



March 18, 2009

The Honorable Jerold Nadler, Chairman
The Honorable F. James Sensenbrenner, Ranking Member
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
United States House of Representatives
Washington, D.C. 20515

Re: “Lessons Learned from the 2008 Election” Hearing

Dear Chairman Nadler and Ranking Member Sensenbrenner:

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On behalf of the American Civil Liberties Union (ACLU), its over half a million members, fifty-three affiliates nationwide, and countless additional supporters and activists, we commend the Committee for holding a hearing to explore the lessons learned from the 2008 election. We thank the Committee for allowing us to submit this letter for the record documenting problems citizens encountered during the 2008 election cycle.

Introduction

According to the Cooperative Congressional Election Survey, 4 million registered voters did not vote in the 2008 presidential election because of administrative problems.¹ Another 4 million to 5 million people reported administrative problems as the reason for not registering.² In order for the United States to continue as one of the world’s leading democracies, it must ensure all eligible citizens are able to register and cast their ballots. Unfortunately, onerous requirements and extensive problems with our country’s voter registration system have disfranchised millions of voters.

The ACLU’s Voting Rights Project has documented many of these problems and has litigated cases across the country to protect our citizens’ rights to register and cast a ballot. The Voting Rights Project challenged numerous barriers to voting in the 2008 election, including, for example, restrictive photo ID requirements, vote dilution schemes, lack of minority language assistance, and improper voter purges. This letter, however, focuses on some of the major voter registration problems that stood as both administrative and legal obstacles to voters during the 2008 election.

¹ *Voter Registration: Assessing Current Problems: Hearing Before the S. Comm. on Rules and Administration*, 111th Cong. 1 (2009) (statement of Stephen Ansolabehere, Professor, Department of Government, Harvard University, Cambridge, M.A.), *available at* http://rules.senate.gov/public/index.cfm?FuseAction=CommitteeSchedule.Testimony&Hearing_ID=c33b5ae8-ae8-413e-85db-a256ce6169f6&Witness_ID=e394ba39-8bf4-441c-8ed3-6e8c68cf4b23.

² *Id.*; see also Editorial, *Shut Out at the Polls*, WASH. POST, Mar. 16, 2009, at A16, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/15/AR2009031501668.html?referrer=emailarticle>.

Processing of Registration Forms and Absentee Ballots

In September 2008, in letters to the Senate Judiciary Committee, House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, and the House Administration Subcommittee on Elections, the ACLU discussed its concerns that DOJ was failing to assist state election officials in facing the unprecedented administrative challenge of backlogged registration applications.³ In 2004, DOJ received many complaints from people who said they were registered to vote, but had not appeared on the voter lists.⁴ Frequently, these people were newly registered voters whose applications had not been processed.⁵ We expressed concern, based on this past experience, that state election officials' failure to process applications, to resolve eligibility prior to rejection of applications, or to clear backlogged new applications would disfranchise many citizens, especially minority and young voters.

As predicted, in the 2008 election season, citizens registered to vote in record rates. Unfortunately, in many instances, election officials failed to process voter registration forms and absentee ballot applications on a timely basis thereby preventing citizens from voting. During the monitoring of the election, the ACLU received calls from people who said the registration forms they filled out at their local motor vehicle offices had not been processed, or that, similarly, their requests for absentee ballots had not been processed or the requested ballots were not received in time to vote.

Registration List Matching Issues

Much of the ACLU's 2008 election litigation dealt with voter registration list problems. State party officials challenged registered voters and voter registration applicants as non-residents based on various database matches or comparisons. For example, in Montana, Republicans challenged 6,000 potential Democratic registered voters as non-residents prior to the 2008 election because their names appeared on a U.S. Postal Service change of address registry. The Secretary of State, however, instructed the counties involved not to process the challenges. A federal court, in a suit brought by the Montana Democratic Party, later ruled that the "timing of the challenges is so transparent it defies common sense to believe the purpose is anything but political chicanery."⁶

In other states, election officials pressed for voter database matching. For example, Georgia, relying upon a comparison of voter registration lists with drivers' license lists, sent letters to 5,000 voters or applicants for registration advising them that they would not be allowed to vote in the November 2008 election unless they submitted proof of citizenship. A three-judge court ruled that the database matching constituted a change in voting that first required pre-clearance by the Department of Justice

³ Letter from Caroline Fredrickson, Director and Deborah J. Vagins, Legislative Counsel, Washington Legislative Office, American Civil Liberties Union to Chairman Patrick Leahy and Ranking Member Arlen Specter, Committee on the Judiciary, United States Senate (Sept. 9, 2008) (on file with authors), available at http://www.aclu.org/images/asset_upload_file353_36689.pdf; Letter from Caroline Fredrickson, Director and Deborah J. Vagins, Legislative Counsel, Washington Legislative Office, American Civil Liberties Union to Chairman Jerrold Nadler and Ranking Member Trent Franks, Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary and Chairwoman Zoe Lofgren and Ranking Member Kevin McCarthy, Subcommittee on Elections of the Committee on House Administration, United States House of Representatives (Sept. 23, 2008) (on file with authors), available at http://www.aclu.org/images/asset_upload_file396_36895.pdf.

⁴ *Lessons Learned in the 2004 Presidential Election: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Judiciary*, 110th Cong. 3 (July 24, 2008) (Statement of Gilda R. Daniels, Asst. Professor, Univ. of Baltimore School of Law).

⁵ *Id.*

⁶ *Montana Democratic Party v. Jacob Eaton*, Case 9:08-cv-00141-DWM, at 10 (D. Mont. Oct. 8, 2008).

under Section 5 of the Voting Rights Act. The court further required the state to notify all those who had been sent challenge letters that they would be allowed to vote on Election Day through a special procedure ordered by the court, after which their votes would be counted if they established their citizenship.⁷

In Ohio, the state Republican Party attempted to purge registration lists and/or challenge newly registered voters whose information did not perfectly match Department of Motor Vehicle records. In fact, almost a third of all newly registered voters in Ohio had some problem with the database match. Not surprisingly then, on Election Day, the ACLU received calls on its voter protection hotline from people who showed up at the polls to vote, but whose names did not appear on the registration lists.

Time Periods for Registration Prior to an Election

Currently, there is a patchwork of laws across the country with varying registration requirements for individuals who move less than 30 days before an election. Relocating from one state to another should not cause someone to lose his or her right to vote. In practice, however, these laws can prevent citizens from voting, and often disproportionately impact young voters and military families who are frequently more mobile. Moves within a state can be even more complex, with rules sometimes depending on when the voter moved and whether the voter moved across precinct, city, or county lines. In Ohio, the ACLU even documented problems where voters were threatened with prosecution for requesting ballots if they had not been registered for 30 days in advance of the November 2008 election. Such complexity breeds confusion and calls out for a simplified standard.

Proof of Citizenship for Voter Registration

Proof of citizenship requirements have also deprived many people of the right to vote. For example, Arizona voters approved a proof of citizenship requirement for voter registration in 2004. Between January 2005 and the fall of 2007, 31,550 voter registration applications were rejected for failure to provide proof of citizenship. Only 11,000 of the total were subsequently able to register, even though some 90 percent of the applicants claimed the United States as their place of birth. The district court upheld the constitutionality of the proof of citizenship statute in a challenge brought by several plaintiff groups.⁸

Student Voter Registration Requirements

The ACLU has found that students in several states have been subjected to improper residency challenges. Many local jurisdictions apply a special, and unconstitutional, presumption that students cannot be residents of the places where they attend school. For example, the ACLU worked on behalf of students at Georgia Southern University in Statesboro, who had been challenged as non-residents. Currently, the ACLU and other organizations are investigating complaints from students attending Georgia Southern College in Cochran, who were denied the right to vote in 2008 because they were not deemed to be local residents.

Georgia was not the only instance of local officials dissuading students from registering in 2008. This past fall, a registrar in Virginia incorrectly advised students attending an in-state university that their parents would not be able to claim them as dependents on their federal income tax returns if they registered to vote in Virginia. To help disseminate corrective registration information, the ACLU of

⁷ *Morales v. Handel*, No. 1:08-CV-3172 (N.D. Ga. Oct. 27, 2008).

⁸ *Intertribal Council of Arizona, Inc. v. Brewer*, No. CV06-01362 (D. Ariz. Aug. 20, 2008).

Virginia faxed letters to 30 local registrars in Virginia urging them to allow students to register to vote where they were attending school. The ACLU of Virginia also sent letters to local Virginia papers setting out the legal standards for student registration.

Homeless Voter Registration Requirements

There are also inconsistent standards for homeless voter registration. A person need not have a home in order to register and vote, but that fact is not widely understood. Only thirteen states have enacted homeless voting rights statutes. Fifteen others have some sort of written policy or formal opinion allowing homeless voter registration. The remaining states rely on judicial decisions or informal guidance, and too often that information does not filter down to lower level election workers. Even those states that have statutes or binding decisions protecting homeless voter registration have widely varying requirements. For example, some require a mailing address while others do not; some will accept a post office box while others will not. The resulting inconsistency operates as a barrier to full participation by homeless Americans, a disproportionate number of whom are veterans of our military.

Felony Disfranchisement Laws and Misinformation

In a recent report, the ACLU and the Brennan Center documented that confusing and highly varied state laws regarding voter registration for citizens with a past felony conviction have led to the dissemination of incorrect information regarding those citizens' ability to register.⁹ Inaccurate information regarding registration eligibility has led to widespread disfranchisement of eligible voters across the country.¹⁰ For example, in February 2009, the ACLU filed suit in South Dakota against state and local election officials who refused to allow people to vote who were convicted of offenses, but not sentenced to prison, despite state law which allows such persons to vote.

In Alabama, the ACLU is challenging that state's lack of clarity over what crimes are disfranchising. The legislature has compiled a short list of such offenses; however, the state's Attorney General has compiled a much more extensive list that is being used to prevent people from voting. Such unnecessary and confusing registration standards have led to the disfranchisement of untold numbers of would-be voters in Alabama and have left litigation as the only option to clarify the standards for an eligible citizen's right to vote.

Finally, the ACLU is also challenging a state law in Arizona that does not allow individuals with former felony convictions to register and vote until they have paid all their court costs, fines, and restitution associated with their sentence. The plaintiffs contend that conditioning the right to vote on the payment of any fee is in the nature of a poll tax in violation of the Twenty-Fourth Amendment. The complaint was dismissed by the district court and is now on appeal.

Conclusion

We appreciate the Committee's examination of some of the barriers our citizens faced in the November 2008 elections. Due to inconsistent information, onerous requirements, and improper election administration our registration system all too frequently robs citizens, often those most vulnerable citizens, of their fundamental right to vote. Reforming our nation's registration system,

⁹ ERIKA WOOD & RACHEL BLOOM, DE FACTO DISENFRANCHISEMENT 6 (2008), available at http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement_report.pdf.

¹⁰ *Id.*

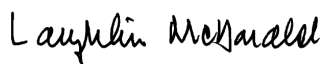
with appropriate safeguards, should be a high priority for Congress. We look forward to working with the Committee as it seeks solutions to these problems and protects voter access.

If the Committee has any questions regarding the registration problems described above or would like any additional information on other voting rights issues in the 2008 election, please contact Deborah J. Vagins at (202) 715-0816 or dvagins@dcacclu.org.

Sincerely,



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cc: Members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties