

Heritage Lectures

No. 1129
Delivered July 17, 2009



Published by The Heritage Foundation

August 11, 2009

Democracy in Danger: What States Can Do to Safeguard America's Election System

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A long-time federal prosecutor once told me that as long as elections put people into positions where they can make decisions about how much the government will spend, who will receive the money, and how the government will exercise its power, elections will be important enough to tempt some individuals to steal them. As the Supreme Court recognized when it upheld the constitutionality of Indiana's voter identification law in 2008, flagrant examples of voter fraud "have been documented throughout this Nation's history by respected historians and journalists." Those examples "demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election."¹

The United States has one of the most decentralized systems of election administration for its national elections of any democracy. Unlike many other countries, we do not have a central government agency administering our federal elections. This is in accord with the Constitution, which reserves to the states the exclusive authority for most election decisions, including voter qualifications, except that Congress may alter "[t]he Times, Places and Manner of holding Elections" for Congress.² Even the relatively new U.S. Election Assistance Commission, created in 2002, does not have the authority to "issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government."³ It can only recommend "best practices" in election administration to the states, an interesting charge given that most of the employees of this federal

Talking Points

- States remain the chief administrators of our elections and should take steps to protect the security and integrity of the election process.
- States should require all individuals who register to vote to provide proof of citizenship, and voter registration information should be verified for accuracy against other state and federal databases.
- States should require all voters to present photographic identification when voting and ensure that absentee ballots are sent to overseas military voters in time to be received and returned.
- Third-party organizations like ACORN that conduct voter registration drives should be required to put the name of their organization and the employee handling each registration on the voter registration form and require all completed forms to be returned to election officials within ten days of the date they are executed by the voter.
- States should oppose further unfunded federal mandates such as "universal registration."

This paper, in its entirety, can be found at:
www.heritage.org/Research/GovernmentReform/hl1129.cfm

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
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Washington, DC 20002-4999
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agency (and some of the commissioners) have absolutely no experience in actually administering elections. The states are still the chief administrators of our elections, although Congress has passed various federal laws in recent decades regulating election procedures, including the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA).

In order to have an election process in which we can be confident that everyone who is eligible gets to vote, the vote is counted, and the vote is not diluted by fraudulent votes, we have to have security and integrity throughout the entire process, from voter registration to the casting of the actual votes and the counting of ballots. Unfortunately, because of various problems with election laws and procedures in many states, we cannot currently ensure that such security is in place. This is particularly true because of the general lack of verification by some states of the authenticity of both basic voter eligibility at registration, including citizenship, and the identity of voters who show up at the polls to vote.

State legislators can take several steps to safeguard America's election system and to improve the integrity of the election process. Based on my experience as a local county election official administer-

ing voting registration and elections in the largest county in Georgia; as a career lawyer in the Civil Rights Division of the U.S. Department of Justice enforcing federal voting rights laws like the NVRA and HAVA; and as a member of the Board of Advisors of the U.S. Election Assistance Commission, I would recommend the following legislation or regulations. While there are some steps that only Congress and the federal government can take, these are improvements to voter registration and voting procedures that states can implement.

- **Require all voters to present photographic identification, issued by the federal, state, or local government, when they vote at their polling place, or to send copies of such identification when submitting an absentee ballot.**⁴ Any individual who does not have identification should be entitled to receive it free from state authorities. The vast majority of eligible voters already have such identification.⁵ Both academic studies and election results show that identification requirements do not depress the turnout of voters, including eligible minority voters.⁶ In addition, the vast majority of voters of all parties and all races and ethnic backgrounds support such a requirement and it increases public confidence in the integrity of

1. Crawford v. Marion County Election Board, 128 S.Ct. 1610, 1619 (2008).
2. U.S. CONST. art. I, §4, cl. 1. Congress has less power to regulate the election for President, being limited to determining the "Time" of choosing electors and the "Day" when they give their votes. *Id.* art. II, §1, cl. 4. By subsequent constitutional amendments, states may not discriminate on the basis of race, ethnicity, gender and age over 18, but Congress still may not interfere with state laws disqualifying noncitizens and certain felons from voting, despite the claims of many activists. See generally *id.* amend. XIV, § 2.
3. 42 U.S.C. § 15329.
4. Voter identification can prevent impersonation fraud, voting under fictitious names, voting by illegal aliens, and voting by individuals registered in more than one state. See Hans A. von Spakovsky, *Stolen Identities, Stolen Votes: A Case Study in Voter Impersonation*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 22, March 10, 2008, available at http://www.heritage.org/Research/LegalIssues/upload/lm_22.pdf.
5. During litigation over Indiana's and Georgia's voter identification laws, the plaintiffs were unable to produce a single individual who would be unable to vote because of the identification requirements. See also ROBERT PASTOR, ET AL., *VOTER IDS ARE NOT THE PROBLEM: A SURVEY OF THREE STATES* (2008), available at <http://www.american.edu/ia/cdem/csae/pdfs/csae080109.pdf>. This survey found that across three states, Mississippi, Maryland and Indiana, less than 1 percent of all voters did not have the required identification, and the number was even smaller (only 0.3 percent) in Indiana, the state with the strictest identification rules. *Id.* at 9, 15.
6. See David B. Muhlhausen and Keri Weber Sikich, *New Analysis Shows Voter Identification Laws Do Not Reduce Turnout*, HERITAGE FOUNDATION CENTER FOR DATA ANALYSIS REPORT NO. 07-04, Sept. 10, 2007, available at <http://www.heritage.org/research/legalissues/cda07-04.cfm>; Hans A. von Spakovsky, *Voter ID Was a Success in November*, WALL ST. J., Jan. 30, 2009, available at <http://online.wsj.com/article/SB123327839569631609.html>.

elections.⁷ For states that are not covered by Section 5 of the Voting Rights Act,⁸ Indiana's voter identification law⁹ provides a good model for states to follow. Although it is considered the strictest identification law in the country, the constitutionality of the law has been upheld by six justices of the U.S. Supreme Court,¹⁰ a fact that will make it much more difficult for groups opposed to such a law to succeed in any litigation.

For states covered under Section 5 of the Voting Rights Act, Georgia's voter identification law provides a good model.¹¹ Not only was Georgia's law precleared without objection by the U.S. Department of Justice, it has also been upheld in federal court as both constitutional and not a violation of the Voting Rights Act.¹² That will make a law modeled on Georgia's law much harder to oppose successfully in litigation by groups opposed to voter identification requirements or a U.S. Department of Justice led by ideological partisans opposed to voter identification requirements from a public policy perspective.

- **Require all individuals who register to vote to provide documentation establishing that they are United States citizens.** Individuals who are not U.S. citizens can easily register and vote without detection.¹³ Federal law and all fifty states provide that only U.S. citizens may vote in federal and state elections, although some local jurisdictions may allow noncitizens to

vote in local elections. States have an interest in preventing dilution of the votes of their citizens at the state level and must maintain citizen-only voting rolls for federal elections. However, only two states have mandated that voters provide proof of citizenship, Arizona in 2004 through the initiative process, and the Georgia legislature in 2009. Arizona's law provides a good model because not only did the U.S. Justice Department preclear Arizona's law without objection (Arizona is covered by Section 5 of the Voting Rights Act), but it has been upheld in federal court as not violating the Constitution or the Voting Rights Act.¹⁴

- **Require state and local election officials to verify the accuracy of new voter registration information against other available state and federal databases.** Section 303 of HAVA requires states to coordinate their voter registration lists with "other agency databases" and to "verify the accuracy of the information provided on applications for voter registration." However, some election officials are not complying with the federal law and are not verifying new voter registration information against other available databases such as Department of Motor Vehicles (DMV) driver's license records and Social Security Administration records. During the 2008 election, for example, the Ohio Secretary of State refused to investigate the accuracy of 200,000 new voter registration applications whose information did not

7. ROBERT PASTOR, ET AL., *supra* note 6, at 3.

8. Section 5 requires certain covered states to submit any changes in voting procedures either to the Justice Department or to federal court in Washington, D.C., for preclearance before they can take effect. 42 U.S.C. § 1973c.

9. IND. CODE § 3-5-2-40.5 (2009).

10. *Crawford*, 128 S.Ct. 1616. Indeed, emotional opponents of voter ID should reflect instead on the simple logic of Justice Stevens's opinion for the majority in *Crawford*.

11. GA. CODE ANN. § 21-2-417.

12. *Common Cause v. Billups*, 554 F.3d 1340 (11th Cir. 2009), *cert. denied* (June 8, 2009).

13. See Hans A. von Spakovsky, *The Threat of Non-citizen Voting*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 28, July 10, 2008; http://www.heritage.org/Research/Legalissues/upload/lm_28.pdf.

14. *Gonzalez v. Arizona*, No. 06-1268 (D. Ariz. August 20, 2008). The case is on appeal to the Ninth Circuit Court of Appeals. Arizona's law requires both proof of citizenship and identification at the polling place. See ARIZ. REV. STAT. §§ 16-166(F), 579(A). Georgia's legislation is House Bill 139, amending GA. CODE ANN. § 21-2-6, and it has not yet been reviewed by the Justice Department.

match information in other state databases.¹⁵ Although it is the duty of the U.S. Justice Department to enforce compliance with this HAVA requirement, it refused to do so in Ohio and is unlikely to do so in the future because of the views of both the Department's current leadership and its liberal career lawyers towards such requirements. Only by implementing this requirement as a state law can legislators ensure that their state election officials will follow this commonsense requirement.

- **Require an individual who registers by mail to vote in person the first time they vote.** States are specifically allowed to implement such a requirement by Section 6 of the NVRA¹⁶ although it cannot apply to any voter entitled to vote by absentee ballot or other than in person under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) or the Voting Accessibility of the Elderly and Handicapped Act.¹⁷ This generally includes disabled voters and those over age 65, along with military and overseas voters.
- **Require all individuals who register to vote through the use of mail-in forms, whether they are mailed back to election officials or hand-delivered by the individual or third-party organizations, to comply with the applicable HAVA provision.** HAVA requires persons who register to vote by mail who have not previously voted in a federal election to provide a copy of certain identification documents when they register or the first time they vote.¹⁸ Unfortunately, some states have interpreted this federal requirement to apply only to voter registration forms received through the mail and not to such forms delivered through other means.

- **Require all third-party organizations (like ACORN) that conduct voter registration drives to put the name of their organization and the volunteer or employee handling each registration on the voter registration form and require all completed forms to be returned to election officials by such organizations within ten days of the date the forms are executed by the voter.** These measures will allow election officials to identify which organization and individual handled voter registration forms that are found to be incomplete or fraudulent as well as ensuring that completed registration forms are provided to election officials on a timely basis so they can be properly processed before the state's pre-election registration deadline.
- **Facilitate voting by overseas members of the military by requiring that all absentee ballots being sent to UOCAVA voters be mailed at least 45 days prior to the election deadline or alternatively by express mail or electronic means so the ballots will be received by voters in time to be returned.** The long transit times for overseas mail have led to the disenfranchisement of many military personnel stationed overseas, particularly those in combat zones in Afghanistan and Iraq. Most states mail out absentee ballots 30 or fewer days before an election, which is not sufficient time for them to be received and returned. States should also allow absentee ballot request forms to be sent to election officials by facsimile or as a scanned attachment to an email.¹⁹
- **Require all state courts to notify election officials when individuals whose names are drawn from the registration rolls are excused from jury duty because they claim they are**

15. The Secretary of State was sued by the Ohio Republican Party under HAVA; however, the Supreme Court vacated a stay that had been issued by the Sixth Circuit Court of Appeals directing her to comply with the law because the Supreme Court held that a private party was not "likely to prevail on the question whether Congress has authorized... a private litigant" to bring an action under HAVA. *Brunner v. Ohio Republican Party*, 555 U.S. ___ (2008). This leaves it up to the Justice Department to enforce this particular requirement of HAVA.

16. 42 U.S.C. § 1973gg-4(c).

17. See *id.* § 1973ff-1 and §1973ee-1.

18. 42 U.S.C. § 15483(b). There are certain exceptions, including for individuals entitled to vote under the Uniformed and Overseas Citizens Absentee Voting Act.

not U.S. citizens or no longer live in the jurisdiction. Such a requirement would be similar to the provision contained in Section 8(g) of the NVRA that requires United States attorneys to notify state election officials whenever an individual is convicted of a felony in a federal district court. This allows election officials to remove that individual from voter registration rolls if felons are not entitled to vote in that particular state. Such a requirement for noncitizen notification will allow local election officials to remove ineligible voters and refer them to state authorities for possible prosecution. Completion of a jury questionnaire by an individual stating that he no longer resides in the jurisdiction would allow local election officials to immediately delete such voters from the rolls, avoiding having to keep them on the inactive list for years. State and local tax officials should also notify election officials when they receive similar information. Running data comparisons between voter registration addresses and property tax rolls is also recommended to detect individuals who are illegally registering at commercial addresses.

- **Require the state to enter into agreements with other states, especially neighboring states, to compare voter registration lists to find voters who are registered in more than one state.** There have been a number of reports comparing voter registration lists among different states showing individuals registered in multiple states.²⁰ Because there is no national voter registration list, it is relatively easy for individuals to register in more than one state without detection. Regional agreements would

be a good start to detecting (and deterring) double registration and possible double voting.

One final warning to state legislators: Pass resolutions urging your congressional representatives to oppose legislation that will impose further federal requirements on how you conduct your elections or would give the U.S. Election Assistance Commission the power to regulate elections. There are many proponents in Washington who would like to see a complete federal takeover of the administration of elections. From overruling state laws barring felons from voting, to requiring states to implement same day (or election day) registration, these groups want to impose such federal mandates on all of the states.

One of the current proposals that is gathering momentum is “universal registration,” a concept that would force states to automatically register individuals who are contained in driver’s license records, tax lists, public assistance and welfare rolls, and other such databases. This concept is being pushed based on the fallacy that large numbers of individuals were unable to vote in the 2008 election because of voter registration problems. This claim is supported by almost no evidence other than an academic survey that used very questionable methodologies, and did not determine whether individuals who reported not voting due to “registration” problems ever attempted to register or were even eligible to register or vote.²¹ The contrary evidence is much more powerful: The Census Bureau just reported that there was an increase of 4 million registered voters in 2008 from the 2004 election and voter turnout increased by 5 million voters.²²

Driver’s license, public assistance, and tax rolls all contain individuals who are not citizens, are

19. See also Hans A. von Spakovsky and Eric Eversole, *America’s Military Voters: Re-enfranchising the Disenfranchised*, HERITAGE FOUNDATION, LEGAL MEMORANDUM NO. 45, July 28, 2009, available at <http://www.heritage.org/Research/LegalIssues/lm0045.cfm>.

20. See Press Release, Kentucky Secretary of State, Kentucky Blazes Path in New Voter Fraud Prevention Technique (April 24, 2006), available at <http://sos.ky.gov/secdesk/mediacenter/pressreleases/article41.htm>; Russ Buettner, *City Mulls Action Against Two-Timing Voters*, N.Y. DAILY NEWS, Aug. 24, 2004, available at http://www.nydailynews.com/archives/news/2004/08/24/2004-08-24_city_mulls_action_against_tw.html; 60,000 Could Be on File to Vote in Both Carolinas, THE STATE, Oct. 25, 2004, at A1.

21. It is human nature to make up excuses for failing to vote, but such excuses must be tested by social scientists if they are really interested in finding the truth rather than pushing a nationalization agenda.

22. Press Release, U.S. Census Bureau, Voter Turnout Increases by 5 Million in 2008 Presidential Election (July 20, 2009), available at <http://www.census.gov/Press-Release/www/releases/archives/voting/013995.html>.

mentally incompetent or are felons, making them ineligible to vote under most state laws. Yet universal registration would automatically register such ineligible individuals and give them the ability to vote. Many people own property in more one location or pay taxes to more than one political jurisdiction. Universal registration would automatically register them in more than one location, allowing them to vote more than once. Universal registration would thus automate voter registration fraud and decrease the security and integrity of our election process to deal with a nonexistent problem.

This push for universal registration is especially ironic given that many of its proponents are the same liberal groups that have filed lawsuits, some successfully, trying to stop states from verifying the accuracy of new voter registration information by running data matches with other state records such as driver's license databases. They claim that those records are too inaccurate and cause large numbers of mismatches, disenfranchising voters.²³ Yet now

these same groups claim those records are accurate enough to be a source of automatic voter registration. These views are totally inconsistent. State legislators should oppose any attempt to force states to implement universal registration unless it is done in such a way as to verify the identity, residence, eligibility, and citizenship status of each registrant, and will avoid duplicate registrations in more than one location. That will be the only way to ensure the accuracy of voter registration lists.

These are all relatively simple steps that can be taken by state legislatures, but they are very important to protecting our democracy from errors and intentional fraud that can affect the integrity and security of our election process.

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23. See, e.g., BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, USING DATABASES TO KEEP ELIGIBLE VOTERS OFF THE ROLLS (2006), available at http://www.brennancenter.org/page/-/d/download_file_38655.pdf.

24. This article is based on a presentation made at the annual meeting of the American Legislative Exchange Council in Atlanta, Georgia, on July 17, 2009, on a panel with John Fund of the *Wall Street Journal* and Bob Williams of the Evergreen Freedom Foundation. Many of these legislative recommendations first appeared in an article by the author under the name Publius. See Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 TEX. REV. L. & POL. 227 (2005).