



TO: Presidential Advisory Commission on Election Integrity
FROM: Lawyers Democracy Fund
DATE: September 8, 2017

Thank you for the opportunity to comment on laws and practices that enhance or undermine the confidence of the American people in federal elections and vulnerabilities in the system.

Lawyers Democracy Fund (LDF) is a non-partisan, non-profit organization dedicated to promoting the role of ethics and legal professionalism in the electoral process. Our efforts currently focus on three areas: creating a proposed uniform election code, providing guidance to legislators interested in reforming their electoral systems; conducting, funding, and publishing research regarding the effectiveness of current election methods, particularly those reports that fail to receive adequate coverage in the national media; and providing legal education opportunities for lawyers interested in election law. LDF's leadership and volunteers are lawyers with vast experience in election law and administration.

The Constitution wisely reserved the power of election administration to the states in Article I, Section 4. Elections being conducted, managed, and regulated at the local level has many benefits, and the Founders' wisdom continues to be demonstrated in new ways. Our dispersed, federalist system makes it extremely unlikely that an entire election could be "hacked." This is the best protection to thwart widespread cyber disruptions of elections that will increasingly be attempted by bad actors around the world. Rather than Congress or the federal Executive Branch, state legislatures have primary responsibility for regulating elections, and local election officials have primary responsibility for administering elections.

States and localities struggle to find the financial resources to administer elections as well as they would wish. A network of federal, state, and local laws, regulations, and procedures control election administration, and local election officials face immense practical problems daily. While the work of election administration is complex and challenging, it is vitally important because it protects one of our most precious constitutional rights. The American people's confidence in the election process derives not only from the controlling laws and procedures but also from local election officials' implementation of those laws and procedures.

The Commission on Election Integrity has a tremendous opportunity to assist state legislatures and local election officials in their important work by studying elements of our election system and providing suggestions for improving both the system and voter confidence in the system.

While there are many laws, policies, and practices that impact the American people's confidence in election processes and election outcomes, three primary areas deserve the Commission on Election Integrity's attention: voter identification, voter registration list accuracy, and the integrity of mail or absentee ballots.

Voter Identification

While voter identification requirements have, somewhat inexplicably, become a political issue, voter identification requirements are vital to ensuring public confidence in the election process. Voters understand that without identification requirements, the election process is open to fraud, manipulation, and honest mistakes. This is why voters themselves, unlike many politicians, strongly support voter identification requirements.

For example, public opinion polling consistently shows that 70-80% of Americans support requiring photographic identification at the polls before a voter is issued a ballot.¹ Last year, Missouri citizens voted on a constitutional amendment to allow a photographic identification law in their state, and the measure passed overwhelmingly, with 63% voting in favor.²

There are two primary points of vulnerability when identification is needed: at registration to determine eligibility and when voting to determine identity.

The Help America Vote Act (HAVA) required that persons registering to vote provide identification or other proof of name and address at the time of registration or, if the person registered by mail, when the person first votes.³ This provides a minimum identification requirement for voter registration for federal elections.

States have enacted higher requirements for identification at the time of registration in their states. Recently, Arizona and Kansas have had to defend their laws requiring proof of citizenship for voter registration against legal challenges from activist organizations.⁴ Citizenship is a requirement for eligibility to vote, and requiring proof of that eligibility—instead of just the voter’s affirmation of eligibility—would drastically improve voters’ confidence in the election process and the accuracy of the voter registration list.

Requiring photographic identification at the polls ensures that the person presenting to vote is indeed the person registered to vote. While the critics of voter identification requirements correctly point out that this requirement does not stop many types of fraud, it does provide an important backstop in two ways.

¹ “Most Still Favor Voter ID Laws,” *Rasmussen Reports*, Aug. 10, 2017, http://www.rasmussenreports.com/public_content/politics/general_politics/august_2017/most_still_favor_voter_id_laws (showing 70% support for photographic identification requirements); “Four in Five Americans Support Voter ID Laws, Early Voting,” *Gallup*, Aug. 22, 2016, <http://www.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx> (showing 80% support for photographic identification requirements); “Most Still Support Requiring Photo ID To Vote,” *Rasmussen Reports*, Mar. 4, 2016, http://www.rasmussenreports.com/public_content/politics/general_politics/march_2016/most_still_support_requiring_photo_id_to_vote (showing 69% support for photographic identification requirements); “Fear of voter suppression high, fear of voter fraud higher,” *The Washington Post*, Aug. 13, 2012, https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2012/08/12/National-Politics/Polling/release_116.xml?uuid=E1kPqOQZEeGJ93biOpgtBg (showing 74% support for photographic identification requirements).

² Missouri Secretary of State, State of Missouri - General Election, November 08, 2016, Official Results, Constitutional Amendment 6, Dec. 12, 2016, <http://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750003949>.

³ 52 U.S.C. § 21083(b).

⁴ See, e.g., *Brown v. Kobach*, No. 2016-CV-550 (Dist. Shawnee Co. Kan. Filed July 19, 2016); *Fish v. Kobach*, No. 2:16-cv-02105 (D. Kan. Filed Feb. 18, 2016).

First, it prevents a person from intentionally or mistakenly voting in the name of a correctly registered, eligible voter. Without a requirement to show photographic identification prior to voting, it is nearly impossible to catch people voting in the name of another person, and even if caught, it is difficult to successfully prosecute such voter impersonation without some concrete proof.

Second, it prevents errors in voter registration lists from being exploited through fraud or mistake. If a voter must present photographic identification prior to receiving a ballot, the chances that a person will be able to vote in the name of someone who is deceased, does not exist, has moved, or is a duplicate greatly decreases.

It is important to note that while most voters possess identification necessary to receive a ballot at the polls under state laws⁵, there are legitimate concerns expressed by opponents of voter identification requirements over the ability of certain voters to obtain the required identification. That is why states should and do provide the opportunity to obtain a free identification card for voting and should be willing to work with voters who have difficulties with transportation, obtaining required documents, etc. While the number of voters who need the free identification is small, this is an important feature of any voter identification program, along with educating voters on the voter identification requirements.

The purpose of such requirements, contrary to the hyperbole of their critics, is not to disenfranchise any voter but rather to ensure that all eligible voters' votes are counted. Every fraudulent or mistaken vote, many of which could be prevented by voter identification requirements at the time of registration and voting, disenfranchises an eligible voter who has taken the time to research the candidates and issues and exercise his or her important constitutional right to vote. By enacting voter identification requirements, states protect the right to vote and increase voter confidence in both the election process and election results.

LDF recommends that the Commission on Election Integrity study and provide suggestions on how states and localities can best implement voter identification requirements at the time of registration and the time of voting and how best to ensure that the identification requirements do not improperly burden eligible voters, thereby improving the American people's confidence in the election process and the outcome of elections.

Voter Registration List Accuracy

Accurate voter registration records are one of the most effective ways for states to protect the integrity of their elections and increase the confidence of voters in the election process.

Voters can be registered in more than one state or locality, often through lack of communication among state and local officials and no fault of the voter. A voter registration that exists for a person who is not an eligible voter, whether the person has moved, is deceased, does not exist, or

⁵ Don Palmer, "Faulty Data Fuel Challenges to Voter ID Laws," *The Heritage Foundation Backgrounder*, No. 3069, Jan. 12, 2016, <http://thf-reports.s3.amazonaws.com/2015/BG3069.pdf>.

is ineligible, presents an opportunity for a fraudulent or mistaken vote to be cast with virtually no chance of being detected. Errors in the voter registration rolls lead to long lines at the polls, inconveniencing voters who have taken the time to vote. Registrations for ineligible voters increase the likelihood that a person will be wrongly marked while checking in at the polls, which corrupts the records of which voters have voted in that election and may cause the count of ballots and voters checked in not to match.

Multiple or inaccurate registrations are a widespread problem, seriously undermine the public's confidence in the election system, and present great opportunity for fraud and mistake.

The National Voter Registration Act (NVRA) requires states to "conduct a general program," the purpose of which is "to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office." The NVRA also contains important safeguards to ensure that voters are not wrongfully removed from voter registration lists or removed close to an election.⁶

Previous bipartisan presidential commissions have recommended actions to increase the accuracy of voter registration records.⁷ While some states and localities are beginning to take this problem seriously and improve the accuracy of these records, a tremendous amount of work remains to be done. Rhode Island recently discovered and is in the process of removing 150,000 incorrect voter registration records from their lists, and the entire state has a voting age population of fewer than 850,000.⁸ This is just one example of a state with serious voter registration list accuracy problems but unlike some states that resist efforts to clean their voter rolls, Rhode Island is taking the problem seriously and cleaning its rolls.

Maintaining accurate records requires an immense amount of time and effort by local election officials, assistance from the voters themselves, and cooperation among different government agencies—state and local, state and federal, between the states, and between agencies within the same state.

One of the most effective methods to ensure accurate voter registration records is implementation of interstate data sharing. There are two systems for sharing data, and it is vital that states participate in both. Unfortunately, states have been slow to join these data sharing systems. In 2016, only nine states participated in both existing systems (Electronic Registration Information Center (ERIC) and Interstate Voter Registration Crosscheck Program (IVRC)): Alabama, Colorado, Illinois, Louisiana, Nevada, Ohio, Pennsylvania, Virginia, and West Virginia.⁹ These interstate data sharing systems flag records that may be duplicates or otherwise

⁶ 42 U.S.C. § 1973gg-6.

⁷ The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration, Jan. 2014; Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform, Sept. 2005.

⁸ Paul Edward Parker, "150,000 names erroneously on R.I. voting lists," *Providence Journal*, June 28, 2017, <http://www.providencejournal.com/news/20170628/150000-names-erroneously-on-ri-voting-lists>; U.S. Census Bureau, Voting Age Population: Rhode Island, Apr. 19, 2016, https://www.census.gov/library/visualizations/2016/comm/voting_age_population/cb16-tps54_voting_ri-social.html.

⁹ Electronic Registration Information Center, Who We Are, <http://ericstates.org/whowear>; "Interstate Voter Registration Crosscheck Program," Powerpoint Presentation to National Association of State Election Directors,

ineligible based on the data that different states possess. The data sharing systems are not able to remove any voters from the registration rolls but only flag them for follow up by local election officials according to their existing processes for identifying and removing ineligible registrations.

Upgrading voter registration technology and security is also vital to improving both the actual accuracy of the voter registration records but also voter confidence and turnout. Modern voters expect processes to be done electronically, including voter registration record updates. States and localities need to adapt to the needs of voters in our changing technological environment. Upgraded technology, such as electronic poll books, not only meets the needs and expectations of voters but will also drastically improve the accuracy of voter registration lists.

As with any use of technology, upgrades to voter registration systems also present additional risks for cybersecurity breaches, manipulation of records by third parties, and technical failure. While technology is a vital tool for election officials, officials also need to consider any use of technology carefully and develop security and information protection protocols. Security breaches, access to or manipulation of voter data, and technical issues will counteract any gains in voter confidence achieved through the adoption of the latest technology.

Automatic voter registration is often touted as a way to improve voter registration list accuracy, but there are serious concerns with automatic voter registration systems, at least as currently implemented in several states. First, it perpetuates existing errors in government databases or creates errors in voter registration records unbeknownst to voters. For example, voters have had their party affiliation removed from their voter registration records due to updating their address at the DMV.¹⁰ Their existing voter registration record was overwritten with the new data from the DMV, which did not contain party affiliation information. In states with closed primaries or convention systems, party affiliation is an important feature of ensuring that voters are not disenfranchised in the candidate selection process. Second, automatic voter registration creates inaccurate voter registration records by registering ineligible persons without their knowledge or consent.¹¹ Third, automatic voter registration increases the likelihood that a voter will be registered in multiple locations.

LDF recommends that the Commission on Election Integrity study and provide suggestions on how states and localities can best maintain the accuracy of their voter registration lists, thereby improving the American people's confidence in the election process and the outcome of elections.

Feb. 17, 2017, <https://nased.org/national-association-of-state-election-directors/winter-conference/2017/Interstate-Voter-Registration-Crosscheck-Program-NASED-Winter-Conference-February-2017.pdf>.

¹⁰ Murphy Woodhouse, "Commission faults MVD in presidential preference election confusion," *Arizona Daily Star*, June 15, 2016, http://tucson.com/news/local/govt-and-politics/commission-faults-mvd-in-presidential-preference-election-confusion/article_b41e18db-225b-5f73-8faa-49e91483ae84.html; "San Diego Voters Say Party Affiliation Changed by DMV," *KPBS Public Broadcasting*, Apr. 1, 2008, <http://www.kpbs.org/news/2008/apr/01/san-diego-voters-say-party-affiliation-changed-by/>.

¹¹ Dan D'Ambrosio, "VT pauses automatic voter registration after problems," *Burlington Free Press*, Feb. 3, 2017, <http://www.burlingtonfreepress.com/story/news/2017/02/03/vt-pauses-automatic-voter-registration-after-problems/97454818/>.

Integrity of Mail or Absentee Ballots

Mail, or absentee, ballots present an extremely convenient way for voters to cast a ballot. Some states have a system where voters can only submit an absentee ballot if they have an excuse, such as traveling on Election Day. States are increasingly expanding the use of mail and absentee ballots through no-excuse absentee programs and certain elections conducted entirely by mail. Colorado, Oregon, and Washington hold all elections entirely by mail, and California will hold all elections by mail starting in 2018.

Mail ballots are convenient for voters and reduce election administration costs, but they present significant, systemic vulnerabilities in three principal ways: opportunity for fraud or mistake in requesting a ballot, opportunity for fraud in voting a ballot, and opportunity for lost, mishandled, or miscounted ballots.

First, a voter can request or obtain a ballot improperly. In partial mail ballot elections, ballots may be requested in the names of eligible voters or voters who are ineligible but on the voter registration lists so that the ballot may be improperly voted. A recent investigation in Palm Beach County, Florida, concluded that nearly two dozen voters' signatures were forged on absentee ballot requests.¹² Unfortunately, this example of fraudulent absentee ballot applications presents a common problem. In all-mail ballot elections, ballots are mailed to every registered voter. If the voter registration rolls are not completely accurate, ballots will be mailed to ineligible or nonexistent voters. In 2016 in California, there were reports of stacks of ballots mailed to a single address.¹³ Any errors in the voter registration list means that an extra ballot is mailed that could be fraudulently voted or that an eligible voter does not receive a ballot.

Second, mail ballots are difficult to trace and present an opportunity to vote a ballot improperly with little risk of detection. While voter identification laws and other identification requirements have been implemented in many states to prevent fraud at the polls, many states are increasing the opportunities to vote by mail without addressing the risk for fraud. In Florida last year, a temporary election official was discovered filling in blank spaces while processing mail ballots.¹⁴ In Texas this year, large numbers of mail ballots were fraudulently requested and voted.¹⁵ Elderly persons being pressured to vote a certain way on their absentee ballots or "assisted" in voting so that they have no control over their absentee ballots is a perennial election story.¹⁶

¹² Lawrence Mower, "EXCLUSIVE: Voter fraud in Palm Beach County: State attorney finds crimes, but no suspect," *Palm Beach Post*, July 23, 2017, <http://www.mypalmbeachpost.com/news/exclusive-voter-fraud-palm-beach-county-state-attorney-finds-crimes-but-suspect/buShkHum7thKuTKE8F69QO/>.

¹³ Malia Zimmerman, "'Voter fraud'? California man finds dozens of ballots stacked outside home," *Fox News*, Nov. 3, 2016, <http://www.foxnews.com/politics/2016/11/03/voter-fraud-california-man-finds-dozens-ballots-stacked-outside-home.html>; see also Gordon R. Friedman, "Dennis Richardson: 2 Oregon addresses are receiving a suspicious number of ballots," *The Oregonian*, Feb. 21, 2017, http://www.oregonlive.com/politics/index.ssf/2017/02/dennis_richardson_2_apparent_i.html.

¹⁴ "2 Miami women arrested for violating election laws," *CBS News*, Oct. 28, 2016, <https://www.cbsnews.com/news/gladys-coego-tomika-curgil-miami-women-arrested-for-violating-election-laws/>.

¹⁵ Naomi Martin and Robert Wilonsky, "Prosecutors issue first arrest warrant in West Dallas voter fraud case," *Dallas News*, June 2, 2016, <https://www.dallasnews.com/news/elections/2017/06/02/prosecutors-issue-first-arrest-warrant-in-west-dallas-voter-fraud-case>.

¹⁶ See, e.g., Sergio Bichao, "Judge: Democratic chairwoman took advantage of frail nursing home voters," *myCentralJersey.com*, Mar. 26, 2015, <http://www.mycentraljersey.com/story/news/local/middlesex->

Similarly, there is risk for pressure to vote a certain way being exerted over a voter that would not be possible at a polling place with a secret ballot. Mail ballots present the opportunity to actually view how someone votes.

Third, mail ballots present significant practical hurdles to overcome to ensure that every proper mail ballot is counted. At a polling place, a voter has possession of his or her ballot during the entire process of voting until turning it in, the voter usually obtains some indication of the ballot having been counted, and the ballot is then subject to a number of security protocols along with all other ballots voted at the polling place. In a mail election system, the voter has very little control over the processing of his or her ballot. A voter may not receive a ballot due to an error in the voter registration lists or an error by the postal service and not realize it until after the election has passed. A voter's location may not have consistent or reliable mail service, such as in remote rural areas or on Native American reservations. A voter may misplace a ballot or forget about it until after Election Day, as Election Day is no longer a shared community event. Organizations often collect ballots from voters to turn in to election officials, with voters having no way of knowing if they have done so. A voter's ballot may be lost in the mail and never received by election officials. Election officials may lose a voter's ballot. A voter's ballot may be disqualified with no notice to the voter, as occurred last year with thousands of ballots in California.¹⁷ Central processing of ballots creates a more attractive target for hacking and a higher risk of other security compromises.

There are ways for states to mitigate these vulnerabilities, and states should carefully consider these issues before enacting broader or complete mail ballot systems. Accurate voter registration lists protect against ballots being mailed to incorrect addresses or ineligible persons. Signature verification, identification number, and identification copy requirements protect against fraudulent applications and fraudulently voted ballots. Penalties for voter intimidation deter pressure placed on persons to vote mail ballots a certain way. Practical concerns can be addressed through voter education and electronic ballot tracking systems that provide notice to voters of when their ballots are received and when they are counted.

LDF recommends that the Commission on Election Integrity study and provide suggestions on the means by which improper absentee/mail ballot voting is accomplished, how it can be detected, how it can go undetected, the best methods to prevent and discover improper mail ballot voting, and how to prevent disenfranchisement of voters through practical issues. Mail ballots provide the potential to drastically improve turnout if the systems are implemented correctly, but voter confidence in the current mail ballot systems used is—quite correctly—low due to the issues outlined above.

Thank you for considering Lawyers Democracy Fund's comment. For additional information, please contact LDF President Harvey Tettlebaum at harvey.tettlebaum@huschblackwell.com or LDF Publications Director Lisa Dixon at lawyersdf@gmail.com.

county/2015/03/26/perth-amboy-democratic-chairwoman-took-advantage-nursing-home-voters-judge-says/70515170/.

¹⁷ Matthew Renda, "California Sued Over Voters' Discarded Ballots," *Courthouse News*, Aug. 25, 2017, <https://www.courthousenews.com/california-sued-voters-discarded-ballots/>.