

AN AGENDA
FOR ELECTION
REFORM

Wendy R. Weiser and Jonah Goldman

Brennan Center for Justice *at New York University School of Law*
and the
Lawyers' Committee For Civil Rights Under Law

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a public policy institute that works to strengthen democracy and secure justice through law, scholarship, education and advocacy. With Justice Brennan, we believe that a “living constitution” is the genius of American law and politics – and that the test of our institutions is the ability to apply timeless values to a changing world.

ABOUT THE LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Lawyers’ Committee for Civil Rights Under Law, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers’ Committee is to secure, through the rule of law, equal justice under law.

The Lawyers’ Committee implements its mission and objectives by marshaling the pro bono resources of the bar for litigation, public policy advocacy, and other forms of service by lawyers to the cause of civil rights.

© 2007. This paper is covered by the Creative Commons “Attribution-No Derivs-NonCommercial” license (see <http://creativecommons.org>).

It may be reproduced in its entirety as long as the Brennan Center for Justice at NYU School of Law and Lawyers’ Committee for Civil Rights Under Law are credited, links to the Center’s web page and to the LCCRUL’s web page are provided, and no charge is imposed. The paper may not be reproduced in part or in altered form, or if a fee is charged, without the Center’s and LCCRUL’s permission. Please let the Center and LCCRUL know if you reprint.

AN AGENDA FOR ELECTION REFORM

by

Wendy R. Weiser

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

and

Jonah Goldman

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Our Constitution promises every eligible American a full and equal opportunity to participate in the political process. Unfortunately, defects in election administration and procedures undermine that promise by disenfranchising countless eligible Americans every election cycle. These defects can be remedied, and the promise of democracy restored, by implementing real reforms to ensure that all eligible Americans have a fair and equal opportunity to vote and to have their votes counted. This memorandum sets out a comprehensive reform agenda for the 110th Congress to achieve that goal and explains the reasons for each policy reform.

This memorandum provides elaboration, support and background for “An Agenda for America’s Voters,” a comprehensive proposal to Congress on how best to use its Constitutional authority to regulate federal elections, endorsed by dozens of organizations. This agenda is the product of years of research and experience by a variety of organizations and institutes focused on civil rights, voting rights, and civic participation. Over the past few years, these organizations have created an extensive record of the problems voters face as they attempt to register, vote, and have their votes counted. The following recommendations are designed to address those problems, to promote the integrity of elections, and to ensure that our electoral process serves all American citizens. The recommendations are organized into the following five subsections: (i) measures to improve the voter registration process, (ii) measures to improve electronic voting systems, (iii) measures to prevent disenfranchisement on or near Election Day, (iv) measures to improve the administration of elections, and (v) measures to expand the franchise.

I. IMPROVE VOTER REGISTRATION PROCESS

Voter registration problems typically are the largest cause of unwarranted voter disenfranchisement in the United States. Year after year, a substantial number of Americans show up at their polling places only to find that their names are not on the voter rolls, either because of a problem in the registration process or because their names have been incorrectly removed from the rolls. Others are unable to register to vote in advance of Election Day because of restrictive voter registration requirements. Although the new statewide voter registration databases mandated by HAVA have the potential to mitigate these problems, that potential has not been reached, and few states have adopted policies and practices to use their databases to help voters. The causes of voter registration problems are multiple, and they have been fleshed out through extensive study and advocacy experience.

Any reform agenda should address the myriad barriers to voter registration that currently plague our electoral system. Since new barriers frequently arise, a reform agenda should also include protections to ensure that additional barriers do not disenfranchise voters. And since existing voter registration systems themselves are often a significant barrier to voting for many citizens, even when they function properly, a reform agenda should seek to expand the ways in which citizens can become registered to vote. Overall, the goals of federal reform of the voter registration process are: (a) to expand the avenues for voter registration; (b) to remove technical and other barriers to voter registration; (c) to improve practices for purging the voter rolls of ineligible voters by increasing public transparency and reducing the likelihood that eligible voters will be disenfranchised; and (d) to make it easier for citizens to determine their voter registration status.

A. Expand Avenues for Voter Registration

1. SAME DAY REGISTRATION

Election 2004 saw an encouraging trend in voter turnout nationwide—about a 5% increase from four years earlier. While voter turnout was up across the country, four of the top five states with the highest percentage of eligible voters who cast ballots had one thing in common: they allowed citizens to register and vote at the polls on Election Day. In the six states that had “same day registration” in 2004, eligible voter turnout was 13.6% higher than in those states that did not.¹

In addition to increasing turnout, same day registration helps overcome a number of problems in state registration systems. Americans often complain that voter registration deadlines prevent them from participating in elections because they frequently become engaged in elections and political discussions after the registration deadline has passed. Moreover, one of the most frequent causes of disenfranchisement on Election Day, even for those who have submitted timely voter registration applications, is the registration process. Year after year, thousands upon thousands of voters show up at the polling place only to find that a technical or administrative error prevented

them from showing up on the rolls. Election officials often cannot meet the last minute demand for voter registration before the deadline, causing backlogs of voter registration cards that do not get processed in time for Election Day. These problems will not disenfranchise voters if states provide for same day registration. We therefore propose the following federal reform:

- **Same Day Registration.** Congress should pass legislation that allows every eligible Americans to register and vote the same day for all federal elections. Any such legislation must provide adequate resources to state and local election administrators to implement an effective same day registration system. It should also ensure that only eligible voters can take advantage of the same day registration system.

2. REGISTRATION WHEN CITIZENS BECOME ELIGIBLE TO VOTE

New citizens, young people who reach voting age, and Americans who reenter civic life after incarceration should be encouraged to participate fully in our democracy. Studies show that when voters cast a ballot the first time they are eligible to vote, they are far more likely to become life-long voters. To do so, they must first become registered to vote. According to the Census Bureau, more than 25% of voting-age Americans, and more than 50% of those aged 18-24, are not registered. We therefore propose the following federal reforms:

- **Voter registration for newly eligible citizens.** Congress should require that voter registration be made available at high school graduations, college freshmen orientations, naturalization ceremonies and, where applicable, when Americans become eligible to vote after they have lost their eligibility for a period of time. Currently, the NVRA requires all state departments of motor vehicles and state social service agencies to provide opportunities for their clients to register. This model should be expanded to encourage newly eligible voters to register by making registration available at naturalization ceremonies, at high schools and colleges, and at the appropriate departments of correction, probation or parole.
- **Mailing to newly eligible citizens.** Congress should require states to mail voter registration application cards to citizens on their eighteenth birthdays and to other newly eligible citizens.
- **Improve civic education.** Congress should also encourage, possibly through pilot programs, creative civic education in high schools to teach young people the importance of democratic participation as well as how to be effective voters. Such programs should include classroom voter registration and education on how to be a poll worker.

3. REGISTRATION WHEN ELIGIBLE CITIZENS MOVE

One of the problems most frequently reported to the voter protection hotlines on Election Day is that eligible registered voters do not know that they must re-register when they move, even if they move just a few houses away.² The NVRA already contains only limited protections for voters who change their address within a precinct, municipality, or county. Simple outreach to moving citizens can help

ensure that all valid registrations are properly updated, and that all eligible citizens are thereby able to cast a valid vote. We therefore propose the following federal reform:

- **Voter registration materials in postal moving materials.** Congress should require that the United States Postal Service offer voter registration forms among the other materials they make available to Americans who change their mailing address. Currently, the NVRA provides for the use of postal change-of-address information to remove voters from jurisdictions where they are no longer eligible, but it does not provide a straightforward corresponding process for adding voters in their new jurisdictions.

4. ENSURE PROPER NVRA IMPLEMENTATION

The National Voter Registration Act (NVRA) provides for voter registration at motor vehicle and public assistance offices, at state disability agencies, and via the mail. Congress designated public assistance offices as voter registration sites so that low-income citizens would have equal access to registration at public agencies. These Americans are less likely to own automobiles, frequent departments of motor vehicles, and register at DMV agencies. While the NVRA requires that public assistance agencies offer voter registration to applicants and clients, research suggests that many states are ignoring this federal requirement. Voter registration applications from public assistance offices dropped by almost 60 percent from 1995 to 2004, while applications from all other sources increased by 22 percent. To ensure that registration opportunities are enjoyed by all Americans, regardless of income levels, Congress should ensure that the NVRA's provisions are implemented and enforced:

- **Congressional oversight of NVRA Implementation.** Congress should increase its oversight over state implementation of the NVRA's public assistance provisions and the Department of Justice's enforcement of the federal law.

5. ENCOURAGE INNOVATIONS IN VOTER REGISTRATION PROCESS

New technologies and ideas have the potential to improve the accuracy, accessibility, and effectiveness of our voter registration systems. Congress should promote innovations in the voter registration process to ensure that it better serves voters, including the following:

- **Public access portals to voter registration lists.** To enable citizens to verify and update their voter registration status and information, Congress should encourage states to make available secure and accessible public access portals through which individual voters or their agents can verify, correct, or update the information in their voter registration records. These portals should be accessible to individuals with disabilities and language minority voters.
- **Study on-line voter registration.** Congress should provide funding for research on whether and how the Internet can be useful in the voter registration process, including research on how to overcome security and privacy concerns. Although there are serious concerns about the security and reliability

of using the Internet in connection with elections, if those concerns can be addressed, the Internet may provide a convenient way to enable eligible citizens to register and vote.

B. Remove Technical and Other Barriers to Voter Registration

1. FAIR PROCESSING OF VOTER REGISTRATION FORMS

Voter registration forms are often rejected for technical reasons that have nothing to do with a voter's eligibility.³ For example, as they implemented their new statewide voter registration databases, a number of states refused to add registrants to the voter rolls unless their voter registration information "matched" data in other government databases. Unfortunately, given the inconsistent quality of existing government databases and the poor technology used for "matching," up to 20%—and in some cases, 30%—of registrants who should have "matched" did not because of typos, maiden names, and other immaterial differences in records.⁴ These policies resulted in the disenfranchisement of eligible voters through no fault of their own. Other common examples of this phenomenon are discussed in part 2, below. To guard against unwarranted disenfranchisement as a result of incorrect processing of voter registration forms, the following additional protections are needed:

- **Construction of voter registration forms.** States should be prohibited from refusing to process voter registration forms that contain all the information necessary to determine voter eligibility, even if the forms are not completed entirely in the prescribed manner, such as if there are minor errors or omissions that are not determinative of eligibility. Ambiguous responses on a voter registration form should be construed in favor of the registrant. For example, states should be prohibited from summarily rejecting voter registration applications where applicants are unable to recall their driver's license or non-driver's ID numbers or make mistakes in transcribing those numbers.
- **Notice and opportunity to correct.** States should provide registrants timely notice and opportunities to correct errors on or information missing from their voter registration forms. Forms submitted before the voter registration deadline should be deemed timely submitted even if the correction is made or the missing information is provided after the voter registration deadline but before the election.
- **Matching as a tool, not a barrier.** Congress should make it clear that, under HAVA, states may not reject voter registration applications based solely on the fact that the information in the application does not match the information in existing government databases.⁵
- **Uniform and transparent rules for processing forms.** States should be required to promulgate uniform and transparent rules for determining voter eligibility and for determining when a voter registration form may be rejected.
- **Coordination with social service agency databases.** States should be required to coordinate their statewide voter registration databases with the databases of social service agencies to ensure timely

processing of voter registration forms submitted through social service agencies and to provide another tool for verifying and correcting information in voter registration records.

2. CLARIFY VOTER REGISTRATION FORMS

The Help America Vote Act of 2002 (HAVA) mandated several changes to state and federal voter registration forms that have caused confusion among many voters and, in a number of states, has led to the rejection of many voter registration forms submitted by eligible applicants.

The first set of requirements that have caused problems are HAVA's citizenship and age check box requirements. The new language HAVA requires on all voter registration forms is confusing to many voters and leads many reasonably to understand that they need not check any boxes in order to become registered.⁶ Unfortunately, some states have penalized voters for failing to understand this language and have refused to register eligible voters who fail to check the "yes" boxes on their voter registration forms, even though the forms contain no instructions to suggest that any adverse consequences would follow from failing to check those boxes, and even though the forms otherwise include sufficient information to determine the applicants' eligibility.⁷

HAVA's identifying number provisions have caused similar problems.⁸ Although there is nothing inherently disenfranchising about those provisions, a number states have implemented them in a way that incorrectly blocks eligible voters from participating in the process. For example, several states have refused to register voters without driver's license or Social Security numbers if those voters did not write "none" in lieu of providing the numbers, even though nothing on the form instructs applicants to do so. In addition, few state forms specifically indicate that a state-issued non-driver's ID number is acceptable as a "driver's license number."

To address these and similar problems, federal law should ensure that voter registration forms are easy for citizens to understand and use and should ensure that states do not refuse to register eligible voters because of technical errors or omissions. To address the problems arising from the forms themselves, Congress should require:

- **Clarification of check box language.** The HAVA language for the citizen and age check boxes should be revised to eliminate any ambiguity on the voter registration form.
- **Clarification of identifying number language.** The HAVA language for identifying numbers should be clarified to specify that the space for a "driver's license number" includes non-driver's ID numbers, and to provide a clearly-marked space on the voter registration form for applicants who do not have the requested numbers to so indicate.
- **Usability testing.** State and federal voter registration forms should be tested for usability, to ensure that all eligible citizens can understand and properly complete them.

3. NO NEW REQUIREMENTS FOR VOTER REGISTRATION

In a recent trend that is causing great concern, several states are seeking to impose new and onerous requirements for voter registration. The most burdensome such policy currently in effect is Arizona's demand that citizens provide documentary proof of citizenship with their voter registration applications. Arizona's new requirement, which is currently the subject of federal litigation, has led to the disenfranchisement of many citizens, including more than 22,000 people whose applications were rejected in 2006 for lack of proof of citizenship.

Proof-of-citizenship requirements invariably put burdens – including financial burdens – on citizens themselves. While it would be ideal if all U.S. citizens had documents such as a passport, a birth certificate, or naturalization papers readily available, the truth is that many do not.⁹ A birth certificate usually costs \$10 to \$15. According to the Bureau of Consular Affairs, only 25-27% of eligible Americans have passports, which now cost \$97. Naturalization papers, if they are lost or damaged, cost \$210. A proof of citizenship requirement would result in making the exercise of the right to vote unaffordable for many citizens. For some citizens, proof of citizenship may even be impossible to obtain. In certain parts of the country, for example, many African Americans and Native Americans were born at home, under the care of midwives, and were never issued birth certificates.

Congress should enact further protections to guard against these new barriers to voter registration:

- **No new requirements for voter registration.** States should not be allowed to require voters to meet additional requirements beyond those already required by the NVRA in order to be registered to vote for federal elections.¹⁰ In particular, states should not be allowed to require identity documentation or proof of citizenship as a condition of voter registration.

4. PROTECT VOTER REGISTRATION DRIVES

Nonprofit voter registration drives are playing an increasingly important role in expanding voter registration and participation in the United States, especially among those citizens who have traditionally faced the greatest barriers to the franchise. In 2004, several large nonprofits alone registered 10 million voters, more than one fifth of the total that year; in some jurisdictions, private voter registration drives accounted for as much as 40% of the total registrations. For certain groups of citizens, such as many people of color, people in low-income communities, and younger and elderly citizens, these drives provide the most convenient and accessible means of registering to vote.

Unfortunately, instead of praising voter registration groups for their contribution to democracy and civic participation, a number of states responded by passing laws restricting voter registration drives, making it difficult—and in some cases, impossible—for them to operate. These new restrictions, which vary from state to state, include short deadlines for submitting voter registration forms,

backed by criminal penalties or heavy civil fines; rules limiting the number and types of forms available to organized voter registration drives; onerous pre-registration and training requirements; and rules specifying the manner in which voter registration drives are to be operated, among other things. As a result of these new laws and regulations, voter registration drives were seriously hampered in a number of states in 2006, including Florida, Ohio, New Mexico, Colorado, and Georgia, among others.¹¹

To protect this important avenue of voter registration as well as the civic engagement essential to a vibrant democracy, Congress should:

- **Prohibit undue burdens on voter registration drives.** States should be prohibited from imposing undue burdens on the ability of private groups and individuals, as well as governmental entities, to conduct voter registration drives.
- **Additional protections for voter registration drives.** More specific protections may also be warranted. For example, states should be expressly prohibited from limiting the number of voter registration forms available to organized voter registration programs or from preventing those programs from using the federal voter registration form. In addition, states should not be allowed to impose financial or criminal penalties on individuals or groups for conduct in voter registration drives that is not willful, fraudulent, or likely to injure voters.

C. Fair List Maintenance

1. FAIR STANDARDS FOR PURGING INELIGIBLE VOTERS FROM VOTER ROLLS

Although purges of the voter registration rolls are an important component of list maintenance, poorly conducted purges can disenfranchise thousands of eligible citizens. New statewide voter registration databases make it easier for states to purge voters from the rolls by pushing a button. Most states are now able to develop lists of voters to be purged from the rolls by electronically “matching” names on voter rolls against government databases of persons ineligible to vote. Unfortunately, the “matching” processes used are inaccurate and may result in many eligible voters being purged from the voter rolls. Since states rarely provide effective notice of a purge, voters whose names have been removed from the rolls usually do not learn of the problem until they show up at the polls on Election Day and are denied a regular ballot. The secrecy of the process makes it easier for election officials to manipulate purges to target certain groups of citizens.

The most notorious examples of flawed purges occurred in Florida in 2000 and 2004. In 2000, thousands of legal voters were purged from Florida’s voter rolls simply because their names shared 80% of the characters of the names on a list of people with felony convictions. In 2004, the state developed a purge list of 47,000 “suspected felons;” despite Florida’s sizable Hispanic population, the list contained only 61 Hispanic surnames, over-represented African Americans, and also mistakenly included thousands who had had their voting rights restored. Although these errors were widely publicized, similar errors across the country escape public scrutiny.

To protect eligible citizens from inaccurate or unfair purges, Congress should enact the following protections:

- **Transparency of purge procedures.** States should be required to develop and publish uniform, non-discriminatory, and transparent standards for determining when, why, how, and by whom a voter registration record can be purged from the list of eligible voters.
- **Public notice of purges.** States should be required to provide effective public notice of an impending purge at least 30 days in advance of the purge. The NVRA already provides that no organized purge should take place within the 90 days preceding any federal election.
- **Notice to voter and opportunity to contest purge.** No state should be permitted to remove an individual's registration record from the list of eligible voters without giving the affected person sufficient notice and an opportunity to contest the purge or correct any errors. Notice should be provided at least 30 days in advance of a prospective purge by sending to the last known address of the affected person a certified, forwardable letter, accompanied by a postage pre-paid response card.
- **Maintain purge history to facilitate reinstatement.** States should be required to retain registration records that have been purged from the list of eligible voters, preferably in their computerized databases, and to develop procedures for reinstating records that have been incorrectly purged. States should also be required to transmit data regarding individuals who have completed incarceration or sentences from their departments of corrections or other relevant agencies to their chief election officials to facilitate reinstatement.
- **Acceptable basis for purge.** No state should be permitted to refuse to register a voter or to premise a purge based solely on one undeliverable mailing. Despite the serious potential for inaccuracy, postcards sent to voters and returned as undeliverable are often used as the basis for a purge or a bar to initial registration. The NVRA already provides some protection against using unreliable postcard mailings to obstruct registration, but several states ignore this provision in practice, and a Michigan federal district court has interpreted the language to be meaningless for new registrants.

2. PRIVACY AND SECURITY OF PERSONAL INFORMATION ON VOTER REGISTRATION LISTS

As a result of HAVA, each state is required to have a statewide voter registration database that is coordinated with other state databases and that contains personal information about each registered voter, such as her driver's license number or her Social Security number. This new development creates a substantial risk that confidential information about voters may be accessed by unauthorized individuals and used for improper purposes. This could leave many voters susceptible to identity theft and other injuries. Although federal law already requires states to ensure the privacy and security of personal information in voter registration lists, few states have implemented serious security measures. Indeed, over the past two years, there have been several well-publicized security

breaches involving voter registration lists. We therefore recommend that Congress take further steps to ensure the security and privacy of voter registration information:

- **Voter registration list privacy and security.** Congress should take additional steps to ensure the security and privacy of electronic voter registration lists, including by promoting research on best practices and by requiring the Election Assistance Commission or the National Institute of Standards and Technology to develop privacy and security standards.

II. IMPROVE VOTING SYSTEMS

Research shows that all of the most commonly purchased electronic voting systems have significant security and reliability vulnerabilities. For example, radio frequency wireless components in voting machines pose an especially large security risk, as does the failure of states to audit voter-verified paper records. Unless adequate protections are put in place, there is a risk that these voting systems could be tampered with so as to change the outcomes of elections. This risk further undermines Americans' confidence in our electoral system.

In addition to security and reliability problems, some voting systems have significant usability and accessibility problems that lead to the loss of votes. It is essential that, in making any reforms, Congress preserve the gains that HAVA made in ensuring that all voters, including voters with disabilities and language minority voters, have an opportunity to cast an independent and secret ballot. Those protections need not be compromised to ensure that new voting systems are secure and reliable.

Congress should pass comprehensive legislation mandating necessary security protections for all voting systems. Congress should also take additional steps to ensure that voting systems are usable and accessible. The most important such protections include:¹²

- **Voter verified audit records.** Congress should mandate voter verified audit records for all electronic voting systems. The voter verified audit records must be independent of the software used in the voting systems, such as paper records.¹³ They must also be accessible to people with disabilities and language minority voters.
- **Mandatory audits.** Congress should require an audit of the voter verified audit records after every federal election. It should also ensure that the auditing procedures are transparent and effective.
- **Ban wireless components.** Congress should ban radio frequency wireless components in all voting systems. The use of all other wireless components should be severely curtailed, if not eliminated.
- **Ballot chain of custody practices.** Congress should require states to implement good practices concerning ballot chain of custody.

- **Access to firmware and software.** Many states have had difficulty gaining access to the firmware and software on their own machines. Congress should address this problem and end the exclusive private control that many vendors have over the code on voting machines owned by local jurisdictions.
- **Usability and accessibility testing.** Congress should mandate usability and accessibility testing for all new voting systems and ballot designs.
- **Emergency ballots.** Congress should require all states to make available emergency ballots in all polling places using electronic voting systems.
- **Different Election Methods.** Congress should promote voting systems that are ready to implement effectively any election method currently used in elections in the United States, including cumulative voting and ranked choice systems.

III. PREVENT DISENFRANCHISEMENT ON OR NEAR ELECTION DAY

A. Prohibit Deceptive Practices and Voter Intimidation

Every election cycle, voters are inundated with a flurry of information aimed at educating them about issues, candidates, and the electoral process. Unfortunately, not all of this information is designed to help voters make informed political choices; instead, in nearly every election cycle many voters, disproportionately those in minority communities, are confronted with deceptive information designed to prevent them from casting a meaningful ballot. In 2004, for example, fliers in African American neighborhoods of Milwaukee, Wisconsin falsely warned voters that if they had not paid their parking tickets, if they had ever been convicted of a felony or if they had ever voted in an election that year that they would be punished for going to the polls. In 2006, fliers distributed to voters with Latino surnames in Orange County, California incorrectly intimated that it is illegal for naturalized citizens to vote. In Virginia, Colorado and New Mexico, voters received automated calls communicating incorrect information about where and when to vote and the requirements for voting.¹⁴

- **Prohibit voter intimidation and deceptive practices.** Congress should pass legislation that prohibits and provides voters with adequate recourse for conduct aimed at preventing them from voting through intimidating or deceptive practices. This legislation should preserve the fundamental First Amendment freedom of speech, particularly in the political arena. In addition, the legislation should include a remedial structure that provides members of affected communities with immediate, correct information from a reliable and trusted source.

B. Prevent Disenfranchisement as a Result of Documentation Requirements

A wave of restrictive voter ID and proof of citizenship laws and proposed laws across the country seek to condition the right to vote on presentation of a strictly limited set of documents. Tens of millions of eligible citizens do not have the documents required under those proposals, especially people of color, low-income citizens, the elderly, and students. A recent study by the Brennan Center, for example, shows that more than half of all voting-eligible women do not have proof of citizenship with their current names on it. A 2005 Wisconsin study showed that 78% of African-American men between the ages of 18 and 24 do not have driver's licenses.

In 2006, new voter ID requirements caused enormous problems and disenfranchised many across the country, even where restrictive laws were not in effect. Most notoriously, South Carolina Governor Mark Sanford and Ohio Representative Steven Chabot were turned away from the polls for lack of proper ID, and Missouri's chief election official, Robin Carnahan, was improperly asked to show photo ID despite the fact that the state's supreme court had struck down Missouri's photo ID law. Equally problematic, calls to voter protection hotlines revealed that many voters were turned away across the country even though they showed military IDs or because their addresses on their photo IDs were not current.

In some jurisdictions, restrictive ID laws may have helped determine the outcome of the elections. In Franklin County, Ohio, for example, many voters were turned away or forced to cast provisional ballots because of new ID requirements which were improperly administered. Overall, 20,000 provisional ballots were cast in the county (5,000 more than in 2004). In the race in Ohio's 15th Congressional district, Rep. Deborah Pryce beat challenger Mary Jo Kilroy by only 1,062 votes. In Arizona, at least 22,000 voters were denied registration because of the state's new proof of citizenship requirement, and 1,300 voters in one county alone were forced to cast provisional ballots because of the state's new polling place ID requirements. Several local races were decided by a smaller margin.

- **Resist restrictive ID and proof of citizenship requirements.** First and foremost, Congress should resist any attempt to make proof of citizenship or photo ID a pre-condition of voting. Congress should similarly resist efforts to require voters to present a durable voter registration card, since a substantial number of Americans in states that currently produce such cards do not receive their cards in the mail or lose them before the election.
- **Repeal onerous provision of REAL ID Act.** The REAL ID Act of 2005, which is scheduled to go into effect in 2008, imposes a series of burdensome federal requirements on state photo ID cards, including driver's licenses. Among those is a requirement that each citizen show documentary proof of citizenship and that the state verify that documentation with the Department of Homeland Security before the individual is issued a driver's license or other photo ID. The National Governors

Association, the National Council of State Legislatures, and the American Association of Motor Vehicle Administrators have estimated that it will cost states at least \$11 billion to implement the REAL ID Act over the first 5 years.¹⁵ Because states cannot and will not comply with its mandates, and because individuals will be injured, Congress should repeal the onerous requirements of the REAL ID Act.

- [Resources for voter education on ID](#). Congress should provide resources for state and local election officials to educate their voters and poll workers about what identification is necessary in order to vote as well as what identification is not required. Congress should amend Section 302 of HAVA to require that states post at every polling place, information about voter identification including what identification is required to receive a ballot.
- [Prohibit onerous state documentation requirements](#). Congress should also enact protections to guard against voter disenfranchisement as a result of restrictive state-imposed voter ID or proof of citizenship requirements and the improper implementation of any such requirements.

C. Ensure Fair and Effective Provisional Balloting

Provisional balloting was one of the centerpieces of HAVA, intended to provide a fail-safe mechanism to ensure that eligible voters will not be disenfranchised as a result of administrative errors. Although provisional ballots have saved many votes that otherwise would have been lost, their promise has been severely hampered by the failure of states to adopt procedures to ensure that provisional ballots are a true fail-safe for eligible voters. Worse yet, a number of states have adopted provisional balloting procedures under which voters are provided ballots that will not be counted under any circumstances. These “placebo ballots” not only fail to provide a fail-safe for eligible voters, but they also mislead voters into believing that they have cast meaningful ballots when they have not. The problems are compounded by the fact that many states do not have uniform rules for counting provisional ballots, which means that one county might count certain provisional ballots that neighboring counties will reject.

We therefore recommend the following proposals to restore the promise of provisional ballots:

- [Require provisional ballot forms to be used as voter registration forms](#). All states should be required to add eligible voters who voted by provisional ballot to their voter registration lists. The provisional ballot envelope typically includes all information required on a voter registration form. This has been implemented successfully in a number of states.
- [Uniform and transparent counting standards](#). All states should be required to publish uniform and transparent standards for determining when a provisional ballot will count, well in advance of an election.

- **Provisional ballots cast by voters sent to the wrong precinct or polling place.** States should not refuse to count a provisional ballot cast by an eligible voter in the wrong precinct or polling place for all the races for which that voter was eligible to vote. This would not prevent states from maintaining a precinct-based voting system or from penalizing voters or others for deliberately undermining that system without good cause.

IV. IMPROVE ELECTION ADMINISTRATION

A. Prevent Conflicts of Interest

Over the past few election cycles, Americans have become frustrated with election officials who seem more interested in partisan electoral successes than in ensuring that voters in their jurisdictions have the ability to cast meaningful ballots. In 2000 and 2004, the national spotlight shone on chief election officials in several states because of the conflicts of interest between their roles in running elections and their official positions in partisan political campaigns. Controversies arose over last minute election administration decisions in those states because those decisions appeared to benefit the candidates for whom those officials were working. Regardless of whether state election officials who hold positions in partisan political campaigns actually base their election administration decisions on illegitimate partisan considerations, conflicts of interest create incentives for wrongdoing and cause voters to doubt the impartiality of those running their elections, undermining the integrity of the process. Voters should be confident that those who are selected to run their elections have the interest of democracy, and not the interest of partisanship, as their primary concern. To increase confidence in the fairness of elections, we recommend the following reforms:

- **Prevent conflicts of interest.** Congress should adopt legislation that prevents conflicts of interest by amending Title III of the Federal Election Campaign Act to prohibit chief state election officials from actively campaigning for a candidate for political office or serving as an official on a candidate's campaign.
- **Prohibit last-minute changes in election rules.** Congress should prohibit last minute changes in the rules that govern elections. Instead, states should be required to publicly post election laws and regulations 90 days before an election and should be prevented from changing the rules after that date, except in response to court rulings or an unforeseen emergency.

B. Ensure Adequate and Equitable Allocation of Election Resources

In the past two federal election cycles, voters across the country were disenfranchised by long lines at the polling place. In 2004, for example, some voters in urban districts in Columbus, Ohio waited to vote in the pouring rain for over 5 hours while other voters in suburban precincts in the same

county quickly cast ballots at their polling places. In 2006, voters in St. Louis reported similar delays at the polling place to the Election Protection hotline. It is a constant struggle for state and local election officials across the country to ensure adequate and equitable allocation of election resources, including voting machines and poll workers. These problems disproportionately affect voters who have work, family or other considerations that prevent them from spending hours at the polling place on Election Day.

- **EAC study and guidance.** Congress should require the Election Assistance Commission to study the issue of election resource allocation and develop recommendations on the most effective formula for states and local election officials to follow in making election resource allocation decisions. It should provide adequate resources for this task.
- **State plans.** Congress should require each state to submit a written plan about how it intends to adequately ensure, to the extent possible, equitable wait times for all polling places within each jurisdiction and that no voter has to wait more than one hour.

C. Improve Poll Worker Recruitment and Training

According to the Election Assistance Commission, two million poll workers are needed to run an effective federal election. Those Americans who devote their time to serve as poll workers should be praised for their commitment to our nation's democratic principles. Unfortunately, each election many polling places have too few poll workers to administer orderly and well-run elections. Equally problematic, the poll workers who do commit their time are frequently unfamiliar with essential rules and procedures.

In 2006, poll workers in precincts across the country showed up on Election Day to find unfamiliar voting machines and registration procedures, causing polling places to open late. In other precincts unfamiliarity with the proper procedures for overcoming election machine problems forced voting to slow to a trickle and, in some cases, led to lost votes. Voters from coast to coast were asked for identification in violation of state election laws.¹⁶ Some poll workers discriminated against certain voters, including voters with limited English-speaking skills. In 2004, there were widespread reports about poll worker confusion with provisional balloting that caused many voters to leave the polls without taking advantage of this safeguard. Clearly, poll workers need to be better trained. As federal, state and local election laws and rules are in a constant state of flux, poll workers should be trained before every election cycle.

Congress should do all it can to address the problems that voters face due to a lack of poll workers or because poll workers are under-trained and under-prepared.

- **Funding and incentives to states.** Congress should provide funding incentives to state and local jurisdictions to provide poll workers with the resources they need to do their job effectively.

Congress should also provide incentives for states to develop adequate training protocols as well as incentives for states to make training more frequent, more comprehensive and better tailored to the experience and inexperience of those citizens who serve as poll workers.

- **Pilot programs on poll worker training and recruitment.** Congress should promote pilot programs to encourage public employees to serve as poll workers. These programs should develop a detailed training curriculum for workers who elect to participate and who can dedicate more time than most poll workers to preparing for Election Day service. Because of their superior training, employees who take advantage of the pilot program should lead operations at the polling place. They should be rewarded, not penalized, for their participation in the program. Similarly, Congress should promote pilot programs to encourage high school and college students to serve as poll workers. This will serve the dual interests of bolstering the poll worker ranks and instilling civic responsibility and familiarity with our nation's democratic process in young citizens.
- **Uniform training manuals.** Congress should amend Title III of HAVA to require states to develop uniform statewide training manuals that cover those parts of the election process that can be standardized statewide.
- **Improve civic education.** As discussed in section I.A.2 above, Congress should promote civic education in high schools to improve democratic participation. Such programs should include education on how to be a poll worker.

D. Enhance Information Collection and Reporting

Although state election officials have access to useful information about voters, elections, and the electoral process, too little of that information is compiled and disseminated to the public. Better data about each election could provide a much better understanding of what works and does not work in election administration, which practices should serve as models for other jurisdictions, where problems occur, and the needs of voters in different communities, among other things. This data should be compiled on a regular basis because both the American public and state elections systems continue to change.

- **Information collection and reporting.** Congress should amend Title III of HAVA to expand the information states must provide in a timely and comprehensive reports about their elections. These reports should include: registration statistics, including demographic breakdowns and information about voters who have moved; detailed statistics about voter turnout; information about absentee balloting including the number of absentee ballots requested, processed, and rejected; details about provisional balloting including the number of provisional ballots cast, the number counted, and the number of provisional ballots rejected and the specific reasons those ballots were rejected; information about how voters with disabilities and language minority voters were afforded access

to the ballots, as required by federal law; information about the number and location of voting sites, including how many voting sites were moved since the last election and why those sites were moved; information on voting machines including the number of machines available in each jurisdiction, where and how many of those machines were placed at each location; and detailed information on the costs and funding of elections.

E. Improve Voter Education

One of the most frequent causes of voter disenfranchisement is a lack of information. As our election system continues to change, voters often show up at the polling place to find new and confusing procedures and equipment. The drafters of HAVA were correct in emphasizing the responsibility of election officials to educate their constituents on how to cast a meaningful ballot. Voters need clear information about how the registration process works and what the qualifications to vote are. They should also know what to expect when they show up at the polling place. Rules about what voters cannot do, or what constitutes election fraud and intimidation, should also be clear and the penalties communicated to deter those who would like to unfairly manipulate the system. In addition, voter education programs are far less effective if they are not conveyed in a way that is accessible to the audience. Different communities respond to different messages and methods. Significant resources and attention are thus needed to improve voter education.

- **HAVA funding.** Congress should fully fund HAVA to ensure that states have the resources to conduct effective voter outreach and education. Congress should also expand the mandate for voter education to require jurisdictions to provide voters with more information.
- **Sample ballots.** Congress should encourage states to ensure that each jurisdiction sends each registered voter a sample ballot configured for the upcoming election, along with voting instructions, within a reasonable period of time before an election.

F. Encourage Electoral Innovation

Many citizens have work, family, or other obligations that make it difficult for them to participate in elections. Innovative new voting procedures could make it easier for those citizens to participate and increase voter turnout. Many states have been experimenting with new ways to vote in an attempt to increase access to the franchise. These new methods include expanded opportunities for absentee voting; opportunities for voters to vote early and in person; opportunities for voters to vote by mail; and vote centers or mega-polling places that seek to address problems created by precinct distinctions and poll worker shortages.

Other innovations being considered at the federal level include moving Election Day to the weekend or making Election Day a holiday. While additional research is needed to determine the effect of the former proposal, the latter proposal is not helpful. Making Election Day a federal holiday will not help many eligible voters, especially those in lower-income communities. A large number of Americans who work in the service and retail industries will be unable to take advantage of an Election Day holiday because federal holidays are typically among the busiest shopping days of the year. In addition, additional research is needed to determine whether the Internet can be safely used for voting. So far, the limited experiences we have had with Internet voting have been met with criticism, and across Europe, where there have been more widespread experiments, the results with Internet voting have been inconsistent.

- [Study new ways to vote](#). Congress should encourage innovation in the electoral process by amending Title II of HAVA and providing the resources and direction for the EAC to study new methods of voting, including vote by mail, universal absentee voting, permanent absentee voting, early voting, vote centers, and Internet voting. The research should explore whether and how these methods can be used to increase the turnout of eligible voters; how they affect voters from different demographic and geographic communities; whether and how they can be misused or create the potential for misconduct and how such problems can be solved; and what it would cost for states to implement new programs.

V. EXPAND THE FRANCHISE

A. Restore Voting Rights to People with Past Felony Convictions

Voting is both a fundamental right and a civic duty. Yet, alone among modern democracies, the United States permits laws that lock people out of the voting booth for life once they have been convicted of crimes. These laws are often a remnant of Jim Crow. Restoring the right to vote strengthens democracy by increasing voter participation. Political participation also helps people reintegrate into the community after serving time in prison. And re-enfranchisement means that the home communities of those convicted regain their political voice and the ability to elect representatives.

An estimated 5.3 million Americans are barred from voting because of a felony conviction. Approximately 4 millions of the disenfranchised are living in our communities, working, paying taxes, and raising families; 2 million are people who have completed their sentences but remain relegated to permanent second-class citizenship. About 1.4 million African-American men are barred from voting under these laws. Their 13% disenfranchisement rate is seven times the national average. In six states, more than one in four African-American men are permanently disenfranchised.

There is a growing movement in the states—including Rhode Island, Iowa, Florida, Connecticut, Nebraska, and Alabama—to reform restrictive felony disenfranchisement laws. Congress should join this movement to halt this continuing injustice.

- **Restoration of Voting Rights.** To address this ongoing injustice, Congress should pass legislation that would restore the right to vote in federal elections to people as soon as they are released from prison and are living, working, and raising families in our communities.
- **No Conditioning Right to Vote on Ability to Pay.** No state should be permitted to condition the franchise on the payment of any legal financial obligations, including fees, fines, costs, or restitution. Currently, many states condition the restoration of the right to vote on payment of such financial obligations imposed as part of a criminal sentence, creating an economic or wealth barrier to the franchise.
- **Preventing Vote Dilution Due to Incarceration.** Congress should require the Census Bureau to initiate a research and testing program, including as part of the 2010 census, to evaluate the feasibility and cost of assigning incarcerated and institutionalized individuals with a legitimate preferred or permanent address to that address rather than to the address of the locations where they are in person, as recommended by the National Research Council of the National Academy of Sciences. The Census Bureau should also be required to provide tract- or block-level counts of prison populations along with the population data provided to the states for apportionment and districting purposes. This would address the problem of undercounting in the communities to which prisoners belong and over-counting in communities where prisons are located.

B. Ensure Voting Rights for Residents of the District of Columbia

More than half a million Americans living in the District of Columbia currently have no right to vote in any congressional elections. As a result, those Americans have no representation in either the U.S. Senate or the House of Representatives, and they have no say over a range of matters that affect their lives, from taxes, to military service, to health care, to education, to voting rights. Congress should address this injustice and eliminate second-class citizenship for DC residents.

- Congress should pass legislation to ensure that American citizens living in the District of Columbia have voting representation in Congress.

ENDNOTES

¹ For more information on the impact of Same Day Registration, see “About Election Day Registration” available at <http://www.demos.org/page52.cfm>.

² A preliminary analysis of the problems voters faced in the 2006 election is available in “Election Protection 2006: Report on the Legal Program to Board of Directors and Trustees, Staff and Pro Bono Partners” available at http://www.lawyerscommittee.org/2005website/home/images/features/FINAL_EP%20Board%20Report.pdf.

³ Although such a result most likely violates a provision of the Voting Rights Act that prohibits states from rejecting voter registration forms because of immaterial errors or omissions, 42 U.S.C. § 1971(b), that provision has not been enforced to its full extent.

⁴ A detailed report on these policies, and a comprehensive catalog of state matching and identifying number procedures is available at http://www.brennancenter.org/dynamic/subpages/download_file_35559.pdf.

⁵ A federal court in Washington State has held that HAVA and the Voting Rights Act already prohibit states from imposing a “no match, no vote” requirement, *Washington Ass’n of Churches v. Reed*, No. 06-0726 RSM (W.D. Wash. Aug. 1, 2006) (order), and several other states have revised their policies in response to that ruling. This reform would extend that result to the rest of the country.

⁶ Specifically, HAVA requires each voter registration form to include the questions, “Are you a citizen of the United States of America?” and “Will you be 18 years of age on or before election day?” along with ‘yes’ and ‘no’ boxes for the applicant to check in response to those questions. The form must state, “If you checked ‘no’ in response to either of these questions, do not complete this form.” 42 U.S.C. § 15483(b)(4)(A). Many voter registration applicants are confused by this language and do not understand it to mean that they must check the “yes” boxes in order to be registered; instead, they understand it to mean only that they should not fill out the rest of the form if the answer to either question is “no.”

⁷ Florida’s refusal to register applicants who did not check “yes” boxes was the subject of a legal challenge in *Diaz v. Cobb*, No. 04-22572 (S.D. Fla. Filed 2004).

⁸ Under those provisions, states are required to ask each new applicant for her driver’s license number if she has one, and if not, for the last four digits of her Social Security number. If she has neither number, the state is required to assign her a unique identifying number. 42 U.S.C. § 15483(b)(5).

⁹ Recent studies on Americans without proof of citizenship are available at http://www.brennancenter.org/stack_detail.asp?key=97&subkey=39242&init_key=9153 and <http://www.cbpp.org/9-22-06id.pdf>.

¹⁰ This rule is most likely already required by the National Voter Registration Act of 1993 (“NVRA”); it is consistent with the longstanding interpretation of the NVRA by the DOJ, the FEC, and the EAC. Nevertheless, additional legal protection is warranted because courts have not uniformly interpreted the NVRA in this way.

¹¹ Federal courts blocked enforcement of the Florida, Ohio, and Georgia laws after the 2006 primary elections. The Florida case is currently on appeal.

¹² Additional recommendations are available at http://www.brennancenter.org/stack_detail.asp?key=97&subkey=36343.

¹³ Currently, the only records that are truly software independent are paper records. New technology in the future may produce independent audit records that are not paper-based.

¹⁴ For documentation of such incidents, see www.stopdeceptivepractices.org.

¹⁵ See http://www.ncsl.org/print/statefed/Real_ID_Impact_Report_FINAL_Sept19.pdf.

¹⁶ For an egregious example, see *Voters First: An Examination of the 2006 Midterm Election in Missouri, Report from the Office of the Secretary of State to the People of Missouri*, at 15-17, available at <http://www.sos.mo.gov/elections/VotersFirst/>.

BRENNAN
CENTER
FOR JUSTICE

At New York University School of Law

161 Avenue of the Americas

12th Floor

New York, NY 10013

212-998-6730

www.brennancenter.org



Lawyers' Committee for
Civil Rights Under Law

Lawyers' Committee for

Civil Rights Under Law

1401 New York Avenue, NW

Suite 400

Washington, DC 20005

202-662-8600

www.lawyerscommittee.org