

Testimony of

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On behalf of the Brennan Center for Justice at NYU School of Law, I thank the Subcommittee on Elections for holding this hearing and for providing me the opportunity to discuss our work on voter registration and list maintenance—topics central to the realization of Americans’ fundamental right to vote.

The Brennan Center for Justice is a nonpartisan think tank and advocacy organization that focuses on issues of democracy and justice. We are deeply involved in the effort to ensure fair and accurate voting and voter registration systems and to promote policies that maximize participation in elections. We have done extensive work on the subjects of voter registration and the maintenance of voter registration lists, including conducting studies and publishing reports, providing assistance to federal and state administrative and legislative bodies with responsibility over elections, and, when necessary, litigating to compel states to comply with their obligations under federal law and the Constitution.

My testimony today will focus on three areas of concern that warrant congressional attention and action: (1) the unacceptable difficulties experienced by some eligible citizens in attempting to register and to get onto states’ computerized voter registration lists; (2) the lack of adequate protections against unfair purges of the voter rolls, driving eligible citizens off of the states’ voter registration lists; and (3) the misguided effort by the U.S. Department of Justice (“DOJ”) to promote overly aggressive purges of the voter rolls, while failing to enforce federal requirements that states make voter registration more accessible to their citizens. Each of these problems can arise when decision-makers—some of whom may have the best of intentions—jump to unwarranted conclusions about the problems to be addressed or the means of addressing

them, and in so doing, unduly jeopardize the registration status of eligible American citizens.

I. Barriers to Getting on Voter Registration Lists

Federal law addresses appropriate voter list maintenance practices through two statutes, the National Voter Registration Act of 1993 (“NVRA”), and the Help America Vote Act of 2002 (“HAVA”). The relevant provisions of these two laws are intended to promote policies and practices that make it easier for eligible citizens to register and vote.

Most recently, HAVA spurred a substantial new improvement in voter registration by mandating the creation of statewide voter registration databases. Though there would inevitably be some snags in implementing these sizable new systems for the first time, when fully developed, these new electronic lists would facilitate better maintenance of the rolls and prevent voters from getting lost in the shuffle.

One feature of these new mandatory lists was a unique identifying number associated with each eligible voter, to keep better track of voters moving within the state, and to ensure that a John Smith in one county would not be confused with a John Smith elsewhere. Following Michigan’s model, HAVA decided to use the state’s driver’s license number as this unique identifier for voters with licenses, and asked voters without licenses to supply the last four digits of their Social Security number. The state would try to confirm these numbers by matching against other state databases, so that a registrant would not mistakenly be assigned another voter’s unique identifier. And if a citizen had neither a driver’s license nor a Social Security number, the state would simply assign that voter a unique identifier.

Thanks to an amendment offered by Senator Wyden, this matching procedure reappeared in another provision of HAVA, also designed to assist voters. In addition to mandating statewide registration databases, HAVA addressed registration by mail, striking a balance between facilitating convenient mail-in registration and protecting the integrity of those mail-in registrations. It requires first-time voters who register by mail to provide some external validation of their identity at some point before voting. As a default, such voters must provide some form of acceptable documentary identification either at the time of registration or when the citizen shows up at the polls to vote. Under Senator Wyden’s amendment, however, a citizen is exempted from this documentary requirement if the relevant election official is able to “match” the information on her registration form with the information in an existing state record. The availability of this exemption is an important example of Congressional intent to protect voters when regulating the exercise of the franchise— HAVA attempts whenever possible to limit burdens imposed on eligible voters, by using available technology to exempt voters from requirements that might otherwise prove burdensome.

After HAVA was passed, a small but substantial minority of states misinterpreted the HAVA matching process described above, to create a new barrier to registration. These states refused to place eligible citizens on the rolls unless the state could find a

match between the voter's registration information and other state systems. Typos, the switch from maiden names, and a variety of common database inconsistencies unrelated to voter eligibility frequently prevented the successful "match" of information, keeping substantial numbers of fully eligible voter off the rolls.

In August 2006, one of these "no match, no vote" laws, in Washington State, was blocked by a federal court, and in part because of the litigation, most of the other states that had erected the matching process as a barrier to registration changed course. There are now just three states of which we are aware that continue to misapply federal law and disenfranchise voters because of common but meaningless errors. Florida is one of these three, and the Brennan Center, along with the Advancement Project and Project Vote, filed suit in September to enjoin Florida's matching law before the 2008 elections. Still, other states may be pursuing "no match, no vote" policies under the radar: most of the practices governing the use of the new statewide registration databases are still uncodified.

Recommendations

Fortunately, there are a number of things Congress can and should do to rectify this problem. These include speaking consistently and clearly as to the important federal objectives at stake. The NVRA states that its primary purpose is to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office. HAVA, passed in response to the debacles of the 2000 elections, has as one of its stated purposes the establishment of minimum election administration standards to ensure that voters are not unnecessarily disenfranchised. Congress should continue to emphasize that it is still a priority to minimize the burden on voters from flawed registration procedures. For example, Congress should:

- **Clarify that states may not reject a voter registration application solely because information on that application does not match a record in an existing government database.** In February of this year, the Social Security Administration admitted that 46.2%, almost half, of all voter registration records that are submitted to it for verification fail to match with the Administration's records. The failure of government records to match other government records is an indication of technological imperfection, not an indication of wrongdoing.
- **Ensure that voters who provide information sufficient to determine their eligibility should be registered even if there are other omissions or minor errors on the registration form.** The Voting Rights Act establishes that immaterial mistakes on a registration form may not impair a voter's status. Forgetting to list a driver's license number or an apartment number has no bearing on a citizen's eligibility to vote and thus should not be a barrier to registration.

- **Protect voters who do not provide sufficient information to be registered, by providing notice of the defect and an opportunity to correct the error.** 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.
- **Establish a presumption of eligibility when a person’s eligibility is in question.** When the very fundamental right to vote is at stake, doubt or error should be resolved in favor of the policy that expands voting rights and opportunities, not contracts it. At present, distrust leads too often to decisions that allow meaningless errors to disenfranchise voters. A presumption of eligibility would raise the bar to denying a vote. Concrete evidence of the lack of eligibility should be required to rebut the presumption.

Adoption of these recommendations, which in large part, are set out in *An Agenda for America’s Voters: Election Reform in the 110th Congress*, published by the Brennan Center and the Lawyers’ Committee for Civil Rights Under Law, will minimize technical and other barriers to registration.¹

II. Inadequate Protection Against Unfair Voter Purges

At the same time that inappropriate hurdles make it difficult for citizens to get on voter registration lists, most states make it unacceptably easy for citizens to be thrown off, or “purged,” from those lists. Although properly administered purges are an important component of state efforts to keep voter registration lists up-to-date and accurate, poorly conducted purges can and do result in widespread disenfranchisement of eligible citizens.

New statewide voter registration databases allow states to purge voters from the rolls with the push of 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. For example, John Michaels, who never committed a crime, could be

¹ *An Agenda for America’s Voters: Election Reform in the 110th Congress* was endorsed by at least twenty-five organizations belonging to the civil rights, voting rights, civic participation, and progressive advocacy community and can be found electronically at: <http://www.federalelectionreform.com/>.

thrown off the list because John Michaelson had a felony record. In 2004, the Brennan Center uncovered evidence of yet another erroneous purge list in Florida, containing 47,000 “suspected felons.” The flawed process used to generate the list identified only 61 voters with Hispanic surnames, notwithstanding Florida’s sizable Hispanic population.² To compound the problem, the purge list over-represented African Americans³ and mistakenly included thousands who had had their voting rights restored under Florida law. Although these flawed purge lists were widely publicized, similar errors across the country typically escape public scrutiny.⁴

Although the NVRA and HAVA provide voters with some protections against unfair purges of the voter rolls, most aspects of the purge process are not addressed by federal law, and most of these processes take place without notice to the public—or the voters to be purged. For example, although the NVRA delineates a procedure that states must follow before removing the names of individuals who appear to have moved from the voter rolls,⁵ it offers no similar procedures regulating purges based on death or criminal conviction records. According to the Brennan Center’s research, the laws of most states do not fill in these gaps. Consequently, election officials have significant latitude and very little oversight when conducting list maintenance. This leaves room for inaccuracy even when officials act with the best of motivations, and room for worse in the rare instances when motivations are not so pure. Registered voters deserve more protection.

The potential for disenfranchisement during the list maintenance process is especially pernicious because list maintenance is done outside public scrutiny, with few to hold accountable, and with many victims unaware of their disenfranchisement until it is too late for them to cast a ballot that will be counted.

Recommendations

There are four areas in which Congress can act to improve list maintenance practices:

First, require transparency in the purge process. Sunlight can help protect against both pernicious and misguided purge practices. Congress should require states to

² Specifically, 0.1% of the people on the list were Hispanic, even though in Florida, 12% of the disenfranchised population, or one in eight citizens, is Hispanic. The contractor that compiled that list did so by matching names on the voter list against records maintained by the state department of corrections. For a match to be found, the contractor required matches in a variety of fields, including a field for race. The problem was that one database had a category for Hispanics and the other did not. The result was a list that systematically excluded Hispanics.

³ African-Americans comprised 46% of the purge list but only 30% of the disenfranchised population.

⁴ One exception to the secrecy that typically surrounds the purge process is a purge conducted by the Secretary of State of Kentucky in 2006 based on a flawed attempt to identify voters who had moved from Kentucky to neighboring South Carolina and Tennessee. The state Attorney General learned of the purge and brought a successful lawsuit to reverse it on the grounds that the Secretary of State did not follow the voter protection procedures outlined in the state law analog to the NVRA. The lawsuit uncovered the fact that eligible voters who had not, in fact, moved out of the state of Kentucky were caught up in the purge.

⁵ 42 U.S.C. § 1973gg-6(d)(1)-(2) (Supp. II 2002).

make public both their procedures for conducting purges and their actual purges. Specifically, 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. States should also be required to provide effective public notice of an impending purge at least 30 days in advance of the purge.

Second, require the standardization of basic aspects of the list maintenance process, including protections for voters against erroneous purges. States, and even localities within states, employ different practices and guidelines for purging their rolls, which means that voters get treated differently, and are afforded different protections and are exposed to different risks, depending on where they live and how conscientious their purging officials are.⁶ While there should be room for innovation and the development of best practices, voters are entitled to certain basic protections. The fate of a citizen's voting rights should not rest on an arbitrary factor like her county of residence. Specifically, Congress should:

- **Require that voters be provided at least 30 days notice before their names are removed from registration lists and an opportunity to contest the purge.** Many states do not require notice before they purge voters they believe have died or become ineligible due to criminal convictions or mental incapacitation, or before voters are purged at the end of an NVRA period of inactivity. Even states that do provide notice do not always do so consistently. 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.
- **Require states to delineate and publish uniform procedures for identifying ineligible registrants.** Without specific public rules for purging, list maintenance occurs on an ad hoc basis, increasing the likelihood of errors and precluding transparency. In addition, non-uniform purge practices that vary from jurisdiction to jurisdiction are unfair to voters and may be inconsistent with the Constitution.
- **Require states to 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

⁶ A typical example of variation in purge practices occurs in Nevada, where the identification of those with disqualifying convictions varies on a county-by-county basis. In interviews with Brennan Center staff, one local official reported a practice of obtaining information on disqualifying convictions from jury questionnaires, another stated that he receives such information from the state Department of Corrections, and a third reported finding information on disqualifying convictions by reviewing court judgments.

purged. States that disenfranchise people with felony records also should 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.

- **Improve protections against erroneous purges resulting from problems with mailings.** No state should be permitted to refuse to register a voter or to base a purge solely on one undeliverable mailing, as is done in the practice known as “voter caging.” 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.

Third, take steps to prevent predictable errors in compiling purge lists.

Many errors in list maintenance occur because decisions about an individual’s identity are made with insufficient information. A particular voter is assumed to be the same person as the individual on a list of ineligible voters, when the voter is actually a different person.

Although such errors occur regularly, they often go undetected. For example, officials often assume that two records showing the same name and date of birth refer to the same person. Louisiana recently attempted to purge thousands of voters based on this assumption. Yet in a sufficiently large pool—like Louisiana’s purge across state lines—two different individuals will share the same name and date of birth surprisingly often. In a group of 23 people, it is more likely than not that two will share the same birthday; in a group of 180, two will probably share the same birth date, including day, month, and year. Particularly for voters who share common names, statistics teaches that in a pool as large as a state, there will be several different individuals who share the same basic information.⁷

Congress should protect against such errors by allowing voters to be purged only when there is a reliable unique identifier—like a signature, or photo, or Social Security number—that ensures that the voter on the lists is the same person as the individual flagged as ineligible.

Fourth, require improvements of lists used to identify ineligible registrants.

When election officials seek to remove ineligible persons from registration rolls, they often use lists of supposedly ineligible individuals that are not entirely reliable. For example, the Social Security Administration’s master death index, though not compiled for voting purposes, is nevertheless used by election officials to purge deceased voters—and it is notoriously rife with error. State lists can also be of questionable quality. Local

⁷ Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 11 (July 1, 2007) (unpublished manuscript, submitted to the 2007 Conference on Empirical Legal Studies), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID997888_code698321.pdf?abstractid=997888&mirid=1.

election officials interviewed by Brennan Center staff reported that the state lists used to identify deceased voters were either unreliable or else contained insufficient information to reliably match the deceased individual with her voter registration record. Congress should require that lists used for the purpose of establishing ineligibility be audited for accuracy, and forbid the uncorroborated use of any such lists below a certain threshold of reliability.

III. Insufficient DOJ Oversight

Although the NVRA is generally acknowledged to have increased the registration rates of American citizens, its provisions to increase opportunities for voter registration have never been fully enforced. The gap in enforcement has been the greatest with respect to Section 7 of that statute, which requires that public assistance agencies provide visitors the opportunity to register to vote. A recent report produced by ACORN, Project Vote, and Demos revealed that since 1995, voter registration applications from public assistance agencies nationwide have declined by 59.6%, and 36 of 41 reporting states demonstrated a decline in registration applications from public assistance agencies.

The DOJ, which is charged with enforcing the NVRA, has largely declined to press states to improve the registration process at their public assistance agencies or their motor vehicle agencies. Instead, over the past few years, the DOJ has made it a priority to encourage aggressive *purges* of the voter rolls. As is noted above, aggressive purges pose a significant risk of disenfranchising substantial numbers of eligible voters, given the flaws in purge practices. What is more, aggressive purges do not protect against any significant problem; although most states have bloated voted rolls, there is no evidence that a significant number of ineligible individuals vote as a result.⁸

The recent focus on purges represents a significant change in direction for the Justice Department. After suing St. Louis in 2002 to *stop* the county from purging too aggressively, for example, DOJ sued Missouri in 2005 to require *more* aggressive purges. The focus on voter purges also has been curiously timed, reaching its peak just when the states were beginning to implement the statewide voter registration databases that would allow improved list maintenance to proceed at a reasonable and voter-protective pace.

Moreover, the DOJ has targeted states for its purge campaign, based on information of dubious quality. It sent letters to ten states in which some jurisdictions reported more voters on the lists than the citizen voting age population, demanding information on purges to date and pressuring the states to purge more substantially. However, as North Carolina noted in one public response to this pressure, the information prompting the DOJ letters was sorely outdated. The voter roll data in question involved 2004 numbers, which were compared with imperfect population estimates. Neither metric accounted for the state's list maintenance from 2004 on, natural fluctuations in the local population, or the express protections against unwarranted purges in the NVRA.

⁸ For research and information demonstrating the infrequency of individual voter fraud, see the Brennan Center's website devoted to that issue, www.truthaboutfraud.org.

Recommendation

Congress should closely monitor the DOJ's aggressive campaign for voter purges, ensuring that the pressure does not promote unwarranted and unlawful purges of eligible voters, and should encourage greater emphasis on NVRA enforcement that will expand the franchise. The DOJ should be in the business of protecting voters and the franchise, instead of increasing the risk of voter disenfranchisement. Congress can and should not only demand answers, but also hold the appropriate persons accountable for their performance or lack thereof.

IV. Conclusion

The Brennan Center has found that the list maintenance process affords numerous opportunities for errors and mischief with significant consequences: Through no fault of their own, millions of eligible citizens could be denied their fundamental right to vote in the next election. Given the importance of the right to vote to our democracy, our history, and to individual citizens, we should not be nonchalant about even unintended disenfranchisement. The straightforward recommendations offered in this testimony will reduce many of the most serious threats to the franchise. We therefore strongly urge the Subcommittee to consider adopting those recommendations.

Thank you.