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The Need for New Federal Reforms

Putting an End to Voter Fraud

Executive Summary

- Voter fraud continues to plague our nation's federal elections, diluting and canceling out the lawful votes of the vast majority of Americans.
- Congress began to address the problem of voter fraud when it passed the Help America Vote Act ("HAVA") in 2002, but much work is still necessary to protect the election process from those who would undermine our democracy.
- ***First***, Congress should require that voters at the polls show photo identification.
 - Without genuine, photographic identification, the avenues for manipulation and fraud by unscrupulous individuals will remain open to exploitation.
 - Government at all levels should ensure fair access to government-issued photo identification — not only for voting purposes, but so citizens can better participate in and contribute to mainstream economic and civic life.
- ***Second***, Congress should examine the integrity of the voter registration process and the ongoing failures of states to maintain accurate voter lists.
 - Current federal laws governing registration list maintenance prevent local officials from taking a zero-tolerance approach to voter fraud.
 - Congress should make certain that non-citizens are not illegally registering and voting: only Americans should decide the results of American elections.
- ***Third***, Congress should examine the extent to which early and absentee voting increases the likelihood of fraudulent votes being cast.
 - These alternative voting options should have at least as many fraud-protection safeguards as those available on Election Day.
 - Congress should examine how states conduct early and absentee voting and determine whether legislation is necessary to protect voters against vote dilution through others' fraud.
- No election-related legislation should proceed in this Congress unless these issues receive a thorough examination.

“The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”

— *Reynolds v. Sims*, 377 US 533, 555 (1963)

“We must recognize that vote fraud cheats all other voters. It is a denial of a basic civil right to lose your vote because somebody not qualified to vote has cast a vote that wipes yours out. Those who took time to follow the rules, stand in line, wait their turn, and then cast their votes should not have to fear their vote will be diluted or canceled by an illegal vote.”

— Senator Christopher Bond, *Congressional Record*, April 10, 2002

“Commendable zeal to protect voting rights must be tempered by the corresponding duty to protect the integrity of the voting process. Equal vigilance is required to ensure that only those entitled to vote are allowed to cast a ballot. Otherwise, the rights of those lawfully entitled to vote are inevitably diluted.”

— Senator Mitch McConnell, *Congressional Record*, April 11, 2002

Introduction

As the November 2004 election approached, it appeared increasingly likely that widespread voter fraud in battleground states would distort the final election returns. Although voter fraud investigations continue in some cities such as Milwaukee and East St. Louis,¹ it appears that the nation dodged a bullet so that the ultimate election results were unaffected. Nevertheless, Congress ought not ignore the extent to which our voting system remains vulnerable to partisan and criminal manipulation. The rationale for that most precious of our democratic rights — the right to vote — is that every legal vote counts 100 percent, that it is not diluted by virtue of fraudulent votes. Democrats and Republicans should agree that voter fraud threatens the integrity of our elections and undermines representative democracy, and that preventing fraud should be the first priority in any election-related legislation that Congress considers this year.

Congress can thwart voter fraud through sensible, commonsense reforms that will address abuses in the current system. *First*, Congress should build on the fraud protection measures in the Help America Vote Act of 2002² (“HAVA”) and require that voters at the polls show photo identification. *Second*, Congress should examine the integrity of the voter registration process and the ongoing failures of states to maintain accurate voter lists. And *third*, Congress should examine the extent to which “convenience voting” (early and absentee voting) increases the likelihood of fraudulent votes being cast. No election-related legislation should proceed in this Congress unless these issues receive a thorough examination.

¹ See Greg J. Borowski, *City OK'd 1,305 flawed voter cards*, MILWAUKEE JOURNAL SENTINEL, Jan. 27, 2005; Michael Shaw & Doug Moore, *Indictment confirms East St. Louis inquiry about voter fraud*, ST. LOUIS POST-DISPATCH, Jan. 22, 2005.

² P.L. 107-252, 42 U.S.C. 15301 et seq.

Voter Fraud and the Help America Vote Act of 2002

After the 2000 elections, Republicans and Democrats came together to pass the Help America Vote Act. Congress recognized that states have the primary responsibility for the administration of elections — even federal elections — but also acknowledged that the *federal* government has a duty to protect the *federal* interest in the integrity of *federal* elections. Whereas most of HAVA focuses on federal funding to help states improve their voting machine technologies, it also addresses the potential for voter fraud in several ways:

- HAVA requires *new* voters who register by mail to provide (non-photographic) evidence of identity either when they register or when they first vote.³
- HAVA requires voters who register by mail to affirm their American citizenship.⁴
- HAVA requires new voters to provide either their driver’s license number or the last four digits of their Social Security number on their voter registration form.⁵
- HAVA requires all states to develop statewide voter registration lists before the 2006 federal elections.⁶
- HAVA requires states to offer a “provisional ballot” option so that individuals who came to the polls without being registered were not automatically allowed to vote, and that, conversely, those who were lawfully registered but whose names did not appear on the precinct-level registration list could nonetheless have their votes counted if the election authorities later determined that the voter was, in fact, registered.⁷

These fraud-protection provisions represent important steps toward improving the integrity of our election system, but much more work must be done if voter fraud is to be prevented.

The Need for a Photo ID Requirement

Federal law today does not require any form of photo identification before an individual can register or cast a ballot. If voters were required to offer that photo identification at the polls, risks of voter fraud could be greatly minimized. Nor is it unreasonable to ask that our nation’s laws treat federal elections at least as seriously as they do rail or air travel, both of which require photo identification. The law, therefore, should be reformed to require *all* voters to show a government-issued photo identification at the polling place when they vote.

HAVA’s Modest Progress

It is important to understand what HAVA does — and does not — do in terms of voter identification. As noted above, HAVA’s only protection is to require *new* voters to provide identity-related documentation sometime before they first vote, but not necessarily documentation with a photograph, and not necessarily at the polls. Three aspects of current federal law are worth emphasizing.

³ See 42 U.S.C. § 15483(b).

⁴ See 42 U.S.C. § 15483(b).

⁵ See 42 U.S.C. § 15483(b).

⁶ See 42 U.S.C. § 15483(a).

⁷ See 42 U.S.C. § 15482.

- *First*, no voter is ever required to show a *photo* identification. HAVA permits mere utility bills to be used as “identification.” Not only does a utility bill not include a photograph, but it usually is not even a government document.
- *Second*, the HAVA requirement only applies to *new* voters. Prior registrants, whether legal or fraudulent, have no new obligation to show any identification at any stage in the voting process. HAVA provided no help to those jurisdictions where voter fraud is a recurring phenomenon from election to election.
- *Third*, no voter is ever required to provide any documentation at the polling place — the place where it matters most. Instead, federal law does nothing to prevent interlopers from arriving at polling places and impersonating voters. Some states will require an individual to sign an affidavit attesting to identity, but the prospects for identifying the affidavit as false while the interloper is still in the polling place is nearly non-existent.

Thus, no current federal law creates *any* requirement that *any* voter provide valid photo identification before voting in federal elections.

Opponents’ Complaints About Photo Identification and Fraud Protection

Some Senators have, in the past, announced their opposition to virtually all voter identification requirements — including even the weak non-photo documentation requirements created in HAVA. The crux of their argument is that any such requirement would place an undue burden on minorities, the poor, and the disabled. They argue that these groups are less likely to have government-issued photo identification, and that all voter identification requirements (even those requiring utility bills) are discriminatory.⁸ This claim is never accompanied by any evidence that minorities, the poor, or the disabled have in fact been affirmatively *denied* access to government-issued identification on any systematic basis. Instead, opponents have characterized voter identification requirements as little more than a modern-day “poll tax” designed to hinder minority access to the ballot.⁹ Such arguments dramatically discount the damage that voter fraud produces: the votes of Americans of every background are votes diluted or canceled out when fraudulent votes are cast and counted.

Some Americans may have neglected to obtain photo identification, but that is no reason to permit our nation’s elections to remain vulnerable to fraud. If photo identification is truly *unavailable* (and systematic study would be required to establish whether it is), then local and state authorities may wish to take steps to ensure better access, not only for voting purposes but to help citizens better contribute to and benefit from mainstream civic life. Yet, while opponents of voter fraud protections seek several billion dollars in additional funding on voting machine technology,¹⁰ they do *not* seek to direct those dollars to any effort to ensure that all voters have appropriate identification. Similarly, activist groups that have fought voter identification requirements so vociferously should help remedy that problem by working with local communities to remove any barriers to photo identification access. And if Congress is to appropriate *any* money to states for federal elections, it should require that a portion of that money be spent so that there are no financial barriers to any citizens who genuinely cannot afford

⁸ See, for example, statement by Senator Christopher Dodd, *Congressional Record*, Oct. 16, 2002, S10488.

⁹ See statement of Senator Hillary Clinton, *Congressional Record*, Oct. 16, 2002, S10499 (calling voter identification requirements not an “unfair analog” to poll taxes).

¹⁰ See S. 17, § 13, introduced Jan. 24, 2005 by Senators Christopher Dodd, Jay Rockefeller, Charles Schumer, and Debbie Stabenow.

the nominal fees that state-issued identification cards may require. It will be a benefit, not a disservice, for members of disadvantaged communities to have the identification.

HAVA's Modest Progress Should Not Be Reversed

Incredibly, some actually want to turn back the clock and move away from the modest fraud protections that HAVA implemented. Some Democrat Senators have now introduced legislation (S. 17) to eliminate *any* identification requirements and instead allow individuals to fill out affidavits of identity rather than provide any identification whatsoever.¹¹ This legislation would also mandate the availability of same-day voter registration.¹² Thus, an individual with fraudulent aims could register and reregister, and vote and revote, repeatedly throughout a given election day. No driver's license. No passport. Not even a utility bill. This is exactly the kind of problem that HAVA began to address. Congress should be strengthening HAVA, not gutting it. According to Rasmussen Polling, 85 percent of Americans support a photo identification requirement, including the vast majority of both Democrats and Republicans.¹³ The American people are on the right side of this issue.

Improvements Needed in Voter Registration

The voter registration process used by the states continues to provide opportunities for fraud and manipulation. This is apparent in two primary ways: *first*, in the difficulties that states have in maintaining accurate voter registration lists in light of the onerous burdens created by the National Voter Registration Act of 1993¹⁴ ("Motor Voter"); and *second*, in the failure to provide sufficient protections to ensure that only American citizens vote in federal elections. Congress should fully investigate each of these challenges facing our system before legislating.

Voter Registration Lists Must Be Cleaned Up to Protect Against Fraud

Perhaps HAVA's most important contribution to the prevention of voter fraud is its requirement that all states develop statewide voter registration databases for federal elections, and complete the task no later than January 1, 2006. There can be little question that this modernization of voter registration lists is necessary. Consider, for example, the evidence from Wisconsin from the 2004 general election. As the *Milwaukee Journal-Sentinel* recently editorialized:

This newspaper has documented many errors from the last election. Some 1,200 people were listed as voting from nonexistent addresses. A gap of thousands exists between the number of ballots cast and the number of identifiable voters. More than 300 people were listed as voting twice, probably as a result of system error.¹⁵

These difficulties in Milwaukee could be due to mere faulty lists or significant fraud, but it is plain that the lists must be updated.

¹¹ See S. 17, §§ 12, 13.

¹² See S. 17, § 7.

¹³ "Should people be required to show a driver's license or some other form of photo ID before they are allowed to vote?" 85 percent, yes. 10 percent, no. Rasmussen Reports, Oct. 18, 2004, survey of 1,000 likely voters.

¹⁴ P.L. 103-31, 42 U.S.C. § 1973gg et seq.

¹⁵ MILWAUKEE JOURNAL SENTINEL, editorial, *Election probe welcome*, Jan. 27, 2005.

The advantages of statewide lists are several. A major goal, for example, should be the elimination of duplicate registrations. When states are in compliance, election officials will find it much easier to identify the duplicate registrations that occur when voters move within the same state. Because all voters do not notify their previous jurisdiction to remove them from the voter registration list when they relocate, the same individual can inadvertently double-register. At the same time, given the lack of any photo identification requirement at the polls, if that voter is unscrupulous, he or she could vote twice — once in each jurisdiction. Moreover, private interests have the ability to send impersonators to vote in the place of individuals who have long since moved. *Ideally*, with the single statewide list that HAVA requires by January 2006, election officials will be able to comb through the names, identify obvious duplicates, and close these gateways to fraud.

This ideal solution is unlikely to materialize, however, as long as election officials are hamstrung in their efforts to ensure the accuracy of statewide voter lists. The Motor Voter law continues to impose lengthy and multi-cycle processes for purging erroneous information from the voter roles. In general, under the Motor Voter law, a state cannot remove the name of a voter until after two elections *after* the voter has failed to respond to a notice advising him that the local registrar has cause to believe that the voter has relocated.¹⁶ Thus, for two full federal elections, the statewide registration list is likely to have a duplicate registrant whenever a voter moves within the state (but outside the original county).

The Motor Voter law has the perverse effect of *guaranteeing* that the statewide voter registration lists will suffer from perpetual inaccuracies. Perhaps in 1993, when voter lists were managed almost exclusively by counties and preserved on pre-Internet computers, the interjurisdictional coordination was too intimidating to policymakers. When all states have statewide lists, however, election officials should be able to take reasonable steps to ensure the integrity of those lists. They must be able to ensure that every registered voter only votes once, and that duplicate listings are removed as soon as possible.

Congress, therefore, should revisit the burdens placed on election officials in their efforts to maintain accurate voter registration lists. The computerized, statewide lists will make it much easier to identify new registrants who may be moving from previous jurisdictions. For example, any new voter registration form could include a statement of previous address, allowing a quick and automated cross-check against the existing list. A single verification could be sent to the prior address, and the list would soon be accurate. Federal law today prohibits this kind of commonsense solution.

Another straightforward solution is simply to require any voter for whom there is an identical name on the statewide list to show current identification at the polls, preferably with a photograph. Thus, no voter would be able to vote twice, and no interloper could use the “stale” registration as a means to vote illegally. At the very least, such identification should be mandated in those situations where election officials have identified a higher potential for fraud.

The HAVA requirement for statewide voter registration lists was a good one, but it was only a first step. Whether by adopting simple reforms such as those suggested above or by

¹⁶ See 42 U.S.C. § 1973gg(b)-(c).

empowering local officials to craft rules that suit their databases and election systems, Congress will need to act to advance the integrity of voter lists in any election-related legislation.

Congress Should Better Ensure that Non-Citizens Do Not Illegally Vote

No state in the nation permits non-citizens to vote in federal elections, but with more than 10 million legal permanent residents in the United States — not to mention no fewer than 7 million illegal aliens¹⁷ — there is always a risk that non-citizens will register and vote. An organized political constituency exists to eliminate the citizenship requirement for voting, perhaps exemplified by the 49 percent of San Francisco voters who sought to grant limited voting rights to non-citizens through a November 2004 ballot initiative.¹⁸ On the other side, the citizens of Arizona passed a state ballot initiative in November 2004 to require all registrants to vote to submit evidence of citizenship.¹⁹ In addition, during the 2004 election cycle, there were reports that some activists were actually assisting illegal aliens to register and vote in the Presidential election.²⁰ The 2004 experience is consistent with the conclusions of the National Commission on Federal Election Reform, co-chaired by former Presidents Gerald Ford and Jimmy Carter: “Non-citizens do vote, albeit illegally.”²¹

The combination of an organized political constituency to eliminate the citizenship requirement, the frequent grant of permission to activist groups to gather voter registrations, and the lack of any documentary checks collectively present the opportunity for non-citizens to register — whether by an innocent mistake or through cooperation with dishonest middlemen. Congress began to address this issue in HAVA by requiring voters *who register by mail* to affirm their citizenship on the registration form.²² No physical documentation is required, however, nor do in-person registrants have any obligation to demonstrate (or even attest to) citizenship before registering to vote.

Congress should examine the avenues available to ensure that the franchise is reserved to American citizens. In 2004, Representative Henry Hyde (R-IL) proposed legislation that would require new registrants to provide evidence of citizenship when registering to vote, but the bill did not provide any guidance as to what forms of documentation would be acceptable.²³

¹⁷ See Immigration and Naturalization Serv., *State Population Estimates: Legal Permanent Residents and Aliens Eligible to Apply for Naturalization*, Nov. 1996, available at <http://uscis.gov/graphics/shared/aboutus/statistics/lprest.htm>. Moreover, more than 700,000 individuals are granted legal permanent resident status every year. See Office of Immigration Statistics, Dep’t of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, at p. 6, available at <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf>. U.S. Census Bureau, *Executive Summary to Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, Jan. 31, 2003, available at <http://uscis.gov/graphics/shared/aboutus/statistics/2000ExecSumm.pdf>. Some now estimate that the number has since risen to 9 million. See, e.g., estimates provided by Center for Immigration Studies, available at <http://www.cis.org/topics/illegalimmigration.html>.

¹⁸ Proposition F would have given limited voting rights to non-citizens regardless of legal status. San Francisco Department of Elections, 2004 Results, available at http://www.sfgov.org/site/uploadedfiles/election_results.htm.

¹⁹ See election results from Arizona Secretary of State showing Proposition 200 prevailing with 55 percent of the vote, available at <http://www.azsos.gov/results/2004/general/BM200.htm>.

²⁰ For one story discussing registration of illegal aliens to vote, see Georgia Pabst, *Group sent couple to ‘test’ voter registration sites*, MILWAUKEE JOURNAL SENTINEL, Oct. 27, 2004.

²¹ National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at p. 24 (2002).

²² See 42 U.S.C. § 15483.

²³ See H.R. 4530 (108th Congress).

Arizona's recently passed ballot initiative allows new registrants to prove citizenship by showing an Arizona driver's license issued after 1996, the year that drivers were first required to prove their lawful presence in the United States in order to receive a license.²⁴ Arizona's approach thus substantially eliminates the risk that illegal aliens will register, but it does not prevent legal permanent residents from doing so. Congress should evaluate the efforts made in the states and examine the most effective ways to ensure that this principle — American citizens should decide American elections — is supported in practice.

Preventing Fraud in Early and Absentee Voting

Every state in the nation now has some form of “convenience” voting, generally defined as voting that occurs in some fashion other than by visiting the polling booth on Election Day. In those states where ballots can be returned by mail, this is referred to as “absentee voting.” Where voters must visit a polling place (but on a day *before* the formal election day), this is referred to as “early voting.” These reforms have made voting more convenient for millions of Americans who find it difficult to go to the polling locations on Election Day, and they are now permanent features of our nation's electoral system.²⁵ At the same time, early and absentee voting present unique risks of fraud and manipulation that should be better understood and examined.

Absentee Voting Challenges

The fundamental challenge facing absentee voting is the fact that the franchise is exercised outside the supervision and protection of election officials. Both the National Commission on Federal Election Reform and the CalTech/MIT Voting Technology Project have concluded that important interests are threatened when voters cast votes on an absentee basis.²⁶ Ballots cast in polling booths are protected by election workers and, often, police officers; ballots cast at home can be lost, tampered with, damaged, or even stolen so that persons other than the voter can cast it illegally. When voters cast ballots in polling booths, they do so free from any coercion from friend or foe, and have no obligation to disclose their choices. Ballots cast at home may be seen by others, and voters may be subjected to intense pressure to reveal the content of the ballot before it is cast. Moreover, the social or professional pressure that an employer, union, or activist group might exert on an individual is at its weakest when the voter is in a secure polling booth.²⁷

Early Voting Challenges

Early voting, available in 23 states, enables voters to cast a vote in person but *before* Election Day. Some states require voters to appear at an election official's office, while others set up satellite locations, including polling booths similar to those available on Election Day

²⁴ See Opinion of Arizona Attorney General Terry Goddard, *Re: Identification Requirements for Voter Registration*, #I05-001, issued Jan. 24, 2005, available at <http://www.attorneygeneral.state.az.us/opinions/2005/I05-001.pdf>.

²⁵ See National Conference of State Legislatures, *Absentee and Early Voting*, Oct. 27, 2004, available at <http://www.ncsl.org/programs/legman/elect/absentearly.htm>.

²⁶ See National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at p. 44; CalTech/MIT Voting Technology Project, *What Is, What Could Be*, at 38-39, July 2001, available at <http://www.vote.caltech.edu/Reports/2001report.html>.

²⁷ See National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at p. 44; CalTech/MIT Voting Technology Project, *What Is, What Could Be*, at 38-39, July 2001, available at <http://www.vote.caltech.edu/Reports/2001report.html>.

itself. According to the National Conference of State Legislatures, the typical period for early voting is 10-14 days before the election, and frequently ending the Friday or Saturday prior to the formal Election Day.²⁸

Early voting presents far fewer opportunities for fraud and manipulation as compared to absentee voting as long as the vote is cast in a secure environment akin to the polling booth available on Election Day. Yet the anti-fraud oversight is still far less comprehensive than it is on Election Day itself. *First*, election officials will have difficulty finding as many high-quality election workers — most of whom volunteer on Election Day — if the commitment is for a two-week period. *Second*, it is less likely that there will be adequate poll-watchers (partisan or nonpartisan) with so many days of voting to monitor, so if particular election officials are dishonest or sloppy, outside oversight will be lax. *Finally*, it is not clear that polling booths used for early voting are always as secure and private as they would be on Election Day. Some early voting booths were placed in grocery stores and malls during the November 2004 election, for example.²⁹ While those locations may have been sufficiently secure, election officials will need to be vigilant to ensure that early voting is treated as a substitute for voting on Election Day. It *should not* simply be seen as a substitute for voting absentee, where security and privacy are compromised.

Additional Study Needed to Evaluate Impact of Early and Absentee Voting

The states have made great strides over the past decades in improving ballot security and voter privacy, but the increasing use of early and absentee voting threatens those positive developments. Senate Democrats have already proposed to mandate early voting nationwide, but their bill provides no additional privacy or security safeguards.³⁰ Congress should not be mandating that states *decrease* voters' privacy and ballot security. It should consider commonsense rules to ensure that deviations from conventional Election Day voting be accompanied by practical protections. Two such examples include:

- *First*, local election officials should treat early voting polling locations the same as they treat Election Day polling booths from the standpoint of security and privacy. All state laws regarding electioneering at or near polling locations should be enforced equally during early voting. All polling booths should be equally private. Law enforcement (whether state or federal) should devote equal attention to early voting locations as compared to those used on Election Day. And the election officials should employ identical measures to protect the integrity of ballots already cast.
- *Second*, states should consider limiting absentee ballots to “for cause” circumstances such as advanced age, physical disability, absence from the jurisdiction, or imprisonment. For example, Texas limits mail-in absentee ballots to these circumstances, but at the same time

²⁸ National Conference of State Legislatures, *Absentee and Early Voting*, available at <http://www.ncsl.org/programs/legman/elect/absentearly.htm>.

²⁹ See, e.g., *Early voting begins today in Colorado*, ROCKY MOUNTAIN NEWS, Oct. 18, 2004, available at http://www.rockymountainnews.com/drmn/election/article/0,1299,DRMN_36_3262722,00.html (noting grocery store locations).

³⁰ See S. 17, § 9.

runs a statewide early voting program for all others.³¹ This approach minimizes the fraud and breach of privacy concerns while ensuring that voting remains convenient.

Congress should study fully the states' use of absentee and early voting options with an aim to ensure that every voter's right to cast a free, private, and secure ballot is protected. Congress should then evaluate whether the states will take the necessary steps to improve these voting options, or if additional federal legislation is required.

Conclusion

In addressing voter fraud concerns, Congress should take a balanced approach that respects the traditional authority of states to administer their elections while guaranteeing that the federal interest in preventing voter fraud is preserved. But Congress should not assume that because some areas of concern theoretically could be addressed at the state level that there is no proper federal role. There are federal interests at stake in federal elections, and Congress should not be timid in protecting them.

³¹ Texas Secretary of State Office, available at <http://www.sos.state.tx.us/elections/voter/earlyvoting.shtml>. Nearly half of the states place some restrictions on the availability of absentee ballots today. See National Conference of State Legislatures, *Absentee and Early Voting*, available at <http://www.ncsl.org/programs/legman/elect/absentearly.htm>.