

An Election
Agenda for
Candidates,
Activists, and
Legislators



Democracy

Edited by Wendy Weiser and Alicia Bannon

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Foreword

How can we fix American government? How can we make sure it works for all?

In the wake of the convulsive 2016 election, there may be no more pressing question.

Nor will 2016 likely be the last such eruption. American politics has stagnated for years, locked in arid debate on old ideas. Political parties have become increasingly tribal. Elections are drenched in money and marked by intense polarization. Government dysfunction has created an opening for racially divisive backlash politics while ignoring long-range economic, social, and environmental challenges.

Until we reckon with that public discontent, we'll continue to be entangled in the same battles we've been fighting for decades.

It is time for fresh thinking, which is why the Brennan Center for Justice is producing Solutions 2018, a series of three reports setting out democracy and justice reforms that are intended to help break the grip of destructive polarization.

This volume lays out proposals to ensure free and fair elections and curb the role of big money in American politics. Others show how we can end mass incarceration, and protect constitutional freedoms, vulnerable communities, and the integrity of our democracy amid new threats.

We hope these proposals are useful to candidates, officeholders, activists, and citizens. The 2018 election should be more than a chance to send a message. It should be an opportunity to demand a focus on real change.

What counts is not what we are against, but what we are for.

A handwritten signature in black ink, reading "Michael Waldman". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Michael Waldman
President

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Introduction

American democracy is facing extraordinary strains — of a kind it hasn't faced in decades.

Voter participation is distressingly low. The last midterm election saw the lowest voter turnout in 72 years. Pervasive gerrymandering fixes outcomes in many elections before voters even show up to the polls. The explosion of political spending by a tiny fraction of Americans is staggering; the amount contributed by mega-donors who gave six figures or more increased more than 12-fold between 2008 and 2016. Dark money now floods into all levels of our elections, including state judicial races. The Supreme Court gutted a century of campaign finance law and a half-century of voting rights protections, all by a slim five-to-four margin. A hostile foreign government manipulated the 2016 presidential campaign and tried to interfere with our voting systems. All that came before Donald Trump's election.

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.

— James Madison,
The Federalist 57

Millions of Americans from all political points of view feel that their voices are not heard, that the government fails to represent their concerns or meet their needs. At a time of stagnating opportunity and deeply polarized government, the system is susceptible to demagoguery. Trump and Trumpism are symptoms, not the cause, of our democratic dysfunction.

Our system now faces new and unnerving challenges. A working system of self-government requires the rule of law as well as robust democracy. This ideal is increasingly being challenged in the United States, as it is across the world. The norms of constitutional democracy — the unwritten rules that curb power and prevent abuse — are regularly flouted. It turns out that many seemingly solid protections guiding our political actions and behaviors were, in fact, flimsy. No laws prevent a president from hiding his taxes, from using the powers of government to bully news organizations or others that displease him, and possibly even from firing the prosecutors who investigate him.

The erosion of democracy is also playing out in the states. Consider North Carolina: In recent years, the state enacted an array of anti-democratic rules. The state's restrictive voting law cut back on early voting and registration and imposed harsh voter ID rules. A federal appeals court found it was crafted to "target African Americans with almost surgical precision." The legislature passed gerrymanders so lopsided that multiple courts found them unconstitutional. When incumbent Republicans lost control of the governorship, legislators sought to entrench party power, passing a law that effectively put Republicans in charge of the state election board in perpetuity. The state's GOP legislators even tried (unsuccessfully) to increase the size of the state supreme court to enable the outgoing governor to fill more seats. North Carolina provides a particularly grotesque version of trends seen throughout the country.

The efforts to manipulate the electoral system are so pervasive they could prevent the voice of the people from being heard in November. Prognosticators see a possible “wave” election, with voter anger yielding surging turnout and electoral change. Yet gerrymandering is now so severe that Democrats would need a nearly unprecedented landslide to win the House of Representatives by even one seat. Voting restrictions in many states continue to thwart thousands of voters — and could be the determinative factor in close elections. Dark money continues to balloon, reaching new highs this year. The crisis of American democracy, in short, is urgent.

This report proposes solutions to address that crisis and revitalize our system of self-government so it works for all people. To do so, we must move the issue of democracy itself to the center of our politics. After all, we will be able to address few pressing problems if we do not repair our democracy. The need for change is clear.

Indeed, the threats to democracy are so vivid and undeniable that they have begun to be the source of political energy and organizing enthusiasm. In 2016, both Bernie Sanders (declaring a “political revolution”) and Donald Trump (pledging to “drain the swamp”) gave voice to discontent. This year, citizens are advancing ballot measures to end partisan gerrymandering in Michigan, to end lifetime felony disenfranchisement in Florida, and to adopt automatic voter registration in Nevada. Even amid partisan voting wars, bills to expand voting are now moving through state legislatures with bipartisan support — far more than bills to restrict access.

Automatic voter registration was adopted unanimously by the Illinois legislature, and by 60 percent of Alaska voters (even as they backed Donald Trump). An impressive bipartisan coalition of elected officials urged the Supreme Court to end extreme partisan gerrymandering. When the new president claimed widespread voter fraud, Republican *and* Democratic election officials spoke out to debunk the false claim, and the commission he created to search for fraud imploded.

In short, there is more energy, more activism, more anger, and more passion around the state of democracy than we’ve seen in years.

This agenda seeks to turn that energy into answers. It sets out changes that can be enacted and implemented at the federal and state level. These changes promote full political participation; truly representative and accountable elected legislatures; a functional government freed from the distorting effect of big money; and a system in which the voice of the people is heard without being blocked by entrenched political forces.

Most of these proposals have, in various forms, been tried on a small scale and succeeded. They draw on the Brennan Center’s expertise and years of research, advocacy, and engagement. Taken together, they could expand democratic participation and representation, transform the country’s governance, and open opportunities for new forms of engagement.



Protect and Expand Voting

Modernize the Voting Process

1. **Enact Automatic Voter Registration.** Congress should pass the Automatic Voter Registration Act, and states should continue to adopt automatic voter registration.
2. **Expand Early Voting.** Congress should set minimum early voting requirements in federal elections, and the states that don't offer early voting should adopt it.
3. **Prevent Long Lines at the Polls.** Congress and the states should set and enforce standards to ensure all polling places have sufficient voting machines, poll workers, and other resources to avoid long lines.

Protect Voting Rights

1. **Restore the Voting Rights Act.** Congress should restore the full protections of the Voting Rights Act, and states should supplement those protections.
2. **Restore Voting Rights to Citizens with Past Criminal Convictions.** Congress should pass the Democracy Restoration Act, and states should also ensure that if you're a voting-age citizen living in the community, you get to vote.
3. **Protect Eligible Voters from Improper Purges of the Voter Rolls.** Congress and the states should pass laws ensuring that eligible voters aren't disenfranchised by improper purges.
4. **Protect Against Deceptive Election Practices.** Congress should pass the Deceptive Practices and Voter Intimidation Prevention Act, and states should also penalize and correct false information aimed at preventing voting or voter registration.

Secure Elections Against Foreign Interference

1. **Upgrade and Secure Voting Infrastructure.** Congress and the states should ensure that jurisdictions have funds to upgrade voting machines and registration databases, conduct regular post-election audits, and undertake continuous threat assessments and remediation.
2. **Protect Against Foreign Spending in Elections.** Congress should pass the Honest Ads Act and the DISCLOSE Act, which would require greater transparency for online ads and make it harder for foreign powers to funnel money into American elections. States should do the same for state elections.

Reduce the Influence of Money in Politics

1. **Boost Citizen Funding of Elections.** All levels of governments should enact small donor public financing or provide tax credits or rebates for small donor contributions.
2. **Fully Disclose All Political Spending.** Congress should pass the DISCLOSE Act, and states should require all groups engaged in political spending in state races to disclose their donors.
3. **Close Fundraising Loopholes for Candidates and Officeholders.** Congress and the states should curb coordinated activity between candidates and super PACs. They should also stop the flow of dark money to nonprofit groups that are controlled by and promote elected officials.
4. **Revitalize the Federal Election Commission.** Congress should restructure and reform the Federal Election Commission.

Improve Redistricting and Representation

1. **Make Redistricting Independent.** States should adopt independent redistricting commissions, or add other safeguards to prevent partisan bias in the redistricting process, and Congress should pass legislation requiring them to do so for federal maps.
2. **Support a Fair and Accurate Census.** Congress should prohibit citizenship questions on the census and approve sufficient funding to ensure a complete and accurate count in 2020.
3. **Elect the President by Popular Vote.** Congress should propose a constitutional amendment to provide for the popular election of the president. In the meantime, states should become party to the National Popular Vote Interstate Compact.

Safeguard Against Erosion of Rule of Law and Democratic Norms

1. **Enact Safeguards Against Inappropriate Political Interference with Law Enforcement.** Lawmakers should promote and enact policies to repair democratic norms, restore trust in government, and ensure balance between the separate branches of government.
2. **Strengthen Executive Branch Ethics Laws.** Congress should close loopholes in federal ethics disclosure rules, strengthen the Office of Government Ethics, and address presidential conflicts of interest.

Promote Fair and Impartial Courts

1. **Reform State Judicial Selection.** States should amend their constitutions to adopt a “one and done” lengthy fixed term for state supreme court justices, and adopt a publicly accountable appointment system in lieu of state supreme court elections.
2. **Strengthen Recusal Rules for Judges.** States should pass legislation or adopt court rules to require judges to step aside from cases when they are the beneficiaries of substantial spending in support of their election.



Protect and Expand Voting

MODERNIZE THE VOTING PROCESS

1. Enact Automatic Voter Registration
2. Expand Early Voting
3. Prevent Long Lines at the Polls

PROTECT VOTING RIGHTS

1. Restore the Voting Rights Act
2. Restore Voting Rights to Citizens with Past Criminal Convictions
3. Protect Eligible Voters from Improper Purging of the Voter Rolls
4. Protect Against Deceptive Election Practices

Modernize the Voting Process

1. Enact Automatic Voter Registration

Why do so few Americans vote? There are many reasons. But one chief factor is that 1 in 4 Americans is not registered at all. This quiet disenfranchisement is the product of an out of date, ramshackle voter registration system. Each Election Day, millions of Americans go to the polls only to have trouble voting because of registration problems.¹ Some have had their names wrongly deleted from the rolls.² Others fall off state records when they move.³ One-quarter of American voters wrongly believe their registration is updated when they change their address with the U.S. Postal Service.⁴ A 2001 commission chaired by former presidents Jimmy Carter and Gerald Ford concluded, “The 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.”⁵ That’s still true.

One bold reform would modernize the system and ensure that all eligible citizens are registered: automatic voter registration (AVR). Under this approach, state governments automatically register eligible citizens, unless they opt-out. If fully adopted nationwide, AVR would:

- add up to 50 million eligible voters to the rolls, permanently;
- save money;
- increase accuracy; and
- improve election security.⁶

No single change could do more to improve American voting.

In the past three years, 12 states have approved automatic voter registration policies. Oregon was the first to act, followed by California, West Virginia, Vermont, Georgia, Alaska, Colorado, Rhode Island, Illinois, Washington, and most recently, Maryland and New Jersey.⁷ In Alaska, voters approved a ballot initiative with support from legislators in both parties, while Colorado and Georgia adopted AVR administratively. In 2017, Illinois’s Republican governor Bruce Rauner signed the plan into law after it passed the legislature unanimously. Altogether, 19 states have introduced legislation this year to implement or expand automatic registration, and an additional eight states had bills carry over from the 2017 legislative session for consideration in 2018.⁸

The federal government should make this reform the new national standard. For example, the Automatic Voter Registration Act of 2017, introduced by Sens. Patrick Leahy (D-Vt.), Amy Klobuchar (D-Minn.), and Dick Durbin (D-Ill.) and Rep. Robert Brady (D-Pa.) [S.1353; H.R.2876] would require states to automatically register every eligible voter.⁹ But if Congress fails to act, states should continue to embrace the approach.

How does it work?¹⁰ When an eligible citizen gives 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 a naturalized citizen — they are automatically signed up to vote unless they decline.¹¹

Automatic registration yields many benefits. It promotes election integrity: Only those who have already demonstrated to a government agency that they are U.S. citizens over 18 years of age are added to the rolls. Electronic systems also save money and increase accuracy. For example, Arizona's Maricopa County found that processing a paper registration form costs 83 cents, compared to an average of 3 cents for

applications received electronically through the DMV or online. Electronic registrations were five times more accurate than paper.¹²

In the past three years, 12 states have approved automatic voter registration policies.

Strong evidence also suggests AVR boosts registration. In Oregon, the rate of new registrations at the DMV quadrupled and the overall registration rate jumped by nearly 10 percent since adopting automatic regis-

tration.¹³ Many of these new registrants turned out to vote. While Oregon had no competitive statewide races, its voter turnout increased by 4 percent in 2016, which was 2.5 percentage points higher than the national average.¹⁴ Vermont saw similar improvements in its registration rate, netting more than 12,000 new and updated registrations from the DMV in the first six months following implementation of AVR.¹⁵

At a time when too many Americans are alienated from our political process, AVR creates an opportunity for transformative change. This smart-minded reform is a critical step in energizing our democracy and engaging everyone in our elections.

2. Expand Early Voting

Why is Election Day the first Tuesday after the first Monday in November? Many wrongly assume it is a constitutional command. In fact, that date was set by Congress in 1845 for the convenience of farmers who had to ride a horse and buggy to the county seat to cast a ballot. Voting on a single workday no longer serves the needs of modern Americans, who must find time to cast a ballot among jobs, child-care, and errands. The inconvenience is magnified by long lines at the polls and overwhelmed election officials and poll workers.

Most states no longer limit voting to one Tuesday. In fact, today 1 in 3 Americans votes before Election Day, usually through early voting or absentee balloting.¹⁶ This is a welcome response to public demand. Early voting eases Election Day congestion, leading to shorter lines and improved poll-worker performance. It allows election officials to correct registration errors and fix voting system glitches earlier. And polling has shown that early voting enjoys popular support.¹⁷

But voters in 13 states have no opportunity to vote early.¹⁸ And starting in 2011, lawmakers in some states have sought to cut back on early voting. In many cases, these reductions have targeted voting days used heavily in African-American communities,¹⁹ such as the last Sunday before the election, when churches organize "souls to the polls" drives. States that cut back on early voting have faced lawsuits and some rulings that the changes were discriminatory. Overall, there is a patchwork of laws and rules setting when citizens in different states can vote, with some having ample opportunity to vote early, and others denied it entirely.

When more people have the opportunity to vote, our democracy is stronger. The 13 states that bar early voting should pass legislation to adopt it. And states that have early voting systems should improve and standardize them. An ideal system would allow for early in-person voting beginning at least two weeks before Election Day and would provide opportunities to vote in the evening and on weekends, including the weekend immediately before Election Day. States should provide public education to ensure citizens know they can vote early.²⁰

States administer elections and can adopt early voting on their own, but there should also be a national minimum standard. Congress can set minimum early voting requirements in federal elections. This mandate is one of the multiple reforms offered in the Voter Empowerment Act (S. 1437; H.R. 12), introduced by Rep. John Lewis (D-Ga.) and Sen. Kirsten Gillibrand (D-N.Y.), which would require states to provide at least 15 days of early voting.²¹

3. Prevent Long Lines at the Polls

The 2016 election was marred by long lines at the polls.²² A 4,000-person line in Cincinnati, Ohio snaked for half a mile.²³ During the presidential primary, some voters in Arizona waited up to five hours.²⁴ In 2012, more than 5 million voters had to wait at least one hour to cast a ballot.²⁵ In Florida that year, about 201,000 people didn't vote because they were discouraged by long lines.²⁶

African-Americans and Hispanics are significantly more likely than whites to wait in long lines.²⁷ In South Carolina, the Brennan Center found that the 10 precincts with the longest lines in 2012 had more than twice as many African-American voters as other precincts.²⁸ In Maryland, the 10 precincts with the fewest machines per voter had more than twice as many Hispanic voters.²⁹

The United States should establish a national policy: Nobody should wait more than a half hour to vote. To achieve this, proper resource allocation is crucial. The precincts with the longest lines generally have fewer voting machines and poll workers.³⁰

State election officials should set standards to ensure all polling places have enough resources — and enforce those standards vigorously to make sure they stick. Administrators should also pay special attention to precincts with high numbers of minority voters, which often have too few machines and poll workers.

In addition, the president and Congress should work to adopt the polling place management recommendations from the 2014 bipartisan Presidential Commission on Election Administration. Robert Bauer, former counsel to Barack Obama's presidential campaign, and Benjamin Ginsberg, former counsel to Mitt Romney's presidential campaign, chaired the panel. It outlined a plan to keep wait times at the polls to 30 minutes or less.³¹ Proposals include expanded access to early voting and no-excuse absentee voting, and steps to institute poll worker training standards, better recruitment practices, enhanced polling place location and design, and improving the management of voter flow.³²

Legislation to reduce long lines introduced in prior sessions include the LINE Act,³³ which would direct the attorney general to work with the Election Assistance Commission to develop plans to minimize wait times in states where voters had previously waited more than 30 minutes to vote, and the FAST Voting Act,³⁴ which would create a competitive grant program to encourage states to reduce wait times.

Protect Voting Rights

1. Restore the Voting Rights Act

The 2016 election was the first presidential election in 50 years without the full protection of the Voting Rights Act (VRA) to combat racial discrimination in voting. Widely regarded as the most effective civil rights law in American history, the VRA prohibits a range of discriminatory voting practices and lets citizens and the federal government challenge discriminatory changes to voting laws and practices.³⁵

In June 2013, however, the Supreme Court gutted the law's core provision in its 5-4 decision in *Shelby County v. Holder*.³⁶ Under Section 5 of the Act, states and localities with a history of voting discrimination had to get permission in advance — or “preclearance” — from the Justice Department or a federal court in Washington, D.C. before making any changes affecting voting processes. To do so, they had to prove that their proposed changes were not racially discriminatory. This process proved remarkably effective at deterring voting discrimination. Between 1998 and 2013, 86 proposed election changes were blocked.³⁷ Hundreds more were withdrawn after Justice Department inquiry or pushback.³⁸ And still more were never put forward because policymakers knew they wouldn't pass muster.

In *Shelby County*, the Supreme Court neutered preclearance, ruling that the law used an out-of-date formula to determine which states were covered. At the argument, Justice Antonin Scalia said that the law was merely a “racial entitlement.”³⁹ Chief Justice John Roberts, the opinion's author, said that the coverage formula made sense at the time it was adopted, but “[n]early 50 years later, things have changed dramatically.”⁴⁰ But, in a stern dissent, Justice Ruth Bader Ginsburg wrote, “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”⁴¹

Who was right? Just hours after the Supreme Court issued its ruling, Texas announced that it would implement the country's strictest voter ID law, which had previously been denied preclearance and hadn't been put into effect. (This notorious law allowed people to use a concealed carry gun permit as voter ID but barred the use of a University of Texas ID.) A federal court later blocked the law as discriminatory — but not before it marred multiple elections.⁴²

Congress and the president should enact legislation to restore the full protections of the Voting Rights Act.

Other states responded similarly to the *Shelby County* ruling with laws restricting voting. Federal courts have repeatedly found that these new laws made voting harder for minorities — some purposefully so.⁴³ One federal appeals court ruled that a North Carolina law — a broad set of voting restrictions unveiled shortly after *Shelby County* — “target[ed] African Americans with almost surgical precision.”⁴⁴ These lawsuits

were brought under a remaining provision of the Voting Rights Act, Section 2, which allows challenges to voting discrimination. But lawsuits are no substitute for preclearance, which effectively prevented discriminatory voting changes from taking effect in the first place. Section 2 lawsuits are lengthy, expensive, and often don't yield results until after an election (or several) is over. And they are rarely used for the most pervasive consequence of the weakening of the law — local decisions that make it harder for people to vote. Since *Shelby County*, officials have closed hundreds of polling places in counties previously covered by the VRA.⁴⁵

Congress and the president should enact legislation to restore the full protections of the Voting Rights Act. The Voting Rights Advancement Act, introduced this session by Rep. Terri Sewell (D-Ala.) (H.R. 2978) and Sen. Patrick Leahy (D-Vt.) (S. 1419), would require preclearance for states that have a record of voting rights violations in the preceding 25 years.⁴⁶ Another bipartisan bill, the Voting Rights Amendment Act (H.R. 3239), introduced by Rep. James Sensenbrenner (R-Wis.), would also restore key protections.⁴⁷

States should also supplement the protections afforded by the federal government. California's Voting Rights Act gives minority voters a more easily navigable channel to challenge discriminatory voting systems than Section 2 of the VRA. Similarly, just this year, Washington state passed a state-level Voting Rights Act.

In the past, the Voting Rights Act won wide bipartisan support. In 2006, the Senate voted 98-0, and the House 390-33 to renew every section of the Act — including the provision the Supreme Court later struck down.⁴⁸ At a White House bill signing, President George W. Bush declared, “By reauthorizing this act Congress has reaffirmed its belief that all men are created equal.”⁴⁹ Many who voted in favor are still in Congress today. The American public also supports the VRA. According to a 2014 poll, 81 percent of voters support the VRA, and 69 percent support restoring it, including 57 percent of Republicans and 84 percent of Democrats.⁵⁰

The Voting Rights Act was a remarkable accomplishment, ushering in the promise of real political equality after centuries of abuse. Restoring and strengthening its protections is crucial to ensuring our elections remain free, fair, and accessible for all Americans.

2. Restore Voting Rights to Citizens with Past Criminal Convictions

One remnant of the Jim Crow era prevents millions of Americans from voting: punitive criminal disenfranchisement laws. Thirty-three states disenfranchise at least some citizens with previous criminal convictions. Fifteen states and Washington, D.C. restore the right to vote immediately upon an individual's release from prison or while serving a sentence in the community, while two states never take away voting rights.⁵¹ As a result, as many as 4.7 million American citizens who live in our communities — working, paying taxes, and raising families — cannot vote because of a past criminal conviction.⁵²

Criminal disenfranchisement laws disproportionately harm minorities, barring 1 out of 13 African-American adults from voting.⁵³ In Florida, the ratio is 1 in 5.⁵⁴ At the 1902 constitutional convention that established Virginia's lifetime ban on voting by those with felony convictions, future Treasury Secretary Carter Glass exulted, “This plan will eliminate the darkey as a political factor in this state in less than five years.”⁵⁵

Disenfranchisement laws diminish democracy. They also hurt public safety by making it harder to reintegrate citizens into the community. A Florida government study, for example, found that people released from prison whose voting rights were restored were three times less likely to return to the criminal justice system.⁵⁶

Congress and the states should adopt the simple and fair rule that if you're living in the community, you get to vote. The federal Democracy Restoration Act, introduced by Sen. Benjamin Cardin (D-Md.) last

Congress and in several previous terms,⁵⁷ would let citizens vote in federal elections immediately upon release from prison or while serving a sentence in the community.

Encouragingly, reform has gained momentum. Over the past 20 years, 10 states have restored voting rights to people with past criminal convictions, including three that reversed lifetime voting bans.⁵⁸ In addition, Pennsylvania was forced to expand voting rights by a court order.⁵⁹

Today, active proposals to restore voting rights are under consideration in several more states. The most significant fight is unfolding in Florida. The state is an outlier, 1 of only 3 with a lifetime voting ban, and has the highest disenfranchisement rate in the country. Citizens collected more than 1 million signatures to place a measure on the November 2018 ballot that would end the state's lifetime voting ban for most Floridians upon completion of their sentences.⁶⁰ If the measure passes, over 1.5 million Floridians would regain eligibility to vote.

**4.7 million
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These efforts have attracted broad support.⁶¹ Criminal justice experts recognize that voting rights restoration is a smart-on-crime policy that strengthens communities and serves public safety.⁶² Police and other law enforcement professionals, faith leaders, and elected officials support rights restoration, including Republican Sens. Lindsey Graham, John McCain, Orrin Hatch, and Rand Paul, and the American Association of Pro-

bation and Parole.⁶³ In the 2017 Virginia gubernatorial election, the candidate who supported ending lifetime felony disenfranchisement beat one who ran ads calling the stance soft on crime.⁶⁴ The political environment is ripe to continue progress on this vexing issue.

3. Protect Eligible Voters from Improper Purges of the Voter Rolls

Voter purges are on the rise.⁶⁵ Properly done, efforts to clean up voter rolls are important for election integrity and efficiency. Done carelessly, hastily, or irresponsibly, such efforts are prone to error, the effects of which are borne by voters whose names are purged from the list (and those who are waiting in line behind them at the polls). Activist groups and some public officials have mounted behind-the-scenes campaigns to provoke purges without adequate safeguards. If successful, these efforts could lead to a massive number of eligible, registered voters losing their right to cast a meaningful ballot this fall.

At times, the way officials purge voters guarantees error. In the 2016 presidential primary, for example, thousands of long-time Brooklyn voters showed up to the polls only to find their names missing from the voter list. It turns out that the elections board had quietly purged more than 210,000 from the rolls either because they had not voted in recent elections or because officials believed they had moved. With no public warning and little notice to voters, many names were deleted in error.⁶⁶ Flawed purges like this, unfortunately, happen all too often.⁶⁷

States also increasingly rely on faulty data sources. A study of one computer program, used in many states to identify voters who have moved, estimated that the program could cause 300 legitimate records to be purged for every double-vote it prevents.⁶⁸

Congress and the states should pass legislation that provides for four key safeguards against improper purges:

- public notice before election officials conduct large-scale voter purges;
- individual notice before a person is removed from the rolls, with an opportunity to correct errors;
- published procedures and clear data quality standards for identifying records for purges; and
- procedures to allow wrongly-removed voters to cast a ballot that counts on Election Day.

These protections would let the public and affected voters catch and prevent errors in advance. Fail-safe protections on Election Day would ensure that eligible voters are not disenfranchised as a result of lingering mistakes in the purge process. The Voter Empowerment Act (S. 1437; H.R. 12) would require some of these elements.

Experience shows that states can easily implement these safeguards. For example, Pennsylvania gives individuals written notice before purges,⁶⁹ and Virginia produces a comprehensive report each year on its list maintenance activities.⁷⁰ Fourteen states allow voters, including those who were wrongly removed, to register on Election Day,⁷¹ while others have special Election Day fail-safe procedures specifically for wrongly-removed voters.⁷²

4. Protect Against Deceptive Election Practices

Dirty tricks have long been part of American politics. The spread of false and misleading information to disrupt voting isn't new, but these tactics proliferate in the era of cell phones and social media.⁷³ During the December 2017 special election to fill a vacant Senate seat in Alabama, voters in Jefferson County — home to the predominantly African-American city of Birmingham — reported receiving text messages that falsely stated that their polling site had changed.⁷⁴ Other reports of false information spread on Twitter.⁷⁵

There is reason to expect an uptick in these unsavory tactics, which often target communities of color. In December 2017, a decades-old consent decree that provided for court monitoring of any “ballot security” operations of the Republican National Committee expired, opening the door to new efforts to target voters. At the same time, President Trump has repeatedly called on his supporters to engage in vigilante poll-watching efforts.⁷⁶ History tells us that unofficial “ballot security” efforts often lead to deceptive practices and voter intimidation.⁷⁷ Social media is also ripe for abuse by those seeking to intimidate or deceive voters.

Congress should act to curb these abuses by passing the Deceptive Practices and Voter Intimidation Prevention Act, which has been introduced in previous sessions by Sen. Charles Schumer (D-N.Y.).⁷⁸ It would prohibit attempts to impede or prevent a person from voting or registering to vote — including making false and misleading statements for that purpose. It provides for criminal consequences and empowers citizens to go to court to stop voter deception. And if election officials do not adequately correct the misinformation, it would require the attorney general to do so. States should adopt similar prohibitions and require officials to take corrective action.

There is broad and bipartisan agreement that lying to voters to prevent them from voting is unacceptable. Many states already have laws to prevent various forms of voter intimidation and interference.⁷⁹ The Deceptive Practices and Voter Intimidation Prevention Act and similar state efforts would address a targeted, yet persistent and pernicious, form of vote suppression.



Secure Elections Against Foreign Interference

1. Upgrade and Secure Voting Infrastructure
2. Protect Against Foreign Spending in Elections

1. Upgrade and Secure Voting Infrastructure

America's election was attacked in 2016. Russia did far more than hack campaign emails. It entered state websites and probed and penetrated voter lists. It targeted private vendors of voting equipment and sent spear-phishing e-mails to over 100 election officials. All told, the Department of Homeland security identified Russian activity in 21 states. Russia will be back in 2018, and there is no reason to believe that other malevolent actors will not join them.

The nation's election systems remain vulnerable. This vulnerability is a product of aging technology, inadequate security, and a patchwork system of election administration with widely varying degrees of sophistication and resources.⁸⁰ Simply put, a 20th century voting system is not suitable for the 21st century.

After years of warnings, federal lawmakers are finally realizing that financially-strapped states need money to improve their voting infrastructure. In late March, President Trump signed a bill to give the states

A 20th century voting system is not suitable for the 21st century.

\$380 million. This funding creates an opportunity to upgrade registration systems, replace electronic voting machines that do not have an independent voter-marked paper ballot, and implement a post-election audit system that can provide confidence in the final tally.

This congressional action is a welcome first step, but it does not go nearly far enough. The last time Congress appropriated funds to substantially upgrade the voting system was in 2002 and it cost \$3.3 billion. States, counties, and Congress must supplement this funding going forward.

Nevertheless, states have an opportunity to use this funding to address the most serious vulnerabilities in their voting systems.

- **Safeguard Voter Registration Rolls.** Among the most vulnerable aspects of the system are the voter registration rolls. If one were trying to wreak havoc with an election, the registration rolls are a perfect target. By manipulating the rolls — deleting every 10th name, for instance — one could cause endless confusion at the polls, resulting in long lines and depressed turnout. The Department of Homeland Security said Russians tried to hack voter registration files.⁸¹ There is no evidence these attacks affected election outcomes, but the development is a harbinger of future assaults.

The Brennan Center estimated that 41 states are using registration databases that were created at least a decade ago.⁸² The need may be even greater at the local level, where systems often run on discontinued software like Windows XP or Windows 2000. These systems are more vulnerable to attack because they are no longer supported with security updates. This is particularly troubling because smaller jurisdictions frequently have little or no information technology support of their own.

Every state should conduct an audit and threat analysis of their registration systems. Rolls should be hardened and designed so that it is easier to detect penetrations if and when they happen. For

many jurisdictions, the single most critical step may be a wholesale upgrade of their voter registration databases and the software and hardware supporting them.

- **Upgrade Voting Machines.** The vast majority of states have at least some voting machines that must be replaced. According to a 2018 Brennan Center survey, 41 states will use systems that are at least a decade old this November, and officials in 33 say they must replace their machines by 2020. Just as one does not expect a laptop to last a decade, one should not expect a voting machine to last that long.⁸³ Older machines malfunction and make mistakes.

Unsurprisingly, there were multiple reports of old voting machines that broke down and malfunctioned in 2016, including “vote flipping,” when the machine does not properly record a voter’s preference.⁸⁴ Worst of all, older voting systems are also less likely to have a voter verified paper record that can be used to check the tallies after Election Day. Maintaining old machines is difficult and expensive since replacement parts are often no longer manufactured. Some election officials scavenge for spare parts on eBay.

Unfortunately, in an era of strained state and local budgets, spending on voting machines is generally not a priority. The vast majority of election officials who told the Brennan Center they must replace voting equipment by 2020 also said they did not have sufficient funds to do so.⁸⁵

Bills pending in both the Senate and the House would provide additional resources to states to address the urgent need to secure our election infrastructure. In the House, the Protecting the American Process for Election Results (PAPER) Act (H.R.3751), would share the costs with the states to replace insecure all-electronic machines with those that produce a voter-verified physical record.⁸⁶ The bill also lays the groundwork for states to regularly implement risk-limiting audits — procedures that check a small random sample of paper records to assure an election outcome is correct. In the Senate, the Secure Elections Act (S.2261), has similar provisions as well as requirements that voting machine vendors publicly report security breaches.⁸⁷

These measures are urgent. As Ambassador James Woolsey, former director of central intelligence has put it, “As has happened at key moments in our history, we face a test from outsiders who would like to harm us. We are forced to answer whether we can, once again, lay aside our differences to work together to protect the common interests of our nation.”⁸⁸

2. Protect Against Foreign Spending in Elections

Russia also sought to sway voters through political advertising.⁸⁹ Although foreign powers are barred from spending on U.S. elections, operatives bought ads through fake accounts disguised as Americans. Their ads were seen by tens of millions of people in the U.S. who didn’t know the messages originated in Russia. Intelligence officials have warned that Russia is likely to repeat this activity in 2018 and 2020.⁹⁰ Others may follow suit.

To prevent this kind of foreign interference in U.S. elections, there are three areas in urgent need of reform: the rules (or lack of them) regarding online advertising; how “foreign ownership” of a corporation is defined for campaign finance purposes; and finally, the ability of tax-exempt entities to spend money

in elections without revealing their donors, foreign or domestic. Each of the reforms proposed below are fully consonant with current Supreme Court doctrine.

- **Update Political Spending Rules to Better Regulate Online Ads.** Congress should enact the Honest Ads Act (S.1989), which closes loopholes that exempt online political ads from many regulations.⁹¹ For example, when political ads appear on TV and radio, there are rules governing when their spending sources must be disclosed, both in public reports and the ads themselves (“Paid for by the Committee to Elect Veterans”). The Act would apply the same rules to online ads.

The Honest Ads Act also requires online ad sellers to maintain a public database of spots that discuss candidates or national political issues, in the same manner as television and radio stations. And, it requires businesses that sell ads, whether online or not, to make reasonable efforts to block foreign nationals from buying political ads. For example, sellers could check that a buyer paying by credit card has a domestic address.⁹² This is a long way from the situation in 2016 when some online ad purchasers paid in rubles, yet never faced any scrutiny.⁹³

Even if the federal government does not act, states such as California and New York have the potential to change the way internet companies deal with political advertisements throughout the country. Once social media platforms are forced to adopt disclosure rules for all state political ads purchased in some states, it may be easier for the companies to apply this regimen to political ads purchased nationwide, rather than parse out which state’s rules apply to the advertisement. One state proposal following the Honest Ads Act model is New York’s Democracy Protection Act, enacted in April.⁹⁴ The Maryland legislature passed a similar law improving transparency for online political ads.⁹⁵

- **Expand the Ban on Foreign Spending to Include Business Entities with Substantial Foreign Ownership.** Under current federal law, domestic corporations, limited liability companies, and partnerships can spend on elections even when they are owned by individuals or entities that themselves are banned from election spending. Lawmakers should close this loophole by expanding the ban on foreign spending to cover businesses with substantial foreign ownership so that foreign interests can’t use such firms as veils to spend on U.S. elections.

Congress can achieve this by passing the DISCLOSE Act, which would ban corporations from making political expenditures if a foreign national owns or controls 20 percent or more of the corporation’s voting shares, or if a foreign government owns or controls 5 percent or more of the voting shares.⁹⁶

States should do the same with their elections. Colorado has led the way by prohibiting political spending by corporations in which foreign nationals hold a more than 50 percent ownership interest.⁹⁷ There are also bills pending in Connecticut, Maryland, Massachusetts, and Washington state that would limit businesses’ political activities if their foreign ownership exceeds a specified threshold, as well as a proposed ballot initiative in Alaska.⁹⁸

- **Require Disclosure of All Sources of Election Spending.** As explained in greater detail elsewhere in this agenda, passing the federal DISCLOSE Act would also clamp down on dark

money, and thereby eliminate hiding places for illegal foreign spending. States should provide for similarly broad disclosure, as California already does.⁹⁹ Washington state enacted legislation to address dark money in April.¹⁰⁰

The 2016 election exposed how the campaign finance system is vulnerable to covert foreign spending. These commonsense measures build on existing law to better protect the integrity of elections. More than 7 in 10 Americans say they're worried about foreign interference in elections,¹⁰¹ and more than 8 in 10 support the disclosure of online ads.¹⁰² States including Maryland, New York, and Washington state are responding with strong proposals. Additional states — and Congress — should join them.



Reduce the Influence of Money in Politics

1. Boost Citizen Funding of Elections
2. Fully Disclose All Political Spending
3. Close Fundraising Loopholes for Candidates and Officeholders
4. Revitalize the Federal Election Commission

1. Boost Citizen Funding of Elections

Big money increasingly dominates politics. True, millions of small donors can now contribute to political campaigns online, giving citizens of modest means a powerful new way to influence elections.¹⁰³ But thanks to a broken campaign finance system, the wealthiest Americans have a far greater say.

Since the Supreme Court's 2010 decision in *Citizens United v. FEC*, which unleashed unlimited political spending, vast sums from a few large donors have come to dominate elections. In the 2016 federal election cycle, \$2.3 billion of the \$6.5 billion spent came from just 0.01 percent of the adult population.¹⁰⁴ The small number of donors who gave \$100,000 or more spent more than the 8 million small donors combined.¹⁰⁵ Political scientists have now confirmed that the views of ordinary citizens turn out to have no discernible impact on the actions of members of Congress; big donors are much more influential.¹⁰⁶

Citizens are disgusted with the role of big money. An October 2017 Washington Post-University of Maryland poll found that 96 percent of Americans blamed money in politics for creating political dysfunction.¹⁰⁷ One pollster found “a clear disconnect between the Beltway and Main Street on campaign finance. Curbing the influence of money on electoral politics was one of the strongest policy initiatives tested.”¹⁰⁸

To restore confidence in American democracy, we must find a way to bolster the voice of ordinary citizens. Citizen-funded elections — including matching small donations at a multiple ratio or offering tax credits or rebates for small contributions — would transform political fundraising.

- **Establish Small-Donor Public Financing.** Public financing has a long pedigree. Theodore Roosevelt first proposed it in 1907, calling it “a very radical measure.”¹⁰⁹ After Watergate, a robust presidential public financing system was enacted. From 1976 through 2004, most qualifying candidates participated. Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush all ran using public funds. But the system weakened, a result of inadequate funding levels and evasions through political party “soft money.” In 2008, Barack Obama made history by declining to take public funds; by 2012, no major party nominee joined the system.¹¹⁰ In 2016, former Maryland Governor Martin O'Malley was the only candidate to opt into the presidential public financing system.¹¹¹

One answer to the broken federal system is to implement a model of public funding that does not seek to end all private fundraising but rather amplifies the impact of small gifts through a multiple match of public money. This would also be a transformative reform for states and localities.

The most prominent model is found in New York City. There, qualified candidates receive \$6 in public funds for each \$1 raised in small donations of \$175 or less.¹¹² The system is optional, but nearly all candidates participate. Office-seekers now focus fundraising within the communities they represent, attracting a far wider and more representative circle of donors.¹¹³ The reform has made elections more competitive and reduced barriers to participation for candidates and donors alike. And it is well-established that voluntary small donor public financing systems are legally permissible under *Citizens United* and other Supreme Court decisions.

The Empowering Citizens Act, introduced by Rep. David Price (D-N.C.) (H.R. 3955) and Sen. Tom Udall (D-N.M.) (S. 1931), would provide public financing for presidential and congressional contests. Building off New York City's successful model, it would amplify small donor voices by matching contributions of up to \$200 at a ratio of 6-to-1.¹¹⁴ The bill encourages candidates to run grassroots-oriented campaigns by reducing contribution limits for matchable donations. The Brennan Center also supports the We the People Democracy Reform Act, a package of reforms sponsored by Price and Udall that includes the Empowering Citizens Act's provisions.¹¹⁵

- **Provide Tax Credits or Rebates for Small Contributions.** Another option would provide tax credits or rebates to citizens who make small contributions.¹¹⁶ Between 1972 and 1986, millions of Americans claimed federal tax credits for small campaign contributions, but the credit was eliminated in the tax overhaul of 1986.¹¹⁷ This reform still lives on in some states, however. Minnesota, Oregon, Ohio, and Arkansas, for instance, offer citizens rebates or tax credits if they make a small contribution to a candidate or party.¹¹⁸ These reforms usually apply to small donations of \$50 or less.¹¹⁹

Tax credits and rebates make it more attractive for individuals to give to their preferred candidate or party.¹²⁰ As with small donor matching, tax incentives encourage more small donors to participate in our elections and help candidates rely less on large contributions.¹²¹ Existing state-level programs have attracted contributions from a broader group of donors, including lower-income individuals and first-time donors.¹²² In a political environment where progressives and conservatives often find themselves far apart, tax credits and rebates offer common ground, with groups from the right and left backing these systems.¹²³

Other jurisdictions offer other options to boost citizen participation. Seattle gives voters four \$25 vouchers to give to city candidates of their choice.¹²⁴ Other states and cities offer candidates block grants.¹²⁵ Several public financing models can also be combined to enhance incentives for candidates and donors to participate. For example, the Government by the People Act, proposed by Rep. John P. Sarbanes (D-Md.) (H.R. 20), would create a voucher pilot program, provide tax credits for small contributions, and institute a matching system.¹²⁶

Citizen-funded elections would transform political fundraising.

A 2015 *New York Times*/CBS News poll showed that 85 percent of respondents — across the political spectrum — believed that the country needed to either make “fundamental changes” to or “completely rebuild” the way political campaigns are funded.¹²⁷ And a majority of Americans favor using small donor matching in elections.¹²⁸ With many success stories in federal, state, and

local elections, and several new and creative systems proposed, candidates can access a wealth of data and experience when assessing how to encourage small-donor participation and discourage elections that are dominated by wealthy individuals and corporations.

Five to Four: A Different Approach to Campaign Finance Cases

Super PACs. Dark Money. Multimillion-dollar contributions. Unlimited corporate and union spending. For many Americans, these may seem like fundamental, if unfortunate, aspects of our elections, but all are recent phenomena.

Only a few years ago, there were no federal super PACs. The term “dark money” had not been coined, because it was virtually nonexistent. Corporations and unions were strictly limited in how they could spend in elections. Super-wealthy individuals could not donate millions to candidates and parties in a single election, because there were aggregate limits on contributions.

These new developments, and others that most Americans decry, can be directly or indirectly traced to just a few Supreme Court decisions issued in the last decade, each decided by a single vote.¹²⁹ Most notably, in 2010, *Citizens United* upended a century of law, striking down the decades-old ban on direct spending by corporations and unions in federal elections.¹³⁰ Subsequent lower court rulings extended the Supreme Court’s ruling to permit unlimited donations to super PACs and other groups that engage in unlimited campaign spending.¹³¹

Other Supreme Court decisions limited the ability of jurisdictions to enact innovative public financing systems¹³² and swept aside “aggregate limits” on how much any one individual can give directly to candidates and parties in an election cycle.¹³³ This allowed political parties to directly raise million-dollar donations from the same wealthy megadonors who fund super PACs.¹³⁴

In each of these cases, the majority not only shredded decades of legal doctrine but did so based on factual assumptions — such as, that all new campaign spending would be transparent and completely independent of candidates’ campaigns — that have been proven wrong.¹³⁵

A new approach by just one Supreme Court justice could once again allow for commonsense regulations that ensure all Americans have a voice in the political process and enable a more representative, diverse group of candidates to competitively run for office without the support of a few super-wealthy donors.

This means more than just reconsidering *Citizens United* and other recent rulings. Those cases have their roots in older decisions, starting in *Buckley v. Valeo*, which found that fighting “quid pro quo corruption” (i.e., bribery) is the only legitimate basis for most campaign finance regulation.¹³⁶ To be sure, fighting corruption is critical, especially if corruption is understood broadly to embrace the many ways that big money distorts governance. But it is not the only democratic value at stake.

Among other things, as the four dissenters in the 2014 case *McCutcheon v. FEC* noted, legislatures must have the ability to enact reasonable rules to uphold “the integrity of the electoral process.”¹³⁷ This includes corruption, and also the right of all citizens to have a chance to participate, compete for public office, and be heard.¹³⁸ Only by giving due weight to these important objectives can we fully realize the Constitution’s promise as the charter for a vibrant, effective, and representative democracy.

2. Fully Disclose All Political Spending

Secret political cash is a growing threat in American politics.¹³⁹ In 2016, “dark money” groups, which do not disclose their donors, spent almost \$181 million on federal elections.¹⁴⁰ States have also seen a surge in dark money spending.¹⁴¹ And outdated disclosure laws that fail to regulate political advertising on the internet create the potential for a massive increase in undisclosed online spending.¹⁴²

Much political spending is already disclosed. Federal law requires candidate committees, party committees, and PACs to file periodic reports disclosing the money they spend and the identities of their donors. As recently as 2006, disclosure rules guaranteed that almost all federal campaign spending was

Keeping voters in the dark about who is trying to sway them eliminates one of the remaining checks on corruption.

transparent. All 50 states also mandate some form of disclosure of campaign contributions,¹⁴³ and most require some form of disclosure for independent expenditures.¹⁴⁴

But one breed of nonprofit, supposedly devoted to “social welfare” activities but actually conducting ill-disguised campaign spending, took off after the Supreme Court’s notorious *Citizens United* deci-

sion.¹⁴⁵ These groups do not have to disclose their donors. And especially in lower-cost state and local elections, a dark money expenditure as low as \$100,000, or even \$10,000 — pocket change for special interests — can easily dominate an election.¹⁴⁶

At the same time, unregulated online political spending has proliferated, reaching \$1.4 billion in the 2016 election cycle, almost eight times higher than in 2012.¹⁴⁷

Keeping voters in the dark about who is trying to sway them eliminates one of the last remaining checks on corruption by special interests. It also makes it harder for voters to assess the messages they receive or understand the impact of private money on policymaking.

Lawmakers at all levels of government should work to pass legislation that requires disclosure of *all* election-related spending, whether through dark money nonprofits or online ad buys.

- **Strengthen Donor Disclosure Requirements.** Dark money can be eliminated by strengthening the requirements for donor disclosure. A federal bill, the DISCLOSE Act (S. 1585, introduced by Sen. Sheldon Whitehouse (D-R.I.); H.R. 1134, introduced by Rep. David Cicilline (D-R.I.)), would require groups, from corporations to nonprofit organizations, to disclose their donors when they spend significantly in elections.¹⁴⁸

Similar legislation is already in effect in some states. In California, for example, nonprofits that are frequent vehicles for dark money are required to disclose donors for their election spending.¹⁴⁹ As a result, California has seen remarkably little dark money in its elections, notwithstanding large amounts of outside spending.¹⁵⁰ Montana also requires all groups engaged in election spending to disclose how they are spending their money and their source of funds.¹⁵¹

- **Require Transparency for Online Ad Buys.** Transparency for internet spending can be achieved by bringing online expenditures under the rules that already apply to broadcast media. To accomplish this for federal elections, Sens. Klobuchar, Warner, and McCain have introduced the bipartisan Honest Ads Act (S. 1989).¹⁵² The Act would ensure, among other things, that online political ad buyers report their expenditures and their donors.¹⁵³ It would also require ad sellers to create public databases of ads that discuss political issues.

States should adopt similar reforms. New York strengthened its disclosure requirements in April, bringing online ads into the regime and requiring the State Board of Elections to maintain a public database of online ads.¹⁵⁴ Legislators in Maryland and Washington state are moving forward with similar proposals that would apply to online spending in state elections.¹⁵⁵

These reforms are plainly constitutional. Transparency is among the few campaign finance rules embraced wholeheartedly by the current Supreme Court. Chief Justice John Roberts, no friend of most campaign finance laws, pointed out in 2014’s *McCutcheon* decision that disclosure helps prevent “abuse of the campaign finance system.”¹⁵⁶ The late Justice Antonin Scalia often echoed these sentiments. “Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed,” he wrote.¹⁵⁷

The public also strongly supports disclosure. A 2015 *New York Times*/CBS News poll found that three-quarters of Americans, regardless of party, believe outside spenders should publicly disclose their donors.¹⁵⁸ And there is momentum for reform. Strong new disclosure laws were recently enacted in Washington state, Delaware, and New York City, and new proposals are under consideration in several other states.

3. Close Fundraising Loopholes for Candidates and Officeholders

In theory, contributions to candidates for federal office are limited. In practice, a donor can support a candidate with gifts of unlimited size. In 2016, most presidential candidates were backed by a super PAC, political committees formed to raise and spend unlimited money in support of candidates.¹⁵⁹ But super PAC activity is legal only if these committees are “independent” of the candidates they help.

That independence is illusory. Many super PACs were run by candidates’ top aides or by close associates to the candidates they supported. Politicians fundraised prominently for their “independent” groups and even appeared in their ads.¹⁶⁰ State candidates now also work closely with super PACs on fundraising, polling, and events.¹⁶¹ These “shadow campaigns” render candidate contribution limits virtually meaningless. They undermine state and local public financing, because candidates who fear a flood of super PAC funds may decline to participate.

Super PACs are not the only way unlimited money can now flow to politicians. In recent years, a new breed of tax-exempt nonprofits has proliferated, boosting politicians — and their policies — *while in office*. These groups raise unlimited, undisclosed funds, often from donors with government business. Typically, they buy TV, radio, and digital ads — largely unregulated because they air between elections.¹⁶² This yawning gap in the rules that govern money in politics and government ethics creates a

serious risk of corruption. Alabama Governor Don Siegelman, for example, was convicted on a bribery charge for taking \$500,000 from a healthcare executive for the nonprofit promoting his education agenda, in exchange for a seat on the state's healthcare regulatory board.¹⁶³ Today, President Trump's former advisors run America First Policies, a 501(c)(4) social welfare nonprofit that spent millions on ads featuring the president to promote passage of tax cuts.¹⁶⁴ President Obama also had a group, as do mayors, senators, and governors.¹⁶⁵

Federal, state, and local lawmakers must close these loopholes. Specifically, they should:

- **Close Loopholes that Allow Super PACs to Coordinate with Candidates.** Candidates and super PACs must keep their distance — no more appearances at “independent” fundraisers, a cooling off period before advisors jump to super PAC staff, and so on. A federal Stop super PAC-Candidate Coordination Act (H.R. 3952, introduced by Rep. David Price (D-N.C.)) has many of these elements.¹⁶⁶ The bill would curb candidate fundraising for outside groups, impose a “cooling off” period before staff members or consultants could work for allied super PACs, and block candidates and outside groups from sharing strategists or vendors.

States and localities can also act. Connecticut, California, and Minnesota have some of the strongest fundraising coordination laws.¹⁶⁷ Philadelphia and Santa Fe have prevented similar abuses.¹⁶⁸ Robust enforcement has also made it more difficult for candidates and outside groups to get away with coordination.¹⁶⁹

- **Stop the Flow of Dark Money to Nonprofits Controlled by Officeholders.** These groups should be required to disclose all donors above a reasonable threshold. Donations from those with financial interests before the officeholder should be capped. In the first law designed to tackle this growing problem, New York City began requiring nonprofits controlled by elected officials to disclose donors and limit gifts for those with business before the city to \$400.¹⁷⁰

4. Revitalize the Federal Election Commission

Campaign laws mean little without strong enforcement. The Federal Election Commission (FEC), split 3-3 between Democrats and Republicans, has long been dysfunctional. In recent years, it has gotten worse. According to former FEC Commissioner Ann Ravel, panel members deadlocked on roughly 1 in 3 enforcement matters in 2016, 10 times more often than a decade ago.¹⁷¹ In 2016, the agency levied less than \$600,000 in penalties, a 90 percent drop over the same time.¹⁷²

One problem is the agency's evenly balanced bipartisan structure, which allows any bloc of three commissioners to prevent action. These deadlocks typically prevent the Commission's staff from even investigating potential violations of the law.¹⁷³ The panel also has no real leader. Commissioners pick a colleague to serve as chair, but the office rotates each year and carries almost no actual authority.¹⁷⁴ And with an annual budget of about \$70 million, the agency is also chronically short of resources.¹⁷⁵

Some problems can be addressed by appointing new commissioners committed to enforcing the law. Over the long term, however, the Commission itself needs an overhaul.

Congress should pass legislation to restructure the FEC. The measure should, at a minimum:

- ensure an odd number of Commissioners (either five or seven), one or more of whom could be required to be registered as an independent;
- give the Commission's career staff authority to investigate alleged violations, and bolster the Commission's enforcement powers;
- have a commissioner serve as chair and as its chief administrative officer for a fixed term of four to six years, with sole authority to hire the staff director and other senior administrative personnel, formulate budget requests to Congress, and manage the agency's day-to-day operations; and
- increase funding to a level that will allow the agency to fulfill its compliance and enforcement responsibilities and maintain modern information technology to collect and disseminate campaign finance disclosure data.

The Federal Election Administration Act, introduced in 2017 (H.R. 3953, introduced by Rep. David Price (D-N.C.)),¹⁷⁶ and the Restoring Integrity to America's Elections Act (H.R. 2034, introduced by Rep. Derek Kilmer (D-Wash.); S.1683, introduced by Sen. Joe Donnelly (D-Ind.)), currently pending before Congress, contain some, but not all, of these proposed reforms.¹⁷⁷ Both bills are a start toward the goal of crafting a long-term solution for the FEC's structural flaws.



Improve Redistricting and Representation

1. Make Redistricting Independent
2. Support a Fair and Accurate Census
3. Elect the President by Popular Vote

1. Make Redistricting Independent

Gerrymandering is hardly new. (In the very first congressional election, James Madison faced a district drawn by Patrick Henry designed to keep him from winning.) But it's getting worse. Map-drawers can now use sophisticated data to lock in an advantage for a decade. This undermines American democracy by making elections a foregone conclusion and fueling a sense among voters that their ballots don't really matter.¹⁷⁸

The tilt is especially severe when a single political party controls redistricting. Consider Pennsylvania, closely divided between the parties. Republicans managed to draw a map that guaranteed them a 13 to 5 advantage in the state's congressional delegation, both in elections where the Democrats did well at the polls (like 2012) and those where Republicans won more votes (like 2016).¹⁷⁹ Maps in other fiercely contested battleground states like North Carolina and Ohio produce similarly distorted outcomes.¹⁸⁰ Democratic map-drawers likewise engaged in aggressive gerrymandering this decade in places like Maryland and Illinois.¹⁸¹

The high-stakes battle to control Congress also fuels a financial arms race to control state legislatures ahead of each redistricting cycle.¹⁸² The next round of redistricting is three years away, after the 2020 census, but Democratic- and Republican-aligned groups have already pledged to spend more money than ever before to gain the upper hand in map-drawing.¹⁸³

To stop gerrymandering abuses, the best approach is to take the power to draw congressional and legislative district lines out of the hands of lawmakers and give it to an independent redistricting commission. California¹⁸⁴ and Arizona¹⁸⁵ offer strong models.

States should establish Commissions that:

- include members who are independents as well as Democrats and Republicans;
- be large enough to reflect the demographic and geographic diversity of a state;
- have strong conflict of interest rules and a vetting process that screens potential commissioners for their fitness to do the job;
- have clear, prioritized rules to guide map drawing, including a ban on favoring particular political parties or candidates; and
- have strong rules on transparency and public participation to ensure that the public can meaningfully engage in and help shape the process.¹⁸⁶

Even states that keep redistricting in legislators' hands can ensure fairer maps. Measures can prohibit drawing maps to favor a political party or candidate, or require a bipartisan supermajority to adopt a map. For example, the Florida Constitution's ban on partisan favoritism has allowed courts to step in and effectively police abuses.¹⁸⁷ Connecticut ensures that both parties have a seat at the table by requiring a supermajority to approve a map.¹⁸⁸ A proposed constitutional amendment passed by the Ohio legislature combines both of these approaches.¹⁸⁹ It requires supermajority support, including a specified level of support from the minority party, to approve a map without special rules, and imposes a ban on unduly favoring a political party if a map is passed without a supermajority.

Congress should also pass legislation requiring independent commissions for congressional redistricting, using its powers under the Constitution's Elections Clause. A bill that provides a good starting point is the We the People Democracy Reform Act (S.1880), introduced by Sen. Tom Udall (D-N.M.).¹⁹⁰ Under this bill, each state with more than one congressional district would be required to establish a redistricting commission, based on California's model, that includes Democratic, Republican, and independent members, among other things.¹⁹¹

The parties have pledged to spend more money than ever to gain the upper hand in map-drawing.

Where they have been adopted, redistricting reforms have been an overwhelming success. California and other states with commissions have experienced less contentiousness and less litigation while improving transparency, partisan competition, and a better fit between legislative outcomes and voters' desires.¹⁹²

These changes are popular with voters, who have enacted reforms most recently in California (2008 and 2010), Florida (2010), and Ohio (2015).¹⁹³ In Michigan, volunteers collected nearly 500,000

signatures to place a proposal to create an independent redistricting commission on the ballot in 2018 and strong citizen-led reform efforts are underway in Utah and Missouri, among other states.¹⁹⁴

Elected leaders increasingly support reform as well. Ohio Governor John Kasich recently described gerrymandering as "the biggest problem we have" and joined forces with other prominent Republican elected officials to ask the Supreme Court to end it.¹⁹⁵ Their calls have been echoed by numerous lawmakers of both parties.¹⁹⁶ Ohio lawmakers passed a proposal to reform congressional redistricting that will go before voters in May 2018. A proposed constitutional amendment to create an independent commission in Pennsylvania has likewise attracted 131 co-sponsors, including 46 Republicans.

2. Support a Fair and Accurate Census

The Constitution requires that every 10 years, the government conduct a census to count all people residing in the United States. The census touches virtually every aspect of American life. Its population tallies are used to divvy up congressional seats and electoral college votes among the states.¹⁹⁷ States use the headcount to draw House and state election districts.¹⁹⁸ Congress relies on the census to divide hundreds of billions of dollars in federal funding.¹⁹⁹ Businesses rely on census data to make crucial decisions about investment and hiring.²⁰⁰ And local governments use census data to plan for schools, infrastructure, and public health efforts.²⁰¹ It requires a colossal effort by hundreds of thousands of permanent and temporary employees.²⁰²

The census has never been perfect, but the 2020 census faces unprecedented challenges that could lead to a failed count. The consequences of a bad count could last for a decade or more.

Chief among these challenges is Commerce Secretary Wilbur Ross's decision to add a citizenship question to the census form. The move came over the strong objections of former census directors from Republican and Democratic administrations, 60 members of Congress, 161 Republican and Democratic mayors, 19 state attorneys general, more than 170 civil rights organizations, and prominent business leaders.²⁰³ Current census staff were also opposed to the move.²⁰⁴

The citizenship question, if it stays in, will chill census participation and result in a serious undercount of the country's population, especially in immigrant communities. It will create privacy concerns and add to fears that the government will improperly use census results for law enforcement or immigration purposes. For the census to succeed, every person, including those in immigrant communities and communities of color, must be confident that their personal information will be secure and that their participation will not risk harm to them or their family members.²⁰⁵

Census Bureau budget shortfalls also add to the risk of an undercount. The agency has long struggled to count rural residents, people of color, immigrants, and the poor, among others.²⁰⁶ It costs substantial sums to ensure these groups are counted fully because their housing is often less stable and they often have special language needs.²⁰⁷ Adding to these challenges, the 2020 census will be the first to be taken largely online. Hard-to-count groups will be more likely to require expensive door-to-door follow-up because many have limited access to the internet.²⁰⁸ In other census years, the government developed extensive programs to boost vulnerable groups' participation. These efforts have been largely underfunded recently and will require substantial infusions of financial support over the next two budget cycles to succeed.²⁰⁹

There is, however, still time to avoid a census crackup. To ensure a fair and accurate census count in 2020, Congress must:

- **Block the Addition of a Citizenship Question.** Congress should pass legislation to block the Commerce Department's attempt to add a citizenship question to the decennial census form. Congressional legislation would boost trust, particularly among immigrant communities, and limit the likelihood of their data being misused. State attorneys general and other groups have sued to block the addition of the citizenship question. But congressional legislation offers the most direct and cost-effective fix for this problem.
- **Empower Individuals to Protect their Census Information.** Congress should also amend the Census Act to give individuals the express right to go to court if the Census Bureau releases their personal information, or if another federal agency tries to use it against them. The Census Act requires the Bureau to keep personal information private and confidential, but, under the current version of the law, only the federal government can bring legal actions to enforce those requirements.²¹⁰ At a time of plummeting trust in government, that guarantee is inadequate.
- **Fully Fund the Census.** Congress should fully fund the Census Bureau in its 2019 and 2020 budgets. Support must meet technology needs (to ensure that information systems are functional and secure) and operational needs (such as outreach).

States and localities also have a role. They can launch their own programs to educate residents on the value of participating in the census and to assist them in completing forms. Governors and mayors should appoint census coordinators or create specialized census offices to coordinate these programs.

For decades, the decennial census has been "the largest peacetime operation conducted in the United States."²¹¹ The successes and failures of past censuses provide key lessons about what is needed to ensure

a fair and accurate count. Lawmakers still have time to draw from those lessons and reduce the risk of a compromised 2020 census.

3. Elect the President by Popular Vote

Donald Trump's election in 2016 marked the fifth time in history — and the second in just 16 years — that the loser of the national popular vote won the presidency. The race was not even close. Nearly 3 million more Americans voted for Trump's rival, Hillary Clinton, than for him.

Under the Electoral College system, each state is allocated a number of electors equal to its total number of senators and representatives in Congress. In all but two states, every elector is assigned to the winning presidential candidate in that state.

The Electoral College was added to the Constitution almost as an afterthought. The delegates knew George Washington would be the first president, but could not decide how to choose his successors. At the last minute, the provision was added.²¹²

It has several glaring flaws.

First, of course, there is the fact that the popular vote loser can prevail — what political scientists call the “wrong winner” problem.²¹³

Even when the “right winner” is chosen, the system distorts. Voters in smaller states have a disproportionate voice.²¹⁴ While California is allotted one electoral vote per 713,000 residents, Wyoming has one per 195,000. The situation grows even more inequitable if no candidate wins an electoral vote majority — which has happened twice and came close several other times. Then, the House of Representatives would choose the president, meaning that states comprising just 17 percent of the U.S. population might make the final call.

The Electoral College also incentivizes presidential candidates to focus their efforts on a handful of competitive states, while disregarding most of the country.²¹⁵ In 2012, the Romney and Obama campaigns spent \$463 million on television ads in 10 general election states, and almost nothing anywhere else.²¹⁶ Four years later, two-thirds of presidential campaign events were held in a mere six states, and almost 95 percent were held in 12 states.²¹⁷ Not surprisingly, Americans living outside the “battleground” states typically vote at a lower rate.²¹⁸

Finally, the Electoral College raises the likelihood of election uncertainty. Recall the 2000 presidential election. Despite knowing that Al Gore had won the popular vote — ultimately by more than half a million votes — a razor-thin vote differential in Florida left the winner unclear for five weeks (only to have the Supreme Court decide the question in favor of George W. Bush).

The Electoral College is inconsistent with basic democratic values, including equality, civic participation, and political certainty. If the Electoral College was ever defensible, it is no longer.

Congress should propose a constitutional amendment for the states to ratify abolishing the Electoral College and, instead, instituting direct elections for the president. Direct elections are simple, fair, and imbue public confidence in our democracy. Most Americans support them for choosing the president.²¹⁹ In 2017, Reps. Steve Cohen (D-Tenn.) and Gene Green (D-Texas) introduced resolutions calling for a constitutional amendment.²²⁰ Indeed, in 1969 the House of Representatives passed a resolution for a constitutional amendment to move to a direct popular vote system (with a runoff if no candidate won over 40 percent).²²¹

Nevertheless, eliminating the Electoral College remains a heavy lift. Support for change can fluctuate depending on perceptions of which party has an edge under the current system.²²² And small states have a disproportionate sway over ratification of constitutional amendments.

But the Electoral College can be rendered irrelevant absent a constitutional amendment. States could take the lead by enacting legislation to join the National Popular Vote Interstate Compact (“NPVC”).²²³ Parties to the NPVC agree to award their electoral votes to whoever receives the greatest number of votes in the 50 states and the District of Columbia. To date, 10 states and the District of Columbia have signed on, accounting for 165 Electoral College votes. With additional state support — enough to meet or exceed 270 electoral votes — the plan would ensure that the winner of the national popular vote becomes president.

The NPVC is a creative, state-based solution to a problem of great national significance, with the potential for bipartisan support. While only Democratic-leaning states have enacted the NPVC thus far, the legislation has passed at least one chamber in 12 others, including some controlled by Republicans.²²⁴ And prior to 2000, Republicans in Congress proposed amending the Constitution to institute a direct election for the president.²²⁵

Our Constitution does not lay out a purely majoritarian government structure. However, the presidency — the singular office accountable to all of America — should be different. The Electoral College is unfair and undermines confidence in our democracy. Lawmakers should modernize the way we choose the president.



Safeguard Against Erosion of Rule of Law and Democratic Norms

1. Enact Safeguards Against Inappropriate Political Interference with Law Enforcement
2. Strengthen Executive Branch Ethics Laws

1. Enact Safeguards Against Inappropriate Political Interference with Law Enforcement

A strong democracy requires a commitment to the rule of law: that no one is above the law, and that the awesome powers of government are used to further the *public* interest, not the interests of any individual or private group.

Insulating law enforcement from self-interested or improper political interference helps ensure even-handed and unbiased administration of the law. While it is fully appropriate for the president to direct policy and set law enforcement priorities, it is not appropriate for him to direct prosecutorial actions in particular cases. The dangers of law enforcement abuses were brought to stark relief during the Nixon White House scandals — including not just Nixon’s interference in the Watergate investigation, but also the ITT scandal, in which the president told the Justice Department to drop the antitrust prosecution of a party contributor.²²⁶

Nixon-era abuses led his successors to embrace limits to the president’s ability to interfere with law enforcement for improper personal, financial, or political reasons. The Independent Counsel Act created a mechanism for investigating executive branch wrongdoing. (That law has since expired.)²²⁷ Presidents since Nixon have also adopted and adhered to policies sharply limiting contacts between the White House and Justice Department.²²⁸ More recently, a 1988 provision in the tax code prevents White House officials, including the president, from directing the Internal Revenue Service to conduct or terminate tax audits of individual taxpayers.²²⁹

The policies and practices that the executive branch imposed on itself have long been followed by members of both parties in all levels of government. For years, they protected the rule of law. But they have shown themselves to be inadequate protections today, as White House officials have repeatedly sought to influence prosecutorial and enforcement decisions.

The most egregious example is President Trump’s attempt to undermine and disrupt the investigation into whether his campaign colluded with Russia during the 2016 election. It is no secret that the president wants the Russia investigation to disappear. By his own admission, he fired FBI Director James Comey because of the “Russia thing,” and he has repeatedly targeted FBI and Department of Justice staff in his public criticism of the investigation.²³⁰ He has reportedly twice ordered the firing of Special Counsel Robert Mueller, only to back down, including once after his White House counsel threatened to resign rather than execute the order.²³¹ He publicly repeatedly demanded investigation and prosecution of his 2016 campaign opponent.

Other examples from the past year further illustrate the threats to independent law enforcement. The president recently threatened to stop a proposed merger between AT&T and Time Warner for the stated reason that it would strengthen Time Warner’s media company, CNN.²³² He has publicly threatened legal action against Amazon, whose chief executive also owns *The Washington Post*.²³³ He has repeatedly threatened to fire senior Department of Justice officials and impugned the credibility of career officials, including those working on matters involving him and his associates.²³⁴

While President Trump's efforts are extreme, other recent presidents have also broken with accepted tradition. Under President George W. Bush, the Department of Justice faced a scandal that ultimately led to the resignation of Attorney General Alberto Gonzales, after nine U.S. attorneys were fired based on their prosecutorial decisions in politically sensitive cases.²³⁵

In the past, when the executive branch abused its powers, Americans pushed for reforms to prevent a recurrence. Congress should act swiftly to enact the following safeguards to protect the rule of law:

- **Protect the Special Counsel from Removal for Improper Reasons.** Congress should enact the bipartisan Special Counsel Independence and Integrity Act (S. 2644),²³⁶ introduced by Sens. Lindsey Graham (R-SC), Thom Tillis (R-NC), Chris Coons (D-DE), and Cory Booker (D-NJ), which imposes a for-cause standard for removing the special counsel and limits the authority for removal to the attorney general, or the most senior Senate-confirmed Justice Department official who is not recused from the matter. The bill prohibits removal while litigation is pending, gives the special counsel a statutory right to challenge his or her wrongful removal, and provides for the preservation of all materials.
- **Require the White House and Federal Enforcement Agencies to Publish Their Policies Relating to Contacts Between White House and Law Enforcement Officials and Keep a Record of All Contacts.** In order to shield federal law enforcement from political interference, administrations since the Nixon era have imposed “limited contacts policies” to limit the number of White House and enforcement agency personnel who may communicate with each other.²³⁷ These limits reduced improper political pressure relating to specific investigations and prosecutions. While the current White House adopted a similar set of policies, it has repeatedly ignored them.²³⁸ Congress can strengthen internal safeguards by requiring the White House and federal enforcement agencies to publish their contact policies and maintain and disclose records of contacts between the White House and law enforcement officials.
- **Empower an Independent Office within the Executive Branch to Investigate and Report Improper Interference in Law Enforcement Matters and Ethics Breaches.** Today no individual or entity within the executive branch has the authority and independence to investigate and report on White House efforts to improperly interfere with law enforcement decisions. Congress has at times acted as a check on such abuses, but only in extreme circumstances, as in Nixon's impeachment. Congress is typically not adept at uncovering wrongdoing in the first instance or providing strong oversight when there is single party control of the government. To safeguard against abuse, Congress can empower an existing office — or create a new one — to investigate and report on improper interference with law enforcement.²³⁹ The Office of Government Ethics, discussed in the next proposal, is one candidate to house such a role, though it would need to be restructured to be able to do so effectively. The office that takes on this role could also be empowered to investigate and report on ethics violations.

There is substantial precedent for the adoption of bipartisan reforms in the face of scandal or abuse — from the adoption of anti-nepotism laws after President Kennedy appointed his brother to lead the Justice Department, to a wide array of laws introduced during and after the Nixon era. President Trump's overreach has galvanized extraordinary grassroots political engagement, and Americans from across the

political spectrum are eager to ensure our democratic system remains strong. There is both need and opportunity to respond to today's abuses with an agenda to safeguard our institutions.

2. Strengthen Executive Branch Ethics Laws

The president of the United States has vast power over much of our economy and society. Yet paradoxically, the president is exempt from many ethics rules that constrain other officers and employees of the executive branch.²⁴⁰ The agency tasked with administering these standards for all executive branch officials, the Office of Government Ethics (OGE), also has no independence, no real enforcement power, and a minuscule budget. This has opened the door to a burst of corrupting conflicts of interest in the Trump administration, starting with the president's own conflicts resulting from his continued ownership of a real estate and branding empire.²⁴¹

For more than 50 years, presidents have sought to avoid ethical questions arising from their own business dealings by voluntarily limiting their direct personal holdings to simple assets like cash and treasury bills, using a "blind trust"²⁴² for other assets, and refraining from other conduct that might be construed as attempting to profit from the presidency while in office. Since Richard Nixon, every president and major party nominee has also disclosed at least some personal tax information.²⁴³

Since OGE's creation in 1978, presidents also voluntarily collaborated with the office to arrange their financial affairs. They did this without any legal obligation to do so. It set the tone for other high-level officials, who were expected to avoid situations that might create even an appearance that they were profiting from public office.

The Trump administration is hardly the first to experience ethical scandals, but its sheer disregard for longstanding norms is unprecedented. Most notably, the president has refused to take any meaningful steps to separate himself from ownership and control of his extensive businesses and declined to voluntarily disclose his personal tax returns. He has also shown a troubling lack of respect for OGE. He declined to work with the agency on his own affairs and allowed his White House counsel's office to publicly question whether White House staff like Jared Kushner, the president's son-in-law and senior adviser, are even required to follow OGE rules. The behavior of appointees like Kushner, whom foreign governments reportedly sought to manipulate, has at least created an appearance of high-level impropriety.²⁴⁴

These are urgent issues that could impact government policy on everything from relations with China and Russia to financial regulation. Without sufficient safeguards, it can be difficult to discern where the public interests end and the president or another official's self-interest begins. Over the long term, such doubts can undermine the integrity of governance at home and compromise U.S. leadership abroad.²⁴⁵

To address these concerns, Congress should strengthen executive branch ethics laws in the following ways:

- **Require Real Transparency with Respect to the President's Financial Affairs and Those of Other Top Officials.** The best way to get sufficient transparency is to update federal ethics disclosure requirements. Current rules require top officials, including the president, to file annual reports listing their sources of personal income and assets and liabilities.²⁴⁶ But there is no analogous disclosure requirement for those officials' private businesses whose securities do not trade on

a stock exchange. President Trump — who mostly owns his businesses through an elaborate web of opaque, nonpublic entities — is a prime beneficiary of this loophole.²⁴⁷ It should be closed. At the same time, to reduce the burden on filers, the monetary thresholds for disclosure of particular assets, liabilities, and sources of income should be significantly raised.²⁴⁸

Much attention has focused on President Trump's tax returns, and there is legislation pending that would require them to be made public.²⁴⁹ While it makes sense to make at least some tax information public, tax returns are not enough to shed light on the full extent of the president's conflicts of interest.²⁵⁰ A return has never been intended to show all financial interests.

- **Significantly Strengthen OGE.**²⁵¹ Congress should specify that OGE's director may only be removed by the president "for cause," and give the director authority to submit a budget directly to Congress.²⁵² OGE should also have the power to review — and potentially cancel — ethics waivers for federal officials, which currently receive little central oversight.²⁵³ And either a revamped OGE or another agency must be given real investigative and enforcement authority — including the power to issue subpoenas, conduct random audits of ethics filings, and pursue civil penalties.²⁵⁴
- **Take Additional Steps to Address Presidential Conflicts of Interest.** At a minimum, Congress should close the loophole exempting the president and vice president from federal conflicts of interest law, which prohibits officials from "participat[ing] personally and substantially" in specific government matters in which they or their immediate family members have a direct financial interest distinguishable from that of a broad segment of the public.²⁵⁵ (For example, an official cannot generally award a contract to a company in which she owns stock, but she can work on a tax overhaul bill that will lower her own marginal rate along with that of many other people.)

Conflict of interest rules target only the most egregious self-dealing. While closing the presidential loophole would not address every concern about self-interested conduct by the president, it would at least ensure that he or she is subject to the same basic ethical standards as the millions of other federal employees. It would also align with the practices in most states, where governors are not exempt from conflict of interest laws, as well as other peer democracies.²⁵⁶

The gaps in executive branch ethics rules should concern even the president's supporters. After all, instead of a conservative real estate magnate, our next commander-in-chief could be a left-leaning tech titan or media mogul. Better safeguards will constrain future presidents of all political persuasions as much as they do Trump, and leave our democracy stronger.



Promote Fair and Impartial Courts

1. Reform State Judicial Selection
2. Strengthen Recusal Rules for Judges

1. Reform State Judicial Selection

In 38 states, supreme court justices are chosen by election, running for powerful posts that provide the final word on interpreting state law.²⁵⁷ These elections have become increasingly expensive, and politicized, threatening public confidence in fair and impartial justice. During the most recent election cycle, for example, a record 27 state supreme court justices were elected in \$1 million-plus races.²⁵⁸

Of particular concern is a post-*Citizens United* surge in spending on supreme court elections by dark money groups that do not disclose their donors.²⁵⁹ That lack of transparency means voters are denied crucial information about the interests seeking to shape their courts. And dark money can obscure conflicts of interest when a judge hears cases involving major supporters. In Montana, for example, a dark money group that spent hundreds of thousands of dollars on the state's 2012 supreme court election was backed by an out-of-state billionaire who was embroiled in litigation in

Montana state court at the time of the election. The candidate supported by the dark money group won the race, and the newly-elected justice sided with the group's billionaire backer when the state supreme court heard the case.²⁶⁰

State supreme court elections also regularly attract misleading attack ads, often targeting judges for their rulings on controversial issues. In Washington state's 2016 election, for example, a justice was described as "enabl[ing] child predators" because he concluded the police had not given adequate warning when they sought to do a warrantless search of a house.²⁶¹ During the 2015-16 election cycle, a majority of all negative television ads in supreme court races criticized judges for their rulings on the bench, often in a misleading way.²⁶²

These attacks heighten pressures on judges. Empirical and anecdotal evidence suggests that election pressures have an impact on judicial decision-making, particularly in criminal cases and in cases involving powerful interests.²⁶³

States should enact two key reforms that would bolster the independence and integrity of state courts, and encourage public confidence in the judicial system.

- **Adopt a "One and Done" Single Term for Supreme Court Justices.** States should amend their constitutions to provide for a lengthy single term of at least 14 years for supreme court justices, with no opportunity for election to subsequent terms. When sitting judges hear cases while an election looms, it puts tremendous pressure on them to consider public opinion and the preferences of powerful supporters — information that should have no role in judicial decision-making. Yet despite the threat to judicial independence, nearly every state requires state court judges to stand for multiple terms on the bench.

A "one and done" single term allows judges to build expertise and have job security as they hear controversial cases, but without entrenching power for generations at a time. This reform should

be adopted regardless of whether states use elections or appointments to select justices in the first instance. In the alternative, states could also consider adopting life tenure for high court judges, or providing for a depoliticized judicial retention process overseen by an independent and bipartisan commission.

- **Replace Supreme Court Elections with a Publicly Accountable Appointment Process.** There is compelling evidence that high-cost and politicized supreme court elections threaten both the appearance and reality of evenhanded justice. States should replace elections with a transparent, publicly-accountable appointment process that encourages fair judicial decision making by reducing the risk of cronyism or special interest capture.

First, judicial candidates should be vetted by a bipartisan nominating commission with diverse membership. Second, the commission should forward a short-list of candidates to the governor, who must select an appointee from the list provided. Finally, the process should include a clear and open application process, public hearings and a public vote, ethics rules for commissioners, and data collection on the diversity of judicial candidates at each stage of the process.

There have been several prior waves of judicial selection reform in the states, including the adoption of judicial elections in the late 19th century. Elections were adopted to respond to the concern that judges were too closely tied to the governors and legislators responsible for appointing them.²⁶⁴ Today, it is elections that pose the principal threat to a fair and impartial judiciary. As powerful interests increasingly look to courts as a vehicle for forwarding their political, ideological, or financial agendas, states are past due in revisiting how they select judges.

2. Strengthen Recusal Rules for Judges

During 2015-16, most contributions to state supreme court candidates came from businesses, lawyers, and lobbyists — interests regularly before the courts.²⁶⁵ Outside spending, too, often can be traced to companies or individuals with a direct financial stake in who reaches the bench.²⁶⁶ All this can create conflicts of interest for judges and undermine public perceptions that the judiciary is fair. Yet only six states have rules addressing when outside spending requires a judge to step aside from hearing a case.²⁶⁷ Even fewer address how to treat donors to groups engaging in election spending.²⁶⁸

Worse, in most states judges themselves decide whether they are biased and must step aside. Federal judges also decide their own recusal motions.²⁶⁹ Because people tend to underestimate their own biases,²⁷⁰ even judges acting in good faith may fail to recuse themselves from cases that others would view as raising conflicts of interest.

Legislation or court rules should promote the appearance and the reality of impartial justice.

- State judges should be required to step aside from cases when they are the beneficiaries of substantial spending in support of their election to the bench. This should include instances where lawyers or litigants have made substantial contributions to judges' campaigns, or when they have contributed to groups engaged in outside spending.

- States should require lawyers and litigants to disclose contributions, expenditures, and gifts to outside groups for or against the judge they are appearing before. That way judges can more easily decide whether they face a conflict.
- State and federal courts should provide for the independent consideration of recusal motions by a judge that is not the subject of the motion. This would allow objective arbiters — who do not face a bias blind spot — to determine whether a judge should step aside from hearing a case where a conflict may exist.

These are all common-sense reforms. More than 90 percent of voters think that judges shouldn't hear cases involving major campaign supporters.²⁷¹ The notion that a person shouldn't be a judge in their own case is a core legal and constitutional value. Fixing judicial recusal would be a straightforward way to enhance public confidence in the fairness of our courts.

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