

FOCUSING THE PRESIDENTIAL DEBATES¹

INTRODUCTION AND OVERVIEW OF ISSUES FACING THE NEW PRESIDENT

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The Constitution of the United States begins with a powerful statement of national aspirations: “**We the people** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States.” That document and its subsequent Bill of Rights, built on the genius of our founders, have produced the greatest success in history. But two hundred and twenty-six years after ratification of the Constitution our Nation faces grave challenges; challenges which could severely erode that singular success. At the same time, the Nation has exceptional opportunity; opportunity which could make the Nation even stronger. Which path is taken largely depends on the choices we make now, and our leadership in implementing those choices.

Once again this Great Nation has embarked on a journey to elect a new President. The candidates have come forward and the debates are under way. It is in the interest of all Americans that the candidates and their debates seriously address the grave national challenges and opportunities now before the Nation. We cannot afford politics as usual, with candidates vying to be the most immoderate in their Party. The challenges are unforgiving and the opportunities fleeting.

¹ The papers, and videos of the press conferences, associated with this initiative will be posted on an initiative website at: www.FocusingThePresidentialDebates.com

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The views expressed in this paper are solely those of Professor Moore, and this project is not associated with the University of Virginia or any governmental or other organization with which he is or has been affiliated. Unless otherwise stated, the views of individual paper presenters are their personal views.

The experts participating in this initiative are deeply concerned about the problems facing this Great Nation and have come together to present suggestions and raise questions for the Presidential candidates; Republican and Democrat alike. The papers being distributed to the Press today are being sent to each of the declared candidates in both parties. The campaign organization of each candidate, as well as the Democratic National Committee and the Republican National Committee, have also been notified of this initiative and invited to send a representative to the press conferences.

Each paper reflects the view of the presenter. There has been no effort to coordinate views; nor is any presenter responsible for the views expressed by other presenters. Some of these papers may appeal more to Democrat candidates and some may appeal more to Republican candidates. The subjects, however, have been chosen for their national importance, and the presenters for their recognized expertise.

It is hoped that as the debates progress in and between both parties that the candidates, and the Nation more broadly, will reflect on the range of serious problems and will consider the questions and/or specific recommendations presented in these papers. We here today are not able to individually participate in the debates, but we hope to be heard by the candidates and the American people through the great institution of America's free press. It is in that spirit that we have invited you today to this press conference at the National Press Club.

America is, and must always remain, a land of opportunity for all, regardless of ethnicity, gender, color, or religion, a leader in the struggle for peace and justice, a beacon of hope to the world, and the home of the free. We must never forget that America's true greatness lies in its national values and its unquenchable spirit.

Priority National Problems and Opportunities

A partial list of critical national problems and opportunities includes:

- *Restoring the American economy to substantially higher levels of sustained economic growth.* This growth goal is critical for our effectiveness in meeting almost all other national goals and must be one of the Nation's highest priorities;
- Restoring the United States military and defense communities to robust strength;
- Promoting a more stable world, and reducing threats from rogue actors and terrorist groups;
- Enhancing United States credibility and effectiveness in foreign affairs;
- Reducing and controlling the national debt;
- Reforming the Social Security System for greater effectiveness and long-term economic health;
- Reforming Obamacare (ACA), Medicare, and Medicaid for greater effectiveness in meeting national health goals and long-term economic health;

- Reducing taxes on Americans and American corporations³, and more effectively controlling the regulatory burden on American business as critical elements in restoring growth;
- Reforming immigration policy to ensure that America will have border security and adequate enforcement, that immigration policy will support American business and the economy, that there will be a one-time path to legal status for the many whose presence is benefiting the Nation, and that going forward immigration policy, like all national policies, will be guided by the rule-of-law;
- Reforming the criminal justice system by reducing incarceration for non-violent offenders and paring back overly broad use of the criminal justice system in non-violent offenses. At the same time, we may need even tougher laws for the most serious categories of *repeat violent* offenders, shooting homicides, and terrorism;
- Reducing crime through enhanced education against crime in our school systems, and more effective “community policing” through engaging the police more actively and directly with the communities they protect. The homicide rate in many of our major cities has surged recently, and it is our minority communities most at risk from any breakdown in mutual trust. Effectively reducing crime requires leadership from both police and the communities they serve. Recent events in Ferguson, Baltimore, and elsewhere suggest that we need to review both the adequacy of police training, and the adequacy of citizen training in supporting our police departments and their vital mission to protect the community. The police, and the communities which depend upon them, are inevitably linked. When that link becomes frayed, both the police and the communities they serve are harmed;
- Embracing modern medical science in settings where a more robust national research program targeting a particular disease holds promise both for enhanced cure offering better relief to millions of Americans, as well as substantial cost savings for the Nation. Arthritis, and other musculoskeletal conditions, which are the top causes of disability among United States adults, meet these conditions and could well serve as an initial focus for a new national “targeting disease” initiative. If successful, perhaps Alzheimer’s and serious mental illnesses could be next;
- Adopting a comprehensive energy policy leading to energy independence for America;
- Rebuilding our crumbling infrastructure of roads, bridges, dams, airports and the power grid. Not only are thousands of “high hazard” dams and “deficient” bridges dangerous, but collectively our inadequate infrastructure has been

³ America’s corporate tax rate of 35% (rising to as high as 39% including state taxes) compares with a rate of 20% in the United Kingdom, 17% in Singapore, 15% in Canada and Germany, and 12.5% in Ireland). This huge rate differential creates a powerful incentive for American firms to relocate abroad.

estimated to cost the Nation a quarter trillion dollars a year, or more, in wasted time and fuel from road and airport congestion, and power outages;⁴

- Enhancing educational opportunities for all Americans, and more effectively meeting skills-based educational needs in the workplace;
- More effectively promoting abroad the core American values of democracy and the rule-of-law;
- Reenergizing our national commitment to protection of the environment, but as with all governmental actions, doing so through cost-benefit effective measures;
- Ending tax and other laws discriminating against the family. Government actions should only strengthen and support the family;
- Paying greater attention to “right-sizing” government and reducing “government failure;” including revitalizing the role of the states in our federal system; and
- Assisting the process of forming a new Administration by streamlining the appointment and confirmation process.

To review this list is to appreciate the enormous challenge faced by the next President of the United States. The discussion which follows, built around the national objectives set forth in the Preamble to the American Constitution, is offered to provide greater granularity on some of the principal challenges and opportunities set out above.

To Promote the General Welfare

The most serious challenge facing the Nation is restoring a more robust growth rate. In recent years we have become mired in a low growth trajectory. The resulting costs are immense; fewer good jobs, a growing deficit, crumbling infrastructure, stagnant wages, a widening wealth gap, a shrinking military, diminishing opportunity to support the environment, and less American influence abroad. Virtually every major national objective is touched by this poor economic performance. *As such, improving our growth rate is the Nation’s number one problem.* We can and must do better! The good news is that even small differences in growth rates make large differences when compounded through time. Thus, to move from a 2% growth rate to a 3% growth rate will make the Nation as a whole 27% richer than it would otherwise be in just 25 years. In a generation (50 years) the Nation as a whole would be 63% richer at the 3% rate. To raise the growth rate to 4% would in 25 years make the Nation as a whole 62% richer. And in a generation the 4% rate would make the Nation 164% richer. The rate of sustained economic growth matters.

ENHANCING AMERICA’S GROWTH

Though economics, like all social sciences, can be fuzzy at the edges, we know generally what works to promote growth and what works to retard growth. Lower taxes, particularly

⁴ Perhaps an increased federal gasoline tax, at a time of a dramatic decrease in the price of gasoline, would now be possible as a targeted way of facilitating national infrastructure repair of highways and bridges. Such a tax would not only fund infrastructure, but also reduce carbon emissions and place the tax squarely on the principal users of the infrastructure. Similarly, a small user tax for airports and power consumption could assist with airport and power grid infrastructure.

income and corporate taxes, profoundly affecting incentives to work and save, encourage growth.⁵ Higher taxes depress growth. Higher taxes on dividends and capital gains, doubly suppresses growth in depressing savings and investment. While environmental, safety, and other regulations are necessary to address market externalities, excessive regulation depresses growth. High quality education encourages growth. Reducing trade barriers enhances growth (though America needs much stronger engagement with China on “non-tariff barriers,” such as “anti-trust” and other domestic laws used by China and other trading partners to reduce the competitiveness of American companies). Facilitating small business encourages growth, as *small* business is, in reality, the *large* backbone of the economy. Facilitating women’s access to the work force encourages growth. Repairing our crumbling infrastructure would enhance efficiency and encourage growth. And a climate of economic uncertainty, or perceived governmental hostility to business, can retard the “animal spirits” necessary for innovation. The paper by John H. Cochrane on “Economic Growth” addresses more fully how our Nation can meet its critical national need of enhancing growth.

TAX FAIRNESS

There is a core misunderstanding about taxes in America; a misunderstanding which must be forthrightly addressed if we are to restore robust growth. The political rhetoric that the income tax unfairly favors the wealthy is not just false; the reality is quite the opposite. Our political history is one of imposing income taxes on a smaller and smaller base of the population; a path ultimately risking third-world out-of-control expenditures, as removal of political inhibitions on raising taxes leads political elites to support larger and larger expenditures. If we continue to focus on raising taxes as the solution to national problems we doom the Nation to subpar growth.

With respect to “fairness,” according to the Internal Revenue Service, as of 2012 (with taxes even more progressive since then) the top 1% of tax payers paid 38.1% of the federal income tax, the top 10% paid 70.2%, the top 25% paid 86.4 %, and the top 50% paid 97.2%.⁶ In contrast, according to the Urban Institute, in 2013 the bottom 43% of taxpayers paid no federal income tax at all.⁷ With a combined state and federal tax rate approaching 50% in some states, such as California and New York, the income tax is a serious drag on growth. Moreover, the recent effort to raise taxes on dividends and capital gains is doubly unfair as the taxpayer will have first paid taxes on the wages she earned and then will be taxed again on the fruits of her decision to invest rather than to immediately spend her wages. Thus, saving and investment, actions critically needed for economic growth, are disfavored in tax policy over immediate

⁵ A legislative change permitting American corporations to bring back their very substantial earnings now parked abroad, and which were already taxed once abroad, would generate billions in stimulus for the American economy.

⁶ Figures are for the tax year 2012. IRS, Statistics of Income Division, Individual Income Tax Shares, 2012, available at <http://www.irs.gov/pub/irs-soi/soi-a-ints-id1506.pdf>

⁷ Estimated for tax year 2013. Urban Institute and Brookings Institution, Tax Policy Center, Tax Notes, September 30, 2013, available at <http://www.taxpolicycenter.org/UploadedPDF/1001697-TN-who-pays-no-federal-income-tax-2013.pdf>

consumption. And America's top corporate tax rate is one of the highest in the world; again serving as a drag on investment and growth.

Sometimes the argument is made that to ascertain overall tax fairness we must include not just the income tax but also payroll taxes. Adding payroll taxes and income taxes together does give a better picture of the total tax burden on lower income workers. But it is a false comparison, as payroll taxes are for the purpose of "entitlements" for the individual worker paying into the system; "entitlements" principally of Medicare and Social Security. Income taxes, in contrast, go to pay all of the myriad costs of government, such as defense and education, and are in no way "entitlements" for the taxpayer.

The tax code is also enormously complex, and compliance costs for business and individuals to file their taxes is yet another drag on growth. Further, these compliance costs are on top of the economic reality that an income tax depresses growth as compared with a consumption tax raising the same revenue. Ideally, America should adopt a simplified flat tax system, or perhaps eliminate the income tax completely in return for a National Sales or Value Added Tax (VAT).⁸ Opposition from entrenched special interests to such approaches, however, is so substantial that possibly the best "tax reform" achievable in the short run may be to reduce the top rate, including "Obamacare surcharges," to 33% and the tax on long term capital gains and dividends to 15%, again including "Obamacare surcharges." No one should be required to pay more than one-third of their income in federal taxes; a rate comparable or higher than taxes owed under feudalism.⁹ We should remember that federal income taxes are on top of state income taxes, property taxes, and a host of other federal, state and local taxes. A top 15% rate on capital gains and dividends would give a kick start to capital formation, another key component of growth. Moreover, dividends have already been taxed once at the corporate level. In contrast, the recent proposals made by some candidates to dramatically increase the top income tax rate, or the capital gains tax rate, would slow an already sputtering economy and are neither the route to fairness, nor the route to reducing the wealth gap. Recent proposals to boost the earned income tax credit for childless low-wage workers, however, could both encourage employment and strengthen the safety net.

Yet another of the myths about the federal tax system is that it is just one big "loophole" for the wealthy. To the contrary, the tax code has been designed to capture revenue. Not surprisingly, it contains numerous *loopholes for the Government* specifically designed to raise revenue regardless of their obvious lack of "fairness." Thus, the "alternative minimum tax," which at its inception was designed to hit the "wealthy" taxpayer who was using abusive tax shelters, today treats all state income taxes paid as though they were an abusive tax shelter and effectively *removes the deduction for state income taxes paid*. Excuse me? *Paying your state income taxes owed is an abusive tax shelter?* The capital gains tax applies fully to all gains but limits deduction of losses to \$3,000 per year. If the taxpayer has a good year and sells capital

⁸ Progressivity can be built into a national sales tax or VAT through such means, for example, as exempting food, clothing, housing and medical services.

⁹ Indeed, according to the *Wikipedia*, Villiens and Serfs under feudalism "usually paid 10% of their income to the Church and 10% to the feudal lord." See <https://simple.wikipedia.org/wiki/Feudalism> .

investments for a substantial profit the Government makes out nicely, thank you. But if the taxpayer has substantial capital losses, even to the point of being poorer at the end of the year, the Government still taxes all income but the \$3,000 loss, *as though the taxpayer had “income” when her net worth actually declined.* And the tax code no longer permits “income averaging” which was a fairer method of taxation letting a one-time windfall be averaged over a number of years. Instead the Code now taxes a one-time windfall at a top rate as if the windfall were the normal annual income of the taxpayer.

Further, as the paper on “Controlling the Deficit” by Peter Ferrara shows, the federal deficit has not arisen because the Nation has decreased taxes. Rather, the deficit is a product of a prodigious increase in federal spending; particularly the increase in “entitlement” expenditures resulting from President Johnson’s “Great Society” programs, and other more recent increases in “entitlement” expenditures under both Republican and Democrat Presidents. Increasing taxes is not the way to increase growth, is not the way to enhance fairness, and is not the way to effectively address the low growth “widening wealth gap.” Grover Norquist will present a paper on Tax Policy, more specifically addressing “What Tax Reform Should Look Like Under the Next President.”

SOCIAL SECURITY OPTIONALITY: REDUCING THE WEALTH GAP

One of the most important papers is that by Peter Ferrara on “Social Security Optionality: Reducing the Wealth Gap.” It is generally understood that, at minimum, the Social Security system can and must be adjusted to prevent the bankruptcy looming at the end of its current trajectory. This could be done, for example, by raising payroll taxes, by raising the retirement age and/or lowering benefits. There are simply fewer and fewer Americans supporting more and more retirees and changes must be made to avoid running short of funds to pay promised benefits as early as 2028 or 2033. But this way of focusing on the social security “problem” completely misses both the core of the “problem” and the compelling social security “opportunity.” It also calls for a wrongheaded additional burden either on senior citizens or workers.

The core of the Social Security problem is not averting bankruptcy, though substantial changes would be necessary even to meet that objective, but the terrible job the system does for working Americans who pay into the system. Even if Social Security continues to pay all promised benefits, the real rate of return on the taxes paid into the system still would be less than 1%. Social Security is not a savings and investment system, but rather a tax system with those taxes returned with only a slight real rate of return, and no guaranty or ownership entitlement at all.

The “raising taxes and lowering benefits” route to Social Security “reform” also misses the Social Security “opportunity.” That opportunity is to give American workers under age 40 the opportunity to opt into a private investment account into which their Social Security taxes would be deposited and invested and which they would own. Their investments would then compound through time like a normal retirement account. A two-earner middle income couple at standard long term investing returns would retire after a lifetime under this approach with an account estimated at over a million dollars which they would own. Their account would pay

them at least *double* the traditional Social Security return while still letting them leave the full account to their children if they so choose. There is no magic here. The great difference in rate of return is achieved by a simple shift from a tax and pay system to a normal savings and investment retirement system.

The return would go up dramatically; at least quadrupling the Social Security 1% return to a 4-6% return, if not higher, as has traditionally been the investment return over the last 200 years. This is nothing more than the TIAA/CREF retirement system used by universities and hospitals in the United States for many years. Nor is this new or untested. When other nations such as Chile have shifted to this approach, despite shortcomings and problems, the returns have gone up and workers have flocked to the new system. Moreover, a guaranteed Social Security type minimum return could be built into the system if desired, restrictions on investments could be imposed to avoid high risk investments, and to protect choice and current expectations the system should be offered as an option. Anyone 40 or under who wished to remain in the old system could do so or they could opt for the new system. Finally, the change can be made while fully protecting retirement obligations of those over 40 in the system without raising payroll taxes, reducing benefits, raising the retirement age, or means testing recipients, as are the usual suggestions for “Social Security reform.”

Social Security obligations, if meaningful, are already obligations of the Nation, so the transition can be funded either through general revenues or issuance of long term bonds without truly increasing national obligations. The long term beneficial economic effects for the Nation of this change in the Social Security system—increasing personal savings, increasing capital available for investments in America, decreasing the “wealth gap,” strengthening the family, and ultimately even decreasing the deficit and increasing tax revenues as income is generated from the new wealth—will hugely outweigh the interest payments on 50 year bonds issued periodically to pay for the transition, should that modality of financing the transition be chosen. *There is no single policy change this Nation can make to more effectively reduce the wealth gap and provide working families a real chance at wealth creation.* Social Security “optionality” for reducing the wealth gap is the most obvious “low hanging fruit” available to America. It is literally a kick at American workers and their families and the worst of “old thinking” to demagogue Social Security optionality.

TARGETING DISEASE

America also has important opportunities not yet addressed in the Presidential debates; opportunities with great meaning for millions of Americans. Medical research has come to the point that we may be able to much more effectively target disease through greater specific support. The national debate has focused on access to medical care; but what if medical science has progressed on certain disease processes that a major directed effort, perhaps one disease process at a time on cures or treatments deemed promising, could dramatically reduce the incidence of the disease? As will be discussed in the “Right-Sizing Government” paper, basic research will be underfunded by markets because it is a “positive externality” in economic theory. There is, then, a case for government in filling this need. Our government, of course, through the National Institutes of Health, already makes substantial commitments to basic

research in dealing with diseases; cancer, heart disease, aids, Alzheimer's, and other diseases. But if the cost to the Nation of certain diseases, through lost work and medical payments, is larger than the likely cost to better understand and cure the disease, and the science is promising enough to make that calculation, then it may be time to consider a national "moon shot" at curing, or at least better controlling, certain diseases. Indeed, perhaps if such a targeted approach is successful, the Nation might target one disease after another where the science suggests that the national savings from cure or better control would exceed the cost of the basic research. And, of course, a wonderful byproduct of any successes would be that millions of Americans would no longer be condemned to a lifetime of pain or disability. As an initial hypothesis for such a "targeting disease" approach, there is considerable evidence to suggest that arthritis and musculoskeletal diseases today meet the criteria for a major national effort.¹⁰ Over fifty million Americans are affected by these diseases, more than twenty million have activity limitations from these conditions, and the direct and indirect economic cost in lost work and treatment costs is estimated to be over \$200 billion per year. If a major research effort were able even to cut this cost in half, the *yearly* saving, repeated each year into the indefinite future, would be \$100 billion.

Dr. Steven R. Goldring, MD, the Chief Scientific Officer Emeritus at the prestigious Hospital for Special Surgery in New York, has prepared a ground-breaking paper which should be considered carefully by all the candidates, discussing whether the cost of these diseases, the percentage of the American population affected, and the state of the scientific understanding, suggests that arthritis and musculoskeletal diseases would be a useful place to start in such a national "Targeting Disease" research initiative.

IMMIGRATION REFORM

No nation can tolerate uncontrolled immigration. The Nation's borders must be secure and future immigration and legal status must be controlled by the rule of law rather than the clandestine crossing or the expired visa. Much of the effective enforcement will inevitably be internal and in this respect the E-verify system, an employment eligibility verification system, should be strengthened and expanded. We must also focus immigration enforcement not just on illegal border crossings but also on illegal visa overstays; a major source of illegal immigration – including some of those who participated in the 911 attacks.¹¹ But when the borders are secure and internal enforcement more effective, some one-time mechanisms should be put in place to legally recognize the many individuals who have come to America to work, who have obeyed the law, who have paid taxes, some who may have gone to school in America, some who may even have served in the American military, and who seek legal status. America needs innovators

¹⁰ Perhaps if this initial "Targeting Disease" program were a success, the Nation could take on other diseases whenever they met the same cost and science criteria, whether schizophrenia (which struck down my older sister in her late teens after a bright start as a National Merit Scholar), Alzheimer's, or other diseases.

¹¹ According to *The Economist*, the proposal to "build a wall on the Mexican border" and "deport all 11 million immigrants currently thought to be in American illegally," "[a]part from the misery this would cause, . . . would also cost \$285 billion, by one estimate—roughly \$900 in new taxes for every man, woman and child left in . . . America." *The Economist*, September 5, 2015, at 15. See also Steve Case, "Our Immigration Opportunity," *Washington Post*, at A21 cols 2-4 (Sept. 13, 2015). A wall would, of course, also not deal with a major part of the immigration problem; that of visa overstays.

and workers and our Nation traditionally has benefitted from immigration from every region in the world. Immigration policy should realistically take account of these economic needs of the Nation and of the reality that immigrants are embedded in our society in important ways.¹² In this respect, we should substantially increase the quota for highly skilled workers as we reexamine categories for lawful immigration. Though surrounded with greater controversy, we might also at least review putting in place a more realistic temporary program for certain agricultural workers; a program required to meet three conditions; first, that the demand cannot be met from American workers, second, that good working conditions and fair wages are mandated as part of the approval process, and third that the program is subject to a 100% departure check. Professor Peter Skerry, an expert on immigration policy, will explore in greater detail issues concerning Immigration Policy.

OTHER CHALLENGES TO THE GENERAL WELFARE

Many other important challenges relate to the general welfare and must also be addressed, though the experts here today have no detailed papers to offer at this time. These additional challenges include:

- **Supporting the family.** The family is the core of child development, social development and an important part of a healthy America. Yet a shocking number of our laws are anti-family; from the “marriage penalty” in the tax code, to the imposition of estate taxes on transfers at death to one’s children. Is it in the National interest to encourage unlimited spending during one’s lifetime, but to massively tax an already taxed lifetime accumulation passed to one’s children at death?¹³ America needs a governmental commission to not only examine anti-family laws, but to examine ways of encouraging stable family formation. The breakdown of the family is a serious national problem and one which has outsized impact on minority communities;
- **Regulatory reform.** As the paper on “Right-Sizing Government” will discuss, proper regulation is an important function of government in protecting the environment, safety, health, truthfulness of investment information, and soundness of the banking system, among other important functions. But special interest pleading, the inevitable governmental overreaction when legislating to resolve problems, and the democratic deficit inherent in the administrative state, can result in badly skewed regulation;

¹² The proposal to immediately deport the millions of immigrants thought to be in America illegally; that is, immigrants who arrived in America through either unlawful entry or overstaying a lawful visa (and their family members), would have a devastating effect on the economy, in addition to the human misery, and the permanent blight on America’s conscience. Costs, among other direct and indirect costs of such a forced migration, would include a major loss of productivity for American employers, as well as the economic and human costs of an army of enforcement agents.

¹³ Property, in the Anglo-American tradition, is a bundle of rights, privileges, powers and immunities with respect to an owned asset. The estate tax is not only anti-family, but it also removes one of the most important indicia of ownership; that is the ability of the owner to pass on the asset. Inheritance was a crucial feature in the development of property rights in the Anglo-American tradition; a tradition which revered the family. For the United States Government to dramatically impair that indicia of ownership is not only a detriment to family, it reduces an important indicia of ownership of the property owner herself. The cost of eliminating the estate tax would be less than 1% of federal revenues, and to eliminate the tax would have positive economic effects on jobs, hours worked, and wages.

regulation generating far greater costs than benefits. America needs a mechanism to swap out these costly regulations for likely more effective but less costly “second generation” regulations. As a start, a new President should task the Office of Management and Budget with conducting a careful agency-by-agency review of those regulations with largest economic effect, and then making recommendations to the President and the Congress, where possible, to swap out inefficient first generation regulations for more efficient second generation regulations, and to repeal altogether those regulations which review shows to be severely non-cost-benefit effective (*when measured by their own objectives*). An additional useful initiative would be to create a small government agency (with a maximum \$20 million budget) which would be tasked with simply publicizing for the American people what it considers each year to be the ten costliest (considering the overall costs of regulations which *when measured by their own objectives* are generating greater costs than benefits) regulatory decisions. We should also review the issue of “regulatory takings” to more fairly treat those whose property has been effectively “taken” through the regulatory process.¹⁴ Yet another possibility, this one which might be considered a “nuclear” option in controlling non-cost-benefit regulations, would be to legislatively expand due process review by the federal courts to permit the courts to strike down administratively imposed regulations where a judicial determination is made that the regulation, by its own objective, generates costs exceeding at least three times the benefits, or some other ratio deemed by Congress as clear regulatory failure;

- **Energy policy.** In recent years “fracking” and other new techniques for producing oil and gas have turned America into a major energy producer. Given the importance to the Nation of ending massive transfers of American wealth to foreign oil producers it is strongly in the national interest to encourage, rather than discourage, energy development. Moreover, lower cost energy produced in America will assist American manufacturing and business in a globally competitive environment. America should aim for permanent energy independence. In contributing to that goal, alternative, non-fossil fuels such as wind, solar, and nuclear should be encouraged where cost effective or likely to become so in a reasonable period of time. One governmental failure from the past to be addressed is that of locating a permanent repository for civilian spent nuclear fuels. Solving this problem can only be accomplished by bringing together all the stake holders to reach an agreed solution; not by resuming the years and years of court battles going nowhere;
- **The environment.** Damage to the environment imposes real costs. Accordingly, we must protect the environment, both on land and at sea. “Negative externalities,” imposing costs on the environment, whether from the private sector or the government,

¹⁴ When government can impose costs on private parties off budget through the exercise of its’ regulatory power this can easily lead to inefficient actions; with costs being ignored. On the other hand, private actions harming others, such as nuisance, have no case for compensation from regulation. Further, much regulation has *de minimus* effect on the property owner, and to seek to compensate for all such government actions is simply not practical. The trick is to find the right balance to be legislatively implemented through some appropriate percentage reduction in value requiring compensation as a “regulatory taking.”

must be priced out through appropriate regulation or legislative mandate. Any such regulation, however, should be at least reasonably cost-effective and should not, as a current Justice of the United States Supreme Court has noted for much such regulation which came before him while a Judge on the Fifth Circuit Court of Appeals, seek the last 10% of benefit at huge and unjustified economic cost.¹⁵ The best scientific evidence is that global warming is real and that mankind's activities are at least a significant contributor. Absent the global warning "deniers" offering better science, they should stand down. But equally important, it is not clear that massive expenses incurred by America to seek to halt global warming will generate greater benefit (a benefit likely achieved simply through slowing global warming) than their considerable and immediate economic costs. Real jobs, real growth, real alternative expenditures, and other real consequences must be carefully weighed against the rush to view all energy policy through a lens of global warming and climate change. Likely, cost-benefit analysis would support some, but not all, proposals for dealing with global warming. In this connection, cost-benefit analysis should not be used, or viewed, as an "anti-environment" tool. Rather, sophisticated analysis, including values other than dollars alone, provides a needed rigor to avoid shooting ourselves in the foot;

- **Obamacare, Medicare, Medicaid and Health Access.** Obamacare (the ACA) has generated substantial opposition. It is highly complex, coercive, costly, job inhibiting for small business, and has still not brought medical insurance to all Americans.¹⁶ Medicare and Medicaid, highly popular programs, have imposed large entitlement costs, costs that are projected to escalate through time without greater cost control. Medicaid, in a well-intentioned effort to control costs, has reduced payments to health-care providers so severely as to dramatically reduce those willing to serve Medicaid patients. Physicians, particularly primary-care physicians, and nurse practitioners are not being trained in adequate numbers. Paper work for health care providers is displacing critical time with the patient, whether driven by a commendable goal of better record keeping for patients, or less commendable goals of "cover you're a ___" actions driven by litigation fear, or bureaucratic requirements for obtaining reimbursement imposed by insurance companies or the government. Accelerating concentration in health-care, as hospitals purchase physician practices and consolidate, will increasingly raise cost issues associated with dominant regional suppliers. Treatment of the mentally ill, with schizophrenics living in the streets, is a national disgrace. Because of an absence of sensible time limitations on

¹⁵ Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1992). As one of many examples of non-cost-benefit regulations discussed by then Court of Appeals Judge Breyer (now Justice Breyer of the U.S. Supreme Court) the Judge presents the following example of an actual mandated PCB cleanup as "the problem of the last 10 percent:" "In 1990, in New Hampshire, \$9.3 million was spent to remove the final little bit of highly diluted PCBs by incinerating the dirt. Without this expenditure, the dirt was 'clean enough for children playing on the site to eat small amounts of dirt for 70 days per year without significant harm.' The area was a swamp, so children did not play there. Future development was unlikely. Experts agree that the chemicals would evaporate by the year 2000. \$9.3 million spent to protect non-existent dirt-eating children is 'the problem of the last 10 percent.'" *Id.* at 11-12.

¹⁶ One useful change which could be quickly implemented would be to relax the ACA regulations limiting the range of insurance plans which can be offered. See Joseph R. Antos, "Health Care Reform After the ACA," 370 *New England Journal of Medicine* 2259, 2261 (2014).

assessing injury, as well as the failure to appropriately cap damage claims, the cost of medical insurance is out of control; particularly for those health care providers specializing in obstetrics. Americans support cost-effective preventive care, high quality medical care, and access to medical insurance for all Americans. How to achieve these goals at affordable cost for the Nation is enormously complex. It is recommended that, as a priority, the new Administration appoint a high-level Health-Care/Health-Cost Commission to make recommendations for a structure which would more effectively meet national health goals. Issues to be addressed should include all the above, as well as nationally portable major-medical policies for the individual, and enhanced preventive care for all.¹⁷ America needs a carefully thought out approach to these difficult issues, not a 2,700 page bill unread by most who voted on it, however well intentioned;

- **Education.** High quality education is an important ingredient of personal development, personal success, aggregate economic growth, and, ultimately, good governance. Many factors go into producing high quality education. These include adequate funding, excellent teachers, starting early, small classes, and good facilities, among other factors. Parental involvement and parental choice also seem to correlate strongly with better educational results from our schools. Perhaps, however, it is time to consider, as well, setting up sophisticated programmed learning systems on the Internet in most educational subjects from beginner to advanced, so that anyone with access to the Internet, of whatever age, can pursue education as desired.¹⁸ Similarly, in areas where basic work skills are in short supply, perhaps more school system/industry partnerships in training could meet these skill needs. Economic theory also deserves a better place in our public school curriculum, including “public choice theory” which won the Nobel Prize in economics for Professor James M. Buchanan and which educates about “government failure,” in parallel with “market failure.” Good civic education should include a solid grounding not only in the strengths and weaknesses of both markets and government; it should instill genuine understanding as to the causes of both “market failure” and “government failure,” and the resulting need for checks and balances, and constant vigilance on the exercise of power. Our school system is also missing an opportunity to “take a bite out of crime” by failing to systematically integrate anti-drug, anti-crime, pro-rule-of-law programs more effectively into the school system. In the past we have taken for granted that anti-crime socialization occurred in the family. But with contemporary stresses on the family, the schools need to supplement this traditional family training. Where such “rule-of-law” or “culture of lawfulness” programs are being taught in the public schools abroad, the results have been promising. Dr. Roy S. Godson, who has been a principal innovator of these “rule-of-law/anti-crime” programs is presenting a paper on their promise;
- **Responding to economic crises.** The 2008 financial crisis, like all deep economic downturns, has done lasting damage to the Nation; indeed to the world. How we handle

¹⁷ For an interesting discussion of a “public utility” model, which might have a place in health-care reform, see Nicholas Bagley, “Medicine as a Public Calling,” 114 *Michigan Law Review* 57 (2015).

¹⁸ The private sector has long since produced superb lectures on a wide range of subjects. See, for example, the lectures offered by The Teaching Company.

such crises is an extremely important issue which needs careful preparation before the crises occur. Given the controversy surrounding the Dodd-Frank “Wall Street Reform and Consumer Protection Act of 2010,”¹⁹ enacted in response to the 2008 crisis, it is imperative that a new Administration review the adequacy of mechanisms now in place and the cost/benefit effectiveness of Dodd-Frank.²⁰ While there is abundant blame to share with the private sector, it is imperative that we also not forget the governmental missteps contributing to the crisis. Surely, these include adoption, prior to the crisis, of the “mark-to-market” accounting requirements which had properly been abandoned after the Great Depression. Mark-to-market accounting distorts markets by exaggerating the effect upward of asset values during booms, and distorting real asset values downward during liquidity crises. The effect during the crisis of mark-to-market requirements for assessing bank capital under conditions of extreme illiquidity in the mortgage market was devastating. Similarly, government agencies promoted overly permissive mortgages in their support for increasing home ownership. We should not have let our understandable interest in promoting home ownership, which has many benefits including reducing the wealth gap, set aside appropriate standards for offering mortgages; a cost paid by the economy as a whole, as well as in devastating financial pain for the individual homeowner, when property prices went south.²¹ Further, though controversial and “banned” by Dodd-Frank, we should examine, as an alternative crises mechanism, the use of government bridge loans for “too-big-to-fail” financial institutions in a crises meltdown threatening the economy as a whole. While we will never be sure, it is likely that had the Federal Reserve or the Treasury Department prevented the collapse of Lehman Brothers, Bear Stearns, and subsequent companies such as American International Group (AIG), through the use of bridge loans to meet the liquidity problems of these companies (with possible option kickers for the Government) that the taxpayer would have made out hugely,²² and the resulting downward spiral of confidence in the overall economy might have been considerably lessened. Yes, such an approach poses a “moral hazard,” potentially incentivizing sloppy risk performance.²³ But what is worse; a cascading crisis of confidence throughout the economy triggered by collapse of major financial institutions, or some “moral hazard” cost? In this connection, the economic value of an institution which continues to function is far greater than one put out of business. Just imagine, for example, the greater return to the taxpayer, and the lesser downward effect in financial markets, if the AIG liquidity crisis had been handled through a bridge loan permitting full continued operation of one of the finest insurance

¹⁹ 2,300 pages long, and giving rise to thousands of pages of subsidiary regulations.

²⁰ For a devastating critique of the broadly accepted narrative of market failure in the Great Depression and the 2008 Financial Crisis, as well as an exploration of the costs of much of the “regulatory reform” in response, *see* Paul G. Mahoney, *Wasting a Crisis: Why Securities Regulation Fails* (2015).

²¹ The housing crisis also had a devastating effect on minority wealth. *See* Michael A. Fletcher, “A Shattered Foundation,” cols. 1-3 A1 (January 25, 2015).

²² The taxpayer ultimately made out extremely well in the 2008 financial crisis with respect to the pay back to the government at more than the cost of government financial loans and guarantees.

²³ “Moral hazard” can also be significantly offset through appropriate individual penalties, or by Central Bank crisis lending at very high interest rates, rather than assuming the only antidote is permitting institutional collapse.

companies in the world. The broadest issue here is not just an assessment of Dodd-Frank, but also the still developing international Basel rules on banking; indeed, ultimately the full national and international regulatory structure imposed on the banks. We can, of course, dramatically decrease the risk of bank failure by massive advance regulatory intervention through both Dodd-Frank and Basel banking rules. But at some point the costs to efficiency, competitiveness, and the economy may outweigh the benefits from further hikes down the regulatory risk reduction path,²⁴ compared to an after-the-fact liquidity mechanism. Dodd-Frank commits the Nation to a “risk reduction” regulatory path for too-big-to-fail financial institutions, as opposed to the Nation’s previous understanding of meeting emergencies through using after-the-fact liquidity extensions from a Central Bank. Likely, this Dodd-Frank moment reflected a post-crisis political setting in which the “left” wanted more regulation, and the “right” abjured “bail-outs,” as inconsistent with free markets. We may, however, have made at least too one-sided a choice.²⁵ Finally, given the haphazard fiscal response to the crises of billions spent on allegedly “shovel ready” projects during the 2008 crisis, would it not make sense to adapt, going forward, one of the proposals from the Great Depression? That is, set up a small government agency (perhaps with a \$20 million budget) which would in advance of crises compile a list of needed infrastructure projects (and engage in some appropriate contingent work); projects which would genuinely add to growth if implemented by Congress for needed fiscal stimulus during a future crises;

²⁴ See generally, “Risk-weighted capital: Whose model is it anyway?” *The Economist* 70, at 73 (Sept. 19, 2015).

²⁵ A classic in economic theory, Walter Bagehot’s “Lombard Street” essay, sets forth the alternative crises management approach followed for many years by central banks. “[T]he Bank of England . . . must in time of panic do what all other similar banks must do; that in time of panic it must advance freely and vigorously to the public out of the reserve. And with the Bank of England, as with other Banks in the same case, these advances, if they are to be made at all, should be made so as if possible to obtain the object for which they are made. The end is to stay the panic; and the advances should, if possible, stay the panic. And for this purpose there are two rules: First. That these loans should only be made at a very high rate of interest. This will operate as a heavy fine on unreasonable timidity, and will prevent the greatest number of applications by persons who do not require it. The rate should be raised early in the panic, so that the fine may be paid early; that no one may borrow out of idle precaution without paying well for it; that the Banking Reserve may be protected as far as possible. Secondly. That at this rate these advances should be made on all good banking securities, and as largely as the public ask for them. The reason is plain. The object is to stay alarm, and nothing therefore should be done to cause alarm. But the way to cause alarm is to refuse some one who has good security to offer. The news of this will spread in an instant through all the money market at a moment of terror; no one can say exactly who carries it, but in half an hour it will be carried on all sides, and will intensify the terror everywhere. No advances indeed need by made by which the Bank will ultimately lose.” *Id.* at 75-76 (Lexington, KY reprint). Walter Bagehot [1826-1877], an influential political and economic writer who in 1860 took over as editor-in-chief of *The Economist*, was, of course, principally focusing on the Bank of England.

In the panic of 2008, perhaps the Federal Reserve and the Treasury Department were concerned as to whether they had adequate legal authority. *But see section 13(3) of the Federal Reserve Act.* Perhaps also, Lehman Brothers and Bear Stearns simply could not offer what was felt to be adequate security. But did any concern about adequacy of security take account of the enterprise value of these investment banks as security for non-payment of loans? The author does not seek to second-guess the Federal Reserve or Treasury Department decisions, here, as he is simply not privy to the full 2008 context. He would, however, like to make a point that perhaps a mixture of emergency lending powers and risk reduction regulation might be a better approach than simply reliance on risk-reduction. Further, a relevant question in relying solely on regulatory risk reduction measures, quite apart from the added regulatory burden, is whether the triggering of too big to fail mechanisms, such as those set out in Dodd-Frank, will halt a panic or increase it? We should never forget that the principal objective here is to stop an economy wide panic!

- **Providing a level playing field for our security markets.** America’s stock exchanges and security markets are the most important and deepest security markets in the world. As such, they perform critical roles for the Nation, including facilitating investment and supporting retirement for millions of Americans. Maintaining the health of our security markets, including faith in their honesty, efficiency, and fairness, is essential. Modern technology, particularly high speed computers and high speed access, but also newer security derivatives, add substantial complexity in policing the health of these markets. The “flash crash” of 2010, and the recent “mini-flash-crash” of the summer of 2015, raise important questions as to the current regulatory structure for these markets, and whether we are providing a level and fair playing field. A new Administration should undertake a careful review of the health of our security markets; with a particular focus on the impact of new technology.

To Provide for the Common Defence

A second major grouping of challenges to the Nation are external, relating to national security and defense.²⁶ The world today has numerous serious challenges; a rogue Russia under Putin’s leadership waging unconventional war on Ukraine, bombing to support a genocidal regime in Syria, and threatening elsewhere; an Iran seeking to become a nuclear power and continuing its support for terrorism, destabilization of the Arab Middle East, and implacable hostility to Israel; an intransigent Israeli/Palestinian dispute; an unstable nuclear North Korea continuing to add to its nuclear arsenal; a China doubling down on assertiveness of its oceans claims against Japan in the East China Sea and its ASEAN neighbors in the South China Sea; an out-of-control series of cyberattacks against the West aimed largely at theft of both security and commercial information; a radical Islamist movement (ISIL) currently controlling large swaths of Iraq and Syria, dedicated to a new “Caliphate” setting aside national borders, and seeking to inspire terrorism in North Africa, Europe and America; and finally competing radical Islamist terrorist groups such as Al Qaeda supporting global terror, among more localized violent movements.

As though this panoply of threats is not enough, American credibility (and resulting ability to deter) has eroded through both Republican and Democratic Administrations. It is today clear that the War in Iraq was a serious miscalculation,²⁷ and a subsequent Administration has

²⁶ For an excellent overview discussion of critical security and foreign policy choices facing a new American President see *Choices for America in a Turbulent World* (Rand Corporation, 2015). This is a first volume in a “Strategic Rethink” series from Rand). The preface to this volume appropriately notes that it “should be of interest to [among others] . . . the staff and advisers to the 2016 presidential candidates . . .” *Id.* at *iii*.

²⁷ There is no question that Saddam Hussein and his regime were thoroughly evil. The Hussein regime initiated aggressive wars against Iran and Kuwait, they committed horrific human rights abuses against Shia and Kurd populations in Iraq, they brutally tortured American POWs during the Gulf War, they attacked Israel with Scud missiles during the War, and they flaunted United Nations arms control inspections in the years after that War. But before the Iraq War, United States pressure had forced Iraqi compliance with much tougher on-site arms control inspections, and, according to George Tenet as then head of the CIA, at that time there was no credible threat from

compounded the problem by walking away from a red line for Syria not to use chemical weapons in its civil war, not intervening in a timely manner in Iraq to prevent the virtual explosion of ISIL, failing to deter Putin in Ukraine, and concluding an arms agreement with Iraq opposed by a majority of the Congress and by both our Israeli and Arab allies in the Middle East. No one believes these issues are simple, or that they have obvious solutions. But whatever the rationale for these recent American actions, collectively they and other actions have eroded American prestige and credibility around the World. At the same time, budgetary constraints have harmed the readiness of the United States military while problematic actors, such as China and Russia, have continued to increase their military. Other problems in meeting these challenges have included repeated failures, from the Vietnam War, through the War in Afghanistan and the Iraq War, to the war against ISIL, to follow professional military advice for any necessary war fighting; an embrace during the George W. Bush Administration of a “torture-lite” policy which alienated America’s allies and damaged the intelligence community; reduced effectiveness of the critical National Security Council system for coordinating United States policy on an interagency basis; absence of an effective structure to engender lasting and meaningful democratic governance in post-conflict settings such as Afghanistan and Iraq; and massive leaks in classified materials undercutting our ability to obtain crucial intelligence information and angering our allies.²⁸

THE LAW OF THE SEA

As another serious problem inhibiting effective United States engagement abroad, the Republican Senate caucus has acquiesced to an isolationist faction within the Party which has opposed United States adherence to the Law of the Sea Convention with a patina of canards that has to date blocked United States adherence. This Convention, supported by all American Presidents of both parties, the United States Military (and particularly the Coast Guard and the Navy), and American industry (including the oil companies and our one remaining deep seabed mining company), the environmental community, and meeting all of the conditions set by President Ronald Reagan, expands United States resource jurisdiction in an area greater than the Louisiana Purchase and the acquisition of Alaska combined. United States non-adherence to date, in the face of overwhelming international acceptance of the Convention, has cost United States leadership in oceans policy, a greatly weakened United States ability to engage in critical oceans issues affecting the Arctic Ocean and the South China Sea, and the loss of two of the four United States deep seabed mine sites with strategic mineral deposits of an estimated value of half a trillion dollars, while China and Russia move aggressively to lock up strategic deep seabed sites in America’s absence.

CHINA & THE SOUTH CHINA SEA

Hussein against the United States. The better course would have been to wait out the new much tougher on-site inspection regime while continuing economic sanctions against the Hussein regime.

²⁸ As a consumer of intelligence information in the United States Government I was raised on a system of strict need-to-know. Somehow, the Nation lost its way in the wide sharing of intelligence after 9/11; an understandable reaction motivated by the need for sharing critical information across then government intelligence stovepipes. The Nation needs a more carefully thought out solution to these two real problems; protecting classified information and sharing across capabilities and agencies where needed.

The South and East China Sea disputes are also a problem requiring early attention. The United States has a direct interest in protecting navigational freedom in the area and has important defense treaties with the Philippines and Japan. Every effort should be made to have China understand that its own interest lies, not in aggressive actions toward its neighbors, but in cooperative efforts with Japan and the ASEAN nations to peacefully resolve these island and oceans boundary disputes.

ISIL

The threat from ISIL, now controlling large swaths of both Syria and Iraq, is real. ISIL is destabilizing the Arab Middle East and parts of Africa, is breeding a global terrorist threat, and is working at generating violence in America and Europe. While ISIL likely could have been more easily stopped in its formative period, the challenge today is formidable. An early priority for the new President will be to explore the potential for a global or regional coalition, effective military options, and effective political options²⁹ to defeat ISIL. The difficulty of implementing an effective strategy should not be underestimated.

RUSSIA & UKRAINE

The crisis in Ukraine is also real and dangerous. Russia, under Putin, must be deterred from further escalating the crisis in the Ukraine, or elsewhere. If possible, and it may not be, Russia should also be brought back more effectively into détente. A carefully thought out combination of enhanced deterrence, including in Ukraine, and renewed diplomacy to explore possible areas of agreement, would seem required.³⁰ We should not forget that throughout the Cold War America continued to negotiate arms control and other agreements with the then Soviet Union. Putin is playing an increasingly dangerous, and self-destructive, game in the Ukraine, in Syria, and in partnerships with China and Iran. Russia, a major nuclear power, must be an early and important focus of the new President.

NORTH KOREA

The increasingly erratic behavior of North Korea, another nuclear nation, will also require prompt and careful Presidential attention. The United States, in conjunction with the United Nations Security Council, which still guarantees South Korea against North Korean aggression, should send a clear deterrent message to the leadership of North Korea. It is an absence of deterrence which motivates the North to higher risk behavior. If, of course, North Korea can enter into useful discussions with South Korea such discussions should be

²⁹ At this stage there are few attractive options, particularly political options, in the fight against ISIL. Though opposing the Iraq War, the author convened a group of experts in Washington D.C. when it became evident that the War would take place, to discuss a constitution for Iraq. At that time the author recommended a federal structure for Iraq, with separate areas of significant autonomy for Kurds, Sunnis and Shia, under a strong Iraqi central government. If there is any possibility of Sunni tribal leaders abandoning the extreme ISIL leaders, some alternative political mechanism might be needed, given the failure of the Iraqi Government to generate confidence in its' Sunni population. A federal system for the Kurds, Sunnis and Shia, under a weakened central Iraqi Government, may be one of the few remaining political possibilities in taking on ISIL in Iraq.

³⁰ Of these, the critical current need is for enhanced deterrence. No one should have illusions about the ease of restoring détente with Russia, but détente should remain on the table as a United States objective.

encouraged. In addition to deterring North Korean aggression against its neighbors, America also has an important interest in discouraging North Korean export of its nuclear technology.

IRAN

Though Iran is in focus as a result of the Iran Nuclear Agreement, Iran is one of the largest supporters of terrorism in the world today, including its support for Hamas, Hezbollah, militias in Iraq, the Houthi rebels in Yemen, the Bashar al-Assad regime in Syria, and at least past attacks against United States military directly in Lebanon and Iraq. An important challenge facing the new President is how to more effectively deter these seriously destabilizing actions by Iran. It is time to stop ignoring the Iranian commitment to terrorism! Nor is Iran's support for terrorism unrelated to Iran's deepening repression at home; yet another issue crying out for a strong American voice rather than a diminishingly audible murmur!

SUPPORTING DEMOCRACY & THE RULE OF LAW ABROAD

Finally, it is a sad reality that the period of rapid democratization following the 1990 collapse of the former Soviet Union, and the brief period of hope associated with the "Arab Spring," have given way to push-back by totalitarian and authoritarian leaders, civil wars supported by brutal totalitarian factions, and increasing repression in Russia, Iran, China, Venezuela, and many other countries. America faces a serious challenge in restoring the earlier global momentum toward democracy and the rule of law; a momentum so important for peace, human rights, economic development, and national well-being. David J. Kramer, one of the world's top experts on democracy, human rights and the rule-of-law, will address this challenge.

GENERAL RECOMMENDATIONS

A few broad recommendations on these defense and foreign policy challenges include:

- **America must be engaged in the world and must lead.** The siren song of isolationism may be tempting but is a formula for decline. America must provide the leadership for a more peaceful and stable world;
- **America must keep its word and be true to its allies.** Deterrence against security threats depends heavily on a reliable America. Once credibility is lost, it is difficult to regain, and the loss makes for a riskier world;
- **America must never engage in foreign wars when better options are available.** The great destructiveness of war, the human cost, and the unpredictable nature of war, suggest that, except in defense against attacks on America or our allies, or severe threats against the Nation or our allies, the Nation should proceed with the greatest caution in committing the United States military to foreign wars. Short of war America has a broad panoply of foreign policy tools, including providing leadership to principally affected nations, economic sanctions, logistics support, training and intelligence support;
- **Once a war is undertaken, America should fight to win, and win decisively.** The President is the constitutionally designated Commander-in-Chief. War-fighting decisions should be based on professional military advice, vetted throughout the course of the war, directly with the President;

- **The United States military requires increased support now.** Readiness, following years of conflict in Afghanistan and Iraq, has dropped substantially while the threat, including the geographic range and combat mode of potential engagement, has increased. According to the National Defense Panel, commissioned by Congress to review the *2014 Quadrennial Defense Review*, our military faces “major readiness shortfalls that will, absent a decisive reversal of course, create the possibility of a hollow force”³¹
- **Ideas matter. America, working with its allies, must engage robustly in the political struggle against destructive ideologies such as that of Al-Qaeda, Boko Haram, and ISIL.** And our own engagement, whether on the battlefield or in the war of ideas, must adhere to our values of human rights, the rule of law and religious freedom;
- **The level of cyber-attacks against America and American industry is out-of-control and must be deterred.** Deterring such attacks, with closer cooperation of both government and industry, is a priority;³²
- **Economic sanctions today are light years ahead of economic sanctions of old and if used effectively can be a distinctive tool of American foreign policy.** Global trade, and financial transactions implemented through the global banking system, among other interactions, are essential for modern nations. When America is successful in coordinating such sanctions with the European Union, China, Russia and the United Nations, as it was in sanctions against Iran, the potential to enforce compliance with the non-proliferation treaty (the NPT) and to end support for terrorism is great. We should not underestimate the potential for such measures as an alternative to use of force when they are broadly implemented internationally and are maintained with strength and determination.³³ We should not have abandoned these sanctions against Iran without insisting on *full compliance* with the NPT and *full compliance* with the non-use of force norms of the Charter;
- **The recent nuclear deal with Iran is weak.** It should not have permitted Iranian enrichment given the past Iranian violations of the Non-Proliferation-Treaty (the NPT), and despite the agreement’s safeguards, it is likely inherently unverifiable should Iran be committed to a nuclear bomb. It is too narrow in failing to focus, as well, on compliance by Iran with the fundamental non-use of force norms embodied in Article 2(4) of the

³¹ William J. Perry and John P. Abizaid, *Ensuring a Strong U.S. Defense for the Future: The National Defense Panel Review of the 2014 Quadrennial Defense Review*, Washington, D.C.: United States Institute of Peace, July 2014, at 36. See also Robert H. Scales, “Our Army is breaking,” *The Washington Post* cols. 2-4, at A13 (August 2, 2015).

³² According to *The Economist*: “If Chinese spies broke into an American Government building and stole important documents, or were seen planting explosives in the electric grid, uproar or worse would ensue. Yet state-supported Chinese hackers have, officials say, been getting away with the digital equivalent for years, with notably little response.” *The Economist*, “Cyber-security Trouble Shooting,” Sept. 12, 2015, at 27. Cyber-security includes, among other issues, espionage, theft of commercial secrets, and “digital” as a weapon for intimidation or destruction.

³³ Smart sanctions, when levied against individual human rights violators and purveyors of terror, as opposed to sanctioning an entire country, also have demonstrated considerable effectiveness. There is pending in the Congress a bi-partisan “Global Magnitsky Human Rights Accountability Act” which, if enacted, would provide America with an even sharper tool against these individual bad actors.

United Nations Charter with respect to all of Iran's neighbors, including Israel. It is weakness, not strength, for the Group of 5 plus 1, under United States leadership, to mobilize enormous sanctions pressure on Iran but to apply none of that pressure to Iran's continuing support for terrorism around the world.³⁴ The global concern that Iran not obtain a nuclear bomb is, of course, strongly related to Iran's support for terrorism and its blatant threats of aggression. These are not "separate" issues. Unfortunately, by concluding the agreement as a *fait accompli*, whatever the vote in the Congress the Administration will have left the United States isolated in any future effort to roll back the agreement. What *can* be done is enhanced military support to Israel and American allies in the Gulf, and coordination with America's allies to make it clear to Iran that future cheating by Iran with the agreement, including its NPT pledge not to develop a bomb, will be met by whatever actions are necessary, including the use of force, to uphold the NPT and decisively prevent an Iranian nuclear bomb. To add to the deterrent effect of such a United States pledge, and thus reduce the risk that an actual use of force would be required, Congress should enact a joint resolution making "No Iranian Nuclear Bomb" a national policy;

- **America should work internationally to hold terror states accountable through civil damages for the killing and destruction they cause.** The rule of law generates a right to seek civil damages against those who unlawfully kill or destroy the property of others. Yet we continue to provide sovereign immunity to the purveyors of terror around the world; insulating them from suit in domestic courts. A protocol to the twelve international anti-terrorism Conventions, already in force for the United States, which would extend the current criminal penalties under those Conventions to include civil judgments against the purveyors of terror, such as Iran and its leaders today, is now available. This protocol should be actively supported by the United States. Billion dollar judgments against terror-nation assets around the world, and those of their leaders, are potentially one of our most effective tools in the fight against terror;³⁵
- **More effective engagement in the Israeli/Palestinian Conflict.** America has, in the past, played an important role in efforts at peace in this lingering conflict. Choices today, whether premised on a continuing status quo or a two-state solution, have become more difficult. It is likely that through time such choices will become even more difficult for both Israelis and Palestinians. As such, America should explore diplomatic openings offering promise while continuing to support Israel against aggression and terrorism;
- **More effective engagement in the United Nations.** The United Nations has serious problems, including its blatant discrimination against Israel. But the failure of more effective American engagement has only made matters worse and empowered our

³⁴ The deal to "normalize" relations with Cuba is also weak. Diplomacy is our most important path to resolving international differences. But when America negotiates, it should do so with strength and appropriate bottom line goals. Negotiating with the Castro regime may be a useful strategy, but a deal should have required real concessions in liberalizing the regime, freeing political prisoners, and improving the plight of the Cuban people. A weaker deal simply perpetuates the Castro Gulag.

³⁵ For a copy of this Draft Protocol to the United Nations Anti-Terrorism Conventions see John N. Moore, "Civil Litigation Against Terrorism: Neglected Promise" in *Legal Issues in the Struggle Against Terror*, J.N. Moore and R.F. Turner, eds., Durham: Carolina Academic Press, 2010, at 231.

enemies. We need a tougher policy of engagement with the United Nations to support American foreign policy and American values, and those of our allies. In this connection, we should examine “collective security” generally with a view to greater before-the-fact deterrence, explore the Canadian initiative for a more effective stability force as an alternative to unilateral American action, engage more vigorously in diplomatic lobbying in capitals on UN issues, seek to end the Israel bias which cripples the UN in the Middle East, work to enhance a “democracy caucus” in the UN, and press for more effective UN engagement on promoting democracy and the rule of law;

- **America should deploy an effective anti-ballistic missile system, whether land-based or mobile sea-based, to protect against rogue-nation ballistic missile threats.** Unlike the era of the ABM Treaty with the USSR, when effective ABM systems required air bursts of nuclear warheads, effective non-nuclear ABM technology is now virtually on the shelf, particularly for mobile sea-based systems.

Admiral Dennis C. Blair, the former Commander-in-Chief of the United States Pacific Command and, more recently, the Director of National Intelligence in the Obama Administration, will present a paper on these critical defense and security issues. He will be followed by Professor Chester A. Crocker, one of the Nation’s preeminent experts in foreign policy, a former Assistant Secretary of State for African Affairs, and the former Chairman of the Board of Directors of the United States Institute of Peace, who will present a paper on foreign policy issues facing the Nation and questions for the candidates on those issues.

To Establish Justice & Insure Domestic Tranquility

America has serious problems with its justice system. Too many Americans are in jail serving long sentences for non-violent crimes, nevertheless there is still too much violent crime, especially gang-related shootings in our largest cities, and our police are not always adequately funded or adequately trained.³⁶

TOO MANY IN JAILS AND PRISONS

The Nation’s prison and jail population has more than quadrupled since 1980. With less than 5% of the world’s population the United States has nearly a quarter of the World’s prison and jail population. According to a recent *Washington Post* article, approximately 1 in 100

³⁶ The justice system has other issues not discussed here. For example, civil forfeiture, morphing from the war on drugs to many other areas of criminal law enforcement, and permitting seizure of assets without judicial process, is greatly in need of review. Some twenty years ago, Congressman Henry Hyde, the Chairman of the House Judiciary Committee, wrote an important book on civil forfeiture abuses and their encroachment on property rights and civil liberties. Henry Hyde, *Forfeiting Our Property Rights: Is Your Property Safe From Seizure?* (Cato Institute, 1995). Subsequently, the abuses have gotten worse, leading to a recent *Washington Post* expose. See Michael Sallah, Robert O’Harrow Jr. & Steven Rich, “Stop and Seize,” *Washington Post*, page A1 (Sept. 7, 2014). If police department budgets should receive any funding at all from civil forfeitures, which may be doubtful, it should be under careful controls to protect property rights of the innocent, require genuine due process for forfeitures, and protect associated civil liberties.

adults in America are behind bars.³⁷ The cost is great to house this many prisoners, but even greater in the loss of potential earnings power, higher unemployment rates, and damage to the families of the incarcerated. Moreover, we are using jails to house too many of our mentally ill, rather than providing effective medical treatment and care.³⁸ For the world's leading democracy this silent blight of over incarceration is not just wrong, but a national scandal.

We have come to this sad state in part because of a genuinely difficult war on drugs, in part because of sentencing reforms aimed at encouraging uniform sentencing, in part because we have tended to criminalize every infraction whether or not violent, and in part because politics supports a message of "tough on crime;" thus supporting tougher and tougher criminal laws and sentencing. But what is really needed are more effective policies in preventing crime. We are also much overdue for a National Commission to review the sentencing guidelines for non-violent offenses to make sentences more appropriate for the crime. But the problem goes beyond sentencing and more effective crime prevention. We have made one non-violent offense after another subject to criminal penalties. Literally, we have piled law upon law, and embellished them with criminal sanctions and prison terms. This excessive criminalization too should be reviewed in light of penalties other than incarceration, and sanctioning approaches other than criminalization. Did the Nation really benefit from putting Martha Stewart in jail at enormous cost to the taxpayer rather than simply levying a large fine against her? Did the criminal charge against the accounting firm Arthur Andersen, *a corporation rather than a person*, serve the national interest when it destroyed one of the big five American accounting firms in 2002, putting over 80,000 innocent employees out of work for the asserted abuse by a few in their accounting for the bankrupt Enron Corporation?³⁹ Would a substantial fine, or license suspension of the individuals involved, *as opposed to a corporate criminal sanction*, have been more in the national interest? Have we applied criminal sanctions too broadly to the business world?

Further, Texas and other states, along with many other countries in the World, are exploring alternatives to lengthy incarceration.⁴⁰ Some of these approaches seem to be working well. A national criminal justice review should be looking carefully at all of these issues, more effective policies in preventing crime, sentencing reform, over criminalization, better alternatives for those needing psychiatric care, and alternatives to lengthy jail sentences. The paper by Harry R. Marshall, Jr., a former Senior Legal Adviser in the Criminal Division of the United States Justice Department, explores a range of these issues in reducing prison populations.

³⁷ Sari Horwitz & Nikki Kahn, "Unlikely Allies," *Washington Post*, page A1, cols. 2-4 (Aug. 16, 2015) (A story about how left and right are coming together for sentencing reform.)

³⁸ See, e.g., Justin Volpe, "Jail is No Place for People with Mental Illness," *Washington Post*, at cols. 1-2, page B3 (Sept. 27, 2015). See also "Editorial: Jamycheal Mitchell's ghastly death," *Washington Post*, at cols. 1-3, page A22 (Oct. 4, 2015). "For want of an available bed in a state psychiatric hospital, Jamycheal Mitchell, a mentally ill young man in Virginia who shoplifted a soda and two snacks worth \$5.05 from a 7-Eleven, wasted away behind bars for four months, all but ignored by jail staff who should have noticed his catastrophically deteriorating health. Incoherent, emaciated and filthy, he died in his cell in August. Police are now investigating." *Id.* at col. 1.

³⁹ The criminal conviction of the Arthur Andersen firm was subsequently set aside by the Supreme Court. But this came too late to save the reputation of the firm itself.

⁴⁰ See, e.g., Reid Wilson, "Juvenile prison populations fall as states' changes take effect," *The Washington Post* cols. 1-3 A5 (February 1, 2015).

REDUCING CRIME AND ENHANCING COMMUNITY/POLICE RELATIONS

Despite previously unprecedented levels of incarceration, the Nation still has a serious crime problem, a problem particularly acute in victimizing minority communities in major cities. This blends with too few resources for police departments, too little community understanding of the difficulties faced by the police, and sometimes inadequate police training, to generate the witches' brew of disorders and reduced trust between the police and the residents they serve—a toxic brew seen recently in Ferguson, New York, Baltimore, and other cities. This too is a major national problem, and a complex one, which must be addressed. Quite possibly we must enact even tougher laws for *repeat violent* offenders or firearm homicides. But the problem will not be solved simply by increasing incarceration rates.

Two of the papers being presented in this initiative address these intertwined problems of enhancing police and community relations. Collectively, these papers address likely the most effective avenues to *crime prevention*; much more effective anti-crime pro rule-of-law education of our youth, and “community” or “relational policing,” much more effectively engaging the police and the community it serves. The first paper, mentioned briefly above in the discussion of education, is the paper by Dr. Roy S. Godson on “Education against Crime: Fostering Culture Supportive of the Rule of Law.” If we were able to better instill an anti-crime message in our public schools, a message rooted in powerful information about the costs to the perpetrator, the victim, the city, minority communities, and society in general, we would be reaching the most important point for crime control—that is, the belief system of the individual.⁴¹ Dr. Godson has pioneered the teaching of these innovative programs around the world. They deserve a trial in America.

The second paper; that by Chief Timothy J. Longo, Sr., the nationally respected Chief of Police of Charlottesville, Virginia, addresses “Relational Policing,” a title the Chief believes better addresses needed engagement than “Community Policing.” Chief Longo’s paper addresses how greater police involvement directly with residents in a community can both assist the police and lead to safer communities. More effective policing will likely require higher police budgets for more old-fashioned “walking the beat,” more police, higher salaries for police, community youth programs run by the police, greater police training (particularly in settings involving potential use of deadly force), and other modalities of engendering greater interaction and greater trust between the police and the community which they protect. But the reduction in crime and enhanced respect for the police and the rule-of-law more broadly just might make it a

⁴¹ While not offering a panacea for mass killings; killings which are all too frequently committed by mentally ill shooters, a major anti-crime educational initiative just might help to reduce the frequency of these atrocities. *See also* the work of the Duke University School of Medicine Professor, Dr. Jeffrey Swanson in mental illness and the prevention of gun violence.

bargain. While such programs are not new in America, their adoption on a larger scale could make a difference. This enhanced “Relational Policing,” too, deserves a try.⁴²

STRENGTHENING THE JUDICIARY

The courts are a crucial fundament of our rule-of-law democracy. We rightly believe that America has a criminal justice system rooted in fundamental protections for the accused. For the most part that is the case. Recent investigations, however, many triggered by newer DNA science, have demonstrated too many times where the innocent have been convicted. A review of these cases shows that most relate to issues of witness identification (frequently involving poor line-up or other witness identification missteps), junk science, incompetent representation, or over-zealous prosecution at the trial level. All of these issues can and should be addressed in a careful review by new Justice Department leadership (and the equivalent in all fifty states) to ensure that American courts remain the bastion of a free peoples. We must also ensure adequate public defenders to make our adversary system work as it was designed.

The Supreme Court of the United States has traditionally come under fire by those who disagree with its decisions. But the Supreme Court is a core institution of our great democracy. It is not designed to reflect the will of the majority, which is a principal role of the Congress, but rather to implement the rule-of-law in interpreting statutes and applying the Constitution of the United States (including the Bill of Rights) and its system of checks and balances. Some discourse about the Court seems to assume that its task is to clear the way for congressional action. A more Madisonian way of thinking about the Court, however, is that it is the principal bulwark in protecting the multiple protections for our freedoms which are built into the Constitution. The Court protects the separation of powers between the legislative and executive branches. It protects states’ rights in our federal system. It protects the integrity of the electoral process. And it protects individual freedom as guaranteed in the Bill of Rights, including freedom of speech and the press as a crucial “fourth estate” so necessary for effective governance. The Court does all of the above by applying the Constitution of the United States as the highest law of the land. As a human institution the Court may sometimes get it wrong, and given its role in protecting minority freedoms, it will frequently be criticized by the public. But the alternative to the Court is a Westminster style democracy without the checks and balances which remain the genius of our Constitution.

In its role in interpreting statutes, however, a strain of thought about interpretation is harming the work of the Court. It is an approach to interpretation which should, I believe, concern the Congress whose work is being interpreted in these cases. This interpretive approach is also misleading some to believe that the approach restrains the Court, when the opposite is true. Inevitably, legislation and regulations will be filled with semantic and syntactic ambiguity.⁴³ This is simply the nature of ordinary language. Not surprisingly, it is these

⁴² Some of this is already underway in Baltimore. See the story in the *Washington Post* of August 16, 2015, at page C1 “Mending Ties in Fractured City,” featuring recent youth community engagement in Baltimore by Interim Police Chief Kevin Davis.

⁴³ It is theoretically possible to run a draft of statutory language through a computer to identify syntactic ambiguities (that is, those ambiguities dealing with the logic of language) before a legislature acts. In reality, however, while

ambiguities which make their way to the Court. As such, most interpretive decisions at the Supreme Court level can be reasonably argued for either interpretation of the statutory language. It is simply myth to believe that the language in these cases coming before the Court always carries a “plain and natural meaning.” The interpretive error is to argue in interpreting an Act of Congress, as does at least one Justice of the Court in quite vehement language, that it is impermissible to examine legislative history.⁴⁴ Instead, according to this view, only the language of the statute is relevant. But modern linguistics makes it clear that language takes much of its meaning from context. Legislative history may well provide that crucial context. Moreover, surely the obligation of the Court in interpreting an Act of Congress is to carry out the intent or purpose of the Congress, not that of the Court. In its interpretive role, as opposed to its role in assessing constitutionality, the Court is subordinate to the legislature. If examining additional legislative history, that is examining the maximum context available, holds better promise in getting to the congressional purpose behind the language, then surely the Court is obliged to do so. The Court should always review, not only the full language itself of a legislative enactment, but the maximum context likely to assist in understanding the congressional purpose. Some legislative history, of course, is of dubious value and may only reflect the view of an individual member of Congress, or even that of a staff member. But the Court has plenty of intellectual firepower to give minimal, if any, weight to such legislative history. Of course, too much should not be made of this difference in legislative interpretation. For legislative history also will

perhaps possible at the edges as an aide in the work of the legislature, such programs generate so many ambiguities as to make the legislative process cumbersome. In any event, the present reality is that legislative language, like ordinary language, is filled with both semantic and syntactic ambiguity.

⁴⁴ For a flavor of the debate within the Court on this interpretive issue *See, e.g., Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-83 (1996) (Stevens, J. concurring, debating with Scalia, J., concurring); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610-12 n.4, 616-23 (White, J., writing for the Court, debating with Scalia, J. concurring). The strongest “textualist” on the Court, opposed to the use of legislative history generally, is Justice Scalia. One of the most striking “textualist” statements in the work of the Court is the statement in the statutory interpretation decision, authored for the Court by Justice Scalia, in the case of *Republic of Iraq v. Beatty*. The opinion in *Beatty* actually states in authorizing a retroactive removal of jurisdiction from the Federal Courts: “We cannot say with any certainty (for those who think this matters) whether the Congress that passed the EWSAA would have wanted the President to be permitted to waive § 1605(a)(7) (emphasis by the Court).” *Republic of Iraq v. Beatty*, 556 U.S. 848, 860 (2009). As the numerous *amicus* briefs in this case show, there was abundant legislative (and executive) history, as well as textual analysis, to rule out the interpretation of the statutory language chosen by the Court. *See, e.g.,* “Brief for Tortured American Prisoners of War as *Amici Curiae* Supporting Affirmance,” (*Republic of Iraq, Et Al., v. Robert Simon, Et Al*) (This *amicus* brief, submitted to the Court by the author as Counsel for *Amici*, shows that the textual provision in question was drafted by the Executive and presented to the Congress for enactment with a written statement from the Executive as to its purpose; a purpose which did not include the interpretation accepted by the Court, *id.* at 11). *See also* for a purely linguistic analysis of this case, the “Brief of Dr. Stephen Neale as *Amicus Curiae* in support of Respondents,” (*Republic of Iraq, v. Robert Simon, Et Al*). This latter brief, applying modern linguistics, clearly shows that language heavily takes its meaning from context. “Linguistic theory, the philosophy of language and cognitive science provide a concrete framework, within which it is possible to articulate a principled rationale for determining the plain meaning of statutory language. These ‘linguistic tools’ include the theories of grammatical structure, linguistic context and pragmatic inference. The absence of such a framework has hampered the Court’s ability to provide rules in the consistent interpretation of the plain meaning of statutory language” *Id.* at 4. The author had an office next to then Professor Scalia at the University of Virginia Law School, and is an admirer of much of the Justice’s jurisprudence. Elsewhere the author defended the Justice against an unfair attack made on the Justice’s approach to treaty interpretation. *See* John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law* (2001). But the Justice, and those on the Court following him in not taking account of legislative history in statutory interpretation, are seriously mistaken.

frequently not carry conviction for the Court as to the congressional purpose. *But the bottom line is that when the Court is simply interpreting an Act of Congress it is obliged to carry out the legislative purpose, not whatever purpose the Court believes may be better. It is mythology, and a mythology counter to modern linguistics, to believe that ambiguous language alone holds the answer to interpretation, and thus that it is impermissible to examine legislative history.* The rule-of-law requires that the language embodied in the Congressional enactment, as well as its full context, is the basis for statutory interpretation. The importance of this obligation to properly implement congressional purpose makes this more than simply a personal choice in legal philosophy.

To Secure the Blessings of Liberty

American values of freedom, democracy, human rights (including freedom of religion, freedom of speech and the press, and property rights, among other human rights), and the rule of law, matter. These are not just “American values,” but values which have emerged from bitter human struggle and experience (for example, as in the events leading to the British Magna Carta) even before the adoption of these values in our Constitution. Moreover, they are values which work cross culturally around the world. The core political struggle throughout much of human history has been between a ruling “vanguard elite” on the one hand, leading to totalitarian and authoritarian regimes with their largely unchecked power, and “democracy” on the other hand, with leaders chosen through periodic free elections and an array of checks and balances on the exercise of power. While the former model features “rule-by-law,” as well as rule by naked power, as interchangeable modalities for sending regime opponents to the gulag, the latter model features “rule-of-law” as a check on power, and strong protections for the individual.

Half a century ago the relative superiority of these models was debated. Today we know that, in the aggregate, democracy wins by virtually all major social indicators. Democracies as a whole have fewer aggressive wars (and virtually never fight other democracies), have higher economic growth (though China for some time has been an exception as it leaves behind the disastrous economic policies of the Mao era), greater protection of human rights, better environmental protection, less famine, fewer refugees fleeing, and better performance on a host of other social indicators. Not surprisingly, America has sought to support transitions to democracy and the rule of law. The record is clear, enhanced success for those nations making the transition as in much of Eastern Europe, and continuing failure for those such as Cuba, Iran, North Korea, Sudan, Syria, Venezuela, and too many others. For America to assist transitions to democracy not only assists millions beyond our borders to have a better life, but it also contributes to enhanced *American economic growth and reduced risk of war.*

THE COMMUNITY OF DEMOCRACIES

One policy which might be explored to more effectively further democracy and the rule of law abroad would be to work more effectively within the United States created “Community of Democracies” to generate a powerful “democracy caucusing group” within the United Nations as a counterpart to existing “regional groups,” or more narrow functional groups such as the “Group of 77” developing countries. We should also coordinate with the Community of

Democracies on a robust global educational program about the importance of democracy and the rule of law.

AN AFRICAN DEMOCRACY CENTER

A second policy, which would assist in Africa against the inroads of ISIL, would be to coordinate with the European Union and the Organization of African Unity to establish a major democracy training center in Africa for the training of African officials across the Anglophone divide, in both English and French. The Center would be a permanent bricks and mortar facility designed to train thousands of African leaders in weekend seminars, speeches all over Africa, month-long courses, and full degree programs. The United States and the European Union might each put in about 50 million U.S. dollars equivalent over a span of the first ten years in establishing the Center, with future expenditures gradually transferred to the Organization of African Unity, or simply a coalition of African democracies.⁴⁵

David J. Kramer, the former President of Freedom House, and a former Assistant Secretary of State for Human Rights in the George W. Bush Administration, will present a paper “Supporting Democracy, Human Rights and Rule of Law,” setting out why and how the United States should continue to support these core American values of democracy and the rule of law as important United States foreign policy goals.

To Form a More Perfect Union

“[T]here are more instances of the abridgment of the freedom of the people by gradual and silent encroachments . . . than by violent and sudden usurpations.”

James Madison, Speech in the Virginia Convention, 1788

“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”

James Madison, The Federalist No. 51 (1788).

The great genius of the United States Constitution is that it is structured to control power with periodic popular elections of our leaders, separation of powers between the Executive, the Legislative and the Judicial branches, a federal system dividing powers between the federal government and the states, and, with the adoption of the Bill of Rights, robust protections of fundamental rights of the individual—protections safeguarded even from the wishes of a majority. In this structure the American Constitution has centrally embodied the core principals separating failed totalitarian and authoritarian governments from successful liberal democracies. Some, in response to contemporary difficulties in governance, would have us fundamentally

⁴⁵ This is an initiative I first jointly developed with Ms. Fern Holland, one of my former law students at Georgetown, who was assassinated in Iraq while leading the American effort on training in women’s rights. Subsequently, the Congress of the United States appropriated a million dollars to fund a grant, implemented through Freedom House, exploring the feasibility with African leaders of establishing such an Institute. The response from African leaders was positive and a new American Administration should undertake talks with the European Union as to jointly funding such an Institute. Because of the contribution made by Ms. Fern Holland to this project, I believe that an appropriate part of any such Institute, such as scholarships to attend the Institute, should be in her name.

rethink this system, perhaps shifting to a Westminster Parliamentary type system. Would it not be easier for a Government to make things happen in such a system? But our Constitution was not designed to be make things happen easily. It was designed to check power. Americans should start each day thankful for that genius of James Madison and the other founders of this great Nation.

CONTROLLING FISCAL IRRESPONSIBILITY

But America does have governance problems. As the Nobel Prize winning economist James M. Buchanan wrote in a paper presented in October 2005 in my seminar on “The Rule of Law: Controlling Government” at Virginia, “Fiscal irresponsibility stares us in the face and cries out for correction.”⁴⁶ Writing a decade ago, Buchanan understood with great clarity that the Nation was embarked on a massive increase in spending. How much worse it has become since! Professor Buchanan also saw clearly that one of the paths to such spending was to focus the taxes necessary to pay for even a portion of this spending *tsunami* on a narrower and narrower base of the electorate. Doing so would postpone, or prevent altogether, the otherwise inevitable tax revolt. Addressing America’s fiscal problems then requires both a focus on controlling spending and an end to populist efforts to narrow the tax base onto a minority referred to as “the wealthy.” Sadly, the constitutional framers built in no direct checks on fiscal irresponsibility, and with the adoption of the Sixteenth Amendment in 1913 authorizing the income tax, a way was open to progressively narrow the tax base. The framer’s original structure, of course, did not contemplate direct taxes on incomes opening a path to a progressive narrowing of the tax base; a core mechanism incentivizing out-of-control spending.

Professor Buchanan suggested that one way to get this fiscal irresponsibility under control was to adopt a principle of generality preventing government from taking any discriminatory measures. Under such a principle, if we had an income tax, all Americans would pay the same percentage of their income in taxes. While there is much to be said for this principle, which is a core principle of non-discrimination underlying the rule of law, it may be that the Nation has gone too far down the road of progressive income taxes to adopt such a principle, for example through a single flat-tax system, or even through an elimination of the income tax in return for a value added or national sales tax. As such, what is to be done? As a start either or both political parties might adopt a platform with a double pledge; first, pledging to work to reduce the deficit through spending reductions—aiming at a balanced budget within ten years, and second, pledging that the top income tax rate will never exceed 33% (with 15% as the top rate on dividends and long-term capital gains).⁴⁷

Ultimately, it would be desirable to then adopt these principles as constitutional amendments, with, of course, the necessary requirement that the budgetary ceiling must be flexible in wartime. This “Fiscal Responsibility” Amendment, addressing both spending and

⁴⁶ James M. Buchanan, “Responsibility, Generality and Natural Liberty,” (A paper delivered at the seminar on “The Rule of Law: Controlling Government,” the University of Virginia School of Law (10/8/2005 draft).

⁴⁷ In this connection, long term means a year or longer. To extend this period as a requirement to qualify for the long term rate would generate even greater market inefficiencies than is caused by the tax distortion of the present one-year holding period.

taxing limits, would become the 28th Amendment to the Constitution (Amendment XXVIII). As an alternative, America might simply repeal the Sixteenth Amendment, authorizing “taxes on incomes,” as an aberration inconsistent with the framer’s Constitution. The lost revenue could be made up by a new federal sales or value added tax. Such a tax, *on consumption instead of income*, would both enhance economic growth, and abolish the complexity (with its substantial compliance costs), and supported special interests, of the current income tax code. The progressivity of such a consumption tax could easily be adjusted as desired by exempting food, clothing, housing and medical services from the tax, among other possibilities. Moreover, a new “earned income credit” type safety net could be structured to greatly simplify, and likely increase in doing so, current safety net programs and payments.

CONGRESS AND THE BUDGET

There is also a second serious governance problem. The Congress of the United States has lost its way in implementing a normal budget cycle. In recent years, the Congress has been unable to reach agreement on budget in a timely manner, and the Nation has been run on continuing resolutions, or even equal percentage cuts across all programs whatever their relative priority or merit. The Nation needs to return to a thoughtful budget process, with considered authorizations and appropriations across the range of federal programs, and then enactment in a timely manner. A major cause of the budgetary dysfunction, of course, has been serious and important differences about controlling the national deficit. The President of the United States has also been a key player in this dysfunction. But the occasion of a new Administration needs also to be an occasion for Congressional leaders of both parties to come together to restore the normal budgeting process and review other ways in which the work of the Congress might be facilitated.

Further, the Nation should not be threatened with government shut downs, or credit downgrades, because of a Congressional or Presidential inability to reach agreement on the budget. Nor does the gimmick of a vote on “the debt ceiling” make sense after the Congress has already spent the money and borrowed to pay for it. This “debt ceiling” gimmick only casts shameful doubt on America’s willingness to live up to its existing debt obligations.⁴⁸ It should be abolished as unfit for an honorable Nation.

PROFESSIONAL MILITARY ADVICE

America has an additional governance problem as well, one which has come about through repeated amendments to our defense structure—a gradual change made without any real debate. We may have given the civilian Secretary of Defense too much authority in directing war-fighting once the Nation commits, as opposed to greater reliance on professional military advice offered directly to the President as the constitutional Commander-in-Chief. Most Americans are unaware that there was no Secretary of Defense in World War II. That War was successfully fought with military advice from our professional military directly to the President of the United States. It was only in the aftermath of World War II that we created a Department

⁴⁸ And, of course, a fight over the “debt ceiling” adds to volatility in our financial markets, as well as contributing to potential credit downgrades for the Nation, thus doubly shooting America in the foot.

of Defense (a necessary structure for then needed integration and specialized services) and a civilian Secretary of Defense. The civilian Service Secretaries of the Army and the Navy have been removed from the war-fighting chain for some time. There is, of course, a second major role for all of the civilian Service Secretaries, and for the Secretary of Defense. That is, the awesome responsibility of administering the Defense Department, with all of its defense agencies, office of the Secretary, office of the Joint Chiefs, and Armed Services. Its administrative responsibility includes the acquisition of weapons systems, training, and management of ongoing intelligence.

The war-fighting record of too many civilian Secretaries of Defense has not been good. Secretary McNamara systematically ignored professional military advice during the Vietnam War. Many military professionals today believe that War was winnable with normal war-fighting modes as recommended at the time by United States defense and intelligence professionals: isolate the battlefield by cutting the Ho Chi Minh Trail (after the War a North Vietnamese General said cutting the trail, and thereby preventing the required logistics supply for 300,000 North Vietnamese fighters in the South, would have defeated the North's aggression against South Vietnam), dramatically reduce Soviet resupply to the North by mining Haiphong Harbor (later done), use normal strategic bombing of military sites in the North (later done), build up South Vietnamese forces (later done), and adopt a "take and hold" anti-guerrilla war strategy as opposed to the "attrition" strategy used by General Westmorland in the early years of the War (later done by General Abrams).⁴⁹ Even without isolating the battlefield by cutting the Ho Chi Minh Trail, the War was eventually ended with an honorable peace in the Paris Accords, only to have the Congress pull the plug on further assistance to South Vietnam as Watergate disintegrated the presidency. But whether or not the Vietnam War was winnable, the war fighting by America was badly mishandled in the early years of the War, costing thousands of additional casualties for American service personnel.

Subsequently, Les Aspen, the then civilian Secretary of Defense, rejected professional military advice with respect to Somalia as tendered by General Colin Powell, then Chairman of the Joint Chiefs of Staff, to send adequate armor in country to deal with the contingency of "Black Hawk Down." That contingency occurred, and the resulting fiasco absent adequate armor quickly ended the United States effort in Somalia.

The successful 1991 Gulf War reverted to the Military Chiefs working closely with the President of the United States and was an extraordinary success. Going forward to the Iraq War, Secretary Rumsfeld ignored professional military advice as to the forces necessary during the occupation phase. Further, the Chiefs were not consulted on the extraordinary decision to send all of the Iraqi Army home or the draconian De-Bathification program firing the civilians running the government ministries, military advice to isolate the battlefield through forces necessary to seal the borders with Syria and Iraq went unheeded, and "take and hold" was effectively instituted only after General Petraeus arrived in Iraq. War-fighting in dealing with

⁴⁹ For a quarter century the author has co-taught with a Vietnam veteran one of the Nation's top seminars on the Vietnam War; a seminar which has repeatedly vetted these and other issues with many of the Nation's wartime leaders, as well as historians and military experts on the War.

ISIL also seems questionable but this may be due to direct limitations imposed by the White House itself, rather than recommendations from the civilian Secretaries.

Has this questionable war-fighting in numerous post World War II conflicts been simply a happenstance of the wrong civilian Secretaries? Perhaps. Is modern war-fighting too complex for the President not to have a civilian adviser on war-fighting, as well as on the Administrative chain of command? Quite possibly. Certainly, we must maintain solid civilian control of the military, both a fundamental condition of democracy, and a Constitutional mandate with the President as Commander in Chief. We do so even accepting that from time to time Presidents themselves may make mistakes. But equally, we must involve the President of the United States, the constitutionally charged official, in critical war-fighting decisions.

Emphatically this is not an argument to “let the generals run the war.” Generals can be wrong and Presidents right, as seems to have been the case for Lincoln in the Civil War and Truman in Korea. But when the Nation is committed to war, we must ensure that it is the President, the constitutionally designated Commander in Chief, who personally focuses on the conduct of the war, and who is advised directly by the Nation’s professional military leaders.

Perhaps a starting point would be for the Presidential candidates, or their parties, to pledge that their Presidency will request professional military advice prior to any American commitments and war-fighting decisions, and that during the course of any war they will meet at least once per month with the Operational Commander, the Chairman of the Joint Chiefs, and the Chiefs, for a discussion of progress in the war. If this informal pledge proves useful through time, then we can more clearly incorporate this consultation recommendation into the statutory base of the Defense Department as a follow on to the Goldwater/Nichols Act. Such an approach would not remove the civilian Secretary of Defense from also offering war-fighting advice to the President, but it would more clearly prevent professional military advice from being excluded in critical war-fighting decisions.

STAFFING A NEW ADMINISTRATION

As one more issue worthy of review by the Presidential candidates, and their parties, the candidate ultimately elected will need to staff their Administration. Getting the right team, and surely that means nothing less today than the A-Team, will be difficult. Increasingly, we have adopted so many conflict-of-interest, disclosure, and pre-clearance laws that it is harder to get the A-Team to agree to serve, and even after agreeing, the clearance and Senate approval processes take too long. The result has been a huge delay in getting an administration up and running.⁵⁰ As examples, according to the Congressional Research Service, in the 112th Congress (2011-13) the mean time to move from nomination to confirmation was 151 days. And for the 113th

⁵⁰ I am indebted to former Secretary of State George Shultz for reminding me of this important issue directly related to the Presidential election cycle. For the Secretary’s discussion of the importance, and contemporary difficulty, of staffing our government with the A-team, as well as other suggestions for better governance, *see* Chapter 2 “Better Governance,” in George P. Shultz, *Issues on My Mind: Strategies for the Future* 9- 25 (2013).

Congress (2013-15) the mean time to move from nomination to confirmation was 119 days. And this was *after* the already time consuming nomination process.⁵¹

This problem of getting a new administration up and running will be a problem for either party which wins the Presidency. Further, addressing the problem after the election is too late, as most of these requirements are embedded in legislation. Of course, we must protect the government against unfit nominations, and we must maintain clean and good government. These are critically important goals! But surely we can simplify the current morass of appointment laws, and hopefully find more flexible solutions to problems preventing the Nation's best from accepting appointment. As an initial suggestion, it might be useful for House and Senate leadership, in both Democratic and Republican parties, to agree to convene hearings about the appointment and confirmation process to see what might be done on a genuine bi-partisan basis prior to a new administration. Perhaps such hearings, with adoption of a bi-partisan agreed statutory solution shortly thereafter, might be held in the spring of 2016, well before the Presidential election and the next transfer of power.

RIGHT-SIZING GOVERNMENT

How do we make decisions as to the right size of government? For too long we have debated the proper size of government along a “left-right” spectrum tracing back to the French Revolution. But we have much better understanding of government today, in part based on a fuller understanding as to the functioning of markets as well as the functioning of governments; that is, the strengths and limitations of each. I will be presenting a paper entitled “Freedom and Authority: Right-Sizing Government” which will offer a few thoughts on this fundamental issue. Hopefully, the categorizations of “government failure” offered in this paper may serve as a useful check list for assessing government programs.

A POSTSCRIPT FOR THE CANDIDATES AND THE PRESS

FOR THE CANDIDATES

Congratulations on your decision to run for the Presidency of this great Nation! The experts gathered in this initiative hope that you will find the issues discussed and recommendations made in these papers helpful as you address the major problems and opportunities facing the Nation. We know that you are in a tough political race which you want to win. But we would ask that you make known to the American people what you regard as the major national problems, and your specific solutions for addressing each of those problems. The candidate who wins should be the candidate offering the best solutions, not the best soundbites.

⁵¹ According to the *New York Times*, as of May 2, 2013, “One of the worst backlogs is at the State Department, where nearly a quarter of the most senior posts are not filled, including those in charge of embassy security and counterterrorism. The Treasury Department is searching for a new No. 2, the Department of Homeland Security is missing its top two cybersecurity officials and about 30 percent of the top jobs at the Commerce Department are still vacant, including that of chief economist.” *The New York Times*, <http://www.nytimes.com/2013/05/03/us/politics/top-posts-remain-vacant-throughout-obama-administration.html>

Ultimately this race belongs, not to you, but to the American people. For it is America, and its future, which is at stake.

FOR THE PRESS

We hope that as you write about the candidates, and possibly assist in preparing questions for them in the Presidential debates, you will find the issues discussed, the questions posed, and the recommendations made in the papers presented in this initiative helpful. We know that each of us, including the members of the press corps, has preferences, whether on candidate, party or issues. But we would ask that you drill down on each of the candidates as to their views on the full scope of problems facing the Nation. Ultimately, it is through interaction of the candidates with the media that the American voter will make a determination as to which candidate has “the right stuff.” We are privileged in America to have a free and robust media. You, the Fourth Estate, are an essential check to ensure that we put only the best candidate in the weighty office of the American Presidency. That means that you, too, have a solemn responsibility to the Nation as the debates, and the campaigns, go forward.

FOCUSING THE PRESIDENTIAL DEBATES INITIATIVE

PARTICIPANTS

- Admiral Dennis C. Blair, “Defense & Security Policy: Time for a Strategic Approach.” Admiral Blair is the former Commander-in-Chief of the Pacific Command, former Deputy Director of the CIA, and Former Director of National Intelligence. He is one of the most esteemed voices in the Nation on defense and security policy;
- Professor Chester A. Crocker, “Foreign Policy.” Professor Crocker is Professor of Strategic Studies at Georgetown’s Walsh School of Foreign Service, former Assistant Secretary of State for African Affairs, and former Chairman of the Board of the United States Institute of Peace. He is one of the most respected voices in the Nation on foreign affairs;
- John H. Cochrane, “Economic Growth.” Cochrane is a Senior Fellow at the Hoover Institution at Stanford University, a Research Associate of the National Bureau of Economic Research, and a Distinguished Fellow and formerly Professor of Finance at the University of Chicago Booth School of Business. Many top economists have told me that if anyone can recommend policies effectively to move the Nation forward at a more robust and sustained growth rate it will be John H. Cochrane;
- David J. Kramer, “Supporting Democracy, Human Rights and the Rule of Law.” David is a former Assistant Secretary of State for Democracy, Human Rights and Labor, former Deputy Assistant Secretary of State for European and Eurasian Affairs, and former President of Freedom House. He is a top national leader in promoting democracy, human rights, and the rule of law;
- Dr. Steven R. Goldring, MD, “Targeting Disease: Musculoskeletal Conditions.” Dr. Goldring is the Chief Scientific Officer Emeritus, and Richard L. Menschel Research Chair, at the Hospital for Special Surgery in New York, Professor of Medicine at the Weill Cornell College of Medicine, former Professor of Medicine at Harvard Medical School, and former Chief of Rheumatology at Beth Israel Deaconess Medical Center. No one has a better understanding of what might be done to more effectively “target disease,” starting with arthritis and related diseases, than Dr. Goldring;
- Harry R. Marshall, Jr., “Reducing Prison Populations: One of Many Needed Criminal Justice Reforms.” Harry was a Senior Legal Adviser in the Criminal Division at the Department of Justice from 1991-2011, is an Adjunct Professor at the University of Virginia School of Law, and previously had a distinguished career as a Principal Deputy Assistant Secretary in the Department of State and as an ACDA Senior Attorney in the SALT Negotiations;
- Grover Norquist, “What Tax Reform Should Look Like Under the Next President.” Grover is President of Americans for Tax Reform, a former economist at the U.S. Chamber of Commerce, and a former Commissioner on the National Commission on Restructuring the Internal Revenue Service. He is nationally prominent for his work to hold down taxes and reform the tax code;

- Peter Ferrara, “Social Security Optionality: Reducing the Wealth Gap,” and “Controlling the Deficit.” Peter is Director of the International Center for Law and Economics. He served as a senior staff member in the Reagan White House Office of Policy Development, and as an Associate Deputy Attorney General of the United States under President George H.W. Bush. He is the top expert in the world on meaningful Social Security Reform;
- Dr. Roy S. Godson, “Education against Crime: Fostering Culture Supportive of the Rule of Law.” Dr. Godson is Professor of Government Emeritus at Georgetown University and former President of the National Strategy Information Center. He has pioneered the teaching of courses in public schools against crime and in support of the rule of law and is the leader internationally in this effort;
- Professor Peter Skerry “Immigration Policy.” Professor Skerry is Professor of Political Science at Boston College and a Nonresident Senior Fellow at the Brookings Institution. His research focuses on social policy and immigration, among other issues. He has been a Fellow at the Woodrow Wilson International Center for Scholars in Washington, D.C., and served as Director of Washington Programs for the University of California at Los Angeles’ Center for American Politics and Public Policy, where he also taught political science. He was formerly a Research Fellow at the American Enterprise Institute, and Legislative Director for Senator Daniel Patrick Moynihan. He serves on the Editorial Board of the *Journal of American Politics*;
- Chief Timothy J. Longo, Sr. “Relational Policing.” Chief Longo is the Chief of Police of the City of Charlottesville, Virginia. He is entering his 34th year in law enforcement and is nationally-recognized in the areas of police ethics and professional standards. He holds a law degree from the University of Baltimore, and from 1981-2000, he served on the Baltimore police force, where he commanded several divisions. Since 2001 he has served as Chief of Police for the City of Charlottesville, Virginia; and
- Professor John Norton Moore, “Introduction and Overview of Issues Facing the New President,” and “Freedom and Authority; Right-Sizing Government.” Professor Moore is the Walter L. Brown Professor of Law at the University of Virginia and directs both the Center for National Security Law and the Center for Oceans Law and Policy at Virginia. Formerly he served as a United States Ambassador, and as Chairman of the Board of the United States Institute of Peace. Much of his research has focused on democracy, the rule of law, and controlling government failure, as well as participating in founding the field of National Security Law. Professor Moore initiated this project and extended an invitation to the other participants.