



## ELECTRONIC PRIVACY INFORMATION CENTER

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Paper

By

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The Revealed I

“Race & Ethnicity Implications on the Right to Vote in Public Elections”

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Voter fraud is the intentional casting of ballots in a public election by a person who knows that they are not allowed to vote based on the rules of the election process.

There are two conditions that must be satisfied to have a public election declared fair: all those who are legally eligible to participate in a public election must be allowed to vote, while at the same time those who are not legally allowed to participate are not allowed to vote. The dispassionate and objective application of voting law precludes looking at an individual voter and making a determination of eligibility. The voter registration process is based on identification of the applicant and is designed to determine eligibility. On Election Day most registered voters engage in the voting process by presenting themselves to election administration representatives who then authenticate voters, verify that the voter is listed on voter registration roles and are in fact the person they claim to be. The voting process in a free democratic pluralistic society is accomplished without consideration of the voter’s income, language of origin, education, tribe, clan, gender, race, or ethnicity. Most nations establish 18 years of age as the only prerequisite for applying for voter registration.

The sophistication of voter registration documents vary greatly from a slip of paper reporting the most basic demographic information such as name, address, minor political jurisdictions, a voter registration number; to more durable documents such as a plastic card like those provided by Mexico’s Instituto Federal Electoral, which contains a photo, fingerprint, anti-tamper features along with other vital statistics on the voter.<sup>1</sup> In 2006, the Mexican election came under intense scrutiny because the margin of victory between the top two vote receivers was only 200,000 votes out the 41 million cast. Post passage of the Help American Vote Act, which established for the first time a voter identification requirement for first time voters who register by mail.<sup>2</sup> In the United States, many voting civil rights advocates are locked in a struggle over more restrictive

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<sup>1</sup> Instituto Federal Electoral, The 2006 Mexican Elections Frequently Asked Questions, available at <<http://www.ife.org.mx/portal/site/ife/menuitem.6d5c4db6df32b7b841695c16100000f7/?jsessionid=GncjSkFRvWPtNPcQ9X0WemoY9fzrROmOuPFvOxrwZ287Qi6QuBc2!-2046246460>>

<sup>2</sup> National Committee for Voting Integrity, Electronic Voting Laws Acts and Bills, available at <<http://votingintegrity.org/tool/law.html>>

voter identification and authentication requirements because of how they will affect minority, poor, and elderly voters. Globally there are increasing demands for governments to visit the issue of greater identification requirements on citizens to prove residency status by obtaining government issued identification documents, in some cases there are costs associated with the acquisition of the approved document.

No matter what means are deployed to determine eligibility for participation in public elections they should be uniform. The dispassionate and objective application of voting law precludes looking at an individual voter and making a determination of eligibility. The voter registration process should determine eligibility, and on Election Day the role of the poll worker is to authenticate voters without consideration of their income, religion, language of origin, education, gender, race, or ethnicity.

Protecting the right to cast a secret ballot in public elections is the highest value of a political system based on self-governance. In the United States the notable increase of disinformation and misinformation efforts directed at otherwise eligible voters to impede their decision to vote in public elections is disturbing. Further the charges that voter identity theft and ineligible persons casting ballots raises alarm among United States policy makers about the security and integrity of the voter registration and ballot casting process. The history of the United States political process governed by public elections is belabored by true stories of voter intimidation, coercion, and bribery.

The Electronic Privacy Information Center opposes the implementation of increased proof of citizenship and photo identification requirements for otherwise eligible electors as a condition for participate in public elections. The arguments for increased scrutiny of citizenship and demands for government issued photo identification documents are based on concerns regarding election integrity. Recently, in the United States several proposals have been advanced at both the federal and state level to change existing election administration regulations to require eligible electors to provide proof of citizenship in order to register to vote and/or a form of photo identification in order to cast a ballot.<sup>3</sup>

In the United State the approved forms of proof of citizenship or photo identification vary across jurisdictions but, in general, the options are limited to a few, government issued documents. This approach has proven to be one of the greater challenges facing displace New Orleans residents following Hurricane Katrina. According to a report investigating the performance of the of the New Orleans flood protection system, over 450,000 people were displaced by the storm and 250,000 residence of the greater New Orleans area remained outside of their pre-Katrina dwellings as of June 1, 2006.<sup>4</sup> The official loss of life attributable to Katrina is over 1300 persons with nearly 400 persons still missing.<sup>5</sup> The death toll only accounts for victims

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<sup>3</sup> Election Law @ Moritz, 2006 Voter ID Litigation Nationwide, Ohio State University, available at <http://moritzlaw.osu.edu/electionlaw/news/2006VoterIDLitigationChart4.php>

<sup>4</sup> R.B. Seed, R.I. Abdelmalak, ..., Report: "Investigation of the Performance of the New Orleans Flood Protection Systems in Hurricane Katrina on August 29, 2005, available at [http://www.ce.berkeley.edu/~new\\_orleans/](http://www.ce.berkeley.edu/~new_orleans/)

<sup>5</sup> National Oceanographic and Atmospheric Administration, Tropical Cyclone Report Hurricane Katrina (December 20, 2005) available at [http://www.nhc.noaa.gov/pdf/TCR-AL122005\\_Katrina.pdf](http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf)

of Hurricane Katrina recovered as of February 2006, but the death toll is expected to be higher.<sup>6</sup> Some of the missing may have been lost in the chaos of the post storm evacuation, others may be in the millions of tons of debris left in the storms wake, and some may never be accounted for if they were taken by the retreating storm surge back into the Gulf.<sup>7</sup> The majority of victims were 60 years of age or older.<sup>8</sup>

It is worth noting that the Federal Emergency Management Agency (FEMA) could have been of greater assistance to evacuees' ability to reconnect to the democratic process. FEMA was the only government entity to compile requests for assistance from individuals who had been displaced by the disaster. The Secretary of State of Louisiana, the agency responsible for maintenance of voter registration list, offered to prepare an information mail piece and asked that FEMA send to the new addresses of Louisiana residence to inform them of their civic rights.

There is also a pernicious practice in United States elections called voter "caging" that employs a tactic used by mass mailers to determine if an address list is accurate. Mass mailers using caging tactics send mail with a no forward request and return to sender pre-paid postage should the individual not be at an address where the mail is sent. In this way marketers can remove names from list so that they can save money by not sending material to bad addresses.<sup>9</sup> In the United States partisan interests who use the same mass marketing technique by obtaining lists of registered voters and sending them mail with a no forward mail request and pre-paid return postage. The correspondence could also require that the recipient sign for the mail. If the mail is returned then those individuals absentee ballots or on Election Day are automatically challenged. This tactic has been used in target individuals living in areas where minority or low income voters reside, it has also been used to target African American military personnel who are deployed outside of the area where they are registered to vote.

The City of New Orleans will be rebuilt and the decisions on how that will be accomplished will come from those elected to local, state, and national offices. On Saturday, October 20, 2007 the state of Louisiana elected a new Governor. The activity by the election office of Orleans Parish struck registered voters from the rolls or reassigned poll places based on address forwarding information obtained from the United States Postal Service. Thousands of homes and hundreds of neighborhoods no longer exist in the city of New Orleans, but many residents have found alternative places to live in the city as they work to restore their lives. Some of these residents have their home mail forwarded to drop boxes, or work addresses because they no longer have homes where they lived prior to the storm. Because Orleans Parish reassigned voting locations based on the mail forwarding and new address information supplied by the federal postal

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<sup>6</sup> MSNBC, *Death toll from Katrina likely higher than 1,300*, j(February 10, 2006) available at <http://www.msnbc.msn.com/id/11281267/>

<sup>7</sup> National Oceanographic and Atmospheric Administration, Tropical Cyclone Report Hurricane Katrina (December 20, 2005) available at [http://www.nhc.noaa.gov/pdf/TCR-AL122005\\_Katrina.pdf](http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf)

<sup>8</sup> MSNBC, *Death toll from Katrina likely higher than 1,300*, j(February 10, 2006) available at <http://www.msnbc.msn.com/id/11281267/>

<sup>9</sup> 'Vote caging' allegations arise in probe of U.S. attorney firings, Saceeb.com, available at <http://www.sacbee.com/111/story/239832.html>

service voters were unaware of the change until they attempted to cast a ballot at their home voting location in last Saturday's election.

Orleans Parish most displaced voters realistically could not be expected to know the rules of voter registration and participation. They may not know that initially following the hurricane Louisiana's Secretary of State has declared that once registered you are registered. However, if voter registration is changed to another state they will forfeit their Louisiana registration. Secretary of State Alan Alter, at the time of the hurricane was the state of Louisiana's chief election's officer, expressed the belief that the "physical and technical obstacles are too great to overcome." Other state officials stated a belief that the elections might be delayed for as many as eight months.<sup>10</sup>

The Orleans Parish February 2006 municipal elections were postponed due to the disruption introduced by Hurricane Katrina.<sup>11</sup> On January 25, 2006 Louisiana Governor set April 22, 2006 as municipal Election Day for Orleans Parish.<sup>12</sup> Court challenges to holding the election without provisions for the thousands of voters who had been displaced by the storm were unsuccessful. Federal District Court Judge Ivan L.R. Lemelle ruled that the election would be imperfect but that it would take place on the date announced by the governor.<sup>13</sup> At that time there were no records on the whereabouts of the 297,00 persons on registration rolls for Orleans Parish. The request for absentee ballots only numbered about 8800. The same Department of Justice Civil Rights Division that had pre-cleared the Georgia Voter ID law, which later was struck down by two Federal courts as a "Poll Tax" and therefore unconstitutional did not intercede on the behalf of the 200,000 displaced New Orleans residents.

Initially, Election Day voting poll locations were a good means of authenticating voters because the people within the community are more likely to know the people who are casting ballots. Today, that is more difficult because of the mobility of the American population and the disconnected nature of neighborhoods and communities. The increased demands for voters to hold government issued identification documents avoids the basic discussion on democracy and equal rights. Creating higher barriers to participation will bar otherwise eligible voters from the process. ID proponents readily acknowledge this fact, but they are willing to support the measures based on unsubstantiated beliefs that voter fraud is a real problem.

The question that has not been answered is where is the evidence of ineligible voters who are non-citizens participating in public elections. If this is a definable issue, the question still remains would a strict voter identification requirement address the problem. Privacy advocates are not seeing voter ID theft—it is a crime that would not stay hidden for very long. By the close of any public election where it is present victims would be vocal and angry about being denied their right to vote. Non-citizens voting in public elections present a number of questions: why would undocumented persons seek

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<sup>10</sup> Gary Rivlin, *New Orleans Election in Doubt*, New York Times 15 (December 3, 2005)

<sup>11</sup> Letter to the Editor, *Iraq, New Orleans and Bush's Promises*, New York Times 11 (December 11, 2005)

<sup>12</sup> National Desk, *April 22 Vote for New Orleans*, New Orleans 17 (January 25, 2006)

<sup>13</sup> Adam Mossiter, *Judge Orders New Orleans to Proceed with Election*, New York Times 12 (March 28, 2006)

to bring themselves to the attention of government officials. Second, where is the research that provides some measure of the problem identified, and second is the supposed non-citizen voter participation isolated to certain states, regions or is it a national issue. Unfortunately many of the examples of the undocumented problem of voter fraud feature evildoers who are black, brown, Asian, or speak with an accent.

EPIC finds the ideas of proof of citizenship and photo identification requirements an extreme approach to a yet undefined problem that has yet to be acknowledged by election administration professionals or state attorneys generals as a pressing issue. For this reason, EPIC finds the proposal to increase the burden for voter participation in public elections to include restricted identification requirements to be objectionable, a barrier to the right to vote, and unnecessary in the encroachments on voters' privacy rights. We advise rejection of the ideas on the basis that the proof of citizenship and photo identification requirements: (1) are unnecessary and possibly unconstitutional; and (2) show a disregard of voters' privacy rights.

The first indication of voter identity theft would be the notice provided by those who are victims. Just as in the cast of financial identity theft the victim is the first to note the victimization and will alert authorities or election assistance efforts of the problem. It is important that the application of limited government resources be directed toward addressing real threats to identity and authentication within the environment where problems are discovered to have the greatest opportunity for effective redress.

### **United States Proof of Citizenship Requirements for Voter Registration and Photo Identification Requirements for Voting are Unnecessary and Possibly Unconstitutional**

In order to increase voter participation in federal elections, the United States Congress enacted the National Voter Registration Act of 1993 ("NVRA" or "Motor Voter Act").<sup>14</sup> The act was designed to enhance voting opportunities for every American and makes it easier for all Americans to exercise their fundamental right to vote. Recently, in reply to the Presidential Election of 2000, the federal government attempted to clarify and codify voting rights in the United States for federal elections through the enactment of the Help America Vote Act of 2002 ("HAVA").<sup>15</sup> HAVA, for the first time in the nation's history, established a role for the federal government in public elections held to fill federal elected offices.

Under NVRA and HAVA, states retain control of the election process, but they must meet minimum standards set by statute and federal agencies including a prohibition on states adopting alternative standards that are "inconsistent with ... any law described [herein]."<sup>16</sup> HAVA was generally popular among members of Congress, yet received some criticism because it required more stringent voter identification procedures.

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<sup>14</sup> 42 U.S.C. § 1973gg.

<sup>15</sup> 42 U.S.C. § 15301, *et seq.*

<sup>16</sup> 42 U.S.C. § 15484.

Dissenters feared that the new requirements would repress voter participation by millions of Americans who have no driver's license.

In 2005, the Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, released a new report on the conduct of domestic elections. The Carter-Baker Commission recommended photo IDs for all voters, verifiable paper trails for electronic voting machines, and removing partisan political activity from the administration of elections. Voting reform groups favor the paper trail. But the photo ID requirement conflicts with many civil rights and voting rights laws. EPIC earlier opposed (pdf) Georgia's effort to require all voters to present photo ID to participate in public elections.

Many ideas for increased voter identification requirements allege to further the principle goals of NVRA and HAVA. Yet, most proposals do the very opposite, stripping from the list of acceptable forms of identification several documents HAVA specifically permits, including: a current utility bill, bank statement, government check or paycheck, or other government documents showing the voter's name and address. Moreover, increased voter identification requirements would disproportionately burden minorities, elderly, physically challenged, and the poor by presenting a significant financial and practical hurdle to poll access. Historically, basing such prerequisites on a desire to facilitate the voting process has been merely pretextual, such as was the case with poll taxes.

EPIC has previously explained in the analogous context of voter registration; voter registration was designed to deny suffrage to those groups that were deemed not to be worthy of equal participation in the democratic process.<sup>17</sup> From generation to generation the list of the outcasts of American Democracy included women, new citizens, minorities, young adults, first time voters, poor people, and the homeless.<sup>18</sup> We believe ideas that further increase voter identification requirements, by preventing certain citizens from accessing the polls, will more likely reduce rather than enhance voting integrity. Although we recognize the interest in verifying voter identity, we believe that compelling eligible electors to acquire and present proof of citizenship to register to vote and photo identification to cast a ballot represents an unjustified privacy infringement.

The goal should be to keep the balance of furthering legitimate voter access, while ensuring that only those who may participate in the election do so. The voter access document in the form of voter registration should be the document needed to assure access to the ballot box. The role of that process is to make the necessary checks of identity and assure that those checks are based on real measures that reflect the needs of public election participation. However, the documents that can offer some proof of citizenship could include a birth certificate or a federal government issued passport, however, neither of these documents contain any relevant information for voter

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<sup>17</sup> DENNIS R. JUDD & TODD SWANSTROM, CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY 86 (Addison-Westley Education Publishers Inc.) (2d ed. 1998).

<sup>18</sup> See ACLU & Dēmos, Purged! How a Patchwork of Flawed and Inconsistent Voting Systems Could Deprive Millions of Americans of the Right to Vote (Oct. 2004), available at <http://www.aclu.org/Files/OpenFile.cfm?id=16844>.

registration purposes. A place of birth does not indicate whether someone is a current resident of a community, or answers other questions about eligibility for participating in a public election. The passport is solely for the purpose of identifying citizens as they travel to and from the country and provides even less information that could be used for voter registration purposes.

Nor can ideas for increased voter identification requirements be said to remedy voter fraud, accusations of which have, in recent years, centered on charges of fictitious registration.<sup>19</sup> HAVA was passed partly on the grounds that requiring identification at the time of registration, rather than at the time of voting, would remedy this very problem.<sup>20</sup> Moreover, while multiple registrations have occurred in some instances, these incidents do not necessarily reflect an intention by the voter to cast multiple ballots; lack of understanding and poor administration of the registration process itself may induce honest persons to register multiple times in an effort to try to ensure registration.<sup>21</sup> Another documented reason for multiple registrations is poor governmental recordkeeping.<sup>22</sup> Regardless of the cause of the problem, compelling voters to present state-issued identification at the polls is unlikely to resolve voter fraud.

Each election there is a small percentage of votes that are cast which raise questions about voter fraud. However, many of these ballots probably do not fit the typical profile most people would expect, they may be voters with residences in more than one state i.e. retirement or vacation homes and a permanent residence. They may be people who initially vote absentee and then find that they can vote on Election Day and do so. There are also concerns about people without the capacity to cast an independent, and informed vote i.e. those in assisted living or nursing homes who may have absentee ballots cast in their names. To be truthful the biggest opportunity for rampant voter fraud are absentee ballots, but little attention is placed on that process.<sup>23</sup> In any regard the evidence of rampant illegal vote casting is just not there.

Mandating presentation of state-issued documents as a condition to the exercise of the right to vote – unquestionably the most fundamental of all democratic freedoms<sup>24</sup> – represents a sharp departure from national precedent. Requiring voters to carry such documents could compromise the historic distinction between the United States and those nations requiring citizens to present papers as a condition to free passage. Identity cards have historically been a hallmark of injustice; they were essential to South Africa's apartheid system and proved useful in the Nazi and Rwandan genocides, for which they

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<sup>19</sup> CNN.com Online News Law Center, Mary Poppins prompts investigation, <http://www.cnn.com/2004/LAW/10/18/mary.poppins.registers.to.vote/>

<sup>20</sup> See Robert Pear, The 2002 Campaign: Ballot Overhaul: Congress Passes Bill to Clean Up Election System, N.Y. TIMES, Oct. 16, 2002, at A1 (quoting Sen. Bond (MO) as saying, "If your vote is canceled by the vote of a dog or dead person, it's as if you did not have the right to vote.")

<sup>21</sup> Dennis J. Willard & Doug Oplinger, Figures Don't Add Up, AKRON BEACON J., Oct. 2, 2004, at 8A.

<sup>22</sup> Too Close to Election to Purge Voter Rolls, Editorial, INDIANAPOLIS STAR, Aug. 27, 2004, at A12; Brad Schrade & Anne Paine, and Bloated Registration Rolls Might Mean Long Lines at Polls, TENNESSEAN, June 28, 2004, at 1A.

<sup>23</sup> Maria A. Morales, Karen Branch & David Lyons, *Carollo Headed Back to Court, Commissioners Don't Act to Fill Mayor's Seat*, THE MIAMI HERALD, March 6, 1998, at 1A (documenting the confusion caused when a judge calls a new election due to massive absentee voter fraud).

<sup>24</sup> "Other rights—even the most basic—are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

were powerful tools to identify members of targeted groups.<sup>25</sup> Requiring citizens to present non-voting-related documents, such as a driver's license, at voting polls is akin to demanding citizens to present government-issued food-rationing cards for unrelated purposes, a practice that prompted rebellion in World War II Britain.<sup>26</sup>

Requiring voters to provide the state with information that is unnecessary to verify their identity or citizenship, such as the voter's address and fingerprints, may also raise questions of whether the vote itself is being cast in secret. Such concerns of voters are particularly acute in jurisdictions that use electronic voting machines, such as the State of Georgia.<sup>27</sup> Whenever the state mandates disclosure of personal information, the possibility arises that the data will be collected, stored in a centralized database to which subjects lack direct access and used for unknown purposes. Such a scheme of identification may thus chill rather than enhance popular confidence in election integrity. As one scholar notes, a system of mandatory identification by documentation raises fears that, "[a]ll human behavior would become transparent to the State, and the scope for nonconformism and dissent would be muted to the point envisaged by the dystopian novelists."<sup>28</sup> Innocent voters may feel especially intimidated if their information is checked against a database as they have, "no way of knowing the contents of the database against which their identification is being run, whether these contents are accurate or not, or what further impositions might be triggered by the information linked to their identity card. This uncertainty will turn every identification demand into cause for apprehension."<sup>29</sup>

In *Burson v. Freeman*,<sup>30</sup> the United States Supreme Court described voter privacy as a means of preventing voter fraud while ensuring against undue coercion. Upholding, under strict scrutiny analysis, a Tennessee statute that prohibited political candidates from campaigning within 100 feet of a polling place entrance, the plurality stated:

[A]n examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in

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<sup>25</sup> Daniel J. Steinbock, National Identity Cards: Fourth and Fifth Amendment Issues, 56 FLA. L. REV. 697, 708-09 (Sept. 2004).

<sup>26</sup> Id. at 708.

<sup>27</sup> Georgia uses a touch-screen, direct recording electronic (DRE) voting system, which requires an access card to unlock the voting machine. Significantly, the Secretary of State Elections Web site includes the following statement about the card: "It contains no personal information about you or your vote." Georgia Secretary of State Cathy Cox, Elections, Frequently Asked Questions, [http://www.sos.state.ga.us/elections/electronic\\_voting/faqs.htm](http://www.sos.state.ga.us/elections/electronic_voting/faqs.htm) (last visited July 25, 2005). For an overview of security of electronic voting in Georgia, see Britain J. Williams, Security in the Georgia Voting System, Apr. 23, 2003, <http://www.votescount.com/georgia.pdf>.

<sup>28</sup> Steinbock, *supra* note 19, at 809 (quoting Roger Clarke, Human Identification in Information Systems: Management Challenges and Public Policy Issues, 7 INFO. TECH. & PEOPLE, (No. 4) 6, 34 (1994), available at <http://www.anu.edu.au/people/Roger.Clarke/DV/HumanID.html>).

<sup>29</sup> Steinbock, *supra* note 19, at 734 (citations omitted).

<sup>30</sup> 504 U.S. 191 (1992).



order to serve the States' compelling interests in preventing voter intimidation and election fraud.<sup>31</sup>

Thus, voting and privacy work in tandem: the latter gives meaning to the former. Compelling voters to present photo identification and to reveal more information than is absolutely necessary to affirm identity before allowing them into the restricted zone will chill voters' sense of seclusion and infringe on the sanctity of the private vote.

Judicial precedent advises against giving statewide latitude in the use of personal information for administrative purposes in elections. In *Greidinger v. Davis*,<sup>32</sup> the Fourth Circuit limited the scope of use of Social Security Numbers in the administration of elections after a Virginia citizen seeking to register to vote challenged the state's publication of the Social Security Numbers in the public voting roles. While allowing the use of Social Security Numbers for the limited purpose of preventing voter fraud, the Fourth Circuit held that publishing Social Security Numbers placed an impermissible burden on the right to vote.<sup>33</sup>

In *Harman v. Forssenius*,<sup>34</sup> the United States Supreme Court struck down a Virginia statute requiring voters to submit an affidavit of residence six months before Election Day as an alternative to paying the customary poll tax. Finding that the statute violated the Twenty-Fourth Amendment, the Court rejected the state's argument that the law was necessary to prevent voter fraud: "[C]onstitutional deprivations may not be justified by some remote administrative benefit to the State.... Moreover, ... the State has not demonstrated that the ... requirement is in any sense necessary to the proper administration of its election laws."<sup>35</sup>

The administrative challenge with increased voter identification requirements is the development of lists of approved forms of proof of citizenship. Naturalization papers are clear proof of citizenship but natural born citizens have no equivalent. Birth certificates or passports, under some circumstances, can prove the citizenship of an individual. However, proof of birth at an American hospital may not equate to American citizenship. Every year resident working or student aliens deliver children in American hospitals who will never become citizens of the United States. In addition, members of the American military serving abroad regularly deliver children who are natural born American citizens in foreign hospitals. A passport requires proof of citizenship to obtain but can only be acquired at a cost, a possible violation of the Twenty-Fourth Amendment.

Approved lists of forms of photo identification also have administrative challenges. Although most Americans hold a valid drivers license, many departments of motor vehicles ("DMVs") around the country are no longer issuing new licenses when citizens relocate within a state. Some DMVs do not collect old drivers licenses when a driver changes address. Because of that, many voters may have a photo ID with an

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<sup>31</sup> *Id.* at 206.

<sup>32</sup> 988 F.2d 1344 (4th Cir. 1993).

<sup>33</sup> *Id.* at 1344.

<sup>34</sup> 380 U.S. 528 (1965).

<sup>35</sup> *Id.* at 542-43.

outdated address or have several valid drivers licenses with different addresses. In addition, most DMVs charge a processing fee for an individual to obtain a license, to require presentation of a driver's license in order to cast a ballot may be a possible violation of the Twenty-Fourth Amendment.

### **Proof of Citizenship Requirements for Voter Registration and Photo Identification Requirements for Voting Disregard Voters' Privacy Rights**

Increased voter identification requirements as proposed are often equally onerous, requiring voters to obtain at least one form of identification for which the state typically collects a monetary charge. Some states allow persons who cannot afford a card to obtain one for free; however, this, requires not only documented proof of identity, state residency, and citizenship but also submission of proof of indigence and income. Moreover, such applicants are often required to apply for such cards well in advance of an election and to have a current mailing address, an impossibility for the indigent.

Consideration of increased voter identification requirements should also be informed by the reasoning in *Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County*, in which the United States Supreme Court declined to hold that law enforcement can mandate that citizens produce documents proving their identity.<sup>36</sup> In that case, the Court upheld a Nevada statute that required a person stopped by police to disclose his or her name when reasonable; particularly suspicion of a crime was present. The Court reasoned that the statute did not violate the Constitution because “[t]he request for identity has an immediate relation to the purpose, rationale, and practical demands of a Terry stop.”<sup>37</sup>

No such reasonable relation exists here. Increased voter identification requirements would require all citizens presenting themselves at the poll – the vast majority of whom presumably arouse no suspicion whatsoever – to disclose not only their names but also all information that appears on their identification cards. Further, the requirements would require citizens to present the cards not to police but to poll workers, most of whom are neither professionally licensed in law enforcement nor permanent governmental employees. Furthermore, the requirements would mandate self-identification not in the context of criminal apprehension – a state interest that, although strong, must be balanced vis à vis Fourth Amendment rights<sup>38</sup> – but as a condition to an innocent person's exercise of the constitutional right to vote.<sup>39</sup>

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<sup>36</sup> 542 U.S. 177 (2004) (upholding Nevada statute because “[a]s we understand it, the statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means—a choice, we assume, that the suspect may make – the statute is satisfied and no violation occurs.”).

<sup>37</sup> *Id.* at 177.

<sup>38</sup> See, e.g., *Muehler v. Mena*, 125 S. Ct. 1465, 1470 (2005) (holding that no Fourth Amendment violation occurred where officers handcuffed suspect during lawful search: “Inherent in [the] authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention.”).

<sup>39</sup> The U.S. Constitution places no such restriction on the right to vote and specifically excludes several restrictions. See U.S. Const. art. XIV, § 2; U.S. Const. amend. XIV, U.S. Const. amend. XV; U.S. Const. amend. XIX; U.S. Const. amend. XXIV; U.S. Const. amend. XXVI.

The disclosure of personal information mandated by the increased voter identification requirements could be considerable. The most common form of identification likely to be used – a driver’s license – includes not only the voter’s name and photographic likeness but also may include such information as the voter’s age, height, weight, driver’s license number, restrictions owing to disability or impairment (such as for imperfect vision or a prosthetic limb), and fingerprints. Furthermore, the State, and not the voter, would have sole control over the information placed into a state-issued identification card, and the applicant for such identification cannot choose to withhold certain data. Changes in the design and content of driver’s licenses and other state-issued identification are also at the discretion of the government rather than the data subjects.

The cumulative effects of what many would deem a minor burden on voter rights would be substantial over time because checking papers has “an additional subjective effect on a grand scale: the psychic harm to free people of having to ‘show your papers’ . . . . Not only would people forced to go through identity checkpoints experience some degree of fear and surprise, but also knowing that this has become a permanent part of the social fabric would diminish their sense of liberty.”<sup>40</sup> Such effects are certainly immeasurable, but there can be no question that the effects are compounded where the right at issue – voting – is the very heart of democratic liberty.

We should not assume that all identification requirements would fall equally upon all citizens. One of the largest sources of voter disenfranchisement is poll worker errors, which could be compounded with additional voter identification requirements. In the recent Indiana primary elections Veterans were denied their right to vote because their VA identification cards were not one of few forms of identification approved by the new state law.

## **REAL ID and Voting**

Identity (ID) cards are in use in one form or another in virtually all countries of the world. The type of card, its functions, and integrity vary enormously. While several countries have official, compulsory, national ID cards that are used for a variety of purposes, many countries do not. Nationwide ID systems are established for a variety of reasons. Race, politics and religion often drive the deployment of ID cards. The fear of insurgence, religious differences, immigration, or political extremism have been all too common motivators for the establishment of ID systems that aim to force undesirables in a State to register with the government, or make them vulnerable in the open without proper documents.

In recent years technology has rapidly evolved to enable electronic record creation and the construction of large commercial and state databases. A national identifier contained in an ID card enables disparate information about a person that is stored in different databases to be easily linked and analyzed through data mining techniques. ID cards are also becoming "smarter" – the technology to build

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<sup>40</sup> Steinbock, *supra* note 19, at 740.

microprocessors the size of postage stamps and put them on wallet-sized cards has become more affordable. This technology enables multiple applications such as a credit card, library card, health care card, driver's license and government benefit program information to be all stored on the same national ID along with a password or a biometric identifier.

Governments in Finland, Malaysia, and Singapore have experimented with such "Smart" ID cards. In July 2002, the Labor government in the United Kingdom launched a six-month public consultation process on whether the United Kingdom should adopt an "entitlement card" with similar features. Critics contend that such cards, especially when combined with information contained in databases, enable intrusive profiling of individuals and create a misplaced reliance on a single document, which enables precisely the type of fraud the cards are meant to eliminate.

For the first time in its history, the United States is instituting a system of national identification called the REAL ID. The new requirements for state issued drivers licenses and identification cards dictate that the Department of Homeland Security will mandate state collection of personal data and documents without setting adequate security standards for the card, state motor vehicle facilities, or state motor vehicle databases. The government will create a national identification database by linking the databases of all 50 states and the data of 245 million state license and identification cardholders. REAL ID also increases the risk of counterfeiting and identity theft by creating one unifying ID card (with one design) to forge and one database full of sensitive personal information, with many entry points across the nation, to attack. DHS also divert funds needed for other state homeland security projects, such as equipment for rescue and first responder personnel by regulating that 20% of a state's Homeland Security Grant Program money can be spent on REAL ID implementation.

The Electronic Privacy Information Center (EPIC) opposes the use of the REAL ID as a voter authentication document. EPIC is on the record as being in opposition to Georgia's use of government-issued photo ID as the sole means of casting a ballot in a state or federal election. EPIC said that the Georgia voting photo identification law encroaches on privacy, would discourage voter turnout, and is inconsistent with the federal Help America Vote Act. Under the 1965 Voting Rights Act, Georgia is required to receive Justice Department approval before making any changes to its voting laws. The list of approved government photo identification documents does not include state and federal identification documents that would otherwise establish eligibility to vote. The State of Georgia did not intend to accept federal or state issued checks, employment identification documents, state college or university identification, utility bills, sworn affidavits, or public assistance identification. EPIC found the Georgia voting ID law and the Carter-Baker Commission recommendation on REAL ID as the sole voting identification requirement objectionable, a barrier to the right to vote, and unnecessary in its encroachments on voters' privacy rights.

EPIC objects to the proposal by the Carter-Baker Commission to restrict voter participation only to those who can obtain a REAL ID on many of the same grounds that

we object to the Georgia voting ID requirement. First, the rules for implementation of the REAL ID have not been provided by the Department of Homeland Security, which has sole legislative authority over this critical area.

The REAL ID will not be a definitive document on citizenship, but a test of the ability of some to successfully navigate the course and receive a document based on the high bar established by the law. The law is lacking in that there is no requirement that local and state agencies receiving requests reply to the state DMVs attempting to verify source documents presented by applicants. Further the language of the law regarding an inability to verify documents will be ripe for abuse:

“(11) In any case in which the State issues a driver's license or identification card that does not satisfy the requirements of this section, ensure that such license or identification card--(A) clearly states on its face that it may not be accepted by any Federal agency for federal identification or any other official purpose; and (B) uses a unique design or color indicator to alert Federal agency and other law enforcement personnel that it may not be accepted for any such purpose.”

Second, the requirement that only one document is the only means of authenticating voters makes the penalty for not having a REAL ID too costly for a popular democracy. Third, states can choose to opt-out of the REAL ID program, but the Act mandates that licenses from opt-out states cannot be used as identification for federal purposes. If Congress follows the Commission's recommendation that voters participating in federal elections can use only the REAL ID card as identification, then residents of states that reject the REAL ID program will not have acceptable voter identification.

The record of voting rights in this nation does not support the assumptions made by the Carter-Baker report that if states make the REAL ID available to indigent voters then the issue of access will be address. The history of voting rights in this nation should not be ignored. The adoption of the 15<sup>th</sup> Amendment prohibited the denial of voting rights based on race.<sup>41</sup> The 19<sup>th</sup> Amendment prohibits the denial of the right to vote based on gender.<sup>42</sup> The 24<sup>th</sup> Amendment prohibits the poll tax for federal elections.<sup>43</sup> The 26<sup>th</sup> Amendment prohibits the denial of voting rights of those 18 and older base on age.<sup>44</sup>

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<sup>41</sup> Amendment XV to the Constitution provides:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Congress shall have power to enforce this article by appropriate legislation.

<sup>42</sup> Amendment XIX to the Constitution provides:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation

<sup>43</sup> Amendment XXIV to the Constitution provides:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

The Congress shall have power to enforce this article by appropriate legislation.

<sup>44</sup> Amendment XXVI to the Constitution provides:

Each Amendment is a testament to the Federalists and Antifederalists struggle to define democracy in the United States.

The Carter-Baker Recommendations cite as the reason for a photo ID requirements the curbing of voter fraud is not substantiated by empirical evidence. We believe that the proposed recommendation if acted upon will prevent certain citizens from accessing the polls, will more likely reduce than enhance voting integrity. Although we recognize the Commission's interest in verifying voter identity, we believe that compelling qualified citizens to acquire and present state-issued picture identification cards at voting polls represents an unjustified privacy infringement. We believe that the Georgia experience in noting being able to present evidence of the type of election fraud intended to be addressed by the proposed new state ID standard is indicative of the current debate on this issue. The Georgia state legislature has not cited evidence of actual effects of voter identity fraud on outcomes of Georgia elections. Indeed, Georgia's Secretary of State Cathy Cox recently could not recall even "one documented case of voter fraud during [her] tenure as Secretary of State or Assistant Secretary of State that specifically related to the impersonation of a registered voter at voting polls."

### **Provisional Ballots**

In the United States Congress in passing HAVA placed a resource in the hands of local and state election officials for those instances when the authentication of a voter is in doubt--the Provisional Ballot can be used. However, the rules for the use of this ballot and the inclusion of these ballots in the final results of election need clarification. The goal of preventing voters from participating in public elections when they should not, but allowing a process that includes legal voters in engaging the process is a good approach.

### **Conclusion**

According to the CalTech MIT study, *Voting: What Is, What Could Be*, between 4 and 6 million votes were lost in the 2000 election.<sup>45</sup> The study attributed the loss in part to problems with voter registration and polling place practices. In 2004, EPIC identified two general problem areas with voter registration during the elections: lack of transparency and voter privacy regarding the public administration of voter registration.<sup>46</sup> The solutions to voter registration and Election Day problems lie not in additional legal barriers between American voters and the ballot box but in increased training and funding for local election administration. There is no evidence that local election administrators face drastic challenges to the identification of voters and registering to vote and the act of casting a ballot must, by law, cost nothing to the voter. Therefore, and for the reasons

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The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

The Congress shall have power to enforce this article by appropriate legislation.

<sup>45</sup> THE CALTECH/MIT VOTING TECHNOLOGY PROJECT, *VOTING, WHAT IS, WHAT COULD BE* (California Institute of Technology and The Massachusetts Institute of Technology Corporation) (2001) available at [http://www.vote.caltech.edu/media/documents/july01/July01\\_VTP\\_Voting\\_Report\\_Entire.pdf](http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf).

<sup>46</sup> Ralph Vartabedian, LOS ANGELES TIMES, *State Laws Unjustly Bar Voters, ACLU Says*; Oct 19, 2004, at A16.

state above, increased voter identification requirements are unnecessary, possibly unconstitutional, and disregard voters' privacy rights.

Thank you,

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Lillie Coney is Associate Director with the Electronic Privacy Information Center (EPIC) in Washington, DC. She is the Public Policy Coordinator for the National Committee for Voting Integrity (NCVI), and has testified before the Election Assistance Commission. She served on the Brennan Center Taskforces on the Security and Usability of Voting Systems. She also served as a member of the ACM Committee on Guidelines for Implementation of Voter Registration Databases. She participated as a contributor in the academic paper "Towards a Privacy Measurement Criterion for Voting Systems." She has written several law journal articles on voting, and contributed to the development of the Election Incident Reporting System. She is a contributor to the New York Times Best Seller, 50 Ways to Love Your Country. She serves in an advisory capacity to several organizations, which include Verified Voting, ACCURATE, Voting System Performance Rating, and Open Voting Consortium. She is also on the board of Computing Professionals for Social Responsibility.