



April 7, 2006

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Civil Rights Division
U.S. Department of Justice
Room 7254-NWB
950 Pennsylvania Ave NW
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Re: Voting Section File No. 2006-1018
Comment on Submission of S.B. 84 (Georgia)

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Participation on Hans von Spakovsky
in preclearance review of Georgia
photo ID requirements

Dear General Kim:

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The Voting Rights Project of the ACLU represents clients who are opposed to the preclearance of photo ID provisions in Georgia under Section 5 of the Voting Rights Act. Along with others, we represent the plaintiffs in Common Cause of Georgia v. Billups, 406 F.Supp. 2d 1326 (N.D.Ga. 2005). We are part of a coalition of groups and attorneys that have submitted comments opposing preclearance of Georgia's SB 84 (2006).

Review of Georgia S.B. 84 (2006) is currently pending before the Voting Section. S.B. 84 amends Georgia H.B. 244 (2005) which first imposed presentation of a photo ID as an absolute requirement for in-person voting. H.B. 244 was precleared on August 26, 2005 (DOJ file no. 2005-2029).

In the preclearance review of H.B. 244, we met with Voting Section staff members. I participated in that meeting, held July 19, 2005, by telephone, along with Jon M. Greenbaum of the Lawyers Committee for Civil Rights Under Law (who attended in person), and Seth A. Cohen, attorney at

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Kilpatrick Stockton LLP of Atlanta (also by phone).

At the time, Hans von Spakovsky held the title of Counsel to the Assistant Attorney General for Civil Rights in the U.S. Department of Justice. Mr. von Spakovsky participated in that meeting which concerned the racial purpose in enacting and what would be the effects of the photo ID requirement.

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We have now learned that Mr. von Spakovsky authored an article which advocated that "a photo identification should be required as proof of identity" in order to vote. "Securing the Integrity of American Elections: The Need for Change," Texas Review of Law & Politics (Spring 2005), page 288.¹ The publication was done anonymously under the name "Publius". That article also contains a note on the first page stating "Publius is an attorney who specializes in election issues. The opinions expressed here are the attorney's own and not that of the attorney's employer."

As you are aware, Mr. von Spakovsky has been appointed a commissioner of the Federal Election Commission. On the website of the FEC, under "Commissioner von Spakovsky," under "Articles," there are 14 articles listed. The second listing is the Texas Review article; the other 13 specifically disclose Mr. von Spakovsky as the author.² It seems fair to infer that he claims to be the author published as "Publius."

1. See Attachment 1 for copy of article.

2. Available at:
http://www.fec.gov/members/von_Spakovsky/von_Spakovsky.shtml or see Attachment B.

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In that article, the Mr. von Spakovsky claims to have done a study of turnout in Georgia which he asserts shows no reduction in turnout in Georgia and other states with significant minority populations caused by previous identification requirements. The racial effect of Georgia's prior requirements were the benchmark against which H.B. 244 were to be measured for discriminatory purpose and effect. Being that the publication date is Spring, 2005, it would appear that Mr. von Spakovsky's study was available and likely relied on by him in the preclearance process.³

We are extremely concerned by the anonymous publication of Mr. von Spakovsky's article. Our understanding of Department procedures, and the disclaimer in the article, suggest that the Department vetted the article prior to publication. The procedures for employee publication are not our concern. What is of concern is that either Mr. von Spakovsky or his superiors made a judgment that the article should be published anonymously. If the article met the criteria for publication by a Department attorney (and in view of the included disclaimer protecting the Department against attribution of the views), there does not appear to be a benign reason for anonymity. To the contrary, there appears to have been an intentional desire to prevent the public and in particular, advocates with business before the Voting Section, from knowing the views of one of the senior officials involved in the preclearance process.

Mr. von Spakovsky's article includes a

3. Id., p. 291. This is not the place to address the inadequacy of the author's assertions, but we would certainly have challenged them if we had been made aware of them during the preclearance process.

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gratuitous and incorrect attack on the League of Women Voters (LVW) and the American Civil Liberties Union (ACLU), both of which had submitted comments to the Voting Section regarding H.B. 244.

In the article Mr. von Spakovsky discusses the section of the Help America Vote Act which requires the National Voter Registration Act form to contain the question "Are you a citizen of the United States of America" followed by boxes for the applicant to check regarding their citizenship. 42 U.S.C. § 15483(b)(4)(A)(i). He argues that failure to check the box should result in rejection of the application based on

the statutory language requiring that the national form instruct applicants not to complete the form if they checked "no" in response to the citizenship question (as well as a check box for age-eligibility); and

the statutory language that the registration form shall contain language informing the applicant that "[i]f an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i) [the citizenship and age eligibility questions], the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form..."
42 U.S.C. § 15483(b)(4)(B).

Mr. von Spakovsky asserts:

Despite the clear language in [the Help America Vote Act] that requires individuals to answer the citizenship question before their voter registration can be accepted by election officials, many states have ignored the law, **pressured by groups such as the League of**

Women Voters and the American Civil Liberties Union, and continue to register individuals who do not answer the citizenship question.⁴ (Emphasis added.)

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The LVW and the ACLU, of course, did not "pressure" any one to ignore any law. To the contrary, because all states to our knowledge require voters to be U.S. citizens, we in no way suggested that HAVA or any other law requiring applicants to assert that they possess this qualification is inappropriate. What we do contend is that where state registration forms included an oath of citizenship, if the applicant executed the oath that he or she was indeed a citizen, the applicant had in fact answered the "citizenship question" required by HAVA regardless of whether the citizenship box was also checked.

For example, in writing to the Secretary of State and Attorney General of Iowa, the LVW and ACLU stated: "Clearly if a voter signs an oath, under penalty of criminal perjury and imprisonment for five years, that he or she is a U.S. Citizen, the voter has satisfactorily answered the question required by HAVA of whether the voter is a U.S. citizen."⁵ We also noted that if a voter swears he or she is a citizen, it is immaterial that the voter may have left unchecked a duplicative box that asks precisely the same question.

4. Id., at 293.

5. Letter of October 8, 2004 to Iowa Secretary of State Chet Culver and Attorney General Tom Miller from LVW, ACLU, National Voting Rights Institute and, Lawyers Committee for Civil Rights Under Law, p.3. A copy of this letter was simultaneously sent to Joseph D. Rich of the Voting Section.

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Accordingly, we pointed out that if Iowa or any other state

chose to reject applications for voter registration based on such a non-material omission in the registration form, it would violate an independent provision of federal law. Under 42 U.S.C. § 1971(a)(2)(B) (enacted as part of the Civil Rights Act of 1964), it is illegal for an election official to deny "the right of any individual to vote in an election because of an error or omission on any record or paper relating to an application, registration, or other act requisite to voting, if such error is not material to determining whether such individual is qualified under state law to vote in such election."⁶

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The arguments we made were correct. They were consistent with HAVA and reconciled both HAVA and Sec. 1971. The arguments were convincing to officials in Iowa and other states.

It is extremely disturbing that in the course of attacking the LVW and ACLU, Mr. von Spakovsky's article not only failed to address these points, he did not even acknowledge they exist. Nor did he include the information that the LVW and the ACLU only made these arguments in states where the registration form included a citizenship oath and the arguments were premised on the applicants executing the oath. His description of the position taken by the LVW and ACLU is incomplete to the point of being inaccurate. That he would then imply or characterize the positions of the LVW and ACLU as pressuring officials to ignore the law reveals, at the least, a deep seated bias.

6. Id. quoting 42 U.S.C. § 1971(a)(2)(B).

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Based on the above, we believe it was inappropriate for Mr. von Spakovsky to participate in the preclearance consideration of H.B. 244. We recognize that preclearance of that statute is not reviewable.⁷ However, its enforcement has been enjoined.⁸ S.B. 84 repealed and replaced H.B. 244. The benchmark for assessing whether S.B. 84 is retrogressive is the previous legally enforceable law.⁹ Because S.B. 84 is to be compared to the law as it existed prior to the enactment of H.B. 244, all of the issues on which Mr. von Spakovsky participated regarding H.B. 244 are up for review de novo by the Voting Section.

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In order to remove the effect of Mr. von Spakovsky's prior participation, we request that:

- 1) we be provided any information Mr. von Spakovsky provided in the review process, including disclosing the views he expressed to reviewing staff members; we view this as necessary so that we address and seek to correct his information;
- 2) reviewing staff be instructed to disregard any views Mr. von Spakovsky expressed about the League of Women Voters or ACLU, and the positions they took in the submission of H.B. 244;
- 3) any member of the Department of Justice who authorized the publication of the

7. Morris v. Gressette, 432 U.S. 491 (1977).

8. Common Cause of Georgia v. Billups, 406 F.Supp. 2d 1326 (N.D.Ga. 2005).

9. 28 C.F.R. § 51.54(b).

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anonymous article not be allowed to participate in the review of S.B. 84;

- 4) any member of the Department of Justice who was aware of Mr. von Spakovsky's attack on the League of Women Voters and the ACLU and who permitted him to participate in the review of H.B. 244 not be allowed to participate in the review of S.B. 84.

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Because S.B. 84 is pending and the remaining time is short, I am sending this as a comment on that submission directly to the Chief of the Voting Section.

I look forward hearing from you on this matter.

Sincerely,



Neil Bradley

cc:

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Dennis R. Dunn (via email)

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SECURING THE INTEGRITY OF AMERICAN ELECTIONS:
THE NEED FOR CHANGE

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**SECURING THE INTEGRITY OF AMERICAN ELECTIONS:
THE NEED FOR CHANGE**

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* Publius is an attorney who specializes in election issues. The opinions expressed here are the attorney's own and not that of the attorney's employer.

I. INTRODUCTION

It is unfortunately true that in the great democracy in which we live, voter fraud has had a long and studied role in our elections. Maintaining the security of our voter registration and voting process, while at the same time protecting the voting rights of individuals and guaranteeing their access to the polls, must be our foremost objective. Unlike what certain advocates in the civil rights community believe, these goals are not mutually exclusive. Every vote that is stolen through fraud disenfranchises a voter who has cast a legitimate ballot in the same way that an individual who is eligible to vote is disenfranchised when he is kept out of a poll or is somehow otherwise prevented from casting a ballot. In other words, violations of criminal election crimes statutes are just as important as violations of federal voting rights statutes and both cause equal damage to our democracy.

Most importantly, putting security measures in place—such as requiring identification when voting—does not disenfranchise voters and there is no evidence to suggest otherwise. In fact, the most recent election in 2004, with its record turnout and increases in voter registration, shows that such identification requirements have no effect on turnout at all. The other problems encountered in this and prior elections, particularly the large number of fraudulent voter registration forms turned in to election officials by some third-party organizations engaged in voter registration drives, show the need to make further changes in federal and state law that will safeguard our elections and our right to vote.¹

The stealing of elections happens from the local level, such as in the mayor's race in Miami in 1997, to congressional races,

1. See Employment Policies Institute, *The Real ACORN: Anti-Employee, Anti-Union, Big Business* (May 2003), available at http://www.EPIonline.org/studies/epi_acorn_05-2003.pdf (a description of one organization's pattern of turning in false registration forms). See also Robert Patrick, *Jury finds Montgomery guilty in vote fraud case*, ST. LOUIS POST-DISPATCH, Feb. 10, 2005, at B1 (thousands of fraudulent voter registration forms were turned in by an organization called Operation Big Vote); Juliet Williams, *Federal investigators join probe into Milwaukee voting problems*, DULUTH NEWS TRIB., Feb. 16, 2005 (city voting records showed that more than 1,200 people voted from invalid addresses); *'Mary Poppins' admits phony voter registrations*, STAR TRIBUNE, Feb. 19, 2005; Mark Brunswick, *Voter card stash brings guilty plea*, STAR TRIBUNE, Dec. 7, 2004, at 8B.

such as Lyndon B. Johnson's famed theft of his 1948 U.S. Senate Democratic primary with Ballot Box 13, to the 1960 presidential race with Mayor Daley's long-rumored stuffing of ballots in Chicago on behalf of John Kennedy. Information about some of the better known incidents is documented by Larry Sabato and Glenn Simpson in "Dirty Little Secrets: The Persistence of Corruption in American Politics"² and by John Fund in "Stealing Elections: How Voter Fraud Threatens Our Democracy."³ In 1984, a special federal grand jury in the Northern District of Illinois investigated the 1982 general election in Illinois and concluded that 100,000 fraudulent votes had been cast.⁴ Its public report provides a textbook guide to how voter fraud is committed. It details false registration, fraudulent use of absentee ballots, vote buying, and altering of the vote count. In that case alone, fifty-eight precinct captains, election judges, poll watchers, and political party workers were convicted in the largest vote fraud case ever prosecuted by the United States Department of Justice.⁵ The grand jury concluded "that similar fraudulent activities" had occurred prior to 1982.⁶

Most cases of voter fraud are prosecuted by state authorities, but anyone interested in looking at the scope of the problem, which most liberal advocacy groups wrongly insist is almost nonexistent and exaggerated,⁷ need only look at the many cases

2. LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* (1996).

3. JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (2004).

4. See Northern District of Illinois, Eastern Division Special Grand Jury Report, No. 82 CJ 1909, Dec. 14, 1984. What is clear from reading the grand jury report and some of the reported cases on these convictions is that the election officials learned these techniques from their predecessors and that there was a long tradition of these types of practices in Chicago. See also Mark Eissman, *U.S. to Probe Primary: Vote Fraud Federal Laws May Have Been Broken*, CHI. TRIB., Mar. 11, 1987, at 1C. A detailed account of extensive voter fraud in Miami is contained in the Miami-Dade County Grand Jury, Interim Report, *Inquiry into Absentee Ballot Voting*, Feb. 2, 1998. In 1984, Brooklyn District Attorney Elizabeth Holtzman disclosed the results of another grand jury investigation that found "serious and repeated fraud in primary elections held in Brooklyn" for fourteen years, including the use of fictitious names to create large numbers of voter registration cards that were then used to cast fraudulent votes. Press Release, Brooklyn, New York District Attorney's Office, D.A. Holtzman Announces Grand Jury Report Disclosing Systematic Voting Fraud in Brooklyn (Sept. 5, 1984).

5. *Id.*

6. *Id.*

7. See, e.g., Lori Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud*, Demos, 2003, available at http://www.demos-usa.org/pubs/EDR-Securing_the_Vote.pdf. The problem with this report is that it does not recognize that so many security holes exist in our current voter registration and election process, and that is it very hard

prosecuted under the federal statutes prohibiting various election crimes such as vote buying and providing false information to register and vote, which are violations of 42 U.S.C. § 1973i(c). There are numerous reported cases listed after these statutes in an annotated volume of the United States Code.⁸ While it may be true that most elections are conducted without being affected by voter fraud, the many past (and ongoing) prosecutions make it clear that voter fraud is a continuing problem.

The fastest and most uniform way of making needed changes in election administration would be to amend the Help America Vote Act of 2002 (“HAVA”).⁹ HAVA was signed into law by President Bush on October 29, 2002, and was the first statute passed by Congress affecting federal elections since the passage of the National Voter Registration Act in 1993 (“NVRA”).¹⁰ HAVA’s provisions were intended to correct the perceived problems with the conduct of the 2000 presidential election. Organizations involved in election administration such as the National Association of Secretaries of State (“NASS”) and the National Association of State Election Directors formed task forces that made various recommendations for reforming the election process.

The final bill was full of compromises between Republicans and Democrats (and election officials and civil rights leaders) who did not always agree on what needed to be fixed or how. In some instances the provisions were so controversial that the bill almost died, particularly the identification provisions that were added at the behest of Senator Kit Bond of Missouri. Congress,

to detect voter fraud unless a victim or perpetrator bring it to the attention of authorities. In the past, for example, election officials never verified any of the information received on voter registration forms, resulting in an honor system for voter registration. Many studies have shown numerous false names and even animals registered to vote in jurisdictions all over the country. As another example, this study asserts that “vigorous” signature matching is sufficient to prevent voter fraud with balloting by mail. Any criminal prosecutor with experience in handwriting analysis knows that it takes extensive training to do such analysis accurately, something that the election clerks who conduct signature comparisons do not receive. Furthermore, if someone sends in 100 false voter registration forms under different names, but signs each form in their normal signature, a signature comparison of each absentee or mail-in ballot with the original registration card will not result in any detection of the fraud because the signatures will match.

8. See also, e.g., the many election cases under 42 U.S.C. § 241 (2005) (conspiracy against rights).

9. 42 U.S.C. §§ 15301–15545 (2005).

10. See 42 U.S.C. § 1973gg (2005).

for the first time ever, also appropriated funding for election administration for the states to help them comply with HAVA. Administering elections is probably the oldest unfunded mandate in the history of the federal government since federal elections have always been run by mostly county (and in some states like Michigan) even municipal governments. As of February 9, 2005, however, the new Election Assistance Commission had distributed more than \$2.2 billion to the states to help them meet HAVA's requirements.¹¹ These requirements for federal elections apply to all fifty states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Most of them became effective during 2004 election cycle.

HAVA presents an interesting contrast between federal and state responsibilities. Federal mandates imposed in Title III require the states to implement certain requirements for federal elections, yet at the same time the statute leaves the "specific choices on the methods of complying with the requirements" to the states.¹² HAVA created a new federal agency, the U.S. Election Assistance Commission ("EAC"), to oversee the funding to states and to provide guidance on the best methods for states to implement these HAVA requirements. But the EAC's guidance is only voluntary and states can completely disregard it. Obviously fearing a new federal agency would take over election administration through the regulatory process, Congress prohibited the EAC from having "any 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."¹³ However, the nation's secretaries of state, who are the chief election official in nearly every state, are obviously fearful of Congress amending HAVA to provide the EAC with regulatory authority that would result in a federal takeover of the states' authority to administer elections. NASS

11. Press Release, United States Election Assistance Commission, U.S. Election Assistance Commission Reports to Congress on Election Reform Progress in 2004 (Feb. 9, 2005), available at http://www.eac.gov/news_020905.asp.

12. 42 U.S.C. § 15485 (2005). A copy of the statute and other information on its requirements may be found on the U.S. Department of Justice's website at <http://www.usdoj.gov/crt/voting/hava/hava.html>.

13. 42 U.S.C. § 15329 (2005). The only exception is for the regulations issued under section 9(a) of the NVRA on the use of the federal mail-in voter registration form. Responsibility for this form was transferred by HAVA from the Federal Election Commission to the EAC. See 42 U.S.C. § 15531 (2005).

recently overwhelmingly passed a resolution calling on Congress to dissolve the EAC after the 2006 election.¹⁴

Under Title III of HAVA, states were required by 2004 to implement provisional ballots, identification for new voters who registered by mail, and statewide voter registration lists, although the registration list requirement could be delayed until 2006. Changes were also made in the federal mail-in voter registration form that all states are required to accept by the NVRA. Before discussing what changes should be made to HAVA or state election laws to improve the integrity of our elections and to deter voter fraud, it is important to understand these HAVA mandates and how they were implemented in 2004, as well as the problems that exist in our election process. Although HAVA only applies to federal elections,¹⁵ HAVA's requirements for federal elections are being applied by the states to all elections due to the difficulty and expense of applying separate registration and election procedures to local versus federal elections.

II. PROVISIONAL VOTING

Section 15482(a) of HAVA requires states to implement provisional balloting. If a voter appears at his polling place to vote and his name is not on the list of registered voters or an election official challenges his eligibility to vote, the voter has to be given a provisional ballot as long as the voter declares that he is registered and eligible to vote in the jurisdiction in which he desires to vote. The provisional ballot is counted if election officials are able to verify that the individual is a registered and eligible voter under applicable state law.¹⁶ The states were required to establish a toll-free telephone number or website where the voter could find out if his vote was counted or the reason it was not.

14. Letter from Meredith Imwalle, Director of Communications, NASS, to Members of Congress (Feb. 6, 2005), available at <http://www.nass.org/EAC%20Position%20Cover%20Ltr.pdf>. This is a legitimate concern given the content of some of the new bills introduced in Congress to amend HAVA. See, e.g., S. 17, 109th Cong. § 15 (2005).

15. The preamble to the statute states that it is an Act "[t]o establish the Election Assistance Commission to assist in the administration of *Federal elections* and to otherwise provide assistance with administration of certain *Federal election* laws and programs, to establish minimum election administration standards for States . . . with responsibility for the administration of *Federal elections*." Help America Vote Act of 2002, Pub. L. No. 107-252 (codified as 42 U.S.C. §§ 15301 *et seq.* (2005)) (emphasis added).

16. 42 U.S.C. § 15482(a).

Additionally, under HAVA voters who vote after the statutory time for polls to close due to a court order extending that time must vote by provisional ballot.¹⁷ This is designed to avoid the kinds of problems that occurred in St. Louis in the 2000 election when Democrats convinced a lower court to extend polling hours based on specious claims.¹⁸ This allowed hundreds of invalid ballots to be cast before the decision was overturned the same evening by a higher court. The invalid ballots cast disappeared into the anonymity of the ballot box before the original court order could be overturned.¹⁹ As a result, the ballots could not be separated from other ballots and were counted in the election. This HAVA requirement essentially puts a stop to this campaign tactic as evidenced by the very few times it occurred in the November 2004 election.

The purpose of HAVA's provisional balloting requirement is to allow an individual to vote who has duly registered as required under state laws but whose name is not on the registered voter list in the voter's precinct due to some type of administrative error. An example is someone who registered to vote when she renewed her driver's license but the state's motor vehicle department did not send her voter registration form to election officials. Contrary to the desires of some, this provision was not meant to void state voter registration deadlines and to institute election day registration or to force states to count the provisional ballots of individuals who did not attempt to actually register to vote, even if they would otherwise be eligible to vote if they had registered.

HAVA's provisional balloting requirement was not intended by Congress to preempt the long tradition of precinct-based voting. However, the Democratic Party and its alter ego organizations like the Association of Community Organizations for Reform Now ("ACORN"), the NAACP, People for the American Way, and the League of Women Voters, tried to use

17. 42 U.S.C. § 15482(c) (stating that such provisional ballots must also be "separated and held apart from other provisional ballots" cast at the polling place).

18. It turned out that the lead plaintiff in the lawsuit, Robert D. Odum, who supposedly had not been able to vote because of long-lines at polling locations, had been dead since 1999. The Democrats then claimed the plaintiff was actually Robert M. Odum, a staffer for Democrat Congressman William Clay; however, Mr. "M" Odum had voted prior to the filing of the lawsuit. Beverly Lumpkin, *Beverly Lumpkin: Halls of Justice* (Apr. 20, 2004), at <http://abcnews.go.com/US/story?id=93445&page=1>.

19. *State ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000).

HAVA to do just that prior to the November 2, 2004 election.²⁰ They filed numerous lawsuits in battleground states, including Michigan, Ohio, Florida, and Missouri. In these suits, the plaintiffs mistakenly argued that 42 U.S.C. § 15482 of HAVA invalidates state laws and required those states to count the provisional ballots of voters that were cast outside of the precincts where the voters would normally vote. Most of these suits used 42 U.S.C. § 1983 to assert claims under HAVA as well as making claims under the Equal Protection Clause of the Fourteenth Amendment. It was an obvious effort to institute “precinct-shopping” by using federal law to preempt state law requirements.

Federal judges at the district court level issued opinions dismissing the plaintiffs’ claims in Florida and Missouri, recognizing from the statutory language and the legislative history that Congress had not intended to override traditional precinct-based voting by the states when it passed HAVA;²¹ the plaintiffs won in the district courts in Michigan and Ohio in poorly reasoned decisions that appear to be attempts by the judges to legislate from the bench.²² Fortunately, the Sixth Circuit Court of Appeals issued a decision just a week before the election that overruled the Ohio decision, holding that HAVA does not require a state to count a provisional ballot “if it is cast outside the precinct in which the voter resides.”²³ The court did confirm that if a voter declares that he is registered and eligible to vote in the jurisdiction, the state must give him a provisional ballot even if the election official is able to determine that the voter is registered in a different precinct, but the ballot does not have to be counted outside of his assigned precinct. In its opinion, the court summarized succinctly the sound public

20. While these organizations are all independent of each other legally, the positions they assert in election litigation are usually virtually identical.

21. *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073 (N.D. Fla. 2004) (holding that federal law does not invalidate the long-standing requirement in the State of Florida that a voter must vote on election day only at the voter’s assigned polling place); *Hawkins v. Blunt*, No. 04-4177, U.S. Dist. LEXIS 21512 (W.D. Mo. Oct. 12, 2004).

22. *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004); *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975 (N.D. Ohio 2004).

23. *Sandusky County Democratic Party v. Blackwell*, 386 F.3d 815 (6th Cir. 2004). A full written opinion was issued three days later. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004). Since Michigan is also in the Sixth Circuit, this decision effectively overruled *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004).

policy reasons behind the traditional precinct-based voting process of the states:

[I]t caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences.²⁴

Unfortunately, despite the lack of statutory language authorizing a private right of action in HAVA²⁵ and the clear legislative history showing Congress's intent to the contrary, the Sixth Circuit also recognized a private right of action under 42 U.S.C. § 1983, at least with respect to the right to cast a provisional ballot.²⁶ The court determined that the provisional ballot requirement in HAVA is rights-creating language and that individual enforcement under § 1983 is not precluded by the explicit language of HAVA or by a comprehensive enforcement scheme incompatible with individual enforcement.²⁷

The problem with this decision is its failure to recognize that the standards established by HAVA focus on the administration of federal elections by state officials, not the individuals who may benefit from the administration of well-run elections. The provisional ballot requirements of § 15482 are all directed at election officials, not individual voters, and it is a mistake to read private remedies into a statute where Congress is regulating an area of traditional state functions and when the statute itself does not unambiguously provide for such remedies.²⁸ In fact, Congressional statements at the time of its passage show that Congress did not intend to create a private right of action. Democratic Senator Christopher Dodd of Connecticut, one of the chief sponsors of HAVA and a member of the conference committee, lamented that HAVA created no private remedy,

24. *Blackwell*, 387 F.3d at 569.

25. See 42 U.S.C. § 15511 (2005). Only the Attorney General is given authority to bring a civil action against a state or jurisdiction violating 42 U.S.C. §§ 15481-15483 of HAVA. *Id.*

26. *Blackwell*, 387 F.3d at 572.

27. *Id.* at 572-73.

28. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 n.5 (2002).

stating “[w]hile I would have preferred that we extend [a] private right of action . . . , the House simply would not entertain such an enforcement provision.”²⁹

The Sixth Circuit also failed to recognize that Congress had, in fact, crafted a comprehensive enforcement scheme that ensured compliance with federal law while respecting traditional state authority in running elections. While the Attorney General was given the authority to seek enforcement in federal court, the states were required to establish an administrative complaint procedure for voters who met specified standards and provide appropriate remedies for violations.³⁰ Congress designed a comprehensive dual state/federal enforcement scheme that was deferential to the states’ traditional role in administering elections while providing for uniform national standards in discrete areas by vesting enforcement authority in the Attorney General. As the Attorney General said in an amicus curiae brief filed in *Sandusky*:

Allowing individual voters to judicially enforce HAVA’s requirements would undermine each of these important purposes. Indeed it is implausible to suppose that the same Congress that sought to obtain uniformity, stability, and certainty in voting procedures for federal elections simultaneously intended to consign control over HAVA’s interpretation to thousands of federal and state court judges and juries across the country.³¹

What is clear from the statute, the legislative history, and these decisions is that the conditions under which a provisional ballot will be counted is a matter that Congress properly left up to the states to determine. Twenty-eight states decided to only count ballots cast in the correct precinct, while seventeen states decided to count provisional ballots cast outside a voter’s residential precinct.³² Neither the courts nor Congress should

29. 148 CONG. REC. S10488-02, S10512 (daily ed. Oct. 16, 2002). The Conference Report confirmed that the enforcement provision only allowed for civil actions filed by the Attorney General. H.R. CONF. REP. NO. 107-730, at 76 (2002).

30. 42 U.S.C. § 15512 (2005).

31. “Brief of Amicus Curiae United States at 22-23, *Sandusky County Democratic Party v. Blackwell*, 386 F.3d 815 (6th Cir. 2004) (No. 04-4265), available at http://www.usdoj.gov/crt/voting/hava/oh_brief.pdf.

32. Electionline.org, *The 2004 Election*, Dec. 2004, at 5, available at <http://electionline.org/site/docs/pdf/ERIP%20Brief9%20Final.pdf>. Other states offer election day registration while North Dakota has no registration, obviating the need for provisional ballots.

interfere with the states' prerogative to decide the circumstances under which such ballots will be counted.

The provisional balloting process proved successful, with the EAC reporting that one-and-one-half million provisional ballots were cast and over one million were counted. However, the effort to force states to count ballots not cast in the proper precincts will no doubt continue with more lawsuits in the future outside the ambit of the Sixth Circuit's jurisdiction.

III. IDENTIFICATION REQUIREMENT

Persons who register to vote by mail for the first time who have not previously voted in a federal election in a state now have to provide a copy of certain specified identification documents when they register or show such identification the first time they vote.³³ The list of acceptable identification under HAVA includes photo identification as well as a utility bill, a bank statement, a paycheck, or a government document that shows the name and address of the voter.³⁴ Individuals who do not comply with this requirement can cast a provisional ballot.³⁵ An exception to the provision is provided to voters who are entitled to vote under the Uniformed and Overseas Citizens Absentee Voting Act³⁶ and the Voting Accessibility for the Elderly and Handicapped Act.³⁷ These requirements also do not apply to a voter who supplies a driver's license number or the last four digits of his social security number when registering if election officials are able to match the registration with an existing state identification record bearing the same number, name, and date of birth as provided in the registration application.³⁸

There are two problems with this identification requirement: it applies to only a small percentage of the electorate, one made even smaller by some states' interpretation, and the types of documents that meet the identification requirements are too broad. Under HAVA's statutory language, this identification requirement applies only to an individual who "registered to

33. 42 U.S.C. § 15483(b) (2005).

34. 42 U.S.C. §15483(b)(2)(A)(i)(II).

35. 42 U.S.C. §15483(b)(2)(B)(ii).

36. 42 U.S.C. § 1973gg-4 (2005).

37. 42 U.S.C. § 1973ee-1(b)(2)(B)(ii).

38. 42 U.S.C. §15483(b)(3)(B)(ii).

vote in a jurisdiction by mail."³⁹ The point of this provision was to require identification from individuals who use the federal mail-in voter registration form that the NVRA requires states to accept since no election official ever sees the individual registrant or does any verification of the registrant's identity. This rationale applies whether the individual actually uses the mail to send back the complete form to election officials or the form is personally delivered in a large batch by some third-party organization that conducted a voter registration drive. In both situations, no verification of any kind is conducted on the identity and actual existence of the applicant.

Unfortunately, a number of states such as New Mexico interpreted this provision to apply only to voter registration forms actually received through the mail—if an individual or an organization dropped it off, the identification requirement did not apply.⁴⁰ And it was these third-party voter registration drives that resulted in thousands of fraudulent voter registrations in places like Florida and Georgia prior to the November election, showing a clear need to apply such requirements to all registrations using the mail-in form.⁴¹

Proving or verifying the voter's identity should also apply across the board to all voters when they register to vote and when they vote at the polling place, not just to new voters. We have had an honor system for too long in most states, with only seventeen states requiring that all voters show identification before voting.⁴²

Furthermore, a photo identification should be required as proof of identity. Anyone who has ever moved into a new house or apartment and received bank statements and other government documents (all of which would satisfy the HAVA requirement) in the mail intended for the former occupants knows how easy it is to obtain such documents. When combined with the huge rise in identity theft, it is obvious that allowing documents without photographs is not an acceptable security

39. 42 U.S.C. §15483(b)(1)(A).

40. Electiononline.org, *Election Preview 2004: What's Changed, What Hasn't and Why*, Oct. 2004, at 45, available at <http://www.electiononline.org/site/docs/pdf/2004.Election.Preview.Final.Report.Update1.pdf> [hereinafter *Election Preview 2004*].

41. Bill Cotterell, *FDLE looks into vote fraud; Registration irregularities emerge across state*, TALLAHASSEE DEMOCRAT, Oct. 22, 2004, at A1; Carlos Campos, *Election 2004: bogus voter forms pop up in Fulton*, ATLANTA JOURNAL-CONSTITUTION, Oct. 21, 2004, at A1.

42. *Election Preview 2004*, *supra* note 40, at 24.

measure for our voter registration and voting process. The federal government has already imposed such a requirement for rail and air travel because of its understanding of these limitations. The same standards should be applied to voting.

Contrary to the argument raised by civil rights organizations that such requirements will reduce voter turnout by minority voters,⁴³ there are no valid studies presenting any objective data supporting such claims. The objections are merely anecdotal and based on the unproven perception that minority groups such as African-Americans do not possess identification documents to the same degree as Caucasians (although there are no claims that minorities do not have the same opportunity to obtain such identification from state authorities). Although driver's licenses are not the only form of photo identification available (since many employers and universities now routinely issue photo identification), it is useful to examine the available statistics on driver's licenses. According to an Federal Election Commission ("FEC") report covering the 1995-96 period, "approximately 87% of persons 18 years and older have driver's licenses while an additional 3% or 4% have, in lieu of a driver's license, an identification card issued by the State motor vehicle agency."⁴⁴

More recently, in 2000, the Federal Highway Administration reported that the number of licensed drivers age eighteen and over is 186,797,586.⁴⁵ Since the total population of the United States age eighteen and over according to the 2000 Census is 209,128,094, the percentage of the U.S. voting age population with a driver's license is 89.32%.⁴⁶ Using the FEC's 3% to 4% figure for additional non-driver's license identification cards, approximately 93% to 94% of the voting age population has, at

43. See, e.g., Robert Pear, *Rights Groups Say Voter Bill Erects Hurdles*, N.Y. TIMES, Oct. 7, 2002, at H1.

44. Fed. Elections Comm'n, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office*, at 5-6 (1995-96).

45. Fed. Highway Admin., *Distribution of Licensed Drivers by Sex and Percentage in Each Age Group and Relation to Population: 2000*, tbl. DL-20 (Oct. 2001), available at <http://www.fhwa.dot.gov/ohim/hs00/dl20.htm>. Neither the FEC nor the FHA has driver's license statistics by race.

46. U.S. Census Bureau, *Profile of General Demographic Characteristics: 2000*, tbl. DP-1 (July 2002), available at <http://www.census.gov/prod/2002pubs/c2kprof00-us.pdf>. If one compares 2003 driver's license statistics to the Census Bureau's 2003 population estimate, the voting age population with a driver's license rises to over 92%.

a minimum, photo identification documents issued by state authorities.

Advocacy groups further claim that identification requirements will adversely affect the elderly. However, a surprisingly large number of individuals over the age of sixty-five have driver's licenses. According to the Federal Highway Administration, the number of older Americans who hold driver's licenses as a percentage of their age group is as follows:⁴⁷

Licensed Drivers as a Percentage of Age Group

Age	Lic. Drivers
65-69	90.1%
70-74	85.7%
75-79	81.4%
80-84	73.1%

Given these statistics, it is obvious that even elderly Americans have driver's licenses with photo identification in large numbers, without even taking into account the number of passports, employer identification cards, and other such documents.

A second objection is that voters will be intimidated by identification requirements and therefore will not vote. The 2004 election certainly does not bear that out. For the first time, voter identification requirements (although limited) were applied nationwide because of HAVA. Yet turnout in the 2004 presidential election was 60.7% of those eligible to vote, the highest turnout since 1968 when 61.9% voted.⁴⁸ In fact, turnout increased by 6.4%, or nearly seventeen million votes, from the 2000 election, the largest percentage point increase since the

47. Fed. Highway Admin., *Distribution of Licensed Drivers by Sex and Percentage in Each Age Group and Relation to Population: 2003* (Oct. 2004), available at <http://www.fhwa.dot.gov/policy/ohim/hs03/pdf/dl20.pdf>.

48. Committee for the Study of the American Electorate, *Turnout Exceeds Optimistic Predictions: More Than 122 Million Vote, Highest Turnout in 38 Years*, Jan. 14, 2005, at 1, available at http://election04.ssrc.org/research/csae_2004_final_report.pdf.

1948 to 1952 election when it increased 10.1%.⁴⁹ The HAVA identification requirement also did not appear to affect voter registration. The EAC estimated that there were thirteen million new voters, an increase of 8%, while the Committee for the Study of the American Electorate estimated that the number of newly registered voters in 2004 as compared to 2000 was “an increase of nearly three million more than the increase in the eligible population” and an increase of more than six million if “registration rates remained constant.”⁵⁰ In other words, even with these new requirements, voter registration and turnout increased substantially.

The increase in turnout in the 2004 election despite the imposition of HAVA’s nationwide identification requirements is also in accord with the turnout in individual states that imposed identification requirements prior to the passage of HAVA. While there is not space in this article to go into detail, a study by the author of the turnout in presidential elections in four states with large minority populations (Georgia, South Carolina, Virginia, and Louisiana) prior to HAVA showed no affect on minority voters from the implementation of state identification requirements by their legislatures.⁵¹ By reviewing turnout in presidential elections, the possible effects of such a requirement can be gauged. Since turnout in presidential elections has fluctuated since 1960 in the midst of a general long-term decline, the effects of identification requirements must be analyzed in terms of whether turnout in a particular state has increased or decreased in comparison to the national average increase or decrease in turnout as well as the state’s turnout history. In conducting such an analysis, it must also be noted that according to numerous published studies, many other factors may influence turnout, including early voting, state laws on absentee balloting, and local races of interest to voters. In any event, however, an examination of turnout statistics in these four representative states with significant minority populations

49. *Id.*

50. Press Release, U.S. Election Assistance Commission, U.S. Reports to Congress on Election Reform Progress in 2004, Feb. 9, 2005, available at <http://www.civilrights.org/issues/voting/details.cfm?id=28137>; *Turnout Exceeds Optimistic Predictions*, *supra* note 48, at 2.

51. GA. CODE ANN. § 21-2-417 (2004); S.C. CODE ANN. § 7-13-710 (Law. Co-op. 2004); VA. CODE ANN. § 24.2-643 (Michie 2002); LA. REV. STAT. ANN. § 18:562 (West 2004).

showed no reduction in turnout due to the implementation of identification requirements.

Virginia provides just one example. According to the 2000 Census, Virginia's population is 72.3% white and 19.6% black.⁵² The percentage of the driving age population with driver's licenses in 2000 was 87.5%.⁵³ Virginia passed an identification requirement in 1999 that became effective for the 2000 presidential election.⁵⁴ It requires a voter to present a voter registration card, a social security card, a driver's license, or any other photo identification issued by a government agency or employer. If the voter has none of these forms of identification, he can sign an affidavit subject to felony penalties that he is the named registered voter. Yet from the 1996 to the 2000 presidential election, when Virginia's identification requirement became effective, Virginia's turnout increased 5.46 points—from 47.54% to 53%.⁵⁵ During that same time period, the national turnout increased 2.22 points from 49.08% to 51.3%. Thus, even after imposing a new identification requirement, Virginia's turnout increased at *twice* the rate of increase of the national turnout.

IV. CITIZENSHIP OF VOTERS

Two changes to the national mail-in voter registration form that states are required to accept by section 6 of the NVRA⁵⁶ are required by 42 U.S.C. § 15483. Two questions with yes/no check boxes had to be added: "Are you a citizen of the United States of America?" and "Will you be 18 years of age on or before election day?"⁵⁷ The form also has to state that "[i]f you checked 'no' in response to either of these questions, do not complete this form."⁵⁸ If the citizenship question is not answered, the registrar "shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely

52. U.S. Census Bureau, *State and County Quick Facts: Virginia*, available at <http://quickfacts.census.gov/qfd/states/51000.html> (last visited March 26, 2005).

53. U.S. Census Bureau, *Licensed Drivers by Sex and Ratio to Population: 2000*, tbl. DL-1C (Oct. 2001), available at <http://www.fhwa.dot.gov/ohim/hs00/dl1c.htm>.

54. VA. CODE ANN. § 24.2-643 (Mitchie 2002).

55. Information in this paragraph about voter turnout is available on the Election Assistance Commission website at http://www.eac.gov/election_resources.asp?format=none.

56. 42 U.S.C. 1973gg-4(c) (2005).

57. 42 U.S.C. 15483(b)(4)(A) (2005).

58. *Id.*

manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).⁵⁹

Despite the clear language in this provision that requires individuals to answer the citizenship question before their voter registration can be accepted by election officials, many states have ignored the law, pressured by groups such as the League of Women Voters and the American Civil Liberties Union, and continue to register individuals who do not answer the citizenship question. For example, on September 7, 2004, Ohio's Secretary of State ordered county election officials to accept voter registration applications "even if the applicants did not checked[sic] the 'yes' boxes."⁶⁰ The South Dakota Secretary of State also ordered his county election officials to do the same and the Iowa Attorney General issued an opinion telling his Secretary of State that he could ignore state law to the contrary and accept voter registrations of applicants who did not answer this question.⁶¹

Florida was actually sued to *stop* the state from complying with this requirement. A number of unions including the AFL-CIO and the AFSCME filed suit prior to the November 2004 election claiming that Florida's refusal to register individuals who did not answer the citizenship question violated the Voting Rights Act as well as state law. The case was dismissed for lack of standing.⁶²

The addition of this citizenship question to the voter registration form was prompted by Congress's concern over the ability of noncitizens, both legal and illegal, to register to vote without detection. Even the addition of this question, however, still leaves an honor system in place on the issue of the citizenship status of voters. Harris County, Texas has already reported finding at least thirty-five foreign citizens who either applied for or received voter cards in 2004 after checking the box on the application saying they were U.S. citizens and is

59. 42 U.S.C. 15483(b)(4)(A).

60. Directive No. 2004-31, Ohio Secretary of State, Sept. 7, 2004.

61. Letter from Chris Nelson, South Dakota Secretary of State, to County Auditors (Oct. 25, 2004), available at <http://www.votelaw.com/blog/blogdocs/Response%20Letter%20from%20Chris%20Nelson.pdf>; Letter from Thomas J. Miller, Iowa Attorney General, to Chester J. Culver, Iowa Secretary of State (Oct. 20, 2004), available at <http://www.votelaw.com/blog/blogdocs/AG%20Opinion%20-%20Check%20the%20Box%20-%202010-20-041.pdf>.

62. Diaz v. Hood, 342 F. Supp. 2d 1111 (S.D. Fla. 2004).

investigating another seventy.⁶³ The presence of noncitizens on our voter rolls is certainly a problem as evidenced by various reported cases where noncitizens were found to be registered and, in some cases, to have voted in elections. However, because of the lack of verification of citizenship status by election officials and the reported refusal of the Immigration and Naturalization Service to cooperate with election officials, it is difficult to know how significant a problem this is.

Some examples show the possible extent of the problem. In 1985, the district director of the INS testified before a task force in Illinois that 25,000 to 40,000 illegal and legal aliens in Chicago were registered voters.⁶⁴ Before officials in Washington stopped the probe, a random check by the Dallas INS office in 1997 of only 400 registered voters found ten noncitizens. If this percentage (2.5%) had held true for the entire county, it would represent thousands of illegally registered voters.⁶⁵ Random checks by the Honolulu city clerk's office in 2000 with the state identification card registry maintained by Hawaii showed over 550 registered voters who had admitted they were not U.S. citizens when applying for a state identification card.⁶⁶ In 2002, eight illegal immigrants testified in court that they had registered to vote, and six testified that they had voted in a June 5, 2001 city council and mayoral election in Compton, California.⁶⁷

On the federal level, voting by noncitizens was found by the Committee on House Oversight in the Dornan-Sanchez election dispute in California in 1997. After a limited comparison of Orange County voter registration files with INS databases, the Committee found 784 invalid votes due to individuals who had

63. Joe Stinebaker, *Loophole lets foreigners illegally vote*, HOUS. CHRON., Jan. 16, 2005, at B1. The story estimated that dozens if not hundreds of foreign citizens had been allowed to vote, including a Brazilian woman who voted at least four times and reregistered (and voted) after her first registration was cancelled when she acknowledged on a jury summons that she was not a citizen. A Norwegian was discovered to have voted in a state legislative race decided by only thirty-three votes.

64. Desiree F. Hicks, *Foreigners landing on voter rolls*, CHI. TRIB., Oct. 2, 1985, at 4D.

65. Ruth Larson, *INS workers forced to halt check of voters*, WASH. TIMES, June 4, 1997, at A1; Ruth Larson, *Dallas voter-fraud probe taken out of control of INS*, WASH. TIMES, June 10, 1997, at A3. It should be noted that such a check would turn up only the names of aliens in the INS system, i.e., lawful aliens who have been issued visas to be in the United States or illegal aliens who have been arrested and released pending further legal proceedings.

66. Scott Ishikawa & Kevin Dayton, *Non-U.S. citizens found on voter rolls*, THE HONOLULU ADVERTISER, Sept. 6, 2000, at 1A.

67. Daren Briscoe, *Noncitizens testify they voted in Compton election*, L.A. TIMES, Jan. 23, 2002, at B5.

registered illegally.⁶⁸ The Committee's Report stated that the question of how many aliens were registered and voting in the 46th Congressional District was not resolved by its investigation. The Committee concluded:

[T]here is a significant number of aliens who appear within the INS databases and are on the voter registration rolls of Orange County. This fact leads logically to a serious question and a troubling hypothesis: if there is a significant number of "documented aliens," aliens in INS records, on the Orange County voter registration rolls, how many illegal or undocumented aliens may be registered to vote in Orange County?⁶⁹

In a report released in 1998, California Secretary of State Bill Jones reported that in just one five-month period from September 1, 1996, to February 1, 1997, the Orange County Jury Commissioner had 455 potential jurors who had been summoned from the county voter file claim an exemption from jury service because they were not U.S. citizens.⁷⁰

Finally, shortly before the 2004 general election, the chairman of the Maryland State Board of Election was quoted as saying he was "shocked" to learn that noncitizens were on the voting rolls.⁷¹ What was most interesting about this story was the refusal of the Citizenship and Immigration Service at the Department of Homeland Security (formerly the INS) to cooperate with the Maryland election board, with a spokesman citing the federal Privacy Act and the Immigration and Nationality Act.⁷² The problem with this refusal is that CIS is violating federal law and apparently doing so without repercussions. Section 642 of the Illegal Immigration and Immigrant Responsibility Act of 1996 *obligates* the INS to respond to such inquiries notwithstanding any other provision of federal law (including the Privacy Act):

Notwithstanding any other provision of Federal, State, or local laws, a Federal, State, or local government entity or

68. COMM. ON HOUSE OVERSIGHT, DISMISSING THE ELECTION CONTEST AGAINST LORETTA SANCHEZ, H.R. Doc. No. 105-416, Feb. 12, 1998, p. 15. Since the winning margin was 979 votes, the election challenge was dismissed.

69. *Id.*

70. Press Release, California Secretary of State Bill Jones, Press Release and Official Status Report on Orange County Voter Fraud Investigation (Feb. 3, 1998).

71. Robert Redding, Jr., *Purging illegal aliens from voter rolls not easy; Maryland thwarted in tries so far*, WASH. TIMES, Aug. 23, 2004, at A1.

72. *Id.*

official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.⁷³

What is clear from these reports is that the lack of verification of citizenship in the voter registration process is a serious problem that can affect the integrity of our elections, particularly when we have an estimated eight to ten million illegal aliens in the country.⁷⁴ Having an "honor" system with no verification or requirement that voter registration applicants document their citizenship status is unacceptable, as is the refusal of a federal agency to comply with federal law. In November 2004, Arizona voters passed a requirement that individuals registering to vote provide "satisfactory evidence of United States citizenship"; it is a good model for other states to follow, particularly in regard to the list of documents that will satisfy the requirement.⁷⁵ Arizona is also covered by section 5 of the Voting Rights Act, which requires all changes affecting voting to be submitted to the Attorney General or a federal district court in the District of Columbia for preclearance. The Attorney General precleared the citizenship proposition without objection on January 24, 2005, indicating that the Department of Justice concluded that this requirement would not have any discriminatory impact on minority voters.⁷⁶

73. 8 U.S.C. § 1373(a), (c) (2005). Since you must be a citizen to register and vote in federal (and all state) elections, verifying citizenship status is obviously "within the jurisdiction" of election officials.

74. Redding, *supra* note 71.

75. Arizona Proposition 200, available at <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.htm>.

76. Howard Fischer, *DQJ: Voter-approved law not detrimental to minority voting rights*, ARIZ. DAILY SUN, Jan. 25, 2005; Yvonne Wingett & Robbie Sherwood, *Voting provisions get clearance*, ARIZ. REPUBLIC, Jan. 25, 2005, at 1B.

V. STATEWIDE VOTER REGISTRATION LISTS AND THE NVRA

HAVA requires states to implement a single, uniform, official, centralized, interactive computerized statewide voter registration list for use in all federal elections.⁷⁷ Each state must maintain and administer this database, which must list the name and registration information of every legally registered voter. Specific standards are set out for maintaining the list, including cross-referencing the list with state drivers license records, felony and death records, and federal social security records. These lists were supposed to be implemented by 2004 but the majority of states received a waiver until 2006 from the EAC as allowed under section 15483(d).⁷⁸

The computerized statewide database is intended to solve existing problems with, for the most part, county voter registration lists. Many of these lists are full of duplicate names,⁷⁹ individuals who have died, and voters who are no longer eligible because they have moved, not to mention the fraudulent and nonexistent individuals that are registered, such as the 1,200 voters under investigation in Wisconsin because of nonexistent or invalid addresses. A recent study by the *Chicago Tribune* found 181,000 dead people on voter rolls in six swing states after the November election.⁸⁰

Unfortunately, the National Voter Registration Act imposed onerous and unreasonable restrictions on the ability of states to purge voters who are ineligible because they have moved and that was not changed by the requirement of HAVA. Before the NVRA, if a jurisdiction received information that a voter had moved, it could send a letter notifying the voter that he would be deleted from the registration roll unless he confirmed that he had not moved. Under NVRA, however, a voter can be dropped *only* if he confirms in writing to the election officials that he has moved, or if he does not vote in two federal elections after failing to respond to a written notice.⁸¹ NVRA's assumption

77. 42 U.S.C. § 15483(a) (2005).

78. 42 U.S.C. § 15483(d).

79. See Susan Greene & Erin Cox, *Election becomes a test of trust*, DENV. POST, Oct. 31, 2004, at A1 (reporting that 68,000 duplicate names were found on registration rolls prior to the November election).

80. Geoff Dougherty, *Dead voters on rolls, other glitches found in 6 key states*, CHI. TRIB., Dec. 4, 2004, at C13.

81. See generally section 8 of the NVRA. 42 U.S.C. § 1973gg-6 (2005).

that an individual who has moved will receive a written notice sent to him at his new address or will take the time to respond in writing to his former jurisdiction is naive and ignores the huge volume of junk mail most people receive these days (and promptly ignore and throw out).

It also does not take into account that the Postal Service will only forward a person's mail to a new address for a limited amount of time. A voter may never receive his notice and thus will not be able to confirm that he has moved and should be dropped from the registration list. These NVRA restrictions have resulted in large numbers of ineligible persons remaining on voter registration lists—increasing the possibility that fraudulent ballots will be cast in their names. There are numerous jurisdictions across the United States (such as Alaska) that have more registered voters than the voting age population, a clear indication that the jurisdiction is not properly maintaining its registration list by purging individuals who have moved or died.⁸²

A statewide database, while solving the problem of duplicate registrations within a state, will, of course, not be a bar to individuals registering and voting in more than one state. This is a significant problem. In two separate investigations, the *Charlotte Observer* found as many as 60,000 voters registered in both North Carolina and South Carolina and the *New York Daily News* found 46,000 voters registered in both New York and Florida, with at least 1,000 voters who cast ballots in both states in at least one election.⁸³ Given that the 2000 presidential election was decided by less than 1,000 votes cast in Florida, these investigations reveal a serious security problem that must be remedied. Interestingly, in these cases these problems were *not* discovered by election officials running database comparisons—they were found by newspapers using existing

82. As other examples, the City of East St. Louis has 20% more registered voters than it has voting age population. Mike Fitzgerald, *Dual registration: a recipe for fraud*, BELLEVILLE NEWS-DEMOCRAT, Nov. 28, 2004. Thirty-four of Mississippi's 82 counties have more registered voters than voting age population. Emily Wagster Pettus, *Official seeks bid for computerized statewide voter roll*, COM. APPEAL, Sept. 1, 2004, at DS4.

83. John Strauss & Mark Nichols, *11,214 on rolls in 2 counties*, INDIANAPOLIS STAR, Oct. 28, 2004, at 1A; Russ Buettner, *City mulls action against two-timing voters*, N.Y. DAILY NEWS, Aug. 24, 2004; *60,000 could be on file to vote in both Carolinas*, THE STATE, Oct. 25, 2004, at A1; *Double Voting Demands State Action*, TAMPA TRIB., Aug. 26, 2004, at 10; James Gordon Meek & Lisa L. Colangelo, *The News Rocks the Vote: Fla. officials say fraud will be probed*, N.Y. DAILY NEWS, Aug. 23, 2004, at 10.

database technology. Unfortunately, this is the type of investigation that election officials have shown no interest or initiative in doing on their own.

VI. STATE AND FEDERAL LEGISLATIVE RECOMMENDATIONS

While many of the changes made by these new HAVA requirements are an improvement over existing election requirements and administration, they are not sufficient to protect the security of our voter registration and election process. Some of the provisions, such as the identification requirement, do not go far enough. Some groups have already exploited ambiguities in the statutory language of some of the provisions to avoid the statute's mandates. Additionally, some of HAVA's provisions should be clarified to quash the attempts to use litigation that forces substantive election administrative changes on the states that would imperil the integrity of our elections, were not intended by Congress, and intrude on the constitutional prerogative of the states to control "[t]he Times, Places, and Manner" of holding federal elections.⁸⁴ As discussed, but for the Sixth Circuit overturning the wrongly decided opinions of two federal district court judges just days before the November 2, 2004 election, HAVA would have been used to force states to implement the same kind of "precinct shopping" for voting that tort lawyers have successfully used in forum-shopping for favorable venues.⁸⁵

In order to fix the problems outlined in this article and improve the security of the voter registration and election process, the Help America Vote Act should be amended. A number of bills have already been introduced in Congress to amend HAVA, but most experts who follow these issues in Washington doubt whether any effort to amend HAVA will succeed. The statute as currently passed was the result of compromise and hard negotiations between the House and Senate and Republicans and Democrats. Both sides fear opening the statute to amendment because of possible changes the other

84. U.S. CONST. art. I, § 4, cl. 1.

85. This would have also led to these groups attempting to influence election outcomes by pressuring local election officials to count provisional ballots despite problems with the voter's eligibility, similar to the examination and argument over individual punch card ballots in Florida in 2000, especially given the short time frames after elections that officials have to make determinations and the constant threat of litigation over every decision.

side would also want. For example, most Republicans would like to improve the identification requirements, but most Democrats would like to delete them entirely.

The other solution is for states to pass laws amending their election laws, thereby putting in place stricter requirements than those imposed by HAVA, as they are allowed to do by § 15484.⁸⁶ All of the changes noted below could be implemented by states at the local level through state legislative or regulatory changes or at the federal level by amending HAVA:

- *Require all voters to present photo identification at their precinct polling locations and to send copies of such identification when submitting an absentee ballot.* Although, as discussed, the claim that minority voters cannot meet such requirements is unsubstantiated, that problem can be easily resolved. For any individual who does not have a driver's license or other photo identification and who needs to obtain one to meet this requirement, states should waive the fee their motor vehicle departments charge for the nondriver's license identification cards they issue.
- *Require an individual who registers by mail to vote in person the first time.* A small number of states such as Virginia⁸⁷ have such a legal requirement, but all states should implement such a statute.⁸⁸
- *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 HAVA or stricter state identification requirements.* This requirement should apply to all individuals who do not appear before election officials who verify their identification, particularly large voter registration drives organized by third-party organizations.

86. "The requirements established by this title are minimum requirements and nothing in this title shall be construed to prevent a State from establishing . . . requirements that are more strict than the requirements established under this title so long as such State requirements are not inconsistent with the Federal requirements under this title or any law described in section 906 [federal voting rights statutes]." 42 U.S.C. § 15484 (2005).

87. VA. CODE ANN. § 24.2-416.1(B) (Mitchie 2004).

88. States are specifically allowed to have such a requirement by section 6 of the NVRA. 42 U.S.C. § 1973gg-6 (2005).

- *Require all individuals who register to vote to provide documentation establishing that they are United States citizens, similar to Arizona's Proposition 200.⁸⁹ At a minimum, individuals who do not answer the citizenship question that HAVA requires on the federal voter registration form should not be registered unless they confirm that they are U.S. citizens. In addition, all state voter registration forms should be changed to add the same citizenship question that is now on the federal voter registration form.*
- *Prohibit any third-parties (other than a voter's family), such as campaign workers, from delivering absentee ballots to voters or voted absentee ballots from voters to election officials. Absentee ballots represent the biggest source of potential voter fraud because they are obtained and voted away from official oversight. Prohibiting third-parties from delivering ballots would prevent alteration of ballots and intimidation of voters or fraud by campaign organizations and other parties.*
- *When third-party organizations request large numbers of voter registration forms for voter registration drives, require all such forms to have individual serial numbers and require election officials to keep track of which forms are assigned to the organizations. This will allow election officials to identify which organization handled voter registration forms that are found to be fraudulent and help in the investigation and prosecution of voter registration fraud.*
- *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 not U.S. citizens.*
- *Require states to enter into regional agreements to compare their new computerized voter registration lists to find voters who are registered in more than one state.*

In addition to the changes noted above that could be implemented either by states or at the federal level through changes in HAVA, there are several recommended changes that can only be done at the federal level. HAVA should also be amended to:

89. ARIZ. REV. STAT. § 46-140.01 (2005).

- *State unequivocally that there is no private right of action under HAVA or any other federal statute such as § 1983. As discussed, HAVA required states to implement comprehensive administrative complaint procedures and it gave enforcement authority to the U.S. Department of Justice.⁹⁰ The debates in Congress during HAVA's passage make it clear that Congress did not intend to create a private right of action to enforce HAVA. HAVA should be clarified by Congress to make it explicit that the administrative complaint procedures are the exclusive venue for individuals who have complaints about a state's compliance with its provisions.*
- *State unambiguously that the provisional balloting requirements of § 15482 do not require states to count the ballots of individuals who cast votes in any precinct other than the precinct to which they are assigned based on their residence address. Additionally, it should be made clear that individuals who are provided provisional ballots as required under HAVA when they do not present identification either at the time of registration or when they vote cannot have their provisional ballot counted for any federal candidates unless the voter complies with the identification requirement prior to some period of time after the election.*
- *Make clear that if an individual does not answer the citizenship question on the federal voter registration form mandated by § 15483(b), he cannot be registered to vote for a federal election.*
- *Require all federal courts to notify state election officials when individuals whose names are drawn from their registration rolls are excused from jury duty because they claim they are not U.S. citizens. This would be similar to a provision that already exists in section 6(g) of the NVRA⁹¹ that requires all U.S. Attorneys to notify state election officials when they obtain a conviction of an individual for a felony in a federal district court. This is intended to provide election officials with the opportunity to remove a felon from the voting rolls if their state provides such a disqualification.*

90. See 42 U.S.C. §§ 15511-15512.

91. 42 U.S.C. § 1973gg-6(g)(1).

- *Amend the NVRA to allow states to purge individuals who have not voted in two federal elections as long as they have been sent a written notice warning them that they will be removed unless they contact election officials within a certain period of time.* This would change an unworkable and impractical provision in the NVRA that has single-handedly been responsible for padding voter registration rolls with huge numbers of ineligible voters and preventing states from properly purging their registration lists. It should also be clear in this change that, unlike the current requirements of the NVRA, this notice does not have to be sent out prior to the individual not voting twice; as long as the individual has not voted in two federal elections, the states should be able to remove the voter once they have sent out the written notice and there has been no response from the individual by the deadline.

All of these changes would improve the security of our election process and would prevent fraud. They would ensure that every citizen's vote counts and that the value of his vote is not stolen by wrongdoing and sloppy procedures. Even if Congress fails to act by correcting some of the problems in HAVA and the ambiguities caused by unclear language (as well as the problems with the NVRA), there is nothing to stop the states from implementing many of these changes on their own. Under the Constitution, the states retain a great deal of constitutional authority to define the requirements for voting. Despite claims to the contrary, requiring proof of citizenship and identity as well requiring voting in a precinct where a citizen resides does not violate the explicit language, the spirit, or the intent of the Voting Rights Act or other federal voting rights statutes. It was not the intent of Congress to prevent reasonable measures to authenticate the eligibility of voters. Ensuring that elections are fraud free and that all voters are actually eligible to vote is the key to assuring citizens that the election process is legitimate and that election results accurately reflect the will of the voters. The proposed changes discussed here would be important steps in achieving that goal.



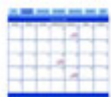
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