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American Confidence in Elections: The Path to Election Integrity Across America

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Hans A. von Spakovsky
Senior Legal Fellow
Manager, Election Law Reform Initiative
Edwin Meese III Center for Legal and Judicial Studies
The Institute for Constitutional Government
The Heritage Foundation

Background

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board of trustees. My testimony also does not constitute support for or opposition to any specific legislation.

I am a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. Prior to joining The Heritage Foundation, I was a Commissioner on the U.S. Federal Election Commission for two years (2006-2007), where I was one of six commissioners responsible for enforcing the Federal Election Campaign Act.

Before that, I spent four years at the U.S. Department of Justice as a career civil service lawyer in the Civil Rights Division, where I received three Meritorious Service Awards (2003, 2004, and 2005). I began my tenure at the Justice Department as a trial attorney in 2001 and was promoted to Counsel to the Assistant Attorney General for Civil Rights (2002-2005), where I helped coordinate the enforcement of federal voting rights laws, including the Voting Rights Act, the National Voter Registration Act ("NVRA"), the Help America Vote Act ("HAVA"), and the Uniformed and Overseas Citizens Absentee Voting Act.

I served in Georgia on the Fulton County Board of Registration and Elections (1996-2001), including as its Vice Chairman in 2001, as well as serving in Virginia as Vice Chairman of the Fairfax County Electoral Board (2010-2013). Both of these boards were responsible for all voter registration and election activities in the largest counties of both states.[2]

Introduction

In my opinion, we can and must have both access and security in our elections. Contrary to what some mistakenly claim, it is possible to provide both access and security to fully protect the voting process – one does not cancel out the other, and the common-sense reforms that Georgia has implemented are a prime example of providing both access for eligible voters as well as security to protect those votes.

Under our Constitution, states have the primary role in administering our elections, including federal elections, in accordance with the protections provided by important statutes such as the Voting Rights Act. The role of the federal government should be limited to providing states with whatever assistance they need that only the federal government can provide, such as access to federal databases that can help verify the accuracy of voter registration data that is used for state and federal elections. Federal statutes such as the NVRA were intended to assist states, not prevent them from providing secure elections.

The federal government should not be imposing unconstitutional, unjustifiable, and impractical mandates on the states that interfere with their authority and endanger the integrity and security of the election process. An unfortunate example of such an effort was H.R. 1, the "For the People Act of 2019." As I stated in testimony before the House Committee on the Judiciary on Jan. 29, 2019:

[2] I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981.

> *H.R. 1 interferes with the ability of states to determine the qualifications of their voters, to secure the integrity of the election process, and to determine the districts and boundary lines of their representatives. Overall, H.R. 1 is an attempt to federalize and micromanage the election process and impose unnecessary, unwise and in some cases unconstitutional mandates on the states, reversing the decentralization of the American election process that our Founders believed was essential to preserving liberty and freedom.*[3]

Furthermore, political speech and political activity are protected by the First Amendment, and neither the federal government nor state governments should attempt to restrict such speech or such activity even if it is not popular or voices sentiments that offend some and are not in accord with the political orthodoxy of the moment.

American Confidence in Elections Act (ACE Act)

Unlike H.R. 1, the ACE Act, which is being introduced in Congress, balances the constitutional requirement to protect the primary role of the states in administering our elections while still ensuring that the federal government provides the states with assistance where it is needed. As the bill correctly explains in Section 3, "Congress has a purely secondary role" and "must restrain itself from acting improperly and unconstitutionally," avoiding imposing "burdensome, unfunded Federal mandates" and only "resolving highly significant and substantial deficiencies to ensure the integrity of our elections."

Maintaining Accurate Voter Registration Rolls

In addition to state laws that require state election officials to maintain accurate voter registration rolls, federal law imposes the same requirement for federal elections. The HAVA contains detailed "provisions to ensure that voter registration records in the State are accurate and are updated regularly."[4] Similarly, the NVRA requires states to "protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for election for federal office" by removing "the names of ineligible voters from the official lists of eligible voters."[5]

Access to federal databases is essential for states to be able to carry out this function, whether it is receiving information on aliens from the U.S. Department of Homeland Security to obtaining death records from the Social Security Administration.

Section 121 of the ACE Act amends HAVA to ensure such assistance by requiring every "entity of the Federal government which maintains information which is relevant to the status of an individual as a registered voter in elections for Federal office in a State" to provide such information "upon the request of an election official of the State." It contains other helpful provisions such as a requirement that all federal district courts provide state election officials with information on any individual who is recused "from serving on a jury on the grounds that the individual is not a citizen of the United States."

This new provision is similar to an already-existing provision in the NVRA that requires all U.S.

[3] https://www.heritage.org/testimony/the-people-act-2019.
[4] 52 U.S.C. § 21083 (a)(4).
[5] 52 U.S.C. § 20507 (a)(4) and (b).

attorneys to notify the chief state election official of the state of a federal criminal defendant's residence when that defendant is convicted in federal court. The U.S. attorney is directed to provide whatever information state officials need "for determining the effect that a conviction may have on an offender's qualification to vote."[6]

This is a vital change because federal courts obtain their lists of potential jurors from state voter registration rolls and, in some states, from the department of motor vehicles. Potential jurors who have been summoned for federal jury service must fill out a "jury qualification questionnaire" under oath which includes providing current address information and certifying that the individual is a U.S. citizen and has "never been convicted of a felony (unless civil rights have been legally restored)."[7] Such information is relevant to a registered voter's eligibility, and all federal courts should be required to transmit that information back to state election officials who maintain state voter rolls.

Section 121 of the ACE Act also provides needed clarification of the NVRA, which has been misinterpreted by courts,[8] to make it clear that the NVRA does not prohibit states from removing aliens from voter registration rolls or from requiring voting registration applicants to provide proof that they are U.S. citizens. The federal government itself requires such proof in order to be employed in this country, and the right to work and earn a living to support one's family is just as important as the right to vote.

As the U.S. Citizenship and Immigration Services explains in the use of the federal I-9, "Employment Eligibility Verification" form, all potential employees "must attest to their employment authorization" and present "acceptable documents as evidence of identity and employment authorization" as either a citizen or a legally admitted alien with a work authorization.[9] Barring states from requiring the same proof of citizenship when it comes to voting makes no sense and deprives states of information essential to determining voter eligibility.

The ACE Act corrects this anomaly as well as making other changes to ensure the integrity of federal elections, such as the requirement in Section 121 that a state that allows aliens to vote in local or state elections maintain a voter registration list for such aliens that is separate "from the official list of eligible voters" who are citizens of the United States. It also requires separate ballots for state and local elections in which aliens are allowed to vote. Thus, the Act states that "the ballot used for the casting of votes by a noncitizen in such State or local jurisdiction may only include the candidates for the elections for public office in the State or local jurisdiction for which the noncitizen is permitted to vote." This will help prevent aliens from unlawfully voting in federal elections.

This issue will also be helped by Section 124, which adopts a recommendation of the Carter-Baker Commission on Federal Election Reform regarding the ubiquitous identification used by an overwhelming majority of Americans – their state driver's license. Section 124 amends the REAL ID Act to require that all such driver's licenses indicate on the license itself whether the holder of the license "is a citizen of the United States." This is a needed change.

[6] 52 U.S.C. § 20507(g).
[7] https://www.uscourts.gov/services-forms/jury-service/national-ejuror-program.
[8] Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1 (2013).
[9] https://www.uscis.gov/i-9.

On the other hand, the federal government should not be interfering with and intruding into the responsibilities of the states in registering voters and otherwise administering their elections. President Joe Biden directed agencies to engage in such interference when he issued Executive Order 14019 on March 7, 2021, mandating that federal agencies become involved in the voter registration and absentee balloting process for citizens interacting with those agencies, including soliciting third-party organizations to provide such services on government property.[10]

President Biden has no constitutional or statutory authority to issue such a directive that potentially allows non-government organizations to use government facilities for partisan get-out-the-vote campaigns. Such activities also risk confusing and intimidating vulnerable members of the public who are applying for federal benefits into thinking they have to register and vote for the political party in control of the White House to ensure their applications for benefits are not declined.

Section 134 of the ACE Act properly and correctly prohibits the use of any federal funds to implement that Executive Order or to enter into any agreements with outside groups to "conduct voter registration or voter mobilization activities…on the property or website of the agency."

Post-Election Audits

Among the numerous beneficial changes to current federal law that would be made by the ACE Act is Section 127, which specifies that federal funding appropriated by Congress to improve election administration that is distributed to the states by the U.S. Election Assistance Commission may be used "to conduct and publish an audit of the effectiveness and accuracy of the voting systems, election procedures, and outcomes used to carry out an election for Federal office in the State and the performance of the State and local election officials who carried out the election."

While in-depth financial and accounting audits are a standard practice (and legal requirement) in the business world, audits of election agencies and election procedures and systems are almost nonexistent in our public elections except for very limited audits in limited circumstances. As I have previously recommended, comprehensive post-election audits should be a requirement in every state for public elections "to ensure the proper conduct of the entire election system, from the registration of eligible voters to the casting of ballots to the tabulation and reporting of the election results."[11]

Clarifying that federal funds appropriated for the states to assist them in administering their elections can be used for comprehensive post-election audits will encourage states to make such audits a standard practice.

Improving Election Standards in the District of Columbia

Under Clause 17 of Section 8 of Article I of the Constitution, Congress has plenary authority over the District of Columbia. It would exercise that authority in Section 143 of the ACE Act to provide

[10] 86 Fed. Reg. 13623.

[11] Hans A. von Spakovsky, "Best Practices and Standards for Election Audits," The Heritage Foundation, Legal Memorandum No. 304 (June 15, 2022).

a set of standards for elections in the District that include requiring a photo identification to vote in person or to request an absentee ballot, ensuring the accuracy of its voter registration list through annual maintenance, prohibiting ballot trafficking and same-day registration, and providing meaningful access for election observers.

These and other requirements in Section 143 match the best practices standards recommended by the Heritage Foundation for safe and secure elections[12] and are sorely needed due to the poor job that District election officials have done in conducting their elections, as well as the lack of best practices and secure standards implemented by the District's city council.

The best practices outlined in the Heritage *Fact Sheet* were incorporated into the *Election Integrity Scorecard* that the Foundation launched in 2021.[13] The *Scorecard* compares these best practice recommendations to the election laws and regulations of every state and the District of Columbia. The *Scorecard* not only reviews the voter roll maintenance procedures of states and the District, but also reviews many other factors such as their management of absentee ballots and the transparency of the entire voter registration and election process to outside observers, which is an essential element of fair and honest elections.

As of today, the District of Columbia only scored 57 points out of a possible 100 points on the *Scorecard* because of its failure to properly secure its elections and provide needed protections for its voters. The standards proposed by the ACE Act would improve that score and provide the District with more secure elections that protect the right to vote of its residents.

Protecting First Amendment Rights

Participation in the election process, including engaging in political speech and political activity by members of the public, candidates, and political parties, is of fundamental importance in our democratic process. Such participation is protected by the First Amendment and the ACE Act contains numerous provisions intended to underscore and protect political and campaign activities.

One of the most important provisions is in Title VI, which terminates the "Disinformation Governance Board" and prevents the use of any federal funds to establish any similar board. The federal government is prohibited from censoring American citizens, yet that is exactly what that board at the U.S. Department of Homeland Security was established to do. The federal government has no business determining what is "truth" or engaging in any actions that censor information, opinions, and viewpoints that the bureaucrats, politicians, and others disagree with because it does not fit their preferred narrative or the political orthodoxy of the moment.

The Benefits of Election Reform

This hearing is being held in Atlanta, Georgia, a state that became the target of unfair and unjustified criticism for passing election reforms in 2021 that helped improve the integrity and security of the

[12] "The Facts About Election Integrity and the Need for States to Fix Their Election Systems," The Heritage Foundation, Fact Sheet NO. 196 (Feb. 1, 2021).
[13] Election Integrity Scorecard, The Heritage Foundation, https://www.heritage.org/electionscorecard/index.html.

state's elections.

Turnout data and other evidence show very clearly that claims that voter ID requirements and other reforms such as those proposed in the ACE Act prevent eligible individuals from voting are simply untrue. As outlined in a recently published Heritage study, the latest data from the 2022 election demonstrate that common-sense reforms of the sort passed by states such as Georgia, Florida, and Texas, to, among other things, extend their voter ID requirements for in-person voting to absentee ballots do not "suppress" votes. [14]

This is just the most recent evidence that reinforces other long-term analyses of this issue. As summarized succinctly in a 2019 study, based on turnout data from all 50 states from 2008 to 2018, by the National Bureau of Economic Research, voter ID "laws have no significant negative effect on registration or turnout, overall or for any subgroup defined by age, gender, race, or party affiliation."[15]

Although harshly criticized for implementing its 2021 election reforms, Georgia had turnout of its voting eligible population ("VEP") in 2022 that was six percentage points *above* the national turnout rate (54.1 percent vs. 46.6 percent), according to the U.S. Election Project.[16] In fact, Georgia had a higher VEP turnout than Delaware, New York, and California, the home states of Pres. Joe Biden, Sen. Chuck Schumer (D), and Rep. Nancy Pelosi (D), all of whom unfairly criticized Georgia's election reforms including its ID requirement.

Voters in Georgia also disagreed with those harsh criticisms of its reforms. A voter survey conducted by the University of Georgia's Survey Research Center found that all of the criticisms of these reforms were completely unfounded.[17] When asked about their overall voting experience in the 2022 election, 72.6 percent of black Georgians said their experience was "excellent," and another 23.6 percent said it was "good."

The percentage of black voters who said they had a "poor" experience voting was 0.0 percent—a remarkable number that one does not often see in polls and surveys. By comparison, 72.7 percent of white voters had an "excellent" experience, 23.3 percent had a "good" experience, and 0.9 percent had a "poor" experience. The differences in the experiences of white and black voters were statistically insignificant; it is clear from the survey that almost no voters had any problems voting with the new reforms in place.

The survey also asked voters another crucial question about comparing their voting experience in 2022 to their voting experience in 2020 before the election reforms were implemented. The responses to that question once again show that the criticisms of Georgia were unwarranted. Among

[14] Hans A. von Spakovsky, "The Latest Election Data Show – Once Again – That 'Voter Suppress' Claim is Just Propaganda," The Heritage Foundation, Backgrounder No. 3761 (April 19, 2023), https://www.heritage.org/sites/default/files/2023-04/BG3761_0.pdf.

[15] Enrico Cantoni and Vincent Pons, "Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2018," National Bureau of Economic Research Working Paper No. 25522 (Feb. 2019, revised May 2021).

[16] Heritage Backgrounder No. 3761, p. 7-8.

[17] University of Georgia, School of Public & International Affairs, Survey Research Center, "2022 Georgia Post-Election Survey," January 17, 2023, https://sos.ga.gov/sites/default/files/2023-01/9700FA83-3195-4F3B-AD36-DE83D97FFB10.GA%20Voter%20Survey-2022.pdf.

black voters, 19.1 percent said their experience in 2022 was actually "easier" than in 2020, and another 72.5 percent said there was "no difference" for a total of 91.6 percent. White voters had similar responses: 13.3 percent said their experience was "easier," and 80.1 percent said there was "no difference" for a total of 93.4 percent—again, a statistically insignificant difference, although still noteworthy for the fact that a larger percentage of black voters than white voters said their voting experience was easier after the reforms were implemented.[18]

The polemic attacks against Georgia for its 2021 reforms were simply a repetition of what happened after Georgia first passed a photo ID law in 2005. The law survived court challenge, was precleared by the U.S. Department of Justice as not discriminatory, and took effect for the first time in the 2008 presidential election.[19] Similar to the criticisms of the state's 2021 reforms, many claimed the 2005 law would suppress votes, particularly of minority voters. The exact opposite happened. In comparison to the 2004 election, when there was no such ID requirement in place, the number of votes cast by black voters in 2008 increased by 42 percent, while the number of votes cast by Hispanic voters increased by 140 percent. The number of votes cast by white voters only increased by eight percent.[20]

Conclusion

We want to ensure that every eligible citizen is able to vote and that those votes are not diluted, voided, or stolen due to errors, mistakes, fraud, or other problems in the election system. Common-sense measures proposed in the ACE Act require the federal government to assist the states in their administration of elections. That includes giving the states access to federal databases with information relevant to eligibility, as well as prohibiting the federal government from engaging in other actions such as censoring political speech. These changes will not only provide us with more secure elections, but also guarantee public confidence in their outcomes.

Such measures are essential if we are to convince the public that they can and should turn out to exercise the franchise and actively and meaningfully participate in the governance of our nation.

[18] All cited statistics are from the survey by the University of Georgia.
[19] Hans A. von Spakovsky, "Lessons from the Voter ID Experience in Georgia," The Heritage Foundation, Issue Brief No. 3541 (March 19, 2012), https://www.heritage.org/report/lessons-the-voter-id-experience-georgia.
[20] Id.