



FALL 2017 VOL. 17 NO. 1

A TOLERANCE AND DIVERSITY NEWSLETTER

Real Threat to Democracy is Voter Suppression, Not Fraud *by Jodi L. Miller*

The right to vote is at the core of American democracy. If you don't have access to the ballot box, you don't have a voice in government.

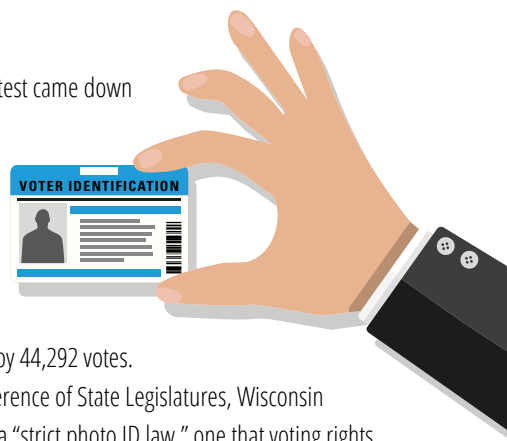
Roughly 135 million votes were cast in the 2016 presidential election. When all was said and done, Donald Trump emerged the winner in the Electoral College (304 to 227), but Hillary Clinton won the popular vote by almost three million votes. It is the Electoral College, however, that matters, so the presidency went to Trump.

In our system of government, the president is not elected by popular vote, but through the Electoral College. In this system, voters in each state actually select a slate of electors (either Democrat or Republican). The candidate that wins the popular vote in a particular state receives all (winner-take-all) of that state's electors, except in Maine and Nebraska. Both of those states allocate their electoral votes by the percentage of popular vote won. Whichever candidate wins 270 electors, wins the presidency.

Three states key

Experts agree that the contest came down to three key states—Wisconsin, Michigan and Pennsylvania—and less than 80,000 votes. All three states went to Trump by slim margins: Wisconsin by just over 22,000 votes, Michigan by 10,704 votes and Pennsylvania by 44,292 votes.

According to the National Conference of State Legislatures, Wisconsin is one of seven states that have a "strict photo ID law," one that voting rights advocates assert suppressed the vote in the state. The Wisconsin Elections



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When Bias Eclipses Jury Secrecy *by Cheryl Baisden*

In a court case where a jury will decide the defendant's fate, one of the most important aspects of the trial is the certainty of impartiality.

"The Sixth Amendment [of the U.S. Constitution] guarantees the rights of criminal defendants, including the right to a trial by a fair and impartial jury," says Mary Francis Palisano, a Newark-based criminal defense attorney.

As a result, prosecution and defense attorneys interview potential jurors before they are selected to hear a case, and can request an individual be removed from consideration if they believe the candidate will be unable to make an impartial

decision. One important aspect of that impartiality involves the guarantee of secrecy during jury deliberations.

"There are many reasons individuals would prefer that juries deliberate in secret," Palisano says, "including finality [the fact that a case, once settled cannot be retried], the ability of jurors to discuss issues freely, protection from harassment, and promoting trust in the jury system."

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America's Colleges Face Their Racist Legacy *by Phyllis Raybin Emert*

When we think about slavery and who benefited from the institution, the South immediately comes to mind. However, the North benefited greatly from the Atlantic slave trade as well. Slavery didn't end in the Northern colonies until 1804, when the last Northern colony (New Jersey) passed legislation to abolish it.

Today, many colleges and universities are coming to grips with how they benefited from the institution of slavery—from the slave labor used in construction of campus buildings to wealthy benefactors involved in the slave trade. In 2003, Brown University, located in Providence, RI, was the first institution of higher education to examine and acknowledge the university's links to slavery. A report released by the university in 2006 revealed that 30 members of its Board of Governors owned or captained slave ships. While Brown University did not own or trade slaves, the Brown family, for whom the university is named, did. Rhode Island was the Northern hub of the Atlantic slave trade. Approximately 1,100 voyages brought more than 100,000 Africans into bondage.

Universities Studying Slavery (USS) is a consortium of colleges and universities devoted to researching the historical relationship between institutions of higher education and their ties to slavery. Originally comprised of only a few Southern schools, the USS has grown to incorporate more than two dozen colleges and universities, including Rutgers and Columbia universities.

A New Jersey connection

Working in conjunction with USS, in 2016 Rutgers University released *Scarlet and Black, Volume 1: Slavery and Dispossession in Rutgers History*, which examines how the university benefited from the slave economy during the time the college was built. In the Foreword of the book, Rutgers University Chancellor Richard L. Edwards stated that he asked the researchers "to seek out the untold history that we have ignored for too long, such as that our campus is built on land taken from the Lenni Lenape and that a number of our founders and early benefactors were slaveholders." In addition, Edwards writes about the discovery that an enslaved man named Will helped lay the foundation of Old Queens, the college's original building.

The publication's Introduction, which lays out the project's goals, states: "We show the wealth that was generated by slavery and the slave trade, and how and to what affect that wealth was transferred to Rutgers by its early benefactors."

Sparking debate

As a result of the USS's efforts, college students around the country are taking a closer look at the people their schools choose to celebrate, which has sparked a national debate. Should these "heroes" be judged by the standards of the times they lived in or by today's morals and ethics? If these champions

"What does it mean to honor someone who did something dishonorable?"

are found wanting, do we wipe out their names and memorials, or explain them in a historical context as a means of educating the public?

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America's Colleges Face Their Racist Legacy CONTINUED FROM PAGE TWO

Craig Steven Wilder, an MIT historian and the author of the book, *Ebony and Ivy: Race, Slavery and the Troubled History of America's Universities*, told the Atlanta Journal Constitution, "Part of the conflict that we're having on campuses is a generation of students who are making us be honest about the legacies of racism and racial inequality that actually helped to form our universities."

Brian Stevenson, founder of the Equal Justice Initiative, said in an interview for *CBS News Sunday Morning*, that he would like to see discussion about "what it means to honor someone who did something dishonorable."

Georgetown University

Last year, Georgetown University in Washington DC, the oldest Catholic college in the United States, acknowledged that the university profited from the sale of 272 slaves in 1838. The money earned from the sale was used to help pay off university debts. The slaves, including men, women, and children, were sent to plantations in Louisiana.

Student activists protested that two buildings on campus were named after men who participated in the sale. Georgetown President John J. DeGioia announced in September 2016 that Mulledy Hall and McSherry Hall would be renamed for Isaac Hawkins, one of the slaves sold in 1838, and African American educator Anne Marie Becraft, who started a school for black girls.

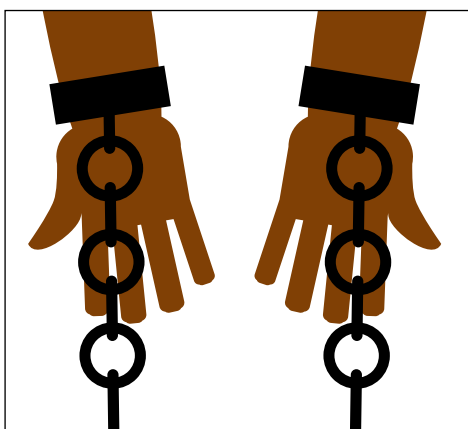
In addition, DeGioia offered a formal apology to the descendants of those slaves, and advised that the university would create an institute for the study of slavery and erect a public memorial to the slaves whose labor benefited Georgetown. The university will also award "preferential status in its admissions process to descendants of all the enslaved whose labor benefited the university." Preferred status is usually only given to the children of alumni.

Yale's Calhoun College

In 1930, Yale University in New Haven, Conn. named one of its residential colleges for John C. Calhoun (1782–1850), a political figure from South Carolina, who was best known as a defender of

slavery. A Yale grad, Calhoun served as Vice President of the United States (under Presidents John Quincy Adams and Andrew Jackson), Secretary of War (under President James Monroe) and Secretary of State (under President John Tyler).

In 2016, Yale students protested, demanding the university change the name of Calhoun College, but the administration initially took no action. After white supremacist Dylann Roof murdered nine black members of the Emanuel A.M.E. Church in Charleston, SC, however, the school formed a



committee to study the issue.

Yale undergrad Dasia Moore was a member of that committee and wrote in an opinion piece for *The Nation*, "What and whom we choose to memorialize from the past...serve as powerful symbols of the present...[We] continue to struggle to preserve history without perpetuating inequality and prejudice."

The committee offered several principles to judge the namesake of a building or memorial. Was the person a "subject of debate even in their own lifetime?" Did the university act "against its own mission" of community, learning, and diversity? Was the building or memorial "central to community life and unity?"

In February 2017, Yale President Peter Salovey announced the committee's conclusion, saying, "The decision to change a college's name is not one we take lightly, but John C. Calhoun's legacy as a white supremacist and a national leader who passionately promoted slavery as a 'positive good' fundamentally

conflicts with Yale's mission and values."

The college was renamed after Grace Murray Hopper, a Yale graduate, computer scientist, mathematician and teacher, who helped develop the computer language COBOL in the 1970s. She joined the Navy and rose to the rank of rear admiral as well as being the recipient of the Presidential Medal of Freedom.

It should be noted that Elihu Yale (1649–1721), the university's namesake, was a very successful slave trader.

Different outcome at Princeton

In 2015, after student activists accused Woodrow Wilson (1856–1924) of racism, a special committee was formed at Princeton University to study his life, legacy and views on race to determine whether he should still be honored on campus. Students wanted his name taken off Princeton's School of Planning and Public Policy.

Born in Virginia, Wilson grew up in Georgia and South Carolina, graduated from Princeton in 1879, and taught law and the political economy. He became president of Princeton University in 1902, then Governor of New Jersey in 1910, serving as president of the United States from 1912 to 1921.

During Wilson's presidency, the 19th Amendment was passed, allowing women to vote. He led America during World War I and was the architect of the League of Nations for which he received the Nobel Peace Prize in 1919. He was also a segregationist all his life and once said, "Segregation is not a humiliation but a benefit, and ought to be so regarded."

Ultimately, the committee concluded that Wilson's substantial accomplishments overshadowed his shortcomings and decided his name should remain on campus buildings. As a concession to the protesters, Princeton University agreed to establish a program to encourage minority students to pursue doctoral degrees and to diversify symbols and art on campus.

Valuing U.S. Citizenship *by Jodi L. Miller*

"Your argument is demeaning the priceless value of citizenship," Justice Anthony Kennedy told a Justice Department lawyer during oral arguments in the case of *Maslenjak v. United States*. "You're arguing for the government of the United States, talking about what citizenship is and ought to mean."

Three ways to get it, two ways to lose it

There are three means of acquiring citizenship in the United States. You can have what is called *jus soli* (right of the soil) birthright, which means you were born here. You can also be born outside of the U.S. and still be a U.S. citizen if at least one of your parents is a U.S. citizen. Finally, you can become a naturalized citizen via an application process after meeting certain requirements, including being a permanent resident for at least five years or three years if married to a U.S. citizen.

The two ways to lose citizenship are either by expatriation, which is voluntarily relinquishing your nationality, or via denaturalization. Denaturalization only applies to those who acquired their citizenship via naturalization. In addition, denaturalization can only be imposed if it is proven that some type of fraud was committed in the naturalization process.

That brings us back to the case of *Maslenjak v. United States*. The defendant in the lower court case is Divna Maslenjak, an ethnic Serb from Bosnia, who, along with her family sought refugee status in 1998. Maslenjak claimed that her family fled Bosnia fearing persecution because her husband evaded joining the Bosnian Serb Army. That turned out to be false. Maslenjak's husband did serve in the Bosnian Army and, in fact, his brigade participated in a bloody massacre.

One of the questions on the citizenship application is whether you've ever given false information to a government official, to which Maslenjak answered no. The government later discovered her husband's army participation and she was charged with knowingly obtaining her naturalization illegally. She was convicted in a lower court and an appeals court **affirmed** that conviction. She and her family were deported to Serbia.

What constitutes a lie?

The *Maslenjak* case was **appealed** to the U.S. Supreme Court. The lower court had instructed the jury that any lie told in connection with the citizenship process was a crime. The justices of the U.S. Supreme Court took issue with that from the beginning.

For instance, one question on the application form for citizenship asks whether the applicant has ever committed a criminal offense, even a minor one, even if the offense did not result in an arrest. During oral arguments, Chief Justice

John Roberts set up a scenario of getting a speeding ticket and asked the Justice Department lawyer, "If I answer that question no, 20 years after I was naturalized as a citizen, you can knock on my door and say, 'Guess what, you're not an American citizen after all?'" The lawyer said, "If we can prove that you deliberately lied in answering that question, then yes."

Justice Roberts was skeptical. Then, Justices Elena Kagan and Sonia Sotomayer asked about the failure to disclose embarrassing information such as a nickname or their weight. The Justice Department's position was that any false statement, no matter how trivial, is still subject to the law.

Justice Stephen G Breyer said he found it surprising "that the government of the United States thinks that the naturalization laws should be interpreted in a way that would throw into doubt the citizenship of vast percentages of all naturalized citizens." Justice Roberts expressed concern as well.

"If you take the position that not answering about the speeding ticket or the nickname is enough to subject that person to denaturalization," Justice Roberts said, "the government will have the opportunity to denaturalize anyone they want."

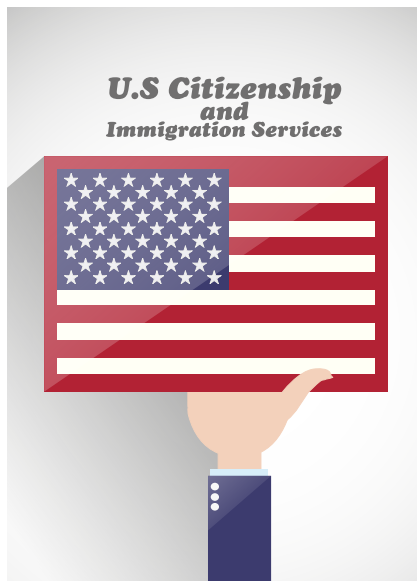
"We have never read a statute to strip citizenship from someone who met the legal criteria for acquiring it. We will not start now."

Decision of the Court

The Court ruled unanimously that naturalized citizens cannot be stripped of citizenship if a lie or omission on their citizenship applications was irrelevant to the decision to grant citizenship. In other words, if a lie was told it needs to be material to obtaining citizenship in order for it to be prosecutable.

In the Court's majority opinion, Justice Elena Kagan wrote: "We hold that the government must establish that an illegal act by the defendant played some role in her acquisition of citizenship. When the illegal act is a false statement, that means demonstrating that the defendant lied about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would predictably have led to other facts warranting that result." Justice Kagan added, "We have never read a statute to strip citizenship from someone who met the legal criteria for acquiring it. We will not start now."

The Court was concerned about the implications for all naturalized citizens.



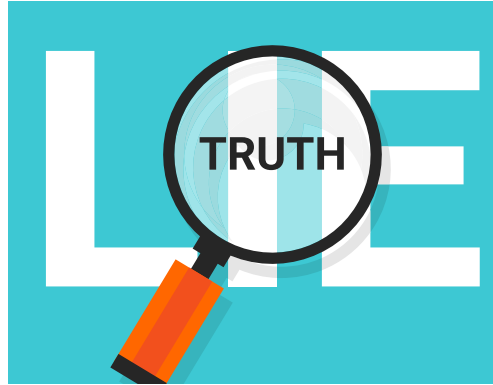
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"The government opens the door to a world of disquieting consequences," Justice Kagan wrote and added that it would "give prosecutors nearly limitless leverage—and afford newly naturalized Americans precious little security."

When is a lie material?

What the case ultimately came down to, according to Professor Linda Bosniak, of Rutgers Law School—Camden, who has been published extensively on the topics of immigration and citizenship, was the "**materiality**" of the misrepresentation that Maslenjak had made." The question being: "Would what she had falsely stated about her husband's situation during the war be deemed material to her own eligibility for naturalization such that government could proceed to say that naturalization was fraudulently procured [obtained]?"

Professor Peter J. Spiro, a law professor from Temple University, who specializes in immigration law, says the bottom line of the Court's decision is that



the misrepresentation has to be material either directly to a defendant's naturalization qualifications or would lead to the discovery of other facts that would go to qualifications for naturalization.

For example, Professor Spiro says if she had lied about where she lived in Bosnia, by itself wouldn't be material. However, if she told that lie to conceal other things that would have been revealed if she had given the correct address, that would be a material lie.

The Court **remanded** Maslenjak's case back to the lower court, which will need to retry the case with the correct standard.

So, what does this case mean for others seeking citizenship via naturalization? It means they don't have to be nervous that their citizenship could be revoked if they inadvertently omit information from their application.

Professor Spiro points out that had the Court's decision gone the other way, those seeking naturalized citizenship would have had cause to worry. ●

Bias Eclipses Jury Secrecy CONTINUED FROM PAGE 1

It's important to recognize, however, that "secrecy" does not mean *complete* secrecy, she notes.

"When individuals refer to jury deliberations as being secret, that only means that a juror can not be compelled to talk about what happened in deliberations or what another juror said during deliberations," says Palisano. "While state laws differ, the general rule is that jurors are otherwise free to discuss their experiences during jury deliberations. In fact, lawyers routinely interview jurors after a trial to gain insights about a case they won or lost."

Under what is known as the no-impeachment rule, jurors can disclose deliberations, including related misconduct to the court at any time before a verdict is reached. Once a verdict is handed down, however, while jurors are free to discuss the deliberations, that information cannot be used in an appeal.

That longstanding rule was put to a legal test in March, when the U.S. Supreme Court handed down

a 5–3 decision in *Pena-Rodriguez v. Colorado*, finding that courts must make an exception to the secrecy rule when there is evidence that deliberations were tainted by racial or ethnic bias.

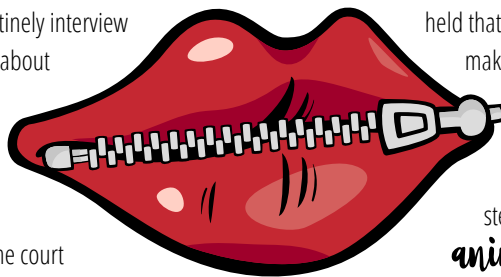
"The Court considered whether the no-impeachment rule, which is meant to protect the secrecy of jury deliberations and the finality of jury verdicts, should be set aside when the deliberations include overt racial bias," says Palisano. "The Court held that 'where a juror makes a clear statement that indicates he or she relied on racial stereotypes or **animus** to convict a criminal defendant, the

Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement.' The Court further found that 'not every offhand comment indicating racial bias or hostility

will justify setting aside the no-impeachment bar to allow further judicial inquiry.' For the inquiry to go further, there must be a showing of 'overt racial bias' that casts 'serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict.'"

The debate over bias

Pena-Rodriguez centered around statements made by a member of a Colorado jury during deliberations in a 2010 sexual assault trial. According to the sworn testimony of two jurors, one member of the jury, referred to in court records as H.C., said he believed Pena-Rodriguez was guilty of harassing and trying to grope two teenage girls because "he's Mexican, and Mexican men take whatever they want." The juror, a former police officer, added that where he used to patrol, Mexican men were guilty of being aggressive toward women and young girls nine times out of 10. He also said he didn't believe the witness who provided an alibi for the defendant because, among other things, he was "an illegal,"



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Commission revealed that voter turnout for the 2016 election was down by three percent from 2012, amounting to over 93,000 votes.

What is voter suppression?

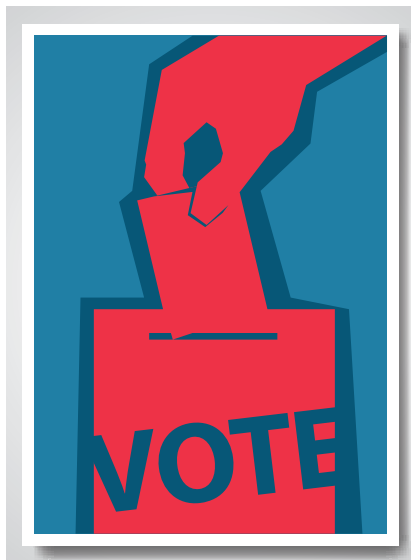
Voter suppression is the discouragement or prevention of citizens from voting. It is used as a strategy to influence the outcome of an election. According to the Brennan Center for Justice, a **nonpartisan** law and policy institute that seeks to improve our system of democracy, 99 bills were introduced in 31 states that sought to limit access to the ballot box.

There are countless ways that states can use their power to suppress voters, Myrna Perez, deputy director of the Brennan Center's Democracy Program, says. Some voter suppression tactics are subtle, while others are more obvious. According to Perez, voter suppression tactics that the Brennan Center fights in court include "strict voter ID laws, unlawful purging of voter rolls, and documentary proof of citizenship laws." Perez notes that proof of citizenship is an example of an obvious suppression technique.

"These are state laws that require voters to produce a birth certificate or U.S. passport before they can register to vote [and] make community voter registration drives virtually impossible to run," Perez says. "Such a law was implemented in Kansas, and tens of thousands of attempted registrations have already been blocked—between eight and 14 percent of new registrants—in the first years of the requirement. Almost all of these registrants were eligible citizens."

A subtle example of voter suppression, Perez says, is voter ID laws. The Brennan Center is in an ongoing fight against Texas over its voter ID law. "That ID law has been found to have been passed

with intent to discriminate against Black and Latino voters by multiple federal courts," Perez says.



Missing the VRA

The Voting Rights Act (VRA) of 1965, signed into law by President Lyndon Johnson, prohibited discrimination in voting nationwide on the basis of race. A special provision of the VRA was Section 5, which required certain jurisdictions (mainly but not all in the South) with a history of discrimination to obtain pre-clearance from the U.S. Attorney General before implementing any changes to voting laws.

With its decision in the 2013 case of *Shelby v. Holder*, the U.S. Supreme Court struck down parts of the VRA, in particular the formula used to determine which jurisdictions are subjected to pre-clearance. The 2016 presidential election was the first in 50 years without the full protection of the Voting Rights Act. As a result, Perez says, 14 states had new voting restrictions in effect—including cuts to early voting and photo ID laws in Virginia and Wisconsin.

"We know from litigation that these types of restrictions disproportionately harm Black and Latino voters who are less likely to have the required forms of ID and are more likely to make use of early voting," Perez says.

In addition to the harms to affected voters, Perez notes that the widespread confusion among voters and officials in the 2016 election also made it harder for citizens to cast ballots.

"In Texas, for example, the country's strictest photo ID requirement was found to be racially discriminatory by a federal court," Perez says. "The court-ordered fix for the 2016 election still required voters who could show photo ID without difficulty to do so. But voters who faced a 'reasonable impediment' to obtaining ID should have been able to vote after signing an affidavit and showing one of a much longer list of IDs."

According to Perez, the remedy was not properly implemented with numerous reports of "public education materials in the polling places being incorrect as to what the ID requirement was; poll workers not understanding the ID requirement; and voters not having enough information before Election Day to understand the ID requirements."

Looking into fraud

Shortly after the election, President Trump made unsupported claims of rampant voter fraud during the 2016 election, which he said caused him to lose the popular vote to his opponent. In May 2017, he established the Presidential Advisory Commission on Election Integrity to look into what most believe, and repeated studies have shown, is a non-existent problem—in-person voter fraud.

"The data show Americans are more likely to be struck by lightning than commit election fraud," Rudy Mehrbani, senior counsel at the Brennan Center, told *Time*.

Kansas Secretary of State Kris Kobach, who co-chairs the president's commission, told CNN, "The commission is not set up to disprove or to prove President Trump's claim, nor is it just looking at the 2016 election. We're looking at all forms of election irregularities, voter fraud, voter registration fraud, voter intimidation, suppression, and looking at the vulnerabilities of the various elections we have in each of the 50 states."

The American Civil Liberties Union has filed a lawsuit, *ACLU v. Trump*, demanding transparency and accountability from the president's Election Integrity Commission.

Purging voters

Another tactic to suppress the vote is the purging of voter rolls. The Justice Department under the Obama Administration claimed Ohio's policy of purging voters that don't regularly vote was in violation of the 1993 National Voter Registration Act. The Sixth U.S. Circuit Court of Appeals blocked the policy. Ohio **appealed** to the U.S. Supreme Court, who agreed to hear the case. In a reversal of position, the Trump Administration is now backing

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Ohio in its appeal. Voting rights advocates are also fighting voter purges in Georgia and Indiana.

In an op-ed for *The New York Times*, Vanita Gupta, president and chief executive of the Leadership Conference on Civil and Human Rights, points to a letter sent by the Justice Department's Civil Rights Division. "It forced 44 states to provide extensive information on how they keep their voter rolls up-to-date. It cited the 1993 National Voter Registration Act, known as the Motor-Voter law, which mandates that states help voters register through motor vehicle departments," wrote Gupta, who headed the Civil Rights Division under the Obama Administration. "The letter doesn't ask whether states are complying with the parts of the law that expand opportunities to register. Instead it focuses on the sections related to maintaining the lists. That's a prelude to voter purging."

Kobach advocates using the Interstate Crosscheck System, an anti-fraud data program, to purge voter rolls. The system compares names on voter rolls and identifies voters registered in more

than one state. The problem with the system is that it is wrong 99 percent of the time. A 2017 study conducted by researchers at Stanford, Harvard and Microsoft revealed that for every double vote the program finds, it flags 200 legitimate voters as well.

Real problems

In an effort to prevent voter fraud, Kobach has been a staunch advocate for voting restrictions and has spearheaded several initiatives in his state. A federal court ruled that these restrictive requirements for Kansas voters denied more than 18,000 the right to cast a ballot and garnered only nine convictions for voter fraud.

In addition, Associated Press reports revealed that Kansas rejected 13,717 ballots from the 2016 election, three times as many ballots as other states of the same size. For

perspective, Florida, the third largest state, which has seven times as many residents as Kansas, tossed fewer ballots (13,461).

Kansas Minority House Leader Jim Ward told *The New York Times*, "Whenever I hear Kris Kobach use the words 'voter fraud,' what that means in English for regular old folks is voter suppression. Most secretaries of state see their job to be a fair arbiter of elections. Kris has believed that the secretary of state is a **partisan** tool to affect the results of elections."

A *New York Times* editorial stated: "If the commission were serious about improving confidence in elections, it would focus on real problems afflicting voting and registration—like aging voting machines, hours long lines at the polls and cyber attacks by hostile nations." ●



America's Colleges Face Their Racist Legacy CONTINUED FROM PAGE THREE

Taking a second look

Established in 1836 as the first chartered women's college in the U.S., Wesleyan College in Macon, GA, which is also part of the USS, recently acknowledged its ties to the Ku Klux Klan.

Wilder told *The Atlanta Journal Constitution* that few schools have acknowledged such ties.

"I think it gets a little too close to home," Wilder said. "If

the subject of slavery on campus is uncomfortable, imagine the discomfort that we have with the heavy presence, the constant presence of racist traditions well into the 20th century when many of us actually began our college and professional school careers."

In an attempt to atone for the past, many colleges across the country are taking second looks at buildings

named for white supremacists. At the University of Texas, for example, Simkins Hall was renamed Creekside Residence. William Simkins was an outspoken racist. Saunders Hall at the University of North Carolina was renamed Carolina Hall. William Saunders was a KKK organizer. In addition, students at both Clemson and Winthrop universities are calling for the renaming of their respective Tillman Halls. Benjamin Tillman was a white supremacist and advocated violence against African Americans. ●



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when, in fact, the man was a legal U.S. resident.

The jury ultimately found Miguel Angel Pena-Rodriguez guilty of three misdemeanors and sentenced him to two years probation, but they deadlocked on the more serious felony charge. Following the verdict, two jurors revealed H.C.'s statements and questions arose about whether they influenced the jury. Based on state and federal law, the judge ruled H.C. couldn't be asked about his comments because statements made during deliberations can't be used as evidence to challenge a verdict.

Later, the Colorado Supreme Court ruled 4-3 to **uphold** the judge's decision, with the majority finding: "Protecting the secrecy of jury deliberations is of paramount importance to our justice system." Justice Monica Marquez, however, writing for the dissenting justices, noted that jury secrecy cannot "trump a defendant's opportunity to vindicate his fundamental constitutional right to an impartial jury untainted by the influence of racial bias."

When the matter reached the U.S. Supreme Court, the U.S. Department of Justice, the state of Colorado and 12 other states argued that ruling in favor of Pena-Rodriguez could make future jurors hesitant to voice their opinions about racial issues and encourage losing parties to harass jurors in an effort to find evidence of racism.

"No one disputes that racial bias is reprehensible and has no place in the jury room," Colorado's brief to the Court read. "The question here is whether one particular method of addressing racial bias among jurors—post-verdict inquiry into jury deliberations—is constitutionally compelled despite wide acceptance of the no-impeachment rule."

The Court's prior rulings

The Court's decision in *Pena-Rodriguez* actually runs counter to its earlier rulings related to jury secrecy and misconduct.

In 1987, in *Tanner v. United States*, the Court did not act even though a juror said jurors participated in "rampant drug and alcohol abuse," including beer, wine, marijuana and cocaine, during recesses. And in 2014, in *Warger v. Shauers*, the Court unanimously ruled that jurors could not testify about deliberations, even in cases where a juror was dishonest during the selection process. The case involved a motor vehicle accident where one driver lost part of his leg. During deliberations, the jury foreman revealed for the first time that her daughter had been involved in a fatal accident, and that a court case would have "ruined her life."

In that finding, Justice Ruth Bader Ginsburg wrote: "What's involved here is a juror reporting what she heard during deliberations. And it seems to me that's exactly the kind of thing that is not permitted." At the same time, Justice Sonia Sotomayor opened the door for the recent *Pena-Rodriguez* decision, writing: "There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process."

The challenge going forward

The *Pena-Rodriguez* ruling may pose a challenge to courts and juries in the future.

In writing for the dissent in the case, Justice Samuel Alito Jr. noted it will be difficult to limit the scope of the ruling. "The real thrust of the majority opinion is that the Constitution is less tolerant of racial bias than other forms of juror misconduct,

but it is hard to square this argument with the nature of the Sixth Amendment... What the Sixth Amendment protects is the right to an 'impartial jury.' Nothing in the text or history of the amendment or in the inherent nature of the jury trial suggests that the extent of the protection provided by the amendment

depends on the nature of a jury's partiality or bias," he wrote.

According to Palisano, there are both pros and cons to the decision.

"The pro to this ruling is that in these types of situations, which most agree it is an extraordinary case, a defendant's right to a fair and impartial trial will be protected," she notes. "The con, as noted by the majority and Justice Alito's dissent, this ruling may discourage meaningful discussion during jury deliberations. Other individuals may be more reluctant to serve on a jury. It also takes away the finality to verdicts, and may cause juror harassment after they are discharged, then possible exposure to further court inquiry and proceedings." ●



Glossary

affirm—to uphold, approve or confirm. **animus**—hostile feeling or animosity. **appeal**—a request that a higher court review the decision of a lower court. **materiality**—the quality of being relevant or significant. **nonpartisan**—not adhering to any established political group or party. **partisan**—someone who supports a party or cause with great devotion. **remand**—to send a case back to a lower court. **uphold**—support; keep the same.