

ACCESS TO
JUSTICE:
OPENING THE
COURTHOUSE
DOOR

David Udell and Rebekah Diller

Brennan Center for Justice *at New York University School of Law*

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TABLE OF CONTENTS

Executive Summary: Key Findings and Recommendations 2

I. Most Low-Income Individuals Cannot Obtain Counsel 4 To Represent Them in Civil Matters

II. The Promise of *Gideon v. Wainwright*—Legal 7 Representation for Low-Income Persons in Criminal Matters—Is Largely Unfulfilled

III. Courts Often are Unable to Provide Access to People 9 with Physical and Psychiatric Disabilities

IV. Courts Often Do Not Provide Translation and 10 Interpreting Services to People Who Have a Limited Ability to Speak and Understand English

V. Recent Legislation And Court Decisions Have 11 Made Courts Less Available Than Ever To Hear Certain Categories of Cases

VI. The Increased Reliance on Alternative Dispute Resolution 16 Methods Raises New Concerns

Recommendations 17

Endnotes 20

Access to justice: opening the courthouse door

Foreword

Our nation's promise of "equal justice for all" is among its proudest traditions. American courts promise a forum for individuals to settle disputes in a civil manner, under the rule of law. Courts are supposed to ensure predictability so that individuals and businesses can tailor their actions accordingly; contracts, for example, are binding because courts exist to enforce them. In our tripartite system of government, courts act as a check on the ability of the legislative and executive branches to accumulate excessive power. They protect the most vulnerable among us and curb the excesses of majoritarianism. Finally, courts reaffirm the citizenry's faith in the equal application of the laws and thus in the legitimacy of government in general.

To be sure, resort to the courts is not always a desirable end. Anyone who has ever been involved in litigation is aware of its limitations—the expense, the complexity, the delay, and the ways in which human concerns can be filtered out of the process. Yet, the opportunity to resolve disputes within a court pursuant to the rule of law remains essential in a broad range of matters involving the concerns of low-income individuals. Just as a person with substantial means would never dream of buying a home or seeking a divorce without consulting a lawyer, persons of modest means likewise enter into life-altering transactions for which consultation with counsel is essential. For people of limited financial means, access to an attorney can be the difference between losing a home or keeping it, suffering from domestic violence or finding refuge, languishing in prison or reuniting with family and community. And as decisions related to the War on Terror have demonstrated yet again, the courts can and do function as an essential bulwark of liberty—affording those accused of the worst crimes their only opportunity to establish their innocence and acting as a check on overreaching by the executive branch. In order for "equal justice for all" to be more than a hollow promise, people require access to the courts that is meaningful, with representation by qualified counsel, the opportunity to physically enter the court and to understand and to participate in the proceedings, and the assurance that their claims will be heard by a fair and capable decision-maker and decided pursuant to the rule of law. In this white paper, we describe how these features of meaningful access to the courts are increasingly absent. We conclude by offering a series of proposals to bridge the gap between the lofty promise of equal justice and the often disappointing reality of justice on the ground.

EXECUTIVE SUMMARY: KEY FINDINGS AND RECOMMENDATIONS

Key Findings

In this white paper, we argue that the gap between America's promise of equal justice and the reality of justice on the ground is substantial, and growing. Meaningful access to the courts—consisting of representation by counsel, the ability to physically enter court and understand and participate in the proceedings, and the opportunity to have claims heard—is increasingly out of reach for many Americans for the following reasons:

- First, there are not enough lawyers available to represent low-income people in civil legal matters. As one scholar has noted, “[a]ccording to most estimates, about four-fifths of the civil legal needs of low-income individuals, and two- to three-fifths of the needs of middle-income individuals remain unmet.”¹
- Second, in the criminal law context, where counsel is guaranteed by the Supreme Court's 1963 landmark *Gideon v. Wainwright*² decision, the promise has gone unfulfilled. Counsel for the indigent is commonly underpaid, under-supervised, under-resourced and, ultimately, unable to provide effective representation.
- Third, for people with physical or psychiatric disabilities, court buildings and court procedures pose barriers that may be insurmountable.
- Fourth, for people with limited English proficiency, the lack of translation and interpreting services in many of the nation's courts also can be insurmountable.
- Fifth, the role of the courts is increasingly circumscribed by laws and court decisions that eliminate whole categories of claims from the courts' jurisdiction.
- Sixth, increased and often mandatory reliance on alternative dispute resolution has placed judicial review out of reach for an increasing number of people.

RECOMMENDATIONS

To restore meaningful access to the courts, we make the following recommendations:

- 1) Expand access to attorneys in civil cases by strengthening the federal Legal Services Corporation and promoting a right to counsel when basic human needs are at stake. In order to achieve this goal, Congress must provide essential funding to the Legal Services Corporation (“LSC”) and remove the restriction that prevents LSC grantees from using state, local and private funds to provide essential services to their communities.

- 2) Strengthen defense services within state criminal justice systems. States must provide essential funding and supervision for state indigent defense services. Congress should allocate federal funds for defense services that are comparable to funds allocated to prosecutors and police. Federal funding should be tied to states' adherence to the American Bar Association's Ten Principles of a Public Defense Delivery System.
- 3) Guarantee access to the courts for people with disabilities. The Americans with Disabilities Act promises access to public buildings, including the courts. We need a national commitment by federal and state governments to finance meaningful access for people with physical and psychiatric disabilities to all of our nation's courtrooms.
- 4) Guarantee access to the courts for people with limited English proficiency. People who are learning English are also entitled to equal justice, and the society and the courts are better off when laws are enforced evenly and disputes resolved pursuant to the rule of law. We need our federal government and state governments to commit sufficient resources to ensure that translation and interpretation services make it possible for all members of our society to participate equally in court proceedings.
- 5) Correct the excesses of court-stripping. Congress should pass legislation that would restore access to the courts to enforce essential civil rights protections stripped by recent Supreme Court rulings. In addition, Congress should repeal the jurisdiction-stripping provisions of the Detainee Treatment Act of 2005 and the Military Commission Act of 2006. Congress should also reform the definition of "enemy combatant" so that it allows military tribunal jurisdiction solely over those who have fought on a recognized battlefield, and excludes those who provide undefined materially support.
- 6) Control the excesses of alternative dispute resolution requirements. Although alternatives to litigation are desirable, new problems can be created by policies that favor private mediation or promote the complete waiver of litigation rights. Where binding arbitration is authorized, we need to be sure that the terms are fair, that the decision-makers are unbiased, and that judicial resolution remains available when necessary to preserve justice.

I. Most Low-Income Individuals Cannot Obtain Counsel To Represent Them in Civil Matters

Nearly three decades ago, President Jimmy Carter observed: “Ninety percent of our lawyers serve ten percent of our people. We are overlawyered and underrepresented.”³ Concern for equal justice is shared across the political spectrum. In 1995, Senator Peter Domenici (R-NM) declared on the Senate floor, “I do not know what is wrong with the United States of America saying to the needy people of this country that the judicial system is not only for the rich. What is wrong with that? . . . That is what America is all about.”⁴ A decade later, the National Association of Evangelicals, the nation’s largest association of evangelical Christians, echoed these concerns in a letter to several congressional leaders: “Without a helping hand from legal aid programs and the shared blessings of others, low-income families too often have no place else to turn for help. . . . God measures societies by how they treat the people at the bottom, and He teaches us to care for the poor and oppressed among us.”⁵

Yet notwithstanding widespread acknowledgment of the problem, the crisis of representation for low-income people in civil cases persists, and grows worse, because of chronic funding shortages, state and federal restrictions, shortfalls in pro bono help, and a rollback of financial incentives for attorneys in private practice to bring critical cases.

The major source of funding in the United States for legal aid in civil matters is the federal Legal Services Corporation (LSC), established by federal law in 1974.⁶ The value in real dollars of the funding appropriated by Congress to LSC has declined dramatically over the last twenty-five years. In fiscal year 1981, Congress allocated \$321.3 million to LSC, which at the time was seen as the level sufficient to provide a minimum level of access to legal aid in every county, although not enough to actually meet all the serious legal needs of low-income people.⁷ Adjusted for inflation this “minimum access” level of funding would need to be about \$687.1 million in 2005 dollars; yet Congress’s LSC allocation for fiscal 2007 was a mere \$348.5 million.⁸ On average, every legal aid attorney, funded by LSC and other sources, serves 6861 people. In contrast, there is one private attorney for every 525 people in the general population.⁹

The dramatic nature of the funding shortfall becomes even more apparent when U.S. legal aid funding is compared to that of other industrial democracies, many of which spend at least twice as much per capita on legal aid, if not more. For example, during fiscal year 1998, combined federal, state, and local government funding for civil legal services for the poor in the United States was \$600 million, or \$2.25 per capita.¹⁰ In contrast, England spends eleven times as much per capita on civil legal services, at \$26.00 per person; the Netherlands spends four times as much, at \$9.70 per person; and Germany and France spend at least twice as much, at \$4.86 and \$4.50 per person, respectively.¹¹

As a result of money shortfalls, in 2004 LSC-funded programs turned away at least one person seeking help for each person served.¹² This means that approximately one million cases per year are turned away due to lack of funding.¹³ As striking as these figures are, they understate the real number of low-income people who go unserved because they do not include those who do not seek out help, those who were

turned away from non-LSC-funded legal aid providers, or those who received limited advice but required full representation.

In addition to these consequences of funding shortages, the ability of legal aid programs to serve the poor is further impeded by harsh and wasteful federal restrictions imposed by Congress in 1996. These restrictions cut deeply into low-income people's capacity to secure meaningful access to the courts. First, Congress restricted the legal tools that LSC-funded lawyers could use to represent their clients, prohibiting them from: representing clients in bringing class actions; seeking court-ordered attorneys' fee awards; educating potential clients about their rights and then offering to represent them; and communicating with policymakers or legislators on a client's behalf, except under very narrow circumstances.¹⁴

Second, Congress limited the categories of clients whom LSC-funded programs could represent, prohibiting representation of certain categories of legal immigrants as well as all undocumented immigrants, people in prison, and those charged with illegal drug possession in public housing eviction proceedings.¹⁵

Finally, Congress imposed an extraordinarily harsh and largely unprecedented limitation on LSC-funded programs: it extended these prohibitions to the non-LSC-funded activities of legal aid programs. As a result, nearly \$390 million in state, local, and private funding for legal aid is restricted under the same terms as the LSC funds.¹⁶ Faced with a court ruling that such a sweeping restriction on private funds violates the First Amendment, LSC issued a regulation that theoretically provides an opportunity for non-profits receiving LSC funds to spend their private money free of these substantive restrictions.¹⁷ Under LSC's "program integrity" regulation, the only way a legal aid non-profit and its private donors may free themselves of the federal restrictions is to divert private funds from direct client service in order to establish a separate program—with physically separate staff, offices, and equipment.¹⁸ However, this physical separation requirement is so burdensome and wasteful that virtually no program in the country has been able to comply.

Apart from the restrictions and funding shortages, the reach of LSC-funded programs is inherently limited by their mandate to serve those in the most dire need. To be eligible for assistance from LSC recipient programs, clients must earn less than 125% of the Federal Poverty Guidelines.¹⁹ In real terms, a family of four living in the forty-eight contiguous states with a household income that exceeds \$25,000 is ineligible for assistance from LSC-funded programs.²⁰ Asset ceilings also apply.

Thus, many working poor and middle-income families find themselves in a bind when they have a legal problem. A study commissioned by the American Bar Association (ABA) and issued in 1994 found that about one-half of moderate-income households at any given time face a problem that could be addressed by the courts.²¹ However, with the exception of family law matters such as divorce, the usual course of action for such households was to try to handle the situation on their own, without a lawyer.²² Middle-income families also lack one of the advantages businesses have in being able to afford lawyers: while legal fees are tax deductible when incurred as a business expense, they are not when incurred for personal reasons.²³

Pro bono—free or reduced-fee legal assistance by private law firms—provides some relief. Yet notwithstanding the considerable resources of major law firms and the sheer number of attorneys in the United States, pro bono practice falls far short of meeting the legal needs of America’s low- and middle-income families. Pro bono participation is quite low. The average attorney donates less than a half-hour per week to pro bono service, and financial contributions average less than fifty cents per day.²⁴ Less than one-third of the nation’s major law firms meet the ABA’s pro bono challenge of donating three to five percent of total revenues.²⁵ Moreover, a substantial proportion of pro bono service is done for family or friends, not for low-income communities.²⁶ Fewer than one in ten attorneys accepts referrals from legal services programs or other organizations that serve the legal needs of low-income communities.²⁷

The shortage of legal assistance that results from all these factors can have devastating consequences for low-income people. Perhaps nowhere can the impact of legal assistance be seen more dramatically than in the context of domestic violence cases. Take, for example, the case of Mariella Batista, a Cuban immigrant who had suffered for years from domestic violence by an abusive partner. Ten years ago, Batista sought help from a local legal services program. Even though she feared for her life, the program had to turn her away due to the 1996 LSC restriction that prohibited representation of most immigrants. The next week, Batista was killed by her abuser outside the family court building.²⁸

Although Congress has since amended the LSC restrictions to allow for representation of domestic violence victims regardless of immigration status,²⁹ the lesson persists: denial of access to a lawyer can have tragic consequences. In contrast, when legal services are made available, survivors of domestic violence have assistance obtaining protective orders, custody of their children, child support, and sometimes public assistance. Legal services programs help women achieve physical safety and financial security and thus empower them to leave their abusers. In fact, one recent study found that access to legal services was one of the primary factors contributing to a twenty-one percent decrease nationally in the reported incidence of domestic violence between 1993 and 1998.³⁰

The consequences of inadequate access to the courts affect not just the individuals directly involved, but also society at large. When families are evicted from their homes because they cannot obtain counsel in a housing proceeding, for example, their resultant homelessness costs taxpayers in the form of public services.³¹ In New York City, the average cost of sheltering a single homeless adult is \$23,000 annually—far more than providing counsel to prevent an eviction.³² Medical and other costs rise, too, when individuals, particularly senior citizens, lose their homes because they lack access to a lawyer. When victims of domestic violence are unable to obtain help, the health care, criminal justice, and social welfare systems bear the strain.³³ Employers, too, suffer from decreased productivity and increased absenteeism.³⁴ Many of these societal costs could be ameliorated if low-income individuals had access to counsel to assist them in resolving their legal problems.

II. The Promise of *Gideon v. Wainwright*— Legal Representation for Low-Income Persons in Criminal Matters—Is Largely Unfulfilled

In the 1963 landmark case of *Gideon v. Wainwright*, the Supreme Court established that indigent criminal defendants have the right to an attorney, under the Sixth and Fourteenth Amendments to the Constitution, regardless of their ability to pay.³⁵ Yet notwithstanding the promise of *Gideon*, more than forty years later the criminal justice system in many states is largely broken due to inadequate funding of indigent defense services, crushing caseloads, and a lack of oversight, supervision, and training of court-appointed defense counsel.

In 2003, in recognition of the fortieth anniversary of the *Gideon* decision, the ABA conducted four hearings across the country over the course of a year to examine the quality and consequences of indigent defense services in the nation. The ABA received testimony from a broad range of experts, documenting a stunning array of obstacles to enforcement of the *Gideon* right. The ABA's investigation culminated in publication of a report in 2004 titled *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*.³⁶ Among the obstacles identified by the experts were the following:

- The lack of adequate funding for indigent defense services, leading to inadequate attorney compensation; lack of essential resources (including expert, investigative, and support services); lack of training; reliance on various cost cutting measures; and resource disparity between prosecution and indigent defense.³⁷
- “Inadequate legal representation,” including “meet ‘em and plead ‘em” lawyers; incompetent and inexperienced lawyers; excessive caseloads; lack of contact between defense counsel and clients (and lack of continuity in representation of clients); lack of investigation, research, and zealous advocacy by defense counsel; lack of conflict-free representation; and other ethical violations by defense counsel.³⁸
- “Structural defects in indigent defense systems,” including insufficient independence of counsel from courts and prosecutors and an absence of oversight sufficient to ensure the provision of uniform, quality legal services.³⁹
- Complete failure to provide counsel to those entitled to counsel: people detained in jail without a lawyer; people encouraged to waive their right to counsel and enter pleas of guilty; and counsel provided too late or not at all.⁴⁰
- A diverse range of additional problems, including inordinate delays in the criminal justice process; a lack of full-time public defenders and of participation by the private bar; and a lack of data regarding indigent defense systems.⁴¹

Problems virtually identical to those identified in the ABA report have been the subject of numerous reports in many jurisdictions across the country, extending back decades in time.⁴² Most recently, the

Chief Judge of the State of New York, Judith S. Kaye, appointed a blue ribbon commission that, after receiving testimony in a series of hearings, called for substantial reform of the defense services provided in New York State.⁴³ As described in *The New York Times*, the commission identified “such problems as overburdened defenders who, in one county, average 1,000 misdemeanors and 175 felony cases in a year, and ‘grossly inadequate’ financing.”⁴⁴ The Commission further described “wide disparities in counties’ spending and in the resources available to prosecutors and defenders,” and noted that “[t]he state lacks standards to define what it means to provide adequate indigent defense and has no system for enforcing such standards.”⁴⁵

The ABA report explains that inadequate defense lawyering is a cause of wrongful convictions: “Although there undoubtedly are a variety of causes of wrongful convictions—including police and prosecutorial misconduct, coerced false confessions, eyewitness identification errors, lying informants—inadequate representation often is cited as a significant contributing factor.”⁴⁶ The report further quotes former Attorney General Janet Reno stating that,

[a] competent lawyer will skillfully cross-examine a witness and identify and disclose a lie or a mistake. A competent lawyer will pursue weaknesses in the prosecutor’s case, both to test the basis for the prosecution and to challenge the prosecutor’s ability to meet the standard of proof beyond a reasonable doubt.

A competent lawyer will force a prosecutor to take a hard, hard look at the gaps in the evidence. . . .

A competent lawyer will know how to conduct the necessary investigation so that an innocent defendant is not convicted

. . . .

In the end, a good lawyer is the best defense against wrongful conviction⁴⁷

The problem of wrongful convictions cannot be ignored. As of December 2006, the Innocence Project, a legal clinic at the Benjamin N. Cardozo School of Law, had identified 188 persons as having been wrongfully convicted of crimes, and of having served more than 1000 years in prison as a result.⁴⁸ The discovery of additional wrongful convictions has become an almost daily occurrence.

One example is Eddie Joe Lloyd, a mentally ill Michigan man who was convicted of the 1984 rape and murder of a teenage girl. While residing in a psychiatric hospital, Lloyd, who suffered from paranoid schizophrenia and mild retardation, contacted police and made suggestions on how to solve this case and others. The police interrogated Lloyd and told him that, if he confessed to the murder, he would help them “smoke out” the real murderer. Lloyd then confessed to the crime in horrific detail by recounting facts fed to him by the police. Lloyd’s court-appointed attorney failed to challenge the coerced confession in court. As a result, Lloyd spent seventeen years in prison before being exonerated by DNA evidence. Tragically, he died two years after his release from prison.⁴⁹

When access to counsel in the criminal justice system is inadequate, society suffers as well. Convicting Eddie Joe Lloyd and others of crimes they did not commit enables the real perpetrators to remain at large. Moreover, taxpayers must foot the bill for lengthy appeals processes and the high costs associated with unnecessary and excessive incarceration.

Against a backdrop of rampant noncompliance with *Gideon* and the attendant costs and consequences, it is encouraging to note that there are some signs of real change. Across the country, reform initiatives are beginning to hold states accountable under *Gideon*. The ABA report cites examples of successful initiatives in Georgia, Texas, and Virginia that have led to the creation of new statewide defender systems with increased state funding and state oversight.⁵⁰ Additional reform efforts succeeded in Montana in 2005 and are underway in Louisiana, Michigan, New York, and Pennsylvania.

III. Courts Often are Unable to Provide Access to People with Physical and Psychiatric Disabilities

If the courts are to fulfill their essential role of protecting the most vulnerable people in our society, then the most vulnerable people must be able to get into court. People with physical and psychological impairments face unique challenges when attempting to vindicate their rights in court. Although the federal Americans with Disabilities Act (ADA) aims to eradicate disability-based discrimination in a variety of settings, one threshold question is whether the courts themselves are sufficiently accessible to enable individuals with disabilities to enter courthouses and to participate in court proceedings.

Noncompliance with the ADA in state judicial systems has been widely documented.⁵¹ Surveys have found inaccessible courtrooms in California, Washington, Texas, New York, Tennessee, Missouri, and Florida. And, in some jurisdictions, inaccessible courtrooms are the norm.⁵²

The problems leading to this inaccessibility include:

- Architectural barriers: many people have difficulty navigating courthouse facilities, including parking lots and bathrooms, as well as gaining access to assistive devices such as listening aids, print enlargers, etc.
- Court practices: courts often impose inflexible scheduling requirements, including refusing to offer mid-morning or afternoon hearings for persons who need extra time to get to court.
- Court officials: court personnel, including judges and clerks, may lack sufficient knowledge to prevent misunderstandings and to avoid reliance on mistaken stereotypes.
- Signage: Court signage may be inadequate, making it difficult to obtain essential information, or to obtain assistance in completing required forms.⁵³

For individuals with psychiatric impairments, analogous problems arise. Individuals may be unable to handle the stress of courtroom proceedings, the challenges of communicating with courthouse officials and judges, and the daily effects of medications.⁵⁴ 10

In 2004, the Supreme Court held in *Tennessee v. Lane*⁵⁵ that individuals are entitled to sue state court systems for their failure to comply with the ADA.⁵⁶ George Lane had sued Tennessee for failing to make the county courthouse accessible to persons who rely on wheelchairs. Lane had been jailed after he refused to crawl up the courthouse steps to attend a scheduled court appearance.⁵⁷ The Court rejected Tennessee's argument that it was immune from suit and held that Congress was within its power in enacting the ADA as a means of protecting the constitutional right of access to the courts.⁵⁸ State court systems are cognizant of the need to address these problems. In a memorandum responding to the *Lane* decision, the National Center on State Courts identified forty-three court locations across the country where ADA compliance activities were ongoing.⁵⁹ Additionally, the Architectural and Transportation Barriers Compliance Board (Access Board), an independent federal agency devoted to accessibility for people with disabilities, has created a Courthouse Access Advisory Committee to advise it on issues related to the accessibility of courthouses covered by the ADA. These issues include best practices, design solutions, promotion of accessible features, educational opportunities, and the gathering of information on existing barriers, practices, recommendations, and guidelines.⁶⁰ Nevertheless, substantial work remains to make courthouses more accessible to persons with disabilities.

IV. Courts Often Do Not Provide Translation and Interpreting Services to People Who Have a Limited Ability to Speak and Understand English

There is another particularly vulnerable segment of society—those people with limited proficiency in English (often known as LEP individuals)—that is frequently confronted with virtually insurmountable obstacles to accessing the courts. LEP individuals often are unable to communicate with court personnel, to conduct legal research, to read their opponents' legal papers, and to understand and participate in court proceedings.

A recent California study found that “courtroom language services [i.e. interpreters] are virtually unavailable to many Californians.”⁶¹ Most court documents, such as standard pleadings, legal opinions, and self-help materials, are written in English only, making them incomprehensible to LEP individuals.⁶²

In California alone, there are seven million people who cannot access the courts without language assistance.⁶³ The practical consequences for the court system are enormous. In Los Angeles County, approximately 10,000 proceedings each year are postponed because there is no interpreter available.⁶⁴ These problems are particularly acute in rural areas, where often there is no certified interpreter available to speak the necessary language.⁶⁵ When no interpreter can be found at all, judges must attempt to reach a fair and accurate decision knowing that they cannot communicate with one or more of the litigants. For this reason, the Judicial Council of California recently called the participation of interpreters in domestic violence proceedings “a fundamental factor contributing to the quality of justice.”⁶⁶ 11

These problems generally stem from the courts' inadequate resources. Although the California Access to Justice Commission reported in 2005 that many litigants in California's court are forced to proceed without necessary interpreters, in 2006 California Governor Arnold Schwarzenegger vetoed a bill that would have allocated \$10 million for interpreter services in the courts.⁶⁷ The complicated logistics of providing language access contributes to the problem. In New York State alone, litigants speak 168 different languages and many more dialects.⁶⁸ Courts must ensure that the interpreters appearing in their courts are competent. Court interpreters must be proficient not only in the two languages they are translating between, but also in the legal terminology of each language. Unfortunately, in many instances, even when court interpreters are available they lack the requisite proficiency and provide incorrect translations.⁶⁹

V. Recent Legislation And Court Decisions Have Made Courts Less Available Than Ever To Hear Certain Categories of Cases

The last two decades have witnessed a substantial narrowing of the scope of the courts' authority to enforce laws when individual litigants raise claims of unlawful conduct by the government. The effects of this eroded jurisdiction are widespread and long lasting. Principles and expectations are established that can affect the development of the law in related areas for years to come.

Some of the retrenchment is a product of the Supreme Court's own decisions. Under the banner of the so-called "new federalism," the Court has declared that the federal government lacks sufficient constitutional power to authorize some suits against the states for civil rights violations. These decisions have limited the ability of the disabled and senior citizens to seek redress against state employers for discrimination⁷⁰ and provide a rationale that more broadly threatens the continued enforcement of federal civil rights against the states. Other Supreme Court decisions have ruled that individuals may not bring claims to enforce civil rights either because the statute did not explicitly authorize such a claim⁷¹ or because such claims were not sufficiently related to Congress's constitutional power to regulate interstate commerce.⁷²

Other limitations result from actions of the executive or legislative branches. We highlight below several particular contexts in which the executive or legislative branches have stripped courts of the power to hear claims: the War on Terror and limitations on immigrants' access to the courts. The ultimate effects of these limitations reach further than the immigrants and terror suspects directly affected. The judicial branch is charged with protecting the most vulnerable in our society who often cannot assert their rights through the political process. Consequently, the weakening of the Judiciary through the War on Terror and the assault on immigrants' rights threatens not only the direct targets of each action, but also everyone who turns to the Judiciary to protect their rights when the political process fails to do so. 12

A. the executive branch has sought to reduce the function of the courts in reviewing the government's conduct in the war on terror

Since the terrorist attacks of September 11, 2001, the U.S. military, the Central Intelligence Agency (CIA), and allied nations have engaged in counterterrorism operations and detained hundreds, perhaps thousands, of individuals without the threshold of a lawful process to determine the factual or legal bases for detention. Although detainees have been tagged "the worst of the worst" by senior executive branch officials, a substantial number appear to have been incorrectly detained. During "Operation Enduring Freedom" in Afghanistan, for example, the military did not conduct hearings to determine whether the Afghans swept up during the conflict (and handed in for \$5000 bounties) were properly characterized as enemies.⁷³

Often illiterate, without English language skills or experience with any legal system, these detainees have had no meaningful opportunity to demonstrate innocence, and few advocates to protest their improper detention. Detainees have been held in the Naval Brig at Charleston, South Carolina,⁷⁴ Guantánamo Bay Cuba,⁷⁵ and secret CIA-run "black sites" scattered around the world.⁷⁶ Coercive interrogations, rising to levels widely recognized as torture, have been confirmed at many of these overseas detention sites.⁷⁷ The Bush Administration holds detainees as presidentially designated "enemy combatants"—a category now applied without precedent in modern military operations or international law.⁷⁸

Protecting physical liberty against executive detention historically has been at the heart of the Judiciary's role.⁷⁹ As Supreme Court Justice David Souter recently explained, "[f]or reasons of inescapable human nature, the branch of Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory."⁸⁰ But the administration has fiercely resisted any and all judicial oversight of detention operations, arguing that even U.S. citizens detained in the United States as "enemy combatants" are entitled to only minimal due process, and certainly not to an opportunity to examine and challenge the legal and factual bases for their detention.⁸¹

Justice Souter's insight is confirmed by journalistic reports of the principles of counterterrorism decisionmaking that have been recently adopted. According to one journalist, the Administration has acted on the principle that "a one percent chance of a catastrophe must be treated 'as certainty,'" with preventative action taken accordingly.⁸² Unsurprisingly, this approach has yielded an overwhelming proportion of false positives among detainees, rendering the need for judicial oversight more pressing. Moreover, international condemnation of American detention and interrogation practices is damaging counterterrorism efforts.⁸³ Given these trends, judicial review for both domestic and at least some off-shore facilities appears to be increasingly likely.

A tangle of thorny legal questions, however, obscures the proper venue and scope of judicial review in these detention cases. Essentially, there are three pivotal legal questions raised by detainee policy. First, what is the legal regime that governs interdiction and detention operations under counterterrorism auspices: Is it some part of the law of war,⁸⁴ or is it the civilian criminal law?⁸⁵ And, if the law of war applies, which laws—specifically, which parts of the 1949 Geneva Conventions—govern?⁸⁶ Second, if 13

a detainee falls outside the ambit of the criminal law and is detained either here or overseas, can federal courts hear challenges to detention, and, if so, how can they do so effectively? Finally, when a person is properly detained under the laws of war, especially outside areas that traditionally would have been designated as battlefields, what process ought properly be used to determine whether that person is guilty of a criminal offense? A trilogy of Supreme Court cases in 2004⁸⁷ and a fourth case decided in June 2006⁸⁸ have cast light on some of these issues, but much remains unclear.

On the first question, in *Hamdi v. Rumsfeld* the Supreme Court concluded that individuals detained on a foreign battlefield bearing arms against the United States are properly subject to the laws of war.⁸⁹ Application of the laws of war means that an “enemy combatant” detained on the battlefield may be detained for the length of the relevant territorial conflict.⁹⁰ *Hamdi* left open the very important question of whether the “enemy combatant” designation could be extended beyond the battlefield context. Further, in the 2006 *Hamdan* case, the Court held that all detainees are entitled to the protections of Common Article 3 of the Geneva Conventions, which guarantees, among other things, that sentences and executions can be carried out only upon “previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁹¹ The laws of war, including some parts of the Geneva Conventions, thus apply to foreign battlefield captures.⁹²

Second, courts to date have rejected executive branch arguments that the judicial branch must refrain from exercising jurisdiction. Thus, the Supreme Court rejected government arguments that the Guantánamo Bay Naval Base is beyond judicial ken.⁹³ One district court has also concluded that jurisdiction obtains when the United States collaborates with another sovereign.⁹⁴ Once jurisdiction is established, however, how challenges to the factual and legal bases of detention can and should be brought remains unclear. Citizen detainees are at least entitled to a judicial hearing to ascertain whether they are in fact “enemy combatants.”⁹⁵ *Hamdi* gave some clues to the form procedures might take. Nevertheless, it is unclear whether *Hamdi*-compliant hearings have yet been convened, and the precise form of such hearings has yet to be definitively defined by the Judiciary.⁹⁶ Much rests on the precise quanta of fact-finding permitted in challenges to government accusations of terrorist activity.

Finally, the *Hamdan* Court held that military commissions established to determine guilt or innocence of war crimes charges were invalid and that such commissions must comport with procedural standards established by the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.⁹⁷

These cases leave much undecided. Procedures to determine “enemy combatant” status, as well as the scope of that term, remain unclear. The aforementioned cases also focused on the *fact* of detention, not the *conditions* of detention. After the Court in *Hamdi* affirmed detainees’ right to counsel, issues concerning conditions of detention have largely been addressed in the context of requests by lawyers for access to their clients. Although Congress could step in and usefully clarify these questions, one intervention in December 2005 was a manifest moral and practical failure.⁹⁸ That law purported to curtail federal court jurisdiction over actions arising out of Guantánamo and reflected a factually inaccurate premise that habeas litigation out of Guan14

tánamo was similar to frivolous prison conditions challenges.⁹⁹ The legislation was construed narrowly in *Hamdan*.¹⁰⁰

Even if Congress does not act, the federal courts have ample resources to determine the propriety of initial detentions and the military justice system has the ability to hold war crimes trials safely and fairly.¹⁰¹ The optimal solution to the detention thicket thus is one that has been staring the nation in the face all along: employing the federal courts' and their military counterparts' long-respected capacity to mete out equitable and procedurally fair justice that will be respected around the world.

Yet, not long before this Paper went to print, Congress approved and the President signed a far-reaching omnibus measure addressing the scope of detention authority, the kinds of tactics that could be used in interrogations, and the scope of post-hoc judicial review. Entitled the Military Commissions Act of 2006 (MCA),¹⁰² this Act purported to respond to *Hamdan* but in fact swept much further. With respect to access to the federal courts, the MCA professes to eliminate jurisdiction over habeas corpus petitions filed by or on behalf of noncitizens designated as "enemy combatants" by the Executive.¹⁰³ The Administration has argued that a noncitizen assigned the vague designation of "awaiting determination" as an "enemy combatant" is also covered by this habeas-stripping provision¹⁰⁴—suggesting that the Administration is intent to detain individuals *without* designating them "enemy combatants." If the government prevails, neither detainees at Guantánamo nor noncitizens swept up and detained as "enemy combatants" in the American heartland will have any meaningful opportunity to challenge the factual or legal basis of their detention by habeas corpus. The MCA further purports to eliminate all other actions that an alien "enemy combatant" might bring in federal court,¹⁰⁵ leaving open the possibility that victims of torture, or other abusive interrogation measures, would have no civil remedy in a U.S. court.

B. the government has sought to reduce the role of the courts in reviewing decisions applying immigration law

Judicial review has long played an important role in immigration law and remains an important safeguard of individual rights against the misuse of government power. During the past decade, however, the government has repeatedly attempted to restrict immigrants' access to the courts. Moreover, various jurisdiction-stripping provisions have been coupled with measures rendering even long-term residents deportable for minor infractions, emphasizing security at any cost. Although the Supreme Court has helped preserve judicial review, access to the courts has decreased and remains vulnerable to future limitations.

In 1996, Congress enacted two statutes that sought to significantly restrict immigrants' access to the federal courts: the Antiterrorism and Effective Death Penalty Act (AEDPA)¹⁰⁶ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).¹⁰⁷ AEDPA, passed in response to the Oklahoma City bombing of 1995, contained many anti-immigrant provisions (though the attack was the work of homegrown terrorists), including limits on judicial review.¹⁰⁸ IIRIRA, enacted several months after AEDPA, contained additional anti-immigrant measures. It not only eliminated court review over administrative deportation decisions for noncitizens convicted of most criminal offenses, but also cur-

tailed the availability of important forms of relief from deportation that took into account individual circumstances.¹⁰⁹ These provisions, moreover, were applied retroactively, thus penalizing noncitizens for minor infractions committed decades before without any independent review or individualized assessment of their claims.¹¹⁰ In addition, the IIRIRA provided for the creation of a new “expedited removal” process which summarily turns away asylum seekers arriving at America’s shores.¹¹¹ As human rights groups have documented, the “expedited removal” process has allowed the government to deny entry to people fleeing persecution without making an independent assessment of their claims.¹¹²

The Supreme Court’s 2001 decision in *INS v. St. Cyr*¹¹³ reaffirmed the importance of judicial review in immigration cases. The Court held that AEDPA and IIRIRA did not eliminate federal habeas corpus review over deportation orders¹¹⁴ and that restrictions on relief from deportation did not apply retroactively to cases pending before the statutes’ enactment.¹¹⁵ Further demonstrating the importance of judicial review, the Court ruled in another case that term that the INS could not indefinitely detain noncitizens in the United States.¹¹⁶ *St. Cyr*’s importance has reverberated beyond immigration law, providing an important precedent for federal court review of the executive detention of individuals at Guantánamo Bay after September 11th.¹¹⁷

However, court decisions have neither resolved all limits on judicial review nor ended the push for further restrictions. The terrorist attacks of September 11th prompted the dissolution of the Immigration and Naturalization Service and its replacement with the Department of Homeland Security,¹¹⁸ which has placed even greater emphasis on security at the expense of court access for asylum seekers and others immigrants.¹¹⁹ In addition, streamlining regulations adopted in August 2002¹²⁰ weakened the system of internal administrative review of immigration judge decisions by the Board of Immigration Appeals (BIA), decreasing the BIA’s size by over half, making disposition of appeals by a single BIA member (rather than a panel of three) the norm, and encouraging the issuance of opinions without analysis of the claims.¹²¹ The regulations have increased pressure on federal appeals courts and helped prompt calls for further limits on judicial review even though, as Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit suggested last year, such review is necessary to correct the BIA’s “staggering” error rate.¹²²

In 2005, Congress enacted the REAL ID Act, which eliminated one of the ways in which immigrants adjudged deportable could seek court review of the BIA’s decisions.¹²³ Recently proposed legislation threatens to further undermine immigrants’ access to the courts by imposing procedural obstacles to meaningful consideration of removal decisions and by restricting review of denials of citizenship petitions.¹²⁴

In sum, while Congress and the Executive have broad power to set U.S. immigration policy,¹²⁵ federal courts play an important role in ensuring that this power is exercised in accordance with the nation’s laws and Constitution.¹²⁶ Preserving immigrants’ access to the courts thus safeguards both individual liberty and the separation of powers against unlawful government action.¹⁶

VI. The Increased Reliance on Alternative Dispute Resolution Methods Raises New Concerns

The courts need not be understood as the exclusive forum for the enforcement of laws or resolution of disputes. Litigation can be prohibitively expensive, complex, and time-consuming. Presumably, there could and should be less expensive, faster, and no less fair systems for resolving disputes pursuant to the rule of law. At the very least, there is a need to simplify litigation. Alternative dispute resolution systems, such as mediation and arbitration, appear to offer one such opportunity.¹²⁷

In fact, courts offer litigants the opportunity to participate in mediation proceedings as an option prior to proceeding with full litigation, and some also offer binding arbitration as an alternative to litigation. But the private nature of these proceedings, compared to litigation which is public in nature and creates a public record, has generated concern. Decisions are made without the sanitizing effects of public scrutiny. Moreover, the law itself, which in the normal course would evolve to reflect the decisions made in litigation, does not have opportunity to change and develop in response to outcomes and insights developed off the record.¹²⁸

Distinct from these court-affiliated alternatives to litigation is the increased inclusion of binding arbitration clauses—promises made by individuals that they will not sue in court but rather submit any dispute for resolution by a private arbitration organization—in a broad range of contracts. In many contexts, including consumer contracts and employment agreements,¹²⁹ binding arbitration clauses prohibit recourse to the courts.¹³⁰

Such arbitration requirements have been shown to be problematic for a variety of reasons. First, low-income people typically have little negotiating leverage when entering into agreements with employers, credit card companies, and many other entities. They cannot realistically expect to alter the terms of such clauses or decline to agree to them.¹³¹ Second, the substantial administrative costs of arbitration processes may and generally do exceed those of the civil court system.¹³² Third, arbitration agreements increasingly include mandatory collective action waivers. These provisions prohibit individuals from joining forces to advance their claims together through class action litigation, even though such collective action sometimes offers the best and most efficient option for recovery (particularly if the sum due is not so substantial as to induce any individual to proceed alone).¹³³ Fourth, in many contexts, arbitrators have been shown to develop a bias in favor of so-called repeat players.¹³⁴ Finally, as noted above, arbitration clauses are designed to preclude appeal to the courts.

When binding arbitration agreements lead to unjust results, there is little opportunity to set them aside. Under the Supreme Court's interpretation of the Federal Arbitration Act, the scope of a court's review of such agreements is generally restricted to the narrow question of whether the arbitration provision itself, as contrasted with the broader substantive contract terms, was obtained by fraud, duress, or unconscionability.¹³⁵ This is an extremely high threshold for a party seeking court review to meet. 17

Recommendations

To stabilize our courts, assure their independence, and secure meaningful access so that all the members of our society can resolve their critical legal needs, a commitment is required by all of us. Inadequate access to the courts harms the court system itself and the citizenry's respect for the rule of law. When segments of the public believe that the courts are unfair to the poor, or that the courts treat communities of color with hostility, the courts lose legitimacy. Not only do courts suffer as institutions, but the nation's promise of "equal justice for all" is broken. As the Supreme Court has stated, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."¹³⁶ The following specific reform initiatives aim to address and correct this fundamental problem:

- 1) Expand access to attorneys in civil cases by strengthening the federal Legal Services Corporation and promoting a right to counsel when basic human needs are at stake.
 - Provide essential funding for LSC – Increase the annual federal appropriation for the Legal Services Corporation (LSC). The Board of LSC supports a funding level of \$430.7 million for FY 2008. This amount is an improvement over the current funding level of \$348.5 million, even though more is needed to meet genuine need.
 - Remove federal restrictions that apply to the Legal Services Corporation and its grantees, particularly the restriction that encumber non-federal funds. These funding restrictions undercut effective representation of low-income clients by lawyers in programs that receive LSC funding.
 - Expand access to lawyers for immigrants – In addition to removing the LSC restriction that prevents LSC-funded programs from assisting many categories of immigrants, it is essential that new immigration reform legislation enables guestworkers to qualify for legal assistance from LSC-funded civil legal aid programs to enforce their wage and hour, safety, and other rights. It is also essential that children in the immigration system be permitted to qualify for representation from LSC grantees through the proposed Alien Child Protection Act.
 - Promote a right to counsel in civil cases in which basic human needs are at stake – In a formal resolution adopted unanimously in August 2006, the ABA urges government at all levels to provide counsel to low-income individuals in important civil cases, including those in which shelter, sustenance, safety, health, or child custody are at issue.¹³⁷ Other nations have recognized that it is vital either to provide counsel or to simplify procedures and substantive law to the point where counsel is not necessary.¹³⁸ The United States needs to do more in both areas.
 - Fund student loan forgiveness programs – Fund student loan repayment programs for civil legal aid attorneys. LSC's pilot Loan Repayment Assistance Program (LRAP) is a possible model. Congress approved \$1 million in 2005 to start LRAP, which provides up to \$5,000 in annual assistance for up to three years for selected civil legal aid attorneys. 18

2) Strengthen defense services within state criminal justice systems.

- Provide essential funding and supervision for state indigent defense services. The promise of *Gideon v. Wainwright* has been deferred for too long. Our states need to ensure that low-income persons charged with crimes receive defense counsel who are adequately financed, properly trained and supervised, and accountable to appropriate practice standards. Congress should allocate federal funds for defense services that are comparable to existing federal funds allocated to prosecutors and police. Federal funding should be tied to states' adherence to the ABA's Ten Principles of a Public Defense Delivery System.

- Fully implement the Innocence Protection Act – Congress should implement all provisions of the Innocence Protection Act, particularly those that require states to meet national standards for providing capital defense services.

- Fund student loan forgiveness programs – Congress should reintroduce and pass the Prosecutors and Defenders Incentive Act, which would provide student loan repayment for prosecutors and public defenders.

- Create a Center for Defense Services – Establish and fund a “Center for Defense Services” to serve as an independent, national, non-profit watchdog that would monitor the adoption and implementation of indigent defense standards, conduct training sessions, and administer matching grants and other programs, for the purpose of strengthening indigent defense services in the states.

3) Guarantee access to the courts for people with disabilities.

The ADA promises access to public buildings, including the courts. We need a national commitment by federal and state governments to finance meaningful access for people with physical and psychiatric disabilities to all of our nation's courtrooms.

4) Guarantee access to the courts for people with limited English proficiency.

- Fully enforce Title VI – The federal government should fully enforce Title VI of the Civil Rights Act of 1964, which obligates state courts and other state entities receiving federal funding to provide equal access to people with limited English proficiency.

- Provide funding to enable state court systems to provide adequate interpreter services – States should allocate funding sufficient to enable their court systems to meet this obligation, and the federal government should also provide funding to the states for this purpose.

5) Correct the excesses of court-stripping.

- Pass legislation similar to the FAIRNESS Act of 2004 – Pass legislation similar to the Fairness and

Individual Rights Necessary to Ensure a Stronger Society: The Civil Rights Act of 2004 (the FAIRNESS Act), which has not been passed by Congress. The FAIRNESS Act would restore access to the courts to enforce essential civil rights protections stripped by recent Supreme Court rulings.

- Repeal the jurisdiction-stripping provisions of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 – The full scope of habeas corpus rights, as outlined in relevant part by the Supreme Court in *Rasul v. Bush*,¹³⁹ should remain available. This would promote meaningful judicial review for detainees who have been held for many years without adequate process.
- Reform the definition of “enemy combatant” contained in the Military Commissions Act of 2006 – The Act should allow military tribunal jurisdiction solely over those who have fought on a recognized battlefield, and excludes those who provide undefined “material support.” This reform is important to ensure that the military justice system does not become a second-tier justice system in criminal cases.

6) Control the excesses of alternative dispute resolution requirements.

Although alternatives to litigation are desirable, new problems can be created by policies that favor private mediation or promote the complete waiver of litigation rights. We need to examine the societal consequences for the rule of law of taking disputes out of our public courts and promoting their resolution by non-judges in private settings. Where binding arbitration is authorized, we need to be sure that the terms are fair, that the decisionmakers are unbiased, and that judicial resolution remains available when necessary to preserve justice.²⁰

Endnotes

- ¹ Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 *Geo. J. Legal Ethics* 369, 371 (2004).
- ² 372 U.S. 335 (1963).
- ³ Rhode, *supra* note 1, at 371 (quoting President James E. Carter, Remarks at the 100th Anniversary Luncheon of the Los Angeles County Bar Association (May 4, 1978), in 64 *A.B.A. J.* 840, 842 (1978)).
- ⁴ 141 *Cong. Rec.* S14573-02, S14587 (daily ed. Sept. 29, 1995) (statement of Sen. Domenici).
- ⁵ Letter from Rev. Richard Cizik, Vice President for Governmental Affairs, Nat'l Ass'n of Evangelicals, to Rep. Frank R. Wolf and Rep. Alan B. Mollohan (July 13, 2006) (on file with the Brennan Center for Justice).
- ⁶ *See* 42 U.S.C. § 2996 (2000).
- ⁷ LegalServs. Corp., Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 2 (2005).
- ⁸ LegalServs. Corp., LSC Updates, http://www.lsc.gov/press/updates_detail_T6_R93.php#updateon (last visited on March 8, 2007).
- ⁹ LegalServs. Corp., *supra* note 7, at 18.
- ¹⁰ Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *Fordham Int'l L.J.* S83, S95 (2000).
- ¹¹ *Id.*
- ¹² LegalServs. Corp., *supra* note 7, at 5.
- ¹³ *Id.*
- ¹⁴ *See* Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53 to -56. Congress has carried forward these restrictions each year by incorporating them in the annual appropriations rider for LSC.
- ¹⁵ *See id.* at 1321-55 to -56.
- ¹⁶ *See* LegalServs. Corp., *Fact Book 2005*, at 9 (2006), available at <http://www.rin.lsc.gov/rinboard/2005FactBook>.
- ¹⁷ *See* 45 C.F.R. § 1610 (2005).
- ¹⁸ *See* 45 C.F.R. § 1610.8 (2005).
- ¹⁹ *See* 45 C.F.R. § 1611.3(c)(1) (2005).
- ²⁰ *See* Legal Services Corporation, *Income Level for Individuals Eligible for Assistance*, 71 *Fed. Reg.* 5012, 5012 (Jan. 31, 2006) (to be codified at 45 C.F.R. pt. 1611).
- ²¹ Roy W. Reese & Carolyn A. Eldred, *Temple Univ. Inst. for Survey Research, Legal Needs Among Low-Income and Moderate-Income Households: Summary of Findings from the Comprehensive Legal Needs Study 8* (1994).
- ²² *Id.* at 21.
- ²³ *See* I.R.C. § 162(a) (Supp. 2006) (allowing deduction of all “ordinary and necessary expenses” incurred in the course of business); *Comm’r v. Tellier*, 383 U.S. 687, 690–91 (1966) (holding that litigation expenses for an underwriter’s defense of a criminal prosecution for securities fraud were deductible under section 162(a)); 21

Gilliam v. Comm’r, 51 T.C.M. (CCH) 515 (1986) (holding that litigation expenses growing out of an artist’s defense of a civil tort claim were personal and not deductible under section 162(a) even though the underlying events took place on a business trip).

²⁴ Deborah L. Rhode, *Access to Justice* 17 (2004).

²⁵ *Id.* The ABA Model Rules on Professional Conduct establish an aspiration that lawyers will “render at least (50) hours of pro bono publico legal services per year,” a “substantial majority” of which should be without fee to low-income communities. Model Rules of Prof’l Conduct R. 6.1 (2002). However, Rule 6.1 is non-binding.

²⁶ *See* Rhode, *supra* note 24, at 17.

²⁷ *Id.*

²⁸ *See* Leslye Orloff et al., *Opening a Door to Help: Legal Services Programs’ Key Role in Representing Battered Immigrant Women and Children*, *Clearinghouse Rev.*, May–June 2003, at 36, 36.

²⁹ Violence Against Women & Dep’t of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 104, 119 Stat. 2960, 2978–79 (2005).

³⁰ Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 *Contemp. Econ. Pol’y* 158, 169 (2003).

³¹ *See* Nancy Smith et al., *Vera Inst. of Justice, Understanding Family Homelessness in New York City: An In-Depth Study of Families’ Experiences Before and After Shelter*, § 3, at 13–14, 28 (2005) (finding that almost half of all families in the New York City homeless shelter system had experienced an eviction in the five years preceding their admission to a shelter, and that being evicted made it seven times more likely that a household would enter a shelter that same month).

³² Coalition for the Homeless, Research, Basic Facts about Homelessness, http://www.coalitionforthehomeless.org/advocacy/basic_facts.html (last visited Dec. 20, 2006).

³³ *See* S. Rep. No. 103-138, at 41 (1993) (“[E]stimates suggest that we spend \$5 to \$10 billion a year on health care, criminal justice, and other social costs of domestic violence.”).

³⁴ *See* H.R. Rep. No. 103-711, at 385 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 (“[C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . [,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . .”).

³⁵ 372 U.S. 335, 344–45 (1963).

³⁶ Am. Bar Ass’n Standing Comm. on Legal Aid and Indigent Defendants, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* (2004) [hereinafter *Gideon’s Broken Promise*].

³⁷ *Id.* at 7–14.

³⁸ *Id.* at 14–20.

³⁹ *Id.* at 20–22.

⁴⁰ *Id.* at 22–26.

⁴¹ *Id.* at 26–28.

⁴² *See id.* at 7 n.39 (citing eight reports and articles from 1982 to 2004 on problems in indigent defense systems).²²

- ⁴³ See Danny Hakim, *Judge Urges State Control of Legal Aid for the Poor*, N.Y. Times, June 29, 2006, at B1. According to William E. Hellerstein, a professor at the Brooklyn School of Law and a co-chairman of the commission, “Virtually every member of the commission has had long experience in the criminal justice system.” Hellerstein added: “I think it’s fair to say that despite our experience, we were somewhat taken aback by the depth and the extent of the crisis.” *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ *Id.*
- ⁴⁶ Gideon’s Broken Promise, *supra* note 41, at 3 n.25 (citing C. Ronald Huff et al., *Convicted but Innocent: Wrongful Conviction and Public Policy* 76–77 (1996); Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* 183–92 (2000); Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 *Hastings L.J.* 835, 868 (2004)).
- ⁴⁷ Janet Reno, Att’y Gen., Remarks at the National Symposium on Indigent Defense 2000 (June 29, 2000), in *Office of Justice Programs, U.S. Dep’t of Justice, National Symposium on Indigent Defense 2000: Redefining Leadership for Equal Justice* vi–vii (2000), *quoted in* Gideon’s Broken Promise, *supra* note 41, at 3.
- ⁴⁸ See Innocence Project Home Page, www.innocenceproject.org (last visited Dec. 20, 2006).
- ⁴⁹ See Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, N.Y. Times, Aug. 26, 2002, at A1; Innocence Project, Case Profiles, Eddie Joe Lloyd, http://www.innocenceproject.org/case/display_profile.php?id=110 (last visited Dec. 20, 2006).
- ⁵⁰ See Gideon’s Broken Promise, *supra* note 41, at 29–35.
- ⁵¹ See Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 *Vand. L. Rev.* 1807, 1857 (2005).
- ⁵² See *id.* at 1857–58.
- ⁵³ See Maryann Jones, *And Access for All: Accommodating Individuals with Disabilities in the California Courts*, 32 *U.S.F. L. Rev.* 75, 91–95 (1997).
- ⁵⁴ See generally Jeanette Zelhof et al., *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 *Cardozo Pub. L. Pol’y & Ethics J.* 733 (2006).
- ⁵⁵ 541 U.S. 509 (2004).
- ⁵⁶ See *id.* at 533–34.
- ⁵⁷ See *id.* at 514.
- ⁵⁸ See *id.* at 518, 531.
- ⁵⁹ Memorandum from Jerry Kuban, Court Consulting Services on National Center for State Courts Response/Reaction to *Tennessee v. Lane* 2 (June 16, 2004), *available at* http://www.ncsconline.org/WC/Publications/KIS_AmeDisResponseLanevTN.pdf.
- ⁶⁰ See Courthouse Advisory Committee Home Page, <http://www.access-board.gov/caac/index.htm> (last visited Dec. 20, 2006).
- ⁶¹ Cal. Comm’n on Access to Justice, *Language Barriers to Justice in California* 9 (2005), *available at* http://calbar.ca.gov/calbar/pdfs/reports/2005_Language-Barriers_Report.pdf.
- ⁶² See *id.* at 18.
- ⁶³ *Id.* at 1 n.2.23

⁶⁴ *Id.* at 23.

⁶⁵ *See, e.g.*, N.Y. State Unified Court Sys., Court Interpreting in New York: A Plan of Action 1 (2006), available at http://www.courts.state.ny.us/courtinterpreter/action_plan.pdf.

⁶⁶ Admin. Office of the Courts, Judicial Council of Cal., Family Law Interpreter Pilot Program: Report to the Legislature 2 (2001), available at www.courtinfo.ca.gov/programs/cfcc/pdffiles/FLIPP.PDF.

⁶⁷ Claire Cooper, *Interpreter Shortage Leaves Courts in a Bind*, Sacramento Bee, Sept. 8, 2005, at A1; *Line Item Injustice: Governor Blue-Pencils Court Interpreters*, Sacramento Bee, July 15, 2006, at B6.

⁶⁸ N.Y. State Unified Court Sys., *supra* note 70, at 1.

⁶⁹ *See* Cal. Comm'n on Access to Justice, *supra* note 66, at 17–18, 22–23.

⁷⁰ *See, e.g.*, Garrett v. Bd. of Trs. of the Univ. of Ala., 531 U.S. 356 (2001) (sharply circumscribing the ability of the disabled to bring claims against state employers under the ADA); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (similarly limiting the ability of senior citizens to sue state employers for damages under the Age Discrimination in Employment Act).

⁷¹ *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that private individuals could not bring claims under Title VI of the Civil Rights Act of 1964, which prohibits race- and national origin-based discrimination, under a “disparate impact” theory, and could bring claims only under the much harder to prove *intentional* discrimination theory).

⁷² *See* United States v. Morrison, 529 U.S. 598, 617–19 (2000) (holding that Congress was not authorized under the Commerce Clause to create a private remedy for victims of gender-motivated violence to sue in civil court).

⁷³ *See generally* Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (2006); David Rose, *Guantánamo: The War on Human Rights* 13–22, 33–41 (2004); Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. Times, Oct. 25, 2004, at A1; Tim Golden & Don van Natta, Jr., *U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. Times, June 21, 2004, at A1.

⁷⁴ *See* Al-Marri v. Hanft, 378 F. Supp. 2d 673 (D.S.C. 2005).

⁷⁵ *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (mem.).

⁷⁶ *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, Wash. Post, Nov. 2, 2005, at A1; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, Wash. Post, Dec. 26, 2002, at A1.

⁷⁷ *See generally* Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (2004).

⁷⁸ *See In re Guantanamo*, 355 F. Supp. 2d at 450 (defining “enemy combatant”) (quoting Memorandum from the Deputy Secretary of Defense regarding Order Establishing Combatant Status Review Tribunal to the Secretary of the Navy (July 7, 2004), available at <http://defenselink.mil/news/Jul2004/d20040707review.pdf>). *See generally* Major Richard B. Baxter, *So-Called “Un-privileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int’l. 323, 340 (1951); W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 Case w. Res. J. Int’l. 39 (1977).

⁷⁹ *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001); *see also* U.S. Const. art. I, § 9, cl. 2 (preventing suspension of habeas corpus except “in cases of rebellion or invasion”).

⁸⁰ Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

⁸¹ *See generally* Brief for the Respondents in Opposition, *Hamdi*, 542 U.S. 507 (No. 03-6696).24

- ⁸² Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11*, at 150 (2006).
- ⁸³ Cf. Aziz Huq, *Extraordinary Rendition and the Wages of Hypocrisy*, 23 *World Pol'y J.* 25, 28–32 (2006) (discussing the foreign policy consequences of extraordinary rendition).
- ⁸⁴ For an examination of the law of war related to detention issues, see generally Michael Byers, *War Law: Understanding International Law and Armed Conflict* 127–35 (2006).
- ⁸⁵ *But see* Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* 13–72 (2006) (criticizing the dichotomy between “war” and “criminal” approaches to counterterrorism).
- ⁸⁶ See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 *Cornell L. Rev.* 97, 124–29 (2004) (discussing the extent to which the Geneva Conventions are self-executing).
- ⁸⁷ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).
- ⁸⁸ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).
- ⁸⁹ See *Hamdi*, 542 U.S. at 518–19 (O'Connor, J., plurality opinion).
- ⁹⁰ In *Hamdi*, the relevant territorial conflict was the ground war in Afghanistan. See *id.* at 518, 521.
- ⁹¹ *Hamdan*, 126 S. Ct. at 2795 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).
- ⁹² See *Hamdi*, 542 U.S. at 516–20 (plurality opinion); see also *Padilla v. Hanft*, 126 S. Ct. 1649, 1649 (2006) (mem.) (declining certiorari review to petition from “enemy combatant” detained in United States).
- ⁹³ See *Rasul v. Bush*, 542 U.S. 466, 484 (2004).
- ⁹⁴ See *Abu Ali v. Aschroft*, 350 F. Supp. 2d 28, 59–61 (D.D.C. 2004) (explaining that the United States does not evade liability for constitutional violations by acting in collaboration with foreign government).
- ⁹⁵ *Hamdi*, 542 U.S. at 536–37 (plurality opinion).
- ⁹⁶ See *id.* at 538; *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 465–78 (D.D.C. 2005) (mem.).
- ⁹⁷ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (2006) (Stevens, J., plurality opinion). See generally Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *Yale L.J.* 1259 (2002) (exploring the constitutionality of military tribunals).
- ⁹⁸ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–06, 119 Stat. 2680, 2739–44.
- ⁹⁹ See *id.* § 1005(c), 119 Stat. at 2742.
- ¹⁰⁰ See *Hamdan*, 126 S. Ct. at 2765–69.
- ¹⁰¹ See generally Serrin Turner & Stephen J. Schulhofer, Brennan Ctr. for Justice at NYU Sch. of Law, *The Secrecy Problem in Terrorism Trials* (2005).
- ¹⁰² Pub. L. No. 109-366, 120 Stat. 2600.
- ¹⁰³ Military Commissions Act of 2006 § 7(a). Thus far, one district court has agreed with the government and upheld the MCA's repeal of habeas jurisdiction over the petitions of Guantanamo detainees. See *Hamdan v. Rumsfeld*, -- F. Supp. 2d --, No. 04-1519 (JR), 2006 WL 3625015, at *9 (D.D.C. Dec. 13, 2006).
- ¹⁰⁴ See *Hamdan v. Rumsfeld*, 2006 WL 3625015, at *1.
- ¹⁰⁵ See Military Commissions Act of 2006 § 950j(b), 120 Stat. at 2623–24.25

¹⁰⁶ Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA].

¹⁰⁷ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) [hereinafter IIRIRA].

¹⁰⁸ See AEDPA §§ 401–43.

¹⁰⁹ See IIRIRA tit. III, §§ 301–88 (Inspection, Apprehension, Detention, Adjudication, and Removal of Inadmissible and Deportable Aliens).

¹¹⁰ See Ronald Weich, ACLU, *Upsetting Checks and Balances: Congressional Hostility Toward the Courts in Times of Crisis* 30 (2001) (citing the example of a mother of two who was deported for a previous conviction of shoplifting fifteen dollars of merchandise when she tried to return baby clothes without a receipt, notwithstanding her pending application for citizenship and steady work history).

¹¹¹ See IIRIRA § 302(a).

¹¹² See, e.g., Lawyers Comm. for Human Rights, *Is This America? The Denial of Due Process to Asylum Seekers in the United States* (2000).

¹¹³ 533 U.S. 289 (2001).

¹¹⁴ See *id.* at 308–14.

¹¹⁵ See *id.* at 315, 326.

¹¹⁶ See *Zadvydas v. Davis*, 533 U.S. 678, 699–700 (2001).

¹¹⁷ See *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (relying on *St. Cyr*).

¹¹⁸ See Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205.

¹¹⁹ See, e.g., Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 Cal. L. Rev. 1173, 1190, 1228 (2004) (describing the adverse impact on asylum seekers).

¹²⁰ See 8 C.F.R. § 3 (2005).

¹²¹ See Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 Cornell L. Rev. 459, 474–75 (2006).

¹²² *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

¹²³ See REAL ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231, 310–11; Motomura, *supra* note 126, at 486–88.

¹²⁴ See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 609 (2005).

¹²⁵ See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

¹²⁶ See *INS v. Chadha*, 462 U.S. 919, 941–42 (1983).

¹²⁷ See generally Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping our Legal System*, 108 Penn St. L. Rev. 165 (2003) (providing a history of the development of alternative dispute resolution methodologies).

¹²⁸ See *id.* at 187.

¹²⁹ It has been estimated that as of 2002, about ten to twenty percent of the workforce was covered by a mandatory arbitration agreement. See Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 Cal. L. Rev. 1203, 1209 (2002) (citing Charlie Cray, *See you in . . . Arbitration?*, *Multinat'l Monitor*, Dec. 1, 2000, at 4; David E. Feller, *Putting 26*

Gilmer Where it Belongs: The FAA's Labor Exemption, 18 Hofstra Lab. & Emp. L.J. 253, 253 (2000)).

¹³⁰ A recent study of 161 businesses across 37 industries from which consumers make expensive and/or ongoing purchases found that 35.4% of those businesses included mandatory arbitration clauses in their consumer contracts. Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 Law & Contemp. Probs. 55, 62 (2004). The study found use of arbitration agreements in each of the following categories: Home Repair/Remodeling, Homeowners' Insurance, Apartment Rental, Renters' Insurance, Real Estate, Internet Service, Online Retail, Auto Purchase/Lease, Gas Card, Auto Insurance, Health Insurance, Health Club, Tour Operator, Credit Card (general, airline, store), Banking, Investments, Accountant/Tax Consultant, Attorney, and Cellular Telephone. *Id.* at 63 tbl. 2.

¹³¹ See generally Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 Law & Contemp. Probs. 133 (2004); Julia A. Scarpino, *Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers*, 10 Am. U. J. Gender Soc. Pol'y & L. 679 (2002); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33.

¹³² See Pub. Citizen, *The Costs of Arbitration* 42–51 (2002), available at <http://www.citizen.org/documents/ACF110A.PDF>.

¹³³ See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 378 (2005) (citing David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 Va. L. Rev. 1871, 1906 n.62 (2002), and arguing that class actions serve the important role of aggregating small claims). These collective action waivers also serve as a bar to collective action in the arbitration context, precluding individuals from aggregating their claims in that forum as well. See Demaine & Hensler, *supra* note 143, at 66 (stating that just over thirty percent of surveyed arbitration clauses precluded collective action in arbitration proceedings). Courts have generally upheld these collective action waivers. See Gilles, *supra*, at 400 nn.137, 139 (surveying state and federal court decisions regarding the unconscionability of arbitration provisions that waive class action rights).

¹³⁴ Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emp. Rs. & Emp. Pol'y J. 189, 205–10 (1997) (finding that employers who are repeat players at arbitration do better in arbitration than employers who arbitrate only once).

¹³⁵ See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006).

¹³⁶ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

¹³⁷ Am. Bar Ass'n, Report to the House of Delegates No. 112A(2006), available at <http://www.abanet.org/legal-services/sclaid/downloads/06A112A.pdf>.

¹³⁸ See, e.g., *Airey v. Ireland*, 2 European Court of Human Rights (series A) 305 (1979).

¹³⁹ 542 U.S. 466 (2004) (holding that detainees at Guantanamo Bay have the right to challenge their indefinite executive detention by habeas corpus).

At New York University School of Law
161 Avenue of the Americas
12th Floor
New York, NY 10013
212-998-6730
www.brennancenter.org