

KEEPING THE LIST

VOTER REGISTRATION AND ELIGIBILITY

STAFF REPORT
2008



TENNESSEE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS
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Keeping the List

Voter Registration and Eligibility

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INTRODUCTION

At its December 2006 meeting, the Tennessee Advisory Commission on Intergovernmental Relations (TACIR) voted to study the election process in Tennessee. The House Election Subcommittee and the House State Government Subcommittee then referred several bills to TACIR for study in 2007. TACIR staff reported on those bills related to voting machines and security, early voting, and absentee voting in its 2008 report, *Trust but Verify: Increasing Voter Confidence in Election Results*, and in a companion brief with the same title. Several of the other bills also referred to TACIR have been addressed in memos to the subcommittee or to bill sponsors. Some of the bills, those concerning voter access and election fraud, are covered in this report.

BACKGROUND

In the wake of the 2000 presidential election, a serious examination of all aspects of American elections took place. While voting technology and voting machines often receive the most attention, there are several aspects of the election process that are considered problematic and that have been the subject of legislative attention in recent years. In this brief, staff examine the rules and requirements surrounding voter registration and polling place identification.

When TACIR staff first outlined this study of election issues, three areas of dueling concerns were noted:

- Access vs. Security
- Privacy vs. Verifiability
- Expense vs. Accuracy

The issues in this brief cut to the heart of the first set of competing concerns listed, access vs. security. The easier it is to vote, the

In the wake of the 2000 presidential election, a serious examination of all aspects of American elections took place.

The U.S. Constitution does not guarantee anyone the right to vote.

easier it is to vote fraudulently. There are different philosophies of what makes an ideal balance between these two interests.

American history has seen evolving standards of who should and should not vote. Arguments abounded during the formation of the Constitution, and it does not guarantee anyone the right to vote. Voting rights amendments that have passed since the ratification of the Constitution say only that the vote cannot be denied to a class of citizens for specific reasons.

States initially restricted the vote to white male property owners at least 21 years old. But the American Revolution had begun to change minds about the right to representation. Benjamin Franklin famously said:

Today a man owns a jackass worth fifty dollars and he is entitled to vote; but before the next election the jackass dies. The man in the meantime has become more experienced, his knowledge of the principles of government, and his acquaintance with mankind, are more extensive, and he is therefore better qualified to make a proper selection of rulers — but the jackass is dead and the man cannot vote. Now gentlemen, pray inform me, in whom is the right of suffrage? In the man or in the jackass?

Through the first half of the 19th century, property ownership requirements gave way to taxpaying requirements, which themselves went out of style. By 1855, there were no more such requirements in any states. Before the end of that century, the Civil War led to the elimination of race requirements, and in the wake of World War I, the 19th amendment removed gender barriers. The civil rights movement helped overturn further barriers, including a constitutional ban on poll taxes in the 24th amendment. The Vietnam War brought about a reduction in

the age requirement from 21 to 18, as it seemed unfair for the draft to apply to those who could not vote. As it stands today, only those under the age of 18 and those convicted of felonies may be denied the vote while other citizens have it.

Most legislation that attempts to balance the competing interests of access and security include the idea that high turnout is desirable. There is a significant minority opinion in the United States that differs. For example, Lawrence W. Reed, President of the Mackinac Center for Public Policy in Michigan, argues that:

The right to vote, frankly, is too important to be cheapened and wasted by anyone who does not understand the issues and the candidates. The uninformed would be doing their duty for representative government if they either became informed, or left the decisions at the ballot box up to those who are. How did the idea that voting for the sake of voting is a virtue ever get started anyhow?¹

While this opinion is held by some, the overwhelming trend of U.S. history has been expanded suffrage and greater opportunities for political participation. For this reason, TACIR staff presents this brief from the perspective that high turnout is a desirable goal to be encouraged by making registration and voting as convenient as possible while ensuring that reasonable safeguards against fraud are in place.

VOTE SUPPRESSION

Until after the Civil War, there were no explicit Constitutional guarantees concerning the vote. State law governed and, while there were states in the north that allowed a small number of free black men to register and vote, the franchise was primarily

¹Reed 1995.

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Until after the Civil War, there were no explicit Constitutional guarantees concerning the vote.

Many southern states passed laws limiting voter registration that, while race-neutral in language, effectively disenfranchised black citizens for decades.

for white men. Confederate states rejoined the Union under the Military Reconstruction Act of 1867, which required them to extend the franchise to all male citizens.

A series of Constitutional amendments and federal acts followed which made the rights clear:

- The 14th Amendment, ratified in 1868, confers citizenship to all persons born or naturalized in the United States.
- The 15th Amendment, ratified in 1870, states that the right to vote cannot be denied on the basis of race, color, or previous condition of servitude.
- The Enforcement Act of 1870 created penalties for interfering with the right to vote.
- The Force Act of 1871 provided for federal election oversight.

Two Supreme Court decisions limited the scope of the Enforcement and Force Acts, and the removal of federal troops following the Hayes-Tilden Compromise of 1877 left the southern states free to adopt practices that disenfranchised black voters. Many southern states passed laws limiting voter registration that, while race-neutral in language, effectively disenfranchised black citizens for decades because local election officials, who were all white, could apply them selectively. These included such limitations as: poll taxes, literacy tests, requirements for vouchers of good character, and disqualification for “crimes of moral turpitude.”

Throughout the 1940s, 50s, and 60s, the Supreme Court and Congress systematically dismantled all of the legal justifications in place to prevent black citizens from registering to vote. Culminating in The Voting Rights Act of 1965, these efforts put several state and local governments under restrictions requiring federal approval for any changes in their election laws that

affected voting rights. Some state and local governments are still under these restrictions.²

Even with these protections in place, complaints over the last several years have included reports of problems that, intentional or not, tend to reduce access to the polls:

- Voter intimidation
- Misinformation concerning voters' rights given at the polls
- Misinformation concerning places or dates for voting
- Polling places opening late or lacking necessary supplies

In the context of this history, many members of racial minorities view restrictions on voter registration and acceptance of ballot applications at the polls with suspicion. Though such restrictions are aimed at preventing voter fraud, their possible unintended consequences must be considered, and efforts to avoid any unintended disenfranchisement of qualified voters must be made.

VOTER FRAUD

Fraud that is committed by voters can take several forms, including:

- Persons voting who are not qualified
- Qualified persons voting more than once
- Voting in the name of a qualified voter who did not vote

²There are many sources for descriptions of voter suppression and laws preventing it. Staff relied on information from the United States Department of Justice at <http://www.usdoj.gov/crt/voting/intro/intro.htm>.

Though restrictions are aimed at preventing voter fraud, their possible unintended consequences must be considered, and efforts to avoid any unintended disenfranchisement of qualified voters must be made.

Though there are not many cases that have been proved, there are several very suspicious instances throughout America's electoral history that suggest fraud has occurred.

- Voting in the name of a formerly qualified voter who has died
- Manipulating or paying for the vote of a qualified voter
- “Stuffing” the ballot box with extra ballots

Though there are not many cases that have been proved, there are several very suspicious instances throughout America's electoral history that suggest such fraud has occurred. One of the more famous concerned an early contest in the political career of President Lyndon B. Johnson. Having lost a senatorial election in 1941 amid reports of his opponent stuffing the ballot box, Johnson appeared to learn a lesson. In 1947, then-Congressman Johnson overcame an 854-vote election day deficit during recounting. The recount in Jim Webb County added 200 votes to Johnson's total. These votes reportedly came from “ballot box 13,” and had been found by Johnson-supporter and election official Luis Salas after the initial vote counting. Johnson ended up prevailing by 87 votes over his opponent, two-time Texas Governor Coke Stevenson.

In the aftermath of this election, when allegations of fraud were shooting back and forth, the Johnson camp examined Stevenson's leads in some of the counties where he was strongest and made their own allegations of fraud and ballot box stuffing. As this was actually the democratic party primary for Texas (which decided all statewide races in Texas at the time), the state democratic executive committee made the final decision as to which name to place on the ballot, Lyndon Johnson, by a vote of 30 to 29.³

This kind of story is accepted as typical of machine politics in the mid-20th century. When local party “bosses”⁴ controlled

³Woods 2006.

⁴Watkins.

political patronage, jobs and often local businesses, most people voted as asked. If the vote didn't go as planned, the bosses also appointed election officials and could "find" the necessary votes. Chicago boss Richard J. Daley (father of the current mayor) was infamous for allegations made against him for stuffing ballot boxes with the votes of the deceased. In larger cities, these political bosses often had ties to organized crime, and there was a seedy air of corruption and fear around elections. Most of these political machines had fallen apart by 1950, and very few are left today. Those that do exist wield little real power and affect only local elections if they affect any at all.

Much of the voter fraud that has been reported throughout our history was connected to political machines, the most powerful often run by Democratic Party bosses. Without such machines in place, it is difficult for that kind of widespread, systemic fraud to occur. Concern about such fraud has transferred to computerized voting machines with software protected as a trade secret. Suspicion of these machines tends to focus on the owners of the companies who often have ties to the Republican Party. In a now-famous 2003 fund raising letter, George W. Bush supporter and Diebold Chief Executive Officer Wally O'Dell said he was "committed to helping Ohio deliver its electoral votes to the president next year" in 2004. Many Ohio counties used Diebold voting machines, and O'Dell was forced to resign his position with Diebold.⁵

As the word "machine" in both of these fraud descriptions suggest, these types of fraud require a planned, large-scale effort to affect elections. The more transparency that can be included in voter registration, voter identification and voter database maintenance, the more likely that such fraud can be avoided.

⁵Warner 2003.

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CURRENT LAW IN TENNESSEE

Laws against voter fraud and intimidation and vote suppression are laid out as part of generally prohibited acts in TCA §§ 2-19-101 – 2-19-144. Prohibited acts that involve voter fraud or voter intimidation and vote suppression have wide-ranging penalties that may need review.

Table 1. Prohibited Practices Related to Voter Fraud and Vote Suppression by Severity of Crime

Prohibited Practice	Tennessee Code Reference	Level of Offense	Last Updated
Bribing election officials	TCA § 2-19-125	Felony - Class C	1999
Bribing voters	TCA § 2-19-126	Felony - Class C	1999
Voter accepting bribe	TCA § 2-19-127	Felony - Class C	1989
Procurement or inducement to violate § 2-19-104 or § 2-19-105	TCA § 2-19-106	Felony - Class D	1989
Illegal registration or voting	TCA § 2-19-107	Felony - Class D	1989
False entries on official registration or election documents	TCA § 2-19-109	Felony - Class D	2006
Unlawful possession of official registration or election supplies	TCA § 2-19-108	Felony - Class E	1989
Illegal act by official causing loss of ballots or invalidating election	TCA § 2-19-114	Felony - Class E	2006
Procuring illegal vote	TCA § 2-19-117	Felony - Class E	1989
Tampering with, mutilating or defacing voting machine	TCA § 2-19-118	Felony - Class E	1999
Interfering with a nominating meeting or election	TCA § 2-19-101	Misdemeanor - Class A	2001
Interfering with another's duties or rights	TCA § 2-19-103	Misdemeanor - Class A	2006
False swearing or affirming	TCA § 2-19-105	Misdemeanor - Class A	1999
Abuse of voter assistance	TCA § 2-19-110	Misdemeanor - Class A	2006
Unlawful examination, removal, rejection or destruction of marked ballots	TCA § 2-19-111	Misdemeanor - Class A	1989
Willful or fraudulent violations by officials	TCA § 2-19-113	Misdemeanor - Class A	1994
Violence and intimidation to prevent voting	TCA § 2-19-115	Misdemeanor - Class A	1989

Prohibited Practice	Tennessee Code Reference	Level of Offense	Last Updated
Misconduct in performance of duties for purpose of misleading another	TCA § 2-19-104	Misdemeanor - Class C	1989
Misrepresentations on campaign literature or sample ballots	TCA § 2-19-116	Misdemeanor - Class C	1989
Violation of § 2-7-111 while boundary signs are posted	TCA § 2-19-119	Misdemeanor - Class C	1989
Candidate bargaining for support	TCA § 2-19-121	Misdemeanor - Class C	1989
Demanding candidate make promise	TCA § 2-19-122	Misdemeanor - Class C	1989
Coercing or directing employees to vote for measure, party, or person	TCA § 2-19-134	Misdemeanor - Class C	1989
Threatening work stoppage as a result of election	TCA § 2-19-135	Misdemeanor - Class C	1989
Knowingly publishing false campaign literature	TCA § 2-19-142	Misdemeanor - Class C	1989

While most fraud and suppression tactics that have been employed historically are now against the law, it is instructive to see how serious each is deemed to be. As the table above shows, while it is not a firm rule, voter fraud tends to constitute a felony while voter intimidation and vote suppression tend to be misdemeanors. This table does not include prohibited practices that primarily concern campaign finance, disclosure of funding for advertising, or any part of the “Little Hatch Act,” which pertains to acceptable campaign behavior by public employees. The offenses in the table are ordered by severity of the criminal offense.

It is often the case that the laws most recently updated are the more serious crimes, but that is not always the explanation for the difference; furthermore, some laws that have been recently updated still show the disparity. TCA § 2-19-110, for example, outlaws abuse of voter assistance, including casting a voter’s ballot for someone other than whom the voter intended while otherwise legally assisting them to vote. This statute was updated in 2006 to make it a Class A misdemeanor rather than a Class C misdemeanor. That same year, violations of TCA § 2-19-114, illegal acts by an election worker that cause ballots to be lost or results overturned, was upgraded from a Class C misdemeanor to a Class E felony. This was the law broken by campaign workers in a Memphis special election to fill the seat vacated by Senator John Ford when officials allowed persons to vote in the name of deceased registered voters.

Voter registration serves two purposes:

- to control access to the polls to prevent voter fraud
- to gather information on the electorate that is useful in planning and administering elections

VOTER REGISTRATION

Voter registration dates back to the early 1800s in the United States and serves two purposes:

- to control access to the polls to prevent voter fraud
- to gather information on the electorate that is useful in planning and administering elections⁶

CURRENT LAW IN TENNESSEE

The Tennessee Division of Elections describes age requirements on its web site.

Any citizen of the United States who is or will be eighteen (18) years of age or older before the date of the next election and who is a resident of Tennessee may register to vote unless disqualified under the law.

The only disqualification for those who meet the above description is conviction of a felony. Some convicted felons can have, and many have had, their voting rights restored under Tennessee law.

Tennessee voter registration forms are available online and at county election offices. In compliance with federal law, they can be returned in person or by mail, and automatic registration is offered when applying for a Tennessee driver's license. Registration forms must also be offered to anyone applying for or updating personal information for public benefits and services for the disabled. There are no state restrictions on third-party registration.

Current laws governing voter registration require only that the voter affirm that he or she is qualified to vote. The registration

⁶Alvarez 2005.

form requires the voter to attest under penalty of felony conviction for giving false information that he or she meets the requirements.

- I am a U.S. Citizen. An answer of “yes” is required for successful registration.
- I am a resident of the State of Tennessee. An answer of “yes” is required for successful registration.
- I will be at least 18 years old on or before the next election. An answer of “yes” is required for successful registration.
- I have been convicted of a felony. An answer of “no” is required for successful registration.

Those who wish to violate the law by voting illegally are unlikely to be deterred by the need to lie on their registration forms. It is reasonable to verify that voters meet the requirements if such verification can be done without limiting the ability of qualified voters to register.

SHOWING EVIDENCE OF CITIZENSHIP

Arizona is the only state that requires registrants to show proof of United States citizenship. Those with Arizona driver’s licenses issued after 1996 can use their licenses as proof. Other applicants must provide a document number or photocopy from a set of qualifying documents that prove citizenship including birth certificates and passports. Other forms of federal- or state-issued identification are accepted as long as citizenship status was checked prior to issuance.

While the vast majority of Tennesseans of voting age have a driver’s license and could satisfy the requirement with the license number, those who do not may have difficulty proving citizenship. The Tennessee Department of Safety reports that Tennesseans over the age of 18 held 4,234,743 driver’s licenses

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Tennessee is one of six states that keeps the full social security number of registered voters, which allows a reasonable, though not perfect, check for citizenship.

in 2007. The US Census Bureau shows 4,591,753 persons 18 years and over residing in Tennessee in 2006. This lag of one year between the data will tend to inflate the percentage of people who have driver's licenses, but not by very much. That portion appears to be roughly 92%.

Some of the other 8% of Tennesseans who do not have driver's licenses are ineligible to vote and would still be unaffected by the law. The Pew Hispanic Center estimates that there are 100,000 to 150,000 undocumented residents in Tennessee, with roughly 16% under the age of 18. These residents are not eligible for driver's licenses and those over 18 should be among the adults who do not have them. This leaves between 230,000 and 270,000 potential Tennessee voters who could have difficulty producing a photo ID at the polls.

There are a certain number of felons who have not had their voting rights restored, but there is no way to know how many have licenses and how many do not. The 2006 Census Bureau American Community Survey estimates that there are 161,425 legal residents who are not citizens in Tennessee, though some of these are children. The adults in this population are allowed to have driver's licenses but not to vote. As with the former felons, there is no way to judge how many have licenses and how many do not. These two groups reduce the number of eligible voters without licenses, but there is not enough data to estimate by how much.

Tennessee's State Election Coordinator said there have been few cases of non-citizens registering to vote, and even those seemed to be in pursuit of identification rather than voting rights. Tennessee is one of six states that keeps the full social security number of registered voters, which allows a reasonable, though not perfect, check for citizenship.

RESIDENCY REQUIREMENTS

Voters are required to be residents of the precinct in which they are registered. Voters affirm their residence upon registration and are responsible for updating their registrations when they change residences. Periodic mailings to registered voters help remind voters to report address changes and update their registrations. In addition, voters are asked if their residence has changed when they turn in ballot applications at the polls.

If a voter's residency is in question, as when a voter does not appear on the rolls and is casting a provisional ballot, satisfactory proof of residence includes, but is not limited to,

- a Tennessee driver's license,
- a residential lease agreement, or
- a utility bill or other document bearing the applicant's residential address.

According to the principles laid out in TCA § 2-2-122, voters reside where they actually live, but they can keep as their official residence a place where they intend to return even if they will be absent for several years.

Since the Supreme Court decision in *Dunn v. Blumstein* in 1972 overturned Tennessee's durational residency requirement as unconstitutional, no state has maintained such a requirement of more than 30 days. Though Tennessee now has no durational residency requirement, the state closes registration to vote in an election 30 days prior to that election, creating an effective 30 day residency requirement, the period mentioned as "reasonable" in the Supreme Court decision.

In Tennessee, voters reside where they actually live, but they can keep as their official residence a place where they intend to return even if they will be absent for several years.

Indiana, Kentucky, and Ohio allow those who will be 18 before the general election to vote in any associated primary even if they are still 17 on the primary date.

AGE REQUIREMENTS

While all states require voters to be 18 years of age to vote, there are small differences in how this is interpreted. Tennessee's age requirement is specified in TCA § 2-2-104(3).

A person who will be eighteen (18) years of age on or before the date of the next election after the person applies to register and who is otherwise eligible to register.

A survey conducted by electionline.org, a project of the Pew Center on the States, found that several states allow voters to register before they are 18, with Hawaii allowing registration at 16, Texas allowing it 60 days prior to turning 18, and many states falling somewhere in between. One real difference to note is that Indiana, Kentucky, and Ohio allow those who will be 18 before the general election to vote in any associated primary even if they are still 17 on the primary date.⁷

RESTORATION OF FELON VOTING RIGHTS

According to the Tennessee Division of Elections web site, persons convicted of a felony lose their voting rights in Tennessee. They can regain them through application if

- the applicant received a pardon,
- the applicant's maximum sentence expired, or
- the applicant was granted final release from incarceration or supervision by the Board of Probation and Parole, the Department of Correction, or the county correction authorities.

Persons convicted of a felony between January 15, 1973 and May 17, 1981 did not lose their right to vote. The list of felonies

⁷Survey results are available online at <http://www.pewcenteronthestates.org/uploadedFiles/ERIPBrief13.final.pdf>

that resulted in the loss of franchise prior to January 15, 1973 was limited, and the judge had to declare the convicted person “infamous” in order for voting rights to be lost.

There is an additional requirement in Tennessee, that the applicant be current on any court-ordered payments, including any restitution for their crime and any child support payments, in order to have voting rights restored. This could be a difficult requirement for someone just released from incarceration, as they have likely been unable to make full (or perhaps any) such payments while incarcerated. If they are far behind, it could take some time to meet this requirement, even if a good faith effort to do so is being made.

The American Civil Liberties Union (ACLU) recently filed suit in Tennessee, saying that these requirements amount to a poll tax. The child support payment requirement was especially bothersome they said, because there are people who fall behind on child support payments who have not committed crimes who do not lose their voting rights.⁸

CORRECTING REGISTRATION FORMS

Of the 37 states that responded to the electionline.org survey question on this subject, all attempted to contact registrants by mail or by phone if there were problems with their registration forms to give them the opportunity to correct them. Few states provided data on the number of rejected applications. In Tennessee, county election offices notify applicants by mail if there are problems with their applications, and they are allowed to address the problems until the 5th day before the election or vote a provisional ballot on election day.

County election offices notify applicants by mail if there are problems with their applications, and they are allowed to address the problems until the 5th day before the election or vote a provisional ballot on election day.

⁸Fields 2008.

Seventeen states regulate organizations that run registration drives through registration procedures, mandatory training classes for volunteers or workers, and/or strict rules governing financial incentives in exchange for new registration applications.

THIRD-PARTY REGISTRATION

Third-party voter registration is when someone other than the applicant turns in the registration application. This often happens when groups conduct voter registration drives and then the applications come in as a group. Problems have arisen that have brought about some regulation:

- In states with partisan registration, applications listing an affiliation different from the one of the group conducting the drive are sometimes not turned in, and by the time the person realizes they were not registered, it is too late.
- Some groups pay people to register voters, and some pay plans are based on the number of registration cards turned in, tempting those conducting the drive to fill in false information on cards to make extra money.

Electionline.org's survey found that 17 states regulate organizations that run registration drives through registration procedures, mandatory training classes for volunteers or workers, and/or strict rules governing financial incentives in exchange for new registration applications.

Florida, Georgia, and Ohio have recently made the news for enacting very strict third-party registration rules that were subsequently overturned by federal courts. Florida's rules placed legal and financial penalties on those registering voters if they failed to turn in applications within 10 days, even if it was shown to be an inadvertent failure. Georgia's rules required registrations to be sealed by the registrants, preventing those running registration drives from reviewing them for errors and from photocopying them to use in contact lists for get-out-the-vote efforts. Ohio's rules required that voter registration workers

had to turn applications in themselves, in person, rather than giving them to a supervisor to be turned in as a group.⁹

RELATED BILLS FROM THE 105TH GENERAL ASSEMBLY

**Bills with an asterisk were referred to TACIR for study*

Though only a few of the election-related bills filed during the last session of the General Assembly were referred to TACIR, there were many others related to the same subject areas.

SB0015(JACKSON)/HB0021(SHEPHARD)

Allows persons who will be 18 years of age by the general election to vote in the primary election. This bill was recommended for passage by the Senate State & Local Government committee in 2007, but no action was taken on the bill in the Senate Calendar Committee or in the House State & Local Government committee during 2008. Fiscal Note: Increase local government expenditures \$30,000 one time.

SB0535(JACKSON)/HB0754(MCDONALD)

Creates presumption that a move within the same county is a change of residence for election purposes. No action was taken on the bill in the Senate State & Local Government committee during 2008, but it was recommended for passage in the House State & Local Government committee in 2007. Fiscal Note: Minimal.

SB0673(BUNCH)/HB0780(CAMPFIELD)

Prohibits an official from allowing persons known to be ineligible to vote to register or vote; and prohibits an official from allowing unauthorized persons to perform duties of election officials; violation is a Class A misdemeanor. No action was taken on the bill in the Senate State & Local Government committee during 2008, and no action was taken on the bill

⁹OMB Watch 2008.

in the Election subcommittee of the House State & Local Government committee during 2008. Fiscal Note: Increase state expenditures \$2,600 annually for incarceration costs.

SB1082(TATE)/HB1768(UJONES)

Establishes presumption that person has changed residence if such person has left and remained absent from home and stayed primarily in another country, state, or place within this state for a period exceeding two years. This bill was reassigned to the General subcommittee of the Senate State & Local Government committee during 2008, and no action was taken on the bill in the Election subcommittee of the House State & Local Government committee during 2008. Fiscal Note: Minimal.

SB1578(HERRON)/HB1997(UJONES)

Creates Class A misdemeanor offense of knowingly misleading voter or potential voter from voting or registering by spreading false or misleading information by any form of communication concerning qualifications or ability to vote or register. This bill was amended so as to rewrite the bill to allow a person to register to vote in any county in which that person pays property taxes. It became Public Chapter 939. Fiscal Note: Not significant.

***SB1610(NORRIS)/HB0408(TODD)**

Requires citizenship status to be proven prior to registration to vote and requires certain procedures to ensure identity and citizenship status prior to voting. This bill was recommended for passage by the Senate State & Local Government committee, but it was taken off notice in the Election subcommittee of the House State & Local Government committee during 2008. Fiscal Note: Increase state expenditures \$37,200 one time.

***SB1611(NORRIS)/HB0409(TODD)**

Requires citizenship status to be proven prior to registration to vote and requires certain procedures to ensure identity and citizenship status prior to voting. This bill is the same as the one above except that it requires a voter's party preference be included on registration forms. No action was taken on this bill in the Senate State & Local Government committee during 2008, and it was taken off notice in the Election subcommittee of the House State & Local Government committee. Fiscal Note: Increase state expenditures \$37,200 one time.

SB1642(JACKSON)/HB1128(BUCK)

Requires wildlife resources agency and license agents to provide voter registration-by-mail application forms to hunting, fishing, or sportsman's license applicants 18 years of age and older. No action was taken on the bill in the Senate State & Local Government committee during 2008, and no action was taken in the Government Operations subcommittee of the House State & Local Government committee during 2008. Fiscal Note: Increase state expenditures by more than \$100,000 and could jeopardize over \$14 million in annual federal funds because the Wildlife Resources Agency would make significant non-wildlife related expenditures.

SB2794(TRACY)/HB3050(MUMPOWER)

Requires citizenship status to be proven prior to registration to vote and requires certain procedures to ensure identity and citizenship status prior to voting. This bill was assigned to the General subcommittee of the Senate State & Local Government committee during this session, and it was taken off notice in the Election subcommittee of the House State & Local Government committee. Fiscal Note: Increase state expenditures \$37,200 one time.

SB2810(TRACY)/HB3052(MUMPOWER)

Requires identification and proof of citizenship for voter registration. This bill is the same as the one above except that it also requires a voter's party preference be included on registration forms. It was assigned to the General subcommittee of the Senate State & Local Government committee during 2008 and the Election subcommittee of the House State & Local Government committee. Fiscal Note: Increase state expenditures \$37,200 one time.

SB3163(STANLEY)/HB3061(WATSON)

Clarifies the time a conviction of a felony is effective that renders a person infamous. This bill was assigned to the Senate Judiciary committee during 2008 and the Criminal Practice and Procedure subcommittee of the House Judiciary committee. Fiscal Note: Minimal.

SB3453(MARRERO)/HB3151(LTURNER)

Removes requirement that a person must be current on child support obligations to have right of suffrage restored. This bill was assigned to the General subcommittee of the Senate State & Local Government committee during 2008 and the Civil Practice and Procedure subcommittee of the House Judiciary committee. Fiscal Note: Not significant.

SB3649(KETRON)/HB3440(RINKS)

Allows voter to transfer registration by facsimile or e-mail with an attached document that includes a scanned signature (pertinent part). Action was deferred on this bill in the Senate State & Local Government committee during 2008, and it was assigned to the Election subcommittee of the House State & Local Government committee. Fiscal Note: Not significant.

REGISTRATION DEADLINES

According to the electionline.org survey of the states, 30 states and the District of Columbia have voter registration deadlines between 21 and 30 days before the election, 12 states have deadlines 10 to 20 days before the election, seven states offer election-day registration, and one state—North Dakota—does not register voters at all.

CURRENT LAW IN TENNESSEE

According to the Tennessee Division of Elections, registration must take place

no later than thirty (30) days before the election. The election commission office will process any by-mail voter registration form that has been postmarked at least thirty (30) days before the election.

POTENTIAL PROBLEMS UNDER CURRENT LAW

Although elections are covered extensively by media in the months before election day, much of the controversy and excitement picks up in the last few weeks or even days before election day. It is then that citizens are most likely to be drawn into the election process, but at that point, it is too late to register to vote. The 30 day cut-off in Tennessee that requires residents to register in advance to participate on election day possibly limits voter participation. Indeed, various academic studies have consistently shown the requirement for voters to register “well in advance of elections is the largest institutional hurdle to voter participation in the United States.”¹⁰

¹⁰Alvarez, Nagler, and Wilson 2004.

According to the electionline.org survey of the states, seven states offer election-day registration and one state—North Dakota—does not register voters at all.

A Northwestern University School of Journalism poll found 64% of all non-voters said election day registration would make them more likely to vote.

According to a memo from the Pennsylvania Department of State Voter Registration Project, 84% of Americans do not know voter registration deadlines in their state. Similarly, the memo goes on to say in 2000, there were 20 million non-voters who had been registered to vote, moved, and then did not re-register in their new district in time. The memo highlights a Northwestern University School of Journalism poll, which found 64% of all non-voters said election day registration would make them more likely to vote.

ELECTION DAY REGISTRATION

Election day registration (EDR) allows residents to register and vote on election day, usually in the same location. Typical EDR rules allow residents to vote on election day at either a central election commission office or their polling place with identification and proof of residence. The goal behind EDR is to increase voter participation by allowing residents to complete all of their election-related tasks on one day. Currently, there are eight states that offer this option. In previous years, the states with EDR all had higher turn-out rates than states without EDR.¹¹ While it is likely EDR will increase voter turnout, some argue it will also increase voter fraud and work for election officials and poll workers.

States that do not have EDR require residents wishing to vote to register anywhere from three to 30 days prior to elections. The lag between the end of registration and election day offers useful time to election officials to prepare for elections. Registered voter and pre-registration totals help election officials in supply allocation and staffing decisions. Nonetheless, there are states that successfully conduct elections with EDR available for residents who have not yet registered.

¹¹ Alvarez, Nagler, and Wilson 2004.

There are currently eight states that have EDR: Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming. Maine, Minnesota, and Wisconsin have all had EDR available for 25 years or more. Idaho, New Hampshire, and Wyoming implemented EDR after the National Voter Registration Act (NVRA) in 1993.¹² Iowa passed the EDR measure in 2007 in time for the 2008 elections. North Dakota, unlike any other state, has quasi-EDR; there is no registration period there.

Eighteen states introduced legislation in 2007 to create or expand EDR. In an LA Times op-ed piece written by previous Minnesota Secretary of State Joan Growe, she encouraged California voters to approve an EDR measure on their 2002 ballot. She said, “Over 24 years in office, I supervised a registration process that consistently gave our state the highest voter turnout in the nation, with no increase in election fraud.” She explained her state countered the fear of long lines “by increasing the numbers of election workers,” and that EDR is an important tool to increase voter turnout. Minnesota had 592,421 residents register to vote on election day in 2004.

There have also been a few attempts to end EDR. There was legislation introduced in 2007 to discontinue EDR in Montana and Wisconsin, two of the eight states that currently offer EDR. The reasons cited by Montana state legislators were long lines at the polls (which may allow for groups to campaign to those waiting in line) and to relieve election workers from working an election in addition to processing new registrants at the same time. Wisconsin had instances of fraud in the 2004 presidential elections (discussed below), which prompted some state legislators to terminate EDR. The measures to end EDR did not pass in either state.

There are currently eight states that have Election Day Registration: Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming.

¹²Alvarez 2005.

Some state election officials express concern that election day registration will increase the workload on poll workers and create unnecessary congestion at polling places on election day.

Another more prominent criticism of election day registration is the potential for fraud that might occur if ineligible voters register or if people vote twice.

As seen in Montana, some state election officials express concern that EDR will increase the workload on poll workers and create unnecessary congestion at polling places on election day. There is no doubt this is possible and probable. If states allow residents to register at their polling place, poll workers will have the added responsibility of registering new voters; however, if EDR is limited to election commission offices only, this removes any possible burden on poll workers. This option also allows qualified professionals to handle voter registration. Since the passage of the “motor voter” law in 1993, workers in local driver license offices have processed thousands of voter registration forms. Some election administrators and EDR advocates have cited this as a cause of erroneous registration forms since DMV workers lack the proper training for voter registration.

Another more prominent criticism of EDR is the potential for fraud that might occur if ineligible voters register or if people vote twice. The most well-known story of fraud related to EDR was alleged in Wisconsin after the 2000 general elections. A Marquette University student told ABC News he voted four times and that many other Marquette students also voted more than once. After a thorough investigation, it was revealed there were no instances of students voting more than once. The student later recanted and said he wanted to show that fraud was *possible*, though he did not commit it.

Yet again in Wisconsin during the 2004 presidential elections, a state and federal-led inquiry into claims of fraud initially found that over 200 felons voted and more than 100 people voted twice. EDR was considered as a cause in the case of residents who allegedly voted twice. Ultimately, however, it was found that a computer glitch caused hundreds of voters to be incorrectly listed as having voted twice. In some of these cases, city and county panels that were charged with checking ballot totals did not do so at the end of election day. Additionally, it was

found that felons may have been unaware they were not yet eligible to vote (they must fully complete parole or probation to restore voting rights). There was evidence of poor compliance with procedures to verify same-day registrants on the part of poll workers.¹³ Ultimately, the U.S. Attorney in charge of the investigation found isolated cases and no “massive conspiracy” to subvert the electoral process in Milwaukee. Milwaukee mayor Tom Barrett also noted that there was no hard evidence of fraud in the system.

EDR is probably best accomplished when electronic voter lists, which are instantly updated, are available. This prevents any efforts to vote twice in the same county. In Tennessee, electronic voter lists are used for early voting, but hard copies of registered voter lists are still used at polling places on election day.

RELATED BILLS FROM THE 105TH GENERAL ASSEMBLY

Though none of these bills were referred to TACIR for study, they are closely related to other bills covered in this brief that were.

SB0925(KETRON)/HB1917(RINKS)

Requires applications for voter registration to be accepted and processed through the 29th day before election if the 30th day falls on Sunday (pertinent part). This bill became Public Chapter 125. Fiscal Note: Minimal.

SB1261(BURCHETT)/HB1880(OVERBEY)

Requires applications for voter registration to be accepted and processed through the 29th day before election if the 30th day falls on Sunday (pertinent part). No action was taken on the bill in the Senate State & Local Government committee or in the

Election day registration is probably best accomplished when electronic voter lists, which are instantly updated, are available. This prevents any efforts to vote twice in the same county.

¹³Borowski 2005.

Election subcommittee of the House State & Local Government committee during 2008. Fiscal Note: Not significant.

SB1418(MARRERO)/HB1374(KERNELL)

States that if 30th day before an election falls on a Saturday or Sunday then the last day to register will be the Monday immediately following such Saturday or Sunday and if the 30th day falls on a legal holiday then the last day to register will be the next business day immediately following the legal holiday. No action was taken on the bill in the Senate State & Local Government committee during 2008, and it was taken off notice in the Election subcommittee of the House State & Local Government committee. Fiscal Note: Not significant.

SB2877(HAYNES)/HB2872(MOORE)

Allows individual to register to vote in person at the county election commission 29 days before an election until the end of the early voting period. This bill was assigned to the General subcommittee of the Senate State & Local Government committee and was withdrawn in the House. Fiscal Note: Increase local expenditures \$197,600 every two years.

SB3353(KYLE)/HB3869(RINKS)

Authorizes same day voter registration (pertinent part). This bill was assigned to the General subcommittee of the Senate State & Local Government committee and was taken off notice in the Election subcommittee of the House State & Local Government committee. Fiscal Note: Exceeds \$100,000.

SB3354(KYLE)/HB3824(RINKS)

Authorizes same day voter registration. This bill was assigned to the General subcommittee of the Senate State & Local Government committee and was taken off notice in the Election subcommittee of the House State & Local Government

committee in 2008. Fiscal Note: Increase local expenditures \$360,000 every two years.

SB3650(KETRON)/HB3441(RINKS)

Makes various changes to election laws, including when 30th day before election falls on Sunday, Saturday, or legal holiday, applications for registration shall be accepted and processed through the 29th day before the election. This bill became Public Chapter 928. Fiscal Note: Increase local expenditures \$31,500 every two years.

VOTER DATABASE MAINTENANCE

Voter lists have traditionally been maintained by counties and often people ineligible to vote were listed for reasons other than fraud, including

- change of address within the county,
- moving out of the county,
- death, or,
- in many states, felony conviction.

CURRENT LAW IN TENNESSEE

Tennessee had always had its voter registration lists strictly administered at the county level prior to Help America Vote Act’s (HAVA) statewide voter database requirements. Tennessee was in the process of building a statewide list prior to the HAVA requirement and was able to adjust its plans to match the requirements in time for the deadline. Tennessee has a bottom-up list which is maintained by the counties and combined at the state level. According to Tennessee’s State Election Coordinator, Brook Thompson, the counties update the state with list changes daily.

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Tennessee has conducted some comparisons of its voter list with Kentucky and South Carolina.

A purely uniform statewide voter registration list would simplify comparison with other states.

Voter lists are purged according to the rules set up in the 1993 “motor voter” law and in HAVA. Thompson said that the Tennessee Office of Vital Statistics updates his office monthly and that his office additionally purchases the Social Security Administration’s Master Death file each year. In addition, his office receives information on felony convictions from various federal courts and has begun a program of receiving data from the Department of Corrections. County criminal and circuit court clerks notify counties of such convictions.

Tennessee has conducted some comparisons of its voter list with Kentucky and South Carolina. Additionally, legislation was filed in the 105th General Assembly to require Tennessee to make such comparisons.

POTENTIAL PROBLEMS UNDER CURRENT LAW

Tennessee’s bottom-up statewide voter database may not be ideal. Not all of the data match well between counties as they would if the list were maintained by the state. For example, TACIR staff asked the State Election Coordinator’s office if it could run turnout data for city elections. Among the information in the voter dataset is a voting history. Whether or not a person voted in a particular election, and whether that person voted early or on election day, is part of the voter record. Theoretically, one could use these records to determine how many people voted in different city elections statewide. Though the state coordinator’s office made every effort to help, it turned out to be impossible because the codes used to record voting history do not match across counties. A purely uniform statewide voter registration list would also simplify comparison with other states.

VOTER CAGING

Efforts to update voter lists by purging ineligible voters have been controversial, with the usual partisan arguments about

access versus security. Blanket purges tend to remove eligible voters along with ineligible ones, and failure to purge leads to bloated lists and the opportunity for fraud. Some of the efforts to update lists, however, have been shown to have a partisan bias and are known as “voter caging.” Caging occurs when voters are selectively targeted for challenge or removal through the use of mailings that, if returned, can be used as evidence that the voter does not reside at the listed address. Some notorious cases in the 1960s through the early 1990s led to the inclusion of this issue in the National Voter Registration Act (more commonly known as “motor voter”).

In an Arizona district in 1960, postcards were sent by the local Democratic party to 349 registered Republicans warning them of punishment if they had moved but tried to vote in their old districts. A list of postcards returned undeliverable was used to compile a list that could be used for challenging voters at the polls.

One legal challenge resulted in the release of a memo from one Republican National Committee (RNC) regional director to another discussing the effect of the RNC’s ballot integrity program on the Louisiana senate race in 1986.

I would guess that this program will eliminate 60-80,000 folks from the rolls. If it is a close race, which I’m assuming it is, this could keep the black vote down considerably.¹⁴

In response to cases such as these, the motor voter law passed in 1993 set up rules governing the removal of voters from registration databases based solely on returned mailings. All mailings must be forwardable, and returned mailings can only be used to flag the voter to request proof of residence at the polls. The voter cannot be removed from the rolls until failing

Caging occurs when voters are selectively targeted for challenge or removal.

The motor voter law passed in 1993 set up rules governing the removal of voters from registration databases based solely on returned mailings.

¹⁴Tolchin 1986.

The Help America Vote Act of 2002 (HAVA) required states to develop statewide voter registration lists by January 1, 2006.

The Carter-Baker Commission offered a strongly-worded recommendation for top-down, state-administered voter lists based on its assessment of the weaknesses of a bottom-up system.

to show up at the polls for two federal elections after being flagged.

TOP-DOWN VS. BOTTOM-UP

The Help America Vote Act of 2002 (HAVA) required states to develop statewide voter registration lists by January 1, 2006. Many states, including Tennessee, have traditionally had “bottom-up” voter registration lists in which counties control the lists. Many of these lists were not computerized, and the data fields and codes did not match across counties, much less across states. This makes voter lists impossible to compare, making duplicate registration difficult to detect and making moving voter registration more complicated than it needs to be.

These requirements were taken up by the Commission on Federal Election Reform (also referred to as the Carter-Baker Commission in reference to its co-chairs, former President Jimmy Carter and former Secretary of State Jim Baker). In its September, 2005 report, the Commission found that

[a]s of June, 2005, 38 states were establishing top-down voter registration systems. The remaining states were either (a) creating bottom-up systems; or (b) creating systems with both top-down and bottom-up elements. Three states had not finalized plans. The [U.S. Election Assistance Commission] EAC, in its interpretation of the HAVA requirement on statewide voter databases, expressed a preference for top-down systems for voter registration, but did not insist on it and did not rule out bottom-up systems.

The Carter-Baker Commission offered a strongly-worded recommendation for top-down, state-administered voter lists

based on its assessment of the weaknesses of a bottom-up system:

In the judgment of our Commission, bottom-up systems are not capable of providing a complete, accurate, current and valid voter registration list. They are ineffective in removing duplicate registrations of individuals who move from one county to another and in coordinating with databases from other state agencies. Even in the best of circumstances, with excellent cooperation and interaction between states and counties—an unlikely scenario with the bottom-up system—there will be a time-lag in updating voter files in a bottom-up system. This time lag could be particularly harmful in the period approaching the deadline for voters to register.

VOTER MATCHING

While there are not many concrete, proven examples of modern day voter fraud, the potential exists as long as voter lists are maintained as they are now. A story in the web magazine Slate found that thousands of people registered in Florida are also registered in New York, South Carolina, or Georgia. Author Bill Gifford also mentioned double registrations in Kansas City, Missouri and Kansas City, Kansas as well as St. Louis city and St. Louis County. The article quotes two voters who admit voting twice, but who either think they did nothing wrong or nothing seriously wrong.

But these states do no systematic comparisons of voter lists to determine if there are voters registered in both places who should be informed of the rules or people double-voting who should be prosecuted. It is legal to be registered in more than one place if you maintain more than one residence, and

It is legal to be registered in more than one place if you maintain more than one residence, and some cities allow non-resident property owners to vote in local elections.

HAVA requires states to match information from voter registration forms with information in the state's motor vehicle database or the Social Security Administration database.

In a 2004 New York City test run matching registration data to the state motor vehicle database, almost 20% of the records did not match because of typos by election officials.

some cities allow non-resident property owners to vote in local elections. It is not permissible to vote more than once in the same election.

HAVA requires that states give each voter a unique identifier in the database. Many states use driver's license numbers, supplemented by the last four digits of the social security number for those without licenses, and unique numbers generated by the state for those with neither. Tennessee is one of six states that identifies voters with their full social security numbers, but the numbers are not made public. In addition, HAVA requires states to match information from voter registration forms with information in the state's motor vehicle database or the Social Security Administration database.

A 2006 study by the Brennan Center for Justice points out that all large databases have errors and mismatched information. Problems can occur for many reasons, such as

- typos,
- misspellings,
- maiden names versus married names,
- nicknames versus full names,
- double names (such as Maryann versus Mary Ann), and
- hyphenated names.

The Brennan Center study relays the results of a 2004 New York City test run in which registration data was matched to the state motor vehicle database. The experiment found that almost 20% of the records did not match because of typos by election officials. The report points to these matching problems as a concern because some states (Iowa, South Dakota, Texas, and Washington were early ones) are using them as screening for registration, refusing to process applications that do not

match the state motor vehicle or Social Security Administration databases.

HAVA also encouraged states to enter agreements to compare voter rolls with neighboring states and purge voters with duplicate registrations. After comparing its list to South Carolina and Tennessee in 2006, Kentucky purged 8,000 voter records. There is concern that qualified voters will be removed from the lists, and the state later agreed to let those removed under such a system vote if they came to the polls and presented proper identification.

RELATED BILLS FROM THE 105TH GENERAL ASSEMBLY

**Bills with an asterisk were referred to TACIR for study*

Both of the bills relating to voter matching to get registered voter lists clean and up-to-date were referred to TACIR for study.

***SB1182(BLACK)/HB1279(LYNN)**

Requires state coordinator of elections to seek to enter agreements with other states for the purpose of comparing data to identify duplicate voter registrations. This bill was amended to encourage the state coordinator to enter agreements rather than require it, to require the state coordinator to promulgate rules for the process that will protect the confidentiality of voter information, and to require the state coordinator to periodically report to both State and Local Government committees on the status of the effort. It became Public Chapter 895. Fiscal Note: Not significant.

***SB1909(HARPER)/HB1397(LYNN)**

Requires certain county election commissions to periodically undertake certain actions to purge voter registration lists of persons whose registrations are based upon false or inaccurate residential information. This bill was assigned to the General subcommittee of the Senate State & Local Government

HAVA encouraged states to enter agreements to compare voter rolls with neighboring states and purge voters with duplicate registrations.

Voters who are voting for the first time after registering by mail must present signature-bearing identification at the polls.

committee and was referred to TACIR by the Election subcommittee of the House State & Local Government committee. After reviewing the bill, Staff was concerned that it may conflict with other laws. Staff sent a memo to the Chair of the Election subcommittee suggesting that the bill's sponsor request an Attorney General's opinion on its legality. Fiscal Note: Minimal.

DETERMINING ELIGIBILITY AT THE POLLS

Once a voter appears at the polls and is determined to be registered, poll workers must still verify that the voter is eligible to vote at that precinct. This includes determining that the voter still resides within the precinct and that the person presenting himself/herself at the polls is the person who is registered.

CURRENT LAW IN TENNESSEE

Voters who are voting for the first time after registering by mail must present signature-bearing identification at the polls, including, but not limited to, a valid voter's registration card, a Tennessee driver's license, or identification with a photo. If voters do not have such identification, they may sign an affidavit certifying their identity and vote a regular ballot as long as they can provide any one of the following forms of identification:

- Current & valid photo ID of any kind, either government-issued or private, not containing a voter's signature
- Current utility bill
- Bank statement
- Government check
- Paycheck
- Any other government document(s) that show the voter's name and address

Voters who registered in person or who have voted before must provide evidence of their signature or sign an affidavit certifying their identity. All voters sign a ballot application and that signature is compared to the signature on a copy of the voter's registration form. In counties with the necessary technology, a scanned signature from the registration form appears in the poll book with the voter record for comparison.

POTENTIAL PROBLEMS UNDER CURRENT LAW

It would be possible for a voter to acquire a ballot under a false name and sign an affidavit to get a ballot.

IDENTIFICATION REQUIREMENTS

Concern that some individuals may vote multiple times under different names has prompted some states to require that photo identification be shown at the polls. But some legal voters do not have photo identification. Though most states offer free identification when it is required for voting purposes, those most likely to be without driver's licenses, the elderly and disabled, may find it difficult to get to a location where they can obtain the identification. Tennessee requires signature-bearing identification from all voters at the polls, but state rules allow voters to sign an affidavit confirming identity if the voter has no such identification.

A recent Associated Press account of the issue states that seven states have passed photo identification laws since the HAVA passed in 2002: Arizona, Florida, Georgia, Indiana, Michigan, Missouri, and Ohio. Florida's law allows voters to present a signature-bearing ID if they do not have a photo ID. Missouri's law was struck down by its state Supreme Court. Appellate courts have upheld photo ID laws in Arizona, Georgia, and

Voters sign a ballot application and that signature is compared to the signature on a copy of the voter's registration form.

It would be possible for a voter to acquire a ballot under a false name and sign an affidavit to get a ballot.

Seven states have passed photo identification laws since the HAVA passed in 2002: Arizona, Florida, Georgia, Indiana, Michigan, Missouri, and Ohio.

Identity theft is a crime on the rise and voters impersonating others at the polls is a real concern.

Impersonating someone else at the polls is a crime for which no one has ever been prosecuted.

Michigan. Ohio's secretary of State suspended its law in 2006.

Indiana's law is the strictest of them all, and it was upheld by the federal Supreme Court in an opinion issued on April 28th 2008. The Indiana law requires that all voters present identification issued by the federal or state government with a photo, a name exactly matching that on the registration card, and a current expiration date.¹⁵

The U.S. Department of Justice filed an amicus brief in the case pointing out that identity theft is a crime on the rise and that voters impersonating others at the polls is a real concern. On the other hand, nonpartisan groups like the Brennan Center highlight the fact that this is a crime for which no one has ever been prosecuted. A brief submitted by individuals challenging the law's constitutionality describes the likelihood of having photo ID.

About 11% of voting-age United States citizens - more than 21 million individuals - lack any form of current government-issued photo ID. That 11% figure grows to 15% for voting-age citizens earning less than \$35,000 per year, 18% for citizens at least 65 years old, and 25% for African-American voting-age citizens.¹⁶

It was noted in the discussion of Indiana's law before the Supreme Court that proponents of the law have been unable to produce evidence of actual fraud in the state, but that those opposed to the law could not find people who would be disenfranchised by the law. Opponents were able to produce a small number of people who would be so inconvenienced as to have their vote

¹⁵Associated Press. 2008.

¹⁶Frost 2007.

uncounted in the end. Justice Samuel A. Alito Jr. summed up the mood of many on the Court:

If you concede that some kind of voter ID requirement is appropriate, the problem that I have is where you draw the line on a record like this, where there's nothing to quantify in any way the extent of the problem or the extent of the burden. How do we tell whether this is on one side of the line or the other side of the line?¹⁷

The Supreme Court ultimately upheld the law in a 6-3 decision. Two opinions made the majority. The opinion of Justice John Paul Stevens, joined by Chief Justice John G. Roberts, Jr. and Justice Anthony M. Kennedy left open the possibility that some photo identification laws may be unconstitutional, though Indiana's law does not impose "excessively burdensome requirements on any class of voters."

The concurring opinion of Justice Antonin Scalia, joined by Justices Clarence Thomas and Samuel A. Alito, Jr. stated that changes to election codes were in the hands of state legislatures and that "their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." This differs from the previous opinion in that it requires that a class of voters be intentionally targeted for such a law to be unconstitutional, rather than merely that the effect of the law is to overly burden one class of voters.

The dissenting opinion of Justice David H. Souter, joined by Justice Ruth Bader Ginsburg suggests that the state must make a "particular factual showing that threats to its interest outweigh the particular impediments it has imposed" in order for burdens on the right to vote to be constitutional. The dissenting opinion

The U.S. Supreme Court recently upheld Indiana's photo identification law in a 6-3 decision.

¹⁷Information on the discussion in the court is as reported by Barnes 2008.

In South Dakota, Hawaii, and Louisiana, photo ID is requested, but the law allows the voter to sign an affidavit and vote without one.

Concerns that are mentioned by advocates of photo ID laws are primarily that individuals may vote multiple times.

of Justice Stephen G. Breyer gave states more leeway to make requirements such as the Indiana photo ID law as they see fit, but found that this law was disproportionately burdensome on one class of voters – those without photo identification.

Indiana’s May 6th 2008 primary election fell just after the law was upheld. There were not many publicized complaints about voters being turned away at the polls, but there was a story that received wide publicity concerning a group of 12 elderly nuns who were denied the vote in South Bend for lack of qualifying photo identification. In addition, the Brennan Center was manning a hotline that it said recorded several complaints.¹⁸

In South Dakota, Hawaii, and Louisiana, photo ID is requested, but the law allows the voter to sign an affidavit and vote without one. In South Dakota, that affidavit says that he or she does not have a photo ID. In most other “photo ID states,” the voter must vote a provisional ballot and then return to the county election administrator with the proper ID before the election is certified in order to have that vote counted.

According to an electionline.org list compiled in 2007, 23 states and the District of Columbia have the minimum ID laws required by HAVA: that first-time voters who register by mail and do not provide ID with their registration form must show ID before voting. Both photo and non-photo ID are accepted. Sixteen states, including Tennessee, require ID (photo or non-photo) but allow the voter to sign an affidavit confirming identity if he or she has no identification. Six states require that a photo ID be shown (though, as mentioned above, legal challenges of the laws in two states are still pending). Three states request that voters show photo ID, and 2 states require ID of all new voters, though both photo and non-photo ID are accepted.

Concerns that are mentioned by advocates of photo ID laws are primarily that individuals may vote multiple times, using the

¹⁸Associated Press 2008.

names of deceased voters who still appear on voter registration lists or of other registered voters who did not vote. Advocates of these laws often point to the large number of deceased registrants that appear on registered voter lists as a risk factor. Brook Thompson, Tennessee’s State Election Coordinator, said that the Tennessee Office of Vital Statistics updates his office monthly and that his office additionally purchases the Social Security Administration’s Master Death file each year. He said that the only case of such fraud in Tennessee occurred when poll workers acted criminally and photo identification would not have prevented that.

RELATED BILLS FROM THE 105TH GENERAL ASSEMBLY

*Bills with an asterisk were referred to TACIR for study

There were several bills filed during the last session relating to identification requirements at the polls, though only one of these was referred to TACIR for study.

***SB0227(KETRON)/HB0938(MAGGART)**

Requires a voter to present qualified photographic identification before voting; voters without proper identification shall be allowed to cast provisional ballots. This bill has passed the Senate but was referred to TACIR by the Election subcommittee of the House State & Local Government committee. Staff sent an analysis of the bill to the Chair of the Election subcommittee and the bill was placed on the calendar but was subsequently taken off notice. Fiscal Note: \$51,850 one time plus \$322,500 in forgone revenues for the provision of free identification to some who would have otherwise paid.

SB0512(TRACY)/HB0670(SWAFFORD)

Requires a voter to present qualified photographic identification before voting; voters without proper identification shall be allowed to cast provisional ballots. No action was taken on the bill in the Senate State & Local Government committee or the

The only case of deceased voter fraud in Tennessee occurred when poll workers acted criminally and photo identification would not have prevented that.

Election subcommittee of the House State & Local Government committee during 2008. Fiscal Note: \$51,850 one time plus \$322,500 in forgone revenues.

SB1181(BLACK)/HB1280(LYNN)

Requires computerized counties to have printout of all eligible voters including an electronically scanned signature from the voter's registration application at polling places. This bill was recommended for passage by the State & Local Government committee in both houses. It was assigned to subcommittee in the Senate Finance, Ways & Means committee and was taken off notice in the Budget subcommittee of the House Finance, Ways & Means committee during 2008. Fiscal Note: Increase local government expenditures by \$353,500 one time.

SB2811(TRACY)/HB3049(MUMPOWER)

Requires a voter to present qualified photographic identification before voting; voters without proper identification shall be allowed to cast provisional ballots. This bill was referred to the Senate State & Local Government committee and the Election subcommittee of the House State & Local Government committee during 2008. Fiscal Note: \$51,900 one time plus \$322,500 in forgone revenues.

SB2958(KETRON)/HB2915(MAGGART)

Prohibits printing a social security number on voter registration cards, amended so as to apply only to newly-issued cards. This bill became Public Chapter 635. Fiscal Note: Not significant.

SB3242(BURCHETT)/HB3119(MUMPOWER)

Prohibits printing a social security number on voter registration cards (pertinent part). This bill was assigned to the Senate State & Local Government committee and the Election subcommittee of the House State & Local Government committee during 2008. Fiscal Note: \$364,300 one time.

SB3705(HAYNES)/HB3624(ODOM)

Prohibits the use of a social security number for purposes of voter registration. This bill was referred to the Senate State & Local Government committee and was taken off notice in the Election subcommittee of the House State & Local Government committee during 2008. Fiscal Note: Not significant.

CONCLUSION

Balancing access to the polls with the security of the vote raises complex issues. Restrictions that sound reasonable on their face could, on closer examination, lead to disenfranchisement of qualified voters. At the same time, too lax a system invites fraud.

New requirements in the Help America Vote Act (HAVA) concerning statewide voter database maintenance could help states learn how widespread problems of fraud are and how possible solutions affect access to the polls. At the same time, several laws are being tested in the courts, which should provide guidance to states on what constitutes an acceptable balance of these two competing goals.

Having a voice in our government is one of the most fundamental rights on which this nation was built. Ensuring that all eligible voters have the same access to the polls, whether to cast a vote or to be protected from dilution of their vote through fraud, should be a priority at all levels of government. Securing the vote is an important goal, but care should be taken at each step to ensure that eligible voters maintain their access to the democratic process.

New requirements in the Help America Vote Act (HAVA) concerning statewide voter database maintenance could help states learn how widespread problems of fraud are and how possible solutions affect access to the polls.

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