Washington Post*, Dec. 20, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/12/19/AR2007121902303.html.

160 Mukasey committed to reinstating a more stringent limited contacts policy at his nomination hearing, and upon confirmation, he restricted allowable contacts about pending criminal and civil cases to the attorney general and his deputy and to the White House counsel and deputy counsel, with a provision that civil enforcement matters could also be discussed with the associate attorney general. Jeannie Shawl, "Mukasey Memo Limits DOJ Case Discussions with White House," *Jurist*, Dec. 20, 2007, http://www.jurist.org/paperchase/2007/12/mukasey-memo-limits-doj-case.php; Mukasey, "Communications with the White House."

161 Donald F. McGahn II, Counsel to the President, "Communications Restrictions with Personnel at the Department of Justice," (official memorandum, Washington, D.C.: White House, Jan. 27, 2017), *available at* https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000.

162 Brooke Seipel, "Priebus Could Have Violated WH Policy by Speaking to FBI: Report," *The Hill*, Mar. 17, 2017, http://thehill.com/blogs/blog-briefing-room/news/324596-priebus-could-have-violated-wh-policy-by-speaking-to-fbi-report.

163 Matt Ford, "Why Trump's Dismissal of Preet Bharara Matters," *Atlantic*, Mar. 12, 2017, https://www.theatlantic.com/politics/archive/2017/03/trump-bharara/519318/.

164 Trump personally interviewed Geoffrey Berman, then a partner at Rudy Giuliani's former law firm, for the U.S. Attorney position for the Southern District of New York; Ed McNally, a partner at the law firm founded by Trump's former personal attorney Marc Kasowitz, for the U.S. Attorney position for the Eastern District of New York; and Jessie Liu for the U.S. Attorney position for the District of Columbia. Seung Min Kim and John Bresnahan, "Trump Personally Interviewed U.S. Attorney Candidates," *Politico*, Oct. 19, 2017, https://www.politico.com/story/2017/10/19/trump-us-attorney-interviews-243962.

165 While all administrations since the 1970s have enacted policies, many of them have not been released until long after they were issued, and some have yet to be publicly released. For example, a White House contacts policy memorandum issued by President Obama's White House counsel has not been released publicly as of the publication of this report. Ruemmler, "Prohibited Contacts with Agencies and Departments."

166 The story of the changes to the limited contact policy during George W. Bush's administration provides an illustration of how congressional scrutiny of contacts policies can make a difference. See *supra*, nn. 159–60.

167 This proposal builds on existing DOJ guidance for particular contacts with outside parties. The U.S. Attorneys Manual directs U.S. Attorneys and staff to report contacts with Members of Congress, their staffs, or the media. See Office of the United States Attorneys, *U.S. Attorneys' Manual* (Washington, D.C.: United States Department of Justice, 2018), §§ 1-7.000, 1-8.000, https://www.justice.gov/usam/united-states-attorneys-manual. Law enforcement officers are already required to record certain information regarding their activities and communications; intra-agency structure already exists to manage any additional required disclosures. See Freedom of Information Act, 5 U.S.C. § 552.

168 To reduce duplication (or any perceived burden), Congress could make clear that once the log indicates the subject and individuals involved in communications about a particular matter, subsequent log entries for each communication on the same matter are not required.

169 5 U.S.C. § 552.

170 Pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a, the Department of Justice has procedures and rules in place to electronically track Department communications, including with outside parties. See 66 Fed. Reg. 41445 (Aug. 8, 2001) (implementing new Department-wide correspondence-tracking system proposed on June 4, 2001, 66 Fed. Reg. 29992); "DOJ Systems of Records," *Department of Justice*, last accessed Sept. 4, 2018, https://www.justice.gov/opcl/doj-systems-records. The White House also maintains its records pursuant to the Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2209; see also Julie Hirschfeld Davis, "White House to Keep Its Visitor Logs Secret," *New York Times*, Apr. 14, 2017, https://www.nytimes.com/2017/04/14/us/politics/visitor-log-white-house-trump.html (noting that White House records are maintained pursuant to law and that disclosure practices vary from one administration to the next).

171 Internal Revenue Service Restructuring and Reform Act of 1998, 26 U.S.C. §§ 6654, 7217 (1998). This legislation has not been challenged as unconstitutional.

172 See *supra* n. 157.

173 See Federal Records Act, 44 U.S.C. §§ 2101–2118, 2901–2910, 3101–3107, and 3301–3324 (requiring creation and retention of agency records); Freedom of Information Act, 5 U.S.C. § 552.

174 The Presidential Records Act, 44 U.S.C. §§ 2201–2207. Presidents have consistently conformed to the Presidential Records Act (PRA) without questioning its constitutionality. See Jonathan Turley, "Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records," *Cornell Law Review* 88 (2003): 666–72. While the PRA has not faced a significant constitutional challenge, the Supreme Court upheld the constitutionality of a PRA predecessor, the Presidential Recordings and Materials Preservation Act, in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (holding that requiring the publication of presidential records in no way "prevents the Executive Branch from accomplishing its constitutionally assigned functions," and discussing the "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch"). See also Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991) (noting that, when enacting the Presidential Records Act, "Congress was . . . keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations").

175 See United States v. Nixon, 418 U.S. 683, 706–07.

176 Inspector General Act of 1978, 5 U.S.C. App. § 1 et seq. (1978). Special inspectors general can also be appointed to oversee the administration of temporary government initiatives, such as the Troubled Asset Relief Program in the Treasury Department. See Vanessa K. Burrows, *The Special Inspector General for the Troubled Asset Relief Program (SIGTARP)*, CRS Report No. R40099 (Washington, D.C.: Congressional Research Service, 2009), https://fas.org/sgp/crs/misc/RS22981.pdf.

177 5 U.S.C. App. § 5.

178 *Id.* § 6(a).

179 5 U.S.C. App. 3 § 3(a). Inspectors general are subject to removal by the president, with the president required to communicate in writing the reasons for the removal to both houses of Congress within 30 days of that action. *Id.* § 3(b).

180 *Id.* § 8G. See also "The Inspectors General," *Council of the Inspectors General on Integrity and Efficiency*, 2014, *available at* https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf.

181 5 U.S.C. App. 3 §§ 3(a), 6(f)(1). Agency heads transmit the budget proposals to the president, who submits them to Congress. *Id.* §§ 6(f)(2) – (3).

182 *Id*. § 3(b).

183 Inspectors general do not currently have express statutory authority to investigate political interference. When the Department of Justice Inspector General and Office of Professional Responsibility investigated political interference during the Bush administration's U.S. Attorney firing scandal, the report the Offices co-authored explained that each of the two Offices had jurisdiction to investigate certain aspects of U.S. Attorney and Department of Justice misconduct, and did not reference improper White House interference in law enforcement. *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, 10 n. 12 ("OPR has jurisdiction to investigate allegations against U.S. Attorneys that involve the exercise of their authority 'to investigate, litigate, or provide legal advice.' The OIG has jurisdiction to investigate all other allegations against U.S. Attorneys. See 5 U.S.C. App. 3 § 8E."). The report also noted that, in the midst of congressional and media scrutiny of the U.S. Attorney firings, Deputy Attorney General Paul McNulty recommended to Attorney General Alberto Gonzales that he direct OPR to conduct an investigation into the removals of the U.S. Attorneys. *Id.* at 92–93.

184 5 U.S.C. App. 6 § 6(e)(4) ("[t]he Attorney General shall promulgate, and revise as appropriate, guidelines which shall govern the exercise of [inspectors general's] law enforcement powers"); John Ashcroft, Attorney General, "Attorney General Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority" (official memorandum, Washington, D.C.: Department of Justice, 2003) (requiring, inter alia, adherence to attorney general guidelines applicable to criminal investigative practices and completion of law enforcement training program, and establishing special procedures for investigations involving senior executive branch officials and other sensitive targets).

185 The Council of Inspectors General for Integrity and Efficiency publishes professional standards pursuant to the Inspector General Reform Act of 2008, 5 U.S.C. App. § 11(c)(2)(A) (2008), which require that investigations be conducted ethically, with impartiality and objectivity, and in accordance with all applicable laws, rules, and regulations, guidelines from the Department of Justice and other prosecuting authorities, and internal agency policies and procedures, with due respect for the rights and privacy of those involved. *Quality Standards for Investigations*, Council of the Inspectors General for Integrity and Efficiency, 2011, *available at* https://www.ignet.gov/sites/default/files/files/invprg1211appi.pdf.

186 See, *e.g.,* 5 U.S.C. App. 6 § 4(b) (requiring reviews to ensure compliance with standards established by the comptroller general of the United States for audits and that internal quality controls are in place and operating); *Id.* § 6(e)(7) (requiring establishment of external review process, in consultation with the attorney general, to ensure that adequate internal safeguards and management procedures exist for exercise of law enforcement powers).

187 See Kathleen Clark, "Toward More Ethical Government: An Inspector General for the White House," *Mercer Law Review* 49 (1998): 553, 555–56, 564 (discussing downsides of independent counsel investigations, which included expense, increased political use of ethics allegations, and decreased public trust in government, and arguing that inspector general mechanism helps promote ethical environment); Letter from Walter M. Shaub, Senior Director for Ethics, Campaign Legal Center, to Trey Gowdy, Chairman, and Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform, United States House of Representatives (Nov. 9, 2017): 13–15, *available at* https://www.politico.com/f/?id=0000015f-a141-de5e-abff-bfd5436b0001 (advocating for establishment of inspector general with regular jurisdiction over small agencies and limited special jurisdiction to conduct ethics investigations throughout executive branch).

188 U.S. Const. art. II, § 2, cl. 1.

189 Margaret Colgate Love, "Reinventing the President's Pardon Power," *Federal Sentencing Reporter* 20 (2007): 6, *available at* http://pardonlaw.com/wp-content/uploads/pardonlawimport/FSR.Pardon.2007.final.pdf (quoting Alexander Hamilton in Federalist No. 74 ("the criminal code of every country partakes so much of necessary severity that, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel") and James Iredell, Address in the North Carolina Ratifying Convention ("It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.")).

190 Margaret Colgate Love, "Reinventing the President's Pardon Power," 6, n. 6; Proclamation 4483, 42 Fed. Reg. 4391 (Jan. 21, 1977) (President Carter granting pardon for violations of the Selective Service Act, August 4, 1964 to March 28, 1973); Proclamation 4313, 39 Fed. Reg. 34511 (Sept. 16, 1974) (President Ford creating "amnesty discharge," 32 C.F.R. § 724.112); see also The Federalist No. 74 (Alexander Hamilton) ("in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth, and which, if suffered to pass unimproved, it may never be possible afterwards to recall").

191 The Federalist No. 74 (Alexander Hamilton) ("The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution."). James Madison believed that the threat of impeachment would serve as a check on abuse of the pardon power: "There is one security in this case [a misuse of the pardon power by the president] to which gentlemen may not have adverted: if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President." Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: J.B. Lippincott & co.; Washington, D.C.: Taylor & Maury, 1836–1859), 3:498, *available at* https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=003/lled003.db&recNum=509&itemLink=r?ammem/hlaw:@field(DOCID+@lit(ed00318))%25230030509&linkText=1.

192 Presidents began to rely on the attorney general for advice on pardons in 1854, though it was not until 1865 that the Office of the Clerk of Pardons was established in the Office of the Attorney General. See Margaret Colgate Love, "Reinventing the President's Pardon Power," 6; see also "Department of Justice, Office of the Pardon Attorney. 1894

– Organization Authority Record," National Archives Catalog, accessed Sept. 10, 2018, *available at* https://catalog.archives.gov/id/10451179 (noting the administrative history of the Pardon Attorney office).

193 The Pardon Attorney submits recommendations to the president through the deputy attorney general. 28 C.F.R Part 1.6 (procedure for reviewing petitions and submitting recommendations to the president); 28 C.F.R. Part 0, Subpart G (delegating authority to the Pardon Attorney and specifying that pardon recommendations to the president are submitted through the deputy attorney general).

194 Office of the United States Attorneys, *U.S. Attorneys' Manual* (Washington, D.C.: Department of Justice, 2018), § 9-140.000 ("Pardon Attorney"), *available at* https://www.justice.gov/usam/usam-9-140000-pardon-attorney#9-140.112.

195 See Margaret Colgate Love, "Reinventing the President's Pardon Power," 6 (citing only three occasions between 1953 and 1999 where the Department of Justice's process was not followed: President Ford's pardon of President Nixon in 1974, President Reagan's 1981 pardon of two FBI officials who had authorized illegal surveillance of the homes of friends of the Weather Underground, and President Bush's 1992 pardon of six Iran-Contra defendants.); Samuel T. Morison, "The Politics of Grace: On the Moral Justification of Executive Clemency," *Buffalo Criminal Law Review* 9 (2005): 45 n. 85 (citing pardons of President Nixon, FBI officials, and Iran-Contra defendants as among those constituting "roughly one percent of th[e] total" cases granted between March 1945 and January 2001 for which there was no prior Justice Department review).

196 President Clinton pardoned fugitive billionaire Marc Rich hours before leaving office in 2001 after a carefully orchestrated lobbying campaign that included Rich's ex-wife, Denise Rich, who was a prominent donor to Democratic Party committees, Hillary Clinton's senatorial campaign, and the Clinton Foundation. Josh Getlin, "Clinton Pardons a Billionaire Fugitive, and Questions Abound," *Los Angeles Times*, Jan. 24, 2001, http://articles.latimes.com/2001/jan/24/news/mn-16268; Jackie Judd and David Ruppe, "Denise Rich Gave $450,000 to Clinton Library," *ABC News*, Feb. 9, 2001, https://abcnews.go.com/Politics/story?id=121846&page=1. The pardon was the subject of congressional and criminal investigations for alleged bribery. The pardon was the subject of congressional and criminal investigations for alleged bribery. Joe Conason, "What Sessions Should Tell Trump about Pardons—Before It's Too Late," *National Memo*, July 27, 2017, http://www.nationalmemo.com/sessions-tell-trump-pardons/.

197 Isaac Toussie pleaded guilty in 2001 to using false documents to have mortgages insured by the Department of Housing and Urban Development, and in 2002 to mail fraud. Ken Belson and Eric Lichtblau, "A Father, A Son, and a Short-Lived Presidential Pardon," *New York Times*, Dec. 25, 2008, https://www.nytimes.com/2008/12/26/us/26pardon.html. The White House maintained that when President Bush granted the pardon, neither he nor his advisers were aware that Toussie's father had recently donated a total of $30,800 to Republicans. *Id.*

198 *Id.*

199 Proclamation 8159, 72 Fed. Reg. 37095 (July 2, 2007), *available at* https://www.gpo.gov/fdsys/pkg/FR-2007-07-06/pdf/07-3328.pdf; see also Amy Goldstein, "Bush Commutes Libby's Prison Sentence," *Washington Post*, July 3, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/28/AR2006032800858.html (reviewing the facts and summarizing contemporary criticism of the commutation).

200 Proclamation 6518, 57 Fed. Reg. 62145 (Dec. 24, 1992) (granting clemency to Caspar Weinberger, Elliott Abrams, Duane Clarridge, Alan Fiers, Clair George, and Robert McFarlane), *available at* http://www.presidency.ucsb.edu/ws/?pid=20265; see also Walter Pincus, "Bush Pardons Weinberger in Iran-Contra Affair," *Washington Post*, Dec. 25, 1992, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/28/AR2006032800858.html (including independent counsel's objection that the pardons constituted a "coverup").

201 Flynn and Manafort are potential witnesses in the special counsel investigation into whether Russia interfered in the 2016 election, contributing to the condemnation of the reports. Michael S. Schmidt, Jo Becker, Mark Mazzetti, Maggie Haberman, and Adam Goldman, "Trump's Lawyer Raised Prospect of Pardons for Flynn and Manafort," *New*

York Times, Mar. 28, 2018, https://www.nytimes.com/2018/03/28/us/politics/trump-pardon-michael-flynn-paul-manafort-john-dowd.html.

202 See, *e.g.*, Alex Whiting, "Why Dangling a Pardon Could Be an Obstruction of Justice—Even If the Pardon Power Is Absolute," *Just Security*, Mar. 28, 2018, https://www.justsecurity.org/54356/dangling-pardon-obstruction-justice-even-pardon-power-absolute/; Sean Illing, "I Asked 11 Legal Experts If Trump's Lawyer Obstructed Justice," *Vox*, Mar. 29, 2018, https://www.vox.com/2018/3/29/17174042/trump-pardons-manafort-flynn-mueller-probe.

203 Model Code of Judicial Conduct R. 2.11.

204 The factors considered by the Pardon Attorney include: (1) the perspectives of the prosecutors and sentencing judge; (2) the gravity of the offense; (3) the recipient's acceptance of responsibility; (4) the petitioner's criminal rehabilitation record; and (5) the need for relief. See *U.S. Attorneys' Manual* § 9-140.000.

205 Many scholars and writers on the pardon power have expressed support for greater pardon transparency, through increased congressional involvement or otherwise. See Glenn H. Reynolds, "Congressional Control of Presidential Pardons," *Nevada Law Journal Forum* 2 (2018) (Congress could require that the president submit pardon explanations to Congress, that pardons be recorded and preserved by the National Archives, or that the archivist maintain an index of pardons organized by crimes and circumstances); Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (New York: Oxford University Press, 1989) (pardons should be accompanied by a written explanation of the reasons); Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States,* American Constitution Society, 2013, 9–10, *available at* https://www.acslaw.org/wp-content/uploads/2018/04/Love_-_Reinvigorating_the_Federal_Pardon_Process_0.pdf (the president should publicly announce a pardoning policy and publish an annual report setting forth the reasons for each grant of clemency); P.S. Ruckman, Jr., "Preparing the Pardon Power for the 21st Century," *University of St. Thomas Law Journal*, 12 (2016): 472–75, *available at* http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/JEdit.htm (proposing that a clemency board publish data on the efficiency of processing pardon applications, and further proposing a return to the pre-1933 practice of presidents submitting detailed annual reports on pardons to Congress); Brendan Koerner, "It's Time to Make the Clemency System Less Opaque," *Wired*, Oct. 7, 2016, https://www.wired.com/2016/10/time-make-clemency-system-less-opaque/ (proposing an "online clemency-monitoring system," essentially a digital version of the pre-1933 report).

206 Ruckman, "Preparing the Pardon Power for the 21st Century," 475–76. It is unclear why this process was abandoned. According to one reporter, the process was initially stopped as part of a broader cost-cutting measure to eliminate printing during the Great Depression, and it was not resumed to prevent embarrassment to those whose crimes were being pardoned. Koerner, "It's Time to Make the Clemency System Less Opaque."

207 See, *e.g.*, William Jefferson Clinton, "My Reasons for the Pardons," *New York Times*, Feb. 18, 2001, https://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html; Andrew Novak, "Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States," *Michigan Journal of Legal Reform* 49 (2016): 842 (citing remarks by President Ford on granting a pardon to President Nixon, and a proclamation by President Bush on granting clemency to former Secretary of Defense Caspar Weinberger and others). See Robert Pear, "President Reagan Pardons 2 Ex-F.B.I. Officials in 1970's Break-Ins," *New York Times*, Apr. 16, 1981, *available at* https://www.nytimes.com/1981/04/16/us/president-reagan-pardons-2-ex-fbi-officials-in-1970-s-break-ins.html (citing President Reagan's statement on pardoning two former FBI officials).

208 Colo. Const. art. IV, § 7; Ind. Const. art. V, § 17; Iowa Const. art. IV, § 16; Ky. Const. § 77; Md. Const. art. II, § 20; Ohio Const. art. III, § 11; N.J. Stat. Ann. § 2A:167-3.1; Or. Rev. Stat. § 144.660; Tenn. Code Ann. §§ 40-27-101, 107; Va. Const. art. V, § 12; Wash. Const. art. III, § 11; W. Va. Const. art. 7, § 11; Wis. Const. art. V, § 6; Wyo. Const. art. 4, § 5. See generally Margaret Colgate Love, "Reinvigorating the Federal Pardon Process: What the President Can Learn from the States," *University of St. Thomas Law Journal* 9 (2013): 743–51. For a discussion of the benefits and drawbacks of instating a reasons requirement, see Daniel T. Kobil, "Should Clemency Decisions Be Subject to a Reasons Requirement?" *Federal Sentencing Reporter* 13 (2000): 150.

209 See Presidential Pardon Transparency Act of 2017, H.R. 3489, 115th Cong. (2017) (requiring that the name of the person pardoned, the full text of the reprieve, and the date of issue is published in the Federal Register); Abuse of the Pardon Prevention Act, H.R. 5551 & S.2770, 115th Cong. (2018) (directing the attorney general to produce investigative materials to Congress in the event of certain pardons granted by the president).

210 We calculated this average from the yearly figures provided by the Pardon Attorney. "Clemency Statistics," U.S. Department of Justice, Office of the Pardon Attorney, accessed Aug. 23, 2018, https://www.justice.gov/pardon/clemency-statistics. In 2014, President Obama announced an initiative for federal inmates to have their sentences commuted or reduced if they met certain factors. The initiative resulted in 583 and 1,043 commutations in 2015 and 2016, respectively. Without these two years, the average drops further.

211 Former Pardon Attorney Margaret Colgate Love argues that President Roosevelt's 1933 "decision to stop publishing reasons for grants deprived the public of the factual predicate necessary to hold pardon decision-makers accountable and reinforced the impression that pardoning was mysterious, capricious, and possibly corrupt. It also encouraged both the president and the Justice Department to think that they did not need to be accountable to the public for pardoning." Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States,* American Constitution Society, 2013, 9–10*, available at* https://www.acslaw.org/wp-content/uploads/2018/04/Love_-_Reinvigorating_the_Federal_Pardon_Process_0.pdf.

212 5 U.S.C. App. 3 § 3(b).

213 44 U.S.C. § 2201–2209.

214 Congress also requires disclosure of foreign intelligence information to congressional intelligence committees despite the president bearing "primary responsibility for the scope and conduct of foreign intelligence activities" and acting as "the sole organ of the nation in foreign relations." Philip A. Lacovara, "Presidential Power to Gather Intelligence: The Tension between Article II and Amendment IV," *Law & Contemporary Problems* 40, no. 3 (1976): 107. See National Security Act of 1947, 50 U.S.C. §§ 3001, 3043(a)(1), 3091(a)(1), 3093(c) (requiring the president to transmit to Congress an annual report on the national security strategy of the United States; to keep congressional intelligence committees fully and currently informed of intelligence activities; to provide congressional intelligence committees written findings that covert actions are necessary, and, in instances when such findings are not reported to the committees, to provide a statement of the reasons for not giving prior notice, with an obligation to disclose the finding or provide an explanation for its continued withholding within 180 days); Intelligence Authorization Act for Fiscal Year 2015, Pub. L. No. 113-293, 128 Stat. 3990–4008.

215 The Supreme Court has held that, in some circumstances, the president can be required to disclose information without violating the separation of powers doctrine. United States v. Nixon, 418 U.S. 683, 706–07 (1974); see also Reynolds, "Congressional Control of Presidential Pardons," 33–34 ("Although Congress cannot tie the president's hands, it seems likely that it could take substantial steps to ensure that, under certain circumstances, those hands perform their actions in the open—and if not open to the entire public, then at least behind closed doors to Congress. Rules providing for such transparency would very likely withstand constitutional scrutiny given that a pardon is, by its nature, a public act.").

216 For instance, transparency can help Congress hold the president accountable, where appropriate, pursuant to its impeachment power. The Supreme Court has also recognized that the pardon power is appropriately limited by other constitutional provisions, such as the Spending Clause, Hart v. United States, 118 U.S. 62, 67 (1886) (explaining that pardons cannot have the effect of authorizing a governmental payment not authorized by Congress), the Fifth Amendment privilege against self-incrimination, Burdick v. United States, 236 U.S. 79, 93–94 (1915) ("[T]he power of the President under the Constitution to grant pardons and the right of a witness [against self-incrimination] must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both, to leave to each its proper place."), and the Fifth Amendment's Due Process Clause, Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (J. O'Connor, concurring) ("some minimal procedural safeguards apply to clemency proceedings").

217 Donald J. Trump (@realDonaldTrump), "As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong? In the meantime, the never ending [sic] Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) continues into the mid-terms!" Twitter, June 4, 2018, 5:35 a.m., https://twitter.com/realdonaldtrump/status/1003616210922147841.

218 *Presidential or Legislative Pardon of the President*, 1 Op. O.L.C. Supp. 370 (1974), *available at* https://www.justice.gov/sites/default/files/olc/opinions/1974/08/31/op-olc-supp-v001-p0370_0.pdf.

219 Those potential abuses include pardons of family members or political supporters that would undermine the public's confidence in equal justice, or pardons of public officials who have violated the public's trust or their fundamental rights, signaling to other officials that they may do the same with impunity. Such a resolution would also respond to the recent pardon of former Arizona sheriff Joe Arpaio, who was convicted of criminal contempt for ignoring a court order to stop unconstitutional conduct, and recent speculation that President Trump could issue pardons to his son and son-in-law. See, *e.g.*, Carol Leonnig, Ashley Parker, Rosalind Helderman, and Tom Hamburger, "Trump Team Seeks to Control, Block Mueller's Russia Investigation," *Washington Post*, July 21, 2017, http://wapo.st/2uH7sqO (reporting that Trump has asked his advisers about his power to pardon aides, family members, and even himself). President Trump is also considering pardoning former Illinois Governor Rod Blagojevich, who is serving a prison sentence following convictions for public corruption. Jason Meisne, "Trump Says He's Considering Commuting Sentence of Imprisoned Former Gov. Rod Blagojevich," *Chicago Tribune*, May 31, 2018, http://www.chicagotribune.com/news/local/breaking/ct-met-illinois-governor-blagojevich-trump-20180531-story.html.

220 See, *e.g.,* H. Con. Res. 107, 112th Cong. (2012) (expressing the sense of Congress that use of military force without prior congressional authorization is an impeachable offense).

221 Jane A. Hudiberg and Christopher M. Davis, *Resolutions to Censure the President: Procedure and History*, CRS Report No. R45087 (Washington, D.C.: Congressional Research Service, 2018), https://fas.org/sgp/crs/misc/R45087.pdf.

222 Representatives Al Green and Steve Cohen have proposed amendments to the Constitution to expressly prohibit self-pardons. H.J. Res. 115, 115th Cong. (2017) ("The President shall have no power to grant to himself a reprieve or pardon for an offense against the United States"); H.J. Res. 120, 115th Cong. (2017) (prohibiting self-pardons and pardons for the president's family members, current or former members of the president's administration, or staff from the president's campaigns).

223 See *supra* nn. 209, 222. Members of Congress have introduced several other proposals to amend the pardon power over the years, including a 1974 proposal to give a two-thirds majority of Congress the power to reject pardons, resolutions in the 1990s to prohibit pre-conviction pardons, a 2001 proposal to prohibit pardons during lame-duck presidencies, and a 2009 resolution disapproving of pardons during the final 90 days of a president's term. Kristen H. Fowler, "Limiting the Federal Pardon Power," *Indiana Law Journal* 83 (2008): 1660–61; H Res. 9, 111th Cong. (2009).

224 H. Res. 523, 115th Cong. (2017).

225 See *infra* at 16 (discussing the Saturday Night Massacre).

226 One poll found that support for President Nixon's impeachment nearly doubled, from 23 percent to 44 percent in favor, after the episode. Associated Press, "Poll Shows Many for Impeachment," *Spokane Daily Chronicle*, Oct. 23, 1973, *available at* https://news.google.com/newspapers?id=kJNYAAAAIBAJ&sjid=VvgDAAAAIBAJ&pg=2407,2360158&dq=oliver-quayle&hl=en. Gallup polls showed a steady increase in support for President Nixon's impeachment after the firings. Andrew Kohut, "How the Watergate Crisis Eroded Public Support for Richard Nixon," *Pew Research Center*, Aug. 8, 2014, http://www.pewresearch.org/fact-tank/2014/08/08/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/.

227 Twenty-one members of Congress introduced resolutions calling for President Nixon's impeachment. Allen McDuffee, "The Saturday Night Massacre Actually Sped up Nixon's Political Demise," *Timeline*, May 10, 2017, https://timeline.com/saturday-night-massacre-nixon-1f7c2565c0d8.

228 Nader v. Bork, 366 F. Supp. 104, 108 (D.D.C. 1973) ("[I]n the absence of a finding of extraordinary impropriety[,] [the firing] was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal.").

229 5 U.S.C. § 2301(b)(2) (mandating that employees and applicants for employment receive fair and equitable treatment without regard to political affiliation); 5 U.S.C. § 2301(b)(8)(A) (protecting employees from coercion for partisan political purposes).

230 28 C.F.R. § 600.1. Special counsel regulations were implemented after the expiration of the independent counsel statute that same year. The Office of Independent Counsel was created pursuant to the Ethics in Government Act of 1978. The statute empowered the attorney general to petition a special three-judge panel of the U.S. Court of Appeals for the District of Columbia to name an independent counsel upon the receipt of credible allegations of criminal misconduct by certain high-level executive branch personnel whose prosecution by the administration might give rise to an appearance of a conflict of interest. The attorney general could remove the independent counsel for "good cause, physical or mental disability."

231 28 C.F.R. § 600.7(d).

232 See, *e.g.*, Darren Samuelsohn, "Trump's War against Mueller Borrows from Bill Clinton's Playbook," *Politico*, June 21, 2018, https://www.politico.com/story/2018/06/21/trump-mueller-clinton-independent-counsel-660491; Don Van Natta, Jr., "White House's All-Out Attack on Starr Is Paying Off, with his Help," *New York Times*, Mar. 2, 1998, https://www.nytimes.com/1998/03/02/us/white-house-s-all-out-attack-on-starr-is-paying-off-with-his-help.html.

233 David Smith, Julian Borger and Lauren Gambino, "Donald Trump Admits 'This Russia Thing' Part of Reasoning for Firing Comey," *The Guardian,* May 12, 2017, https://www.theguardian.com/us-news/2017/may/11/donald-trump-james-comey-firing-russia-investigation.

234 The President has sought to undermine Special Counsel Mueller's fitness to lead an independent investigation of Russian interference in the 2016 election, accusing Special Counsel Mueller and his team of having conflicts of interest. See, *e.g.*, Karoun Demirjian, "Conservative Republicans Demand Mueller Recuse Himself over Uranium Deal," *Washington Post*, Nov. 3, 2017, http://wapo.st/2zhDdsP; Adam Edelman, "Trump Slams Mueller Russia Probe, Accuses Team of Having 'Unrevealed Conflicts of Interest,'" *NBC*, May 7, 2018, https://www.nbcnews.com/politics/donald-trump/trump-slams-mueller-russia-probe-accuses-team-having-unrevealed-conflicts-n871866.

235 Michael S. Schmidt and Maggie Haberman, "Trump Ordered Mueller Fired, but Backed off When White House Counsel Threatened to Quit," *New York Times*, Jan. 25, 2018, https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html; Neal Katyal, "Trump or Congress Can Still Block Robert Mueller. I Know. I Wrote the Rules," *Washington Post*, May 19, 2017, http://wapo.st/2qHggce.

236 "Excerpts From the Times's Interview With Trump," *New York Times*, July 19, 2017, https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html?_r=1.

237 Max Greenwood, "Trump: Sessions Recusal 'Unfair' to Me," *The Hill*, July 19, 2017, http://thehill.com/homenews/administration/342843-trump-sessions-recusal-unfair-to-me.

238 Michael Shear, Charlie Savage and Maggie Haberman, "Trump Attacks Rosenstein in Latest Rebuke of Justice Department," *New York Times*, June 16, 2017, https://www.nytimes.com/2017/06/16/us/politics/trump-investigation-comey-russia.html.

239 Though it is not clear whether the regulations are subject to the Administrative Procedure Act's "notice-and-comment" rulemaking process (indeed, the regulations were promulgated by former Attorney General Reno without going through that process), legal scholars agree there is an avenue for the executive to rescind the regulations, either through the APA's rulemaking procedure or more expeditiously. See, *e.g.*, Katyal, "Trump or Congress Can Still Block Mueller" ("Trump could order the special counsel regulations repealed. . . ."); Josh Blackman, "Can the Special Counsel Regulations Be Unilaterally Revoked?" *Lawfare*, July 5, 2018, https://www.lawfareblog.com/can-special-counsel-regulations-be-unilaterally-revoked (though the regulations could be revoked, the special counsel may have standing to challenge a rescission that is "arbitrary and capricious"). *Cf. Nader*, 366 F. Supp. at 108 ("An agency's power to revoke its regulations is not unlimited—such action must be neither arbitrary nor unreasonable.") citing Kelly v. U.S. Dep't of Interior, 339 F. Supp. 1095 (E.D. Cal 1972).

240 See, *e.g.*, Alexi McCammond, "Democrats Worry Trump Will Fire Mueller," *Axios*, Oct. 30, 2018, https://www.axios.com/democrats-worry-trump-will-fire-mueller-1513306540-8e68256f-94a7-4c3c-9d7c-0c3af1386e59.html; Nicholas Kristof, "The Nation Will Pay If Trump Fires Mueller," *New York Times*, Apr. 11, 2018, https://www.nytimes.com/2018/04/11/opinion/fire-mueller-trump.html; Mark Warner, "Congress Must Draw 'Red Line' to Protect Mueller, Warn Trump against Firing and Pardons: Mark Warner," *USA Today,* Mar. 18, 2018, https://www.usatoday.com/story/opinion/2018/03/18/congress-protect-robert-mueller-warn-donald-trump-no-firing-no-pardons-senator-mark-warner-column/435883002/.

241 Special Counsel Independence and Integrity Act, S. 2644, 115th Cong. (2018), *available at* https://www.congress.gov/115/bills/s2644/BILLS-115s2644rs.pdf.

242 Nicholas Fandos, "In Warning to Trump, Senators Advance Bill to Protect Mueller," *New York Times*, Apr. 26, 2018, https://www.nytimes.com/2018/04/26/us/politics/senate-mueller-protection-bill.html. The bill would not open the door for Congress to politicize investigations by imposing real-time reporting requirements on the special counsel, as one contemplated amendment to the bill while it was considered in committee would have done. Mary Clare Jalonick, "As Trump Fumes, Senators Bid to Protect the Special Counsel," *Associated Press*, Apr. 11, 2018, https://www.apnews.com/9a5a0ba245814a9b8259c6290b698ff5 (reporting that Senator Charles Grassley was preparing an amendment requiring new reports to Congress if the scope of the special counsel's investigation changed and a final report on the investigation with a detailed explanation of any charges).

243 Letter from Eric Posner, Professor of Law, University of Chicago Law School, and Stephen I. Vladeck, Professor in Law, University of Texas School of Law, to Senator Charles Grassley, Chairman, and Senator Dianne Feinstein, Ranking Member, Senate Judiciary Committee (Apr. 24, 2018), *available at* https://www.justsecurity.org/wp-content/uploads/2018/04/Posner-Vladeck-Letter-on-S2644.pdf.

244 28 U.S.C. § 591 et seq.

245 28 U.S.C. § 596 (requiring "good cause, physical or mental disability" for removal).

246 12 U.S.C. § 5491 (c)(3) (Consumer Financial Protection Bureau); 42 U.S.C. § 7412(r) (6)(B) (Chemical Safety and Hazard Investigation Board); 42 U.S.C. § 1975(e) (Commission on Civil Rights); 15 U.S.C. § 2053(a) (Consumer Product Safety Commission); 42 U.S.C. § 7171 (b) (1) (Federal Energy Regulatory Commission); 12 U.S.C. § 4512(b)(2) (Federal Housing Finance Agency); 5 U.S.C. § 7104(b) (Federal Labor Relations Authority); 46 U.S.C. § 301(b)(5) (Federal Maritime Commission); 12 U.S.C. § 242 (Federal Reserve); 15 U.S.C. § 41 (Federal Trade Commission); 5 U.S.C. § 1202(d) (Merit Systems Protection Board); 30 U.S.C. § 823(b) (1) (Mine Safety and Heath Review Commission); 29 U.S.C. § 153(a) (National Labor Relations Board); 45 U.S.C. § 154 (National Mediation Board); 49 U.S.C. § 1111(c) (National Transportation Safety Board); 42 U.S.C. § 5841(e) (Nuclear Regulatory Commission); 29 U.S.C. § 661(b) (Occupational Safety and Health Review Commission); 5 U.S.C. § 1211(b) (Office of Special Counsel); 39 U.S.C. § 502(a) (Postal Regulatory Commission); 42 U.S.C. § 902(a)(3) (Social Security Administration); 49 U.S.C. § 1301(b)(3) (Surface Transportation Board).

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APPENDIX D

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AVR Impact on State Voter Registration

New Brennan Center Report Finds Significant Gains in Voter Rolls

by Kevin Morris and Peter Dunphy

Executive Summary

Over the past five years, a significant reform of voter registration has been enacted and implemented across the country. Automatic voter registration or AVR offers the chance to modernize our election infrastructure so that many more citizens are accurately registered to vote.[1]

AVR features two seemingly small but transformative changes to how people register to vote:

1. Citizens who interact with government agencies like the Department of Motor Vehicles are registered to vote, unless they decline. In other words, a person is registered unless they opt out, instead of being required to opt in.

2. The information citizens provide as part of their application for government services is electronically transmitted to elections officials, who verify their eligibility to vote. This process is seamless and secure.

In the past five years, 15 states and the District of Columbia have adopted AVR.[2] (Three states — Connecticut, Utah, and New Mexico — have adopted something very close to automatic registration.)[3]

How has automatic registration worked? Has it, in fact, increased registration rates as its proponents had hoped? This report is the first comprehensive analysis of the impact of AVR on voter registration rates. In the past, individual states have reported increases in voter registration since the adoption of automatic voter registration. But that could be due to many factors, such as compelling candidates or demographic change. Previous analyses have not spoken as to cause and effect or examined the impact of different approaches to AVR.

Is it possible to isolate the impact of automatic registration itself? This multistate analysis leverages low-level voter file data from around the country and cutting-edge statistical tools to present estimates of automatic voter registration's impact on registration numbers.

This report finds:

- AVR markedly increases the number of voters being registered — increases in the number of registrants ranging from 9 to 94 percent.

- These registration increases are found in big and small states, as well as states with different partisan makeups.

These gains are found across different versions of the reform. For example, voters must be given the opportunity to opt out (among other things, to protect ineligible people from accidentally being registered). Nearly all of the states with AVR give that option at the point of contact with govern-

ment agencies; two ask for opt-outs later in the process. The increase in registration rates is similarly high whichever version of the policy is adopted.

How did we do this study? We were able to isolate the effect of AVR using a common political science method known as "matching." We ran an algorithm to match areas that implemented AVR with demographically similar jurisdictions that did not. Matching similar jurisdictions allowed us to build a baseline figure of what a state's registration rate would have looked like had it not implemented AVR. By aggregating and comparing baseline jurisdictions to AVR jurisdictions, we demonstrated that AVR significantly boosted the number of people being registered everywhere it was implemented.

Our nation is stronger when more people participate in the political process. This report shows that AVR is a highly effective way to bring more people into our democracy.

Jurisdiction*	% Increase in Registrations
Oregon	15.9%
Georgia	93.7%
Vermont	60.2%
Colorado	16.0%
Alaska	33.7%
California	26.8%
Rhode Island	47.4%
Washington, DC	9.4%

*In order of implementation date

Introduction

Automatic voter registration (AVR) is an innovative policy that streamlines the way Americans register to vote through two simple tweaks to the traditional method of registering voters:

1. Eligible citizens are automatically registered to vote when they interact with designated government agencies, unless those individuals affirmatively decline. This switch to an "opt-out" system is a subtle but impactful change from the status quo "opt-in" method, which requires eligible citizens to take an affirmative step to register to vote.

2. These government agencies will electronically transfer voter registration information to election officials, avoiding paper registration forms. This saves paper costs and ensures that voter rolls are kept up-to-date.

As of March 2019, 15 states and the District of Columbia have enacted AVR. This is remarkable given that the first state to adopt AVR, Oregon, passed the reform just four years ago, in March 2015.[4]

Previous research has found that states that implemented AVR have seen registration rates rise. However, this research has often failed to establish a causal relationship — that AVR, absent other factors, was responsible for the rise in registrations.[5]

This new report by the Brennan Center for Justice seeks to prove just that. This study examines the seven AVR states (and Washington, DC) that have been operating the program long enough for meaningful results to be available. By using a common political science method known as "matching," we can quantify both the impact and statistical significance of the implementation of AVR in a state. The report concludes that in every jurisdiction that implemented AVR, the policy boosted the number of registrations by a statistically significant degree.

In the following pages, we explain some of the key variations of state AVR policies, detail state factors that could affect the size of the impact of AVR on registrations, lay out our methodology, then provide a state-by-state profile that quantifies and visualizes that impact of AVR. The technical appendix that follows provides a more detailed explanation of the methodology and econometric results.

Variations in AVR

No two AVR systems are exactly the same. Factors including a state's primary system, criminal disenfranchisement law, and technological environment are relevant to the state's AVR design.

For instance: Sixteen states have either closed or partially closed primaries, which makes party registration an important part of the voter registration process.[6] In AVR systems that register voters unless they decline via a mailer (also known as a "back-end" opt-out), voters must return a postcard to indicate the party with which they wish to register. This extra step is often not taken by voters. In Oregon, for example, only 14.5 percent of people registered through AVR in 2018 returned the mailer to select a party. As a result, close to 85 percent of new voters registered through AVR were automatically marked as nonaffiliated, an outcome that would matter greatly in some states and hardly at all in others.[7]

As observable from the chart below, AVR *usually*: is adopted legislatively, is implemented only at the state Department of Motor Vehicles (DMV), and places the opportunity to opt out during the transaction (sometimes called a "point-of-service" or "front-end" opt-out). However, variation exists. For example, Alaska links AVR to the annual check that gets mailed to more than 90 percent of residents who register for the state's Permanent Fund Dividend derived from oil revenues.[8] Georgia and Colorado adopted AVR administratively, meaning it was done without implementing legislation.[9] Oregon provides the opt-out opportunity through the mail — anyone who doesn't respond to a mailing within 21 days gets registered (sometimes called a "back-end" opt-out).[10] Six of the states that have passed AVR either extend automatic registration beyond the DMV or give secretaries of state the power to do so if they believe another agency has the resource capabilities to implement AVR.[11]

There are a few factors that influence the extent to which the introduction of AVR affects the rate of voter registration:

1. **Pre-AVR Rate of Registration.** AVR will likely have a greater impact when introduced in a state in which a smaller proportion of eligible citizens are already registered to vote, as compared with a state in which a higher proportion are already registered. Even in states with high registration rates, AVR is still a valuable reform because

AVR Policy by Jurisdiction

State	Approval Date	Implementation Status	Covered Agencies	Declination Type
Alaska	November 2016: Ballot Measure 1 approved by voters	Implemented March 1, 2017	Permanent Fund Dividend Division	Back-end (post-transaction mailer)
California	October 2015: AB 1461 signed into law	Implemented April 23, 2018	DMV	Front-end (point-of-service)
Colorado	2017: Approved administratively	Tested at certain locations February 2017, subsequently implemented statewide	DMV	Front-end (point-of-service)
DC	December 2016: B21-0194 signed into law	Implemented June 26, 2018	DMV	Front-end (point-of-service)
Georgia	2016: AVR approved administratively	Implemented September 1, 2016	DMV	Front-end (point-of-service)
Illinois	August 2017: SB 1933 signed into law	Statutory implementation deadline of July 2018	DMV, plus social service agencies that the State Board of Elections determines to have reliable personal information for voter registration	Front-end (point-of-service)
Maryland	April 2018: SB 1048 enacted without governor's signature	Statutory implementation deadline of July 2019	DMV, Maryland Health Benefit Exchange, local departments of social services, and the Mobility Certification Office	Front-end (point-of-service)

State (cont'd)	Approval Date	Implementation Status	Covered Agencies	Declination Type
Massachusetts	August 2018: H 4671 signed into law	Statutory implementation deadline of January 2020	DMV and MassHealth, plus social service agencies verified by the secretary of state to collect the information necessary to determine eligibility for voter registration	Back-end (post-transaction mailer)
Michigan	November 2018: Proposal 3 approved by voters	Implementing legislation has not yet been passed	Implementing legislation has not yet been passed	Implementing legislation has not yet been passed
Nevada	November 2018: Ballot Question 5 approved by voters	No specific statutory deadline set	DMV	Front-end (point-of-service)
New Jersey	April 2018: AB 2014 signed into law	Implemented November 2018	DMV, plus social service agencies verified by the secretary of state to collect the information necessary to determine eligibility for voter registration	Front-end (point-of-service)
Oregon	March 2015: HB 2177 signed into law	Implemented January 1, 2016	DMV	Back-end (post-transaction mailer)
Rhode Island	July 2017: HB 5702 signed into law	Implemented June 11, 2018	DMV, plus social service agencies verified by the secretary of state to collect the information necessary to determine eligibility for voter registration	Front-end (point-of-service)
Vermont	April 2016: HB 458 signed into law	Implemented January 1, 2017	DMV	Front-end (point-of-service)
Washington	March 2018: HB 2595 signed into law	Statutory implementation deadline of July 2019	DMV, plus social service agencies verified by the secretary of state to collect the information necessary to determine eligibility for voter registration	Front-end (point-of-service)
West Virginia	April 2016: HB 4013 signed into law	Statutory implementation deadline of July 2019	DMV	Front-end (point-of-service)

it makes election administration more effective and helps capture much of the remaining unregistered population.[12]

2. **Rate of Registration at Implementing Agency Prior to AVR.** A state where most eligible persons visiting the AVR agency have already opted in to registration will see fewer additional people registered via AVR than a state with more "slippage," i.e., persons who are eligible to register but leave the agency without having registered. In the same vein, a state that exempts some portion of its agency transactions from AVR is expected to yield fewer registrants than a state that utilizes AVR in most transactions.

3. **Percentage of State Driver's License Holders**. Except for Alaska, all the states included in this study have implemented AVR at the DMV.[13] In the future, some states plan to extend AVR to other public agencies beyond the motor vehicle agency.[14] States with low car ownership rates, and consequently fewer driver's license holders, should expect to register fewer individuals with AVR if solely implemented at the DMV. Said states have strong incentives, therefore, to implement AVR at agencies beyond the DMV to expand the potential impact of the program.

4. **Noncitizen Population.** Every state in the country allows noncitizens to get driver's licenses.[15] Twelve states and the District of Columbia even grant legal permission to persons who are in the country without documentation to obtain driver's licenses,[16] but only citizens can lawfully participate in federal elections. Noncitizens who register to vote, even if they are lawfully present in the United States and even if they do so accidentally, can face serious legal consequences. As such, we want noncitizens to opt out. Accordingly, states with higher rates of noncitizens obtaining driver's licenses may expect a higher opt-out rate than states with few noncitizens. Each state should design

its AVR process to minimize the risk that noncitizens inadvertently register to vote.

There are other factors that influence the number of people who will be registered through AVR. For instance, 34 states disenfranchise citizens living in the community with felony convictions.[17] Although these disenfranchised individuals can get driver's licenses, they are prohibited from registering to vote and therefore should opt out of AVR. Similarly, domestic violence survivors often opt out of registering to vote because voter rolls are publicly available throughout the country.[18] Note, however, that although the presence of disenfranchised citizens and citizens with concerns about their information being publicly available will influence the number of people opting out of registrations, these populations are likely too small to have a statistically meaningful impact on estimates of AVR's effect.

Statewide Results and Methodology

In the following pages, we assess the impact of automatic voter registration on a state-by-state basis. The information for each state includes a profile of the demographic makeup of the state, a brief discussion of the methodology and any data limitations, and the reported results.

The analysis in this report rests on matching census tracts in states that implemented AVR to tracts in those that did not. We then compare the difference in registration counts between these two groups to estimate the impact of AVR. This is commonly referred to in statistics as a "matched difference-in-differences" model. Here's how these two processes work:

Matching

Myriad factors affect the rise and fall of registration rates in states over time. The purpose of this report is to isolate a single factor in this mix: the implementation of AVR. The abundance of factors impacting registration rates poses significant methodological challenges because we cannot know exactly what would have happened in the states that implemented AVR had they not done so. Accordingly, we must devise a statistical model to estimate how many individuals would have been registered in a state if the state had not implemented AVR. We compare how many voters were actually registered with this estimation of what would have happened without AVR to determine the impact of the policy.

Here's a basic rundown of how our matching works. We started by calculating the number of weekly registrations in every census tract in each state whose voter file we had access to. This includes every state that implemented AVR prior to the 2018 midterms as well as nine others.[19] For each of these census tracts, we also find various demographic information that is related to the number of people registering to vote.[20] Some of these criteria include: voting-age population; growth rate of voting-age population; education; nonwhite and noncitizen population; median income and unemployment; and number of registrations in 2013.[21]

Every "treated" census tract (census tracts in states where AVR was implemented) was then matched to the three[22] census tracts most similar to it among our pool of "untreated" census tracts (tracts in states where AVR has not yet been implemented). To determine which census tracts were most similar to one another, we used the genetic match developed by political scientist Jasjeet Sekhon.[23] Sekhon's matching algorithm is a common and widely accepted methodology for assessing policy impact. In the past decade, many studies in peer-reviewed academic journals have based their methodology on this matching technique.[24]

We then compared the growth in registrations in AVR census tracts and the control census tracts to determine whether the number of voters being registered increased more in places where AVR was introduced.

Modeling

To determine whether registration rates in treated tracts exceeded rates in control tracts, we run a simple difference-in-differences model. The periods of analysis are state-specific and based on when a state implemented AVR. In every case, we compare the growth in registrations from the pre-period (before each state's AVR implementation date) to the post-period (after the implementation date) in the control tracts with the growth in the treated tracts. If the average number of weekly registrations grew by five in the control tracts and by seven in the treated tracts, for instance, we would attribute the difference — two registrations per week — to automatic voter registration.

For the five states that implemented AVR in 2016 and 2017, we generally limit our analysis to the first 35 weeks of 2013 and 2017. In other words, we compare the growth in registrations in treated tracts from the first 35 weeks of 2013 and the first 35 weeks of 2017 with the growth in the same period in the control tracts. We compare 2013 (our pre-period) to 2017 (our post-period) because they are at the same position within the four-year presidential election cycle. We choose the odd years to decrease the interference from election-year registration spikes that could bias our results. Although we do not include 2015 in our econometric estimates, we show the control and treated tracts in 2015 in the charts in the pages that follow. We include these to demonstrate that the growth rate in registrations in treated and untreated census tracts was roughly the same from 2013 to 2015 (just as we would expect, because AVR had not yet gone into effect) and that AVR census tracts began to grow more quickly only after AVR was implemented.

We limit our period of analysis to the first 35 weeks of each year because some of the control tracts had local elections in

the fall of 2017. As these elections approached, get-out-the-vote drives may have registered many people. Registration surges from these drives have nothing to do with AVR. Therefore, we did not include periods in which registration drives were likely to impact registration rates in either treated or control tracts.

Similarly, registration surges prior to the 2018 midterm elections have the potential to distort our results in states that implemented AVR in 2018. To avoid this potential problem, we end our 2018 analyses in August 2018. In each of these models, we use nine months of data (December 2017 to August 2018), and compare the pre-implementation portion of the period with the post-implementation portion of the period in the control and treated census tracts.

For a more in-depth discussion of our matching and econometric results, please see the Technical Appendix.

Oregon

Growth in registration rates due to AVR: **15.9%**

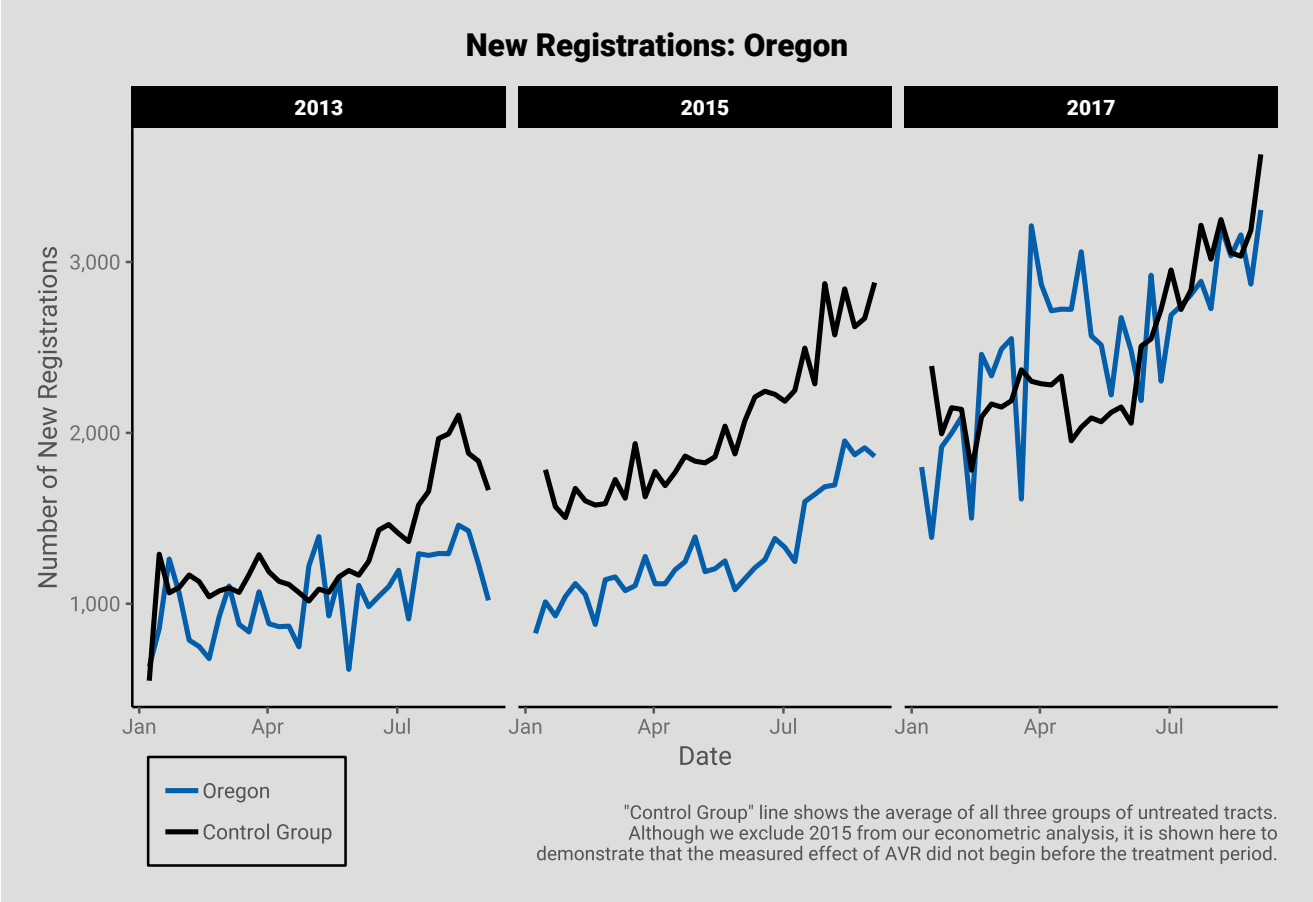
Oregon became the first state to pass AVR (in March 2015) and to implement it (in January 2016).[25] To analyze its impact, we used the state's voter file and, with the help of the secretary of state's office, added the original date of registration to the file of each voter in the state.

There were two parts to Oregon's AVR program: the registration of citizens who went into the DMV during the studied period, and the "look-back." By look-back, we mean that when Oregon implemented AVR, the DMV had reliable information on the citizenship status of individuals who had visited the DMV in 2014 and 2015.[26] Using this information, the DMV automatically registered (and sent mailers to) the eligible Oregonians who had visited it over that period. This was tremendously successful and resulted in over 122,000 Oregonians being registered.[27] However, because the look-back did not impact the number of new people being registered at the DMV each day following implementation, we have excluded the impact of the look-back from our analysis of the state.

Our model suggests that the implementation of automatic voter registration increased the statewide rate of new registrations by 15.9 percent (again, this is of people who went to the DMV after implementation). As noted, Oregon is unique among the states for a number of reasons, including that it has placed the opt-out opportunity at the back end. Perhaps surprising to some, Oregon's use of a back-end opt-out system does not produce higher registration rates than states that chose a front-end opt-out model. The results from Oregon indicate that the decision to switch from an opt-in system to an opt-out system (and, of course, the ability to implement the "look-back") was far more important than the decision about where to place the opportunity to decline registration.

State Profile:

- Passage type: legislative
- Implementation date: January 1, 2016
- Method of opt-out: back-end (post-transaction mailer)
- Registration rate pre-AVR: 76.83%
- % noncitizen population: 6.3%
- Car ownership rate: 92.4%



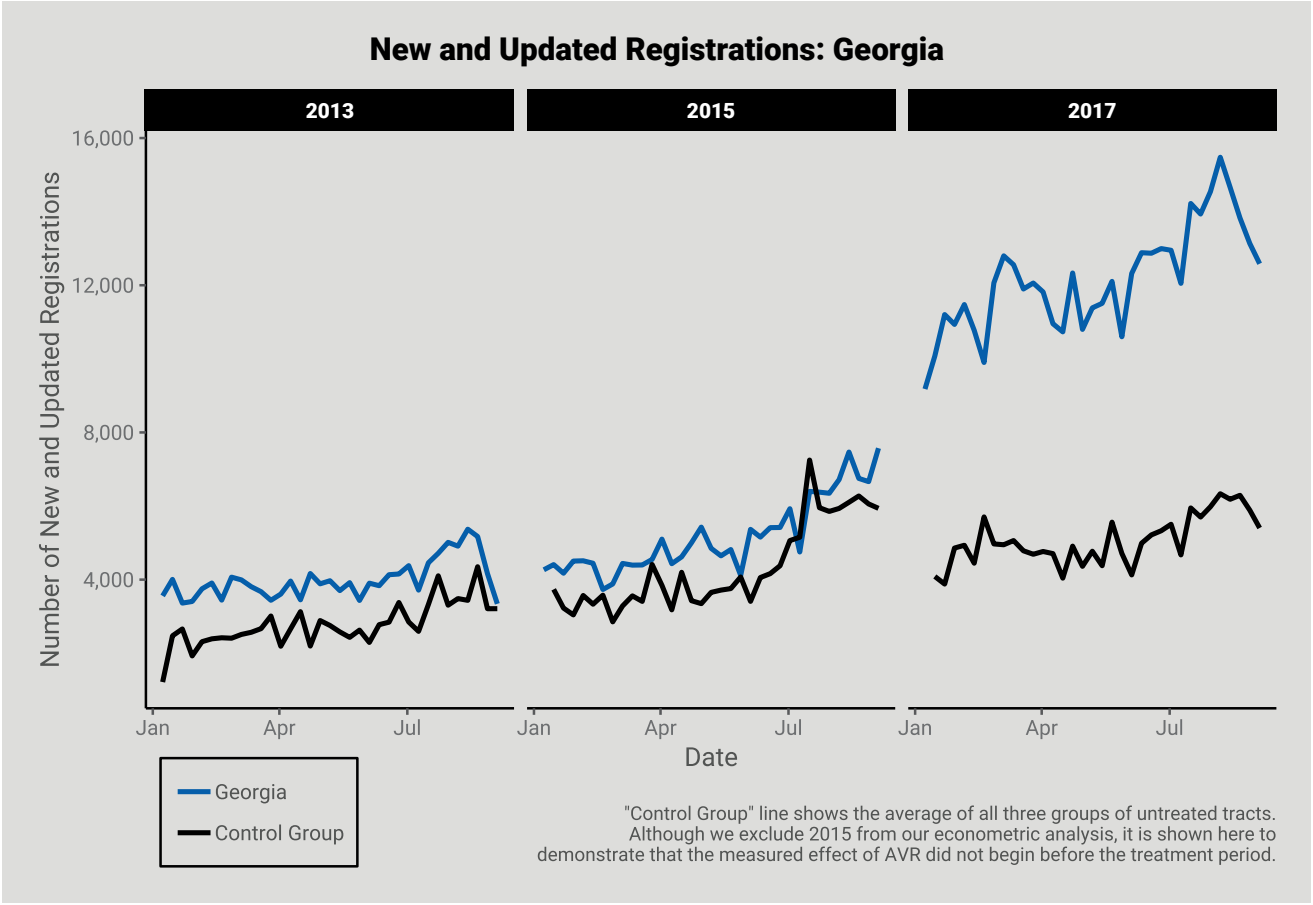
Georgia

Growth in registration rates due to AVR: **93.7%**

We used the Georgia voter file to compare new or materially updated registrations over time. The control tracts estimate that, without AVR, Georgia would have registered just over 6,279 voters each week in this period in 2017. Georgia actually registered an average of just over 12,160 each week — a 93.7 percent increase. This is, of course, a very large increase. The precise reasons for the increase are outside the scope of this report, but may be attributable to Georgia's voter list maintenance practices. Georgia officials reported instead that the increase could be attributed to the active role that Georgia DDS employees take in encouraging drivers' license applicants to register, among other things.[2829]

State Profile:

- Passage type: administrative
- Implementation date: September 1, 2016
- Method of opt-out: front-end (point-of-service)
- Registration rate pre-AVR: 74.94%
- % noncitizen population: 7.2%
- Car ownership rate: 93.3%



Vermont

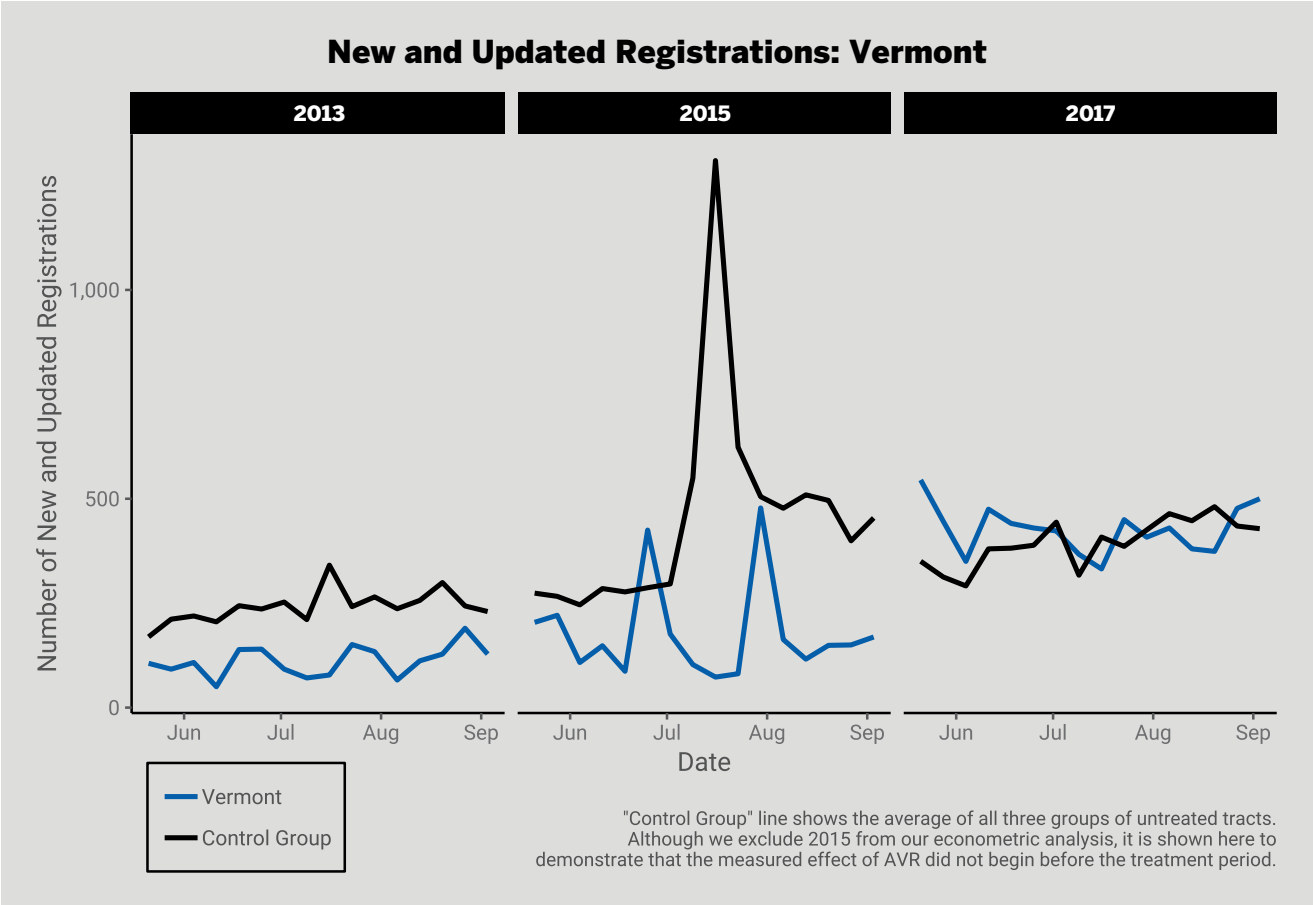
Growth in registration rates due to AVR: **60.2%**

In early 2016, Vermont implemented a new policy that required a state tax filer to include a driver's license number or state ID number.[30] The data suggest that this policy encouraged many to go to the DMV to renew their licenses. This surge of DMV visitors led to many new registrations — a surge that had nothing to do with AVR but was nonetheless a positive outcome. This new policy meant that registrations in the first 20 weeks of 2017 were far higher than the first 20 weeks of 2013. Because it is impossible to know what proportion of this increase was due to the new tax-filing policy and what proportion was due to AVR, we exclude these first 20 weeks from our analysis.

Our model estimates that, without AVR, Vermont would have registered 266 voters each week in 2017. Vermont actually registered an average of 427 voters each week — a 60.2 percent increase.

State Profile:

- Passage type: legislative
- Implementation date: January 1, 2017
- Method of opt-out: front-end (point-of-service)
- Registration rate pre-AVR: 89.22%
- % noncitizen population: 2.2%
- Car ownership rate: 93.2%



Colorado

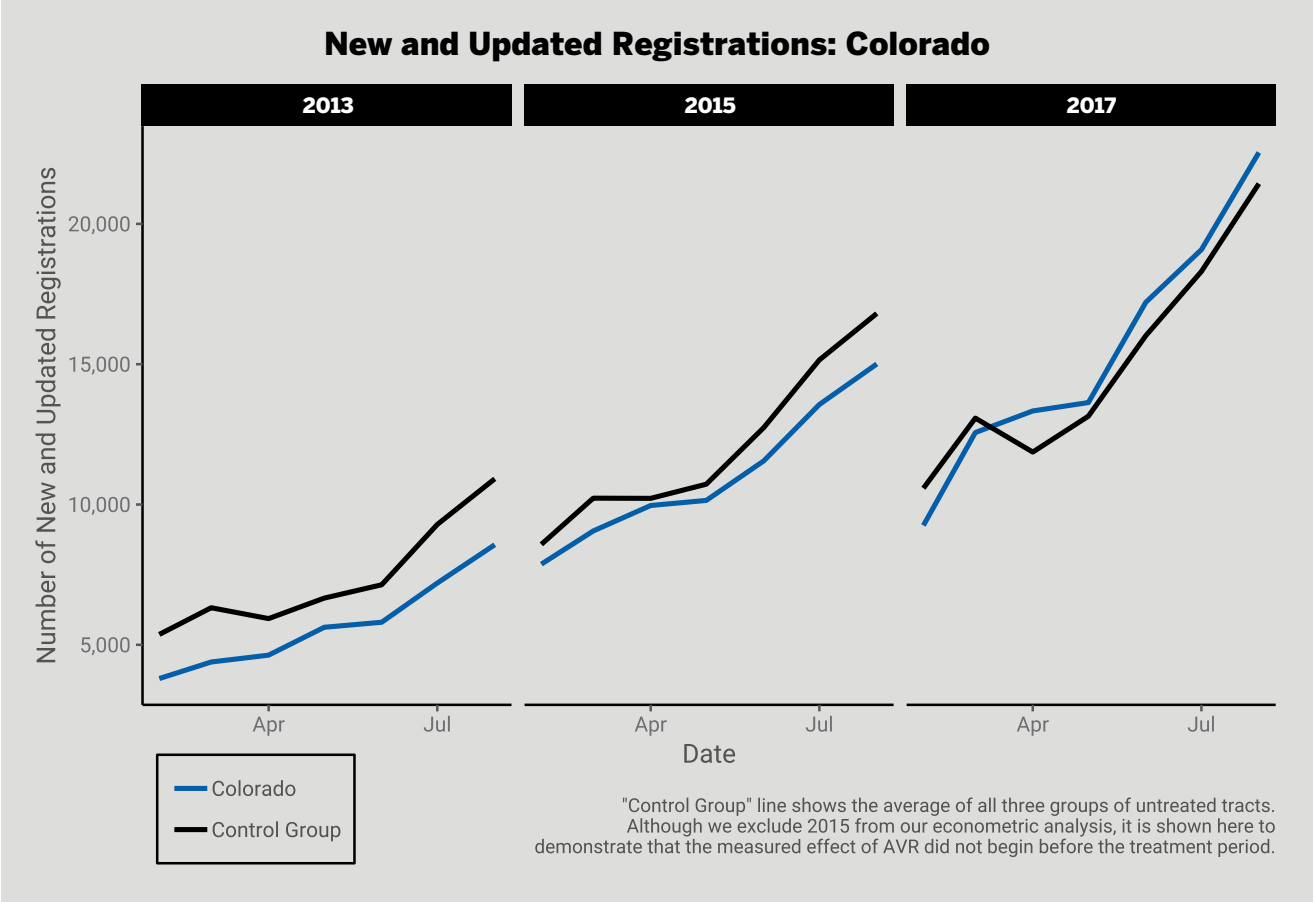
Growth in registration rates due to AVR: **16.0%**

At the end of 2016, Colorado changed the way its voter file data are reported.[31] For this reason, we cannot compare weekly registration numbers in the state from 2013 to 2017 as we do in others. While we can still match Colorado with other states, we must measure the number of *monthly* registrations per tract to account for this data limitation. Because Colorado did not implement AVR until February 2017, we run our model from February through August 2017. These may be somewhat conservative estimates, because Colorado did not immediately implement AVR statewide.[32]

Our model estimates that, without AVR, Colorado would have registered an average of 13,258 voters each month. But Colorado actually registered an average of 15,374 voters per month — a 16.0 percent increase.

State Profile:

- Passage type: administrative
- Implementation date: tested at certain locations February 2017, subsequently implemented statewide
- Method of opt-out: front-end (point-of-service)
- Registration rate pre-AVR: 87.25%
- % noncitizen population: 7.0%
- Car ownership rate: 94.56%



Alaska

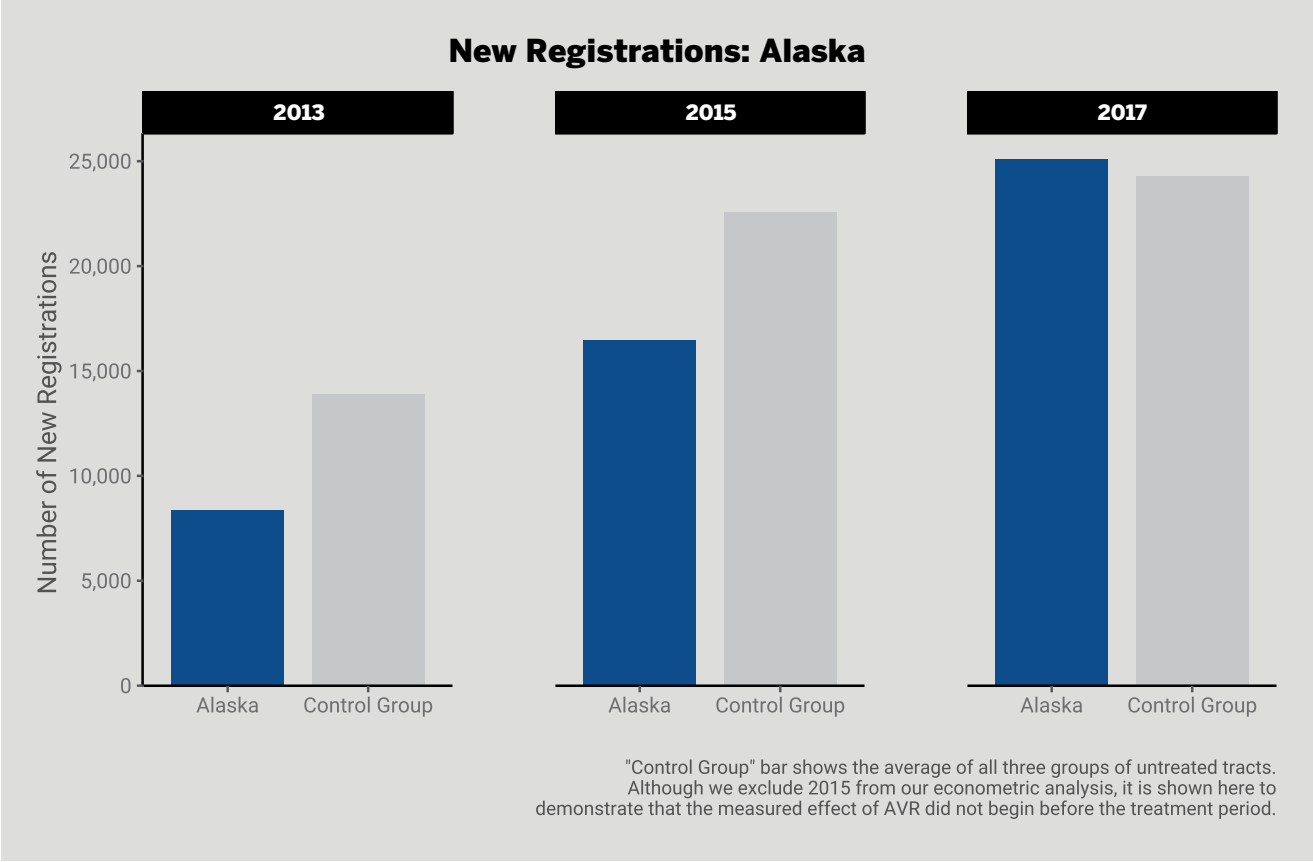
Growth in registration rates due to AVR: **33.7%**

Alaska implemented AVR as of March 1, 2017, but rather than operating primarily through the DMV, Alaska registers citizens through its Permanent Fund Dividend (PFD).[33] The PFD annually distributes money from the profit of the state's oil production to all Alaskans who sign up for the program.[34] Since Alaska sends out PFD mailers only once a year,[35] our model must use data at the *yearly* level.

Our model estimates that, without AVR, Alaska would have registered just over 18,750 voters in 2017. But Alaska actually registered 25,077 — a 33.7 percent increase.

State Profile:

- Passage type: legislative
- Implementation date: March 1, 2017
- Method of opt-out: back-end (post-transaction mailer)
- Registration rate pre-AVR: 100.16%[36]
- % noncitizen population: 4.1%
- Car ownership rate: 90.5%



California

Growth in registration rates due to AVR: **26.8%**

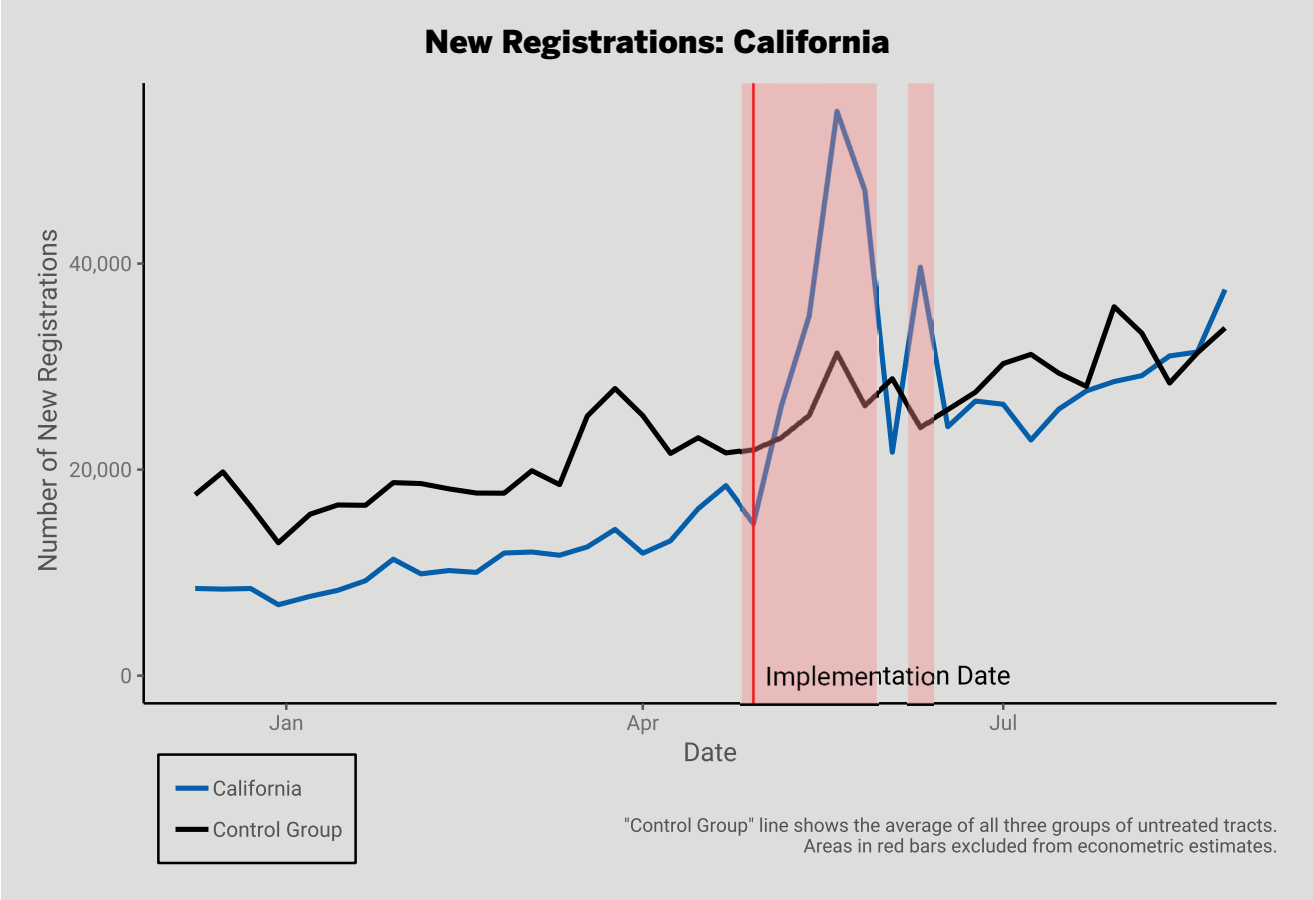
The state of California places certain restrictions on what users of their voter file data may publish or disclose. To comply with these restrictions, we did not geocode voters to their home census tracts, but instead used zip codes for both treatment and control groups.

For California, we created a model that compared registrations in California and control zip codes in the period immediately before and following the implementation of AVR. In California, we compare the 20 weeks before implementation in April 2018 with the 18 weeks following implementation. To avoid overestimating the impact of AVR, the weeks leading up to the registration deadline for California's primary and the week of the state's primary election day have been excluded.

Our model estimates that, without AVR, California would have registered 21,876 voters each week after implementation (excluding the weeks impacted by the primaries). But California actually registered an average of almost 28,000 voters per week during this period — a 26.8 percent increase.

State Profile:

- Passage type: legislative
- Implementation date: April 23, 2018
- Method of opt-out: front-end (point-of-service)
- Registration rate pre-AVR: 79.06%
- % noncitizen population: 16.4%
- Car ownership rate: 93.6%



Rhode Island

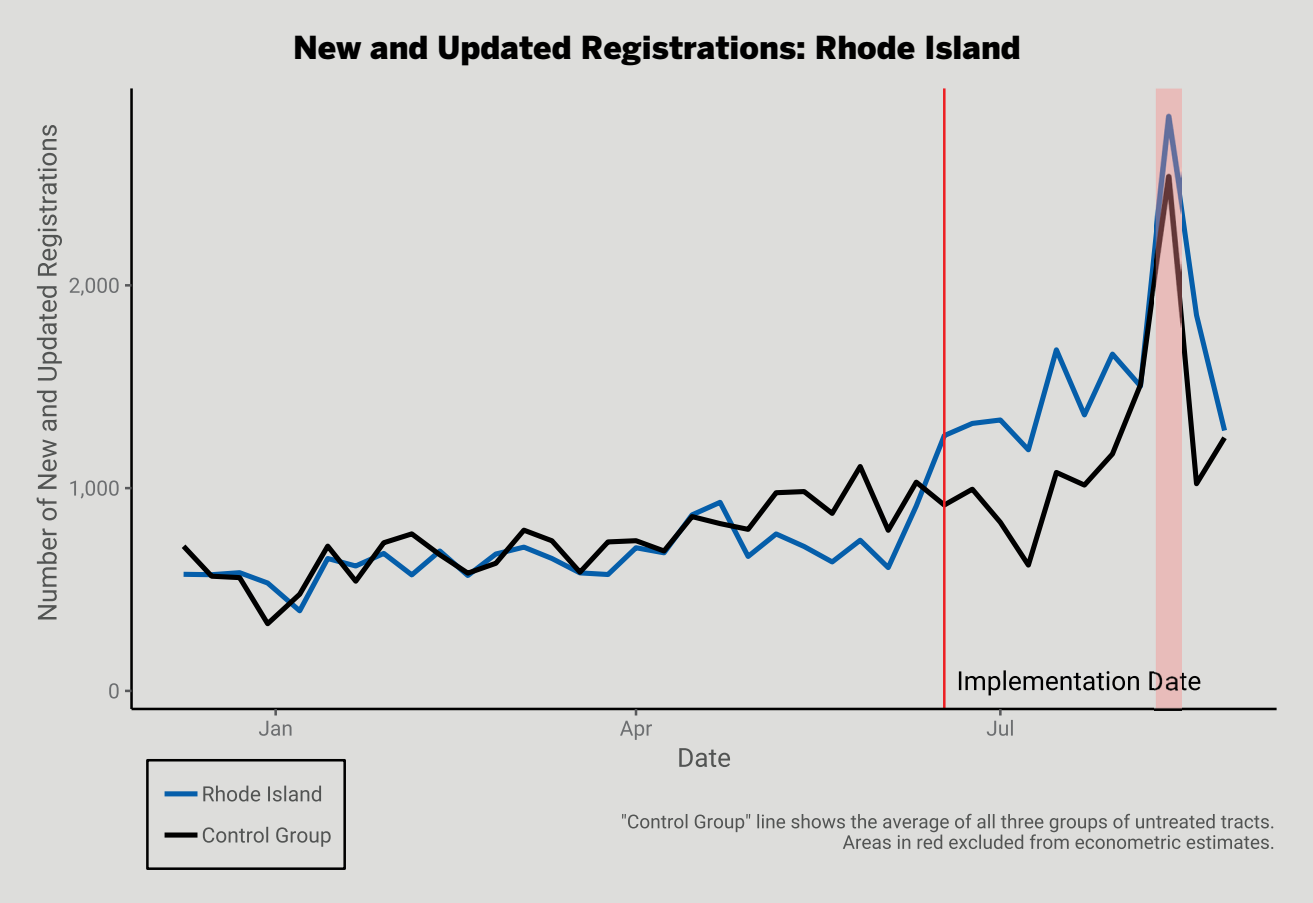
Growth in registration rates due to AVR: **47.4%**

For Rhode Island, we created a model that compared registrations in Rhode Island and control tracts in the period immediately before and following the implementation of AVR. In Rhode Island, we compare the 27 weeks before implementation in June 2018 with the 11 weeks following implementation. We exclude the week of Rhode Island's primary to avoid overestimating the impact of AVR.

Our model estimates that, without AVR, Rhode Island would have registered 1,071 voters each week after implementation (with the exception of the primary week). But Rhode Island actually registered an average of 1,578 voters per week during this period — a 47.4 percent increase.

State Profile:

- Passage type: legislative
- Implementation date: June 11, 2018
- Method of opt-out: front-end (point-of-service)
- Registration rate pre-AVR: 87.25%
- % noncitizen population: 7.1%
- Car ownership rate: 90.3%



Washington, DC

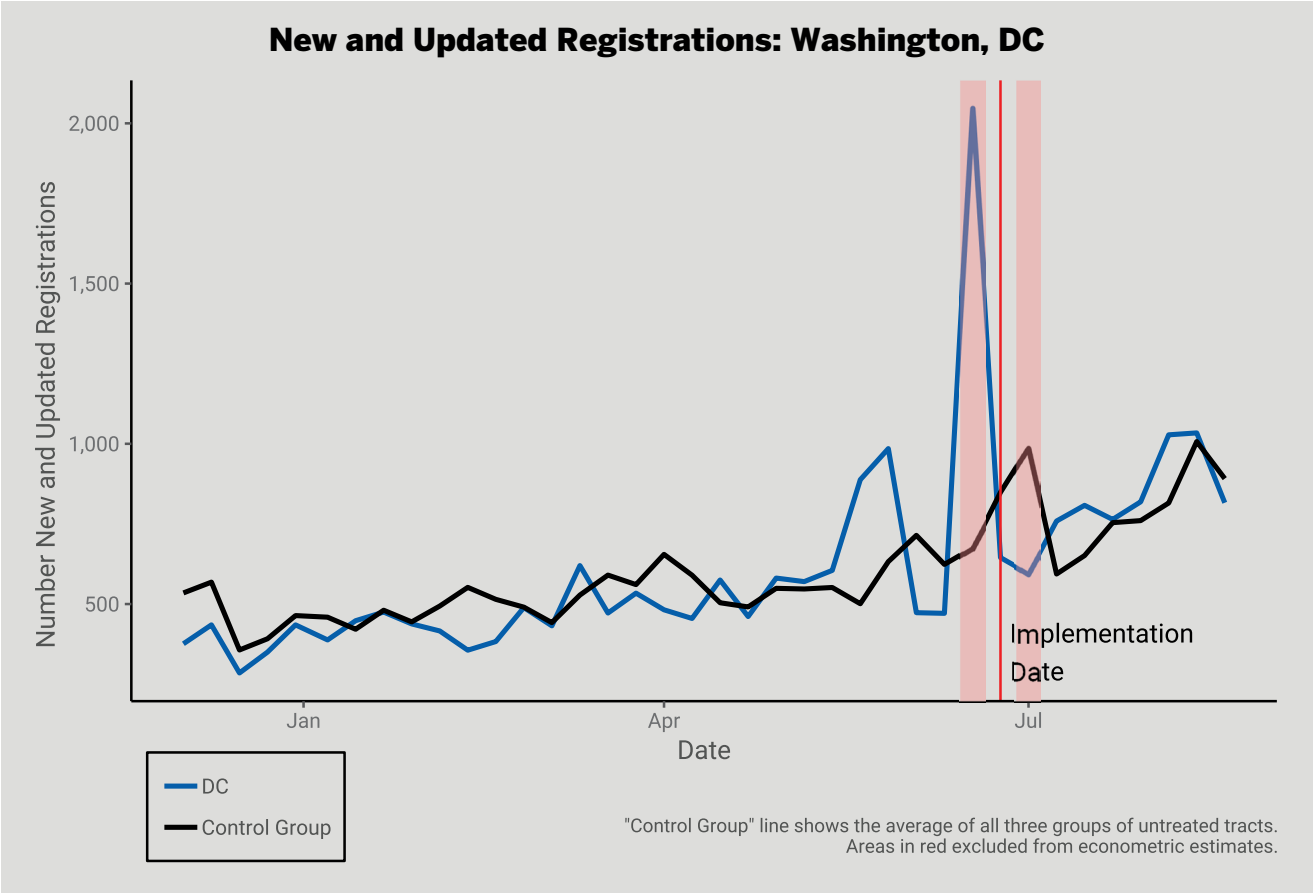
Growth in registration rates due to AVR: **9.4%**

For DC, we created a model that compared registrations in DC and control tracts in the period immediately before and following the implementation of AVR. In DC, we compare the 29 weeks before implementation in June 2018 with the 9 weeks following implementation. To avoid skewing the analysis, week 25 was excluded since it featured the District's primary election. Week 27 was also excluded, as many DC tracts match to Washington State tracts, where the primary election in week 27 distorts the analysis.

Our model estimates that without AVR, Washington, DC, would have registered 763 voters each week after implementation (with the exception of the excluded week). But Washington, DC, actually registered an average of 834 voters per week in each tract during this period — a 9.4 percent increase.

State Profile:

- Passage type: legislative
- Implementation date: June 26, 2018
- Method of opt-out: front-end (point-of-service)
- Registration rate pre-AVR: 99.84%
- % noncitizen population: 8.4%
- Car ownership rate: 64.3%



Moving Forward: The AVR of Tomorrow

The data from this report make clear that certain factors matter more than others in the success of an AVR system in a state. These key takeaways include:

There is little evidence that one particular version of AVR works uniformly better than others. We did not find that certain distinctions between AVR systems (such as method of opt-out) were particularly meaningful. For instance, states with back-end opt-out like Oregon and Alaska did not achieve categorically higher levels of registration increases compared with states with a front-end opt-out.

Automatic voter registrations can be a successful policy no matter the jurisdiction. We do not find that AVR is more effective in states that lean left (like Oregon) or right (like Georgia). Nor has AVR been more effective in large California than in small Rhode Island. The most striking result of this study is how well automatic voter registration works across the country, boosting registration rates in a wide variety of states.

States should choose implementing agencies likely to reach many residents. Washington, DC, a city where just 64.3 percent of households own vehicles, has only implemented AVR at the DMV. This means that fewer residents are exposed to AVR, likely explaining why the impact of AVR in DC was small compared with other states in our study, all of which have car ownership rates that exceed 90 percent. This may be illuminating for other states considering AVR. In New York State, for instance, just 71 percent of households own cars, and this percentage is far lower in New York City. The state would do well to consider adding agencies beyond the DMV to ensure that AVR reaches a larger pool of potential voters. The addition of agencies beyond the DMV would be especially useful in ensuring a diverse electorate, as low-income residents are the least likely to own cars and interact with the DMV.[37]

There is also evidence that the frequency with which individuals visit a designated AVR agency can impact the effect of AVR. California, Rhode Island, and Vermont, for instance, all require their drivers to renew their licenses at least once every five years (most states require drivers to renew only every eight or more years). These states all saw impressive gains from AVR, indicating that individuals who visit AVR agencies more frequently (in this case, DMVs) may be more likely to accept the default option presented to them.

Technical Appendix

In an ideal world, we would know exactly how many registered and unregistered citizens visited each AVR agency each day. We would know what share of these eligible individuals registered to vote before AVR went into effect and how many were registered afterward. Most election administrators, however, do not track the data at this level. As such, we use the statewide voter file to build a model to assess the impact of AVR. For each of the AVR states included in this study, we geocoded voters to the census tracts in which they reside.[38] We then calculated how many voters were registered in each week in each census tract in the states that implemented AVR (at AVR and non-AVR agencies). These numbers form the bases for each analysis.

To account for election-cycle impacts and seasonality in the data, we do not always compare the period immediately before AVR was implemented with the period immediately after. Some states, for instance, implemented AVR in early 2017. Comparing the number of registrations in each census tract in 2017 with the same number from 2016 would underestimate the number of new registrations because far more individuals register to vote in federal election years. In the case of states that implemented in 2016 or 2017, we compare weekly registration counts in 2017 with weekly registration counts in 2013 — the same spot in the previous four-year election cycle.

Of course, we cannot simply attribute any growth in the number of weekly registrations from the period before implementation to the period after to AVR; it is likely that there are other influences causing the overall number of weekly registrations to increase or decrease. These influences would exist irrespective of whether AVR was implemented or not, and therefore need to be controlled for.

We do this through using a statistical technique called "matching."[39] The idea is simple: for every census tract where AVR was implemented, we look at other census tracts around the country to find census tracts where AVR was *not* implemented but which are otherwise similar. Because we do not have voter-file data from every state in the country, not every non-AVR tract is available for matching.[40] We match these census tracts based on multiple criteria that influence registration rates:[41] the growth in voting-age population between 2013 and 2017, racial and ethnic demographics, education levels, and others.[42] We match each treated census tract to the three[43] most similar untreated tracts.[44] These control tracts can come from any control state: a census tract in Georgia, for instance, might match to one tract in Florida, one in North Carolina, and one in New York. No state is singularly similar to Georgia; in aggregate, however, these matched census tracts create a group of control tracts that do look much like Georgia. We allow the same control tract to match with multiple treatment tracts (called "matching with replacement"), and our regressions weight observations based on the number of times they match.

After matching "treated" census tracts (tracts in states that have implemented AVR) to "untreated" census tracts (tracts in states that have not implemented AVR), we are able to build a strong control set (hereafter referred to as "control tracts"). Any growth in weekly registrations in treated tracts *above and beyond* the growth in registrations in the control tracts can be attributed to automatic voter registration. To determine this impact, we run a simple difference-in-differences model.[45]

Below, we present the demographics of each state,[46] the demographics of the control tracts to which the treated tracts were matched, and the difference-in-differences model. After presenting the results from these models, we discuss the potential of using time series analyses rather than matched difference-in-differences.

Overview for Oregon, Georgia, Vermont, Colorado, and Alaska

Each of these states implemented in either 2016 or at the beginning of 2017; therefore, the model for these five states is essentially the same.[47] To avoid state-specific impacts from the 2016 election that cannot be accounted for in the matching process, we exclude 2016 from the analysis. Because some of the untreated census tracts had local elections in the fall of 2018, we limit our difference-in-differences models to the first 35 weeks (roughly eight months) in 2013 and 2017.

The table below presents the results of matching on this set of states:

	Means: Unmatched Data		Means: Matched Data		Percent Improvement			
Tract-Level Variables	**Treated**	**Control**	**Treated**	**Control**	**Mean Diff**	**eQQ Med**	**eQQ Mean**	**eQQ Max**
Citizen Voting-Age Population	3,440.40	3,098.44	3,440.40	3,444.17	98.90	76.83	72.65	57.05
Citizen Voting-Age Population Change (2013–2017)	0.06	0.05	0.06	0.05	65.10	67.31	62.75	53.19
Number of Registrations in 2013	83.26	74.73	83.26	78.27	41.44	17.77	34.77	39.54
% Latino	0.12	0.14	0.12	0.12	64.01	47.51	44.02	23.68
% Non-Hispanic Black	0.16	0.15	0.16	0.15	18.19	41.65	48.45	48.44
% Non-Hispanic White	0.65	0.63	0.65	0.65	88.62	90.09	87.41	80.85
% Noncitizens	0.05	0.07	0.05	0.05	96.49	63.82	60.91	56.75
% Without a Car	0.07	0.13	0.07	0.07	95.73	88.42	86.16	74.19
% Moved in Past 12 Months	0.17	0.14	0.17	0.16	73.55	90.20	86.52	77.86
% With Some College Education	0.74	0.73	0.74	0.74	98.52	68.01	58.02	33.61
Median Income	60,768.82	62,189.42	60,768.82	60,519.29	82.43	56.93	44.69	24.49
% Unemployed	0.07	0.08	0.07	0.07	98.81	53.91	40.61	-19.63
Median Age	38.67	40.64	38.67	38.98	84.47	67.43	67.06	68.32
County-Level Variables								
% Registered in 2014	0.77	0.82	0.77	0.81	29.89	31.59	23.67	23.27
Presidential Republican Voteshare (2016)	0.46	0.43	0.46	0.46	94.52	59.07	54.54	15.98

Oregon

Variable	Treatment Group	Control Group
Tract-Level Variables		
Citizen Voting-Age Population	2,948,750	2,936,343
Citizen Voting-Age Population Change (2013–2017)	6.3%	6.2%
Number of Registrations in 2013	55,184	74,981
% Latino	12.7%	11.4%
% Non-Hispanic Black	1.8%	2.5%
% Non-Hispanic White	76.5%	74.8%
% Noncitizens	5.7%	5.5%
% Without a Car	7.3%	6.0%
% Moved in Past 12 Months	18.0%	17.0%
% With Some College Education	77.2%	77.7%
Median Income	$60,265	$66,595
% Unemployed	7.0%	6.6%
Median Age	40	40
County-Level Variables		
% Registered in 2014	76.9%	80.2%
Presidential Republican Voteshare (2016)	39.3%	40.4%

Regression output:

Dependent Variable: Registrations	
Oregon in 2017	0.422*** (0.052)
Oregon	-0.334*** (0.037)
2017	1.400*** (0.039)
Constant	1.587*** (0.028)
Observations	129,096
R^2	0.132
Adjusted R^2	0.132
Residual Std. Error	3.413 (df = 129092)
F Statistic	6,539.172*** (df = 3; 129092)
Note:	*p<0.1; **p<0.05; ***p<0.01 Robust standard errors clustered at census tract level. Data from first 35 weeks in 2013 and 2017.

As discussed above, we limit the analysis to the first 35 weeks of 2013 and 2017 to avoid the impact that local elections in the fall of 2013 and 2017 might have on our estimates. These local elections might have increased the number of individuals registering to vote — an increase unrelated to AVR.

The table at left shows that the average control tract had 1.40 more weekly registrations in 2017 than in 2013. This represents the expected increase in registrations in Oregon census tracts had the state not implemented AVR. However, the real Oregon census tracts increased by this amount *plus* an additional 0.42, for a total increase of 1.8 new registrations per week per tract.

The additional 0.42 registrations is the estimated impact of AVR in Oregon — an increase of 15.9 percent. This percentage is calculated by comparing the number of registrations our model predicts would have occurred in the absence of AVR with how many actually happened.

This increase is significant at the 99 percent level.

Georgia

Variable	Treatment Group	Control Group
Tract-Level Variables		
Citizen Voting-Age Population	7,148,450	7,099,101
Citizen Voting-Age Population Change (2013–2017)	6.9%	6.5%
Number of Registrations in 2013	210,173	147,051
% Latino	9.3%	10.5%
% Non-Hispanic Black	30.9%	28.2%
% Non-Hispanic White	53.6%	55.3%
% Noncitizens	5.9%	5.5%
% Without a Car	6.6%	7.1%
% Moved in Past 12 Months	15.7%	15.8%
% With Some College Education	71.5%	71.6%
Median Income	$58,442	$55,009
% Unemployed	7.7%	7.6%
Median Age	37.1	37.5
County-Level Variables		
% Registered in 2014	75.4%	83.0%
Presidential Republican Voteshare (2016)	50.8%	50.6%

Regression output:

Dependent Variable: Registrations	
Georgia in 2017	3.014*** (0.079)
Georgia	0.624*** (0.040)
2017	1.172*** (0.030)
Constant	1.423*** (0.026)
Observations	337,498
R^2	0.246
Adjusted R^2	0.246
Residual Std. Error	5.102 (df = 337494)
F Statistic	36,677.550*** (df = 3; 337494)
Note:	*p<0.1; **p<0.05; ***p<0.01 Robust standard errors clustered at census tract level. Data from first 35 weeks in 2013 and 2017.

As discussed above, we limit the analysis to the first 35 weeks of 2013 and 2017 to avoid the impact that local elections in the fall of 2013 and 2017 might have on our estimates. These local elections might have increased the number of individuals registering to vote — an increase unrelated to AVR.

The table at left shows that the average control tract had 1.17 more weekly registrations in 2017 than in 2013. This represents the expected increase in registrations in Georgia census tracts had the state not implemented AVR. However, the real Georgia census tracts increased by this amount *plus* an additional 3.01, for a total increase of 4.19 new registrations per week per tract.

The additional 3.01 registrations is the estimated impact of AVR in Georgia — an increase of 93.7 percent. This percentage is calculated by comparing the number of registrations our model predicts would have occurred in the absence of AVR with how many actually happened.

This increase is significant at the 99 percent level.

Vermont

Variable	Treatment Group	Control Group
Tract-Level Variables		
Citizen Voting-Age Population	493,455	495,973
Citizen Voting-Age Population Change (2013–2017)	1.1%	1.6%
Number of Registrations in 2013	8,000	11,422
% Latino	1.8%	3.3%
% Non-Hispanic Black	1.2%	2.1%
% Non-Hispanic White	93.2%	90.6%
% Noncitizens	2.0%	2.1%
% Without a Car	6.6%	5.8%
% Moved in Past 12 Months	13.3%	11.3%
% With Some College Education	75.4%	76.3%
Median Income	$59,764	$67,389
% Unemployed	4.4%	4.6%
Median Age	42.8	43.0
County-Level Variables		
% Registered in 2014	84.0%	81.9%
Presidential Republican Voteshare (2016)	30.6%	34.4%

In early 2016, Vermont implemented a new policy under which state tax filers were required to include their driver's license number or state ID number. It appears that this policy encouraged residents to go to the DMV to renew their driver's licenses and, subsequently, get registered to vote. This can be seen in the data: the increase from March 2013 to March 2017 is much higher than the increase in other months.

This policy, of course, has nothing to do with automatic voter registration. In order to isolate the impact of the new tax-filing policy from the impact of AVR, we exclude the first 20 weeks of the period. As discussed above, we exclude the period after week 35 in 2013 and 2017 to avoid the impact that local elections in the fall of 2013 and 2017 might have on our estimates. These local elections might have increased the number of individuals registering to vote — an increase unrelated to AVR.

We look, therefore, at the number of registrations in the 20th-35th weeks of 2013 and 2017 in Vermont and the matched untreated census tracts.

Regression output:

Dependent Variable: Registrations	
Vermont in 2017	0.876*** (0.102)
Vermont	-0.710*** (0.061)
2017	0.846*** (0.054)
Constant	1.319*** (0.047)
Observations	17,056
R^2	0.085
Adjusted R^2	0.084
Residual Std. Error	3.267 (df = 17052)
F Statistic	525.291*** (df = 3; 17052)
Note:	*p<0.1; **p<0.05; ***p<0.01 Robust standard errors clustered at census tract level. Data from weeks 20–35 in 2013 and 2017.

The table at left shows that the average control tract had 0.85 more weekly registrations in 2017 than in 2013. This represents the expected increase in registrations in Vermont census tracts had the state not implemented AVR. However, the real Vermont census tracts increased by this amount *plus* an additional 0.88, for a total increase of 1.72 new registrations per week per tract.

The additional 0.88 registrations is the estimated impact of AVR in Vermont — an increase of 60.2 percent. This percentage is calculated by comparing the number of registrations our model predicts would have occurred in the absence of AVR with how many actually happened.

This increase is significant at the 99 percent level.

Colorado

Variable	Treatment Group	Control Group
Tract-Level Variables		
Citizen Voting-Age Population	3,874,810	3,946,978
Citizen Voting-Age Population Change (2013–2017)	9.3%	8.3%
Number of Registrations in 2013	81,146	93,737
% Latino	21.3%	17.8%
% Non-Hispanic Black	3.8%	3.9%
% Non-Hispanic White	68.7%	68.1%
% Noncitizens	5.9%	6.5%
% Without a Car	5.0%	5.1%
% Moved in Past 12 Months	18.6%	17.2%
% With Some College Education	78.9%	77.9%
Median Income	$71,926	$70,672
% Unemployed	5.4%	5.6%
Median Age	37.7	38.2
County-Level Variables		
% Registered in 2014	78.5%	78.3%
Presidential Republican Voteshare (2016)	43.3%	43.4%

According to the Colorado Department of State, Colorado switched its National Change of Address (NCOA) list provider at the end of 2016. The NCOA is the list that is created when people tell the post office to send their mail to a different address. This switch changed the way in which updated registrations were indicated in the voter file. Prior to late 2016, NCOA updates were processed throughout the month, with a new registration date indicating the date on which the change was made. Beginning in late 2016, however, all NCOA address updates in any month were given the same new registration date.[48] Because of this change, we cannot compare weekly registration numbers in Colorado from 2013 with 2017.

Although the matching procedure is the same for Colorado as for other states, our dependent variable in Colorado measures the number of *monthly* registrations in each census tract in 2013 and 2017. We began the analysis in February in each year (the month in 2017 in which Colorado implemented AVR) and ran it through August to avoid the interference of fall elections in untreated census tracts. Because Colorado did not initially implement the program statewide, these may be somewhat conservative estimates.

Regression output:

Dependent Variable: Registrations	
Colorado in 2017	1.715*** (0.264)
Colorado	-1.345*** (0.151)
2017	6.112*** (0.211)
Constant	5.978*** (0.120)
Observations	38,164
R^2	0.185
Adjusted R^2	0.185
Residual Std. Error	12.174 (df = 38160)
F Statistic	2,887.712*** (df = 3; 38160)
Note:	*p<0.1; **p<0.05; ***p<0.01 Robust standard errors clustered at census tract level. Data from February to August of 2013 and 2017.

The table at left shows that the average control tract had 6.11 more monthly registrations in 2017 than in 2013. This represents the expected increase in registrations in Colorado census tracts had the state not implemented AVR. However, the real Colorado census tracts increased by this amount *plus* an additional 1.72, for a total increase of 7.83 new registrations per month per tract.

The additional 1.72 registrations is the estimated impact of AVR in Colorado — an increase of 16.0 percent. This percentage is calculated by comparing the number of registrations our model predicts would have occurred in the absence of AVR with how many actually happened.

This increase is significant at the 99 percent level.

Alaska

Variable	Treatment Group	Control Group
Tract-Level Variables		
Citizen Voting-Age Population	527,810	531,303
Citizen Voting-Age Population Change (2013–2017)	4.6%	6.6%
Number of Registrations in 2013	8,362	13,896
% Latino	6.8%	10.2%
% Non-Hispanic Black	3.1%	5.2%
% Non-Hispanic White	61.5%	69.4%
% Noncitizens	3.3%	3.9%
% Without a Car	10.6%	7.2%
% Moved in Past 12 Months	18.9%	17.9%
% With Some College Education	75.6%	76.6%
Median Income	$78,706	$62,980
% Unemployed	8.2%	7.6%
Median Age	34.7	36.0
State-Level Variables		
% Registered in 2014	98.1%	78.6%
Presidential Republican Voteshare (2016)	51.4%	45.8%

Automatic voter registration works differently in Alaska than it does in the other states included in this study. In each of the other states we examine, AVR is implemented at the DMV, which means its effect can be examined on a daily or weekly basis. However, in Alaska, AVR is implemented through its Permanent Fund Dividend. The PFD automatically registers voters only once each year. This means that any effect from AVR must be calculated at the annual level.

Although the matching procedure is the same for Alaska as for the other states, our dependent variable in Alaska measures the number of *annual* registrations in each census tract in 2013 and 2017.

Regression output:

Dependent Variable: Registrations	
Alaska in 2017	38.309*** (7.393)
Alaska	-33.539*** (4.734)
2017	62.994*** (4.150)
Constant	84.218*** (4.097)
Observations	854
R^2	0.257
Adjusted R^2	0.254
Residual Std. Error	111.003 (df = 850)
F Statistic	98.052*** (df = 3; 850)
Note:	*p<0.1; **p<0.05; ***p<0.01 Robust standard errors clustered at census tract level. Data from 2013 and 2017.

The table at left shows that the average control tract had 63.0 more registrations in 2017 than in 2013. This represents the expected increase in registrations in Alaska census tracts had the state not implemented AVR. However, the real Alaska census tracts increased by this amount *plus* an additional 38.31, for a total increase of 101.31 new registrations per tract.

The additional 38.3 registrations is the estimated impact of AVR in Alaska — an increase of 33.7 percent. This percentage is calculated by comparing the number of registrations our model predicts would have occurred in the absence of AVR with how many actually happened.

This increase is significant at the 99 percent level.

California

	Means: Unmatched Data		Means: Matched Data		Percent Improvement			
Zip Code-Level Variables	**Treated**	**Control**	**Treated**	**Control**	**Mean Diff**	**eQQ Med**	**eQQ Mean**	**eQQ Max**
Voting-Age Population	18,404.90	10,582.12	18,404.90	17,530.88	88.83	84.21	79.62	72.55
Number of New Registrations in Pre-Period	136.33	167.88	136.33	240.54	-230.36	-239.04	-240.23	-206.31
% Latino	0.31	0.09	0.31	0.26	77.00	75.84	76.06	71.72
% Non-Hispanic Black	0.04	0.09	0.04	0.10	-38.83	-257.71	-208.28	-140.65
% Non-Hispanic White	0.51	0.77	0.51	0.54	89.02	91.08	89.40	85.85
% Noncitizens	0.11	0.04	0.11	0.10	95.33	92.02	91.85	89.70
% Without a Car	0.06	0.08	0.06	0.07	79.21	-34.87	-19.72	-38.71
% Moved in Past 12 Months	0.14	0.12	0.14	0.13	79.49	74.91	73.85	67.91
% With Some College Education	0.72	0.71	0.72	0.71	-85.03	74.74	68.40	59.20
Median Income	68,767.16	60,204.83	68,767.16	67,102.30	80.56	71.37	69.68	68.10
% Unemployed	0.08	0.07	0.08	0.08	74.64	81.46	79.23	70.01
Median Age	40.66	42.78	40.66	40.63	98.51	58.59	76.12	78.64
County-Level Variables								
% Registered in 2016	0.66	0.83	0.66	0.73	59.43	53.78	47.01	37.08
Presidential Republican Voteshare (2016)	0.36	0.52	0.36	0.44	49.55	65.63	55.62	33.77

In California, we do not have a full year of post-implementation data. Therefore, we construct a difference-in-differences model within the implementation year. Because of restrictions on geocoding addresses in the California voter file, we ran the same analyses but at the zip code level instead.[49] We look to see whether zip codes in California increased their registrations more after California implemented AVR than the control zip codes.

We continue to match on the number of registrations in the pre-period, which has changed from 2013 to the 20 weeks immediately before implementation (from December 4, 2017 to April 22, 2018).[50] We also match on the share of citizen voting-age population registered as of the 2016 election instead of the 2014 election.[51]

In California, we compare the 20 weeks before implementation in 2018 with the 18 weeks after implementation. We begin our pre-period in December 2017 to avoid any impact from local elections the month before. To avoid overestimating the impact of AVR, the weeks leading up to the registration deadline for California's primary and the week including the state's primary election day have been excluded.

Regression output:

Dependent Variable: Registrations	
California Post-Implementation	3.618*** (0.601)
California	-5.211*** (0.503)
Post-Implementation	6.685*** (0.490)
Constant	12.020*** (0.472)
Observations	107,328
R^2	0.080
Adjusted R^2	0.080
Residual Std. Error	26.697 (df = 107324)
F Statistic	3,112.430*** (df = 3; 107324)
Note:	*p<0.1; **p<0.05; ***p<0.01 Robust standard errors clustered at zip code level. Data from 12/4/2017 to 8/26/2018 Weeks 17–21 and 23 of 2018 excluded.

The second table on the previous page shows that the average control zip code had 6.69 more weekly registrations in the period after April 23 than in the period immediately preceding it. This represents the expected increase in registrations in California zip codes had the state not implemented AVR. However, the real California zip codes increased by this amount *plus* an additional 3.62, for a total increase of 10.3 new registrations per week per zip code.

The additional 3.62 registrations is the estimated impact of AVR in California — an increase of 26.8 percent. This percentage is calculated by comparing the number of registrations our model predicts would have occurred in the absence of AVR with how many actually happened.

This increase is significant at the 99 percent level.

Rhode Island

	Means: Unmatched Data		Means: Matched Data		Percent Improvement			
Tract-Level Variables	**Treated**	**Control**	**Treated**	**Control**	**Mean Diff**	**eQQ Med**	**eQQ Mean**	**eQQ Max**
Citizen Voting-Age Population	3,268.75	3,098.80	3,268.75	3,229.05	76.64	32.95	55.56	50.26
Number of New Registrations in Pre-Period	74.42	76.60	74.42	82.57	-273.66	-141.39	-38.10	26.16
% Latino	0.14	0.14	0.14	0.15	-506.26	-159.19	-105.85	-94.73
% Non-Hispanic Black	0.06	0.15	0.06	0.08	79.18	54.46	51.02	47.70
% Non-Hispanic White	0.73	0.63	0.73	0.71	79.71	76.45	61.07	34.38
% Noncitizens	0.06	0.07	0.06	0.06	40.43	-101.82	-26.30	13.14
% Without a Car	0.10	0.13	0.10	0.11	75.46	42.10	39.34	21.64
% Moved in Past 12 Months	0.14	0.14	0.14	0.13	-53.01	10.03	18.54	7.00
% With Some College Education	0.72	0.73	0.72	0.73	33.58	44.29	42.19	34.41
Median Income	63,071.82	62,010.49	63,071.82	65,391.58	-118.57	33.97	39.21	37.59
% Unemployed	0.07	0.08	0.07	0.07	18.48	-162.98	-166.67	-114.86
Median Age	40.66	40.68	40.66	40.89	-923.64	-16.23	17.67	48.85
County-Level Variables								
% Registered	0.92	0.96	0.92	0.81	-258.15	-241.73	-129.99	-74.28
Presidential Republican Voteshare (2016)	0.39	0.44	0.39	0.40	80.51	51.38	34.96	14.56

In Rhode Island, we do not have a full year of post-implementation data. Therefore, we construct a difference-in-differences model within the implementation year. We look to see whether census tracts in Rhode Island increased their registrations more in the weeks immediately after Rhode Island implemented AVR than the control census tracts.

We continue to match on the number of registrations in the pre-period, which has changed from 2013 to the 27-week period immediately before implementation (from December 4, 2017, to June 10, 2018).[52] We also match on the share of citizen voting-age population registered as of the 2016 election instead of the 2014 election.

Regression output:

Dependent Variable: Registrations	
Rhode Island Post-Implementation	2.112*** (0.162)
Rhode Island	-0.301*** (0.100)
Post-Implementation	1.705*** (0.097)
Constant	3.058*** (0.074)
Observations	22,274
R^2	0.150
Adjusted R^2	0.150
Residual Std. Error	4.850 (df = 22270)
F Statistic	1,314.778*** (df = 3; 22270)
Note:	*p<0.1; **p<0.05; ***p<0.01 Robust standard errors clustered at census tract level. Data from 12/4/2017 to 8/26/2018. Week 31 in 2018 excluded because of primary election distortion.

In Rhode Island, we compare the 27 weeks before implementation in 2018 with the 11 weeks after implementation. We begin our pre-period in December 2017 to avoid any impact from local elections in November 2017. To avoid overestimating the impact of AVR, the week of the deadline for registering for Rhode Island's primary election has been excluded.

The table at left shows that the average control tract had 1.71 more weekly registrations in the period after June 11 than in the period immediately preceding it. This represents the expected increase in registrations in Rhode Island census tracts had the state not implemented AVR. However, the real Rhode Island census tracts increased by this amount *plus* an additional 2.11, for a total increase of 3.82 new registrations per week per tract.

The additional 2.11 registrations is the estimated impact of AVR in Rhode Island — an increase of 47.4 percent. This percentage is calculated by comparing the number of registrations our model predicts would have occurred in the absence of AVR with how many actually happened.

This increase is significant at the 99 percent level.

Washington, DC

	Means: Unmatched Data		Means: Matched Data		Percent Improvement			
Tract-Level Variables	**Treated**	**Control**	**Treated**	**Control**	**Mean Diff**	**eQQ Med**	**eQQ Mean**	**eQQ Max**
Citizen Voting-Age Population	2,823.81	3,098.80	2,823.81	2,799.90	91.30	37.70	20.03	0.86
Number of New Registrations in Pre-Period	89.97	83.67	89.97	86.59	46.33	-135.60	-6.10	41.70
% Latino	0.10	0.14	0.10	0.10	98.64	75.90	72.82	59.54
% Non-Hispanic Black	0.50	0.15	0.50	0.44	82.01	77.89	74.79	60.60
% Non-Hispanic White	0.34	0.63	0.34	0.36	93.45	87.22	85.22	78.20
% Noncitizens	0.07	0.07	0.07	0.08	-47.12	60.83	23.75	-27.05
% Without a Car	0.35	0.13	0.35	0.30	78.04	75.74	75.65	71.21
% Moved in Past 12 Months	0.19	0.14	0.19	0.18	87.98	92.77	88.26	72.59
% With Some College Education	0.78	0.73	0.78	0.78	91.17	87.07	81.76	61.16
Median Income	82,936.30	62,010.49	82,936.30	68,515.49	31.09	27.13	26.39	37.72
% Unemployed	0.10	0.08	0.10	0.10	93.99	66.22	67.25	46.60
Median Age	34.94	40.68	34.94	35.34	92.98	33.86	68.64	70.70
District-Level Variables								
% Registered	1.00	0.96	1.00	1.01	78.73	-206.26	-53.19	3.47
Presidential Republican Voteshare (2016)	0.04	0.44	0.04	0.21	57.72	40.40	-30.60	0.00

In Washington, DC, we do not have a full year of post-implementation data. Therefore, we construct a difference-in-differences model within the implementation year. We look to see whether census tracts in the District increased registrations more after they implemented AVR than the control census tracts.

We continue to match on the number of registrations in the pre-period, which has changed from 2013 to the 29 weeks immediately before implementation (from December 5, 2017,to June 26, 2018).[53]

Regression output:

Dependent Variable: Registrations	
DC Post-Implementation	0.404** (0.182)
DC	-0.156 (0.198)
Post-Implementation	1.508*** (0.139)
Constant	2.956*** (0.142)
Observations	16,200
R^2	0.048
Adjusted R^2	0.048
Residual Std. Error	4.912 (df = 16196)
F Statistic	271.307*** (df = 3; 16196)
Note:	*p<0.1; **p<0.05; ***p<0.01 Robust standard errors clustered at census tract level. Data from 12/5/2017 to 8/27/2018. Weeks 25 and 27 in 2018 excluded because of primary election distortion.

In Washington, DC, we compare the 29 weeks before implementation in 2018 with the 9 weeks after implementation. We begin our pre-period in December 2017 to avoid any impact from local elections a month earlier. We exclude week 25 in 2018, the week of the primary election in Washington, DC, because of the distorting effect of Election Day registration. Similarly, we exclude week 27 in 2018 because many DC tracts match to Washington State tracts, where the registrations for the primary election in week 27 distort the analysis.

The table at left shows that the average control tract had 1.51 more weekly registrations in the period after June 26 than in the period immediately preceding it. This represents the expected increase in registrations in its census tracts had the District not implemented AVR. However, the real Washington, DC, census tracts increased by this amount *plus* an additional 0.40, for a total increase of 1.91 new registrations per week per tract.

The additional 0.40 registrations is the estimated impact of AVR in Washington, DC — an increase of 9.4 percent. This percentage is calculated by comparing the number of registrations our model predicts would have occurred in the absence of AVR with how many actually happened.

This increase is significant at the 95 percent level.

Findings Hold Even Using a Different Methodology

Statistical estimates of policy impacts are never perfect. While we, and our peer reviewers, believe that the afore-mentioned methodology provides the best estimate of AVR's impact, we built another model to test our hypothesis that AVR is generally helpful in increasing registration rates, and that the states with opt-out placements in one location will not outperform the states with an opt-out in another location. This second model was a time series analysis for the states that implemented AVR in 2016 or 2017.[54]

The two models in this report could be compared to estimating the effect of a drug in a clinical trial. A researcher might find two very similar individuals and could give one of the individuals a drug and the other a placebo. Comparing what happened with each of these two individuals would reveal the impact of the drug. This is similar to our matching method.

A medical researcher could also instead decide to use a patient's own history to investigate the impact of the drug. If a patient has woken up with a headache every day for the past year but takes a pill and tomorrow wakes up *without* a headache, one could surmise that the lack of headache is due to the pill. This would be more similar to a time series analysis.

To do the time series model, we use historical data from each of the states to estimate what would have happened in that state if it had not implemented AVR. This is compared with what actually happened. If the number of actual registrations significantly exceeds the number that the historical data forecast would have occurred without AVR, we attribute that difference to AVR.

As is typical for time series models, we include variables to account for seasonality and election-cycle patterns. We also account for underlying trends to control for natural population growth. In each model, we use statewide daily registration data from January 1, 2010, through December 31, 2017. Because our dependent variable measures daily registration counts, we fit them using a Poisson regression. We conservatively use robust standard errors to ensure the validity of our results.

Time Series Models in Non-AVR States

The first building block for this analysis requires that we run the time series model on non-AVR states. This is for comparison purposes: if AVR had an impact on the number of individuals being registered, we would expect to find a statistically significant effect in states that implemented AVR and insignificant results in states that did not implement.

As noted earlier, we used voter files from 17 states. We present two models for each state: one with a dummy variable that begins on January 1, 2016, and runs through the end of 2017, mirroring the period during which Oregon had AVR. In the second model for each state, we include a dummy for only 2017, roughly corresponding to the period in which AVR began in Georgia and Vermont. These variables measure whether the number of voters being registered in 2016 and 2017 in non-AVR states was higher than each state's history would lead us to expect.

Among our nine comparison states, three are significantly elevated over the entire 2016 and 2017 period. This indicates that, in the case of Oregon, time series analysis may be inappropriate: these states indicate that registration rates were elevated at this time even where AVR was not implemented. When we limit our dummy variable to just 2017, however, Washington State is no longer significantly elevated. The increase in Connecticut is substantially smaller. The effect in New Jersey becomes smaller as well.[55]

(see table page 29)

Time Series Regressions in Non-AVR States										
	CT (1)	**CT (2)**	**FL (3)**	**FL (4)**	**MI (5)**	**MI (6)**	**NV (7)**	**NV (8)**	**NJ (9)**	**NJ (10)**
2016–2017	0.430*** (0.103)		-0.204*** (0.051)		0.037 (0.037)		0.027 (0.075)		0.281** (0.086)	
2017		0.177* (0.086)		-0.239*** (0.047)		0.015 (0.037)		0.123 (0.073)		0.216* (0.084)
Trend	0.0004*** (0.0001)	0.001*** (0.0001)	0.0003*** (0.00002)	0.0002*** (0.00003)	0.0004*** (0.00001)	0.0004*** (0.00002)	0.0005*** (0.00003)	0.0004*** (0.0001)	0.0002*** (0.00003)	0.0003*** (0.0001)
Presidential Election Year	0.583*** (0.113)	0.789*** (0.116)	0.610*** (0.065)	0.486*** (0.064)	0.256*** (0.053)	0.272*** (0.053)	1.094*** (0.067)	1.150*** (0.070)	0.367*** (0.068)	0.522*** (0.067)
Midterm Election Year	-0.135 (0.134)	-0.082 (0.134)	-0.054 (0.070)	-0.094 (0.069)	-0.036 (0.057)	-0.034 (0.058)	0.271** (0.086)	0.301*** (0.081)	-0.397*** (0.091)	-0.346*** (0.085)
Saturday or Sunday	-3.010*** (0.151)	-3.008*** (0.151)	-2.830*** (0.074)	-2.830*** (0.074)	-2.469*** (0.031)	-2.469*** (0.031)	-1.257*** (0.146)	-1.257*** (0.146)	-1.586*** (0.051)	-1.585*** (0.051)
Constant	4.200*** (0.099)	3.954*** (0.102)	6.887*** (0.044)	6.969*** (0.050)	6.320*** (0.041)	6.305*** (0.047)	3.999*** (0.062)	3.977*** (0.071)	5.799*** (0.061)	5.668*** (0.081)
McFadden's Pseudo R^2	0.717	0.714	0.734	0.735	0.773	0.773	0.655	0.655	0.593	0.592
Observations	2,922	2,922	2,922	2,922	2,922	2,922	2,922	2,922	2,922	2,922
Note:	*p<0.05; **p<0.01; ***p<0.001 Data from 1/1/2010 to 12/31/2017. Month dummies (which are interacted with election year dummies) not shown. Robust standard errors in parentheses.									

Time Series Regressions in Non-AVR States (cont'd)								
	NY (11)	**NY (12)**	**NC (13)**	**NC (14)**	**OH (15)**	**OH (16)**	**WA (17)**	**WA (18)**
2016–2017	0.062 (0.085)		0.015 (0.076)		-0.204 (0.111)		0.107* (0.053)	
2017		-0.209* (0.083)		0.019 (0.067)		-0.485*** (0.108)		-0.004 (0.051)
Trend	0.0002*** (0.00003)	0.0003*** (0.0001)	0.0005*** (0.00004)	0.0005*** (0.00005)	0.001*** (0.0001)	0.001*** (0.0001)	0.0003*** (0.00002)	0.0003*** (0.00003)
Presidential Election Year	0.600*** (0.079)	0.554*** (0.079)	0.617*** (0.066)	0.628*** (0.067)	0.776*** (0.075)	0.545*** (0.080)	0.497*** (0.052)	0.527*** (0.052)
Midterm Election Year	-0.355*** (0.097)	-0.387*** (0.095)	-0.204* (0.087)	-0.199* (0.085)	0.061 (0.093)	-0.024 (0.097)	-0.065 (0.060)	-0.063 (0.060)
Saturday or Sunday	-2.097*** (0.113)	-2.097*** (0.113)	-2.095*** (0.145)	-2.095*** (0.145)	-1.690*** (0.055)	-1.689*** (0.055)	-0.979*** (0.071)	-0.979*** (0.071)
Constant	6.312*** (0.067)	6.282*** (0.083)	5.567*** (0.067)	5.559*** (0.071)	5.439*** (0.091)	5.513*** (0.100)	5.620*** (0.048)	5.571*** (0.056)
McFadden's Pseudo R^2	0.626	0.628	0.658	0.658	0.488	0.497	0.586	0.585
Observations	2,922	2,922	2,922	2,922	2,922	2,922	2,922	2,922
Note:	*p<0.05; **p<0.01; ***p<0.001 Data from 1/1/2010 to 12/31/2017. Month dummies (which are interacted with election year dummies) not shown. Robust standard errors in parentheses.							

Time Series Models in AVR States

The second building block of the time series analysis is to run the time series model on states that did implement AVR in 2016 or 2017 (Oregon, Georgia, and Vermont). Below is the regression output for that model:

Dependent Variable: Number of Registrations			
	Oregon (1)	**Georgia (2)**	**Vermont (3)**
Post AVR Implementation (OR)	0.351*** (0.074)		
Post AVR Implementation (GA)		0.525*** (0.064)	
Post AVR Implementation (VT)			0.413*** (0.110)
Trend	0.0001*** (0.00001)	0.0001*** (0.00001)	0.0001*** (0.00002)
Presidential Election Year	0.468*** (0.134)	0.579*** (0.087)	1.052*** (0.096)
Midterm Election Year	0.168 (0.146)	0.051 (0.087)	0.366*** (0.108)
Saturday or Sunday	-1.587*** (0.069)	-1.357*** (0.043)	-3.346*** (0.115)
Constant	4.796*** (0.095)	6.240*** (0.063)	3.013*** (0.102)
McFadden's Pseudo R^2	0.600	0.595	0.612
Observations	2,922	2,922	2,922
Note:	*p<0.05; **p<0.01; ***p<0.001 Data from 1/1/2010 to 12/31/2017. Month dummies (which are interacted with election year dummies) not shown. Weeks 25 and 27 in 2018 excluded because of primary election distortion.		

When we run these models on the states that implemented AVR in 2016 or 2017, the effects are larger than those in the control state and are statistically significant at the 99.9 percent level.

Comparing Results of Matched Difference-in-Differences vs. Time Series

Unremarkably, the estimated impact of AVR differs according to the methodology. The difference-in-differences methodology used data from other states to estimate what would have happened without AVR. The time series methodology created estimates based on a state's own history. Again, we believe the matched difference-in-differences methodology produces the better estimate because it incorporates more information relevant to a state's registration rate absent AVR.

To aid in the comparison of these numbers with the increases reported in the matched difference-in-differences section, we here convert these logged coefficients into percent increases and report them together with the results from our matched difference-in-differences models.

Both models show that impact of AVR is statistically significant and that it increased registration rates in exciting and impressive numbers.

The key takeaway here is that even under very different models, we can see that AVR was successful at registering Americans to vote — irrespective of where the opt-out was placed.

State	Percent Increase Time Series	Percent Increase Matched Difference-in-Differences
Oregon	42.0%	15.9%
Georgia	69.0%	93.7%
Vermont	51.2%	60.2%

Endnotes

1 The Brennan Center for Justice first developed automatic registration in 2008. Since then, we have proudly helped push for its adoption around the country. *See:* Wendy Weiser, Michael Waldman, and Renée Paradis, *Voter Registration Modernization* (New York: Brennan Center for Justice, 2009), http://www.brennancenter.org/sites/default/files/legacy/publications/VRM.Proposal.2008.pdf.

2 "History of AVR Implementation Dates," Brennan Center for Justice, accessed February 19, 2019, https://www.brennancenter.org/analysis/history-avr-implementation-dates.

3 Ibid.

4 Ibid.

5 For instance, *see:* Sean McElwee, Brian Schaffner, and Jesse Rhodes, *Oregon Automatic Voter Registration* (New York: Demos, 2017), https://www.demos.org/publication/oregon-automatic-voter-registration; Rob Griffin, Paul Gronke, Tova Wong, and Liz Kennedy, *Who Votes with Automatic Voting Registration?* (Washington, DC: Center for American Progress, 2017), https://www.americanprogress.org/issues/democracy/reports/2017/06/07/433677/votes-automatic-voter-registration/.

6 "State Primary Election Types," National Conference of State Legislatures, accessed February 5, 2019, http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx.

7 "2018 Oregon Motor Voter Registrations by County," Election Division, Oregon Secretary of State, accessed March 8, 2019, https://sos.oregon.gov/elections/Documents/OMV/omv-yearlyReports-2018.pdf.

8 Matthew Berman and Random Reamey, *Permanent Fund Dividends and Poverty in Alaska*, Institute of Social and Economic Research, University of Alaska Anchorage, November 2016, https://iseralaska.org/static/legacy_publication_links/2016_12-PFDandPoverty.pdf.

9 "Automatic Voter Registration," National Conference of State Legislatures, accessed February 6, 2019, http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx.

10 Ibid.

11 "Policy Differences of Automatic Voter Registration," Brennan Center for Justice, accessed February 19, 2019, https://www.brennancenter.org/analysis/policy-differences-automatic-voter-registration.

12 For this report, we calculate the pre-AVR rate of registration by dividing the most recent active registration estimates for the state (provided by jurisdictions to the Election Assistance Commission for its biennial *Election Administration and Voting Survey*) by the citizen voting-age population for that year calculated by the U.S. Census Bureau. This allows us to standardize registration rates throughout states, as the format of state voter registration statistics vary from state to state.

13 Brennan Center for Justice, "Policy Differences of Automatic Voter Registration."

14 In Massachusetts, this other agency is MassHealth, the state welfare agency. Maryland's AVR covers the Maryland Health Benefit Exchange (the state's health insurance exchange established through the Affordable Care Act), local departments of social services, and the Mobile Certification Office. *See*: Brennan Center for Justice, "Policy Differences of Automatic Voter Registration."

15 "Foreign Nationals Driving in the U.S.," USA.gov, accessed February 19, 2019, https://www.usa.gov/visitors-driving.

16 "States Offering Driver's Licenses to Immigrants," National Conference of State Legislatures, accessed February 19, 2019, http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx/.

17 "Criminal Disenfranchisement Laws Across the United States," Brennan Center for Justice, accessed February 19, 2019, https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states.

18 Danielle Root, *Obstacles to Voting for Survivors of Intimate Partner Violence*, (Washington, DC: Center for American Progress, 2018), https://www.americanprogress.org/issues/democracy/reports/2018/11/01/460377/obstacles-voting-survivors-intimate-partner-violence/.

19 Because we do not have the registered voter file from every state (and therefore cannot calculate the number of voters registered in each census tract), not every non-AVR census tract in the country is available for our control set. The non-AVR states whose census tracts are available for matching in this study include Connecticut, Florida, Michigan, Nevada, New Jersey, New York, North Carolina, Ohio, and Washington State. For states

that implemented prior to 2018, we also allow treated census tracts to match to tracts in Rhode Island and Washington, DC, because AVR was not implemented in these tracts until 2018. California is excluded from this group since users of the voter file are prohibited from geocoding the data, and therefore we cannot break the state down to the census tract level. Although New Jersey implemented AVR in late 2018, it was not implemented until the end of the post-period in each state. As such, during our period of analysis, every New Jersey census tract was "untreated" with AVR.

20 Stanley Kelley, Richard E. Ayres, and William G. Bowen, "Registration and Voting: Putting First Things First," *The American Political Science Review* 61, no. 2 (1967): 359–79, doi:10.2307/1953251.

21 A full list of the data on which we match can be found in the Technical Appendix.

22 We perform a 1:3 match to strike a balance between the precision improvements possible from multiple matches and the bias that such multiple matches may introduce. *See:* Jeremy A. Rassen, Abhi A. Shelat, Jessica Myers, Robert J. Glynn, Kenneth J. Rothman, and Sebastian Schneeweiss, "One-to-Many Propensity Score Matching in Cohort Studies," *Pharmacoepidemiology and Drug Safety* 21 (2012): 69–80, doi:10.1002/pds.3263.

23 Jasjeet Sekhon, "Multivariate and Propensity Score Matching Software with Automated Balance Optimization: The Matching Package for R," *Journal of Statistical Software*, 42, no. 7, (2011): 1–52, doi:10.18637/jss.v042.i07.

24 Sekhon's matching algorithm has been used to investigate questions such as the correlation between level of education and voter turnout, the effect of poll consolidation, and how vote by mail impacts turnout. *See*, for instance, Alexander K. Mayer, "Does Education Increase Political Participation?" *The Journal of Politics* 73, no. 3 (2011): 633–45, doi: 10.1017/s002238161100034x; John E. McNulty, Conor M. Dowling, and Margaret H. Ariotti, "Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters," *Political Analysis* 17, no. 4 (2009): 435–55, doi:10.1093/pan/mpp014; Betsy Sinclair, Thad E. Hall, and R. Michael Alvarez, "Flooding the Vote: Hurricane Katrina and Voter Participation in New Orleans," *American Politics Research* 39, no. 5 (September 2011): 921–57, doi: 10.1177/1532673X10386709; Michael C. Herron and Jonathan Wand, "Assessing Partisan Bias in Voting Technology: The Case of the 2004 New Hampshire Recount," *Electoral Studies* 26, no. 1 (2007): 247–61, doi: 10.1016/j.electstud.2006.02.004. Other recent papers employing matching techniques include: Thad Kousser and Megan Mullin, "Does Voting by Mail Increase Participation? Using Matching to Analyze a Natural Experiment," *Political Analysis* 15, no. 4 (2007): 428–45, doi: 10.1093/pan/mpm014; Luke Keele and Rocío Titiunik, "Geographic Natural Experiments with Interference: The Effect of All-Mail Voting on Turnout in Colorado," *CESifo Economic Studies* 64, no. 2 (2018): 127–149, doi: 10.1093/cesifo/ify004; Kosuke Imai, "Do Get-Out-the-Vote Calls Reduce Turnout? The Importance of Statistical Methods for Field Experiments," *The American Political Science Review* 99, no. 2 (2005): 283–300, doi: 10.1017/S0003055405051658.

25 Oregon H.B. 2177, 78th Cong. (2015), https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2177.

26 "VRM in the States: Oregon," Brennan Center for Justice, accessed March 1, 2018, https://www.brennancenter.org/analysis/vrm-states-oregon.

27 "Oregon Motor Voter Program Statistics," Election Division, Oregon Secretary of State, accessed March 8, 2019, https://sos.oregon.gov/elections/Documents/OMV/omv-statistics-2016.pdf. Note that no other AVR state has done a look-back.

28 Kevin Rayburn (Assistant Elections Director and Deputy General Counsel, Georgia Secretary of State), in phone discussion with authors, April 2019.

29 In April 2017, the Georgia Sixth Congressional District held a special election. Throughout this report, we focus on odd years to isolate the impact of AVR from election-specific factors. However, our statistical analysis showed that the leadup to the April special election did not materially influence statewide voter registration rates. As such, we do not exclude the period in the leadup to the election from our econometric model.

30 "Vermont Department of Taxes Implements New Measures to Prevent Fraud," Vermont Department of Taxes, released January 19, 2016, https://tax.vermont.gov/press-release/vermont-department-taxes-implements-new-measures-prevent-fraud.

31 Melissa Polk (legal and internal operations manager, Colorado Department of State), email message to Kevin Morris, February 20, 2019. (On file with author.)

32 "VRM in the States: Colorado," Brennan Center for Justice, accessed March 16, 2018, https://www.brennancenter.org/analysis/vrm-states-colorado.

33 National Conference of State Legislatures, "Automatic

Voter Registration," http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx.

34 Eligibility for the PFD requires establishing residency in Alaska prior to January 1 of the year an individual seeks a dividend and attesting an intention to remain an Alaska resident for the indefinite future. "Permanent Fund Dividend Information & Instructions," Alaska Department of Revenue, accessed February 19, 2019, https://pfd.alaska.gov/LinkClick.aspx?fileticket=-ZonQe0MaHs=&tabid=425&portalid=6.

35 Gail Fenumiai (director, Division of Elections, Alaska Office of the Lieutenant Governor), email message to Kevin Morris, February 21, 2019. (On file with author.)

36 From time to time, jurisdictions may have registration rates of more than 100 percent. This may be due to errors in estimates of the citizen voting-age population from the Census, or due to ineligible voters not being removed from the rolls.

37 Some states that have already passed AVR serve as a good example of how this could work in practice. Massachusetts, the state with the second-lowest car ownership rate behind New York, will be implementing AVR at MassHealth, the state Medicaid program, as well as the DMV. The law also gives the secretary of state the authority to extend automatic registration to other agencies that they verify collect information necessary to determine eligibility for voter registration.

38 Due to aforementioned restrictions on data publication in California, we had to code data on the zip code level.

39 In recent years, the use of matching models has become increasingly popular in political science. It has been used to investigate questions such as the correlation between level of education and voter turnout, the effect of poll consolidation, and how vote by mail impacts turnout. *See*, for instance, Kousser and Mullin, "Does Voting by Mail Increase Participation? Using Matching to Analyze a Natural Experiment," 428-445; Mayer, "Does Education Increase Political Participation?," 633-645; McNulty, Dowling and Ariotti, "Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters," 435-455; Keele and Titiunik, "Geographic Natural Experiments with Interference: The Effect of All-Mail Voting on Turnout in Colorado," 127-149; Sinclair, Hall and Alvarez, "Flooding the Vote: Hurricane Katrina and Voter Participation in New Orleans," 921-957.

40 As explained in endnote 19, the untreated states whose census tracts are available for matching in this study include Connecticut, Florida, Michigan, Nevada, New Jersey, New York, North Carolina, Ohio, and Washington State. We also include Rhode Island and Washington, DC, as untreated tracts for states who implemented prior to 2018.

41 *See*: Kelley, Ayres, and Bowen, "Registration and Voting: Putting First Things First," 359-379.

42 The census-tract-level data on which we match come from the Census Bureau's 2017 American Communities Survey: voting-age population, change in voting-age population (2013–2017), percent Latino, percent non-Hispanic black, percent non-Hispanic white, percent noncitizens, percent of households without a car, percent of individuals who have moved in the past 12 months, percent of individuals with at least some post–high school education, median income, percent unemployed, median age, and the number of registrations in 2013 (from the voter file). We also assign census tracts two county-level characteristics (state-level characteristics in Alaska): percent of citizen voting-age population registered as of the 2014 election (Sources: US Election Assistance Commission; US Census Bureau) and presidential Republican vote share in 2016 (Source: MIT Election Data and Science Lab). Finally, we include the census tract's state's region, as defined by the Census Bureau.

43 We perform a 1:3 match to strike a balance between the precision improvements possible from multiple matches and the bias that such multiple matches may introduce. *See:* Rassen et al., "One-to-many Propensity Score Matching in Cohort Studies," 69-80.

44 The weight ascribed to each of the covariates on which we matched was estimated using a genetic matching procedure. *See:* Sekhon, "Multivariate and Propensity Score Matching Software with Automated Balance Optimization: The Matching Package for R," 1-52.

45 In three states — Oregon, Alaska, and California — the registered voter file updates the date of registration whenever a voter interacts with an agency that collects voter information. We are not interested in whether AVR increases the number of individuals who reaffirm their information, but rather how it changes the number of individuals who either register for the first time or update their information in such a way that, had they not done so, they would have been ineligible to vote. To account for this problem with the data, we use the original date of a voter's registration in these states. We assume that new registrations make up a constant share of new and materially updated registrations before and after AVR, and that AVR does not impact these two groups differently.

46 Because we weight the individual census tracts by population for the presentation of the statewide demographics to compare with the control group, they may differ slightly from statewide estimates from the Census Bureau.

47 As will be discussed below, Colorado's difference-in-differences model looks at *monthly* registrations in each census tract, while Alaska's looks at *annual* registrations. Because these are the dependent variables, this does not affect the matching procedure.

48 Melissa Polk (legal and internal operations manager, Colorado Department of State), email message to Kevin Morris, February 20, 2019. (On file with author.)

49 For county-level variables, zip codes that cross county lines were assigned the demographics of the county in which most voters were registered.

50 Although we are looking at a policy change that occurred in 2018, demographic data for each census tract are still from the 2017 ACS 5-Year Survey, the latest year for which census data are available.

51 In the previously discussed states, where we compared 2013 with 2017, one of our matching criteria was the growth in population from 2013 to 2017. Over a four-year period, population growth likely impacts the number of individuals registering to vote — where there is greater population growth, there is likely greater growth in registrations. In the states that implemented in 2018, however, we are not comparing periods four years apart but rather periods within a single year. Population growth is far less likely to influence registration growth within a single year. Furthermore, the Census Bureau estimates population on an annual level; comparing the population in December of 2017 with June of 2018 is not possible.

52 Although we are looking at a policy change that occurred in 2018, demographic data for each census tract are still from the 2017 ACS, the latest year for which census data are available.

53 Ibid.

54 As discussed earlier, we cannot examine the impact of AVR on daily registrations in Colorado or Alaska due to data and programmatic limitations. As such, we do not include them in this discussion.

55 New Jersey implemented AVR in late 2018. AVR did not impact the number of registrations occurring each day in 2016 or 2017. As such, it is included here (and in our matching) as a control state.

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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 ending mass incarceration to preserving Constitutional protection in the fight against terrorism. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, the courts, and in the court of public opinion.

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The Brennan Center's Democracy Program works to repair the broken systems of American democracy. We encourage broad citizen participation by promoting voting and campaign finance reform. We work to secure fair courts and to advance a First Amendment jurisprudence that puts the rights of citizens — not special interests — at the center of our democracy. We collaborate with grassroots groups, advocacy organizations, and government officials to eliminate the obstacles to an effective democracy.

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APPENDIX E

BRENNAN
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Purges: A Growing Threat to the Right to Vote

By Jonathan Brater, Kevin Morris, Myrna Pérez, and Christopher Deluzio

Brennan Center for Justice at *New York University School of Law*

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The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize — and when necessary defend — our country's systems of democracy and justice. At this critical moment, the Brennan Center is dedicated to protecting the rule of law and the values of constitutional democracy. We focus on voting rights, campaign finance reform, ending mass incarceration, and preserving our liberties while also maintaining our national security. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, in the courts, and in the court of public opinion.

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Kevin Morris is a quantitative researcher with the Democracy Program, focusing on voting rights and elections. His research focuses on the impact of laws and policies on access to the polls, with a particular focus on rights restoration and voter list maintenance. Prior to joining the Brennan Center, he worked as an economic researcher focusing on housing at the Federal Reserve Bank of New York and an economist at the Port Authority of New York and New Jersey. He received a bachelor's degree from Boston College and is currently pursuing a master's degree in Urban Planning at NYU's Wagner School, with an emphasis in Quantitative Methods and Evaluation.

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Christopher Deluzio is counsel for the Democracy Program, where he focuses on voting rights and elections. Prior to joining the Brennan Center, he was a litigation associate in private practice with Wachtell, Lipton, Rosen & Katz. He served as a law clerk to Judge Richard J. Sullivan of the U.S. District Court for the Southern District of New York. He graduated *magna cum laude* from Georgetown Law, where he was elected to the Order of the Coif, served as an executive articles editor of the *Georgetown Law Journal*, and was selected as the top oralist in the Robert J. Beaudry Moot Court Competition and the Thurgood A. Marshall Memorial Moot Court Competition. He received a bachelor's degree from the U.S. Naval Academy and, following graduation, served as an active-duty naval officer.

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Introduction

On April 19, 2016, thousands of eligible Brooklyn voters dutifully showed up to cast their ballots in the presidential primary, only to find their names missing from the voter lists. An investigation by the New York state attorney general found that New York City's Board of Elections had improperly deleted more than 200,000 names from the voter rolls.

In June 2016, the Arkansas secretary of state provided a list to the state's 75 county clerks suggesting that more than 7,700 names be removed from the rolls because of supposed felony convictions. That roster was highly inaccurate; it included people who had never been convicted of a felony, as well as persons with past convictions whose voting rights had been restored.

And in Virginia in 2013, nearly 39,000 voters were removed from the rolls when the state relied on a faulty database to delete voters who allegedly had moved out of the commonwealth. Error rates in some counties ran as high as 17 percent.

These voters were victims of purges — the sometimes-flawed process by which election officials attempt to remove ineligible names from voter registration lists. When done correctly, purges ensure the voter rolls are accurate and up-to-date. When done incorrectly, purges disenfranchise legitimate voters (often when it is too close to an election to rectify the mistake), causing confusion and delay at the polls.

Ahead of upcoming midterm elections, a new Brennan Center investigation has examined data for more than 6,600 jurisdictions that report purge rates to the Election Assistance Commission and calculated purge rates for 49 states.[1]

We found that between 2014 and 2016, states removed almost 16 million voters from the rolls, and every state in the country can and should do more to protect voters from improper purges.[2]

Almost 4 million more names were purged from the rolls between 2014 and 2016 than between 2006 and 2008.[3] This growth in the number of removed voters represented an increase of 33 percent — far outstripping growth in both total registered voters (18 percent) and total population (6 percent).

Most disturbingly, our research suggests great cause for concern that the Supreme Court's 2013 decision in *Shelby County v. Holder* (which ended federal "preclearance," a Voting Rights Act provision that was enacted to apply extra scrutiny to jurisdictions with a history of racial discrimination) has had a profound and negative impact:

For the two election cycles between 2012 and 2016, jurisdictions no longer subject to federal preclearance had purge rates significantly higher than jurisdictions that did not have it in 2013. The Brennan Center calculates that *2 million fewer voters* would have been purged over those four years if jurisdictions previously subject to federal preclearance had purged at the same rate as those jurisdictions not subject to that provision in 2013.[4]

In Texas, for example, one of the states previously subject to federal preclearance, approximately 363,000 more voters were erased from the rolls in the first election cycle after *Shelby County* than in the comparable midterm election cycle immediately preceding it.[5] And Georgia purged twice as many voters — 1.5 million — between the 2012 and 2016 elections as it did between 2008 and 2012.

Meanwhile, the Justice Department has abdicated its assigned role in preventing overly aggressive purges. In fact, the Justice Department has sent letters to election officials inquiring about their purging practices — a move seen by many as laying the groundwork for claims that some jurisdictions are not sufficiently aggressive in clearing names off the rolls.

This new report follows an extensive analysis of this issue in a 2008 Brennan Center report entitled *Voter Purges*.[6] In that report, we uncovered evidence that election administrators were purging people based on error-ridden practices, that voters were purged secretly and without notice, and that there were limited protections against purges. In this year's report, we discovered that little about purge practices has improved and that a number of things have, in fact, gotten worse.

This study also found:

- **In the past five years, four states have engaged in illegal purges, and another four states have implemented unlawful purge rules.**
  Federal standards for purges were set in the 1993 National Voter Registration Act (NVRA). Since 2013, Florida, New York, North Carolina, and Virginia have conducted illegal purges. Moreover, Brennan Center research has uncovered that four states (Alabama, Arizona, Indiana, and Maine) have written policies that by their terms violate the NVRA and provide for illegal purges. Alabama, Indiana, and Maine have policies for using data from a database called the Interstate Voter

Registration Crosscheck Program (Crosscheck) to immediately purge voters without providing the notice and waiting period required by federal law (Indiana's practice has been put on hold by a federal court). Arizona regulations permit Crosscheck purges during the 90 days prior to an election, a period during which federal law prohibits large-scale purges. These eight states are home to more than a quarter of registered voters across the nation.

- **States use inaccurate information.**
  Although states have improved the way in which they use data to purge the voter rolls in some respects, several jurisdictions rely on faulty data to flag potentially ineligible voters. And some of the new sources of information that have come into widespread use since our 2008 report, such as Crosscheck, are especially problematic.

- **A new coterie of activist groups is pressing for aggressive purges.**
  Most purging litigation brought by private litigants before 2008 contended that voter removal efforts were overly aggressive. Today, a different group of plaintiffs is hauling election officials into court, claiming that purging practices in their jurisdictions are not sufficiently zealous.

This report makes the following recommendations:

- **Enforce the NVRA's protections.**
  The NVRA, one of the major federal laws governing how states and localities can conduct purges, permits voters and civic groups to sue election officials if they violate the law's provisions. Monitoring jurisdictions to ensure they are complying with the NVRA — and bringing litigation when necessary — is especially important in an era when election officials are under pressure to mount aggressive purges.

- **States should set purging standards that provide even more protections than the NVRA.**
  The NVRA sets out federal standards for purges and requires that voters removed from the rolls for certain reasons be given notification. But these are minimum guidelines. States can and should do more to protect against disenfranchisement caused by improper purges — for example, providing public and individual notice before purging names from the rolls.

- **Pass automatic voter registration.**
  Automatic voter registration is a popular reform that minimizes registration errors and allows for easy updates, making rolls more accurate and current.

Methodology

We analyzed purge statutes, regulations, and other guidance in 49 states.[7] We interviewed 21 state or local election administrators in 18 states and reviewed documents from 20 states in response to public records requests.[8]

We also calculated state and county purge rates using voter registration data from the Election Administration and Voting Survey (EAVS), which is administered biennially by the U.S. Election Assistance Commission.[9] Our analysis used EAVS data from the 2008, 2010, 2012, 2014, and 2016 reports. In each two-year period, we calculated a jurisdiction's voter removal rate by dividing the number of *removed voters* by the sum of *registered voters* (i.e., both active and inactive registered voters) and *removed voters*.[10]

The 2018 Purge Landscape

Between the 2014 and 2016 elections, roughly 16 million names nationwide were removed from voter rolls.[11] The federal law governing purges[12] allows a voter's name to be purged from the voter rolls on the following grounds: (1) disenfranchising criminal conviction; (2) mental incapacity; (3) death; and (4) change in residence. In addition to these criteria, individuals who were never eligible in the first place, such as someone under 18 or a noncitizen, may be removed. Voters may be removed at their own request (even if they remain eligible). While all 49 states with voter registration lists have affirmative policies to remove names from the rolls (typically for several or all of the four delineated categories), states vary in the manner in and frequency with which they conduct voter purges.[13]

- **Disenfranchising Conviction**
  Except in Maine and Vermont, states disenfranchise at least some voters convicted of a crime for some period of time, which means that there are states that purge voters because of a criminal conviction. States have different policies about what causes a voter to become ineligible and different procedures for removing those who have been disenfranchised.[14] They also draw upon different lists to identify individuals with felony convictions, which may in turn be maintained with different levels of regularity and precision by courts or law-enforcement officials at the state or federal levels.

- **Mental Incapacity**
  Though less ubiquitous than some other bases of removal, 28 states have specific rules requiring removal from the rolls of a person determined not to have mental capacity to vote.[15] Definitions vary, and reform attempts have had

some success limiting the instances in which those with alleged mental incapacity lose their right to vote.[16]

- **Death**
  Federal law mandates that states take steps to remove the deceased from the rolls. Yet there is no uniform standard among the various state laws detailing the sources of information to be consulted to determine which voters are deceased. Some jurisdictions use information from state agencies, some review obituaries, and some rely on the Social Security Administration's Death Master File.[17]

- **Residency Changes**
  States vary in how they perform list maintenance for changes of address. Some of that variation is in timing. Montana, for example, conducts address removals every odd-numbered year,[18] and Connecticut conducts address removals annually.[19] There is also variation in which source of information is used. Two common sources are drivers' license updates and the postal service's National Change of Address (NCOA) database, but states also utilize other sources, such as interstate databases, returned mailings, or voter inactivity.

- **Noncitizenship**
  While election officials generally remove names of persons when it is made known to them that a noncitizen has gotten on the rolls, at least six states also have laws that require state officials to use jury declinations, drivers' license information, and/or federal databases to actively identify noncitizens on the voter rolls, to remove names of noncitizens so identified, or both.[20]

CURRENT FINDINGS

Purge Rates Are Higher Than a Decade Ago

In the two-year period ending in 2008, the median jurisdiction purged 6.2 percent of its voters.[21] At one end of the spectrum in 2008, Salt Lake County, Utah, purged less than 0.1 percent of its voters, and at the other end of the spectrum, Milwaukee County, Wisconsin, purged more than 34 percent of its voters. Of the 2,534 counties that reported purge rates to the Election Assistance Commission in 2008, only 97 had purged more than 15 percent of its registered voters in a two-year period.

Between the federal elections of 2014 and 2016, almost 4 million more names were purged from the rolls than in 2006-08. In this same period, more than twice the number of counties — 205 — had purged more than 15 percent of their voters than between 2006 and 2008.

Although a higher removal rate is not inherently bad, more purging means increased potential for eligible voters to be removed, especially given that we identified no state with the desired level of voter protections against purges.

Purge Rates Increased More in Jurisdictions Previously Subject to Federal Preclearance

Prior to 2013, the Voting Rights Act required certain jurisdictions with a history of discriminatory election practices to obtain federal certification that any intended election change, including voter purge practices, would not harm minority voters and was not enacted with discriminatory intent. This monitoring process was known as "preclearance."[22] In 2013, however, the Supreme Court concluded in *Shelby County v. Holder*[23] that Congress had inappropriately determined which jurisdictions should be subject to preclearance. As a result, jurisdictions subject to (or "covered" by) preclearance requirements were freed from making the case that minority voters would not be harmed by a proposed election change.

Across the board, formerly covered jurisdictions increased their purge rates after 2012 more than noncovered jurisdictions. Before *Shelby County*, jurisdictions that were subject to preclearance requirements ("covered jurisdictions") had removal rates equal to other jurisdictions ("noncovered jurisdictions").[24] After 2013, the two groups

FALLOUT FROM *SHELBY COUNTY*

Increases in purge rates in previously covered jurisdictions weren't the only changes after *Shelby County*.[1] Following the decision, many states and jurisdictions proceeded to enact or implement laws that would have been subject to preclearance. In fact, states formerly under preclearance requirements were more likely to pass legislation restricting their voting and election practices than the nation as a whole. Of the nine states once fully covered by the Voting Rights Act, seven have passed restrictive legislation since 2010. Of the 41 states not fully covered, only 18 passed restrictive laws over the same period. Two of these states (Florida and North Carolina) each had several counties subject to the Voting Rights Act.[2]

1 Shelby County v. Holder, 570 U.S. 2 (2013).

2 See Brennan Center for Justice, *New Voting Restrictions in America*, May 2017, https://www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf. We include in this count legislation that was enacted and subsequently struck down by courts. *See, e.g.*, Applewhite v. Pennsylvania, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014) (striking down Pennsylvania voter ID law).

sharply diverged. For the 2012-14 and 2014-16 two-year election cycles, the removal rate for noncovered jurisdictions did not budge. The story was entirely different for covered jurisdictions, whose median removal rate was 2 percentage points higher after the *Shelby County* decision than the noncovered jurisdictions.[25] Though 2 percentage points may seem like a small number, more than 2 million fewer voters would have been removed if these counties had removal rates comparable to the rest of the country. Previously covered jurisdictions ended up removing more than 9 million voters between the presidential elections of 2012 and 2016. These increases were not concentrated in just a few small counties: 67 percent of residents in previously covered jurisdictions lived in areas where the removal rate increased, compared to just 46 percent of residents in non-covered jurisdictions. These calculations are restricted to jurisdictions that reported their data each year, but there is evidence that the same trend happened in counties that did not report each year, as our Texas analysis below shows.

The increase in removal rates in counties previously covered by the preclearance provision is not attributable to geographical or partisan factors (see footnote 25 for more information). We also conducted a difference-in-differences regression analysis[26] to see if population, minority presence, income, or other factors could explain the increase in removal rates in these counties. Even after controlling for these factors, a jurisdiction's former status under the Voting Rights Act was strongly associated with higher voter removal rates. Although this effect was larger in the two-year period coinciding with the lifting of the preclearance requirement, it continued even into the two-year period ending with the presidential election of 2016.

To be absolutely clear, our analysis cannot establish what percentage, if any, of these post-*Shelby County* purges were done erroneously. What we do know is that provisional ballots, which are given to voters who are missing from the voter rolls, had a statistically significant relationship to purge rates in previously covered jurisdictions.[27] This means that as the purge rates increased, so did the number of people who showed up to vote but were unable to do so, either because their names were not on the rolls or for some other reason.

Another factor is that between the presidential elections of 2012 and 2016, a handful of states implemented strict voter ID laws that required voters to cast provisional ballots if they did not have one of the limited number of accepted identifications. The implementation of these laws could, of course, have led to an increase in provisional ballot rates. (To isolate the impact of increased purge rates on provisional ballot rates, we performed a regression analysis in which we controlled for the implementation of strict voter ID laws and other sociodemographic factors. The regression specification and a closer look at a few counties with big increases in purge rates and provisional ballots can be found in Appendix C.)

The changes were particularly notable in three states: Georgia, Texas, and Virginia.

In **Georgia**, 750,000 more names were purged between 2012 and 2016 than between 2008 and 2012. Although Georgia did not report provisional ballot rates in 2012, their provisional ballot rates in the federal elections of 2010 and 2014 correspondingly increased as the removal rates increased. Of the state's 159 counties, 156 reported increases in removal rates post-*Shelby County*. This included the state's 86 most populous counties. The increased purge rate occurred during a period when Georgia was criticized for several controversial voter registration practices. For example, Georgia was sued for blocking registration applications between 2013 and 2016 because information (including hyphens in names) did not match state databases precisely. Georgia agreed to cease the matching rule as a result of the lawsuit but then enacted legislation reinstating a very similar practice the next year.[28]

Texas did not report removal rates for the two years ending in 2012 and is thus excluded from our high-level analysis of the previously covered jurisdictions. Nonetheless, the state exhibited a substantial increase in removal rates when we compare the two-year periods ending with the federal elections of 2010 and 2014. Between 2012 and 2014, approximately 363,000 more voters were removed than in 2008-10.[29] Unsurprisingly, the provisional ballot rate also increased between the midterm elections of 2010 and 2014. Consistent with the broader trend, these increases were not driven only by small counties: Fourteen of the 20 most populous counties increased their removal rates. Of the 183 Texas counties that reported their removal rates in both periods, 121 saw an increase after the *Shelby County* decision. Among the Texas counties that consistently reported their data and increased their removal rate after the *Shelby County* decision, the median increase was 3.5 percent. This increased purge rate did not occur in isolation but was joined by restrictive voting legislation. In 2014, a federal district court ruled that the strict photo ID law that Texas passed in 2011 was motivated in part by a discriminatory purpose of reducing minority political participation.[30] The Court of Appeals of the 5th Circuit did not decide whether the law was motivated by discriminatory animus but did conclude it had a discriminatory effect.[31] In 2017, Texas passed a new voter ID law. Litigation regarding the new law is ongoing.

In **Virginia**, previously covered counties removed 379,019 more voters between 2012 and 2016 than between 2008 and 2012. Once again, the increase in purge rates in these counties was not driven by small counties purging more voters. All the previously covered counties except one increased removal rates after *Shelby County*. The one previously covered county that showed a decrease — Highland County — is the least populous county in the state, home to just 2,230 people. More than 99 percent of Virginia's voters live in counties that increased their removal rates after *Shelby County*. As later discussed in more detail, a contributing factor may have been a highly problematic purge process that Virginia mounted in 2013.

States Continue to Conduct Flawed Purges

Broadly speaking, purges go wrong for one of two basic reasons: bad information about who should be removed from the rolls or a bad method for removing them. There are tools to catch and correct these mistakes, some of which are legally mandated. For example, federal law sets forth some important and relevant safeguards, such as requiring that systematic purges — those in which voter rolls are compared with lists of potentially ineligible individuals to remove groups of voters at the same time — occur well in advance of an election. Another is making sure certain categories of voters get a notice and waiting period before removal.[32] Yet as both a legal and practical matter, many states lack sufficient safeguards to detect and correct problems so that any harm can be repaired in advance of an election.

Two states' recent experiences illustrate the basic reasons purges go wrong — Arkansas used bad information, while Texas used a bad method.

In June 2016, the Arkansas secretary of state sent county officials a list of more than 7,700 records from the Arkansas Crime Information Center (ACIC) of persons who were supposedly ineligible to vote and should be removed from the rolls.[33] (Those convicted of felonies in Arkansas lose their right to vote until their sentence is complete or they are pardoned.[34]) But the list included a high percentage of voters who were indeed eligible,[35] yet appeared on the list because they had had some involvement with the court system, such as a misdemeanor conviction or a divorce.[36] Also included were names of those whose voting rights had been restored.[37] The error became public in July 2016, and despite the public outcry, the records of fewer than 5,000 of the more than 7,700 erroneously listed voters had been corrected by September 2016.[38] Pulaski County, the largest county in the state, explained that the problem was flagged by the counties, not the state, and not all counties were able to correct errors. Previously, the secretary of state had not been providing counties with regular updates of conviction data and, in the past, had been using the wrong source list for data on felony convictions. Once Arkansas switched to the list required by law, the secretary did an overly broad match and provided counties with inflated lists with bad matches. Pulaski County flagged the errors and was able to investigate the list, but some counties with insufficient resources simply sent purge notices to everyone on the list.[39]

Texas is an example of a bad purge caused by flawed data matching. In 2012, Texas officials conducted a purge of voters presumed to be dead. According to a representative from the Texas secretary of state's office, the purge was driven by a comparison of Texas voters' information to the Social Security Administration's Death Master File — the first time Texas had conducted such an exercise.[40] Matching to the Death Master File was required under a then-new Texas law (H.B. 174) mandating election officials to obtain such information about potentially deceased voters quarterly.[41]

While the 2008 Brennan Center report on voter purges showed that the Death Master File can contain errors,[42] the problem in Texas occurred because the state used what are called "weak" matches (meaning that the chances that the person identified was actually deceased were too low to be trusted) to target voters without conducting any further investigation.[43] For example, a voter whose date of birth and last four digits of their Social Security number matches a dead person's record would be a "weak" match.[44] On these grounds, a living Texas voter (and Air Force veteran) named James Harris, Jr., was flagged for removal because he shared information with an Arkansan, "James Harris," who had died in 1996.[45] According to one analysis, more than 68,000 of the 80,000 voters identified as possibly dead were weak matches.[46] This policy of flagging voters based on a weak match without further investigation was eventually changed when Texas settled litigation that had arisen on account of the bad purge.[47]

States south of the Mason-Dixon Line do not have a monopoly on bad purges. Before the April 2016 primary election, the New York City Board of Elections purged more than 200,000 voters, the majority of whom lived in Brooklyn. In 2014 and 2015, the Brooklyn Borough Office of the Board of Elections targeted for removal people who had not voted since the 2008 election.[48] New York City officials complied with the portion of federal law requiring them to *send* notice to affected voters but not with the part that required them to *wait* two federal elections before purging those who did not respond. Instead, the Board of Elections gave voters 14 days to respond, then

purged voters immediately. In the end, nearly 118,000 registrations were canceled when voters did not respond to these notices.[49] And through another process, an additional 100,000 voters were removed (also without the required waiting period) because New York City Board of Elections officials believed they had moved.[50] On Election Day, thousands of voters showed up at the polls only to learn their registrations had been erased. Moreover, these problems were not evenly distributed. One report found that 14 percent of voters in Hispanic-majority election districts were purged compared to 9 percent of voters in other districts.[51]

Federal Role in Voter Protection Diminished

The increased purge rates are a cause for concern because there are fewer federal protections against improper purges. The *Shelby County* decision has halted the preclearance provision, which had previously blocked election changes in certain jurisdictions unless it could be shown that the change would not make minority voters worse off and was not enacted with discriminatory intent.

And at least for now, voters have lost another important protector against improper purges: the Justice Department. Since 1993, the Justice Department has been charged with enforcing the National Voter Registration Act, the primary source of federal protection against inaccurate or overly broad purges.[52] While the Justice Department's purge history is mixed,[53]it brought pro-voter NVRA lawsuits during the Obama administration. Enforcement actions for violating the NVRA were undertaken against at least six states. In Florida and New York, the DOJ successfully challenged state purge practices.[54] In Florida, the Justice Department joined civic groups who successfully challenged the state's practice of conducting systematic purges just 90 days before an election.[55]

But the Trump administration has reversed course. For instance, in *Husted v. A. Philip Randolph Institute*, the Obama administration filed a brief in support of plaintiffs challenging an Ohio purging practice in which individuals who failed to vote in a single election received purge notices and were ultimately purged if they did not respond and did not vote in the next two federal elections. Failure to vote in a single election is poor evidence of ineligibility because not voting is common; for example, in the last midterm election, nearly 60 percent of Ohioans did not vote.[56] But when the case was pending before the U.S. Supreme Court in the summer of 2017, the Justice Department switched sides and supported Ohio.[57] On June 11, 2018, the Supreme Court ruled in favor of Ohio and the Justice Department's new position.[58]

Last summer, the Trump Justice Department also sent letters to 44 states demanding information about their voter purge practices.[59] Although the Justice Department has not taken further action so far, the suspicion is that the inquiries could be a precursor to enforcement actions to force states to purge more aggressively.[60]

New Flaws in Voter Purges

Three new risks have emerged in voter purges in recent years. One is the growth of interstate databases that purport to identify voters who have moved to a new state and are registered in both their current and former state. The two databases primarily used are the Interstate Voter Registration Crosscheck program (Crosscheck) and Electronic Registration Information Center (ERIC).

Launched in 2005 by the Kansas secretary of state, Crosscheck purports to identify voters who may have cast ballots in two different states in the same election. In 2017, 28 states participated in Crosscheck by sharing voter data with the system,[61] but not all of those states actively used, or use, Crosscheck to remove voters. The number of participating states in 2018 is still to be determined because a number of states are assessing their participation.

Another data-matching initiative, ERIC, began with assistance from the Pew Charitable Trusts in 2012. Twenty-four states and the District of Columbia are or will soon be members of ERIC.[62]

The second risky development is the increasing number of states scouring their rolls to identify alleged noncitizens registered to vote: The number of states with statutes specifically mandating searching for and removing noncitizens from the rolls has increased from two to six since 2008. Of course, noncitizens are not permitted to vote in federal and state elections, but the sources states rely upon to determine voter citizenship, such as driver's license lists, are not highly accurate. Moreover, the primary policy justification for aggressive purges aimed at removing noncitizens from the rolls — supposed widespread noncitizen voting — is not supported by the facts, a Brennan Center study of the 2016 election found. The study looked at 42 jurisdictions in 12 states, including eight of the 10 jurisdictions with the nation's largest noncitizen populations. Out of the 23.5 million votes cast in these jurisdictions, election officials referred only 30 instances of *suspected* noncitizen voting, or .0001 percent of the total.[63]

Finally, several conservative activist groups have sued state and local jurisdictions in recent years seeking to force them to purge their rolls more aggressively. For instance,

last September the Public Interest Legal Foundation noted that it had brought nine suits in six states in the past two years alleging lax vigilance of voter rolls. That tally was included in a press release announcing that the group had put 248 counties in 24 states "on notice" that they were risking litigation if they could not demonstrate "effective voter roll maintenance."[64]

Interstate Voter Registration Crosscheck Program (Crosscheck)

Purges based on a change of address have long been complicated and error prone. When the Brennan Center looked at purges a decade ago, it found that states primarily used the National Change of Address database compiled by the U.S. Postal Service to identify movers (as well as driver's license information).[65] But states have begun using other databases that go beyond the traditional sources of change-of-address information. Our research shows these new interstate databases have serious weaknesses that can lead to widespread and inaccurate purges.

When it began in 2005, the Kansas-based Crosscheck program had only four members.[66] In 2017, the most recent year data was shared, 28 states submitted data to the program.[67] Crosscheck's purpose is to identify possible "double voters" — an imprecise term that could be used to refer to people who have registrations in two states or who actually *voted* in an election in multiple states. While it is not uncommon for those who have recently moved to be registered in multiple places, actual double voting is rare. In 2017, Crosscheck examined the records of 98 million

CROSSCHECK IN THE CROSSHAIRS

Crosscheck's flaws put approximately 100 million voters in its database at potential risk, but some individuals are more vulnerable than others. Because of the loose matching criteria used by the program, parents and children with the same name are at greater risk of being confused with each other. Voters with common names are also more likely to match with different individuals for obvious reasons, but a less-obvious concern is the disproportionate effect this has on minority voters. African-American, Asian-American, and Latino voters are much more likely than Caucasians to have one of the most common 100 last names in the United States.[1]

Crosscheck creates matches based on first name, last name, and birthdate. Shared names and birthdates are fairly common. In fact, if you were to gather 23 or more people in the same place, there is a greater than 50 percent chance that two people would share a birthday (day and month).[2] Even adding in the year doesn't make an enormous difference: In a group of 180 people, it's more likely than not that two people will have been born on the exact same day.[3]

Of course, adding in first and last names substantially decreases the rate at which people look the same on paper. It doesn't, however, lower that rate sufficiently to make Crosscheck anywhere near accurate. When looking at records of millions of people, matching birthdates and names can still return thousands of inaccurate matches. This is true not only because of the so-called birthday problem but also because of the variation in the popularity of names. Jennifer, for instance, was the most common name for women born in the 1970s[4] but was the 191st most common name for women born between 2010 and 2017.[5] On average, 160 Jennifers were born every single day in the U.S. between 1970 and 1979. Among these, there were doubtless many who shared surnames common among Americans.

The program also hurts frequent movers such as college students and military personnel, who are more likely to be wrongly flagged by the database following a recent move. Because Crosscheck's date of registration data is unreliable, those who move more frequently are more likely to be wrongly identified as having moved out of the state that purges them.[6]

1 Non-white people are more likely to have common shared names. For instance, 16.3 percent of Hispanic people and 13 percent of black people have one of the 10 most common surnames, compared to 4.5 percent of white people. Joshua Comenetz, "Frequently Occurring Surnames in the 2010 Census," U.S. Census Bureau, October 2016, available at https://www2.census.gov/topics/genealogy/2010surnames/surnames.pdf.

2 Michael P. McDonald and Justin Levitt, "Seeing Double Voting: An Extension of the Birthday Problem," Election Law Journal 7, (2007): 111–122, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=997888.

3 Sharad Goel et al., "One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections" (working paper, Stanford University, 2017) 3, https://scholar.harvard.edu/files/morse/files/1p1v.pdf.

4 "Top names of the 1970s," Social Security Administration, accessed June 15, 2018. https://www.ssa.gov/oact/babynames/decades/names1970s.html.

5 "Top names of the period 2010 - 2017," Social Security Administration, accessed June 15, 2018. https://www.ssa.gov/oact/babynames/decades/names2010s.html.

6 Sharad Goel et al., "One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections" (working paper, Stanford University, 2017) appendix-22, https://scholar.harvard.edu/files/morse/files/1p1v.pdf.

voters[68] and produced 7.2 million "matches" representing 3.6 million voters supposedly registered in two states.[69]

Crosscheck compares the voter registration list of each participating state against the voter registration lists of the other participating states and flags all records that have the same first name, last name, and date of birth.[70] But in groups as large as statewide (or multistate) voter registration lists, the statistical odds of two registrants having the same name and birth date is sufficiently high as to be problematic.[71] A 2017 study led by Stanford professor Sharad Goel found that if applied nationwide, Crosscheck would "impede 300 legal votes for every double vote prevented."[72] Moreover, the study found that "there is almost no chance that double votes could affect the outcome of a national election."[73] One of Crosscheck's problems is that it does not have reliable registration dates, which means that an election official cannot competently determine which of the two places a voter is registered is more recent and therefore which state should remove the voter.

Virginia had a major problem with Crosscheck five years ago when it tried to purge nearly 39,000 voters. Crosscheck relies on little information before concluding that registration records in different states belong to the same person. Virginia sent counties the roster of voters for removal without checking its accuracy, and counties were not furnished with any guidance about the data or sufficient time to conduct a thorough review.[74] Eligible voters were wrongly flagged as having moved from Virginia to another state when they had in fact moved *from* another state *to* Virginia.[75] Error rates in some counties ran as high as 17 percent.[76] Counties did not begin spotting errors until some had begun removing voters. At the urging of civic groups, the state issued new guidance on the use of Crosscheck data but not until thousands of voters had been purged right before a statewide election.[77]

Especially troubling is that at least four states have policies or regulations on the books providing for the use of Crosscheck in an illegal manner. Alabama,[78] Indiana,[79] and Maine[80] regulations allow counties to use Crosscheck to immediately purge voters from the rolls, without providing these voters notice and a two-election waiting period before deleting them as required by the NVRA.[81] And Arizona regulations permit removing voters based on Crosscheck in some instances within 90 days of a federal election,[82] which is not allowed under the NVRA for systematic purges such as those using Crosscheck.

Not all participating states are actively using Crosscheck data to identify and remove potentially ineligible voters. In recent years, at least eight states have left the program altogether and no longer share data with or receive data from Crosscheck.[83] Additionally, seven other states have curtailed their use of Crosscheck data by not using it for the purposes of voter-list maintenance.[84] Instead, these states either do nothing with the data they receive or use it solely to identify people who appear to have *voted* (not merely registered) in multiple states.

In the midst of publicity around lax security protocols with Crosscheck[85] and news earlier this year that Crosscheck would review its security protocols and postpone uploading data,[86] Illinois announced that it would no longer transmit data to Crosscheck.[87] A state official was quoted as saying, "we will transmit no data to Crosscheck until security issues are addressed to our satisfaction."[88] A South Carolina official expressed a similar sentiment, explaining that the state stopped using data "due to issues with verification and concerns about cybersecurity."[89] According to an attorney representing the state of Indiana in litigation related to the state's use of Crosscheck, as of May 2 of this year, Crosscheck was not accepting data from participating states while a review of security processes remained in progress.[90]

Electronic Registration Information Center (ERIC)

The Electronic Registration Information Center is a program that uses voter registration data, motor vehicle licensing information, Social Security Administration data, and National Change of Address information to identify voters who may have moved. Begun six years ago, 24 states plus the District of Columbia are enrolled in the program (or soon will be).[91] To participate in ERIC, states must submit extensive voter data, including full address, driver's license or state ID number, last four digits of social security number, date of birth, voter registration activity dates, current record status, eligibility documentation, phone number, and email address.[92] Election officials in ERIC-participating states told us they provide notice and a two-election waiting period before removing voters.[93]

Election officials reported that ERIC also helps them identify potential voters who have moved into their jurisdictions but have not registered.[94] And one analysis of ERIC's first year of operation showed increases in registrations in ERIC states relative to non-ERIC states.[95]

Although most of the election administrators that we interviewed reported positive experiences with ERIC, the new data source has its limits. Administrators from Maryland and Illinois, for example, reported that it could be difficult to determine a voter's most recent address, which is a problem for frequent movers.[96] This absence of precise

information means that, even though ERIC is generally processed at the state level, it is local officials who must identify errors and determine which registration is more current — the one in the relevant jurisdiction or a registration in another state.[97] Wisconsin, meanwhile, reported that although ERIC was helpful in updating more than 25,000 registration addresses in 2017 and 2018, it also resulted in more than 1,300 voters signing "supplemental poll lists" at a spring 2018 election, indicating that they had not in fact moved and were wrongly flagged.[98]

Efforts to Purge Noncitizens Are More Frequent and Often Rely on Flawed Data

The Brennan Center's 2008 study found that attempts to purge noncitizens were rare. Back then only two states, Texas and Virginia, had laws mandating specific procedures for identifying noncitizens.[99] In the last decade, four more states — Georgia, Iowa, Minnesota, and Tennessee — have passed laws requiring removal of noncitizens.[100] More states are likely to pass such laws because of pressure to aggressively search for and delete noncitizen registrations.

As is true with other purges, the information relied upon to purge alleged noncitizens can be inaccurate. For example, at least 14 states have sought access to the federal Systematic Alien Verification for Entitlements (SAVE) program,[101] which checks several databases to ascertain the residence or citizenship status of people who have contacted benefit-granting agencies.[102] Some states, such as Virginia, were granted access. However, states found the database is useful only if an election administrator has someone's alien identification number, information election officials typically do not possess.[103]

Some states use driver's license data to purge noncitizens. Minnesota, Tennessee, and Virginia have statutes mandating this approach. Generally, driver's license data is deployed in one of two ways.[104] One involves review of documents the registrant provided to the driver's license office when obtaining a license. If a person showed a Permanent Resident Card, the presumption is that the registrant is a noncitizen and should be removed from the rolls. The problem, however, is that a person can lawfully not update their driver's license information for many years, in which time they may have become a citizen.[105]

States may also scour their voter lists for those who did not check the box indicating that they were a citizen on their driver's license application or renewal. Virginia has a specific statutory provision requiring this; Maryland does not but still engages in the practice.[106] Not surprisingly, election officials told us that sometimes citizens fail to check the citizenship box.[107]

In addition, at least three states (Georgia, Louisiana, and Texas) remove voters if they decline jury service on the grounds of noncitizenship.[108] But election officials told the Brennan Center in a 2017 report on noncitizen voting that eligible voters have been known to assert they are noncitizens solely for the purpose of evading jury duty. While illegal, these declarations are not necessarily indicative that a noncitizen has been registered to vote.[109]

Activist Groups Pressing for More Aggressive Purges

Another new dynamic is activist groups agitating for election officials to purge the rolls more aggressively. In the past, litigation was often used by groups seeking to protect voters *against* bad voter purges. For example, civic groups prevented voters from being illegally purged in Michigan in 2008,[110] Colorado in 2010,[111] and Florida in 2012.[112]

From 1998 through 2007, most of the litigation seeking purges was brought by the Justice Department — which made voter purges a priority in the midst of a failed nationwide voter fraud hunt[113] — whereas private plaintiffs typically brought suits because they were worried eligible people would be improperly purged. From 2008 to the present however, more than half of the 32 federal purge-related lawsuits brought by private parties have been filed by plaintiffs who believed that jurisdictions are not purging enough names from the rolls.[114]

In nine cases brought by private parties since 2012, election officials agreed to undertake more aggressive list maintenance.[115] One of the defendants in these cases was Noxubee County, a poor, rural, majority-Black county in eastern Mississippi that was sued by the American Civil Rights Union (ACRU, not to be confused with the American Civil Liberties Union).

"They went after minority counties who didn't have the financial resources to push back," said Willie M. Miller, the Election Commissioner for Noxubee County's fourth district.[116] As of this writing, the ACRU is suing Starr County and the State of Texas[117] for failing to purge aggressively enough, and the like-minded Judicial Watch has brought litigation in California.[118]

Unfortunately, this litigation has consequences. The ACRU lawsuit against Noxubee County resulted in about 1,500 (more than 12 percent) of its 9,000 voters being made inactive.[119] Being designated as inactive is the first stage of the removal process. The waiting period of two federal elections has yet to expire, so it's unclear at this juncture how many voters will ultimately be removed.[120] Similarly, Judicial Watch's 2012 suit against Indiana[121]

arguably led to the state undertaking more aggressive list maintenance. Before the suit was dismissed, Indiana announced that it had sent an "address confirmation mailing to all voters" and undertook other purging initiatives that led to more than 480,000 canceled registrations after the 2016 election.[122] Judicial Watch boasted that their lawsuit "forced" Indiana to undertake additional purge practices;[123] Indiana first sent out the required federal notices in 2014, then purged voters who did not respond and did not vote in 2014 or 2016.

Litigation is but one element of a broader strategy by these groups to force purges. In 2016, the Public Interest Legal Foundation published a report entitled "Alien Invasion in Virginia," complete with a flying saucer on the cover. Extrapolating from a small sample, the missive misleadingly suggested thousands of votes had been cast by noncitizens,[124] a claim election officials dispute.[125] The Foundation's pressure may have had an impact: Six hundred ninety-three alleged noncitizens were purged in the 2016 reporting period, but that number more than doubled to 1,686 in the 2017 period.[126] The purge has spawned yet more litigation, with several voters complaining that they were wrongly deleted, and the Public Interest Legal Foundation has been sued for defamation and illegal voter intimidation.[127] Election fraud vigilantes have also brought mass challenges to voters' registrations, including in North Carolina, where a judge blocked the practice.[128]

CHALLENGES CONTINUE

In at least 15 states, "challenge" laws permit challenges to the validity of a voter's registration prior to Election Day (additional states allow challenges to eligibility at the time of voting only).[1] These challenge laws, which are designed to allow for questioning the eligibility of registered voters on a case-by-case basis, have been used recently in several states to try to systematically remove voters from the rolls, functioning effectively as a purge that can operate outside the NVRA's protections. The use of challenge laws as back doors for purging is legally dubious and increases the risk of wrongful removals; precisely what has happened in some states.

Colorado's former secretary of state, Scott Gessler, matched the voter rolls against driver's license lists to produce a large (and inflated) list of potential noncitizens. He then attempted to use his state's challenger laws to remove voters en masse. After much public criticism, Gessler abandoned the effort.[2]

In Hancock County, Georgia, the majority-white Board of Elections used challenge procedures in the weeks leading up to a 2015 municipal election to challenge 174 voters — nearly 20 percent of the town of Sparta's electorate. The majority of the challenged voters were Black. Some of the challenges were based on as little evidence as a discrepancy between a voter registration address and an address record in a flawed driver's license database. Other challenges were based on second-hand claims that a voter had moved out of the county.[3] After being sued, the county agreed to reinstate wrongfully challenged voters who had been removed from registration lists.[4]

Iowa's former secretary of state, Matt Schultz, tried to use challenges to remove suspected noncitizens from the rolls, but he was blocked by a court.[5]

And in North Carolina, a federal court ruled in 2016 that local boards of elections likely violated the NVRA (52 U.S.C. § 20507(c)(2)(A)) when they systematically purged hundreds of voters through citizen-initiated challenge procedures fewer than 90 days before the general election. The judge based her ruling on the systematic purge occurring within the prohibited window, but she also remarked that the challenge process, which allows voters to be removed if they do not show up at a hearing upon being challenged based on second-hand evidence of a move, seemed "insane."[6] Nevertheless, state lawmakers expressly rejected legislation that would have made it more difficult to sustain a voter challenge on this basis.[7]

1 Nicholas Riley, *Voter Challengers* (New York: Brennan Center for Justice, August 2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf.
2 "Scott Gessler Decides Not To Proceed With Voter Purge After All," *HuffPost*, September 12, 2012, https://www.huffingtonpost.com/2012/09/10/scott-gessler-decides-not_n_1871524.html.
3 Complaint, Georgia NAACP et al v. Hancock County Bd. Of Elec. and Registration, No. 5:15-cv-00414 (M.D. Ga. Filed Nov. 3, 2015), https://lawyerscommittee.org/wp-content/
4 Kathleen Foody, "Georgia County Agrees to Restore Black Voters' Rights," *Associated Press*, March 8, 2017, https://www.usnews.com/news/best-states/georgia/articles/2017-03-08/georgia-county-to-restore-black-voters-rights-under-us-law. uploads/2016/01/Hancock-Co-Complaint.pdf.
5 Ruling, Am. Civ. Liberties Union v. Schultz, No. CV00931 (Iowa D. Polk March 5, 2014).
6 "North Carolina Voter Challenge Process Seems 'Insane,' Judge Says," *Associated Press*, November 2, 2016, https://www.cbsnews.com/news/north-carolina-voter-challenge-process-seems-insane-judge.
7 H. 303, Sess. 2017 (N.C. 2017), https://www2.ncleg.net/BillLookup/2017/H303.

Solutions

While no one disputes the rolls should be accurate, voters should be protected from wrongful purges. There are several ways to safeguard voters from overly aggressive list maintenance:

- **Enforce the National Voting Registration Act's Protections.**
  The NVRA permits an aggrieved voter to sue if a jurisdiction has been informed of a possible violation and does not correct it in a set period of time. Litigation to enforce the NVRA is especially crucial in a time when the Justice Department is unlikely to enforce voter protections and outside groups are agitating for more aggressive purges. Of course, most voters do not have the expertise or resources to bring such litigation. Therefore it is critically important that civil rights and other pro-voter organizations rigorously monitor purge activity and have the wherewithal to sue when necessary.

- **States Should Enact Laws That Provide Even More Protections than the National Voter Registration Act.**
  While the NVRA includes critical voter protections, states should do more. For example, the NVRA requires that voters suspected of moving from the jurisdiction receive notice of their possible removal. Not surprisingly, most states do not provide notice beyond what is federally required. For example, most states do not provide notice to voters purged based on death or a disenfranchising conviction, and many of those states that do provide notice in these circumstances do so only after the fact. States should surpass these minimal standards. No matter the reason, all voters should be informed in advance of their possible deletion and should be provided easy mechanisms for correcting errors on or before Election Day.

- **Enact Automatic Voter Registration.**
  Automatic voter registration is a popular reform that minimizes errors, saves money, and increases registration of eligible citizens. Automatic voter registration has two key features: (1) eligible citizens are registered unless they affirmatively decline; and (2) voter registration information is electronically transferred from a government office to election officials instead of relying on pen and paper. Currently, 12 states plus the District of Columbia have approved automatic voter registration.[129] In addition to adding more voters to the rolls, automatic voter registration also catches more address updates, reducing the need for change-of-address voter purges.

Endnotes

1 In the two-year election cycle ending in 2008, the Brennan Center found the median jurisdiction purged 6.2 percent of voters. For the two years ending in 2016, this study finds that the purge rate of the median jurisdiction had increased to 7.8 percent. We examined 49 states because North Dakota has no advance voter registration requirement and thus does not have required voter registration lists to purge. The state does keep records of individuals who vote, but it is not necessary to be on any registration list at the time of voting to cast ballots. Although there are other impediments to voting in North Dakota, including a strict photo ID law, voters do not face barriers related to voter registration in the state.

2 We assessed 49 states on the following criteria: First, whether the state used the Interstate Voter Registration Crosscheck program in a way that is problematic or not compliant with the NVRA. We found five states deficient in this category. Second, whether the state makes readily available lists of purged voters. We found 49 states deficient in this category (at least 10 states have statutory requirements for making some names of purged voters available, but all fail to do so in practice). Third, whether states provide prior notice to all voters purged on the basis of death, felony conviction, or noncitizenship. We found 49 states deficient in this category (21 states have statutory requirements whereby voters purged on the basis of death or felony conviction receive notice before or after the purge, but no state requires prior notice to voters purged for both categories). For additional recommendations to guard against unlawful or problematic voter purges and why they are important, see Myrna Pérez, *Voter Purges* (New York: Brennan Center for Justice, September 2008), 25-31, https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf.

3 Calculated from total numbers reported to the Elections Assistance Commission in 2008 and 2016. Compare U.S. Election Assistance Commission, 2008 Election Administration and Voting Survey, https://www.eac.gov/research-and-data/2008-election-administration-voting-survey/, and U.S. Election Assistance Commission, 2016 Election Administration and Voting Survey, https://www.eac.gov/research-and-data/2016-election-administration-voting-survey/.

4 These previously covered areas had median purge rates of 9.5 percent, while noncovered jurisdictions had median purge rates of 7.5 percent.

5 The median county purge rate in the 2008-10 election cycle was 8.4 percent. But in the election cycle including the *Shelby County* decision, 2012-14, the purge rate jumped 26 percent to a median county purge rate of 10.6 percent.

6 Myrna Pérez, *Voter Purges* (New York: Brennan Center for Justice, September 2008), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf.

7 Omitting North Dakota, as explained above.

8 We served public records requests on election officials and their offices at the state and local levels in 22 states and sought interviews with election officials in 45. The numbers referenced in the text refer to respondents.

9 U.S. Election Assistance Commission, *2016 Election Administration & Voting Survey*, June 2017, https://www.eac.gov/research-and-data/election-administration-voting-survey/.

10 Not all jurisdictions report their data consistently. Whenever we make comparisons across time periods, we restrict our sample to the counties reporting consistently. For instance, 2,394 jurisdictions report removal data for each of the two-year periods ending in 2010, 2012, 2014, and 2016. Our analysis exploring the impact of the end of the preclearance condition of the Voting Rights Act looks only at these counties to ensure an apples-to-apples comparison.

11 U.S. Election Assistance Commission, *2016 Election Administration & Voting Survey*, June 2017, https://www.eac.gov/research-and-data/election-administration-voting-survey/. Sixteen million is in fact a conservative estimate because it includes only voters removed from jurisdictions who reported their data to the EAC in 2016. It therefore does not include voters removed during some problematic purges such as that in Kings County (Brooklyn), NY (discussed above).

12 National Voter Registration Act of 1993, H.R. 2, 103rd Cong. (1993), 52 U.S.C. § 20507, is the main source of

federal requirements. For more information on federal law around purges, see Appendix A.

13 Some states are not required to follow the National Voter Registration Act. The NVRA exempts the following states from its purge protocols because those states had Election-Day registration or lacked voter-registration requirements on or after August 1, 1994: Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. National Voter Registration Act of 1993, H.R. 2, 103rd Cong. (1993) 52 U.S.C. § 20504(b). This reflects Congress's assessment that purge consequences are much less grave in a state that permits anyone eligible who is not on the registration rolls to register and vote on Election Day.

14 "Criminal Disenfranchisement Laws Across the United States," Brennan Center for Justice, last modified April 18, 2018, https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states.

15 Ala. Code § 17-4-3(a) (requiring removal "whenever…a person registered to vote in that county has…been declared mentally incompetent"); Ariz. Rev. Stat. Ann. § 16-165(C) (requiring removal "[w]hen proceedings…result in a person being declared incapable of taking care of himself and managing his property, and for whom a guardian of the person and estate is appointed, result in such person being committed as an insane person"); Del. Code Ann. tit. 15, §§ 1701(a), 1702 (requiring removal of "person adjudged mentally incompetent…[which] refers to a specific finding in a judicial guardianship or equivalent proceeding, based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment"); Fla. Stat. Ann. § 98.075(4) (requiring removal for "registered voters who have been adjudicated mentally incapacitated with respect to voting and who have not had their voting rights restored"); Ga. Code Ann. § 21-2-231(b) (requiring removal "[of those] who were declared mentally incompetent during the preceding calendar month in the county and whose voting rights were removed"); Haw. Rev. Stat. Ann. § 11-23(a) (requiring removal "[of person] adjudicate[ed] as an incapacitated person under the provisions of chapter 560…[if] after the investigation the clerk finds that the person…lacks sufficient understanding or capacity to make or communicate responsible decisions concerning voting"); Iowa Code Ann. § 48A.30(1)(e) (requiring removal "[if] [t]he clerk of the district court or the state registrar sends notice that the registered voter has been declared a person who is incompetent to vote under state law"); Ky. Rev. Stat. Ann. § 116.113(2) (requiring removal "[u]pon receipt of notification from the circuit clerk that a person has been declared incompetent"); La. Stat. Ann. § 18:172 (requiring removal "[after] judgment of full interdiction or a limited interdiction for mental incompetence which specifically suspends the right to register and vote and which has become definitive"); Code Me. R. tit. 29-250 Ch. 505, § 1(B) (requiring removal "[if] the municipality receives notice indicating that a registrant has been placed under guardianship due to mental illness"); Md. Code Ann., Elec. Law §§ 3-102(b)(2), 3-501 (requiring removal "[if person] is under guardianship for mental disability and a court of competent jurisdiction has specifically found by clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process"); Minn. Stat. Ann. § 201.145 (requiring removal "[of persons] under a guardianship in which a court order revokes the ward's right to vote or where the court has found the individual to be legally incompetent to vote"); Miss. Code. Ann. § 23-15-153(1) (requiring removal "[of voters who have] received an adjudication of non compos mentis"); Mo. Ann. Stat. § 115.199 (requiring removal "of voters…adjudged incapacitated"); Mont. Code Ann. § 13-2-402(3) (requiring removal "[if] the elector is of unsound mind as established by a court"); Neb. Rev. Stat. Ann. §§ 32-313(1), 32-326 (requiring removal "[of person] who is non compos mentis"); Nev. Rev. Stat. Ann. § 293.540(2)(b) (requiring removal "[if] the county clerk is provided a certified copy of a court order stating that the court specifically finds by clear and convincing evidence that the person lacks the mental capacity to vote because he or she cannot communicate, with or without accommodations, a specific desire to participate in the voting process"); N.M. Stat. Ann. § 1-4-26 (requiring removal "[w]hen in proceedings held pursuant to law, the district court determines that a mentally ill individual is insane as that term is used in the constitution of New Mexico"); N.Y. Elec. Law § 5-400(1)(c) (requiring removal "[of voter who] has been adjudicated an incompetent"); Ohio Rev. Code Ann. § 3503.18(B) (requiring removal of persons "who have been adjudicated incompetent for the purpose of voting, as provided in section 5122.301 of the Revised Code"); Okla. Stat. Ann. tit. 26, § 4-120.5 (requiring removal "of all persons who have been adjudged incapacitated"); S.C. Code Ann. § 7-5-340(1)(b) (requiring removal "if the elector is adjudicated mentally incompetent by a court of competent jurisdiction"); S.D. Codified Laws § 12-4-18 (requiring removal "of persons declared mentally incompetent"); Tex. Elec. Code Ann. § 16.031(a)(3) (requiring removal "on receipt of…an abstract of a final judgment of the voter's total mental incapacity, partial mental incapacity without the right to vote…or disqualification under Section 16.002"); Wash. Rev. Code Ann. § 29A.08.515 (requiring removal "[u]pon receiving official notice that a court has imposed a guardianship for an incapacitated person and has

determined that the person is incompetent for the purpose of rationally exercising the right to vote, under chapter 11.88 RCW"); W.Va. Code, § 3-2-23(3) (requiring removal "[u]pon receipt of a notice from the appropriate court of competent jurisdiction of a determination of a voter's mental incompetence"); Wis. Stat. Ann. §§ 6.03, 6.48, 6.935 (requiring removal "[through challenge] [of a]ny person who is incapable of understanding the objective of the elective process or who is under guardianship, unless the court has determined that the person is competent to exercise the right to vote"); W.S.1977 §§ 22-3-102(a)(iv), 22-3-115(a)(iv) (requiring removal "[of person] currently adjudicated mentally incompetent"). Additional states provide for loss of eligibility on these grounds but do not specifically describe the manner of removal. See Michelle Bishop, "Disability Is No Reason to Strip a Person's Voting Rights," *HuffPost*, May 12, 2018, https://www.huffingtonpost.com/entry/opinion-bishop-disability-voters_us_5af-5b085e4b0e57cd9f9042f.

16 See Doe v. Rowe, 156 F. Supp.2d 35 (D. Me. 2001); Minnesota Voters Alliance v. Ritchie, 890 F.S. 2d 1106 (August 17, 2012); in re Guardianship of Brian W. Erickson, 4th Judicial District, Dist. Ct., Probate/Mental Health Division (October 12, 2012); see also Matt Vasilogambros, "Thousands Lose Right to Vote Under 'Incompetence' Laws," *HuffPost*, March 21, 2018, https://www.huffingtonpost.com/entry/thousands-lose-right-to-vote-under-in-competence-laws_us_5ab25f7ce4b004fe24699810.

17 E.g., Alaska Stat. Ann. § 15.07.130(c) (requiring use of information from bureau of vital statistics); Wash. Rev. Code Ann. § 29A.08.510(2) (permitting use of obituaries); Tex. Elec. Code Ann. § 16.001 (requiring use of Social Security Administration information).

18 Montana Code Ann. § 13-2-220.

19 Conn. Gen. Stat. § 9-32.

20 Ga. Code Ann. § § 21-1-231(a.1)(b) (requiring clerk of superior court to forward noncitizen jury declinations and requiring election officials to remove names from voter list, La. Stat. Ann. § 18:178 (requiring clerk of the court to provide names of individuals who respond to jury notices saying they are noncitizens to Department of State); Minn Stat. Ann. § 201.145 (requiring county auditor to send to county attorney list of names of individuals who are registered to vote and not citizens); Tenn. Code Ann. § 2-2-141 (requiring coordinator of elections to compare registration list with Department of Safety database to ensure non-United States citizens are not registered to vote); Tex. Elec. Code Ann. § 16.0332 (requiring registrar to initiate voter removal process for voters for whom the registrar receives a notice of disqualification or excusal from jury service because of citizenship status); Va. Code Ann. § 24.2-404(A)(4) (requiring registrars to delete record of registered voters known not to be a citizen from reports of Department of Motor Vehicles or Systematic Alien Verification for Entitlements Program).

21 Throughout this document we report median removal rates. The median is the appropriate measure of central tendency because of how the removal rate data are distributed. Because some jurisdictions have very high removal rates, while most are clustered close to the lower bound of zero, using the mean would artificially bias reported numbers upward.

22 "About Section 5 of the Voting Rights Act," The United States Department of Justice, accessed May 24, 2018, https://www.justice.gov/crt/about-section-5-voting-rights-act.

23 Shelby County v. Holder, 570 U.S. 2 (2013).

24 Between the presidential elections of 2008 and 2012, the median two-year removal rate for both previously covered and noncovered jurisdictions was 7.5 percent. Throughout this section, we limit our analysis to jurisdictions that reported removal rates for each of the two-year periods ending 2010, 2012, 2014, and 2016. Kings County, New York, for instance, did not report removal rates for the two years ending 2016 and thus is excluded from the entire pre/post *Shelby* analysis. It is important to note that this does not meaningfully impact our analysis: The median removal rate in 2016 for counties that reported their data each year was 7.9 percent compared to 7.6 percent for jurisdictions that reported their data in 2016 but also failed to do so in at least one other year. To maintain consistency with discussions of two-year removal rates elsewhere in this report, we continue to use two-year removal rates here. For instance, Escambia County, Florida, removed 0.42 percent of its voters between 2008 and 2010, and 0.42 percent again between 2010 and 2012. Here we call their median *two-year* removal rate 0.42 percent. Their four-year removal rate would, of course, be higher. We group the data into four-year buckets because of the natural variation in removal rates between presidential and nonpresidential election cycles.

25 Formerly covered jurisdictions are disproportionately located in the southeastern part of the country. We considered the possibility that the increased purge rate is attributable to some regional factor or factors aside from the lifting of the preclearance requirements. To control for this, we repeated the above analysis but restricted our sample to just those states in the Southeast (AL, FL, GA, KY, MS, NC, SC, TN, VA, and WV). Among jurisdictions in the Southeast that consistently reported their data, 461 counties were covered under the Voting Rights Act and 388 were not. We found that even within the Southeast, formerly covered jurisdictions increased their purge rates more than their noncovered peers. In fact, noncovered jurisdictions in the Southeast did not increase their removal rates between the two periods. The increase in removal rates in previously covered jurisdictions in this region mirrored those of the group of covered jurisdictions as a whole:

	Federal Election 2008-12	Federal Election 2012-16
Previously Covered	7.2%	9.7%
Not Covered	6.6%	6.6%

Nor can the difference in purge rate be explained by differences in partisan tendency. Formerly covered counties are more Republican-leaning than the nation as a whole. Within counties that reported data consistently to the EAC, President Donald Trump received 51 percent of the ballots cast in counties that required preclearance prior to Shelby, but just 46 percent of the ballots cast in noncovered jurisdictions. To test the possibility that Republican-leaning counties were more likely to increase their removal rates regardless of their status under the Voting Rights Act, we compared the 409 previously covered jurisdictions that Trump received more votes than Hillary Clinton to the 1,594 noncovered jurisdictions in which he did so.

	Federal Election 2008-12	Federal Election 2012-16
Previously Covered	7.3%	9.4%
Not Covered	7.5%	7.4%

Removal rates in noncovered jurisdictions that Trump won did not increase their removal rates at all. Trump-supporting jurisdictions that were previously covered, however, increased their removal rates substantially. Clearly, the increase in removal rates among the jurisdictions that were covered under the VRA was not a function of an electorate likely to support Donald Trump. *Sources: Townhall.com,* https://townhall.com/election/2016/president; *and SouthEastern Division of the Association of American Geographers,* http://sedaag.org.

26 See Appendix B.

27 See Appendix C. While not a perfect predictor because there are many reasons why a voter might cast a provisional ballot, our finding that high provisional ballot numbers are probative as to the existence of a purge are corroborated by other experts in the field. See, for example, U.S. Commission on Civil Rights, *Briefing Report: Department of Justice Voting Rights Enforcement for the 2008 U.S. Presidential Election* (Washington: July 2009) (summarizing testimony of Dan Tokaji), http://www.usccr.gov/pubs/DOJVotingRights2008PresidentialElection.pdf.

28 Tim Reid and Grant Smith, "Missing Hyphens Will Make It Hard for Some People to Vote in U.S. Election," *Reuters*, April 11, 2018. https://www.reuters.com/article/us-usa-election-laws/missing-hyphens-will-make-it-hard-for-some-people-to-vote-in-u-s-election-idUSKBN1HI1PX. Georgia's practice of purging voters on the basis of not voting was also challenged. See Georgia State Conf. of the NAACP v. Kemp, No. 2:16-cv-219, filed Sept. 14, 2016 (N.D. Ga.); Common Cause v. Kemp, No. 1:16-cv-00452, filed Feb. 10, 2016 (N.D. Ga.). See also Tony Pugh, "Georgia Secretary of State Fighting Accusations of Disenfranchising Minority Voters," *McClatchy*, October 7, 2016, http://www.mcclatchydc.com/news/politics-government/article106692837.html; Regina Willis, "More Than 380,000 Georgia Voters Receive 'Purge Notice,'" *Rewire.News*, July 21, 2017, https://rewire.news/article/2017/07/21/more-380000-georgia-voters-received-purge-notice/.

29 Overall, 54% of voters lived in counties in which the removal rate increased. Numbers are drawn from counties that reported data in both 2010 and 2014, a set representing 94% of total Texas voters.

30 Veasey v. Perry, 71 F.Supp.3d 627 (S.D. Tex. 2014).

31 Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc) *cert. denied*, 137 S. Ct. 612 (2017).

32 National Voter Registration Act of 1993, H.R. 2, 103rd Cong. (1993), 52 U.S.C. § § 20507(b), (c)(2), (d)(2).

33 Holly Dickson (Legal Director, Arkansas Civil Liberties Union Foundation) to Hon. Mark Martin (Arkansas Secretary of State), October 31, 2016, 3, https://www.acluarkansas.org/sites/default/files/field_documents/369.pdf; John Lyon, "Hutchinson: Clerks Should Lean Toward Letting People Vote," *Arkansas News*, August 4, 2016, http://www.arkansasnews.com/news/20160804/hutchinson-clerks-should-lean-toward-letting-people-vote.

34 In Arkansas, those convicted of a felony are ineligible to vote "unless the person's sentence has been discharged or the person has been pardoned." Ark. Const. Amend. 51, § 9(a)(1).

35 More than 4,000 people were incorrectly included on the list. See John Lyon, "Hutchinson: Clerks Should Lean Toward Letting People Vote," *Arkansas News*, August 4, 2016, http://www.arkansasnews.com/news/20160804/hutchinson-clerks-should-lean-toward-letting-people-vote. Pulaski County found that at least 300 of the 1,800 Pulaski County residents on the list belonged to people who were "completely innocent." Matthew Mershon, "Pulaski Co. Clerk Says Sec. of State Needs to Take Responsibility in Possible Voter Purge," *KATV*, August 13, 2016, http://katv.com/news/local/pulaski-co-clerk-says-sec-of-state-needs-to-take-responsibility-in-possible-voter-purge.

36 See Benjamin Hardy, "Data Mix-Up from Ark. Secretary of State Purges Unknown Number of Eligible Voters," *Arkansas Blog*, *Arkansas Times*, July 25, 2016, https://www.arktimes.com/ArkansasBlog/archives/2016/07/25/data-mix-up-from-ark-secretary-of-state-purges-unknown-number-of-eligible-voters; Brenda Blagg, "Taking a Vote: State Botches Inmate Report to County Clerks," Between the Lines, *Northwest Arkansas Democrat-Gazette*, July 27, 2016.

37 See Benjamin Hardy, "Data Mix-Up from Ark. Secretary of State Purges Unknown Number of Eligible Voters," *Arkansas Blog*, *Arkansas Times*, July 25, 2016, https://www.arktimes.com/ArkansasBlog/archives/2016/07/25/data-mix-up-from-ark-secretary-of-state-purges-unknown-number-of-eligible-voters.

38 See Brian Fanney, "20,000 Cases Erroneously Listed Felonies," *Arkansas Democrat-Gazette*, Sep. 3, 2016, https://www.pressreader.com/usa/arkansas-democrat-gazette/20160903/281496455722563.

39 Jason Kennedy (Assistant Chief Deputy Clerk, Pulaski County, Arkansas), interview by Brennan Center for Justice, June 8, 2018.

40 See Julián Aguilar, "Voter Purge Bill Raises Concerns After Living Flagged as Possibly Dead," *The Texas Tribune*, September 12, 2012, https://www.texastribune.org/2012/09/12/concerns-raised-after-living-voters-flagged-dead/.

41 2011 Tex. Sess. Law Serv. Ch. 683 (H.B. 174), https://capitol.texas.gov/tlodocs/82R/billtext/pdf/HB00174F.pdf#navpanes=0.

42 See Myrna Pérez, *Voter Purges* (New York: Brennan Center for Justice, September 2008), 20 https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf.

43 See Defendant Andrade's Notice Of Withdrawal, Plea To The Jurisdiction, And Motion To Dissolve The Temporary Restraining Order, Moore v. Morton, No. D-1-GN-12-002923 (Dist. Ct. Travis Cnty. Tex. Sept. 21, 2012). See also Chuck Lindell, "State Settles Lawsuit on 'Dead' Voter Purge," *American-Statesman*, October 3, 2012, https://www.statesman.com/news/state--regional-govt--politics/state-settles-lawsuit-dead-voter-purge/n1zTG10Yiyobma3AlT7QSJ/.

44 Corrie MacLaggan, "Texas Voter Purge Lawsuit Ends with Clarification Memo on Process for Clearing Rolls," *Reuters*, October 3, 2012, https://www.huffingtonpost.com/2012/10/03/texas-voter-purge-lawsuit_n_1937564.html.

45 Lise Olsen, "Texas' voter purge made repeated errors," *Houston Chronicle*, November 2, 2012, https://www.chron.com/news/politics/article/Texas-voter-purge-made-repeated-errors-4001767.php.

46 Ibid.

47 See Notice to the Court of Rule 11 Agreement, Moore v. Morton, No. D-1-GN-12-002923 (Dist. Ct. Travis Cnty. Tex. Oct. 3, 2012); see also Chuck Lindell, "State Settles Lawsuit on 'Dead' Voter Purge," *American-Statesman*, October 3, 2012, https://www.statesman.com/news/state--regional-govt--politics/state-settles-lawsuit-dead-voter-purge/n1zTG10Yiyobma3AlT7QSJ/.

48 See Marjorie Landa, *Audit Report on the Board of Elections' Controls over the Maintenance of Voters' Records and Poll Access* (New York: City of New York Office of the Comptroller, November 2017), 9, https://comptroller.nyc.gov/reports/audit-report-on-the-board-of-elections-controls-over-the-maintenance-of-voters-records-and-poll-access/.

49 Ibid.

50 New York State Office of the Attorney General, "A.G. Schneiderman Moves to Intervene in Lawsuit Against NYC Board of Elections Regarding Voter Registration Purges," news release, January 27, 2017, https://ag.ny.gov/press-release/ag-schneiderman-moves-intervene-lawsuit-against-nyc-board-elections-regarding-voter.

51 Brigid Bergin, John Keefe, and Jenny Ye, "Brooklyn Voter Purge Hit Hispanics Hardest," *WNYC*, June 21, 2016, https://www.wnyc.org/story/brooklyn-voter-purge-hit-hispanics-hardest/.

52 The other major federal statute regulating voter purges is the Help America Vote Act of 2002 (HAVA) 52 U.S.C. § 21083(a). The law reaffirms requirements of the NVRA and contains additional regulations for the maintenance of voter lists, requires states to set up unique identifying numbers for registered voters, requires states to attempt to verify the validity of information submitted by voter registration applicants, and ensures certain voters, including those missing from the voter rolls, can cast provisional ballots.

53 Under the Bush Administration, the DOJ filed several suits against jurisdictions for failing to purge enough voters. Office of the Inspector General, U.S. Department of Justice, *A Review of the Operations of the Voting Section of the Civil Rights Division* (2013), 97, https://oig.justice.gov/reports/2013/s1303.pdf. See also Steven Rosenfeld, "Voter Purging: A Legal Way for Republicans to Swing Elections?" *AlterNet*, September 11, 2017, http://web.archive.org/web/20071118161151/http:/www.alternet.org/story/62133/. The Department also pressured a U.S. Attorney to sue Missouri, even though St. Louis had improperly purged 50,000 voters only 4 years earlier. After that U.S. Attorney refused, he was fired. Jonathan Brater, Brennan Center for Justice, "The Purge: Ten Years Later?" June 30, 2017, https://www.brennancenter.org/blog/purge-ten-years-later.

54 See, e.g., "Cases Raising Claims Under the National Voter Registration Act," U.S. Department of Justice, last modified October 16, 2015, https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act; U.S. Attorney's Office, Eastern District of New York, "United States Announces Settlement with New York City Board of Elections Resolving Improper Removal of Voters from Registration Rolls," news release, October 31, 2017, https://www.justice.gov/usao-edny/pr/united-states-announces-settlement-new-york-city-board-elections-resolving-improper; U.S. Department of Justice, Office of Public Affairs, "State of Connecticut Agrees to Resolve Claims of National Voter Registration Act Violations," news release, August 5, 2016, https://www.justice.gov/opa/pr/state-connecticut-agrees-resolve-claims-national-voter-registration-act-violations; U.S. Department of Justice, Office of Public Affairs, "State of Alabama Agrees to Resolve Claims of National Voter Registration Act Violations," news release, November 13, 2015, https://www.justice.gov/opa/pr/state-alabama-agrees-resolve-claims-national-voter-registration-act-violations; see also Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1343–48 (11th Cir. 2014) (finding Florida's purge violated the NVRA's prohibition on systematic purges within 90 days of a federal election).

55 Ibid.

56 Brief for the League of Women Voters et al as Amicus Curiae supporting Respondents 17, Husted v. A. Philip Randolph Institute, No. 16-980 (2017).

57 Brief for the United States as Amicus Curiae supporting Petitioner, Husted v. A. Philip Randolph Institute, No. 16-980 (2017).

58 See "Husted v. A. Philip Randolph Institute," Brennan Center for Justice, last modified June 11, 2018, https://www.brennancenter.org/legal-work/husted-v-philip-randolph-institute-0.

59 See Pam Fessler, "Advocates Worry Trump Administration Wants to Revamp Motor Voter Law," *NPR*, July 8, 2017, https://www.npr.org/2017/07/08/536006813/advocates-worry-trump-administration-wants-to-revamp-motor-voter-law; Jonathan Brater, Brennan Center for Justice, "The Purge: Ten Years Later?," June 30, 2017, https://www.brennancenter.org/blog/purge-ten-years-later. For an example of the letters, see https://assets.documentcloud.org/documents/3881818/SOS-Letter.pdf.

60 For example, Vanita Gupta (CEO of the Leadership Conference on Civil and Human Rights and former head of DOJ's civil rights division under President Barack Obama) said that, "[i]t is not normal for the Department of

Justice to ask for voting data from all states covered by the National Voter Registration Act. It's likely that this is instead the beginning of an effort to force unwarranted voter purges." Sam Levine, "This DOJ Letter May Be More Alarming Than Trump Commission's Request For Voter Data," *HuffPost*, July 5, 2017, https://www.huffingtonpost.com/entry/department-of-justice-voter-purge_us_595d22b1e4b0da2c7326c38b. See also Leon Neyfakh, "How Trump's DOJ Will Try to Purge Voter Rolls," *Slate*, July 11, 2017, http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/how_trump_s_doj_will_try_to_purge_voter_rolls.html (describing DOJ letters as "a first step toward bringing back a George W. Bush–era strategy of forcing states to aggressively purge their voter rolls under threat of litigation"). The Department did intervene in a lawsuit filed against Kentucky by a private plaintiff organization seeking more aggressive purging. Judicial Watch, Inc. v. Grimes, 3:17-cv-00094, filed November 14, 2017 (E.D. Ky.).

61 Kansas State Rep. Keith Esau, "Interstate Voter Registration Crosscheck Program" (PowerPoint presentation, National Conference of State Legislators, Williamsburg, VA, June 15, 2017), 5, http://www.ncsl.org/Portals/1/Documents/Elections/Kansas_VR_Crosscheck_Program.pdf.

62 "ERIC," Electronic Registration Information Center, accessed May 24, 2018, http://www.ericstates.org/.

63 Christopher Famighetti, Douglas Keith, and Myrna Pérez, *Noncitizen Voting: The Missing Millions* (New York: Brennan Center for Justice, May 2017), https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf.

64 Public Interest Legal Foundation, "248 Counties Have More Registered Voters Than Live Adults," news release, September 25, 2017, https://publicinterestlegal.org/blog/248-counties-registered-voters-live-adults/. The Brennan Center for Justice and other civil rights groups contacted the same jurisdictions to notify them that some information provided by the organization was misleading. Brennan Center for Justice, "Civil Rights Groups Launch National Effort to Combat Alarming Voter Purge Attempt," news release, November 22, 2017, https://www.brennancenter.org/press-release/civil-rights-groups-launch-national-effort-combat-alarming-voter-purge-attempt.

65 See Myrna Pérez, *Voter Purges* (New York: Brennan Center for Justice, September 2008), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf.

66 Missouri, Iowa, Nebraska, and Kansas. See Memorandum of Understanding Between the State of Iowa, Nebraska, and Kansas For the Improvement of Election Administration, December 2005 (on file with the Brennan Center for Justice).

67 These states were Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia. This information is derived from a spreadsheet obtained from officials in Idaho via public records request (on file with the Brennan Center for Justice).

68 Ibid.

69 Ibid. Some of these matches could also include individuals matched in more than 2 states, so the number of individuals could be lower than 3.6 million.

70 Interstate Voter Registration Crosscheck Program, *2017 Participation Guide*, January 2017, goo.gl/zbsygH.

71 See *infra* text box describing limitations of name and birthdate matching.

72 Sharad Goel et al., "One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections" (working paper, Stanford University et al., 2017), 3, 26, https://scholar.harvard.edu/files/morse/files/1p1v.pdf.

73 Ibid. 27.

74 See Jonathan Brater, Brennan Center for Justice, "Virginia Offers Lessons for Voter List Maintenance," November 25, 2013, https://www.brennancenter.org/analysis/virginia-offers-lessons-voter-list-maintenance.

75 See Jim Nolan, "Chesterfield Registrar Delays Purge of Voter Rolls," *Richmond Times-Dispatch*, October 9, 2013, http://www.richmond.com/news/local/chesterfield/chesterfield-registrar-delays-purge-of-voter-rolls/article_162e36b5-0be7-5dc8-af9f-48876a167b43.html.

76 Ibid.

77 See Matthew Barakat, "Va. Removes 40K From Voter Rolls Over Democrats' Objections," *Richmond Times-Dispatch*, October 17, 2013, http://www.richmond.com/news/state-regional/va-removes-k-from-voter-rolls-over-democrats-objections/article_2d111de4-49de-523b-bd9c-5d93b7c0a00e.html. Virginia subsequently began to release reports explaining, among other things, the way Crosscheck data was used. They found that only 10 percent of Crosscheck matches were usable for list maintenance. Virginia Department of Elections, *Annual List Maintenance Report*, 2017, 5, https://www.elections.virginia.gov/Files/maintenance-reports/2017SBEListMaintenancereport.pdf.

78 Alabama law exempts county boards from the requirement that they contact voters to verify suspected address changes when another state provides notice that "the elector registered to vote in another jurisdiction, within or without the State of Alabama, at a date subsequent to the date the elector registered to vote in the jurisdiction of the county board of registrars." Ibid. at § 17-4-38.1(c). An Election Handbook provided by the Alabama Secretary of State's office indicates that such notice is sufficient to disqualify and remove the voter when a "registration official from another state notifies registrars in writing that the voter has registered elsewhere." Alabama Law Institute, Alabama Election Handbook: Eighteenth Edition (2017), 262. But in a December 1, 2016 email obtained through a public records request, the Secretary of State's Supervisor of Voter Registration provided county registrars a list of voters that Crosscheck suggested had "registered to vote in another state more recently" than in Alabama and directed the registrars to review the list and "take the action you would normally take as if you received notice directly from another state." Clay Helms (Supervisor of Voter Registration, Office of Alabama Secretary of State), email to local registrars, December 1, 2016, on file with authors. In an interview, Alabama confirmed that the state has considered Crosscheck data as information provided directly from another state; although the state does filter the data to rule out some mismatches, it does not require a notice and waiting-period process. Alabama, which uses ERIC, has not determined whether it will use Crosscheck in future years. John Bennett (Deputy Chief of Staff/Communications Director, Alabama Secretary of State's Office), interview by Brennan Center for Justice, June 15, 2018.

79 Indiana Code § 3-7-38.2-5(d). The Brennan Center is suing Indiana over this matter. Indiana NAACP & League of Women Voters of Indiana v. Lawson, No. 1:17-cv-2897 (S.D. Ind.). Indiana's law does not provide notice as required by the NVRA. See Indiana Code § 3-7-38.2-5(d). On June 8, 2018, a federal judge issued a preliminary injunction against the law, meaning it is temporarily blocked. Order Granting Plaintiffs' Motion for Preliminary Injunction, Indiana NAACP & League of Women Voters of Indiana v. Lawson, No. 1:17-cv-2897 (S.D. Ind.). *Available at* https://www.brennancenter.org/sites/default/files/legal-work/2018-06-18_Order_Granting_Plaintiffs%27_Motion_for_Preliminary_Injunction.PDF.

80 "2017 Maine Crosscheck Data Review Plan" (providing, "If the matched data shows that the Maine voter record is older than the other state's voting record, then the Maine record will be cancelled. No notice to the voter is required"). Document produced in response to public records request issued by Brennan Center for Justice and on file with authors.

81 Idaho also removes voters immediately, but its practice permitting immediate removal of individuals flagged by Crosscheck without notice or a waiting period does not violate federal law because Idaho is exempt from the NVRA, and therefore does not have to abide by the NVRA notice and waiting period requirements.

82 State of Arizona, *Elections Procedures Manual*, 2018 Edition, 104, http://live-az-sos.pantheonsite.io/sites/default/files/2018%200330%20State%20of%20Arizona%20Elections%20Procedures%20Manual.pdf (allowing removal within 90 days in the case of a "true match," which could, but need not, involve direct confirmation from the voter). Arizona declined to be interviewed for this report but informed the Brennan Center that it no longer participates in Crosscheck. Eric Spencer (State Election Director), email to Brennan Center for Justice, June 14, 2018, on file with the Brennan Center. The state did participate in the last Crosscheck match in 2017, and its 2018 election manual provides for removal through Crosscheck.

83 These states are Alaska, Florida, Kentucky, Massachusetts, New York, Oregon, Pennsylvania, and Washington. See Jonathan Brater, Brennan Center for Justice, "The Purge: Ten Years Later?," June 30, 2017, https://www.brennancenter.org/blog/purge-ten-years-later. In addition to those states, Arizona informed the Brennan Center that it is no longer participating in Crosscheck. Eric Spencer (State Election Director, Arizona), email to Brennan Center for Justice, June 14, 2018, on file with the Brennan Center.

84 According to the Center for Investigative Reporting, those 7 states are: Colorado, Georgia, Louisiana, Nevada,

North Carolina, South Carolina, and West Virginia. See Aaron Sankin, "Crosscheck is ineffective and insecure. But states aren't withdrawing," *Reveal*, March 26, 2018, https://www.revealnews.org/blog/crosscheck-is-ineffective-and-insecure-but-states-arent-withdrawing/.

85 For a discussion of some of these security lapses, see, for example, Jonathan Brater, Brennan Center for Justice, "The Purge: Ten Years Later?," June 30, 2017, https://www.brennancenter.org/blog/purge-ten-years-later; Dell Cameron, "As Crosscheck Moves to Secure Voter Data, Hacking Fears Grow Among Experts and Politicians," *Gizmodo*, January 24, 2018, https://gizmodo.com/as-crosscheck-moves-to-secure-voter-data-hacking-fears-1822344007.

86 See *Testimony on the Interstate Crosscheck Program*, Kan. H. Comm. on Elections, January 17, 2018 (testimony of Bryan A. Caskey, Director of Elections), http://www.kslegislature.org/li/b2017_18/committees/ctte_h_electns_1/documents/testimony/20180117_01.pdf; Allison Kite, "Kobach's Office Will Delay Data Uploads for Crosscheck Voter System to Accommodate Security Review," *The Topeka Capital-Journal*, January 17, 2018, http://www.cjonline.com/news/20180117/kobachs-office-will-delay-data-uploads-for-crosscheck-voter-system-to-accommodate-security-review.

87 Sophia Tareen, "Illinois Delays Sending Voter Data to Multi-State Program," *Associated Press*, January 16, 2018, https://www.usnews.com/news/best-states/illinois/articles/2018-01-16/illinois-delays-sending-voter-data-to-multi-state-program.

88 Ibid.

89 Aaron Sankin, "Crosscheck Is Ineffective and Insecure. But States Aren't Withdrawing," *Reveal*, March 26, 2018, https://www.revealnews.org/blog/crosscheck-is-ineffective-and-insecure-but-states-arent-withdrawing/.

90 See Transcript of Oral Argument at 49:7-50:13, In. NAACP & League of Women Voters of In. v. Lawson, No. 1:17-cv-2897 (S.D. Ind., May 2, 2018).

91 "ERIC," Electronic Registration Information Center, accessed May 24, 2018, http://www.ericstates.org/.

92 Electronic Registration Information Center, Inc., *Bylaws*, December 2016, 21, http://www.ericstates.org/images/documents/ERIC_Bylaws_12-16-2016.pdf; Tim Harper, Bipartisan Policy Center, "Florida Joins the ERIC Club – and Brings 14 Million New Eligible Voters," March 20, 2018, https://bipartisanpolicy.org/blog/florida-joins-the-eric-club-and-brings-14-million-new-eligible-voters/. Kentucky informed the Brennan Center in June 2018 that the state would soon be joining ERIC, and agreed to use ERIC data for voter list maintenance in court settlement. Jared Dearing (Executive Director, State Board of Elections), interview by Brennan Center for Justice, June 14, 2018; Judicial Watch, Inc. v. Grimes, 3:17-cv-00094, filed November 14, 2017 (E.D. Ky).

93 See, e.g., Matt Dietrich (Public Information Officer, Illinois State Board of Elections), interview by Brennan Center for Justice, May 8, 2018; Wayne Thorley (Deputy Secretary of State for Elections, Nevada Secretary of State) and Justus Wendland (HAVA Administrator, Nevada Secretary of State), interview by Brennan Center for Justice, May 18, 2018; see also Colo. Rev. Stat. § 1-2-605(7).

94 For example, Alabama credited ERIC with helping to increase voter registration in the state. John Bennett (Deputy Chief of Staff/Communications Director, Alabama Secretary of State), interview by Brennan Center for Justice, June 15, 2018.

95 Gary Bland and Barry C. Burden, *Electronic Registration Information Center (ERIC) Stage 1 Evaluation* (RTI International, December 2013), 1, https://www.rti.org/sites/default/files/resources/eric_stage1report_pewfinal_12-3-13.pdf. In ERIC's first year of operation, "ERIC states showed a net improvement in new registration of 0.87 percentage points over non-ERIC states."

96 Roger Stitt (Voter Registration Manager of Operations, Maryland State Board of Elections), interview by Brennan Center for Justice, May 8, 2018; Kyle Thomas (Director, Voting and Registration Systems, Illinois State Board of Elections), interview by Brennan Center for Justice, May 10, 2018.

97 Kyle Thomas (Director, Voting and Registration Systems, Illinois State Board of Elections), interview by Brennan Center for Justice, May 10, 2018.

98 Memorandum from Meagan Wolfe, Interim Administrator (Prepared by Sarah Whitt, WisVote IT Lead, and Jodi Kitts, WisVote Specialist) to Wisconsin Election Commission Members, May 24, 2018, provided to Brennan Cen-

ter by Wisconsin Elections Commission (on file with Brennan Center). Wisconsin implemented the supplemental poll lists after some voters experienced problems at a February 2018 election. Through the use of the supplemental poll lists, these voters were able to reactivate their registrations at the polls and vote, rather than having to re-register. Sarah Whitt (WisVote Functional Lead, Wisconsin Elections Commission), interview by Brennan Center for Justice, June 4, 2018.

99 Act of May 18, 2006, 2006 Va. Laws Ch. 940 (S.B. 313), § 1 (codified as amended at Va. Code Ann. §§ 24.2-404 & 24.2-427); Act of June 11, 1997, 1997 Tex. Sess. Law. Serv. Ch. 640 (H.B. 1645), § 1 (codified as amended at Tex. Elec. Code Ann. § 16.0332).

100 Act of Apr. 30, 2009, 2009 Georgia Laws Act 86 (H.B. 549), § 1 (amending Ga. Code Ann. § 21-2-231, to require removal of registration of every person that declined jury duty based on noncitizenship); Act of May 5, 2017, Act 2017 (87 G.A.) ch. 110, H.F. 516, § 4 (amending Iowa Code Ann. § 48A.30 to require cancelation of voter registration of every person that submits documentation to prove noncitizenship for purpose of disqualifying themselves from jury duty); Act of Apr. 1, 2010, 2010 Minn. Sess. Law Serv. Ch. 201 (H.F. 3108), § 12 (adding Minn. Stat. Ann. § 201.158, which requires county auditors to challenge the registration of every registered voter who is identified as a noncitizen by the commissioner of public safety) (later repealed and re-codified as amended at Minn. Stat. Ann. § 201.145); Act of May 23, 2011, 2011 Tennessee Laws Pub. Ch. 235 (S.B. 352), § 1 (adding Tenn. Code. Ann. § 2-2-141, requiring coordinator of elections to begin removal proceedings for registered voters identified as noncitizens in the Department of Safety database).

101 Janelle Ross, "Voter Roll Purges Could Spread to At Least 12 States," *HuffPost*, July 31, 2012, https://www.huffingtonpost.com/2012/07/31/voter-roll-purge_n_1721192.html.

102 "About SAVE," U.S. Citizenship and Immigration Services, last modified September 8, 2016, https://www.uscis.gov/save/about-save.

103 "SAVE Verification Process," U.S. Citizenship and Immigration Services, last modified June 15, 2016, https://www.uscis.gov/save/about-save/verification-process; Edgardo Cortes and Liz Howard (Virginia State Board of Elections), interview by Brennan Center for Justice, August 9, 2017.

104 Minn Stat. Ann. § 201.145; Tenn. Code Ann. § 2-2-141; Va. Code Ann. § 24.2-427.

105 See Marc Levy, "State Disputes Claim 100K Noncitizens Registered to Vote," *AP News*, March 1, 2018, https://www.apnews.com/033c89a4d0d646d386a63117c0c72a11. Relatedly, a Wyoming official told us that when the state investigated a list of potential noncitizens produced from state Department of Transportation records, the state did not determine that there were any noncitizens on the rolls and found that many purported noncitizens had subsequently naturalized and were thus eligible to vote. Jennifer Trabing (Election Policy and Planning Analyst, Elections Division, Wyoming Secretary of State's Office), interview by Brennan Center for Justice, May 9, 2018.

106 Va. Code Ann. § 24.2-410.1; Roger Stitt (Voter Registration Manager of Operations, Maryland State Board of Elections), interview by Brennan Center for Justice, May 8, 2018.

107 Christopher Famighetti, Douglas Keith, and Myrna Pérez, *Noncitizen Voting: The Missing Millions* (New York: Brennan Center for Justice, May 2017), https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf ("Other times, noted one administrator, a citizen will forget to check the 'citizen' box when filling out a driver's license form and that will trigger a process which could end in a citizen's registration being canceled, and also artificially inflate the number of alleged noncitizens who are on the registration rolls.").

108 Ga. Code Ann. § 21-2-231; La. Stat. Ann. § 18:178; Tex. Elec. Code Ann. § 16.0332.

109 Christopher Famighetti, Douglas Keith, and Myrna Pérez, *Noncitizen Voting: The Missing Millions* (New York: Brennan Center for Justice, May 2017), https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf ("Several interviewees described how eligible Americans sometimes check a box on a jury service form claiming not to be citizens because they do not want to serve on the jury. 'One way for people to get out of jury duty is they can say they're a noncitizen and fill out a card saying they're not a citizen,' explained Jacquelyn Callanen, Elections Administrator in Bexar County, Texas.")

110 U.S. Student Ass'n Found. v. Land, 2:08-CV-14019, filed September 17, 2008 (E.D. Mich).

111 "Common Cause of Colorado, et al. v. Buescher," Brennan Center for Justice, last modified January 22, 2010, https://www.brennancenter.org/legal-work/common-cause-colorado-et-al-v-buescher.

112 Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1343–48 (11th Cir. 2014).

113 Adam Gitlin and Wendy Wesier, *The Justice Department's Voter Fraud Scandal: Lessons* (New York: Brennan Center for Justice, January 2017), https://www.brennancenter.org/sites/default/files/publications/Justice_Department_Voter_Fraud_Scandal_Lessons.pdf.

114 Compare Judicial Watch, Inc. v. Logan, 2:17-cv-08948, filed December 13, 2017 (C.D. Cal.), Judicial Watch, Inc. v. Grimes, 3:17-cv-00094, filed November 14, 2017 (E.D. Ky.); Voter Integrity Project NC, Inc. v. Wake Cty. Bd. of Elections, 5:16-cv-00683, filed July 18, 2016 (E.D.N.C.); Bellitto v. Snipes, 0:16-cv-61474, filed June 27, 2016 (S.D. Fla.); Va. Voter's Alliance, Inc. v. Leider, 1:16-cv-00394, filed April 7, 2016 (E.D. Va.); American Civil Rights Union v. Philadelphia City Commissioners, 2:16-cv-01507, filed April 4, 2016 (E.D. Pa.); American Civil Rights Union v. Rodriguez, 7:16-cv-00103, filed March 4, 2016 (S.D. Tex.); American Civil Rights Union v. Noxubee Cty., 3:15-cv-00815, filed November 12, 2015 (S.D. Miss.); American Civil Rights Union v. Clarke Cty., 2:15-cv-00101, filed July 27, 2015 (S.D. Miss.); American Civil Rights Union v. Martinez-Rivera, 2:14-cv-00026, filed March 27, 2014 (W.D. Tex.); American Civil Rights Union v. McDonald, 2:14-cv-00012, filed Jan. 27, 2014 (W.D. Tex.); True the Vote v. Stewart, 1:13-cv-03369, filed December 12, 2013 (D. Colo) (voluntarily dismissed); True the Vote v. Wintz 1:13-cv-03368, filed December 12, 2013 (D. Colo) (voluntarily dismissed); American Civil Rights Union v. Jefferson Davis Cty., 2:13-cv-00087, filed April 26, 2013 (S.D. Miss.); American Civil Rights Union v. Walthall Cty., 2:13-cv-00086, filed April 26, 2013 (S.D. Miss.); Judicial Watch, Inc. v. Husted, 2:12-cv-00792, filed August 30, 2012 (S.D. Ohio); Judicial Watch, Inc. v. King, 1:12-cv-00800, filed June 11, 2012 (S.D. Ind.), with Common Cause Indiana v. Lawson, 1:17-cv-03963, filed October 27, 2017 (S.D. Ind.); Indiana NAACP v. Lawson, 1:17-cv-02897, filed August 23, 2017 (S.D. Ind.); N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections, 1:16-cv-1274, filed October 31, 2016 (M.D.N.C.); Husted v. A. Philip Randolph Institute, 2:16-cv-00303, filed April 6, 2016 (S.D. Ohio); Common Cause v. Kemp, 1:16-cv-00452, filed February 10, 2016 (N.D. Ga.); Ga. State Conf. of the NAACP v. Hancock Cty. Bd. of Elections and Registration, 5:15-cv-00414, filed November 3, 2015 (M.D. Ga.); The Democratic Party of Va. v. Va. State Bd. of Elections, 1:13-cv-1218, filed October 1, 2013 (E.D. Va.); LULAC v. Harris Cty., 4:12-cv-03035, filed October 11, 2012 (S.D. Tex.); Colón-Marrero v. Conty-Pérez, 12-cv-1749, filed September 12, 2012 (D.C.P.R.); Arcia v. Detzner, 1:12-cv-22282, filed June 19, 2012 (S.D. Fla.); Mi Familia Vota Education Fund v. Detzner, 8:12-cv-1294, filed June 8, 2012 (M.D. Fla.); Janis v. Nelson, 5:09-cv-05019, filed on February 18, 2009 (D.S.D.); Common Cause of Colorado v. Buescher, 1:08-cv-02321, filed October 25, 2008 (D. Colo.); Mont. Democratic Party v. Eaton, 9:08-cv-00141, filed October 6, 2008 (D. Mont.); U.S. Student Ass'n Found. v. Land, 2:08-cv-14019, filed September 17, 2008 (E.D. Mich).

115 Judicial Watch, Inc. v. Grimes, 3:17-cv-00094, filed November 14, 2017 (E.D. Ky.); Voter Integrity Project NC, Inc. v. Wake County Board of Elections, 5:16-cv-00683, filed July 18, 2016 (E.D.N.C.); American Civil Rights Union v. Noxubee County, 3:15-cv-00815, filed November 12, 2015 (S.D. Miss.); American Civil Rights Union v. Clarke County, 2:15-cv-00101, filed July 27, 2015 (S.D. Miss.); American Civil Rights Union v. Martinez-Rivera, 2:14-cv-00026, filed March 27, 2014 (W.D. Tex.); American Civil Rights Union v. McDonald, 2:14-cv-00012, filed Jan. 27, 2014 (W.D. Tex.); American Civil Rights Union v. Jefferson Davis County, 2:13-cv-00087, filed April 26, 2013 (S.D. Miss.); American Civil Rights Union v. Walthall County, 2:13-cv-00086, filed April 26, 2013 (S.D. Miss.); Judicial Watch, Inc. v. Husted, 2:12-cv-00792, filed August 30, 2012 (S.D. Ohio).

116 Willie M. Miller (Noxubee County District 4 Election Commissioner), interview by Brennan Center for Justice, May 29, 2018.

117 American Civil Rights Union v. Rodriguez, 7:16-cv-00103, filed Mar. 4, 2016 (S.D. Tex.).

118 Judicial Watch, Inc. v. Logan, 2:17-cv-08948, filed December 13, 2017 (C.D. Cal.).

119 American Civil Rights Union v. Noxubee County, 3:15-cv-00815, filed November 12, 2015 (S.D. Miss.).

120 Sylvester Tate (Noxubee County District 1 Election Commissioner) and Willie Miller (Noxubee County District 4 Election Commissioner), interview by Brennan Center for Justice, May 29, 2018.

121 Judicial Watch, Inc. v. King, 1:12-CV-00800, filed June 11, 2012 (S.D. Ind.).

122 Indiana Secretary of State, "Hoosier Voters to Receive Postcard with Election Information in the Mail," news release, June 19, 2014, goo.gl/Xy2cbp; see also Max Greenwood, "Indiana Purges Nearly 500,000 from Voter Rolls," *The Hill,* April 20, 2017, http://thehill.com/blogs/ballot-box/329659-indiana-purges-nearly-half-a-million-from-voter-rolls; Indiana Secretary of State, "Indiana Prepares for Future Elections by Cleaning Up Its Voter Roll," news release, April 18, 2017, https://goo.gl/9dFzps.

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Appendix A: Federal Statutory Regulation of Voter Purge Practices

Purge practices are regulated by a combination of federal and state law. Below is a summary of federal statutes:

VOTING RIGHTS ACT

As a general matter, the Voting Rights Act (VRA), 52 U.S.C. § 10301 et seq, prohibits discrimination in voting. The Supreme Court has held that this prohibition applies to purges.[1] Prior to 2013, certain jurisdictions were required to seek federal preclearance of purge practices before they were implemented.[2] However, the formula by which these jurisdictions were covered was invalidated in *Shelby County v. Holder*,[3] effectively ending preclearance until Congress issues a new formula. Purge practices must still comply with Section 2 of the VRA, which bans discriminatory voting practices.[4]

NATIONAL VOTER REGISTRATION ACT

The National Voter Registration Act (NVRA) is the most comprehensive federal law regulating voter purges and applies to 44 states. Six states (Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming) are exempt because they had election day registration or no voter registration as of the date provided by the NVRA. These exemptions make sense because purge consequences are much less grave in a state that permits anyone eligible who is not on the registration rolls to register and to vote on Election Day (or does not require them to register in order to vote).

The law discusses five categories of removal from voter rolls: (1) request of the registrant; (2) disenfranchising criminal conviction; (3) mental incapacity; (4) death; and (5) change in residence.[5] The NVRA sets forth a series of specific requirements that apply to purges of registrants believed to have changed residence.[6]

The law also contains a series of additional proscriptions on state practices. For example, it provides that list maintenance must be uniform, nondiscriminatory, and in accordance with the Voting Rights Act.[7] It also prohibits *systematic* voter purges (those programs that remove groups of voters at once) within 90 days of a federal election.[8] The Act also has provisions that apply on Election Day if a voter has changed address. Voters who have moved within a jurisdiction are permitted to vote at either their new or old polling place (states get to choose), while purged voters — mistakenly believed to have moved — who show up on Election Day have the right to correct the error and cast a ballot that will count.[9]

HELP AMERICA VOTE ACT

The Help America Vote Act of 2002 (HAVA) reaffirms the requirements of the NVRA and contains additional regulations for voter list maintenance.[10] For example, HAVA requires states to create statewide voter registration databases with unique identifiers for registered voters.[11] The law also requires states to attempt to verify the validity of information submitted by voter registration applicants.[12] HAVA also ensures that certain voters, including those who do not appear on poll books, are permitted to vote provisional ballots at minimum.[13]

1 Young v. Fordice, 520 U.S. 273 (1997).
2 52 U.S.C. § 10304.
3 570 U.S.C. 2 (2013).
4 52 U.S.C. § 10301(a).
5 52 U.S.C. § 20507(a).
6 See 52 U.S.C. § 20507(d)(1).
7 52 U.S.C. § 20507(b)(1).
8 52 U.S.C. § 20507(c)(2)(A).
9 52 U.S.C. § 20507(e).
10 52 U.S.C. § 21083(a).
11 52 U.S.C. § 21083(a)(5)(A).
12 52 U.S.C. § 21083(a)(5)(B).
13 52 U.S.C. § 21082.

Appendix B: What Explains a Jurisdiction's Purge Rate?

	Removal Rate	Removal Rate
D (Preclearance Condition Lifted)	0.0150*** (0.00166)	
D (Preclearance Condition Lifted) * D (2014)		0.0240*** (0.00207)
D (Preclearance Condition Lifted) * D (2016)		0.00605*** (0.00193)
Median Age	-0.000600*** (0.000168)	-0.000601*** (0.000169)
Percent of Residents Who Moved in Past Year	0.0582*** (0.0124)	0.0578*** (0.0124)
Log (Median Income)	0.00639** (0.00283)	0.00625** (0.00283)
Log (Voting Age Population)	-0.000184*** (0.000608)	-0.000182*** (0.000608)
Log (Percent Black)	-0.00124*** (0.000362)	-0.00125*** (0.000362)
D (Secretary of State Appointed by Governor)	0.00634*** (0.00187)	0.00636*** (0.00187)
D (Secretary of State Appointed by Legislature)	0.0168*** (0.00202)	0.0168*** (0.00202)
D (State Legislature Controlled by Republicans)	0.0138*** (0.00122)	0.0138*** (0.00122)
Constant	0.0339 (0.0293)	0.0353 (0.0293)
Observations R-squared	9,057 0.069	9,057 0.073
Robust standard errors in parentheses, clustered by county. Year dummies not shown. *** p<0.01, ** p<0.05, * p<0.1 Notes: Data are from the 2010, 2012, 2014, and 2016 reporting periods. Includes jurisdictions that reported in each time period. Sources: U.S. Election Assistance Commission, U.S. Census Bureau: American Community Survey 5-Year Estimates, National Conference of State Legislatures		

Appendix C: Relationship Between Purge Rates and Provisional Ballot Rates

	Provisional Ballot Rate
Removal Rate	0.0177** (0.00697)
Turnout Rate	-0.00553*** (0.00164)
Log (Median Income)	0.00189*** (0.000504)
Log (Percent Black)	-0.000554* (0.000308)
Log (Percent White)	-0.00453*** (0.00132)
D (Implemented Strict Voter ID Requirement)	-0.00314 (0.000406)
Constant	-0.0185*** (0.00523)
Observations R-squared	1,854 0.741
Robust standard errors in parentheses, clustered by county. Year and state-level dummies not shown. *** p<0.01, ** p<0.05, * p<0.1 Notes: Data are from the 2010, 2012, 2014, and 2016 reporting periods. Includes jurisdictions covered under Section V of the Voting Rights Act at the time of the *Shelby County* decision in 2013 that reported in each time period. Sources: U.S. Election Assistance Commission, U.S. Census Bureau: American Community Survey 5-Year Estimates, National Conference of State Legislatures.	

Regression analysis shows that the higher a covered county's purge rate the higher their provisional ballot rate. Each 1 percent increase in removal rates was associated with an additional 1.8 provisional ballots for every 10,000 ballots cast. Although this number is small, the median for these jurisdictions in the 2012 presidential election was fewer than 1 provisional ballot per 10,000 cast. Importantly, this statistically significant relationship holds even after controlling for other sociodemographic factors such as population, turnout rate, racial composition, political orientation, and implementation of strict voter ID requirements.

As with any statistical study of this sort, it is impossible to determine whether the increase in purge rates in any particular county is responsible for an increase in provisional ballots. However, a closer look at the numbers in a few jurisdictions suggests how this relationship might work.

Shelby County, Alabama, the jurisdiction at issue in *Shelby County v. Holder,* is illustrative. After preclearance ended in 2013, the county's removal rate more than doubled, from 5.0 percent to 10.4 percent. In 2014, more than 18 percent of the county's voters were purged. In 2012, the provisional ballot rate was 0.15 percent, virtually identical to the national average of 0.16 percent. Following years in which the county purged an average of 10 percent of voters, the provisional ballot rate tripled to 0.45 percent.

Montgomery County, Alabama, also had to seek federal preclearance for purges in the past. From 2009 to 2012, when preclearance was required, the average two-year removal rate was 4.7 percent, well below the national average. But after

Shelby County effectively ended preclearance, the removal rates increased dramatically, nearly tripling to 12.0 percent. Montgomery County's numbers are similar to Shelby County's. In the two years ending in 2014, a period covering the cessation of preclearance, Montgomery County had a massive purge in which 21 percent of voters were removed. Subsequently, the provisional ballot rate shot up from 0.31 percent in the 2012 presidential election to more than 1 percent in the 2016 election.

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APPENDIX F

Florida, Georgia, North Carolina Still Purging Voters at High Rates

In a major report in July, we found that voter purges increased significantly in the 2016 election cycle. Now, new numbers from three states offer cause for alarm about 2018, too.

Kevin Morris, Myrna Pérez

October 1, 2018

Earlier this summer, when the Brennan Center released a report examining voter purge data through 2016, we found that four million more people were purged from the rolls between the federal elections of 2014 and 2016 than between 2006 and 2008. Much of that increase came from states that were previously required under the Voting Rights Act (VRA) to get election changes cleared in advance, before that part of the law was eviscerated by the Supreme Court in 2013.

Although comparable data for the two years ending in 2018 won't be available until early next year, we were able to use different data sources to figure out how many voters have been purged over the past two years in three states we had studied — Florida, Georgia, and North Carolina. A preliminary analysis supports our initial alarm over the purge processes in these three states, showing that they continued to have high purge rates.

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Purges in and of themselves aren't bad. They're commonly used to clean up voter lists when someone has moved, passed away, and more. But too often, names identified for removal are determined by faulty criteria that wrongly suggests a voter be deleted from the rolls. When flawed, the process threatens to silence eligible voters on Election Day — especially in states where purge rates are high.

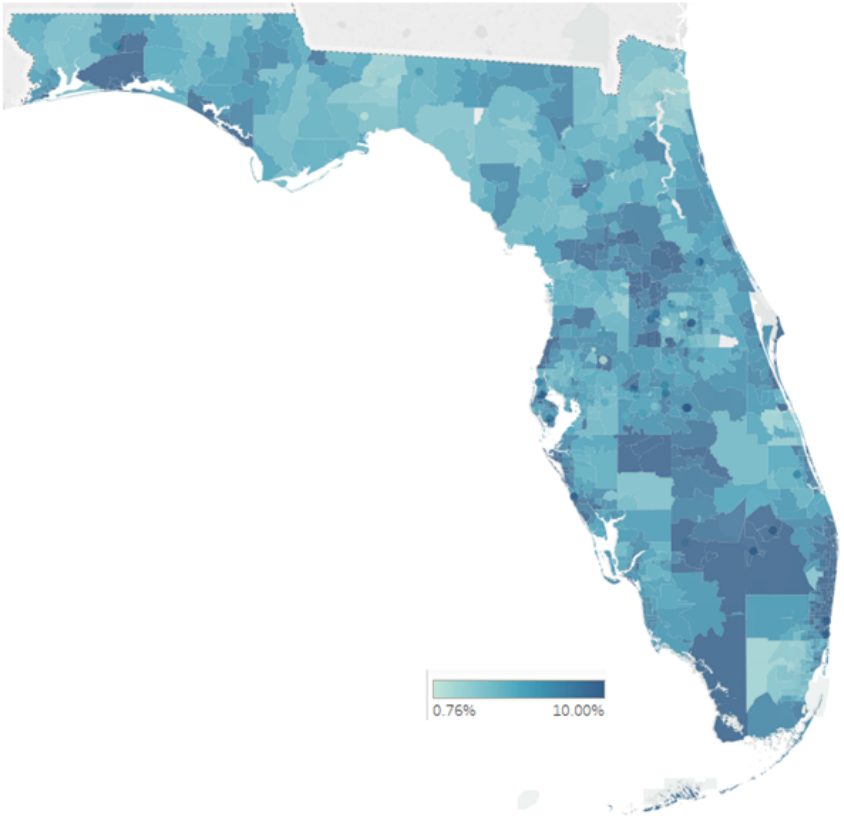
Florida

From November 2008 to November 2010, the median purge rate in the Sunshine State was 0.2 percent. That number jumped to 3.6 percent from 2012 to 2014. And new data show it's jumped again: **Between December 2016 and September 2018, Florida has purged more than 7 percent of its voters**.

Not only can we tell that purges have increased — we also know where the biggest purges are happening. Hardee, Hendry, Palm Beach, and Okaloosa counties have each purged more than 10 percent of their voters in the last two years.

Dade and Broward counties also have a number of zip codes that purged at higher rates. Some of those zip codes, however, include military bases or college campuses, which one would expect to have higher purge rates because of the transient nature of the population and the established processes for removing voters who have moved.

Purge Rates in Florida



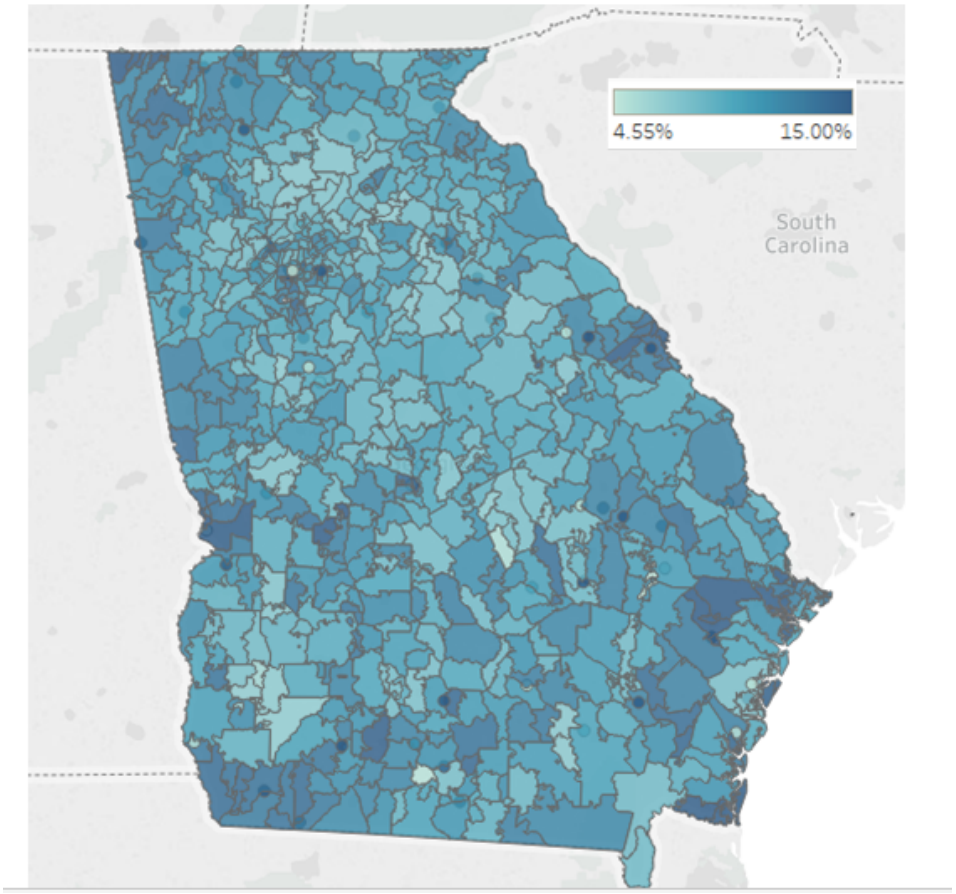
**Purge rates from December 2016 through September 2018. Source: Florida Board of Elections.*

Georgia

Between 2010 and 2014 — a period of time that covers before and after the Supreme Court's decision on the Voting Rights Act — Georgia's median purge rate increased from 6.7 percent to 10.7 percent. Our analysis of the data shows that the state continues to have a high purge rate: **Over the past two years, the state has purged 10.6 percent of voters**. Nonwhite voters were slightly overrepresented among those purged when compared to the total population breakdown.

Ninety-seven of the state's 159 counties purged more than 10 percent of their voters in the last two years. Four counties (Chattahoochee, Liberty, Dade, and Camden) are particular outliers, each purging at least 15 percent of their voters. At a more granular level, 430 of the 781 zip codes have purged more than 10 percent of their voters since 2016. This rebuts any speculation that the VRA's preclearance provision may have blocked reasonable list maintenance practices. "Catching up" might have seemed like an excusable reason for increased rates in the first purge cycle without pre-clearance (2014-2016), but Georgia's purge rates have not returned to pre-2013 levels in the five years since the decision was handed down.

Purge Rates in Georgia

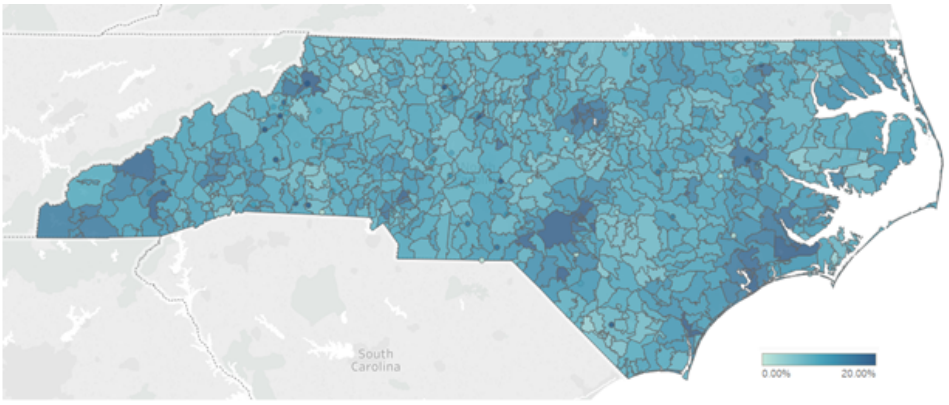


**Purge rates from September 7, 2016 through September 14, 2018. Source: Georgia Board of Elections.*

North Carolina

North Carolina's purge rates fall in between Florida and Georgia. Forty of its one hundred counties were covered under Section V of the Voting Rights Act at the time of the *Shelby County v. Holder* decision in 2013. The average purge rate in the state increased modestly between 2010 to 2014, from 8.0 to 8.8 percent. Like in Georgia and Florida, however, this didn't represent a temporary increase, but rather has been sustained over the past few years. **Between September of 2016 and May of 2018 (the latest date data is available), the state purged 11.7 percent of its voter rolls**. Just 19 of its counties purged fewer than 10 percent of their voters, and no county purged fewer than 8 percent. These purges have been especially troubling for voters of color – in 90 out of 100 counties, voters of color were over-represented among the purged group.

Purge Rates in North Carolina



**Purge rates from September 7, 2016 through September 14, 2018. Source: Georgia Board of Elections.*

To voters living in these three states – and to voters around the country: Check your registration status to make sure that you're still on the rolls. If you are not registered, and think you should be, call your local election official and find out why. There is still time to register in many states if you have a problem.

***Correction**: This post originally said Harris County, Florida was one of the counties that had purged more than ten percent of its voters. In fact, it was Hardee County. There is no Harris County in Florida.*

Photo: Joe Skipper/Getty Images

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APPENDIX G

There's Good Reason to Question Texas' Voter Fraud Claims

Friday's claim of thousands of non-citizen voters is likely false. Here's why.

Sean Morales-Doyle, Rebecca Ayala

January 29, 2019

Here we go again.

On Friday, Texas' secretary of state declared that 95,000 non-citizens were on the state's voter registration lists – and suggested that 58,000 of them had cast ballots in at least one election. Two days later, President Trump falsely tweeted: "These numbers are just the tip of the iceberg." Nothing could be further from the truth.

This latest (and likely erroneous) claim from Texas is part of a larger pattern of vote suppressors making outlandish claims of voter fraud – only to have them thoroughly and exhaustively debunked. It would be funny if such claims weren't being used to deprive eligible citizens of their right to vote.

First, let's examine what exactly Texas Secretary of State David Whitley did to come up with his exaggerated numbers. He has yet to provide much more than a breathless statement to the press, but we do know he compiled his list of supposed non-citizens by comparing driver's license application

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records against the state's voter registration database. We've seen this game before. Here's why it doesn't pass the smell test:

1. It is very likely that many if not most of these people became naturalized citizens since the last time they renewed their driver's license.

2. Large-scale database matching has been proven to be notoriously unreliable.

3. Similar claims made by states in the past—including Texas—have been debunked.

Point one: the data Whitley used only shows if someone wasn't a citizen the last time they renewed their driver's license. But Texans only have to renew their licenses every six years. And since 55,000 Texans take the oath of citizenship every year, it stands to reason that many of these phantom non-citizen voters are now citizens. In fact, according to the U.S. Department of Homeland Security, there were 348,552 Texans naturalized in the last six years. So even if we assume that all of the matches made by the Secretary of State are accurate, it is likely that many if not all of the 95,000 people identified have since been naturalized.

Point two: large-scale database comparisons are often inaccurate. When comparing records from databases as large as these—there are 16 million registered voters in Texas—past experience suggests a significant likelihood of false positive matches. Secretary of State Whitley's own guidance to county officials even acknowledges as much: he instructed county registrars to consider the matches between the driver's license database and the voter registration database to be "WEAK" matches (capitalization his).

In the run-up to the 2012 election, Texas election officials used similar "weak" matches to claim that 80,000 people on the voter rolls were dead. Just as they've been instructed to do this time around, election officials were told to send notices to these voters requiring a response within 30 days – or else they'd be deleted from the voter rolls. As a result, the state repeatedly flagged living, eligible voters for removal, a process that disproportionately impacted people of color. After subsequent litigation and settlement, election officials were barred from using the failure to reply to these notices as a reason for removal.

And point three: Texas is not alone in this pattern of bold claims of voter fraud that are later debunked. In fact, nearly every instance of such claims is thoroughly disproven.

In 2012, Florida officials conducted a similar weak match with driver's license records that indicated that as many as 180,000 non-citizens were on the state's rolls. As in Texas, that number made for some splashy headlines, but after accounting for the fact that people may have become citizens after renewing their licenses, the number was whittled down to 2,600 cases. Even that turned out to be a drastic overstatement, as in the end just 85 voters were identified as non-citizens and removed from the rolls.

That same year, the then-director of South Carolina's DMV used a similar "weak-match" method to claim ineligible individuals voted in previous elections. He claimed that 950 dead people had voted since they died. After a review of the records in question by South Carolina officials, it was determined that no one had cast a ballot from the grave – or had used a dead person's identity to vote.

After the 2016 election, a weak-match system identified 94,610 New Hampshire voters that were supposedly registered in another state. President Trump claimed he lost the state because "thousands" of people came into the state by bus to vote against him. A follow-up review by the New Hampshire secretary of state ruled out all but 142 of those matches as possibly legitimate cases of double-voting, and only referred 51 of those cases to the state's attorney general for further investigation.

We have seen similarly bold but false claims later disproven in New Mexico and Colorado. And Georgia's recent move to place thousands of voters on "pending" status because of matches using a driver's license database is currently the subject of ongoing litigation. But the fact is that study after study has shown that there is no evidence of widespread non-citizen voting or any other type of in-person voter fraud in the United States.

Of course, President Trump has a penchant for making and amplifying such false claims. He famously invented millions of votes cast by ineligible voters to explain why he lost the popular vote in the 2016. He then created a commission dedicated to investigating this non-existent problem, which ultimately imploded after states pushed back against intrusive attempts to inspect voter information and after the commission was ultimately unable to find any evidence of widespread voter fraud. Even Trump's own Republican colleagues refute his baseless claims.

With all of this history in mind, these kinds of alarmist statements and actions are particularly offensive. But Secretary of State Whitley's actions will also likely have immediate consequences for real voters.

Texas has a history of using faulty claims of fraud to justify onerous voter ID laws. In 2011, Texas passed the country's strictest voter ID law, suggesting it was necessary to prevent supposedly rampant voter fraud. After the Brennan Center and others sued to prevent the implementation of that law (and won), it became clear that the state had virtually no evidence of voter impersonation at the polls. In ruling on the case, the court noted that in the ten years preceding the law's passage, though there were 20 million votes cast in the state, only two instances of in-person voter impersonation were prosecuted to conviction.

Further, the secretary of state has now advised local election officials to send supposed non-citizens a notice requiring them to prove their citizenship within 30 days. If they fail to meet the deadline, they can be removed from the voter rolls. This means that there may be thousands of recently naturalized citizens purged from Texas's voter rolls simply because they do not notice the mailer or they do not respond in time. As in previous cases, this sort of inappropriate voter purge is likely to have a much more significant impact on people of color, particularly Latinos, who make up a significant portion of naturalized citizens in Texas.

Just six years ago, before the Supreme Court gutted core provisions of the 1965 Voting Rights Act that required certain jurisdictions to seek federal government approval in changes of voting procedures, Texas probably would have been prevented from these kinds of shenanigans. But now it will be up to voting rights advocates to hold Texas accountable, expending time and energy to debunk false claims that are ultimately used to rob eligible citizens of their right to vote.

(Image: Drew Anthony Smith/Stringer)

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APPENDIX H

Voting Laws Roundup 2019

There's continued momentum for expanding access to the ballot.

April 26, 2019

Last updated: April 26, 2019

Deep into state legislative sessions, bills on voting access reflect four key trends:

1. There is an uptick in activity around measures to restrict voting access. Most notably, perhaps as a backlash to high voter turnout in the 2018 midterms, there has been a resurgence of efforts to restrict how civic groups can assist voters in registering, applying to vote absentee, or casting a ballot. A controversial bill just passed in the Tennessee Senate yesterday, after passing in the House earlier this month.
2. At the same time, a striking number of states have been pushing legislative packages that contain multiple significant pro-voter reforms, reflecting broad national interest in expanding voting access, consistent with Congress's passage of H.R. 1.
3. Florida voters' overwhelming passage of Amendment 4 last year has inspired nationwide momentum for rights restoration for individuals with past criminal convictions, with bills actively moving in five states. The Colorado Senate, for example, passed a restoration bill today with bipartisan support; that bill has already passed in the House. The

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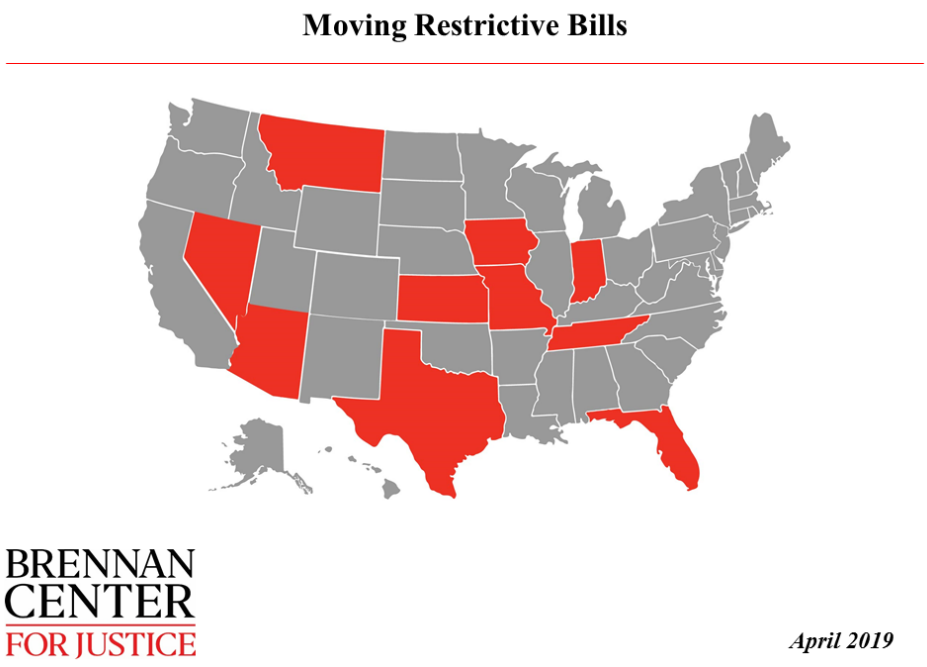
Florida House, in sharp contrast, has passed legislation that would roll back the scope of rights restoration that voters enacted, and the Senate is considering a similar bill.

4. State legislatures are advancing far more election security measures designed to protect election integrity than in previous sessions.

Since the start of the legislative sessions, 45 states have introduced or carried over at least 647 bills that expand voting access, compared to 28 states that have introduced or carried over at least 82 bills that restrict such access. As sessions wind down, bills that have seen movement, like passage through a committee, are the ones to watch – and more expansive bills are moving than restrictive bills so far. At least 115 expansive bills in 35 states have seen some movement this session, compared to 19 restrictive bills in 10 states.

Restrictive Voting Bills

As noted, at least 19 restrictive bills are actively moving in 10 states. Click here for a list of restrictive bills that have seen some movement (at least a hearing) and remain alive.



There are an unusually large number of moving bills that would restrict efforts by civic groups to assist voters, with legislation advancing in Tennessee, Arizona, Texas, and Missouri (HB 29, passed committee). Opponents have made some progress to blunt the worst impacts of the Tennessee restrictions, while advocates in Florida have helped to limit the scope of the Florida Senate bill that would undermine Amendment 4.

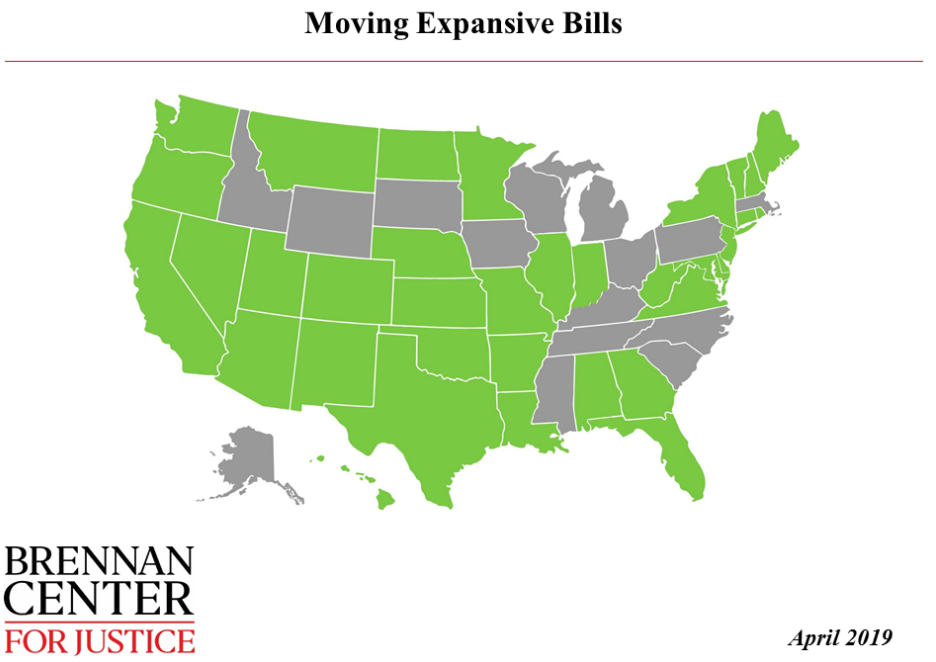
- In **Tennessee**, the House and Senate have passed wide-ranging **new restrictions on assistance of voter registration** (HB 1079 and SB 971). These restrictions follow the efforts of a group called Tennessee Black Voter Project to register tens of thousands of voters in advance of last year's election. A county election commission rejected thousands

of the registrations submitted by the group, leading to a lawsuit. The initial version of the bill imposed new registration and training requirements on registration groups, as well as civil and criminal penalties for, among other things, submitting too many "deficient" voter registration forms. The amended version carves out volunteers and organizations that only use volunteers from the new restrictions.

- In **Arizona**, lawmakers have enacted into law a bill that **extends voter ID requirements to early voting** (SB 1072) and **restricts access to emergency early/absentee voting** (SB 1090). These bills appear to be a GOP reaction to the use of emergency vote centers in Maricopa County during the 2018 Senate election. In addition, the House has passed a bill that would **restrict voter registration assistance** (HB 2616).
- In **Florida**, the House and several Senate committees have passed bills (HB 7089 / SB 7086) that would **cut back** on the **historic changes to the state's felony disenfranchisement laws** that voters passed overwhelmingly less than six months ago. Both bills would disenfranchise otherwise eligible voters by preventing an individual's rights from being restored until they paid off certain financial obligations. The House bill is even more draconian and would likely result in substantially more people being disenfranchised. The Senate has amended its bill to narrow the definition of murder and the types of outstanding financial obligations that would preclude restoration of voting rights. The Senate bill now heads to the floor for a vote.
- In **Texas**, there are a number of restrictions on the move. The Senate has passed a bill that: **significantly increases penalties** and risk of prosecution for election code violations by voters; permits **poll watchers to inspect voter ID**; and **imposes new restrictions on people assisting voters** with physical limitations or who cannot read the ballot, among other measures (SB 9). The Senate has also passed a bill that would require election officials to refer discrepancies between the voter registration list and other databases to be referred to the Attorney General and/or district attorney to investigate voters to determine whether they have violated state law by registering (SB 205). And additional restrictive bills related to list maintenance have had hearings or passed committees. For several years, Texas has attempted to find new ways to keep voters from the polls, in the face of rapid demographic change. In 2011, the state passed extreme restrictions on voter registration assistance, in 2013 it implemented a strict voter ID law, and earlier this year it attempted a massive and misguided voter purge that would have disproportionately impacted newly naturalized citizens. Voter intimidation has been a key ingredient in the mix, and these new bills up the ante.
- In **Iowa**, a legislative committee has passed a bill that would continue to chip away at voting access, just two years after Iowa enacted a restrictive omnibus elections law. The bill would impose a **wide range of new voting restrictions**, including: weakening purge protections, restricting absentee voting, imposing restrictions on student voters, and cutting polling place hours (SF 575).

Expansive Voting Bills

The push to expand voting access continues in many states across the country. Click here for a list of expansive bills that have seen some movement (at least a hearing) and remain alive.



In addition to major bright spots in states with new, post-2018 Democratic trifectas, particularly New York and New Mexico, pro-voter bills are moving or have been enacted in a wide swath of states. A few trends have emerged: pro-voter packages, rights restoration, and notice and cure efforts for absentee ballots and voter registrations. See below for more details:

- **Pro-Voter Packages.** Several states are moving not just one, but several important pro-voter reforms through their legislative process. Here we focus on bills that have at least passed out of a committee:
  - **New York** led the way this year, enacting into law a package of voting reforms at the start of the legislative session, including: **early voting** (SB 1102), **pre-registration** for 16- and 17-year-olds (AB 774), and **portability** of registration records (AB 775), as well as a law that consolidated the dates for state and federal primaries and required ballots to be distributed to military voters farther in advance of elections (AB 779). The Legislature also passed constitutional amendments to permit **same-day registration** (SB 1048) and **no-excuse absentee voting** (SB 1049), which will need to be passed again and then ratified by the voters.
  - The **Colorado** House and Senate have passed a bill that would **restore voting rights** to individuals on release from incarceration (HB 19-1266) and the Senate passed a bill that would enshrine **AVR** in statute (it has already been implemented administratively) (HB 19-235). In addition, the Senate has passed a bill improving voting access for voters with disabilities (SB 19-202) and the House has passed a bill with several additional reforms, including minimum standards for vote centers, improvements to the provisional ballot process, and improvements to the registration process for voters living on Indian reservations (HB 19-1278).

- **Connecticut** legislative committees have reported out a slew of pro-voter bills, including: **AVR** (SB 24), **rights restoration** to people who are on parole (SB 25 and HB 7213), and a requirement that officials site **polling places on campuses** (SB 266), among several other reforms. In addition, committees have reported out proposed constitutional amendments that would permit **no-excuse absentee voting** (HJR 161 and SJR 27), **early voting** (HJR 161 and SJR 14), and **pre-registration** for 16- and 17-year-olds (SJR 28).
- The **Delaware** Legislature has passed **early voting** (HB 38), the House has passed a proposed constitutional amendment to establish **no-excuse absentee voting** (HB 72), and a House committee has passed **election day registration** (HB 39).
- **Georgia** enacted into law reforms addressing a variety of problems with its voting systems (and the lawsuits that challenged them), including improvements to its "no match, no vote" policy, voter purges, absentee voting, provisional voting, voting for people with disabilities (HB 316).
- A **Minnesota** House committee has passed an omnibus elections bill (HF 1603) that includes: **AVR**, **rights restoration** upon discharge from incarceration, and **early voting**, among other reforms.
- The **New Hampshire** Senate has passed **AVR** (SB 7), the New Hampshire House passed a proposed constitutional amendment to permit **no-excuse absentee voting (HB 611)**, as well as bills to **repeal restrictions impacting student voters** that were passed over the last couple of years (HB 105 and HB 106) and a bill that would **ease restrictions on assisting voters with disabilities** to vote absentee.
- The **Nevada** Assembly has passed a bill that would provide for immediate **rights restoration** to people on completion of their sentence (AB 431). Legislative committees have also passed provisions on election day registration (SB 123, AB 345), along with same day registration during early voting and improvements of the provisional ballot process (AB 345).

- **Rights Restoration**. Following Florida voters' paradigm-shifting enactment of Amendment 4 last year, as well as improvements in New York and Louisiana, we are seeing significant momentum for further reform.
  - Several states have moved bills that would restore voting rights to people previously convicted of a felony at least through a committee—
    - The **Colorado** House and Senate passed a bill that would restore voting rights on release from incarceration (HB 19-1266).
    - A **California** legislative committee has passed a bill that would restore voting rights to people on parole (AB 646).
    - **Connecticut** legislative committees have reported out bills that would restore voting rights to people on parole (SB 25 and HB 7213).
    - A **Minnesota** legislative committee has passed a bill that would restore voting rights on release from incarceration (HF 1603).

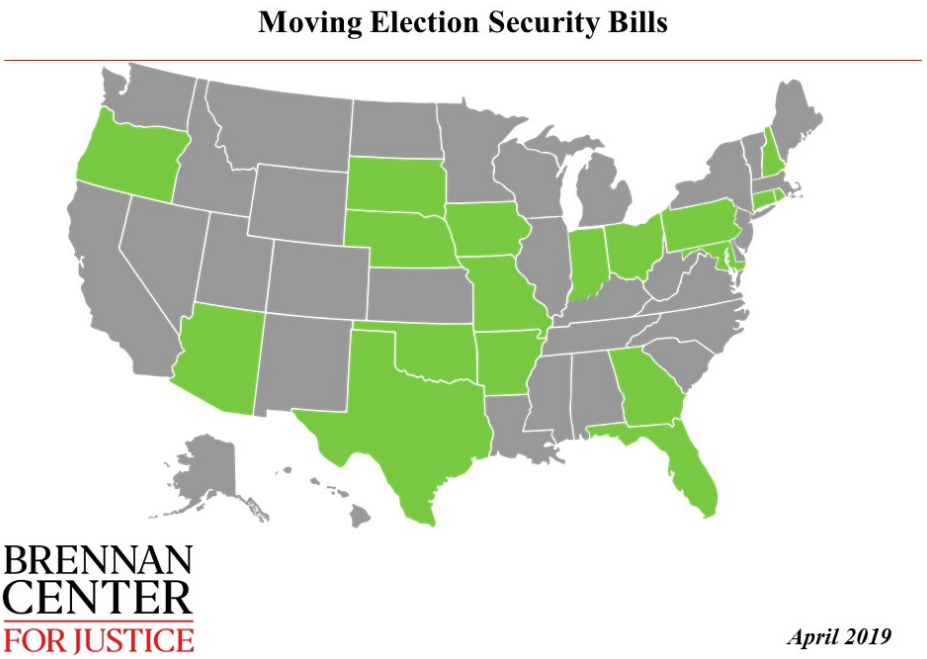
        - The **Nevada** House has passed a bill that would restore voting rights to people immediately on completion of their sentence (AB 431)
    - Additional states have held hearings on rights restoration bills that remain live, including Missouri (HB 508), Nebraska (SB 711 and SB 83), New Jersey (SB 2100), and Texas (HB 1419).
    - Moreover, even though efforts in Iowa (HJR 14) and Tennessee (SB 0589 and HB 0547) came up short this year, the seriousness of those efforts, in states with extremely restrictive rights restoration regimes, is a further indication of the momentum behind this critical reform.

- **Notice/Cure Process.** Several states have moved bills that require election officials to notify and/or permit voters to cure deficiencies in absentee ballots, absentee ballot applications, or voter registration applications (or improve their existing processes) through at least a committee, including: Arizona (SB 1054) (enacted), California (SB 523) (held hearing), Florida (SB 7066 / HB 7101) (passed committee), Georgia (HB 316) (enacted), Kansas (SB 130) (enacted), and Virginia (SB 1042) (enacted).

- **Additional Major Enactments.** Several states enacted additional expansive reforms into law. Most notably:
    - **New Mexico** enacted same day voter registration (SB 672).
    - **Virginia** enacted **no-excuse early in-person voting (SB 1026/HB 2790)**, as well as measures adding protections for absentee voters (HB 1790) and (as noted above) require notification to applicants whose voter registration applications are rejected (SB 1042).
    - **Washington** enacted a Native American voting rights act.

Election Security Bills

In advance of the 2020 elections, state legislatures have shown renewed interest in shoring up election infrastructure and implementing election integrity measures, including risk-limiting audits. Still, more work remains in order for states to be ready for 2020. At least 31 states have introduced 100 election security bills thus far this year, with 28 moving in 18 states. Click here for a list of election security bills that have seen some movement (at least a hearing) and remain alive.



The following bills have passed through at least **one house** of the legislature:

- **Arkansas** enacted a bill into law that requires post-election audits (SB 524).
- **Georgia** enacted a bill into law that requires voting machines to produce a paper record and authorizes a risk-limiting audit pilot program (HB 316).[i] In addition, the legislature has passed a bill that requires the Secretary of State to establish security protocols to protect voter registration information – it is awaiting action from the Governor (HB 392).
- **South Dakota** has enacted a bill into law that requires vote centers and counties that use e-pollbooks to have printed paper copes of the registration list.
- In **Indiana,** the Governor signed a bill authorizing a risk-limiting audit pilot program (SB 405) and a bill requiring risk-limiting audits, prohibiting the acquisition and, eventually, the use of direct recording electronic voting machines ("DREs"), and imposing new security measures for e-pollbooks, among other measures (SB 570). Both houses of the Indiana legislature have passed a bill requiring two-factor authentication to access the computerized voter registration list as well as requiring election vendors to disclose foreign ownership (SB 558).
- Both houses of the **Maryland** legislature have passed a bill requiring vendors to disclose foreign ownership (SB 743).
- The **New Hampshire** Senate has passed a bill requiring a study of new equipment to perform post-election audits (SB 286).
- In **Oklahoma,** the Governor approved a bill authorizing the State Board of Elections to order post-election audits, requiring county election officials to undertake new cyber-security measures and authorizing the State Board to declare an election emergency in response to security threats or interference (SB 261).

- The **Ohio** Senate has passed a bill requiring the Secretary of State to appoint a chief information security officer; requiring post-election audits, including authorizing risk-limiting audits as one audit option; and creating a "cyber reserve" as part of the state militia (SB 52).
- The **Texas** Senate has passed a bill requiring risk-limiting audits and prohibiting the use of DREs without auditable paper record (SB 9).

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[i] The bill, however, is highly controversial: It does not require the use of hand-marked paper ballots and critics are concerned that it would result in the state purchasing voting systems that only use ballot-marking devices.

RELATED ISSUES: Voting Rights & Elections

Restrictive Bills – Moving

AZ	SB 1072	Extend voter ID requirements to early voting	Enacted
	SB 1090	Restrict access to emergency early/absentee voting	Enacted
	HB 2616	Restrict third-party voter registration	Passed Houses
FL	HB 7089	Cut back on Amendment 4 by prohibiting rights restoration unless certain financial obligations are satisfied and including overbroad definition of sexual assault	Passed House
	SB 7086	Cut back on Amendment 4 by prohibiting rights restoration unless certain financial obligations are satisfied and including overbroad definition of murder	Passed committee
	HB 7101/SB 7066	Shorten the absentee ballot application deadline (but note that these bills also expand voting access in a variety of ways)	Passed committee
IN	HB 1311	Shorten the absentee ballot application deadline for certain applicants	Passed both houses
IA	SF 575	Require change-of-address notice to be sent based on failure to vote in a single presidential election, instead of two consecutive general elections; impose restrictions on absentee voting; impose restrictions on student voters; cut polling place hours	Passed committee
KS	HB 2176	Prevent third parties from assisting voters in casting absentee ballots	Passed committee
MO	HB 29	Require applicant for absentee ballot to include photocopy of voter ID and prohibit anyone other than elections officials from distributing absentee ballot applications	Passed committee
MT	SB 366	Referendum to establish strict voter ID for in-person and absentee voting	Held hearing
NV	AB 345	Cut absentee ballot application deadline from 7 days to 14 days prior to an election (but note that this bill also expands access in a variety of ways)	Passed Senate
TN	HB 1079/SB 971	Restrict third-party voter registration	Passed House / passed Senate committee

TX	SB 9	Significantly increase penalties and risk of prosecution for election code violations by voters; permit poll watchers to inspect voter ID; impose new restrictions on people assisting voters with physical limitations or who cannot read the ballot	Passed Senate
	SB 205	Require discrepancies between voter registration list and other databases to be referred to Attorney General and/or district attorney to investigate voters	Passed Senate
	SB 1190	Require voters prove that their residence address meets certain criteria in connection with list maintenance	Passed committee
	HB 1888	Reduce minimum early voting hours at temporary branch polling places	Passed committee
	SB 1254	Require SOS to compare registration list with motor vehicle records indicating voter is not a citizen and send notice to voter registrars	Held hearing
	HB 3576	Require registrar to investigate whether each registered voter is currently eligible for registration in the county	Held hearing

Expansive Bills – Moving

AL	HB 174	Authorize permanent absentee list for voters with permanent disabilities	Passed committee
AZ	SB 1054	Notice and opportunity to cure absentee ballot signature discrepancy	Enacted
AR	HB 1522	Extend absentee voting opportunities to Arkansas National Guard while on active state duty	Enacted
	HB 1868	Permit voter ID to be presented in digital form	Enacted
CA	AB 57	Require a jurisdiction that provides a translation of candidates' names on ballot materials into a character-based language also provide a phonetic transliteration of the names	Passed Assembly
	SB 72	Require election officials to offer conditional registration and provisional voting at satellite offices in the 14 days before an election. (Current law requires such registration at permanent offices and permits election officials to offer it at satellite offices.)	Passed committee
	SB 523	Extend deadline for voter to cure vote-by-mail ballot with unsigned identification envelope and require notice of deficiency to be translated into all languages required by the VRA	Passed committee
	SB 727	Lower age for pre-registration to 15	Passed committee
	AB 363	Require election officials to offer in-person locations to vote a vote-by-mail ballot starting the Saturday before an election	Passed committee
	AB 646	Restore voting rights to people on parole	Passed committee
	AB 1391	Permit voter to indicate preferred language for voting materials	Passed committee
CO	SB 19-202	Require SOS to establish procedures to permit voters with disabilities to independently mark a paper ballot	Passed Senate
	HB 19-1266	Restore voting rights upon discharge from incarceration	Passed both houses
	HB 19-1278	Establish minimum standards for vote centers, including siting vote centers on certain university campuses; permit voters to cast provisional ballots even if	Passed committee

		in the wrong precinct; voters living on Indian reservations who do not have USPS-recognized residential addresses may use alternative addresses	
	HB 19-235	Establish and expand AVR in statute (Colorado already has established AVR administratively)	Passed committee
CT	SJR 14	Constitutional amendment to permit early in-person voting	Passed committee
	SJR 27	Constitutional amendment to permit no-excuse absentee voting	Passed committee
	SJR 28	Constitutional amendment to permit pre-registration for 16-year-olds	Passed committee
	HJR 161	Constitutional amendment to permit no-excuse absentee voting and early in-person voting	Passed committee
	SB 24	Establish AVR	Passed committee
	SB 25	Restore voting rights to people on parole	Passed committee
	SB 156	Ease absentee ballot application process	Passed committee
	SB 266	Require polling places at institutions of higher education	Passed committee
	SB 358	Employers must give employees four hours off to vote	Passed committee
	SB 1046	Election day registration application processing at polling places	Passed committee
	HB 5844	Designate housing agencies as voter registration agencies	Passed committee
	HB 6059	Permit registrars to apply to provide additional election day registration locations	Passed committee
	HB 6063	Eliminate requirement that a voter mail absentee ballot application already submitted by fax or email	Passed committee
	HB 7160	Require election day registration locations to be open the same hours as polling locations and applicants in line when EDR locations close must be permitted to register	Passed committee
	HB 7213	Restore voting rights to people on parole	Passed committee
	GB 7160	Require election day registration location to be open from 6am to 8pm; permit registrars to apply to provide additional election day registration locations; permit voter registration agencies to establish electronic voter registration systems	Passed committee

	HB 5818	Permit applicants in line for election day registration before polls close to register and vote	Held hearing
	HB 6045	Permit applicants in line for election day registration before polls close to register and vote	Held hearing
	SB 53	Restore voting rights to people who are incarcerated	Held hearing
	SB 915	Ease absentee ballot application process	Held hearing
DE	HB 38	Early in-person voting	Passed both houses
	HB 73	Constitutional amendment to establish no-excuse absentee voting	Passed House
	HB 39	Election day registration	Passed committee
FL	SB 7066 / HB 7101	Establish a cure process for provisional and absentee ballots. (Note, though, that this bill also tightens the absentee ballot application deadline.)	Passed committee
GA	HB 316	Omnibus bill, including improvements to "no match, no vote" policy, voter purges, absentee voting, provisional voting, voting for people with disabilities.[i]	Enacted
HI	HB 168	Permit voters with special needs to receive unvoted ballots by electronically	Enacted
	HB 1485	Automatic pre-registration of high school students	Passed both houses
IL	HB 3653	Permit Department of Corrections to become an AVR agency	Passed House
	SB 1970	Require schools to permit students to be absent for two hours to vote	Passed Senate
	SB 2090	Require certain counties to facilitate absentee voting and establish polling places in county jails	Passed Senate
IN	HB 1643	Designate additional voter registration agencies pursuant to NVRA	Passed committee
	HB 1284	Designates service agencies, such as job training, state police, county sheriff, and city law enforcement agencies, as voter registration offices	Passed both houses
KS	SB 130	Opportunity to cure absentee ballot deficiencies; election officials permitted to allow voters to vote at any polling location in a county	Enacted
	SB 129	Election officials permitted to allow voters to vote at any polling location in a county	Passed committee
	SB 43	Establish same day registration	Held hearing

	HB 2092	Establish same day registration	Held hearing
LA	SB 58	Establish AVR	Passed committee
ME	LD 619	Constitutional amendment to authorize municipalities to offer early in-person voting and to establish no-excuse absentee voting	Passed House
MD	HB 286	Establish election day registration (implementing constitutional amendment passed in November 2018)	Passed both houses
	SB 449	Establish election day registration (implementing constitutional amendment passed in November 2018)	Passed both houses
MN	HF 1603	Establish AVR; restore voting rights on release from incarceration; establish early voting; permit electronic transmission of ballot materials to voters with disabilities	Passed committee
	HF 94	Remove restrictions on number of voters who cannot read English or are physically unable to mark a ballot a person can assist	Passed committee
MO	HB 202	Permits voters over 60 to vote absentee without an excuse	Passed committee
	HB 368	Establish no-excuse absentee voting and improve voter ID law	Held hearing
	HB 508	Restore voting rights on release from incarceration	Held hearing
	HB 617	Require at least one voting machine for use by blind or visually impaired voters	Held hearing
	HB 731	Establish AVR	Held hearing
	HB 992	Establish no-excuse absentee voting	Passed committee
	HB 994	Establish early in-person and no-excuse absentee voting	Held hearing
MT	SB 148	Ease process for people who register late to cast a ballot	Passed both houses
	SB 291	Improve access for voters with disabilities	Passed both houses
	HB 536	Establish AVR	Passed House
	HB 699	Establish online voter registration	Passed committee
NE	LB 83	Restore voting rights on completion of sentence (including probation and parole)	Held hearing
	LB 711	Repeal provisions stripping voting rights from people convicted of a felony	Held hearing
	LB 687	Establish AVR	Held hearing
	LB 718	Extend hours for early voting in populous counties	Held hearing

	LB 733	Improve access for voters with disabilities	Held hearing
NV	SB 123	Establish election day registration	Passed committee
	AB 137	Once clerk has sited polling place on Indian reservation, requires clerk to continue to do so unless requested otherwise	Passed Assembly
	AB 345	Establish same day registration during early voting and on election day; authorize clerk to establish polling places where any voter can vote; require provisional ballots to include all offices, instead of federal offices only; online voter registration through the SOS website (note that Nevada already has OVR); extend absentee ballot deadline for ballots sent by mail, require notification to voter of absentee ballot signature deficiency, and presume that the signature is valid	Passed committee
	AB 431	Restore voting rights immediately upon discharge from prison, probation, or parole	Passed House
NH	HB 105	Repeal restrictions impacting student voters	Passed House
	HB 106	Repeal restrictions impacting student voters	Passed House
	HB 531	Ease restrictions on assisting voters with disabilities to vote absentee	Passed House
	HB 611	Amend constitution to permit no-excuse absentee voting	Passed House
	SB 7	Establish AVR	Passed Senate
NJ	SB 589	Establish online voter registration	Passed Senate[ii]
	SB 549	Establish early in-person voting (but note that New Jersey already permits voters to obtain and vote absentee ballots in person, which is functionally similar)	Passed committee
	SB 2100 / AB 3456	Repeal provisions stripping voting rights from people convicted of a felony	Held hearing
	SB 1603	Provide voter registration assistance to people completing criminal sentences	Held hearing
NM	SB 672	Establish same day registration	Enacted
NY	SB 1102	Establish early in-person voting	Enacted
	AB 774	Establish pre-registration for 16- and 17-year-olds	Enacted
	AB 775	Voter registration portability	Enacted

	AB 779	Consolidate primaries and distribute absentee ballots to military voters earlier	Enacted
	SB 1048	Constitutional amendment to permit same day registration	Passed both houses
	SB 1049	Constitutional amendment to permit no-excuse absentee voting	Passed both houses
	AB 507	Expand modes of absentee ballot application submission	Passed committee
	SB 2301	Protections against voter caging operations	Advanced to third reading
ND	SB 2307	Minimum polling place hours	Enacted
OK	SB 58	Employers must give employees two hours off to vote during early voting	Passed both houses
	SB 496	Pre-registration for 17-and-a-half year-olds	Sent to Governor
OR	SB 224	Eliminate failure-to-vote as trigger for placing voter in inactive status and permit military voters to request ballot using email or fax	Held hearing
RI	SB 316	Employers must give employees two hours off to vote	Held hearing
	SB 339	Repeal voter ID law	Held hearing
	SB 611	Permit voter ID that has been expired for up to six months	Held hearing
	SB 628	Extend absentee ballot deadline for military voters	Held hearing
TX	HB 542	Permit certain Native American tribal documents as voter ID	Held hearing
	HB 1419	Restore voting rights upon discharge from incarceration	Held hearing
	HB 2902	Require email notification of deficiencies in absentee ballot application	Held hearing
	HB 2903	Require email notification of deficiencies in voter registration application	Held hearing
UT	SB 61	Authorize extension of early voting hours	Enacted
VA	SB 1026 / HB 2790	Establish early in-person voting	Enacted
	HB 1042	Notification to applicants whose registration applications are rejected	Enacted
	HB 1790	Permit absentee ballot applicant to cast ballot if in line when registrar’s office closes	Enacted
VT	S 107	Permit clerk to accept emergency absentee ballot applications after deadline; authorize electronic delivery of absentee ballots to voters with disabilities	Passed Senate

		or who are ill/injured; authorize early in-person voting (but note that Vermont already permits voters to obtain and vote absentee ballots in person, which is functionally similar)	
WA	SB 5079	Native American voting rights act	Enacted
	SB 5063	Pre-paid postage for vote-by-mail ballots	Sent to Governor
WV	HB 2362	Expand absentee voting qualifications	Enacted

[i] The bill, however, is highly controversial: It does not require the use of hand-marked paper ballots and critics are concerned that it requires the state to purchase voting systems that only use ballot-marking devices.

[ii] New Jersey is one of two state that carries over bills from even to odd years. The online voter registration bill passed the Senate last year, but has languished in an Assembly committee since then.

Election Security Bills – Moving

AR	SB 524	Require post-election audits	Enacted
AZ	HB 2489	Create committee to audit transmission of polling place ballot data and review election security technology	Passed committee
CT	HB 5417	Create task force to study use of blockchain technology to manage voters' information	Passed committee
	HB 7321	Require SOS to create a position focused on cybersecurity and require security analysis of vote tabulator memory cards	Passed committee
FL	SB 268 / HB 689	Require vote tabulation to be based on marksense ballot or voter-verifiable paper output	Passed committee
	HB 7101	Require SOS to promulgate security standards addressing chain of custody of ballots, transport of ballots, and ballot security	Passed committee
GA	HB 316	Require voting machines to produce a paper record and authorize risk-limiting audit pilot program.[i]	Enacted
	HB 392	Require SOS to establish security protocols to protect voter registration information	Passed both houses
IN	SB 405	Authorize risk-limiting audit pilot program	Enacted
	SB 558	Require computerized voter registration list to employ two-factor authentication; require vendors to disclose foreign ownership	Passed both houses
	SB 560	Require cyber- and physical-security training for county election officials	Passed both houses
	SB 570	Require risk-limiting audits; prohibit acquisition of electronic voting machines without a verifiable paper trail after 12/31/19 and use after 12/21/2029; impose new security measures for e-pollbooks; additional measures	Enacted
IA	SF 575	Authorize or require various steps with respect to cyber-security, the voter registration list, and post-election audits	Passed committee
MD	SB 743	Require vendors to disclose foreign ownership	Passed both houses
MO	HB 543	Prohibit approval of electronic voting systems that do not produce election	Held hearing

		results from paper ballots and replacement of DREs; require post-election manual audit	
NE	LB 608	Prohibit use of electronic voting machines without paper ballot	Held hearing
NH	SB 286	Require study of new equipment to perform post-election audits	Passed Senate
	SB 229	Require post-election audits	Held hearing
	HB 554	Authorize post-election audits	Held hearing
OK	SB 261	Authorize State Board of Elections to order post-election audits; require county election officials to undertake new cyber-security measures; authorize State Board to declare an election emergency in response to cyber- and other security threats or interference and system failures	Enacted
OH	SB 52	Require SOS appointment of a chief information security officer; require post-election audit, including authorizing risk-limiting audits; create a "cyber reserve" as part of the state militia.	Passed Senate
OR	SB 944	Authorize risk-limiting audits	Held hearing
PA	SB 48	Impose rules for decertification of voting machines	Passed committee
RI	HB 5275 / SB 468	Expand authorization for risk-limiting audits to include general assembly races	Held hearing
	HB 5479	Require use of auditable, verifiable paper ballots	Held hearing
SD	HB 1027	Require vote centers and counties that use e-pollbooks to have printed paper copes of the registration list	Enacted
TX	HB 1421	Require SOS to establish cyber-security best practices; require county elections officials to obtain cyber-security training and assessment and to report cyber-security breaches	Passed House
	SB 9	Require risk-limiting audits; prohibit use of DREs without auditable paper record	Passed Senate

[i] The bill, however, is highly controversial: It does not require the use of hand-marked paper ballots and critics are concerned that it requires the state to purchase voting systems that only use ballot-marking devices.

APPENDIX I

Florida Lawmakers Attempt to Weaken Voter Rights Restoration

This undermines a historic vote by Floridians in November 2018 to restore the right to vote to more than 1.4 million residents with past felony convictions.

Makeda Yohannes

March 20, 2019

On Tuesday, Florida lawmakers advanced a bill that could severely restrict one of the most impactful expansions of the right to vote in over four decades. The legislation, which passed out of the House Criminal Justice Subcommittee, is a slap in the face to the overwhelming majority of Florida voters, who voted just months ago to restore voting rights to people with past felony convictions. Now, lawmakers are attempting to make the restoration of voting rights contingent on the full payment of all fees and court costs. This would heap financial obligations on people involved in Florida's criminal justice system and essentially reserve the restoration of voting rights to Floridians who have the financial means to pay.

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In November 2018, Florida voters approved Amendment 4, a constitutional amendment that automatically restored the right to vote to more than 1.4 million Floridians who have completed their sentence, including parole or probation. It was a shining example of voters using direct democracy to expand democracy. But even though nearly 65 percent of Florida voters approved the measure, lawmakers have suggested they might limit the amendment's reach through legislation. This week's bill would do just that.

In fact, this new bill would make Florida's rule regarding repayment of financial obligations even more restrictive than it was before Amendment 4's passage. While the clemency procedure under then-Governor Rick Scott was terribly restrictive and arbitrary, it did not require the payment of all fees and costs as a condition for restoring voting rights.

As a nation, we long ago shunned the practice of making voting contingent on wealth. Unfortunately, the practice continues, as a handful of states prohibit individuals who owe court debt from voting. This practice will be particularly harmful in Florida. Since 1996, the Florida legislature has added more than 20 new categories of legal financial obligations for criminal defendants, while simultaneously eliminating exemptions for those who cannot pay. Florida's criminal justice system purposefully levies excessive court costs and fees as a means to underwrite the state's criminal justice costs, trapping poor Floridians in cycles of debt.

Finally, apart from being anti-democratic, this policy will be difficult to administer. Florida will have a very difficult time determining who has paid off every last penny, especially when it comes to people who completed their probation or parole decades ago. The State should not waste its resources on examining decades-old court records in order to potentially deprive someone the right to vote.

It is critical, as the bill moves to a vote before the full state House, that voters defend one of the most transformative civil rights victories—which they approved themselves—from being gutted. Florida lawmakers must protect the rights of all Floridians to exercise the franchise, regardless of their financial means.

(Images: Joe Raedle)

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