

“We Must Confront the Threats to America’s Democracy”

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“WE MUST CONFRONT THE THREATS TO AMERICA’S DEMOCRACY”

JOHN J. DONOHUE*

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[O]ver the course of my career I have seen a number of challenges to our democracy. The Russian government’s efforts to interfere in our election is among the most serious It wasn’t a single attempt. [They’re] doing it as we sit here, and they expect to do it during the next campaign.¹

(Former FBI Director and Special Counsel Robert S. Mueller, testifying before Congress, July 2019)

Over two hundred years ago, an extraordinary episode in world history led to the initiation of our country’s sustained democracy. The legal and governmental institutions that have developed over two centuries created an economic environment that has brought considerable wealth and freedom to many, as the nation fitfully addressed the founding shame of slavery and moved, haltingly at times, in the direction of establishing full civil rights, including the critical right to vote, to all Americans. While the broad trend over the last 100 years has been in the direction of greater freedom and social well-being and certainly major expansions in the right to vote, a number of ominous signs have emerged in the last twenty years that warrant concern that our democracy is under threat.

The Bush victory in the 2000 presidential election revealed that our nation has not given sufficient attention to the importance of electoral integrity. The fiasco that emerged that year in Florida, where local Democratic officials in Palm Beach designed confusing ballots that inaccurately led to a decisive number of miscast votes, and then the five weeks of uncertainty as ballot recounts were conducted in a circus atmosphere should have led to an immediate call for an overhaul of our chaotic and decentralized voting system.² The fact that the ultimate 5-4 decision of

* Stanford Law School and National Bureau of Economic Research. I am grateful to Peter Siegelman for his valuable comments and to Mira Korb, Ammar Inayatoli, and Nicolas Pena Tenjo for excellent research assistance.

1. *Transcript of Robert S. Mueller III’s Testimony Before the House Intelligence Committee*, WASH. POST (July 24, 2019, 8:43 PM), https://www.washingtonpost.com/politics/transcript-of-robert-s-mueller-iiis-testimony-before-the-house-intelligence-committee/2019/07/24/f424acf0-ad97-11e9-a0c9-6d2d7818f3da_story.html.

2. Don van Natta Jr. & Dana Canedy, *The 2000 Elections: The Palm Beach Ballot; Florida Democrats Say Ballot’s Design Hurt Gore*, N.Y. TIMES (Nov. 9, 2000),

the Supreme Court handed the election to George W. Bush when the popular vote was won by Al Gore was both oddly unconvincing and split along ideological lines, and it should have been a clarion call for comprehensive election law reform that would protect our democracy from future avoidable blows.³

Still, the conservative Reagan-appointed federal court of appeals judge and University of Chicago law professor Richard Posner lauded the Supreme Court's abrupt resolution of the recount stalemate, saying that the wisdom of the Court's decision would ultimately be decided by the success or failure of the Bush presidency.⁴ Sadly, the eight years of the Bush Presidency were among the worst eight years in at least half a century. On the domestic front, the feckless Bush administration transformed the strong economy and budget surplus inherited from President Clinton into massive deficits and near world-economic collapse.⁵ There was also catastrophic harm both from the Bush Administration's failure to protect against a warned-against attack from Osama Bin Laden and the subsequent misguided policy of starting the Iraq War based on disingenuous claims that Iraq had something to do with 9/11.⁶

The eight years of the Obama Presidency managed to restore the economy to a sounder footing, far outpacing the less robust rebound experienced in the rest of the world that was damaged by the American-generated global economic disaster, but little progress was made in shoring up the troubling deficiencies and new threats to our electoral system.⁷

Our democracy can only be expected to work effectively if four conditions hold:

1. Americans are accurately informed about the relevant issues,
2. The informed electorate votes,
3. The votes accurately reflect the will of the voters and are correctly tabulated, and
4. Elected and appointed officials—including the U.S. military—act in accordance with proper constitutional dictates and norms.

Unfortunately, all four of these bedrocks of our constitutional government are under siege in dangerous and damaging ways, even given our relatively favorable

<https://www.nytimes.com/2000/11/09/us/2000-elections-palm-beach-ballot-florida-democrats-say-ballot-s-design-hurt-gore.html>.

3. See *Bush v. Gore*, 531 U.S. 98 (2000).

4. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 222 (2001).

5. Kathy Ruffing & Joel Friedman, *Economic Downturn and Legacy of Bush Policies Continue to Drive Large Deficits*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 28, 2013), <https://www.cbpp.org/research/economic-downturn-and-legacy-of-bush-policies-continue-to-drive-large-deficits>.

6. Roy Eidelson, *Stoking Fear: We Must Remember How the Iraq War Was Sold*, COMMON DREAMS (Mar. 20, 2019), <https://www.commondreams.org/views/2019/03/20/stoking-fear-we-must-remember-how-iraq-war-was-sold>.

7. Martin Wolf, *How Barack Obama Rescued the US Economy*, FIN. TIMES (Jan. 10, 2017), <https://www.ft.com/content/b5b764cc-d657-11e6-944b-e7eb37a6aa8e> (“[T]he [Obama] administration rescued the US economy and bequeathed a sound foundation for its successor to build on . . .”).

conditions of a generally sound economy, relatively educated population, a free press, and robust political debate.

I. THE MISINFORMED ELECTORATE

The range of domestic and international issues confronting the American government are among the most complex in the world. Most countries need not have a foreign policy that extends across the globe or worry that their decisions and policies about energy, food production, or countless other issues could have global significance and possibly influence the fate of the earth. The U.S. is one of the few nations that does have to concern itself with these issues.⁸ Moreover, as the richest large nation, it must play a central role not only in helping to maintain world stability in the face of challenges from Russia and China, but it also has a critical role to play as an exemplar of moral government and sound democratic principles.

Unfortunately, evidence continues to mount that raises questions about whether the American electorate is up to the task of voting knowledgeably on the important issues of the day. In many ways, President Trump embodies the slovenly thinking and pugnacious ignorance of far too many Americans. One cannot help but be alarmed at the growing array of forces—motivated by ideology or economics—that systematically distort the truth and seek to mislead the public on almost all aspects of politics and public policy.

Campaigns of deception that some might have associated with miscreants like the tobacco industry and its decades-long effort to distort the information about the costs of smoking are now commonplace throughout our social and political world. The Koch brothers, Fox News, and talk radio propagate campaigns of deception designed to mislead and deceive the American electorate in furtherance of their own economic interests, all without any apparent regard for the public interest.⁹ The gun industry will deceive, dissemble, and suppress accurate information, not only to promote its economic interests but because it has learned that certain issues can trigger the sorts of tribal responses that can be leveraged for broader political gains.¹⁰ It is not surprising that the NRA allies itself with Putin, Trump, and the Republican Party as each tries to profit from these alliances in pursuit of their own interests—often at the expense of the interests of America and the world.¹¹

8. See *Better Life Index: United States*, ORG. ECON. COOPERATION & DEV., <http://www.oecdbetterlifeindex.org/countries/united-states/> (last visited May 21, 2020).

9. Jane Mayer, *Covert Operations*, NEW YORKER (Aug. 23, 2010), <https://www.newyorker.com/magazine/2010/08/30/covert-operations>; Jeremy W. Peters, 'Everything You're Seeing is Deception': How Right-Wing Media Talks About Impeachment, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/us/politics/impeachment-conservatives-republicans.html>.

10. Rukmani Bhatia, *Guns, Lies, and Fear*, CTR. FOR AM. PROGRESS (Apr. 24, 2019, 9:00 AM), <https://www.americanprogress.org/issues/guns-crime/reports/2019/04/24/468951/guns-lies-fear/>.

11. Putin's efforts to support the brutal tactics of Syrian dictator Bashar al-Assad "helped to send millions of refugees fleeing to Europe. When xenophobic nationalist movements flared up in reaction, the Russians poured on the gas via social media. Russia's unseen hand wasn't the only factor in the

One would ordinarily expect that America's increasingly educated population with access to the informational resources of the internet would generate the most informed body of voters with the soundest knowledge base in our nation's history. As Adam Smith wrote in 1776, "The more [people] are instructed, the less liable they are to the delusions of enthusiasm and superstition, which, among ignorant nations, frequently occasion the most dreadful disorders."¹² But Germany showed during the 1930s that in times of perilous economic hardship even educated countries can succumb to such dreadful disorders.¹³

Shirin Ebadi, a lawyer and human rights activist who was awarded the Nobel Peace Prize in 2003, has also described with regret how relatively educated Iran could, in the revolution of 1979, have embraced so enthusiastically and unequivocally the dictatorial regime of the cleric Ruhollah Khomeini.¹⁴ In partial self-defense, Ebadi contends that:

Had free political parties existed, they could have challenged [Khomeini] and contested his ideas. Debate and exchange could have prevented the rise of a cult of personality that paved the way to a religious dictatorship. I strongly believe that Khomeini's ideas could not have survived closer scrutiny in an open environment.¹⁵

But without major economic turmoil at least after the Obama-led economic restoration from the horrific economic shock in 2008, and with plenty of debate and exchange and free political parties, we still see signs of the emergence of a potentially dangerous cult of personality in the United States.¹⁶

The intensifying tribal inclinations in American politics make the public increasingly susceptible to believing ideologically compatible but false information.¹⁷ Certain news outlets have found it profitable to exacerbate the

European backlash. But now the European Union may be coming apart." David von Drehle, *Vladimir Putin's Virus*, WASH. POST (Mar. 2, 2020), <https://www.washingtonpost.com/opinions/2020/03/02/did-vladimir-putin-turn-america-itself/>. This disaster for American security interests would obviously strengthen Putin, and the NRA hopes that it could provide a vehicle to undo restrictive European gun laws that would open up a large market by inflaming the public over increased Syrian immigration. Mike Spies & Adam Weinstein, *The NRA Has Been Moonlighting as an Anti-Immigration Group for Years*, TRACE (Jan. 3, 2017), <https://www.thetrace.org/2017/01/nra-anti-immigration-terrorism-trump-executive-actions/>.

12. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, VOLUME II 227 (Lincoln & Gleason 1804) (1776).

13. Harold James, *What Can Today's Democracies Learn from 1930s Germany?* WORLD ECON. F. (Mar. 8, 2018), <https://www.weforum.org/agenda/2018/05/10-lessons-from-1930s-germany-for-democracies-today/>.

14. Shirin Ebadi, *I Thought the Iranian Revolution Would Bring Freedom. I Was Wrong.*, WASH. POST (Feb. 25, 2020), <https://www.washingtonpost.com/opinions/2020/02/25/i-thought-iranian-revolution-would-bring-freedom-i-was-wrong/>.

15. *Id.*

16. Adam Serwer, *Donald Trump's Cult of Personality Did This*, ATLANTIC (Mar. 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/donald-trump-menace-public-health/608449/>.

17. Michael Seemann, *Digital Tribalism – The Real Story About Fake News*, CTRL + VERLUST (Dec. 19, 2017), <http://www.ctrl-verlust.net/digital-tribalism-the-real-story-about-fake-news/>.

ideological divide by filtering the news in tendentious ways.¹⁸ Politicians, business interests, and even adverse foreign interests have seized upon this development to lie and distort the news in brazen and at times shocking ways that they find advantageous.¹⁹

The ludicrous claim that Hillary Clinton was running a child sex trafficking operation from a pizza restaurant represents the nadir of idiocy that emerged in the 2016 presidential election.²⁰ The bizarre falsehood quickly circulated to a gullible audience on the internet, propagated by no less an establishment figure than the son of former general, first Trump national security adviser, and now convicted felon Michael Flynn.²¹ The immediate danger from this lunacy was reflected in the delusional attempt to investigate this absurdity by an armed zealot, who was arrested after firing a weapon inside the named pizza shop.²² The more alarming danger was what this episode said about the onslaught of social media propagated deception and the utter folly of a wide swath of the American public who were incapable of recognizing and rejecting the most gross and obvious falsehoods.²³ The widespread embrace of the absurd and discredited QAnon conspiracy theory by Republican voters raises serious concerns about the state of American democracy.²⁴

Trump of course has become the embodiment of this trend toward deception, and his campaign to discredit the legitimate media has managed to dilute the sting

18. See, e.g., Cecilia Kang, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html>; see also *Incoming National Security Adviser's Son Spreads Fake News about D.C. Pizza Shop*, POLITICO (Dec. 4, 2016), <https://www.politico.com/story/2016/12/incoming-national-security-advisers-son-spreads-fake-news-about-dc-pizza-shop-232181>.

19. See Kang, *supra* note 18; *Incoming National Security Adviser's Son Spreads Fake News about D.C. Pizza Shop*, *supra* note 18; William Broad, *Putin's Long War Against American Science*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/science/putin-russia-disinformation-health-coronavirus.html> ("A decade of health disinformation promoted by President Vladimir Putin of Russia has sown wide confusion, hurt major institutions and encouraged the spread of deadly illnesses.").

20. See Kang, *supra* note 18; *Incoming National Security Adviser's Son Spreads Fake News about D.C. Pizza Shop*, *supra* note 18.

21. See Kang, *supra* note 18; *Incoming National Security Adviser's Son Spreads Fake News about D.C. Pizza Shop*, *supra* note 18.

22. Faiz Siddiqui & Susan Svrluga, *N.C. Man Told Police He Went to D.C. Pizzeria with Gun to Investigate Conspiracy Theory*, WASH. POST (Dec. 5, 2016), <https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant/?postshare=7791480902189329>.

23. See *id.*

24. "The core of QAnon is the false theory that Trump was elected as a 'savior figure' to root out a secret Satanic child-sex trafficking ring run by Democratic politicians and celebrities." Joshua Bote, *Half of Trump Supporters Believe in QAnon Conspiracy Theory's Baseless Claims, Poll Finds*, USA TODAY (Oct. 22, 2020, 10:56 AM), <https://www.usatoday.com/story/news/politics/2020/10/22/qanon-poll-finds-half-trump-supporters-believe-baseless-claims/3725567001/>. Bizarrely, "One in three Republicans (33%) say they believe the QAnon theory about a conspiracy among deep-state elites is 'mostly true,' and another 23% say 'some parts' are true." Tommy Beer, *Majority Of Republicans Believe The QAnon Conspiracy Theory Is Partly Or Mostly True, Survey Finds*, FORBES (Sept. 2, 2020, 9:33 PM), <https://www.forbes.com/sites/tommybeer/2020/09/02/majority-of-republicans-believe-the-qanon-conspiracy-theory-is-partly-or-mostly-true-survey-finds/#66c8da9a5231>.

of being identified as a prodigious liar.²⁵ Indeed, according to CBS "60 Minutes" correspondent Lesley Stahl, in 2016 then-candidate Trump responded to her question about his reasons for so aggressively and unfairly attacking the press by saying: "You know why I do it? I do it to discredit you all and demean you all so when you write negative stories about me, no one will believe you."²⁶

It is difficult to imagine any previous President or even serious Presidential candidate who could so consistently pronounce brazen falsehoods about easily verifiable factual matters without paying a politically fatal price. Trump has innovated in the modes of deception in ways that other politicians are now rushing to emulate, so the electoral harm going forward is likely to grow. The previous American role as a pillar of democratic values and noble ambitions has turned into a guidebook for thuggish, demagogues around the world—from Brazil to England, India, Turkey, and the Philippines.

A few examples of the divergence of truth and belief in the American public can highlight these troubling developments. Perhaps the most profound social phenomenon in the U.S. over the last thirty years was the enormous decline in crime that swept the nation during the eight years of the Clinton Administration. Figure 1 shows the dramatic downward trend in violent crime after 1992 that saw crime fall from 80 per 100,000 in 1992 to 20 per 100,000 by 2014. The other line in Figure 1 reveals the disturbing fact that the level of comprehension of this unquestionably benign phenomenon has been disturbingly low. Indeed, five years into the crime drop, most Americans were still convinced crime was rising.²⁷

Americans are evidently prone to cling to utterly inaccurate beliefs about crime, and President Trump has been only too willing to exploit this weakness.²⁸ Shortly before his election on October 28, 2016, Trump announced: "You won't hear this from the media: We have the highest murder rate in this country in 45 years. You don't hear that from these people. They don't want to talk about it. The

25. The judgment on Trump by Former White House chief of staff, retired Marine General John Kelly, is telling: "The depths of his dishonesty is just astounding to me. The dishonesty, the transactional nature of every relationship, though it's more pathetic than anything else. He is the most flawed person I have ever met in my life. . ." Marina Pitofsky, *John Kelly called Trump 'the most flawed person' he's ever met: report*, THE HILL, <https://thehill.com/homenews/news/521507-john-kelly-called-trump-the-most-flawed-person-hes-ever-met-report>.

Fellow conservative and former Trump National Security Advisor John Bolton offers a similar assessment in his recent book, "in which he portrays the commander in chief as a walking, talking constitutional and national security disaster who knows little and cares little about anything other than himself." Peter Baker, *Bolton Assaults Trump From the Right, and Takes Fire From All Directions*, THE NEW YORK TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/06/23/us/politics/john-bolton-interview-trump.html>.

26. *Lesley Stahl: Trump Admitted Mission to "Discredit" Press*, CBS NEWS (May 23, 2018, 5:39 AM), <https://www.cbsnews.com/news/lesley-stahl-donald-trump-said-attacking-press-to-discredit-negative-stories/>.

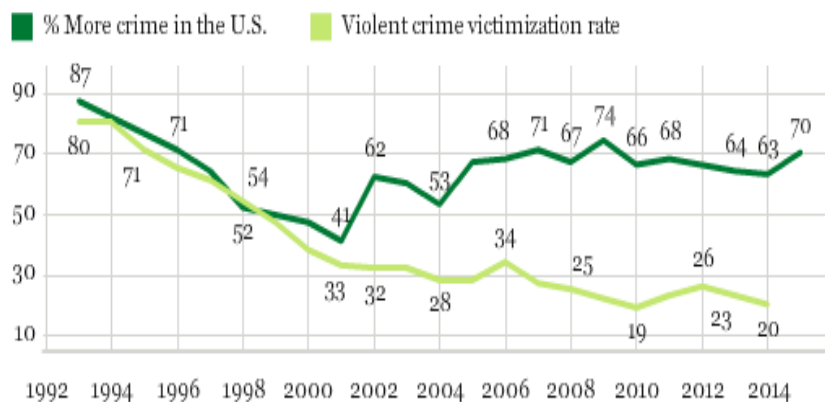
27. Justin McCarthy, *Most Americans Still See Crime Up Over Last Year*, GALLUP (Nov. 21, 2014), <https://news.gallup.com/poll/179546/americans-crime-last-year.aspx>.

28. Mark Berman, *What Trump Says about Crime in America and What is Really Going On*, WASH. POST (Jul. 21, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/21/what-trump-says-about-crime-in-america-and-what-is-really-going-on/>.

highest murder rate in the United States in 45 years."²⁹ One would hope that he would be corrected about such an erroneous belief and would not repeat the grotesque error, but that was not to be. In a White House meeting with county sheriffs on February 7, 2017, President Trump was at it again: "[T]he murder rate in our country is the highest it's been in 47 years, right? Did you know that? Forty-seven years. I used to use that—I'd say that in a speech and everybody was surprised, because the press doesn't tell it like it is. It wasn't to their advantage to say that. But the murder rate is the highest it's been in, I guess, from 45 to 47 years."³⁰

Figure 1

*U.S. Violent Crime Rate[^] and Americans' Perceptions of Crime Rate
vs. Year Ago*



[^] Violent crime rate is number of victimizations per 1,000 persons that occurred during the year. Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1993-2014

Of course, the claim was preposterous. The murder rate in 2016 was 5.4 per 100,000, down from almost double that level in 1991, and at a level not seen prior to the Obama Administration since the mid-1960s.³¹ The great sociologist Otis Dudley Duncan once lamented the "seemingly inexorable trend toward eliminating professionally competent research from discussions of social policy or

29. Michelle Ye Hee Lee, *Trump's False Claim that the Murder Rate is the "Highest It's Been in 45 Years"*, WASH. POST (Nov. 3, 2016), <https://www.washingtonpost.com/news/fact-checker/wp/2016/11/03/trumps-false-claim-that-the-murder-rate-is-the-highest-its-been-in-45-years/> (quoting from Trump rally in Cedar Rapids, Iowa, Oct. 28, 2016).

30. *Remarks by President Trump in Roundtable with County Sheriffs*, WHITEHOUSE.GOV (Feb. 7, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-county-sheriffs/>.

31. See ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008, at 2 (2011), <https://www.bjs.gov/content/pub/pdf/htus8008.pdf>; *Crime in the United States 2016, Table 1*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1> (last visited May 21, 2020).

overwhelming it with junk science. If that trend is not halted, the life blood of democracy itself will dry up. The people cannot make sensible choices without reliable information.”³² Since one study found that those who rely on Fox News for their information have less knowledge about domestic and international events than those who watch no news at all,³³ there is reason for serious concern about whether our electorate is overly susceptible to the distortions of the media, special interests, and unscrupulous politicians.³⁴

The Republican party appears to have generated an unwholly feedback system in which concentrated wealth is marshalled to facilitate the election of those who will then kickback more resources to their funders, who will then have greater economic power that can be used to maintain Republican electoral success. For example, it is estimated that “Charles Koch and David Koch and/or Koch Industries could save between \$1 billion and \$1.4 billion combined in income taxes *each year* from the Trump tax law—and that doesn’t even count how much the brothers might save in taxes on offshore profits or how much their heirs will benefit from weakening the estate tax” (emphasis added).³⁵ The Kochs have spent tens of millions trying to push for the legislation or support those who voted for it, so this is an enormously generous return on their initial investment.³⁶ They can now use their added billions to help keep friendly politicians in office and promote their objective of thwarting critical policies needed to address climate change. The Republican efforts to appoint Supreme Court justices who will enhance the power of corporations over elections and advance measures that will further entrench Republican political success has been a creeping problem for decades and brings us to our second problem.³⁷

32. Tim Lambert, *John R. Lott, Jr. on Defensive Gun Use Statistics*, SCIENCEBLOGS, (Apr. 10, 2003), <https://scienceblogs.com/deltoid/2003/04/10/duncan3>.

33. “People who watch MSNBC and CNN exclusively can answer more questions about domestic [and international] events than people who watch no news at all. People who only watch Fox did much worse. NPR listeners answered more questions correctly than people in any other category.” See Andrew Beaujon, *Survey: NPR’s Listeners Best-informed, Fox Viewers Worst-informed*, POYNTER. (May 23, 2012), <https://www.poynter.org/reporting-editing/2012/survey-nprs-listeners-best-informed-fox-news-viewers-worst-informed/>. The study found that NPR listeners were best informed, followed by MSNBC and CNN viewers. *Id.*

34. For example, a recent study found that “conservatives in the U.S. held the most misperceptions about COVID-19,” which was correlated with whether their source of information was a conservative news outlet such as Fox News. Gordon Pennycook et al., *Predictors of Attitudes and Misperceptions About COVID-19 in Canada, the U.K., and the U.S.A.* 4–5 (PsyArXiv, Working Paper, Apr. 14, 2020), <https://psyarxiv.com/zhjpk/>. Moreover, “there are striking parallels between messaging from President Trump (and others) in the U.S. around COVID-19 and the history of climate change skepticism – where some contrarians have moved from denying global warming entirely [COVID-19 outbreaks in the U.S.] to arguing that the solutions are (now) too costly.” *Id.* at 9.

35. *Analysis: Koch Brothers Could Get up to \$1.4 Billion Tax Cut from Law They Helped Pass*, AMS. FOR TAX FAIRNESS (Jan. 24, 2018), <https://americansfortaxfairness.org/issue/koch-brothers-1-billion-tax-cut/>.

36. *See id.*

37. John Fabian Witt, *How the Republican Party Took Over the Supreme Court*, NEW REPUBLIC (Apr. 7, 2020), <https://newrepublic.com/article/156855/republican-party-took-supreme-court>.

II. THE EXERCISE OF FULL VOTING RIGHTS

A vibrant democracy requires an informed electorate and one that is both allowed to vote and exercises that important right. For a host of reasons, our electorate is so disengaged that voter turnout is shockingly low given the importance of the issues that turn on American electoral decisions. One can only be dismayed at the abundant efforts that Republican officials take to suppress the exercise of voting rights by American minorities. The modern American spin machine is then unleashed to provide an ostensible lofty justification for this tawdry exercise, made worse by the country's horrendous legacy of slavery and denial of human rights that one would think would make all Americans particularly sensitive to avoid inflicting further civil rights insults to black voters.

The proffered lofty justification is that what are clearly designed to be voter suppression efforts aimed at racial minorities are really efforts to preserve the integrity of our elections by avoiding electoral fraud. This is a bit like the claim that President Trump was interested in rooting out corruption in Ukraine when he withheld military aid from that embattled country.³⁸

These episodes reflect a defining aspect of modern political discourse: lying on behalf of one's own tribe, ideology, or economic interest. With Fox News and other outlets tasked with repeating the deceptive mantras, enough of the public can be brought along that electoral outcomes can be skewed. One breath of fresh air came when the afore-mentioned Judge Posner noted that he had been wrong in writing a 2007 decision upholding voter suppression efforts, which was later endorsed by a cadre of Republican appointed judges.³⁹ Posner conceded that the *dissent* to his opinion was in fact correct when it stated: "Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."⁴⁰

To be fair to the judges, it is often a challenging effort to look behind the actions of legislatures to detect their true motivations. But it was an important step to have a judge of Posner's prominence—and conservative Republican credentials—stand up for truth and argue that the claimed justifications of preventing voter fraud are themselves fraudulent and the continuing efforts at voter suppression are both shameful and unconstitutional.⁴¹ These steps pose a continuing threat to our democracy for at least two reasons.

38. Salvador Rizzo, *Trump and Mulvaney's Claim that Corruption Concerns Held Up Ukraine Aid*, WASH. POST (Oct. 23, 2019), <https://www.washingtonpost.com/politics/2019/10/23/trump-mulvaney-claim-that-corruption-concerns-held-up-ukraine-aid/>.

39. Mark Hoekstra & Vijetha Koppa, *Strict Voter Identification Laws, Turnout, and Election Outcomes*, CATO INST. (Feb. 19, 2020), <https://www.cato.org/publications/research-briefs-economic-policy/strict-voter-identification-laws-turnout-election> ("From 2000 to 2018, 20 states enacted voter identification requirements, bringing the total to 34 states. The most pronounced shift has been toward strict voter identification. While no states had such laws in 2000, 10 states had enacted (and sustained) such laws as of 2018.").

40. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

41. *See generally id.*

First, there is the obvious fact that actions designed to disproportionately disenfranchise a racial minority because its members tend to vote Democratic is in essence an effort to steal an election. Indeed, given the nation's legacy of misconduct towards African Americans, it is a particularly odious form of theft. Second, the efforts to justify unprincipled race-based voter suppression with phony high-minded claims of protecting democracy involves the active perpetration of a lie dressed in ostensibly noble ambitions. Systematic lying in furtherance of political power is a fundamental threat to our democracy. Politicians, media outlets, corporate interests, ideologues, and others who engage in this behavior represent a clear and present danger to our constitutional government, especially in light of the new threats that have emerged with the growth of social media. It is particularly important that federal judges—the last line of defense against electoral constitutional misconduct—not become the willing or unwilling facilitators of this misconduct.

While there is evidence that some of the legislative voter suppression efforts—such as voter ID laws—have not succeeded in suppressing voting in the past, this may be cold comfort.⁴² First, even if strict ID laws have not clearly suppressed voting in past presidential elections, they are just one element of a broader campaign of voter suppression whose aggregate effect is undoubtedly more pernicious, and may well grow if not curtailed. Bertrall Ross and Douglas Spencer have noted that:

[T]he coming years will likely see more efforts to actively suppress the vote. Voter ID laws will probably be enacted in more states, voter roll purges could emerge as a common election year practice, early voting might continue to be reduced or eliminated altogether, and registration rules may be tightened further. These new voter suppression tools could further enhance partisan advantage and give candidates victories that they would not have had in the absence of these laws. To ensure the fairness of elections and the opportunity for everyone to vote, voting rights advocates should continue their fights against these laws and in favor of laws that make voting easier.⁴³

Second, if it were true that voter ID laws had no direct impact on voter turnout, they still may be damaging. Have these laws proven to be ineffectual because they were offset by responsive efforts by pro-democracy organizations? If so, this is a tax on the system that cannot be ignored. But perhaps more importantly, the efforts to champion these laws have been based on claims about the need to stop voter fraud that introduce more deception into the public arena and generate more political polarization, which themselves will have damaging

42. Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008–2016* (NBER, Working Paper No. 25522, 2019), <https://www.hbs.edu/faculty/Pages/item.aspx?num=55734>.

43. Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 Nw. U. L. Rev. 633, 702 (2019). Ross and Spencer lament that the lack of effort by campaigns to effectively encourage voting by the poor is an important influence in their low levels of voting participation. *Id.*

consequences for our democracy. Consistently divorcing policy from truth may have broad and pernicious implications in addressing everything from climate change to our response to COVID-19.⁴⁴

One particularly virulent illustration of this threat was evident in the 2016 election in the campaign of disinformation and illegality perpetrated by the Russian government in trying to promote the election of Donald Trump.⁴⁵ In the face of the irrefutable evidence of this interference, the President's craven denials as he stood next to Putin in Helsinki, and his continuing efforts to punish those who speak the truth on these matters will define his legacy as an enemy of the truth in the manner of the attacks on Galileo for noting that the earth was not the center of the solar system.⁴⁶ As Thomas Jefferson wrote in 1804, the American experiment was designed to establish that "man may be governed by reason and truth."⁴⁷ When so much economic and political power are linked with malign foreign influences in efforts to thwart reason and truth, the American experiment is clearly in peril.

III. ACCURATE VOTING

The tawdry efforts by Republicans and their minions to suppress votes by everything from shutting down polling places in certain neighborhoods to misleading voters as to where they should vote or creating needless lines that will impose greater burdens on certain voters are obviously reprehensible.⁴⁸ But even those who make it through the maze may find that their vote will be undermined by misleading ballots or threatened by insecure counting protocols. Sometimes these actions occur not from malevolence but from incompetence. But this provides scant comfort if the effect is that elections are swayed because voter

44. See discussion *supra* note 34.

45. *The Mueller Report, Annotated*, WASH. POST, <https://www.washingtonpost.com/graphics/2019/politics/read-the-mueller-report/>, (last updated Dec. 2, 2020, 11:04 p.m.).

46. David Von Drehle, Opinion, *Vladimir Putin's Virus: How the Russian President has Infected our National Trust*, WASH. POST (Mar. 2, 2020), <https://www.washingtonpost.com/opinions/2020/03/02/did-vladimir-putin-turn-america-itself/?arc404=true>. Trump fired his director of national intelligence Joseph Maguire because one of his aides – a senior intelligence official – informed a congressional committee on Russian efforts to interfere in the 2020 Presidential election. John Walcott, *Trump's Latest Intelligence Meltdown Isn't About the Facts: It's About the Truth*, TIME (Feb. 20, 2020), <https://time.com/5788479/trump-fires-maguire/>. Trump then appointed an acting replacement with virtually no qualifications other than an apparent disposition to deny that Russia had meddled at all in the U.S. Elizabeth Williamson & Kenneth P. Vogel, *An Undiplomatic Diplomat Wins Power in Trump's Washington*, N.Y. TIMES (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/us/politics/richard-grenell-trump-intelligence.html>; see also Mark Sumner, *Intelligence Hearing Designed to Show that Russia Hadn't Helped Trump... Showed Something Else*, DAILY KOS (Mar. 11, 2020, 7:47 a.m.), <https://www.dailykos.com/story/2020/3/11/1926441/-Intelligence-hearing-designed-to-show-that-Russia-hadn-t-helped-Trump-showed-something-else>.

47. MICHAEL SHERMER, *THE MORAL ARC: HOW SCIENCE AND REASON LEAD HUMANITY TOWARD TRUTH, JUSTICE, AND FREEDOM* 136 (2015).

48. Richard Salame, *Texas Closes Hundreds of Polling Sites, Making It Harder for Minorities to Vote*, GUARDIAN (Mar. 2, 2020), <https://www.theguardian.com/us-news/2020/mar/02/texas-polling-sites-closures-voting>.

preferences are not reflected in their ballots, as occurred in the flawed Palm Beach ballots in the 2000 presidential election that elevated popular vote loser George W. Bush.⁴⁹ Of course, a whole new threat emerges as we see malign foreign efforts (by Russians and other enemies of our country) to hack into our election systems, and the pathetic voting disarray in the Iowa Democratic caucus and the Super Tuesday primary.⁵⁰

Former FBI director (and lifelong Republican) Robert Mueller could not have been clearer on the active threat to our 2020 election posed by Russian efforts to damage our democracy. As he said so memorably in his July 2019 testimony before the House of Representatives about the nature of the Russian threat and Russia's "sweeping and systemic" efforts to damage our democracy: "They're doing it as we

49. van Natta Jr. & Canedy, *supra* note 2.

50. See Kristian Hernandez, *Reports of Long Lines, Voting Machine Issues Across Fort Worth Area on Super Tuesday*, FORT WORTH STAR TELEGRAM (Mar. 3, 2020, 10:07 a.m.), <https://www.star-telegram.com/news/politics-government/election/article240811361.html>; see also LaVendrick Smith & Nic Garcia, *Long Lines, Broken Machines, Frustration for Some Voters in Dallas-Tarrant Counties*, DALL. MORNING NEWS (Mar. 3, 2020), <https://www.dallasnews.com/news/elections/2020/03/03/long-lines-broken-machines-causing-frustration-for-some-voters-in-dallas-tarrant-counties/>; see also Jill Cowan & Louis Keene, *Long Waits Frustrate Los Angeles Voters*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/us/california-los-angeles-voting.html>; see also Joseph Marks, *The Cybersecurity 202: Here are the Serious Tech Glitches that Frustrated Voters on Super Tuesday*, WASH. POST (Mar. 4, 2020), <https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2020/03/04/the-cybersecurity-202-here-are-the-serious-tech-glitches-that-frustrated-voters-on-super-tuesday/5e5e9f4d88e0fa101a73f33f/>.

The Texas example is indicative of the problems caused by aggressive gerrymandering in the last redistricting cycle:

On the congressional side, for example, state lawmakers performed what one Democratic congressman described as "substantial surgery" on Texas' congressional districts, clipping economic engines and incumbents' district offices and homes from districts where Hispanic and black voters were in the majority.

....

The white Republicans did not face similar trims. In fact, some of their districts were redrawn at their requests to include specific country clubs and even the school an incumbent's grandchildren attended. Republicans at the time — and throughout the decade — argued that it was politics, not race, that drove their decision-making.

See Alexa Ura, *How a Decade of Voting Rights Fights Led to Fewer Redistricting Safeguards for Texas Voters of Color*, TEXAS TRIB. (Sept. 10, 2019, 12:00 a.m.), <https://www.texastribune.org/2019/09/10/texas-enters-2021-redistricting-fewer-safeguards-voters-color/>.

By 2018, the state's gerrymandered legislature acted to solidify its electoral power:

Texas has closed 750 polling places since 2012, the vast majority coming after the Supreme Court in 2013 ruled states like it — with a history of racial discrimination — no longer had to get pre-approval from the federal government to pass new voting laws or make changes to the election process, according to a new report by The Leadership Conference Education Fund released on Tuesday.

See Benjamin Wermund, *Texas has Closed More Polling Places Than any Other State, Report Shows*, HOUS. CHRON. (Sept. 10, 2019), <https://www.houstonchronicle.com/politics/texas/article/Texas-has-closed-more-polling-places-than-any-14429443.php>.

sit here."⁵¹ It is appalling to think that an American President would find such foreign interference to be acceptable and then be willing to lie about its existence.

IV. PROTECTING CONSTITUTIONAL NORMS

President Obama had the authority to nominate someone to fill the vacancy created by the February 2016 death of Antonin Scalia.⁵²

Republican Senator Orrin Hatch stated:

"The President told me several times he's going to name a moderate [to fill the court vacancy], but I don't believe him[.] [Obama] could easily name Merrick Garland, who is a fine man," he [stated], referring to the more centrist chief judge of the U.S. Court of Appeals of the District of Columbia who was considered and passed over for the two previous high court vacancies.

But, Hatch quickly added, "He probably won't do that because this appointment is about the election. So I'm pretty sure he'll name someone the [liberal Democratic base] wants."⁵³

But Obama kept his promise to select the impeccably qualified nominee Garland, who was a 63 year old moderate.⁵⁴ This measured decision was met by Hatch and the Republican Senate acting to undermine the constitutional norm of considering a legitimate presidential nominee. In a speech in August 2016 in Kentucky, Senate Majority Leader Mitch McConnell stated: "One of my proudest moments was when I looked Barack Obama in the eye and I said, 'Mr. President, you will not fill the Supreme Court vacancy.'"⁵⁵

It is a marker of the status of the Republican party that the leader of the Senate would describe this shameful behavior as his proudest moment. Since Scalia died on February 13, 2016,⁵⁶ we are now far closer to the presidential election of 2020, than we were to the 2016 election when the seat opened up for an Obama appointment. But does anyone think that McConnell would re-assert that there should be no consideration of a presidential appointment to the Court so close to the election? All of the Republican 2016 claims about the need to allow the voters

51. Editorial, *They're Doing it as We Sit Here*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/opinion/robert-mueller-report-testimony.html?smid=nytcore-ios-share>. Mueller also noted that "many more countries are developing the capability to replicate what the Russians had done." *Transcript of Robert S. Mueller III's Testimony Before the House Intelligence Committee*, WASH. POST (July 24, 2019), https://www.washingtonpost.com/politics/transcript-of-robert-s-mueller-iiis-testimony-before-the-house-intelligence-committee/2019/07/24/f424acf0-ad97-11e9-a0c9-6d2d7818f3da_story.html.

52. U.S. CONST. art. II, § 2, cl. 2.

53. John Gizzi, *Orrin Hatch Says GOP Scotus Refusal Just 'The Chickens Coming Home to Roost'*, NEWSMAX (Mar. 13, 2016), <https://www.newsmax.com/Newsfront/john-gizzi-orrin-hatch-obama-will-nominate/2016/03/13/id/718871/>.

54. Ron Elving, *What Happened with Merrick Garland in 2016 and Why it Matters Now*, NPR (June 29, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

55. *Id.*

56. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

to decide the next justice when the presidential election is so close would be ignored.⁵⁷

This type of constitutional hardball is terrible for the democracy. In response to this behavior, Democrats will feel the need to reciprocate in kind lest their legitimate interests be trampled by Republican excesses. In the end, the democratic process will be damaged in various ways, not least of which is the harm from the stream of duplicitous pronouncements used to justify such excesses. Truth is such a critical aspect of a well-functioning democracy—and an articulated Jeffersonian ideal central to the American experiment—that we want to ensure that voters are well-informed rather than assaulted by lies, that their efforts at voting are facilitated by sound election practices that ensure accurate vote counts and fair processes, and that we nurture and protect constitutional norms that can enhance and guide our democracy, rather than demean and discredit it. We need to be mindful of the obligation to preserve, protect, and defend the Constitution of the United States.⁵⁸ To quote the final sentence of Robert Mueller’s prepared

57. Obviously, this prescient statement was written prior to the death of Supreme Court Justice Ruth Bader Ginsburg on September 18, 2020 and the subsequent nomination of Amy Coney Barrett to fill that seat on the Court. The shameful hypocrisy and dishonesty of the Republican senators who blocked Merrick Garland early in an election year only to endorse the much-later nomination of Barrett was captured by Senator Lindsay Graham’s statements about why the Obama nomination should be dropped to allow “the people to decide:”

I want you to use my words against me. If there’s a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey Graham said, ‘Let’s let the next president, whoever it might be, make that nomination,’ ” he said in 2016 shortly after the death of Justice Antonin Scalia. “And you could use my words against me and you’d be absolutely right.

Matthew Schwartz, *Use My Words Against Me! Lindsey Graham’s Shifting Position On Court Vacancies*, NPR (September 19, 2020), <https://www.npr.org/sections/death-of-ruth-bader-ginsburg/2020/09/19/914774433/use-my-words-against-me-lindsey-graham-s-shifting-position-on-court-vacancies>. Of course, as soon as Trump nominated Barrett, Graham simply jettisoned his prior claims – even as he prepared to face the voters in his latest bid for re-election.

58. In this regard, President Trump’s unwillingness to commit to a peaceful transition of power should he lose the election is shocking. Moreover, when Senator Cory Booker raised this issue with Supreme Court nominee Amy Coney Barrett, her answer was not reassuring:

BOOKER: Do you believe that every president should make a commitment unequivocally and resolutely to the peaceful transfer of power?

BARRETT: Well, Senator, that seems to me to be pulling me in a little bit into this question of whether the president has said that he would not peacefully leave office, and so to the extent this is a political controversy right now, as a judge I want to stay out of it and I don’t want to express a view.

Jeremy Stahl, *Amy Coney Barrett Doesn’t Want to Say Whether a President Should Commit to a Peaceful Transfer of Power*, SLATE (October 13, 2020), <https://slate.com/news-and-politics/2020/10/amy-coney-barrett-cory-booker-peaceful-transfer-of-power.html>. The central element of American democracy is premised on a commitment to the peaceful transfer of power, and the evasions of the President and his Supreme Court nominee on this issue about which there is only one clear and unmistakable correct answer is troubling to say the least.

statement to the House Intelligence Committee: "this deserves the attention of every American."⁵⁹

59. Emily Stewart, *Read Robert Mueller's Opening Statement*, Vox (July 24, 2019), <https://www.vox.com/2019/7/24/20708367/robert-mueller-congress-hearing-opening-statement-testimony>.

