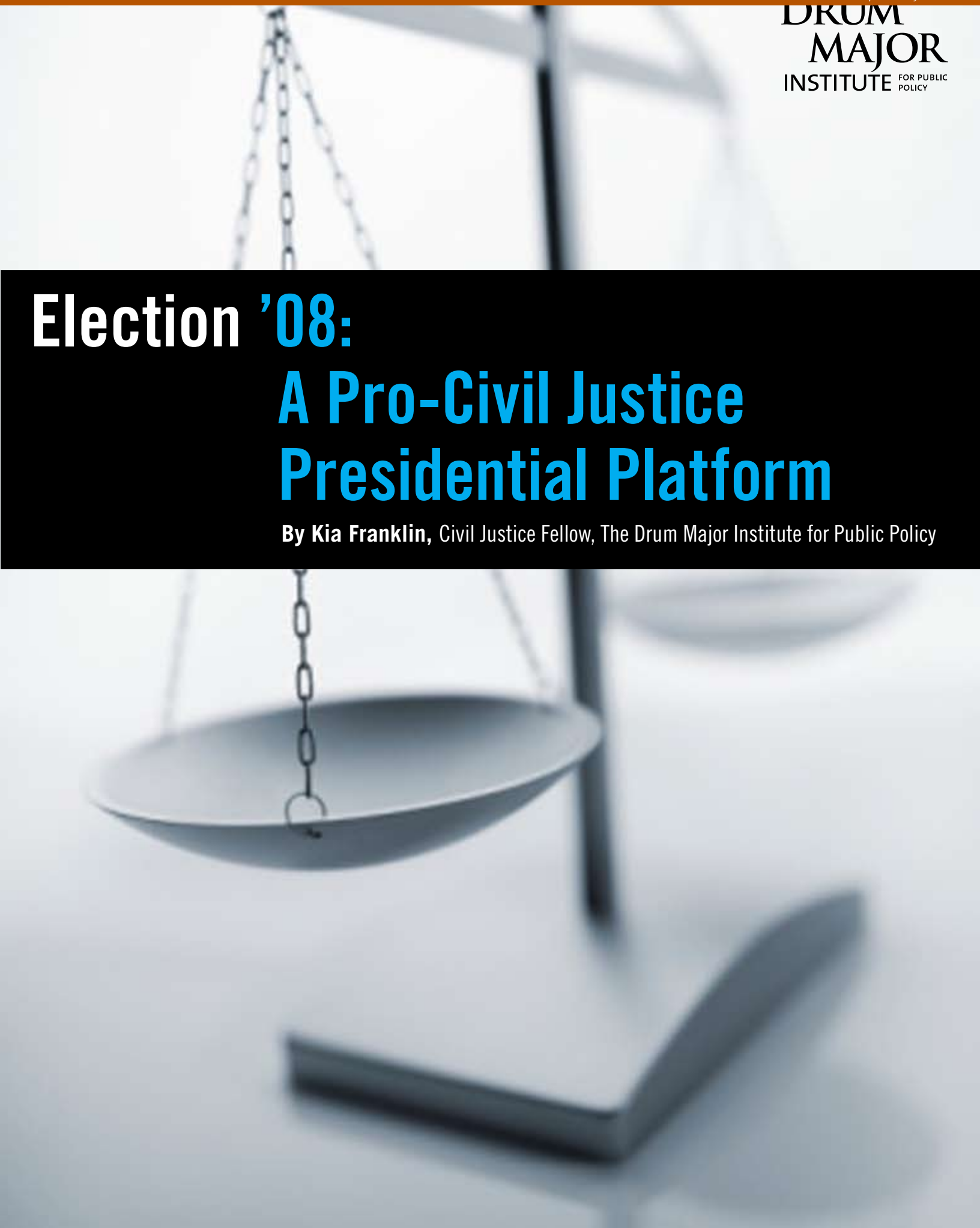

DRUM MAJOR INSTITUTE FOR PUBLIC POLICY

Election '08: A Pro-Civil Justice Presidential Platform

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ELECTION '08:
A PRO-CIVIL JUSTICE PRESIDENTIAL PLATFORM

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EXECUTIVE SUMMARY

The Policy Challenges

The civil justice system allows ordinary citizens to advocate for their rights and protect themselves against undue harm from unsafe products, unscrupulous business practices, and abuses of government power, through the public courts. Drum Major Institute for Public Policy's ("DMI") report, *Election '08: A Pro-Civil Justice Presidential Platform* outlines six key challenges to our civil justice system along with common-sense solutions that would improve the lives of countless Americans. America needs a leader who will not only recognize the significance of these challenges, but who will develop and implement clear and effective policies to address them. Some of the policies we offer in this report have already been proposed as legislation and simply require Presidential support. Other policy solutions are the focus of movements growing at the grassroots level. And within this discussion are proposals that will enable the next President to exert meaningful leadership through our federal agencies. All told, the common-sense solutions discussed herein would strengthen our civil justice system and make it fairer and more accessible to Americans.

Challenge: Poor Americans without access to representation in important civil legal matters

While our laws guarantee a person a lawyer if he runs the risk of going to prison, no such guarantee exists for a person facing equally dire circumstances like the loss of a home or services that help him feed his family. "And justice for all" remains a promise unfulfilled for low-income Americans who lack access to a lawyer but are entwined in critically important legal matters. Pro bono representation and legal aid services help, but to effectively provide representation to people facing a legal crisis, the next President must create a federal right to counsel in important matters like eviction proceedings, child custody hearings, and proceedings over eligibility for public benefits. A growing movement urges the creation of this right—known as "*Civil Gideon*"—for those who cannot afford a lawyer in matters involving basic human needs, such as matters pertaining to housing, sustenance, safety, health, and child custody.

Our next President can demonstrate his or her commitment to ensuring that all people, regardless of their income, have access to a lawyer in important civil legal matters by establishing and implementing *Civil-Gideon*. This will require the President's endorsement of federal legislation establishing the right, allocation of additional funding to the Legal Services Corporation for implementation, and removal of bureaucratic obstacles that prevent legal aid organizations from receiving this funding.

Challenge: Americans forced into binding mandatory arbitration and denied access to a jury of their peers

Far too many victims of harms like employment discrimination, medical malpractice, predatory lending, and breach of contract find that they have inadvertently waived their Constitutional right to a jury trial when they signed a contract containing a binding mandatory arbitration "agreement." Virtually every adult American has signed such provisions, now commonly nestled in the fine print of employment, consumer, and other contracts. Binding mandatory arbitration clauses send disputing parties to a private arbitrator rather than a public court. Unfortunately, however, arbitration's burdensome costs, lack of procedural protections and the documented anti-consumer bias of some arbitration companies make it particularly harmful to individuals and beneficial to companies.

The Federal Arbitration Act ("FAA") is a federal law originally designed to allow equally powerful companies to agree to arbitrate, but it is increasingly used to enforce arbitration between corporations and people, denying individuals their Constitutional right to access the civil justice system. Our next President must support the Arbitration Fairness Act of 2007, which will amend the FAA by prohibiting pre-dispute arbitration agreements in

all contracts involving employees, consumers or franchisees, and "in disputes arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power." Concepts of justice and fundamental fairness demand that American citizens be free from binding mandatory arbitration contracts in their consumer, employment, and service agreements.

Challenge: The use of federal "preemption" to eviscerate state laws providing stronger public health and safety protections, replacing them with federal laws that favor corporate special interests

The United States Constitution's Supremacy Clause provides that when federal and state law directly and irreconcilably conflict, federal law prevails. Where there is no direct conflict, state or local law applies, unless Congress explicitly states that it should not. The preemptive power of federal law has been a major force for positive change at various points in our nation's history. Increasingly, however, federal agencies have been refashioning preemption law into a tool for loosening regulations and eliminating monetary awards in legal claims against regulated industries. These tactics have undermined state laws regarding predatory lending, HMO accountability, highway safety, drug safety, and civil rights.

To preserve states' power to protect the public's health and safety, the next President should prohibit federal agency leaders from enacting regulations that preempt state protections unless they have received the express authorization of Congress to do so. The President should urge Congress to oppose preemption that would weaken important protections to the public. To that end, the next President should promote a federal anti-preemption bill requiring Congress to express clearly and explicitly whether it intends its legislation to preempt state and local law, and encouraging Congress to consider the effect of preemption on the public's health, safety, and welfare.

Challenge: Confidentiality agreements in lawsuit settlements can be harmful, even deadly, to the public

Plaintiffs, their lawyers, and even judges face external pressure to move settlements forward—at the expense of the public's right to know about harmful business practices. When parties to a lawsuit decide to settle, a common condition of settlement is that they promise not to disclose important information revealed during the course of the lawsuit. If this information could impact the public's health or safety, such an agreement creates a conflict between individual compensation and the public benefits that result when the civil justice system is allowed to function as intended. The agreement also unfairly enriches corporations for bad behavior which they can pay for through settlements while still profiting from continuing the harmful practices.

Our next President should support a federal anti-secrecy law prohibiting judges from approving confidentiality agreements that conceal issues pertinent to public health and safety. This would reduce redundant litigation and give corporations added incentive to engage in responsible and safe business practices. It would also allow attorneys to advocate for their clients' best interests and eliminate the pressure to encourage clients to accept settlement agreements that compromise the public's interest. Most importantly, it would protect the American public against unnecessary harm and send the message that public health and safety are more important than corporations' profits or reputations.

Challenge: The prevalence of medical malpractice injuries anddeaths, and the cost of medical errors to the American public

High rates of injuries and deaths due to medical malpractice have created a crisis in healthcare and taken its toll on the economy. The cost to society in the form of additional medical treatment costs, the victims' lost income, lost household productivity, and victims' physical disability, is estimated to be between $17 billion and $29 billion per year. Various structural features of the health care system weaken and even remove incentives for hospitals to take measures to improve safety systems. The civil justice system provides the only means for victims of

malpractice to hold medical facilities accountable for their injuries. Misguided pushes for tort "reform" suggest that the solution to the malpractice crisis is to restrict patients' access to the courts. Instead, something must be done to encourage improvements in patient safety and reduce preventable medical errors so that fewer people are injured in the first place.

The next president should eschew hollow calls from tort "reform" and instead pursue a common-sense national program that focuses on improving patient safety.

The next President should allocate funding for electronic medical records and improved patient safety programs, both of which will save the health care system billions of dollars and prevent the occurrence of errors caused by unsafe procedures and systems. These funds should support a national agency dedicated to meeting the challenges of and demand for emergency medical records and improved patient safety systems. The President should also support the implementation of a national mandatory medical error disclosure system, which would equip patients and their families with the information they need about the quality of their care. Support for improved patient safety benefits everyone because it saves lives as well as money.

Challenge: Bad faith practices in the under-regulated insurance industry

A 1945 law prohibiting the federal government from regulating or applying anti-trust laws to the insurance industry, the McCarran-Ferguson Act, has created a culture of opportunism in the insurance industry, where a growing pattern and practice of bad faith claim denials have produced record-setting profits for companies and decreased protection to consumers. Something must be done to protect responsible, forward-thinking Americans who invest their earnings in insurance policies only to face the same uncertainty and vulnerability as those who never had insurance at all. The next President should support the repeal of the McCarran-Ferguson Act and the establishment of national "bad faith" legislation that would protect policyholders against the unfounded rejection or improper resolution of their insurance claims. This legislation should create incentives for insurance companies to act in good faith, such as imposing civil penalties on insurance companies that deny claims without good cause.

Conclusion

The public deserves a national leader who is concerned about their rights. *Election '08: A Pro-Civil Justice Presidential Platform* should launch a national conversation on how to ensure that the next President is committed to preserving Americans' access to the court system, establishing more effective government oversight, and curbing irresponsible corporate behavior. Such a commitment will require that he or she prioritize the needs of American citizens, and their rights as consumers, employees, and patients, above the needs of corporations and industry trade groups. The proposed solutions are common-sense policies that our next President must champion in order to improve the lives of Americans.

INTRODUCTION

Presidential races are an exciting time for our country, offering an occasion for voters to reflect upon the values and principles that should guide our next leader as he or she addresses America's most pressing challenges. Election 2008 provides hope that the next President will champion the causes of citizens, consumers, and communities through effective and fair policies. America needs a leader who will fight to preserve citizens' civil and consumer rights while encouraging a responsive government and ethical, socially responsible business practices. America needs a pro-civil justice President.

At the forefront of the challenges our next President will face is the task of protecting Americans from unsafe products and unscrupulous business practices. Every day, the news headlines discuss a new food, medical device, pharmaceutical, or other product that consumers have trusted as safe, but which has harmed people or even ended lives. Sometimes these products comply with governmental regulations, and other times they do not. In either case, consumers need a means to hold corporations accountable for injuries over which they had no control. To meet this task, the next President must focus on improving the civil justice system.

The civil justice system allows citizens to advocate for their rights and protect themselves against undue harm through the public courts. It also provides meaningful incentives for businesses to pursue profits responsibly and legally and for governmental entities to function adequately: by avoiding harm to consumers, employees, and others, they avoid the financial and reputation-related consequences of being taken to court. Thus, the civil justice system ensures that everyone, even powerful corporations and our government, abides by the rule of law. It promises everyone, even average American citizens, access to justice.

Precisely because it protects people against corporate and governmental abuse, our civil justice system is under attack by corporate trade groups and the politicians they fund. Our current President ran his campaigns under the banner of tort "reform," working aggressively to make it difficult for victims of corporate and governmental wrongdoing to find redress through the civil court system. Tort "reform" measures have chipped away at the substance of civil and consumer rights by placing limits on what a jury can award an injured plaintiff, allowing defendants to require plaintiffs to settle cases in secret even when this means hiding important information, and even keeping some aggrieved parties out of the courthouse altogether.

Who benefits from this attempt to dismantle the civil justice system? Parties like the home contractor that built uninhabitable homes yet never had to go to court; the hospital that misdiagnosed, mistreated, and disfigured a patient because of negligence, but barely felt any economic repercussions thanks to limits on jury awards; and the employer that broke federal law and fired its employee for his military status, but was able to stay out of federal court and go to a biased private arbitrator to settle the dispute in its favor.

The Drum Major Institute's Pro-Civil Justice Presidential Platform outlines challenges in the civil justice system. These include: ensuring that Americans have access to adequate representation and to the courts; preventing corporations from hiding important information from the public through secret settlement agreements; preserving states' power to protect their citizens' rights; ensuring that the federal government properly regulates powerful industries; and improving patient safety so that fewer patients ever have to step foot in a courthouse, while preserving that option for those who need it. It is our hope that identifying these challenges will open up a focused discussion among the candidates as well as among voters on how to improve Americans' lives by restoring their ability to advocate for their well-being.

This report also recommends common-sense policy solutions that will restore the promise of justice to the civil justice system. Some solutions involve acts of Congress that will require the next President's leadership, while others will require the President's commitment to increasing accountability in the federal agencies. All solutions will require the President's commitment and support. Perhaps most importantly, these solutions also require that American voters ask candidates to stand for the public and then hold them accountable for fulfilling their promises. The Platform is discussed in the following pages.

RIGHT TO CIVIL COUNSEL ("CIVIL GIDEON")

The Problem: Americans Without Access to Representation in Important Civil Legal Matters

> "It is self evident to judges, practicing attorneys, and thoughtful persons, that in most instances indigent persons without counsel are not receiving the same quality of justice as those with counsel and are effectively deprived of meaningful access to the courts."
>
> **—In re the Marriage of Michael Steven King v. Brenda Leone King, Brief Amicus Curiae of Retired Washington Judges in Support of Appellant** [1]

Currently, American citizens are guaranteed a lawyer if they run the risk of being sentenced to prison, but not if they face the threat of eviction or of losing public benefits that help them feed their families. The Supreme Court's decision in *Gideon v. Wainwright* established a right to counsel for defendants in criminal matters where their liberty is at stake.[2] Unlike our criminal justice system, access to our civil justice system is more or less dependent on an individual's economic means; it is largely a "pay-to-play" system. While courts have considered whether litigants who cannot afford a lawyer should be entitled to one in important matters, a 1981 Supreme Court case, *Lassiter v. Department of Social Services*, established the presumption that they do not.[3] This creates a gross injustice for people entwined in critically important civil legal matters who cannot afford legal representation.

When contingency and pro bono arrangements are impossible, and when legal aid is unavailable, the lack of access to counsel can have devastating effects on people's lives. People are evicted from their homes, lose health benefits, lose child custody, and lose their source of sustenance, not because of legal wrongdoing but sometimes solely because they did not have a lawyer.[4] According to a group of retired Washington State judges who advocate for a right to representation in important civil matters:

> [I]ndigent persons without counsel receive less favorable outcomes dramatically more often than those with counsel. The disparity in outcomes is so great that the conclusion is inescapable—indigent *pro se* litigants are regularly losing cases that they should be winning if they had counsel.[5]

The Sixth Amendment to the United States Constitution guarantees all Americans a right to counsel in criminal cases in which their liberty is at stake.[6] The Fourteenth Amendment's Due Process Clause requires all states and state courts to honor this right. In the Supreme Court's words:

> [Reason] and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. **This seems to us to be an obvious truth.**[7]

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1 *In re the Marriage of Michael Steven King v. Brenda Leone King,* Brief Amicus Curiae of Retired Washington Judges in Support of Appellant. *Available at* **http://www.brennancenter.org/dynamic/subpages/download_file_48463.pdf.**

2 *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

3 *See Lassiter v. Dept. of Soc. Svcs.*, 452 U.S. 18 (1981) (Child custody case where the Court found under the Due Process Clause that a balancing analysis must be used to determine if counsel is necessary for a given party in a given trial, but imposed a presumption against providing counsel).

4 *See,* Russell Engler, Shaping A Context-Based Civil Gideon From the Dynamics of Social Change, 15 Temp. Pol. & Civ. Rts. L. Rev. 697, at 714 (2006) (Finding dramatically improved outcomes for represented litigants as opposed to those who are unrepresented in matters including petitions for protective orders against domestic abusers and tenants in eviction actions).

5 *In re the Marriage of Michael Steven King v. Brenda Leone King,* Brief Amicus Curiae of Retired Washington Judges in Support of Appellant. *Available at* **http://www.brennancenter.org/dynamic/subpages/download_file_48463.pdf.**

6 This does not extend to the right to an appeal of a decision.

7 *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (emphasis added). ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.").

However, no such guarantee has been recognized for individuals needing representation in civil cases, even those in which basic human needs—"such as those involving shelter, sustenance, safety, health, or child custody."—are at stake.[8] Eighty percent of low-income persons and between 40 and 60 percent of middle-income persons in this country who need a lawyer cannot access one.[9] Without access to a lawyer, people facing legal crises must choose between self-representation and not going to court at all; and when the person is a civil defendant, such as in eviction actions, his or her only option is to go to court unrepresented and thus at a serious disadvantage regardless of the strengths of his or her claims or defenses.

A few avenues allow individuals who cannot afford a lawyer to obtain representation, but they are insufficient to meet the need. People whose legal claims hold the potential for large awards can obtain a lawyer on a contingency fee basis, an agreement wherein the person does not pay unless he or she prevails in court. But many people do not have the option of a contingency agreement because they are involved in legal claims in which no significant monetary award is likely. Other people seek legal assistance through legal aid or pro bono representation, but there is not nearly enough of it to meet the need, especially in communities that have fewer lawyers and resources, such as in rural America.[10]

The federal government helps pay for legal aid to low-income communities through Legal Services Corporation (LSC) funding. Legal aid programs provide a tremendous resource to people who would otherwise be unable to afford a lawyer, but these programs are stretched thin due to the inadequacy of the funding.[11] As of 2003, about 45 million low-income Americans met financial qualifications for legal aid, but LSC-funded programs, at their present level of funding, can only provide services to 1.4 million people.[12]

The Policy Proposal: Establish a Right to Counsel in Important Civil Matters

The nation's next President can make access to justice attainable regardless of a person's income by urging Congress to establish a civil version of the right established in *Gideon v. Wainwright.* He or she can urge Congress to establish what supporters call a "Civil *Gideon*" right to counsel in important civil legal matters for those who cannot afford it.[13] Under Civil *Gideon,* if a person's basic human needs—relating to health, housing, child custody, or the ability to obtain food—are at stake, and he or she cannot afford representation, he or she would be entitled to a court-appointed lawyer. Almost 80 percent of Americans believe that a Civil *Gideon* right already exists.[14] This suggests that the challenge of establishing Civil *Gideon* lies in its implementation and not in shaping public will.

Many other countries, including Canada and almost fifty countries that participated in the European Convention for the Protection of Human Rights and Fundamental Freedoms, have already established a right to counsel in important civil matters for indigent people.[15] Some states have provided for a right to counsel in certain civil matters. But to the extent that counsel is provided in discrete areas of the law, it is unevenly applied throughout

8 *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981). (Finding that the Due Process Clause requires judges to use a balancing analysis during child custody proceedings to determine if counsel is necessary for a given party in a given trial. The Court imposed a presumption *against* the provision of counsel.); This "basic human needs" language and definition are commonly employed by a variety groups that advocate for Civil *Gideon*.

9 American Bar Association, Task Force on Access to Civil Justice, 14 (Unanimously Approved by ABA House of Delegates August 7, 2006) ("Most needs studies conclude the U.S. is already meeting roughly 20 percent of the need."), *available at* **http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.**

10 *See*, *Struggling to Meet the Need: Communities Confront Gaps in Federal Legal Aid*, 20 (Brennan Center for Justice, 2003). ("As valuable as pro bono is, the hours contributed by the private bar have never been enough to meet the need. There is a particular shortage in rural areas, where there are few lawyers, and where the few lawyers who do exist rarely work for the sort of large firms that can afford to contribute to vast amounts of pro bono time."); *In re the Marriage of Michael Steven King v. Brenda Leone King,* Brief Amicus Curiae of Retired Washington Judges in Support of Appellant, *supra note 5* ("Efforts to provide pro bono representation for indigent litigants in civil cases have not come close to meeting the need.").

11 *See*, *Struggling to Meet the Need: Communities Confront Gaps in Federal Legal Aid*, *supra. note 10.*

12 *Supra.*

13 American Bar Association, Task Force on Access to Civil Justice, *supra note 9,* 1.

14 *See* Mary Deutsch Schneider, *Trumpeting Civil Gideon: An Idea Whose Time Has Come?,* 63 Bench & Bar of Minn., 4 (2006) (citing California State Bar Report, "Bar Survey Reveals Widespread Legal Illiteracy*,"* 11 Cal. Lawyer 68, 69 (1991)).

15 *See* ABA Task Force on Access to Civil Justice, "Report to the House of Delegates," at 3, 8, (Aug. 2006); Fifth Periodic Report: Canada, 18/11/2004, CCPR/CAN/2004/5 (State Party Report) at 22. (Canadian court decision requiring government "to provide an indigent party with state-funded counsel.").

the fifty states, creating a system in which one's rights depend on where one resides and what type of important legal claim one has.[16]

The best way to implement Civil *Gideon* is to convince Congress to pass federal legislation providing a right to civil counsel when basic human needs are at stake. The Civil *Gideon* right to counsel would be available in a uniform matter across the fifty states.[17] This federal legislation should be complemented by reinforcing state laws across the fifty states, along with guidelines on the qualifications, training, role, and compensation of attorneys who provide free counsel to indigent defendants[18]. The next President should take the following steps to establish Civil *Gideon* rights:

1) Advocate for federal legislation. Advocate for legislation requiring the provision of counsel in all civil cases in which basic human needs are at stake, "such as those involving shelter, sustenance, safety, health, or child custody."[19]

2) Advocate for increased funding to the Legal Services Corporation. The Legal Services Corporation already funds the provision of legal aid to individuals who cannot afford attorneys, and if equipped with more funding and support, it could be the appropriate vessel for providing Civil *Gideon*. Current LSC spending levels are approximately $600 million per year, including both state and federal spending as well as Interest on Lawyer Trust Accounts ("IOLTA") funding.[20] LSC funding must be increased dramatically in order to implement a right to counsel in important civil matters.[21] The President must commit to increasing federal appropriations for the Legal Services Corporation.

3) Urge a stronger nationwide commitment to Interest on Lawyer Trust Accounts (IOLTAs). IOLTAs are interest-bearing bank accounts that hold clients' money in trust during litigation. Each individual client's account, if stored separately, accrues only negligible interest, but when pooled with other clients' accounts, these funds generate significant income through interest, which is then used to support legal services work. Clients keep all the money they put into the account, and only the interest earned from that money goes to LSC funding. All states have IOLTA programs but only 32 states require lawyers' participation and most states do not require banks to offer interest rates for IOLTA accounts that are comparable to other accounts.[22] Requiring participation and comparable interest rates would increase IOLTA-derived funding dramatically. The next President should promote legislation requiring that all states participate in an IOLTA program and that all banks offer comparable interest to IOLTA accounts.

4) Eliminate the restrictive "physical separation requirement" for legal aid providers. The federal government has placed harsh restrictions on the use of federal funding for civil legal aid.[23] It prohibits organizations that receive LSC funding from pursuing class actions, engaging in outreach to potential clients, and assisting many different classes of immigrant groups, unless these organizations maintain a separate physical space and separate funding sources for these activities. This requirement increases the overhead costs for already financially-strained legal service providers, making it unreasonably burdensome for the organizations to use even privately donated legal funds for the prohibited services.

16 *See* Laura K. Abel and Max Retig, *State Statutes Providing for a Right to Counsel in Civil Cases,* CLEARINGHOUSE REV., 245-270 (Jul.-Aug. 2006).

17 *See Id.* (finding a lack of uniformity due to uneven local implementation of Civil *Gideon*, and that this can prevent effective and equal access to counsel sometimes even within the same state).

18 *See Id.* (noting the lack of such guidance on a national level).

19 This is the commonly employed language used by a variety of groups that advocate for Civil *Gideon.*

20 *See Struggling to Meet the Need: Communities Confront Gaps in Federal Legal Aid*, *supra at* 5.

21 American Bar Association, Task Force on Access to Civil Justice, *supra note* 9 ("Most needs studies conclude the U.S. is already meeting roughly 20 percent of the need."). Based upon the ABA Taskforce's finding that "most needs studies conclude the U.S. is already meeting roughly 20 percent of the need."

22 Status of IOLTA Programs (Commission on Interest in Lawyers' Trust Accounts, Jan. 18, 2007), *available at* **http://www.abanet.org/legalservices/iolta/ioltus.html.**

23 For more information on the physical separation requirement, visit the Brennan Center's Access to Justice web page, *available at* **http://www.brennancenter.org/subpage.asp?key=413&tier3_key=9544.**

BINDING MANDATORY ARBITRATION

The Problem: Americans Forced into Binding Mandatory Arbitration and Denied Access to a Jury of Their Peers

> "A series of United States Supreme Court decisions have changed the meaning of the [Federal Arbitration] Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or a jury, and instead submit their claims to binding arbitration."[24]
>
> *—S. 1782, Arbitration Fairness Act, Sec. 2 (1), 110th Cong. (2007)*

Most Americans do not know it but on a regular basis they inadvertently sign away their right to go to a public court and have a trial by jury. Often found nestled in a small section of a contract for things like a credit card or a form for a patient about to undergo surgery, arbitration agreements have a large impact on a person's ability to exercise his or her legal rights. If faced with a dispute that cannot be amicably resolved—for example with a bank, student lender, credit card company, wireless service provider, or utility provider—a person would not be able to take the dispute to a court of law. Instead he or she would be forced into a proceeding run by a private service picked by the company with whom he or she has the dispute, and bound to abide by the results of that proceeding.

Arbitration is supposed to be a low-cost, fast alternative to regular litigation, but the reality of binding mandatory arbitration is far different.[25] Arbitration is an informal, private dispute resolution process where the parties to the dispute hire an arbitrator (a private individual who is not necessarily a judge or a lawyer) to hear and decide their case. However, the underlying structure of binding mandatory arbitration speaks to its inadequacies. First, mandatory arbitration essentially requires consumers to pay for two dispute resolution systems: the public court system through their taxes and the privatized version when they actually enter arbitration. The added cost of an additional system is also reflected in the exorbitant and indefinite fees consumers often must pay just to bring their case before the arbitrator, which can reach into the thousands of dollars.[26] And, up against big companies that have lawyers on their side, consumers often still need to hire a lawyer to represent them in the arbitration.

Second, despite all of the extra money spent on arbitration, it nonetheless lacks most of the protections taken for granted in the public court system that ensure fairness, accountability, and neutrality to the parties to a lawsuit. Many arbitration proceedings limit the discovery process, which allows parties to demand information and documents from one another. Without discovery, defendants can withhold important evidence and thus conceal their actions and avoid legal liability. Arbitration also offers little opportunity for review or appeal in a real court, no obligation for an arbitrator to issue a written opinion, and little requirement that the arbitrator rely on the law to decide cases.[27] The process also contains weak conflict of interest standards for the arbitrator, which means that arbitrator biases run unchecked.

24 S. 1782, Arbitration Fairness Act, Sec. 2 (1), 110th Cong. (2007).

25 *See Alternative Dispute Resolution FAQs,* 1 (American Arbitration Association website) *available at* **http://www.adr.org**. ("The arbitration process generally offers parties cost-effectiveness due to its relative speed… resulting in lowered attorneys fees and other expenses through reduced emphasis on evidentiary processes such as discovery.").

26 *Mandatory Arbitration Clauses: Undermining the Rights of Consumers Employees, and Small Businesses,* (Public Citizen) *available at* **http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=7332.** ("A claimant must pay steep filing fees just to initiate a case—seldom less than $750. These fees do not cover the arbitrator's hourly charges, which are generally in the range of $200 to $300 per hour, split between the parties. All these fees must be deposited in advance, and almost always amount to thousands of dollars.").

27 *See* F. Paul Bland, Jr., Michael J. Quirk, et. al. Consumer Arbitration Agreements: Enforceability and Other Topics, 4 (National Consumer Law Center 4th Ed. 2004)("Arbitration involves the loss of a number of rights and procedural protection that some consumers may wish to retain… [T]here is no right to a jury trial, pre-hearing discovery is limited, class actions are eliminated and appeals are severely circumscribed.").

Third, arbitration companies and arbitrators have an inherent financial interest to rule in favor of defendant corporations (a problem directly related to the weak conflict of interest standards mentioned above). Because these large corporations are more likely than any individual consumer to require arbitration in future matters, they are considered "repeat-players" that arbitration companies should appease to secure future business. This severely undermines the notion that arbitration is a neutral process. Arbitration companies face the threat of losing profits or being dropped as a corporate client's designated arbitrator if they too frequently rule for consumers and against these repeat-players.[28]

The primary obstacle to necessary arbitration reforms— such as state consumer protection laws and state court rules that would restrict use of arbitration proceedings—is the Federal Arbitration Act ("FAA"), a law passed in 1925 that established the enforceability of arbitration agreements. Before the FAA, the judiciary took a hostile view to these agreements and often invalidated them, but after the FAA's passage, courts have generally enforced them except in rare cases.

But since 1925 the nature of agreements subject to arbitration has changed from voluntary agreements negotiated between corporations to "take it or leave it" contracts between consumers and corporations that permeate contracts throughout entire industries and lines of products.[29] A 1985 Supreme Court ruling articulated the judiciary's generally favorable leaning toward enforcing arbitration clauses, even those between a corporation and consumers, workers, service purchasers, and other individual parties with less bargaining power.[30] As such, courts often nullify enforcement of state consumer protection laws that limit the use of mandatory arbitration agreements and federal laws providing a right to access the courts for certain grievances.[31] While arbitration agreements between equally positioned corporations are often appropriate or even helpful dispute resolution tools, arbitration generally works to the disadvantage of inexperienced consumers who go up against large corporations on an infrequent basis.[32]

The consequences of being tied to an arbitration requirement run the range from mere inconvenience to pure injustice. It can mean being forced to spend more money replacing a defective product (for example, your microwave, laptop, or cell phone) or inadequate service (for example, your Internet, cell phone, or credit card), or going without the product or service altogether. But these are only some of the many types of claims covered by arbitration clauses. People are also often forced into arbitration proceedings over high-stakes issues such as employment discrimination claims or dangerous and defective products. Being bound by an arbitration "agreement" can mean losing one's job, enduring persistent discrimination, living in uninhabitable conditions, or being unable to procure adequate health services or obtain just compensation for medical negligence.

A more extreme, yet increasingly common example of the ills of binding mandatory arbitration involves nursing home patients who are forced to take their claims of abuse, sexual assault, or medical negligence to arbitration rather than a court of law.[33] In one such case, a New Mexico district court found an arbitration clause enforceable because an elderly husband could have placed his wife in a different nursing home that did not require arbitration,

28 *See supra at* 5 ("There is also some empirical evidence and a good deal of commentary suggesting that arbitrators have a tendency to favor 'repeat player' clients."); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect,* 1 Employee Rts & Emp. Pol'y J. 189 (1997) (finding that employees recover a lower percentage of their claims in "repeat player" cases than in non repeat player cases).

29 *See* F. Paul Bland and Michael J. Quirk, *Special 20th Anniversary Focus: How We Can All Fight Mandatory Arbitration*, 4 (Public Justice, Win. 2002). ("More and more companies in a growing number of business fields across the country are adding mandatory arbitration clauses to their standard form contracts to shield themselves from liability to consumers and workers and to conceal their wrongdoing from public scrutiny.").

30 *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 *at* 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. . . . **Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."** (Emphasis added)).

31 *See Garrett v. Circuit City*, 449 F.3d 672 (5th Cir. 2006) (An employment discrimination claim was sent to arbitration despite federal law protecting military personnel and providing a right to take their employment discrimination disputes to public court).

32 *Supra.* ("Private arbitration generally benefits corporate defendants while working to the disadvantage of consumers, workers, and other individual claimants.").

33 *See, e.g.,* People Over Profits, Nursing Home Arbitration Stories, *available at* **http://www.peopleoverprofits.org/site/c.ntJWJ8MPIqE/b.2897793/k.5282/Nursing_Home_Arbitration_Stories.htm.**

even though this would have required him to drive 120 miles round trip to visit her.[34] People often do not appreciate the extent to which binding mandatory arbitration undermines consumer choice and compromises fairness and equity until it is too late. Binding mandatory arbitration undermines public accountability under the law by privatizing and concealing these disputes.

The Policy Proposal: Support the Arbitration Fairness Act's Amendment of the FAA to Protect Public Law and American Citizens

In order to cease the continued abuse of the Federal Arbitration Act and the rights of American consumers and employees, our nation's next President must support the effort to amend the FAA and restore it to its original purpose. To do this, the next President should urge the passage of the Arbitration Fairness Act of 2007, introduced by U.S. Senator Russ Feingold (D-WI) and U.S. Representative Hank Johnson (D-GA), which would amend the FAA to exclude enforcement of mandatory arbitration clauses in consumer disputes, employment discrimination disputes, and other legal issues to which it was never intended to apply.

Very recently, a small number of discrete exceptions to the Federal Arbitration Act have been carved out. The beneficiaries of these exceptions—from farmers to military personnel to car dealers (though not yet car *buyers*)—represent groups that share a common concern about fairness for less powerful bargaining parties. For example, automobile manufacturers can no longer hold car dealerships to an arbitration clause, and payday lenders can no longer enforce such agreements against military personnel.[35] While these advancements are steps in the right direction, incremental protections of discrete groups leave vast numbers of Americans vulnerable to the harmful effects of binding mandatory arbitration.

The Arbitration Fairness Act of 2007 is a proposed amendment to the Federal Arbitration Act that would prohibit pre-dispute binding mandatory arbitration agreements in all contracts involving employees, consumers or franchisees, and "in disputes arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power."[36] This revision to the FAA preserves the enforceability of arbitration agreements between powerful or well-resourced corporations or those that were truly negotiated between any parties *after* a dispute arises, but prohibits arbitration clauses in standard-form adhesion contracts between large corporations and smaller businesses or individuals. It also clarifies that it is the court's role, and not that of contracting parties or the arbitrator, to determine enforceability of an arbitration agreement.

Further, the bill observes that as binding mandatory arbitration agreements are currently employed most consumers have no choice but to submit to arbitration or else give up necessary products, services, or employment opportunities.[37] It notes that: "While some courts have been protective of individuals, too many courts have upheld even egregiously unfair binding mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals."[38] This is particularly troubling in light of proof that "many corporations add to their arbitration clauses unfair provisions that deliberately tilt the system against individuals."[39]

The Arbitration Fairness Act of 2007 would vindicate the rights of American citizens and restore access to the civil justice system. For this reason, the next President should champion this legislation.

34 *Thompson v. THI of New Mexico at Casa Arena Blanca,* 2006 WL 4061187, *13 (D. N.M. Sept. 12, 2006) (Concluding that "[s]taying in Alamogordo rather than going to Las Cruces was… a choice, not an absolute necessity," and finding the arbitration clause enforceable).

35 15 U.S.C. 20 (1945) (exempting most insurance contracts from mandatory arbitration clauses); H.R. 534 S. 1020 (2002) (exception to the FAA prohibiting mandatory arbitration clauses in contracts between car manufacturers and dealerships); *S. 2766/ H.R. 5221, 2007 Defense Authorization Bill* (anti-predatory lending law capping interest rates for soldiers on many types of loans at 36 percent and prohibiting the use of mandatory arbitration agreements in these same loan contracts).

36 *See* S. 1782, 4, 110th Cong. (2007).

37 *See id.* at 3.

38 *Id.* at 4.

39 *Id.* at 3.

PREEMPTION

The Problem: The use of federal "preemption" to eviscerate state laws providing stronger public health and safety protections, replacing them with federal laws that favor corporate special interests

Under the Supremacy Clause of the United States Constitution, where federal and state law directly and irreconcilably conflict, federal law prevails.[40] When there is no direct conflict, state or local laws apply unless Congress explicitly has stated its intention to preempt them.[41] At times throughout this nation's history, the preemptive power of federal law has served as a major force for positive change. For example, federal civil rights legislation helped strengthen American civil rights by outlawing discriminatory practices that many states' laws would have allowed.[42] Today, however, preemption is increasingly used as a weapon to undermine state laws protect the public health and safety, and to eliminate provisions allowing persons to take violators of these laws to court.

The danger of preemption lies in its capacity to undermine consumer-friendly state or local laws and remedies that advance public health, safety, and other important public policy goals in favor of weaker federal laws that provide lesser or even no oversight of powerful actors like large corporations. In addition to preventing states from requiring higher standards for consumer safety and other laws, federal preemption of state law removes the compensatory element of the civil justice system.[43] The Center for Progressive Reform explains:

> Since federal health and safety laws are primarily prescriptive, they generally do not provide compensation for those injured by regulated entities. Preemption therefore deprives injured consumers and patients of their right to recover for harms wrongfully perpetrated against them. Moreover, taxpayers will end up picking up medical and other expenses of increasing numbers of injured persons because they will be unable to obtain tort compensation and will not be able to pay for the resulting medical expenses out of their pockets.[44]

The public pays the price when these preemption arguments prevail. Over the past fifteen years, corporations have argued with increasing frequency that courts should shut their doors to citizens with state law claims when corporations satisfy the standards of weaker federal laws.[45] This is called the "implied preemption" argument because it applies preemptive power to a federal law or regulation despite the absence of an express statement from Congress of its intent to do so. When corporations have been successful, implied preemption has severely weakened important areas of the law that are designed to protect American citizens, including predatory lending laws, HMO accountability laws, highway safety regulation, drug safety rules, and civil rights laws.[46]

A recent example involves a medical device company's effort to preempt state product liability law with lax FDA regulation.[47] A recent publication by Public Citizen summarizes the case:

40 U.S. Const. art. I. § 2.

41 *See, Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 239 (1074); *Arnold v. City of Cleveland*, 616 N.E.2d 163. ("When considering the constitutionality of a [state or] local ordinance under the Supremacy Clause, we start with the fundamental principles that the ordinance in question is… not to be assumed to be displaced by federal law absent a clear and manifest purpose of Congress.").

42 79 Stat. 427 (1965), 42 U.S.C §§ 1971, 1973a-p.

43 William Funk, Sidney Shapiro, David Vladeck, and Karen Sokol, *The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety*, Center for Progressive Reform White Paper #704, 10 (September 2007).

44 *Id.*

45 *See, Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Since this decision, the implied preemption argument has become increasingly popular among defendant-corporations and defendant-industries.

46 *See*, Emily Gottlieb, *Corporate Empowerment and the Decline of Public Safety.* Center for Justice and Democracy White Paper No. 14, (Center for Justice and Democracy, August 2007).

47 *Riegel v. Medtronic, Inc.* No. 06-179 (U.S. Sup. Ct.) (pending).

> After suffering serious injury when a balloon catheter burst while he was undergoing an angioplasty procedure, Charles Riegel and his wife sued the catheter's manufacturer, Medtronic, Inc. Medtronic moved to dismiss the lawsuit, arguing that the Food, Drug, and Cosmetic Act expressly preempts state-law damages actions brought by patients who have been injured by medical devices that received pre-market approval from the Food and Drug Administration.[48]

Other examples of preemption conflicts include patients' claims against pharmaceutical corporations over deceptively labeled prescription drugs that nevertheless met FDA approval, consumers' claims against manufacturers over flammable furniture that met Consumer Product Safety Act guidelines, and car passengers' claims against manufacturers over automobiles with life-threatening defects that met National Highway Traffic Safety Administration regulations.[49] The federal agencies charged with regulating these products, staffed increasingly with former industry representatives, have become active in urging courts to accept implied preemption arguments.[50] They have filed amicus briefs in support of corporate defendants and issued rules that state an intention to preempt, although Congress is the exclusive governmental entity with this authority. [51]

This past year, the American public has been bombarded with news headlines of under-regulated products entering into the market and harming people. [52] As it becomes increasingly clear that federal agencies, constrained by inadequate budgets and industry-biased administrators, are not protecting the public, it is important that state and local authorities have the power to enact effective laws and regulations to protect their citizens. Unfettered preemption undermines the democratic process by wresting this power from the hands of the elected state and local officials who were chosen to represent the interests and needs of their constituents. If state and local laws cannot be enforced in the state courts, they become merely symbolic, and symbolism provides little comfort to an injured person who thought he or she was protected by state law.

The Policy Proposal: Anti-Preemption Law to Outlaw "Implied Preemption"

Americans need a federal anti-preemption bill that requires Congress to state explicitly whether it intends for federal legislation to preempt state law. This anti-preemption legislation should require Congress to determine whether preemption will have a negative impact on states' protections to citizens. This would restore states' ability to protect the public through their own local laws and regulations, and would preserve citizens' right to compensation when companies violate those regulations.

A previous attempt at this type of legislation was made by Senator Carl Levin (D-MI) and others through the Federalism Accountability Act of 1999. The bill would have eliminated implied preemption by requiring an explicit indication from Congress of its intent to preempt state law unless the federal law and state or local law are in direct, irreconcilable conflict. In his introduction of the bill, Sen. Levin wrote:

> Enactment of this bill would close the back door of implied Federal preemption and put the responsibility for determining whether or not State or local governments should be preempted back in Congress, where it belongs. The bill would also institute procedures to ensure that, in issuing new regulations, federal agencies respect State and local authority…[53]

48 Public Citizen Litigation Group, *available at* **www.citizen.org/litigation/forms/scap_index.cfm#Pending.**

49 William Funk, Sidney Shapiro, David Vladeck, and Karen Sokol, *The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety*, Center for Progressive Reform White Paper #704, (Center for Progressive Reform, September 2007).

50 Emily Gottlieb, *supra note 45*, 5-8.

51 *Supra. See also* Cindy Skrzycki, "Trial Lawyers on the Offensive Fight Against Preemptive Rules, (Washington Post Sept. 11, 2007).

52 *See, e.g.,* (AP) "Fisher Price Recalls 1M Toys" (CNN.com August 2007); Dana St. George and Annie Gowen, "Anger Grows Over Tainted Pet Food: Tests Find Rat Poison in Some Cat and Dog Products" (Washington Post, PA01 Mar. 24, 2007); Walt Bogdanich, "Toothpaste Containing Poison is Found in U.S." (Washington Post June 2, 2007); "21.7 Million Pounds of Beef Recalled" (CNN.com Sept. 30, 2007).

53 *See* Federalism Accountability Act, S. 1782, 106th Cong. (1999). Introduced by Sen. Carl Levin, *available at* **http://www.senate.gov/~levin/newsroom/release.cfm?id=211135.**

This bill did not pass. However, in the years that have lapsed since the bill's introduction, and especially in the past several years, new preemptive efforts have added to the urgency and relevancy of this type of legislation. The next President must urge Congress to thoroughly consider the impact preemption would have on the public's health and safety before explicitly giving federal law preemptive effect over state law. She or he should also encourage Congress to oppose any preemption attempts by the federal agencies that could ultimately threaten the health and welfare of the American public.

Recent opposition by Democrat and Republican members of Congress to a section of the 2007 Homeland Security spending bill, which would have preempted state chemical security laws, is a positive example of what Congress can do to prevent harmful preemption. Congress opposed the FY 2007 Homeland Security spending bill because it gave the Department of Homeland Security authority to override stricter state laws regulating the chemical industry. [54] Noting that the bill would undermine states' ability to ensure that state residents are safe, Senator Frank Lautenberg (D-NJ) introduced FY 2007 Supplemental Appropriations Bill. Despite strong opposition from the chemical industry, the Senate passed the bill, which protects states' right to impose stronger chemical security laws than those provided on the federal level. The next President should support Congressional efforts like this and encourage Congress to continue to take all necessary steps to prevent preemption that poses a threat to the public's health and safety.

54 Homeland Security and Governmental Affairs Committee Chairman Sen. Joseph Lieberman, (I-Conn.), Susan Collins (R-Maine), and Sen. Frank Lautenberg, (D-N.J).

CONFIDENTIALITY AGREEMENTS

The Problem: Confidentiality agreements in lawsuit settlements can be harmful, even deadly, to the public

The prevalence of confidentiality or secrecy agreements is perhaps one of the least discussed and most fundamental problems with our civil justice system. At various stages of a lawsuit, a plaintiff suing a large corporation for causing serious harm will gain access to compelling information. If the parties decide to settle, there is a chance that all of this information, including that which implicates the corporation's role in broader public health and safety hazards, will be kept secret under a confidentiality agreement. In participating in a settlement, the plaintiff signs away his or her ability to share information gained about the harm being committed, the settlement amount, and other valuable details.

As a result of confidentiality settlement agreements, a defendant corporation that is conducting harmful business practices may freely continue engaging in the same practices after settlement, with no fear of public reprisal. As a result, more unsuspecting victims are injured by concealed hazards, and then are being forced to re-invent the wheel in asserting their claims against the perpetrators. This system can lead to astonishingly tragic outcomes. For example, the Firestone and Bridgestone tires that exploded on Ford Explorers, killing at least 88 people, were first made in 1993 but not recalled until the year 2000.[55] This is because the public had no access to the vital, life-saving information from prior lawsuits that was kept secret under confidentiality agreements prior plaintiffs had signed during settlement.[56]

Perhaps the most extreme example of this phenomenon is asbestos litigation: lawsuits against manufacturers for knowingly exposing their employees and others to toxic levels of asbestos, causing often fatal lung and respiratory diseases. The first asbestos case was brought and settled in 1933, compensating eleven clients to the tune of $30,000 ($450,000 in today's dollars).[57] The settlement agreement required that the lawyer not be involved in any future cases, effectively closing off the evidence and expertise he had accumulated.[58] It took forty-five years for anyone to discover this secrecy agreement.[59] Seventy-four years, hundreds of thousands of plaintiffs, and billions of dollars in paid damages later, asbestos litigation remains on the nation's dockets. Had the details of the health risks of this first case been released to the public, many of these injuries and the litigation they required could have been avoided by implementing stricter and ultimately far less expensive safety standards on the asbestos industry and its service providers.

Many plaintiffs file lawsuits not just for individual compensation for their injuries, but also to prevent the wrongdoer from inflicting harm on future victims. But these plaintiffs face external pressure to settle their lawsuits under confidentiality agreements even when public safety and health are at stake. Although many of these plaintiffs do not wish to settle under such conditions, they often feel they have no other realistic choice. Public interest lawyer Arthur Bryant describes the dilemma:

> [W]hat happens at the settlement, is the company often says: 'We will pay you some large sum of money but only if the amount we're paying you is confidential, you agree to return all those documents to us, and you agree not to tell anybody what you saw.' And often the plaintiff will say,

55 *See, e.g.,* Laurie Katrky Dore, *The Confidentiality Debate and the Push to Regulate Secrecy in Civil Litigation*, Report of the 2000 Forum for State Court Judges, Roscoe Pound Foundation (2000)*;* Daniel J. Givelber and Anthony Robbins, *Public Health Versus Court-sponsored Secrecy*, 69 Duke J. L. & Contemp. Problems 131, 132 (2006), also *available at* **http://www.law.duke.edu/journals/lcp**.

56 *See, e.g.,* People Over Profits, *Secrecy: Unnecessary Court Secrecy Bad for Public Policy, available at* **http://www.kintera.org/htmlcontent.asp?cid=71443** ("A confidential settlement kept known defects in Bridgestone/Firestone tires secret for almost a decade. If that early court had not approved the initial settlement with the secrecy order, Bridgestone/Firestone would have likely resolved the defect at a much earlier date, potentially saving hundreds of needlessly lost lives.").

57 Daniel J. Givelber and Anthony Robbins, *Public Health Versus Court-Sponsored Secrecy*, 69 Duke J. Law and Contemporary Problems 131, 132 (2006), also *available at* **http://www.law.duke.edu/journals/lcp.**

58 See, Paul Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial, 114 (1985).

59 *Id.*

> 'Well I don't want to agree to that,' and the company will say, 'Fine, then we will go back to court and keep fighting for years and years and you'll never get a penny.' Again many of the plaintiffs and their lawyers feel essentially blackmailed as if they have no choice, particularly when you're representing somebody who is seriously injured and needs the money to pay their medical bills, they really don't have any choice. And that's the way it ends up being kept secret through settlement.[60]

Supporters of confidentiality agreements argue that the corporate defendant's right to privacy and to contract should trump any larger public safety goals involved in a lawsuit.[61] The privacy interest behind confidentiality settlements is usually recognized when secret information—for instance trademark information—is at issue.[62] But the privacy argument is also often used to protect corporations not from having their valuable trade secrets exposed, but from the "harm" of public accountability for their wrongdoing. As much as privacy is valued, a corporation's privacy regarding its misdeeds simply should not trump the general public's right to be aware of serious public health and safety threats.

Even when the plaintiff agrees to secrecy, the judge has the authority to protect the public interest and deny a secrecy agreement, but experts have found that most judges do not.[63] Corporations are supposed to show "for each particular document it seeks to protect… that specific prejudice or harm will result if no protective order is granted," but often the pressure on judges of running a full docket means that secret settlements are "filed under seal as a matter of course."[64]

Supporters of confidentiality complain that prohibiting these agreements will prevent many cases from being settled and thus "clog" the courts with full-blown trials.[65] It is this argument that some scholars say creates pressure for many plaintiffs, as well as pressure for plaintiffs' lawyers and judges, to settle instead of fully adjudicating their claims.[66] But this argument is weak in comparison to the public's health and safety interest in disclosure. As the asbestos example demonstrates, early public disclosure would save lives and prevent future lawsuits, as well as help businesses model their operations in a way that is beneficial to society, and ultimately, to the business' reputation and profit margin.

The Policy Proposal: Prohibit Secrecy When Public Health/Safety Are At Stake

The next President must support the introduction of federal legislation prohibiting confidentiality agreements in matters that involve the general public's health or safety. This would not only reduce repetitive litigation over the same harm with different plaintiffs, but would give corporations added incentive to engage in responsible and safe business practices. Most importantly, it would protect the American public against undue harm.

60 Chris Richards, The Law Report, "Deadly Secrets—The Dangers of Confidentiality Agreements" (Interview with Arthur Bryant of Trial Lawyers for Public Justice) (Radio National Mar. 10, 2000). Transcript *available at* **http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s195024.htm.**

61 *See, e.g.,* Richard Epstein, *The Disclosure Dilemma: Why a Ban on Secret Legal Settlements Does More Harm than Good* (Boston Globe, D1 Nov. 3, 2002).

62 Fed. R. Civ. Pro. 26 (c).

63 *See, e.g.,* Hon. Jack B. Weinstein, Secrecy and the Civil Justice System, 9 J.L. & Pol'y 53, 58 ("Courts have broad discretion in entering protective orders and sealing records. Most agreements are uncontested, and crowded calendars put great pressure on judges to move cases. As a result, judges routinely approve sealing and secrecy orders.").

64 *Phillips v. Gen. Motors*, 307 F.3d 1206, 1212 (9th Cir. 2002); *Foltz v. State Farm,* 331 F.3d 1122 (9th Cir. 2003).

65 *See,* Richard Epstein, *supra note* 60.

66 *See, e.g.,* Laurie Katrky Dore, *The Confidentiality Debate and the Push to Regulate Secrecy in Civil Litigation*, Report of the 2000 Forum for State Court Judges, Roscoe Pound Foundation (2000); USAction, "Court Secrecy: What you Don't Know Might Kill You" (USAction July 21, 2004), also *available at* **http://www.usaction.org/site/pp.asp?c=eiJPJ5OVF&b=127967#i**; Robert Schwaneberg, "The Dilemma of the Secret Settlements" (Star-Ledger Oct. 19, 2003).

Consumer advocates and legal experts concerned about the public's interest advocate this approach.[67] And evidence shows that the American public agrees. A New Jersey poll showed that 69 percent of respodents opposed secrecy agreements that hide hazards in the products they use, and agreed that "when lawsuits over allegedly defective products are settled out of court, the public has a right to know its terms."[68]

A few states have taken the lead and implemented rules prohibiting or restricting secrecy agreements that would adversely affect the public's health or safety.[69] In Texas, courts must balance the presumption of openness and the potential adverse effect that sealing would have on public safety with a specific and substantial interest a party may have for sealing the records. [70] The records can be sealed only if a significant interest outweighs the interest in keeping the records open. [71] The court must also find that there is no less restrictive means to protect the privacy interest asserted by the party. [72] Florida law prohibits a court from enforcing a secrecy agreement that has "the effect of concealing a public hazard or any information concerning a public hazard."[73]

Forty additional states have introduced similar bills, but none has become law. What is needed is universal federal legislation that applies across the nation. Over the past twelve years, Senator Herb Kohl (D-Wisconsin) and various other Congressional representatives have proposed legislation that would do just that, but it has never passed.[74] The Sunshine in Litigation Act of 2005, the latest of these proposed bills, would have barred judges from enforcing confidentiality agreements related to public health and safety. This bill essentially declares such confidentiality agreements unenforceable due to conflict with public policy.

The passage of legislation like the Sunshine in Litigation Act would signal significant progress in the effort to rebalance priorities in favor of the public's health and welfare. America needs a President who will actively advocate for this legislation.

67 *See, e.g.,* Daniel J. Givelber and Anthony Robbins, *Public Health Versus Court-sponsored Secrecy*, 69 Duke J. L. and Contemp. Problems 131, 132 (2006), also *available at* **http://www.law.duke.edu/journals/lcp**. (Authors suggest barring judges from enforcing confidentiality agreements that would suppress information relevant to public health. They also propose that juries be allowed to consider previously negotiated confidentiality agreements when deciding on liability for punitive damages). *See also,* Robert Schwaneberg, "The Dilemma of the Secret Settlements" (Star-Ledger Oct. 19, 2003) (Quoting statements in support of such laws, by Richard Zitran, director of the Center for Applied Legal Ethics at University of San Francisco Law School, Rosemary Shahan, founder of Consumers for Auto Reliability and Safety, and others).

68 *See* Star-Ledger/Eagleton-Rutgers Poll # 144 (September 2003) ("Lawsuits claiming that a particular product is defective and caused injury are frequently settled out of court. Which of the following statements comes closer to your view: Companies should have the right keep the terms of out-of-court settlements secret if all parties involved agree to it - OR - The public should have the right to know the terms of defective product cases, even if they are settled out-of-court.").

69 *See,e.g., Texas R. Civ. Pro.* 76 a (1990); Fla. Stat. Ann. 69.081 (2000).

70 *See, Texas R. Civ. Pro.* 76 a (1990).

71 *Id.*

72 *Id.*

73 Fla. Stat. Ann. 69.081, Florida Sunshine in Litigation Act (2000).

74 Senator Kohl and others have been proposing this legislation since at least 1995.

MEDICAL MALPRACTICE REFORM

The Problem: preventable medical malpractice injuries and deaths are costly to the American public

Would people go to the hospital if they knew that the average patient should expect to be the victim of *at least* one medication error *each day* there? This figure, provided by a study from the Institute of Medicine, best illustrates the crisis in medical care.[75] Many patients and their families have lost trust in the American healthcare system because of an increase in medical errors.[76] It is time to restore American citizens' faith in the healthcare system by implementing policies that will improve patient safety.

More and more serious injuries and deaths caused by medical errors are reported each year. In 1999, the Institute of Medicine reported that there were between 44,000 and 98,000 medical error injuries per year. Recently, the Institute for Healthcare Improvement reported that an astounding 40,000 "incidents of harm" happen to patients every *day* in American hospitals.[77] The 1.5 million medication errors that occur every year add $3.5 billion in costs to the medical system, and between $17 billion and $29 billion per year in total costs to society—including medical expenses, lost income, lost household productivity, and physical disability.[78] This is too costly to the economy, to Americans' health and well-being, and to the public's confidence in our health care system.

But rather than focusing on how to regain the public's trust and improve patient safety, tort "reform" enthusiasts have derailed the discussion into a debate over rising medical malpractice premiums and the supposed need for measures to limit compensation for victims of medical errors. This is despite a growing body of evidence that malpractice lawsuits and malpractice insurance rates are, at best, tenuously linked.[79] The attack on Americans' access to the courts in the guise of solving the nation's health care problems has made confronting medical errors one of the premier civil justice challenges the nation faces.

Reducing medical errors is a desirable goal, but hospitals have few incentives to invest in increasing patient safety besides the threat of lawsuits. Litigation against hospitals and doctors for medical errors has led to improvements in "catheter replacement, drug prescriptions, hospital staffing levels, infection control, nursing home care and trauma care."[80] Yet unyielding efforts for tort "reform" seek to reduce what little recourse patients have now. In turn, these rigorous measures to reduce compensation to injured patients or keep them out of public courts altogether weaken the impact of lawsuits as an incentive for hospitals to improve patient safety.

Patient safety can be achieved not by weakening the civil justice system, but by building upon its strengths with reforms that focus on patient safety, so that fewer patients will ever even need to enter a courtroom. Those concerned with patient safety must seek systematic methods for preventing medical errors and must fight to preserve patients' right to go to court when doctors and medical staff are negligent. As contentious as the health

75 Kohn LT, Corrigan JM, Donaldson MS, eds. To err is human: building a safer health system. (Washington, D.C.: National Academy Press, 2000), *available at* **http://www.iom.edu/CMS/8089/5575.aspx.**

76 *Supra.*

77 *See* Kohn LT, Corrigan JM, Donaldson MS, eds., *supra.*; Institute for Healthcare Improvement, Protecting Five Million Lives, *available at* **www.ihi.org/IHI/Programs/Campaign/Campaign.htm?TabId=1**. ("incident of harm" defined as: unintended physical injury resulting from or contributed to by medical care (including the absence of indicated medical treatment), that requires additional monitoring, treatment or hospitalization, or that results in death. Such injury is considered harm whether or not it is considered preventable, resulted from a medical error, or occurred within a hospital.)

78 *Report Brief: Preventing Medication Errors,* 1-2, (The Institute of Medicine, July 2006)*, available at* **http://www.iom.edu/File.aspx?ID=35943.**

79 *See, generally, The Great Medical Malpractice Hoax: NPDB Data Continue to Show. Medical Liability System Produces Rational Outcomes,* 12, (Public Citizen, 2007); *see also* Jay Angoff, "Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry," (Center for Justice and Democracy 2005) *available at* **www.centerjd.org/ANGOFFReport.pdf**; *Mythbuster: "Caps" Do Not Cause Insurance Rates to Drop* (Center for Justice and Democracy)*, available at* **http://centerjd.org/MB_2007caps.pdf**; *Mythbuster: The Truth About Medical Malpractice Litigation* (Center for Justice and Democracy), *available at* **http://centerjd.org/MB_2007medmal.pdf.**

80 Meghan Mulligan and Emily Gottleib, *Lifesavers: CJ&D's Guide to Lawsuits that Protect Us All*, Center for Justice & Democracy (2002). Available at **http://www.centerjd.org/free/Lifesavers.pdf.**

care debate may be, all sides should agree that reducing medical errors is a desirable goal, and that reducing the number of lives lost and permanently changed by medical malpractice should be a national priority.

The Policy Proposal: Fund Electronic Medical Records and Patient Safety Programs

The prevalence of serious injuries and deaths linked to medical error is the crisis in medical care, not the lawsuits that sometimes arise from cases involving medical negligence allegations. Yet instead of focusing on improving patient safety, the misguided debate led by supporters of tort "reform" hones in on lawsuits and their tenuous connection to insurance premiums. This is the wrong approach. As Senators Hillary Clinton and Barack Obama point out in their co-authored article:

> [I]f we are to find a fair and equitable solution to this complex problem, all parties—physicians, hospitals, insurers, and patients—must work together. Instead of focusing on a few areas of intense disagreement, such as the possibility of mandating caps on the financial damages awarded to patients, **we believe that the discussion should center on a more fundamental issue: the need to improve patient safety...**[81] (Emphasis added)

How can the next President work to improve patient safety? Reports like the Institute of Medicine's publication, To Err is Human, and the Institute for Healthcare Improvement's Protecting Five Million Lives campaign state that many, if not most, medical errors are related to unsafe procedures and systems "that lead people to make mistakes or fail to prevent them."[82] So the next President should eschew hollow calls for tort "reform" and instead pursue common sense by establishing a national program that focuses on improving patient safety.

One step the next President should take to accomplish this is to allocate funding for electronic medical records and improved patient safety programs. Paper medical records are inferior to electronic records in a variety of ways that increase errors and reduce treatment effectiveness and efficiency.[83] The use of electronic medical records has been found to reduce medication errors by as much as 80 percent and some estimates have placed savings generated by the system at an eventual $81 billion a year.[84] Encouraging hospitals to improve patient safety systems will also reduce medical errors and improve communication between clients and medical caregivers. Incentives against disclosing medical errors have impeded progress in developing better patient safety systems. Providing funding will increase the incentive for hospitals to improve patient safety and encourage disclosure, which will inform the development of better patient safety programs.

The next President should:

> **1) Allocate federal funding to support the Department of Health and Human Services' (HHS) Center for Quality Improvement and Patient Safety and the Patient Safety Task Force,** which is charged with supporting the collection and dissemination of improved patient safety mechanisms.[85] This support will allow HHS to provide education, research, guidelines, and technical support to hospitals regarding Electronic Medical Records and Improved Patient Safety systems.
>
> **2) Allocate government funding and grants to develop electronic medical records and improved patient safety systems in hospitals across the country.** Hospitals that are willing but unable to modernize their information technology could do so if they had the funding. The next President should champion legislation to create a federal funding program that encourages

81 Hillary Clinton and Barack Obama, Making Patient Safety the Centerpiece of Medical Liability Reform, New England Journal of Medicine, *supra.* (Emphasis added.)

82 Kohn LT, Corrigan JM, Donaldson MS, eds *supra* at 2.

83 *Supra.*

84 *See* Richard Hillestad, James Bigelow, et al., Can Electronic Medical Record Systems Transform Health Care? Potential Health Benefits, Savings, And Costs, *available at* **http://content.healthaffairs.org/cgi/content/abstract/24/5/1103**.

85 *See* Statement of Center for Quality Improvement and Patient Safety Taskforce, *available at* **http://www.ahrq.gov/qual/taskforce/psfactst.htm.**

> hospitals to invest in new electronic medical records and patient safety systems, by providing dollar-to-dollar funding to qualifying applicants, and full funding for the most dynamic proposals.

The federal government pays for 44 percent of the approximately $1.3 trillion spent each year on medical care costs. [86] By reducing medical errors and therefore its associated medical care costs, the government stands to gain significant savings from this program. More importantly, this policy emphasizes patient safety rather than reductive "reforms" that minimize injured patients' legal rights to adequate compensation.

In turn, focusing on patient safety may also reduce costs associated with medical malpractice legal claims. Focusing on reducing medical errors and the injuries and deaths they cause will reduce the need for individuals to resort to the civil justice system. The vast majority of claims made in the legal system against doctors and hospitals result from verifiable error and defense litigation costs in claims involving verifiable error are the source of the greatest expense in the system.[87] As one study concludes:

> An honest and forthright risk management policy that puts the patient's interests first may be relatively inexpensive because it allows avoidance of lawsuit preparation, litigation, court judgments, and settlements at trial.[88]

It is enough of a burden to be in need of medical care. That so many Americans then must worry about injuries inflicted during treatment is unacceptable. Rather than reduce the remedies available to patients harmed while receiving medical care, the next President should prioritize restoring their faith in healthcare by pursuing legislation to improve patient safety systems.

86 *See* United States Core Health Indicators 2007, Word Health Organization, *available at* **http://www.who.int/whosis/database/core/core_select_process.cfm?countries=all&indicators=nha**; David W Bates M.D. et al., A Proposal for Electronic Medical Records in U.S. Primary Care, 2, Journal of the American Medical Informatics Association, 2003, *available at* **www.pubmedcentral.nih.gov/articlerender.fcgi?artid=150354.**

87 David M. Studdert, Michelle M. Mello, et al, Claims, Errors, and Compensation Payments in Medical Malpractice Litigation, New England J. Med. (May 11, 2006).

88 Steve S. Kraman, MD, and Ginny Hamm, JD, Risk Management: Extreme Honesty May Be the Best Policy, 131 Ann. Int. Med 12, 963-967 (Dec. 21, 1999) (Emphasis added); *See also* Michael Townes Watson, America's Tunnel Vision—How Insurance Companies' Propaganda Is Corrupting Medicine and Law, 372-376 (Horatio Press 2007).

INSURANCE INDUSTRY REFORM

The Problem: An Under-regulated Industry Harms Insurance Policyholders

Responsible citizens who invest in insurance should be able to expect appropriate payouts if it ever becomes necessary. Insurance companies do an excellent job of collecting policyholders' premiums, but in the wake of recent natural disasters like Hurricanes Katrina and Rita, it has become clear that these companies are often reluctant to meet the corresponding task of paying policyholders when the unexpected happens. Aggrieved policyholders can always take these companies to court, but as long as the insurance industry is shielded from federal anti-trust laws, profits from bad faith business practices will outweigh the costs of related lawsuits, and insurance companies will have little incentive to change unfair claims practices.

Lawsuits to force the payment of a claim require additional time, very frequently measured in years, during which the plaintiff must grapple with the consequences of having a damaged home or automobile or an unpaid medical bill, but during which insurance companies lose little. Insurance companies are not forced to find a way to makes "ends meet" while waiting for a claim; they continue to charge and collect premiums from the very policyholder whose claim they have denied; and they make an additional profit from interest earned each day that they are able to hang onto a claimant's money during the period of litigation. In short, there is little consequence for insurance companies that deny legitimate claims for the sole purpose of attempting to avoid their contractually obligated payment to the policyholder.

In the backdrop of often egregious treatment of policyholders is the federal law that gives the insurance industry some of the most preferential treatment by the federal government of all American industries. In 1945, Congress passed the McCarran-Ferguson Act, a law giving the insurance industry a special exemption (shared only with Major League Baseball) from federal anti-trust laws and giving each state the role of regulating the industry within its borders. The stated goal of the McCarran-Ferguson exemption was to allow the insurance industry to collaborate for data collection and other purposes. But in effect, it allows monopolistic collusion and price-fixing of insurance premiums and prohibits the federal government from applying its anti-trust regulations to the industry, with a few extreme exceptions. [89]

Accompanying this legislatively granted advantage has been the shift in the "management and claims" process of many insurance companies. Insurance companies have increasingly adopted sophisticated claims processes that are not geared towards fair dispute and resolution of claims, but instead direct staff to reject enough claims for the insurance company to reach a given profit goal.[90] The tactic is especially effective in deterring small claims, because defensive litigation and stalling by insurance companies makes pursuing small claims prohibitively expensive as the lawsuit itself can cost more than the actual claim. [91]

The result has been a pattern and practice of bad faith claim denials, concomitant with record industry profits nationally.[92] A recent six-part series from CNN documents this practice across insurance areas.[93] News articles feature tragic stories of individuals who were denied claims, or offered severely inadequate payment, for damages they were lead to believe their insurance policies would cover. For instance, State Farm offered one couple

89 *See* Testimony of J. Robert Hunter, Director of Insurance, Consumer Federation of America, Committee on the Judiciary of the United States Senate, McCarran-Ferguson Act: Implications of Repealing the Insurers' Antitrust Exemption; exceptions include extreme collusive actions surpassing price-fixing such as "intimidation."

90 The Center for Justice and Democracy, *The Insurance Industry's Troubling Response to Katrina, available at* **www.centerjd.org/air/pr/KATRINAREPORT.pdf**; The Center for Justice and Democracy, *Insurance Companies Raking in Huge Profits, available at* **http://centerjd.org/air/pr/AIRProfit.pdf.**

91 The Center for Justice and Democracy, *The Insurance Industry's Troubling Response to Katrina, available at* **www.centerjd.org/air/pr/KATRINAREPORT.pdf.**

92 The Center for Justice and Democracy, *Insurance Companies Raking in Huge Profits, available at* **http://centerjd.org/air/pr/AIRProfit.pdf.**

93 CNN Presents: The Town That Fought Back (vols. 1-5).

0.5 percent of the value of their Hurricane Katrina-ravaged home, which was valued at over $1 million; and Nationwide offered another homeowner $515.62 for his $230,000 home which "virtually every insurance adjuster and engineer who inspected the scene" concluded was destroyed by wind damage covered under his policy.[94]

Even in the wake of the massive destruction of homes resulting from Hurricane Katrina, property casualty insurance companies have enjoyed excessively high, record-breaking profits.[95] Just after the hurricane, insurance CEO William Berkley spoke at a conference, saying:

> Our loss will leave us with enough capital to really thrive in the market opportunity that's going to follow… We think there's a lot of profitability left in the cycle, and we think that the hurricane **will in fact extend that.**[96](Emphasis added)

His assessment that the property/casualty insurance industry was going to "thrive" as a result of Katrina devastation was correct. In 2005, property-casualty insurance industry profits reached $49 billion. In 2006, those profits rose an additional 49 percent, to $73 billion. In 2007, Robert Hartwig, chief economist at the Insurance Industry Institute, a trade group for insurers, said: "The insurance industry can be justifiably proud of its performance. It's in the insurance industry's best interests to settle claims as fairly and as rapidly as possible."[97]

Upon close examination, the only incentive for insurance companies to pay legitimate claims when they are initially filed is a moral one. While insurance companies may argue that there is a competitive incentive to practice business in good faith, this argument is particularly hollow given the industry's almost singular exemption from federal anti-trust law, which permits them to legally collude in setting prices, increasing premiums, and resolving claims in bad faith without fear of recourse. As a result, insurance companies have little incentive to resolve legitimate claims quickly or fairly.

To explain its consistently skyrocketing premiums, many in the insurance industry have resorted to blaming lawsuits and lawyers for increasing insurance premiums. The use of lawsuits and plaintiffs-lawyers as scapegoats is not merely an attempt to detract attention from the insurance industry, it is also an attempt to justify tort "reforms" that limit access to the courts to victims of insurance companies' unfair claim denials. But access to the civil justice system is often the only or last safeguard for citizens to hold insurance companies to the terms of their policies.

Rather than buy into tort "reform" rhetoric which would further shield unscrupulous insurance companies by reducing the limited recourse policyholders currently enjoy, the next President should support and promote legislation that focuses on curbing bad faith behavior in the industry. Doing so will increase the efficiency of the civil justice system by reducing the number of aggrieved policyholders, and thus reducing policyholders need to ever step foot in a courtroom.

Policy Proposal: Repeal McCarran-Ferguson Exemptions

Our next President should support legislation to repeal McCarran-Ferguson exemptions in order to create a uniform system of oversight, encourage competition, and discourage bad-faith business practices in the industry. To do this, he or she should urge Congress to pass the bi-partisan Insurance Industry Competition Act of 2007, which would give the Department of Justice and the Federal Trade Commission the authority to apply anti-trust laws to anti-competitive behavior by insurance companies, just as it does for other industries.[98]

94 David Dietz and Darrell Preston, "Home Insurers' Secret Tactics Cheat Fire Victims, Hike Profits" (Bloomberg Press Aug 3, 2007), *available at* **http://www.bloomberg.com/apps/news?pid=20601170&refer=home&sid=aIOpZROwhvNI.**

95 The Center for Justice and Democracy, *The Insurance Industry's Troubling Response to Katrina, available at* **www.centerjd.org/air/pr/KATRINAREPORT.pdf.**

96 William Berkeley, CEO of Greenwich, Connecticut-based specialty insurer W.R. Berkeley Corp., 9.07/05 Insurance Industry Conference (Emphasis added).

97 David Dietz and Darrell Preston, "Home Insurers' Secret Tactics Cheat Fire Victims, Hike Profits,"*supra.*

98 S. 618, The Insurance Industry Competition Act (2007). Introduced by Sens. Patrick Leahy (D-Vt.), Arlen Specter (R-Pa.), Senate Majority Leader Harry Reid, (D-Nev.), and Senate Republican Whip Trent Lott, (R-Miss.).

In 2005, several U.S. Senators introduced The Medical Malpractice Insurance Antitrust Act of 2005, which focused on curbing the industry's practice of overcharging doctors "unconscionably" and "shifting the blame for their increases on to lawyers and victims." The legislation, which called for federal oversight of the medical insurance industry, would have been a limited but effective step in the right direction towards increasing accountability among insurance companies.[99] The bill did not pass.

In February 2007, Senator Leahy and others initiated another, more comprehensive effort to hold insurance companies accountable under anti-trust laws. This bi-partisan push for The Insurance Industry Competition Act of 2007 would apply national anti-trust rules to the entire insurance industry, not just the medical insurance sector.[100] The law would require insurance companies to abide by the same competition laws as every other industry. According to bill sponsor Senator Patrick Leahy:

> Federal oversight would provide confidence that the industry is not engaging in the most egregious forms of anticompetitive conduct—price fixing, agreements not to pay, and market allocations… Insurers may object to being subject to the same antitrust laws as everyone else, but if they are operating in an honest and appropriate way, they should have nothing to fear. American consumers and American businesses rely on insurance—it is a vital part of our economy—and they have the right to be confident that the cost of their insurance, and the decisions by their insurance carriers about which claims will be paid, reflect competitive market conditions, not collusive behavior.[101]

This bill will have a positive impact on individual consumers by increasing their confidence that insurance claims are being processed fairly. Introduced after homeowners affected by Hurricanes Katrina and Rita spoke out and increased public scrutiny of the insurance industry, this bill would apply federal anti-trust laws to the insurance industry, and thus create incentive for insurance companies to practice business in good faith. Civil penalties for bad faith practices like price fixing, agreements not to pay, and market allocations, as well as an increase in competition among companies for satisfied customers, will make it more expensive for insurance companies to delay or deny claims than to handle claims efficiently and based on their merits. Simply put, this bill evens the playing field by treating the insurance industry the same as other industries and by giving consumers confidence in the way insurance claims are processed.

The nature of the insurance industry, which sells a product people are often *required* to purchase to engage in basic, every-day activities like driving or contracting to build a home, makes Americans particularly vulnerable to monopolistic behavior under the McCarran Ferguson Act. Improving regulation of the insurance industry will directly benefit Americans, their families, and their businesses. It will also increase competition within the industry. As competition grows, consumers will enjoy more competitive prices and selection. This increase in market competition will in turn promote a stronger, healthier economy. Because Presidential leadership on this front will benefit the American economy as well as Americans from all walks of life, the next President should support this bill and urge Congress to pass it.

99 S. 1525, Introduced by Sens. Leahy, Kennedy, Durbin, Rockefeller, Boxer, Feingold, Salazar, Obama, and Mikulski.

100 S. 618, The Insurance Industry Competition Act (2007). Introduced by Sens. Leahy, Arlen Specter (R-Pa.), Senate Majority Leader Harry Reid, (D-Nev.), and Senate Republican Whip Trent Lott, (R-Miss.).

101 Office of Sen. Patrick Leahy, "Leahy Leads Bi-partisan effort to hold insurers accountable under the anti-trust laws," Press Statement, *available at* **http://leahy.senate.gov/press/200702/021507c.html.**

CONCLUSION

> "Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds."
>
> **—John Adams, 2nd President of the United States (1774)**[102]

The Drum Major Institute's *Election '08: A Pro-Civil Justice Presidential Platform* is just the launching point for a discussion on the importance of electing a national leader who will prioritize citizens over corporations and democracy over dollars. Identifying the challenges and common-sense solutions is important, as is engaging the candidates in dialogue about their level of commitment to civil justice. Ultimately, ordinary citizens who value the empowerment provided through the civil courts play the most important role. This electorate must require that elected leaders move beyond rhetoric and vague campaign slogans and actually take the action that would strengthen our civil justice system and have a real, positive impact on Americans' lives.

Let us hold the candidates accountable for the promises they make. Will they commit to increasing the effectiveness of how the government regulates the products we use every day? Will they act to curb irresponsible corporate behavior that makes access to the civil justice system necessary? Will they dedicate energy to preserving the public's access to the courts? Will they do so with sensible policies and common-sense approaches to the problem?

Imagine how average Americans' lives would be changed if the next President dedicated his or her work to strengthening the civil justice system in order to empower and protect American citizens. The civil courts would not just be a forum for large corporate powers to battle each other, but for the individuals for whom it was designed. Average people could uphold their rights as consumers, employees, and citizens to be free from harmful products and foods, safe from medical negligence, protected from insurance fraud and corporate abuse. And if they could not afford a lawyer, but had basic rights and interests at stake, they could obtain adequate legal counsel to help them navigate the system. In short, a pro-Civil Justice President would make justice possible for more Americans.

Because it protects us, the civil justice system deserves our protection. And because the public pays for it, the common American citizen should have as much access to the courts as any corporate power does. Civil justice impacts regular Americans' access to economic justice, consumer protection, public safety, civil rights, environmental justice, and more. America needs a President who recognizes this connection and makes a sincere commitment—evidenced in his or her actions—to preserving access to justice by pursuing a pro-civil justice agenda while in office.

102 American Association for Justice, No Price-tag on Constitutional Rights (American Association for Justice 2006) *available at* **http://www.atla.org/pressroom/TrialbyJury.aspx.**

ALSO FROM DMI

THE 2007 DMI YEAR IN REVIEW

December 2007 / It's hard to turn a big ship. Many of the worst shocks of 2007 were the continued fallout of years of wrong-headed right-wing policy to deregulate, starve the public sector, and privatize at every opportunity. But the minimum wage hike, increased aid to students, and green initiatives at the state and local level provided new hope. DMI 2007 Year In Review explores the year's best and worst public policy, looks at six snapshots of the nation and provides a recommended reading list for progressives. Also included: a hawk's eye view of what the think tanks on the conservative right are up to, and, as always, the 2007 Injustice Index.

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SAVING OUR MIDDLE CLASS: A SURVEY OF NEW YORK'S LEADERS

April 2007 / It's harder for New Yorkers to enter the middle class today than ten years ago, according to DMI's groundbreaking survey of 101 top leaders from New York City's academic, business, political, policy advocacy and civic-institutional sectors. The survey analyzed top challenges for the city's current and aspiring middle class and evaluated city, state and federal policies to address New York's middle-class squeeze.

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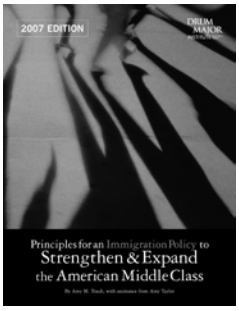

March 2007/ This report finds that immigrants contribute to middle-class prosperity as workers, taxpayers, and consumers, while also concludingthat undocumented immigrants' lack of workplace rights undercuts the middle class. DMI's complete immigration toolkit includes an update of our 2005 report, talking points, a discussion guide, legislative analyses, and Spanish translation.

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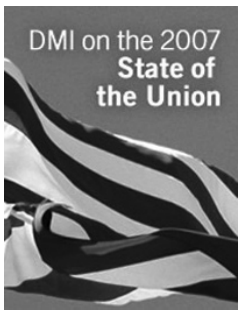

January 2007/ There was little for current and aspiring middle-class Americans in President Bush's State of the Union Address this year. DMI's "instant analysis,"released just hours after the speech, examines the President's domestic policy agenda in-depth. We find that the President's proposals, at their core, are driven by a conservative ideology that doggedly protects the wealthiest Americas from tax hikes by sharply cutting social programs, while also absolving corporations of their obligation to protect the health and welfare of their employees by shifting those burdens to the workers themselves.

WHO IS THE DRUM MAJOR INSTITUTE FOR PUBLIC POLICY?

The Drum Major Institute for Public Policy is a non-partisan, non-profit think tank generating the ideas that fuel the progressive movement. From releasing nationally recognized studies of our increasingly fragile middle class to showcasing progressive policies that have worked to advance social and economic justice, DMI has been on the leading edge of the public policy debate. DMI is also noted for developing new and creative ways to bring its work to the advocates and opinion leaders that need it, from starting one of the first public policy weblogs to pioneering the use of Google Adwords to hold elected officials accountable for their votes on issues of importance to their constituents. For more information, please visit www.drummajorinstitute.org

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