JUNE 26, 2012

PROHIBITING THE USE OF DECEPTIVE PRACTICES AND VOTER INTIMIDATION TACTICS IN FEDERAL ELECTIONS: S. 1994

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

ONE HUNDRED TWELFTH CONGRESS, SECOND SESSION

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United States Senate Committee on the Judiciary

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Statement of

The Honorable Patrick Leahy

United States Senator
United States Senate
June 26, 2012

Today, the Committee is holding a hearing to consider the Deceptive Practices and Voter Intimidation Prevention Act of 2011. This bill is intended to protect one of the most fundamental rights Americans enjoy: the right to vote. In December, I joined Senators Schumer, Cardin, Whitehouse and others to introduce this bill. In 2007, I joined on similar legislation, championed by then Senator Barack Obama.

The legislation has the support of the Justice Department. Attorney General Holder has identified it as one of three areas "crucial in driving progress" to protect all Americans and their right to vote. We should be doing all we can to protect against efforts to infringe upon American's access to the ballot box.

The right to vote and to have your vote count is a foundational right, like our First Amendment rights, because it secures the effectiveness of other protections. The legitimacy of our Government is dependent on the access all Americans have to the political process. Attempts to deny Americans access to voting undermine our democracy.

Protecting access for people is ever more important in the aftermath of the Citizens United decision by the Supreme Court now that corporations are wielding more and more influence over our electoral processes. Just yesterday, without a hearing, the Supreme Court doubled down on its controversial Citizens United decision by summarily striking down a 100-year-old Montana state law barring corporate contributions to political campaigns despite the corruption that let to that state law. The five Justices who opened the floodgates to unlimited and unaccountable corporate spending on Federal political campaigns have now taken another step to break down public safeguards against corporate money drowning out the voices of hardworking Americans.

Like Montana, Vermont is a small state with people who take their civic duties seriously and who cherish their vital role in the democratic process. It is easy to imagine the wave of corporate money we are seeing spent on elections around the country lead to corporate interests flooding the airwaves with election ads and transforming even local elections. Yesterday's decision by the Court deals another severe blow to the rights of Vermonters and all Americans to be heard in public discourse and elections.

Our country has come a long way in expanding and enshrining the right to vote. We should never forget our history and the significant barriers we have overcome as a nation. Pictures of Americans beaten by mobs, attacked by dogs, and blasted by water hoses for trying to register to vote are seared into our national consciousness. We remember a time when discriminatory practices such as poll taxes, literacy tests, and grandfather clauses were commonplace and kept Americans from exercising their basic right to vote. Brave Americans have struggled long and hard, some paying with their lives, for their right to vote. This is no time to backtrack on hard won progress.

Recently, rather than increasing access we have seen restrictive voting laws spring up in various parts of the country. The recent action to purge Florida's voter rolls of legal voters is but one example. Burdensome identification laws are others. According to the National Conference of State Legislatures, since 2001 nearly 1,000 voter ID bills have been introduced in 46 states. Only three states -- one of which is Vermont -- do not have a voter ID law and did not consider voter ID legislation last year. Recently passed laws make it significantly harder for millions of eligible voters to cast ballots in 2012. These include young voters, African Americans, those earning $35,000 per year or less, and the elderly.

Earlier this month, during the recall election in Wisconsin voters received a robo-call telling them "if you signed the recall petition, your job is done and you don't need to vote on Tuesday." In the 2010 midterm elections, a robo-call that went out to over 110,000 Democratic voters in Maryland before the polls had closed stating that Democratic Gov. Martin O'Malley and President Obama, had been successful and that there was no need to vote. . It said, "Our goals have been met. The polls were correct . . . We're okay. Relax. Everything is fine. The only thing left is to watch on TV tonight." President Obama was not on the ballot that year and falsely telling voters to stay home could have cost Governor O'Malley and the people of Maryland if the election had been close. Likewise in 2010 in African-American neighborhoods in Houston, Texas, a group circulated flyers stating that voting for one Democratic candidate would count as a vote for the entire Democratic ticket.

The need for our Deceptive Practices and Voter Intimidation Prevention Act is documented and real. The additional tools provided in the Deceptive Practices and Voter Intimidation Prevention Act would help combat the kind of voter deception seen in places like Wisconsin, Maryland and Texas. This bill would prohibit any person from purposely misleading voters with regard to the qualifications or restrictions on voter eligibility, a political endorsement of a candidate, or the time and/or place of holding a Federal election. In addition, it prohibits obstructing or preventing another person from voting, registering to vote, or assisting another person to vote in a Federal election.

Our bill offers new ways to enforce these prohibitions and combat the dissemination of misleading information: It creates a private right of action for persons aggrieved by the dissemination of such false information. The bill allows any person to report such false information and, if it is determined that such information is false or deliberately misleading, the Justice Department would provide corrective information. In addition, this bill provides a tool for effective oversight by requiring the Attorney General to report to Congress on allegations of the dissemination of false information within 180 days of an election.

It is always good to see Senator Cardin at the Judiciary Committee and I look forward to the testimony of all the witnesses.

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Senator Charles Schumer Statement for the Record
June 26, 2012

Since 2010, we've witnessed an epidemic of anti-voter legislation spreading virally through state legislatures across the country. According to their own authors – organizations such as ALEC and the National Public Policy Research Council -- the express aim of these laws to suppress voter turnout by making voter registration and voting itself more difficult.

Those burdensome and reprehensible state laws are bad enough. But they are far from the only recent efforts to discourage certain segments of the population from voting, in order to improve the chances of a candidate's success. Lying about polling stations, endorsements, and whether someone's vote even matters amounts to guerilla warfare in a zone that should be free of trickery and threats.

In recent elections, we've seen dozens of examples of deceptive practices, ranging from false communications of voting requirements at polling places, incorrect polling place location and hours, and even threats of criminal penalties for voting.

Let there be no doubt that these threats have hindered participation. That's why, with Senator Cardin, I re-introduced the Deceptive Voter Practices and Intimidation Act this Congress. Deceptive tactics that are meant to scare, intimidate or confuse eligible voters threaten to destroy the very fabric of our democracy by jeopardizing the one right that all of our other rights depend on.

In 2004, in Allegheny County, Pennsylvania, voters received flyers which alleged that Republicans should vote on Tuesday, while Democrats should vote on Wednesday, to deal with record turnout. Obviously, no such rule existed, but the group who sent out this flier did not want Democrats to have the opportunity to vote on Election Day.

In the 2006 midterm elections, fliers were distributed in African-American communities in Maryland that falsely claimed that certain candidates were endorsed by the opposing party, and by public figures who really endorsed the candidates' opponents. Clearly, the campaigns responsible for these messages hoped to confuse voters into voting for their candidate.

On Election Day 2010, before the polls closed, thousands of African American voters, also in Maryland, received robo-calls stating that they did not need to go vote, because their favored candidates had already won the election. Just this month, during Wisconsin's gubernatorial recall election, Wisconsin voters reported receiving robocalls saying, "If you signed the recall petition, your job is done and you don't need to vote on Tuesday." And technology is only making the problem more virulent. One false statement about the time or place of an election on a Facebook page with a few hundred "friends" can make or break a candidate.

Unfortunately, what I just mentioned, and what our witnesses have discussed today, were just a few of the many, many examples of deceitful communications that legally registered voters have received over the years. These actions are devious and shameful, and must be made illegal so that all eligible voters have the opportunity to exercise their absolute right to vote. The Deceptive Practices and Voter Intimidation Act of 2011 proposes to do just that.

If a candidate cannot win on the basis of his or her record, past experiences, and ideas, but must resort to scare tactics and duplicity, then that candidate does not deserve to represent constituents in elected office. Throughout my career, I have been a strong and vocal advocate for greater openness and transparency in the electoral process, and this legislation is a necessary vehicle for yielding that change.

This bill was originally introduced by former Senator Obama in 2007. It never received a vote in the full Senate, and as a result, this problem did not go away, but managed to get worse. I reintroduced the bill last year with my colleague, Senator Cardin, in direct response to the fraudulent robo-calls that Marylanders received in 2010. We were deeply concerned about the effects these dirty campaign tricks would have on an electorate that already is reluctant to participate.

As the few examples I listed indicate, deception of voters is a great problem in Maryland and elsewhere, and it will not abate until Congress steps in. Under this Act, it would become a crime subject to up to 5 years in prison, to knowingly disseminate false information regarding voting and election administration, and to prevent a person from voting or registering to vote. The bill would also allow voters who were harmed by these violations to seek private rights of action. Finally, the bill would authorize the Attorney General to correct the misinformation provided to voters, if local officials have not yet done so.

This legislation is a commonsense solution to a growing problem, and I will do everything in my power to get it passed. Intentionally deceiving voters about where or when they should vote, or falsifying eligibility requirements, or otherwise interfering with their right to vote is just plain wrong, and must be prevented with the full force of the law.

Statement of Senator Jeff Sessions
"Deceptive Practices and Voter Intimidation Tactics"

No one disputes that deceptive voting practices are wrong and should be punished; that is why we have laws on the books to prohibit them. I do not believe that we need a new law to address this issue and for that reason I do not support this bill. Perhaps there are provisions in the bill that are justified and if there are, I would be willing to consider them.

But current law already allows the Justice Department to protect eligible voters from deceptive practices and voter intimidation. For example, an individual

who deprives, attempts to deprive, or conspires to deprive anyone of their right to vote faces a fine of up to $5,000, five years imprisonment, or both. Current law also prohibits conspiracies "to injure, oppress, threaten, or intimidate any person…in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States…"

I supported the reauthorization of the Voting Rights Act. No one, regardless of race, religion, or ethnicity should be hampered in the right to vote. And only eligible voters should vote.

The Justice Department has the power to prosecute individuals who seek to deprive others of the right to vote and they do not hesitate to use it. The real problem here is the failure of this Justice Department to prosecute voter fraud and its actions to undermine the constitutionally legitimate efforts by states to combat that fraud. We should be holding a hearing on those issues. We should be talking about the Justice Department's refusal to approve legitimate voter ID laws in South Carolina and Texas and the Department's lawsuit against Florida for its legitimate efforts to clean up its voter rolls.

States not only need to maintain accurate voter rolls, but are required to do so by federal law. When they fail to do so, this allows people who are not citizens, people who are felons, people who have moved, or people who are deceased to remain on the rolls. When these names remain on the rolls, and voters are not required to present a photo ID at a polling place, anyone can walk in with a paper document and say "I am John Jones" and vote for that person.

As a young man illustrated during Virginia's primary election, when a voting location does not require voter ID, the votes

of living, eligible voters can be stolen as well. This young man walked into a polling place in Virginia and said that he was Attorney General Eric Holder and that he hoped he did not have to provide an ID because he did not have one. The poll worker believed him and was going to allow him to cast the Attorney General's ballot. And just last week, a Virginia man received a voter registration card in the mail asking his dog, who had been dead for two years, to register to vote.

We also should be discussing the problems with early voting and absentee voting practices, which were highlighted in

the 2005 Justice Department investigation of the Noxubee County Democratic Executive Committee in Mississippi. In that case, the Chairman of the Committee recruited absentee voters, whether they were qualified or not, and sent "notaries" to their homes to fill out their ballots for them. These strong arm tactics by machine politicians deny people the right to a private ballot and the federal government does not do anything about it.

When the investigation led to a prosecution in the Noxubee County case in 2007, political appointees at the Holder Justice Department, upset with this event,

made sure that such action would never be taken again. This Justice Department does not believe that all people are protected by the Voting Rights Act, and chided Christopher Coates, the Chief of the Voting Section at the time, for pursuing cases where whites were the minority in the precincts in question.

In September of 2010, Coates testified before the U.S. Commission on Civil Rights revealing the Voting Section's "long-term hostility to the race-neutral enforcement of the [Voting Rights Act]." According to his testimony, Assistant Deputy Attorney General Julie Fernandez told the attorneys

in the Voting Section that "the Obama Administration was only interested in bringing traditional types of Section 2 cases that would provide political equality for racial and language minority voters." Statements like these completely ignore that fact that in some precincts, like Noxubee County, the majority of voters and political leaders are of a national racial minority.

So Mr. Chairman, I would just say that there is plenty of evidence of vote fraud in this country. In 2005, the bipartisan Commission on Federal Election Reform headed by former President Carter and

former Secretary of State Baker found that "the electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." And a 2012 report from the non-partisan Pew Center on the States found that 1 in 8 voter registration records are inaccurate, out-of-date, or duplicates. This suggests to me that there is a reasonable and significant justification for voter ID reforms in states like South Carolina, Texas and Florida. We should be discussing those

issues and the fact that this Justice Department has blocked efforts to ensure the integrity of the electoral process. Such actions are unjustified as a matter of law and evidence of a DOJ policy to politicize the enforcement of the Voting Rights Act.

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TESTIMONY OF

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SUBMITTED TO:
THE U.S. SENATE
COMMITTEE ON THE JUDICIARY

"Deceptive Practices and the Impact on Minority Voters in the 2012 Election"

On

June 26, 2012

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Testimony of Tanya Clay House
Public Policy Director, Lawyers' Committee for Civil Rights Under Law

Before the U.S. Senate Committee on the Judiciary

June 26, 2012

INTRODUCTION

Mr. Chairman and members of the Committee, thank you for inviting me to testify today to talk about the harmful impact of deceptive voting practices on historically disenfranchised communities, particularly against communities of color. My name is Tanya Clay House, Director of Public Policy for the Lawyers' Committee for Civil Rights Under Law. The Lawyers' Committee is actively engaged in enforcing the right to vote and ensuring the integrity of our elections through litigation and policy advocacy.

Voting and fair elections are at the center of who we are as a country. The right to vote is one of our nation's most fundamental rights. Throughout our history, various communities have organized and exercised this right to achieve equality and greater access to the American Dream. That is why it is particularly distressing when individuals and groups use deception and intimidation with the sole purpose of preventing eligible Americans from participating in our democracy. The rights of minority voters and other vulnerable communities are severely threatened when deceptive election practices, which disseminate information to voters in order to deliberately misinform them about the time, place or manner of an election, are allowed to go unchecked and unpunished. Unfortunately, current law is insufficient in preventing these nefarious actions. The Lawyers' Committee applauds this committee's efforts to investigate the prevalence of deceptive practices before the November election.

Mr. Chairman, thank you for your leadership in calling for this hearing. I especially wish to thank Senators Charles Schumer (D-NY) and Ben Cardin (D-MD) for their leadership in reintroducing the Deceptive Practices and Voter Intimidation Prevention Act of 2011, S. 1994. This bill will clarify the definition of deceptive practices for law enforcement officials, making it easier for these officials to prosecute perpetrators of deceptive practices. Additionally, the bill's criminal provisions create deterrence measures to prevent future acts intended to intimidate and mislead voters, and also ensure that perpetrators face real consequences when they mislead voters. Finally,

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the bill will also require the federal government to investigate allegations of deceptive practices. This is necessary so that it can take an active role in protecting voters against false information regarding the ability to participate in elections by immediately taking action and publicizing corrective information if it receives credible reports of deceptive voting practices. The immediate dissemination of this information will mitigate the potentially disenfranchising confusion perpetrators of these actions are trying to sow. The Lawyers' Committee supports the Deceptive Practices Bill because it includes direly needed reform provisions also recommended in the Lawyers' Committee/Common Cause upcoming report on deceptive practices. Thus, the focus of my testimony today will be on our findings in this report, and why the Deceptive Practices Bill must be adopted to protect the integrity of our elections.

BACKGROUND

The Lawyers' Committee was founded in 1963 following a meeting in which President John F. Kennedy charged the private bar with the mission of providing legal services to address racial discrimination. We continue to work with private law firms as well as public interest organizations to advance racial equality in our country by increasing educational opportunities, fair employment and business opportunities, community development, fair housing, environmental health and criminal justice, and meaningful participation in the electoral process.

Indeed, since our inception, voting rights has been at the center of our work. As part of our voting and elections work, we are also leaders in the Election Protection coalition. Election Protection works throughout the election cycle to expand access to our democracy for all eligible Americans, educates and empowers voters through various tools, including the 1-866-OUR-VOTE and 1-888-VE-Y-VOTA hotlines, collects data about the real problems with our election system, and puts a comprehensive support structure in place on Election Day. Since its inception, the 1-866-OUR-VOE hotline has received calls from over half a million voters. Most recently, the Election Protection hotline received over 1500 calls from voters seeking assistance during the Wisconsin recall election.

The Voting Rights Project of the Lawyers' Committee has an integrated program that includes litigation, Election Protection, research, advocacy, and voter education. The Lawyers' Committee has consistently been at the forefront of legislative efforts to protect voting rights, including all of the reauthorizations of the Voting Rights Act of 1965 (VRA). The 2006

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reauthorization resulted in large part from the advocacy efforts of a voting rights coalition lead by the Lawyers' Committee. The coalition organization the National Commission on the Voting Rights Act created a report which illustrated the continuing need for the protections afforded by the VRA.

The Lawyers' Committee continues to be extremely active in defending the constitutionality of Section 5 of the Voting Rights Act, having intervened in *Shelby County, Alabama v. Holder*, in which both the District and Circuit Courts have upheld its constitutionality.[1] We have also intervened to enforce Section 5 and defend its constitutionality in the following cases:

(1) ***Mi Familia Vota v. Detzner*** – On June 8, 2012, the Lawyers' Committee filed suit with the American Civil Liberties Union and the law firm of Weil, Gotshal & Manges LLP under Section 5 of the VRA to challenge Florida's efforts to make lawful citizens and already legally registered voters re-verify their citizenship or lose their ability to vote.

(2) ***Florida v. United States* –** On June 21, 2012, the Lawyers' Committee argued in D.C. federal court that Florida's recent restrictions on third-party voter registration drives and early voting violate Section 5 of the VRA because they disproportionately impact minority communities. Indeed, minority communities rely on registration drives to register to vote and utilize early voting at far higher rates than the population as a whole. The suit, filed with the Brennan Center for and the law firm of Bryan Cave, also argues that new requirements permitting recent movers to only vote via provisional ballot also violate Florida's Section 5 obligations.

(3) ***Texas v. Holder* –** The Lawyers' Committee, along with the law firm of Dechert LLP and the Brennan Center for Justice, represent the Texas State Conference of NAACP Branches and the Mexican American Caucus of the Texas House of Representatives ("MALC") as interveners in litigation to oppose preclearance under Section 5 of the Voting Rights Act of a photo ID requirement for in-person voting that the State of Texas enacted in 2011.

[1] Shelby County, Ala. v. Holder, 679 F. 3d 848 (C.A.D.C. 2012).

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(4) ***Texas v. United States*** **-** The Lawyers' Committee is serving as local counsel for the Mexican American Legislative Caucus of the Texas House of Representatives ("MALC") in litigation to oppose preclearance under Section 5 of the Voting Rights Act of redistricting plans adopted by the State of Texas for Congress and the Texas House of Representatives.

(5) ***South Carolina v. United States*** **–** The Lawyers' Committee represents defendant interveners, a private individual and the state conference of the NAACP, in this litigation asserting that South Carolina's voter photo ID law violates Section 5 of the VRA.

We also have filed cases to enforce states' obligations to provide registration opportunities at public assistance agencies under the National Voter Registration Act (NVRA), including:

(1) ***Delgado v. Galvin*** **-** The Lawyers' Committee serves a co-counsel for Bethzaida Delgado, the National Association for the Advancement of Colored People (NAACP) and New England United for Justice (NEU4J), who on May 15, 2012 filed suit in response to Massachusetts's violations of the National Voter Registration Act of 1993 (NVRA) that make it difficult for public-assistance clients to register to vote.

(2) ***NCLR v. Miller*** **-** On June 11, 2012, the Lawyers' Committee, together with law firm pro bono counsel Dechert LLP and Woodburn & Wedge and other litigation partners, filed suit in federal court to remedy the failure of Nevada state officials to provide voter registration services at state public assistance offices, as required by the National Voter Registration Act of 1993 (NVRA).

(3) ***Gonzales v. Arizona*** **-** The Lawyers' Committee and several other legal organizations represented a broad coalition of Arizonans – including the Inter Tribal Council of Arizona, Inc. (ITCA), the Hopi Tribe, the League of Women Voters of Arizona (LWVAZ), the League of United Latin American Citizens (LULAC), People for the American Way Foundation (PFAWF), the Arizona Advocacy Network (AzAN), and State Representative Steve Gallardo – in *Gonzales v. Arizona*, where we have challenged the voting-related provisions of Proposition 200. Proposition 200 disenfranchises qualified and eligible voters by requiring citizens to present documentary proof of their citizenship status when registering to vote, and further requiring qualified and

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registered voters to present additional identification at the polling place on Election Day.

Overall, our NVRA litigation has resulted in about 1 million voters being able to register to vote.

Furthermore, as a result of our Election Protection work in Minnesota, the Lawyers' Committee participated in a successful defense of the decision of the Minnesota election officials preventing the use of "Please ID Me" buttons in the polling place because the buttons gave the false impression that voters needed to provide photo identification in order to vote. The Court agreed with the arguments in our *amicus curiae* brief that the buttons were meant to deceive voters and wearing them into polling places was not protected by the First Amendment. As a result, the court, in *Minnesota Majority v. Mansky*, denied Plaintiffs' request for a temporary restraining order against the injunction preventing the use of the buttons.[2]

DECEPTIVE PRACTICES DISENFRANCHISE VOTERS

Current instances of voter deception are the latest variation of an ugly recurring theme in our nation's politics: attempting to prevent certain populations in this country from casting their vote. Earlier in our history, major obstacles for voters included threats of violence, poll taxes, party primaries that only allowed white voters to participate ("white primaries"), and educational and property requirements. Many hoped and expected the Voting Rights Act of 1965 to eradicate such blatant instances of voter suppression. Almost 50 years after the passage of the Voting Rights Act, however, historically disenfranchised voters continue to be the target of deceptive election practices and voter intimidation. The practices are often more subtle than the instances we have seen the past. Nonetheless, they have been responsible for frightening and misleading voters, convincing many of them that they cannot or should not exercise their fundamental right to vote.

Deceptive election practices occur when individuals, political operatives, and organizations intentionally disseminate misleading or false election information that prevents voters from participating in the electoral process. These tactics often target traditionally disenfranchised communities, which typically are communities of color, persons with disabilities, persons with low income, seniors, young people, and naturalized citizens. These deceptive tactics often take the form of flyers or robocalls giving voters false

[2] Minnesota Majority v. Mansky, 789 F. Supp. 2d 1112 (D. Minn. 2011).

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information about the time, place or manner of an election, political affiliation of candidates, or criminal penalties associated with voting.

The advancement of technology has enabled these types of deceptive tactics to become more sophisticated and nuanced, which creates a greater potential for certain voters to be targeted. The internet and social media platforms like Facebook and Twitter, enable deceptive tactics to have a greater impact by reaching larger audiences and thus potentially depriving a larger amount of voters their fundamental right to vote.

EXAMPLES

The most common types of deceptive practices used in recent elections are: (1) individuals using official-looking seals or insignias to influence or intimate voters; (2) flyers with bogus election rules;(3) flyers advertising the wrong election date; (4) deceptive online messages; (5) robocalls with false information; and (6) Facebook messages containing misleading information.

For instance, on Election Day in 2010, Election Protection received reports to the 1-866-OUR-VOTE Hotline that voters in predominantly African-American jurisdictions in Maryland were receiving strange robocalls. These calls, it turns out, were authorized by the campaign manager for Republican gubernatorial candidate Robert Ehrlich, and claimed that his opponent, Democrat Martin O'Malley, had won the election and implying that there was no longer a need to vote. The call said, "I'm calling to let everyone know that Governor O'Malley and President Obama have been successful. Our goals have been met. The polls were correct, and we took it back. We're OK. Relax. Everything is fine. The only thing left is to watch on TV tonight. Congratulations and thank you."

Election Protection and the Lawyers' Committee received numerous reports of voters being misled by deceptive practices on Election Day in 2008 including:

(1) Voters in Arizona Legislative District 20 received robocalls directing them to a polling location that was incorrect and far from their actual polling place. On that same day, another voter called to report a text message received from an unknown number saying that because of the long lines at the polls, supporters of one major presidential candidate should vote on Wednesday instead of Election Day. The text also advised people to send the text along to all their friends.

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(2) Voters in Colorado received text messages stating that supporters of one major presidential candidate should vote the next day, on Wednesday, due to long lines.

(3) In Florida, students at the University of Florida received text messages trying to trick them into voting on the wrong day. One text message stated, "[d]ue to high voter turnout Republicans are asked to vote today and Democrats are asked to vote tomorrow. Spread the word!" Another read, "News Flash: Due to long lines today, all Obama supporters are asked to vote on Wednesday. Thank you!! Please forward to everyone." Some students even received text messages purporting to be from the vice president of the university.

(4) In Virginia, an email was circulated at 1:16 am on Election Day to students and staff at George Mason University, purportedly from the University Provost falsely advising that the election had been postponed until Wednesday. Later, the Provost sent an email stating that his account had been hacked and informing students the election would take place that day as planned.

(5) Voters in Virginia reported fake flyers claiming to be from the Virginia State Board of Election. They were distributed in the southern part of the state, and on the Northern Virginia campus of George Mason University falsely stating that, due to larger than expected turnout, "[a]ll Republican party supporters and independent voters supporting Republican candidates shall vote on November 4th…All Democratic party supporters and independent voters supporting Democratic candidates shall vote on November 5th."

These are just a few examples of the reports that the Lawyers' Committee has received. This intentional dissemination of fraudulent deceptive information is an affront to the very core of our democracy. To protect a citizen's fundamental right to vote, the law must contain clear protections to combat this type of election fraud. By doing so, the law will provide attorneys general with the clarity they need to pursue these acts as election crimes, direct the Department of Justice and relevant state authorities to immediately correct the false information, and serve as a warning to the perpetrators themselves that their deceptive election practices are subject to prosecution.

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COMBATTING DECEPTIVE PRACTICES ADDRESSES THE REAL FRAUD

Recent attention has been given to the alleged problem of voter impersonation fraud, causing a new wave of suppressive legislation requiring restrictive voter identification and proof of citizenship at the polls. However, it has been well documented that voter impersonation fraud is extremely rare.[3] Instead, these voter identification laws threaten to disenfranchise a large number of voters, particularly voters of color, in order to address a nearly non-existent problem.

On the other hand, deceptive practices are in fact regularly occurring. This has been documented not only through the Election Protection database, but also numerous media reports and investigations throughout the country. Like other forms of voter intimidation, deceptive practices can intimidate or frighten voters into casting a ballot for a candidate for whom they may not otherwise have voting, causing elections to fail to be a reliable indicator of voters' choices. Moreover, based upon our expertise developed through our extensive work to protect voters before, during and after they cast their ballot, we believe deceptive practices prevent many voters from exercising their right to freely cast a ballot because of the dispersal of arguably fraudulent information. Using misinformation to prevent eligible voters, who otherwise would have voted, from casting ballots, can change the outcome of an election.

If we are truly committed to combating real voter fraud, Congress should enact the Deceptive Practices and Voter Intimidation Prevention Act (S. 1994) without delay.

[3] WENDY R. WEISER & LAWRENCE NORDEN, VOTING LAW CHANGES IN 2012, 4 (2011), *available at* http://www.brennancenter.org/content/resource/voting_law_changes_in_2012/.

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CURRENT VOTING RIGHTS STATUTES ARE INSUFFICIENT

While we agree that proper enforcement of current voting rights statutes provides a significant deterrent against many forms of intimidation, they are not always sufficient. In particular, some point to Section 11(b) of the Voting Rights Act and state statutes addressing voter intimidation and voter fraud as adequate measures in preventing deceptive voting practices. However, Section 11(b) of the Voting Rights Act, commonly known as the anti-intimidation provision, does not contain criminal penalties to punish those who perpetuate voter deception.

Moreover, only some states have passed laws protecting voters from deceptive practices and those that have done so have banned only some of the practices highlighted in our Deceptive Practices report and our testimony today.

Further, to the extent that there are laws on the books, legal standards for determining whether a voter practice is deceptive remain murky. For example, both Colorado and Arizona have laws against using "any corrupt means" to influence an election and voter intimidation, respectively. However, no state appellate court in Colorado has defined the term "any corrupt means," and law enforcement agencies have yet to bring a claim under the anti-intimidation statute in Arizona, despite the multiplicity of deceptive voting practices the Lawyers' Committee has documented in that state.

In sum, state laws have been largely ineffective in deterring or punishing deceptive election practices and voters continue to pay the price. The laws that do address certain variations of deceptive election practices tend to be either too narrow in scope or are ambiguous about their application. As a result, prosecutions are rare, corrective information is not disseminated in a timely manner, and similar practices continue to influence and uundermine the integrity of the elections. A consistent standard across the country is direly needed to ensure that all voters have the same protections and can cast their ballots properly, without fear of having received deliberately false information about the voting process or the election.

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RECOMMENDATIONS FROM 2012 DECEPTIVE PRACTICES REPORT

Because state and federal laws addressing deceptive practices have provided little deterrence, the Lawyers' Committee recommends several legal and policy reforms to combat deceptive practices (these recommendations are included in its upcoming report it co-authored with Common Cause). These reforms should be implemented before the November 2012 election to protect voters' rights. The report contains the following recommendations:

(1) The law must provide a clear and precise legal definition of deceptive practices. With a clear definition provided in the law, law enforcement will have less difficulty determining whether a practice intimidating voters falls under the purview of the law, and may then take a more active role in enforcing legal prohibitions on deceptive practices. This definition must include clarity about the forms of communication through which messages intended to mislead voters may be conveyed.

(2) A private right of action must be included in the law to empower voters to actively protect their voting rights. Without a private right of action, laws prohibiting deceptive voting practices will be largely ineffective. The few states with a statute permitting the prosecution of perpetrators of deceptive practices have little track record of enforcement. However, if local, state or federal authorities fail to appropriately redress such practices, victims must be allowed to proceed. For example, over a month and a half before the 2008 election, a Philadelphia voter reported that people were handing out flyers which stated that individuals would be arrested when they went to vote if they had outstanding warrants or parking tickets. If the law had allowed a private right of action, the voter could have brought suit and enjoined the distribution of the flyers.

(3) Federal and state governments must take steps to implement corrective action in addition to passing statutes prohibiting deceptive practices. When a deceptive practice occurs on Election Day, voters may not have enough time to bring a private action to stop the practice. Virginia State Police set a positive example of government intervention to correct a deceptive practice when, one week before Election Day in 2008, they issued a press release announcing that it was investigating "the source responsible for an erroneous election

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flyer circulating in the Hampton Roads region and via the Internet. The one-page flyer falsely claims to be from the State Board of Elections and provides incorrect voting dates. The same flyer has apparently been scanned and is now circulating by email." Indeed, as this in example, the impact of deceptive practices may be minimized if voters are fully informed about their voting rights and federal and state governments must institute voter education programs to combat this misinformation.

(4) In order to rapidly respond to voters' complaints about deceptive practices, federal, state and local law enforcement officials should coordinate a rapid response plan with voting rights and other civil rights organizations working in the state. For example, Election Protection received a call in July 2011 in which the caller stated that voters registered for a particular political party received recorded calls claiming to be from an anti-abortion rights group saying that they did not need to go to a polling place to vote, and that they did not need to worry because their absentee ballot was in the mail. The calls came on the last day polling places were open – too late to submit an absentee ballot. In this case, it is likely that a voter would not have sufficient time to file suit to stop the practice, but a rapid response plan to empower local organizations would help distribute accurate information and mitigate confusion.

(5) States must take a proactive role in collecting data for post-election studies of deceptive practices. The location, date, and details as well any corrective action taken should be monitored so that states may reassess how they may best protect voters from and misleading information in the future.

DECEPTIVE PRACTICES DO NOT CONSTITUTE PROTECTED SPEECH

Some critics have raised the concern that criminalizing deceptive election practices unconstitutionally restricts freedom of speech. The importance of freedom of speech to democracy is immeasurable and should be fiercely guarded by courts and legislators. The constitutional right to free speech, however, cannot be used to prevent another person from exercising an equally fundamental right: the right to vote. The model law we propose does not infringe on freedom of speech because it captures only unprotected speech. Furthermore, we support constructive efforts to

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ensure that S. 1994 does not unconstitutionally infringe upon freedom of speech while vigorously protecting the right to vote.

Supreme Court jurisprudence has long established that certain categories of low-value speech are outside the realm of First Amendment protection. Obscenity, defamation, incitement, and fraud have historically been considered by the Court as unworthy of First Amendment protection.[4] Deceptive election speech regarding voting is fraudulent and therefore unprotected.

This is for good reason. False statements have little constitutional value.[5] They do little to contribute to the "uninhibited, robust, and wide-open debate" on public issues, the key principle underlying freedom of speech protection.[6] Spreading lies about an election to prevent certain people from voting certainly does not comport with this principle. Though the falsity of a statement is not dispositive of its constitutionality, the distinguishing element between false statements which are protected and those which are unprotected is the existence of a *malicious intent*.[7] The Court has steadfastly held that when an individual communicates a false statement of fact about a matter of public concern, the speaker can be held to account only upon a showing of intent; this avoids the risk of punishing innocent mistakes.[8] The Lawyers' Committee supports the regulation of unprotected speech which requires, in addition to a false statement, the showing of intent to deprive another of the right to vote. To hold a person accountable under this standard, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false and demonstrate that the defendant made the representation with the intent to mislead the audience.[9]

Lawmakers should be mindful that even where unprotected speech is implicated, a statute must be carefully crafted to target only the proscribed conduct so as not to chill protected speech. The Lawyers' Committee supports this limitation.

Even if analyzed under heightened scrutiny, the model law proposed by the Lawyers' Committee would pass constitutional muster because states have a compelling interest in protecting the right to vote. In *Burson v. Freeman*, the Court upheld a provision of the Tennessee Code, which prohibited the solicitation of votes and the

[4] *U.S. v. Stevens*, 130 S.Ct. 1577, 1584 (2010).
[5] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
[6] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
[7] *United States v. Alvarez*, 617 F.3d 1198, 1206-07 (9th Cir. 2010) *cert. granted*, 132 S. Ct. 457, 181 L. Ed. 2d 292 (U.S. 2011) (*citing Gertz* 418 U.S. at 347).
[8] *Alvarez*, 617 F.3d at 1206-07 (*citing Sullivan*, 376 U.S. at 283).
[9] *See Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003).

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display or distribution of campaign materials within 100 feet of the entrance to a polling place. 504 U.S. 191, 210 (1992). The Court reasoned that the 100 foot boundary served a compelling state interest in protecting voters from interference, harassment, and intimidation during the voting process.[10] It clearly follows from this holding that the state has a compelling interest in protecting the actual act of voting, which is precisely what deceptive election practices seek to prevent. Losing the opportunity to vote through no fault of the voter is an irreparable harm. Once polls close on Election Day, there is nothing the victim of deceptive election practices can do at that point. That person's vote is lost and that loss cannot be recovered or remedied.

THE DECEPTIVE PRACTICES BILL PROTECTS VOTERS' RIGHTS

The Lawyers' Committee is pleased that the Deceptive Practices and Voter Intimidation Prevention Act of 2011 follow the recommendations of the 2012 Lawyers' Committee and Common Cause report. We believe these are the best legislative solutions to successfully combat deceptive practices. Similar language creating more severe penalties and monitoring requirements is also included in the Voter Empowerment Act, introduced by Congressman John Lewis and the over 100 cosponsors the U. S. House of Representatives.

The Lawyers' Committee has actively supported legislation addressing deceptive voting practices in several past Congresses, including when it was first introduced in 2005 (S. 1975) by then-Senator Barak Obama. With the upcoming presidential election in November, Congress can no longer continue to wait to enact comprehensive electoral reform prohibiting the use of deceptive practices to influence voters.

As we have recommended, the Deceptive Practices and Voter Intimidation Prevention Act defines a deceptive practice in a federal election as when a person communicates, through any means of written, electronic, or telephone communication, or produces information he or she knows to be false with the intent to "mislead" voters, or discourage a voter from casting his or her ballot, within 90 days of an election. This definition would cover acts of deception committed using new technology, such as the previously mentioned incident in Virginia in 2008 when the email account of George Mason University's provost was hacked and an email went out instructing students to falsely vote on Wednesday.

[10] *Id.*

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Furthermore, the bill would prohibit a person from releasing false statements about political endorsements if the person knows that the statement is false and intends to mislead voters. This provision is important because of instances like in Maryland in 2006 where people, who claimed they were hired by a candidate, handed out flyers falsely claiming two candidates were from the other party and that they had been endorsed by prominent African-American officials when they had not.

Because state and federal laws currently addressing deceptive practices fail to provide a clear definition of a deceptive practice, courts are unable to consistently enforce a prohibition on deceptive practices. The bill creates a clear definition so that judges as well as law enforcement can take the necessary actions. This definition may also serve as deterrence so that future elections are not marred by voter deception.

One of the most important changes created by this bill is the implementation of a private right of action for persons whose right to vote has been impacted by a deceptive voting practice, so that voters, like the voter from Philadelphia mentioned previously, can take action to stop these practices from impacting their communities. The remedies allowed under the bill to address harms created by deceptive voting practices permit a court to issue an injunction, restraining order, or other order to stop the deceptive practice.

Perhaps even more important, the Act requires the Attorney General to take corrective action when state and local election officials have not adequately addressed deceptive voting practices. Under the bill's provisions, the Attorney General must intervene to ensure that accurate information correcting any false statements is effectively disseminated. The intent of the examples listed above is to sow enough confusion among certain voters that they vote against their preferred candidate or not at all. Therefore, simply prosecuting a perpetrator does not solve the immediate problem. Instructing the government, a trusted source, to immediately publicize corrective information will help mitigate any damage created by the deceptive practice.

Finally, under the provisions of the bill, the Attorney General is required to submit a report to Congress within 180 days after an election describing allegations of deceptive voting practices and any action taken in response. This report must also be distributed to the public. In aggregating data and assessing any responsive action taken, the Attorney General can then determine whether there has been any progress in deterring these activities, and then implement a revised strategy to address this pervasive attack on the voting rights of Americans.

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Deceptive voting practices have created an atmosphere of fear and intimidation for voters, discouraging participation in elections. In passing the Deceptive Practices and Voter Intimidation Prevention Act of 2011, Congress will be restoring confidence in our electoral system. We must make every effort to ensure that all Americans are empowered to cast their vote in the 2012 election, fulfilling our country's democratic promise.

CONCLUSION

Mr. Chairman, I want to thank you and the Committee for your commitment to protecting the vitality of our democracy in ensuring that every eligible citizen has an equal opportunity to make her voice heard by casting a ballot on Election Day. Deceptive practices continue to disenfranchise millions of American voters by interfering with their right to freely cast a ballot. For too long, Congress had not taken affirmative action to deter deceptive voting practices. The current political climate of deception and intimidation has kept us from reaching our goal of voting equality. In order to realize the full potential of our democratic government under our Constitution which protects the liberty of the individual, Congress must act as a guardian of our fundamental right to vote and pass the Deceptive Practices and Voter Intimidation Prevention Act of 2011.

Testimony of John J. Park, Jr.
Before the Senate Judiciary Committee
Regarding S. 1994 "Prevention of Deceptive Practices and
Voter Intimidation in Federal Elections"
June 26, 2012

Mr. Chairman, Senator Grassley, and Members of the Committee:

My name is John Park, and I am of counsel with the Atlanta law firm of Strickland Brockington Lewis, where my practice includes work on election law and redistricting matters. The views I express are my own.

In my more than 30 years of practice, I have done substantial work on cases involving voting rights, redistricting, and election law. In addition, while an Assistant Attorney General in Alabama, I served for a time as one of the attorneys who advised the Alabama Judicial Inquiry Commission. Alabama uses partisan elections to select its judges, and its Canons of Judicial Ethics address the conduct of election campaigns in ways that are pertinent to this hearing.

I appear before you in opposition to the bill S. 1994, "Prevention of Deceptive Practices and Voter Intimidation in Federal Elections." I oppose this bill because it raises serious constitutional questions and because it is under-inclusive, not because I approve of or condone the use of deceptive practices, voter intimidation, or both.

At the outset, I would note that the Congressional Research Service has been unable to count the number of federal crimes. Some estimate that there are more than 4,500 statutory crimes and many that are created by federal regulations. Before creating new federal crimes, Congress should first consider what remedies are presently available and ask why they are inadequate. Voter intimidation and deceptive practices can be pursued under 18 U.S.C. § 241, 42 U.S. C. § 1971(b), or Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b), so the U.S. Department of Justice should explain why those tools, which are already at its disposal, are insufficient. In addition, I note that there was a federal prosecution under existing law in one of the deceptive practices cases, and a state prosecution in another.

S.1994 would prohibit the making of materially false statements with specified intent regarding certain matters within 90 days of an election. Significantly, the matters involved are political, and, because political speech is at the core of the First Amendment, S. 1994 raises constitutional issues that cannot be avoided.

I note that the United States Supreme Court is considering *United States v. Alvarez*, which presents a challenge to the constitutionality of the Stolen Valor Act. That law makes it a federal crime to lie about having received a military award or decoration. While the text of 18 U.S.C. § 704(b) does not allow for exceptions or require proof of harm, the Solicitor General suggested in oral argument that the Stolen Valor Act be read to require the lie to be knowing and that several exceptions be read into it. I know that it

is risky to predict a court's decision from an oral argument, but the transcript suggests that the Stolen Valor Act may not be held constitutional unless the Court accepts the Solicitor General's attempts to limit the broad scope of the Act, and perhaps not even then. However it comes out, though, the Court's decision in *Alvarez* will be instructive with respect to the power of Congress to punish statements that are untrue.

Even though S. 1994 requires both knowing falsehoods and specified intent, it will still raise constitutional concerns because it will necessarily have a chilling effect. Anyone who contemplates speaking about the qualifications of voters (and there are some people who cannot vote) or endorsements that a candidate has received (and candidates get endorsements) will have to think about the possibility that the U.S. Department of Justice or a private individual will take exception to it. As the Supreme Court, unremarkably, noted in *Citizens United v. FEC*, "As additional rules are created for regulating political speech, any speech arguably within their reach is chilled."

Clearly, speakers should try to speak truthfully, but S. 1994 subjects that effort to second-guessing. One need only think about the hair splitting exercise that Politifact engages in to determine whether a statement is true. What about statements that are "mostly true?" What about those that are "half true?" What about statements that are true as far as they go, but some who hear them deem them incomplete? Will S. 1994 be read to create a private right of action to seek to prohibit or force the rewriting of statements like those?

S. 1994 applies to statements made 90 days before a federal election. In almost all instances, it will also be in effect for state elections because federal and state offices often appear on the same primary or general election ballot. Any enforcement action brought during that blackout period could have an effect on the outcome of the election. Congress should hesitate before giving private individuals a tool a tool to use against their political opponents in a way that could affect an election's result.

With respect to the private right of action, I note that during the time I served as one of the attorneys for the Alabama Judicial Inquiry Commission, the Commission charged one candidate for Chief Justice of the Alabama Supreme Court, who was then an Associate Justice on that court, with making statements about another candidate "either knowing that information to be false or with reckless disregard of whether that information was false" and statements "knowing that the information [disseminated] would be deceiving or misleading to a reasonable person." The effect of filing those charges was to disqualify the charged associate justice from serving on the court until the charges were resolved. Ultimately, the Alabama Supreme Court held that the Canons regulating false and deceptive statements were unconstitutionally overbroad and narrowed their scope by construction. *Butler v. Judicial Inquiry Commission*, 802 So. 2d 207 (Ala. 2001).

Empowered by those Canons and by the prospect of disqualifying a candidate, though, people fly-specked the speeches and advertisements of Alabama judicial candidates looking for opportunities to complain that something stated was false or

misleading. Those complaints could require a campaign to expend energy responding to an inquiry from the Judicial Inquiry Commission. Congress can expect no less if it creates a private right of action. Private parties will pore over the statements of their opponents, looking for an opportunity to expose them to the heavy costs of defending against a lawsuit.

Furthermore, even though S. 1994 requires both knowing falsehood and specified intent, it is not unreasonable to expect that the private parties will use their new private right of action against statements which they believe will have a prohibited effect. They will then work backwards to the specified intent and from there to the knowing falsity.

Given these concerns, we should first encourage the U.S. Department of Justice to use the remedies presently available.

With respect to under-inclusion, I note that S. 1994 does not address (1) fraudulent registration; (2) multiple registrations; or (3) compromised absentee ballots. Peter Kirsanow, a member of the U.S. Commission on Civil Rights, pointed this out in 2007 when he testified on S. 453, the predecessor version of this bill. He pointed to, among other things, the magnitude of the multiple registration problem, noting that approximately 140,000 Florida residents were then registered in multiple jurisdictions.

Recent events suggest that the problems Peter Kirsanow pointed to in 2007 are still an issue. For example, Wisconsin election officials struggled to verify the signatures supporting the recent, unsuccessful attempt to recall Governor Scott Walker. The Department of Justice is fighting with Florida over its effort to remove non-citizens from its voting rolls. In 2011, in Alabama, an illegal alien who voted for many years in state and federal elections was prosecuted for social security fraud and theft of public money, but not for voting illegally.

I encourage Congress to address the deceptive practices that are not included in S.1994.

Thank you for the opportunity to testify. I will be happy to answer any questions the Committee might have.

COMMON CAUSE
Holding Power Accountable

Hearing on Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections: S.1994

Senate Judiciary Committee

Testimony of Jenny Flanagan
Director of Voting and Elections
Common Cause

Common Cause is a nonpartisan, nonprofit organization that is dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process.

Voter suppression has become a household phrase in recent months, and that is nothing to be proud of. The single most fundamental right of every American citizen is to cast a ballot in an election and be counted in our democratic process. It is disheartening that in the 21st century we are here today to address a crisis in our elections where partisan operatives utilize trickery and deceit to change election outcomes.

In the last several election cycles, "deceptive practices" have been perpetrated to suppress voting and skew election results. Usually targeted at minorities and in minority neighborhoods, deceptive practices are the intentional dissemination of false or misleading information about the voting process with the intent to prevent an eligible voter from casting a ballot. It is an insidious form of voter suppression that often goes unaddressed by authorities and the perpetrators are virtually never caught. Historically, deceptive practices have taken the form of flyers distributed in a particular neighborhood; in recent years, with the advent of new technology, "robocalls" have been employed to spread misinformation.

Common Cause, along with its coalition partners, have been responding to this type of intimidation and misleading information through our national and state based programs. We have received numerous complaints over the years at our state offices and through the Election Protection Coalition of intimidation and misleading information about the election process. Across the country, there have been a multitude of examples where voters have been targeted with false information to prevent them from voting, in an effort to influence the outcome of an election. Complaints have come from voters who received robocalls telling them that their polling places had changed, when in fact they did not.[1] Some misleading information came in the form of text messages.[2] Most Americans are shocked and appalled to hear that these types of campaigns occur, but we know that they do, and cannot stand by and wait for it to get worse.

[1] Adam Levine, "*Voters Receiving Misleading Robocalls in Ohio*," CNN.com, Nov. 3, 2008, http://politicalticker.blogs.cnn.com/2008/11/03/voters-receiving-misleading-robo-calls-in-ohio/.
[2] Kristen Gosling, "*Text Messages Spread False Information*," KSDK.com (NBC St. Louis), Nov. 4, 2008, http://www.ksdk.com/news/local/story.aspx?storyid=159310&catid=3#%23.

About S. 1994

Intentional dishonest efforts to undermine the integrity of voting should be against the law. S. 1994 is necessary to make clear that lies about our right to vote will not be tolerated.

To the extent that we can figure out who is behind a deceptive call or mailing, we ought to have a law on the books to hold them accountable. But even if prosecutions are rare, part of the value of the legislation is that it requires corrective action. If there's misinformation being spread to voters, we should have a process for corrective action mandated by law.

S. 1994 ('The Act') makes it unlawful for any person, within 90 days before any election, to knowingly mislead voters regarding 1) the time or place of any federal election, 2) the qualification for or restriction on voter eligibility for any such election, or 3) an endorsement. The Act will address a wide range of deceptive practices that intimidate the electorate and undermine the integrity of the electoral process. Because materially false information can spread virally online, it is commendable that the Act prohibits communicating false information regardless of whether the information is communicated in writing, over the telephone, or by electronic means. The Act also prohibits hindering, interfering with, or preventing another person from voting or registering to vote. Importantly, the Act provides a private right of action for any person aggrieved by a violation of the Act and strengthens criminal penalties for those found guilty of deceptive campaign practices. This underscores the gravity of the harm caused by deceptive practices. Furthermore, the Act authorizes any person to report to the Attorney General any violations of the Act and requires the Attorney General, if the report is credible, to communicate to the public accurate information designed to correct the materially false information when state and local election officials have not taken adequate steps to do so. This corrective action is critical to addressing the harms that deceptive practices cause, often in the immediate run-up to an election or on Election Day itself. Finally, the Act requires the Attorney General to submit to Congress, not later than 180 days after each general election for federal office, a report compiling all allegations of deceptive practices and detailing the status of any investigations, civil actions, or criminal prosecutions instituted pursuant to this Act. This data collection will be critical to understanding the gravity of the harm, promote accountability, and more accurately confront deceptive practices in subsequent elections.

State Law Does Not Uniformly Address Deceptive Practices

The right to vote is a fundamental right accorded to United States citizens and the protection of that right is essential to the functioning of our democracy. Many states do not currently have statutes that specifically address deceptive practices, do not require corrective action, do not provide a private right of action for aggrieved individuals, and where they do exist, vary greatly in scope and strength. The prevention of deceptive practices in voting should be addressed uniformly throughout the country; a state-by-state piecemeal approach does not adequately protect voters. The Supreme Court has stated that the government has a compelling interest in protecting voters from confusion and undue influence.[3] Persons who intentionally mislead or

[3] Burson v. Freeman, 504 U.S. 191, 199 (1992).

interfere with voters plainly suppress the vote. By providing civil and criminal penalties for violations of the Act, installing corrective action mechanisms, and requiring a compilation of reports of deceptive practices in the aftermath of an election, Congress will ensure that all Americans can enjoy the free exercise of the vote regardless of the state in which they live.

Examples in the States

Section 2 of the Deceptive Practices and Voter Intimidation Prevention Act of 2011 contains Congress's findings, which includes a large number of examples of deceptive practices in voting. While these findings illustrate the widespread nature of deceptive practices, many other examples of deceptive practices in voting have been reported. While not exhaustive, these examples show how deceptive practices are targeted toward communities of color, students, and other populations to suppress turnout; how deceptive practices are becoming more sophisticated through the use of hacking; and how they introduce confusion over the time, place or manner of voting.

- On Election Day in 2010, 112,000 Democratic households in Maryland received robocalls stating, "Hello. I'm calling to let everyone know that Governor O'Malley and President Obama have been successful. Our goals have been met. The polls were correct, and we took it back. We're okay. Relax. Everything's fine. The only thing left is to watch it on TV tonight. Congratulations, and thank you."[4] The robocalls were authorized by Paul E. Schurick, the campaign manager for former Governor Bob Ehrlich, and were made to voters in Baltimore and Prince George's County, the state's two largest African American-majority jurisdictions.[5] In one of the very few cases of a court trial for deceptive practices, Schurick was prosecuted under Maryland election law which prohibits a person from willfully and knowingly influencing or attempting to influence a voter's decisions whether to go to the polls to cast a vote through the use of fraud.[6] A jury found Shurick guilty for trying to influence votes through fraud, failing to identify the source of the call as required by law and two counts of conspiracy to commit those crimes.[7] One court document that was admitted into evidence suggests that the robocalls were specifically intended to "promote confusion, emotionalism, and frustration among African American democrats, focused in precincts where high concentrations of AA vote."[8]

[4] Peter Hermann, "*Schurick Will not Serve Jail Time in Robocalls Case*," The Baltimore Sun, Feb. 16, 2012, http://articles.baltimoresun.com/2012-02-16/news/bs-md-ci-schurick-sentenced-20120216_1_schurick-doctrine-judge-lawrence-p-fletcher-hill-robocalls.
[5] John Wagner, "*Ex-Ehrlich Campaign Manager Schurick Convicted in Robocall Case*," The Washington Post, Dec. 6, 2011, http://www.washingtonpost.com/local/dc-politics/ex-ehrlich-campaign-manager-schurick-convicted-in-robocall-case/2011/12/06/gIQA6rNsaO_story.html.
[6] Id.
[7] Id.
[8] Peter Hermann, "*Schurick Will not Serve Jail Time in Robocalls Case*," The Baltimore Sun, Feb. 16, 2012, http://articles.baltimoresun.com/2012-02-16/news/bs-md-ci-schurick-sentenced-20120216_1_schurick-doctrine-judge-lawrence-p-fletcher-hill-robocalls.

- On Election Day in 2008, 35,000 students and staff at George Mason University received an email at 1:16 am from the University Provost. The email falsely stated that the election had been postponed until Wednesday.[9] Later, the Provost sent another email stating that his email account had been hacked and that the election would take place that day as planned.[10]

- In 2008, flyers were distributed in the southern part of Virginia and on the campus of George Mason University claiming to be from the Virginia State Board of Elections. The flyers falsely stated that "[a]ll Republican party supporters and independent voters supporting Republican candidates shall vote on November 4th…All Democratic party supporters and independent voters supporting Democratic candidates shall vote on November 5th."[11]

- In Pueblo, Colorado, on Nov. 3, 2008, the eve of the presidential election, voters received robocalls telling them that their precinct had changed and gave them incorrect locations to go to instead. Pueblo County Clerk and Recorder Gilbert Ortiz testified that his office was "inundated" by calls from confused and angry voters who wondered how their precinct could suddenly change the night before an election.[12]

- During Wisconsin's gubernatorial recall election earlier this month (June 2012), Wisconsin voters received robocalls saying "If you signed the recall petition, your job is done and you don't need to vote on Tuesday."[13] A spokesperson for Governor Scott Walker denied any involvement with the calls and the source of the calls remains unknown.[14]

- In 2011, a church pastor in Walnut, Mississippi posted false information on his Facebook page that he "just heard a public service announcement" concerning a vote on a hotly-contested state constitutional amendment on personhood and conception. The Facebook message instructed those voting "YES" to vote on Tuesday (Election Day), and those voting "NO" to vote the following day.[15]

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[9] Brian Krebs, "*GMU E-Mail Hoax: Election Day Moved to Nov. 5*," The Washington Post, Nov. 4, 2008, http://voices.washingtonpost.com/securityfix/2008/11/gmu_e-mail_hoax_election_day_m.html.
[10] Id.
[11] *Lawyers' Committee Testifies Before Maryland Senate on Deceptive Practices*, Lawyers' Committee for Civil Rights Under Law, Feb. 16, 2012, http://www.lawyerscommittee.org/projects/voting_rights/clips?id=0445.
[12] Patrick Malone, "*Panel Approves Election Fraud Measure*," The Pueblo Chieftain, Feb. 16, 2012, http://www.chieftain.com/news/local/panel-approves-election-fraud-measure/article_2bbd3476-5863-11e1-a4ac-001871e3ce6c.html
[13] Josh Eidelson, "*Nasty Rob-calls in Wisconsin?*," Salon, June 5, 2012, http://www.salon.com/2012/06/05/nasty_robo_calls_in_wisconsin/.
[14] Id.
[15] *Lawyers' Committee Testifies Before Maryland Senate on Deceptive Practices*, Lawyers' Committee for Civil Rights Under Law, Feb. 16, 2012, http://www.lawyerscommittee.org/projects/voting_rights/clips?id=0445.

- In Ohio, voters reported being confronted "with a sea of election-related misinformation."[16] National media reported that some voters received calls stating that Republicans were to vote on Election Day, while Democrats were to vote the following day.[17] Further, an election official reported that she had received multiple reports concerning robocalls that provided incorrect information about polling places.[18]

- In 2003, 300 cars with decals resembling those of federal agencies and men with clipboards bearing official-looking insignias were seen travelling around black neighborhoods in Philadelphia asking voters for identification.[19]

State Law

In the absence of a comprehensive federal standard concerning deceptive practices, states have tried to grapple with the problem exhibited by the above examples. The result has been a patchwork of different state laws that differ in scope and strength. None offer the thorough approach of this federal bill.

Virginia and Missouri have strong deceptive practices laws on the books, however, unlike this proposed federal bill, neither state includes a private right of action or requires corrective action. Virginia passed legislation in 2007 to reduce deceptive election practices in voting by creating penalties for communicating false information to a registered voter about the date, time, and place of an election or about a voter's precinct, polling place, or voter registration status to a registered voter in order to impede the voter in the exercise of his or her right to vote.[20] Similarly, Missouri passed legislation in 2010 that prohibits "[k]nowingly providing false information about election procedures for the purpose of preventing any person from going to the polls."[21] Although these two laws represent the strongest state legislation regarding deceptive practices in voting, they remain merely punitive.

Recently, several other states have introduced legislation to address the problems of deceptive practices in voting.

In 2012, the Colorado State Senate passed S.B. 12-147 which prohibited "[i]ntentionally communicating information known to be false with the intention of preventing or inhibiting someone else's voting rights."[22] The State House of Representatives, however, failed to pass the legislation and postponed consideration of the bill indefinitely.[23]

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[16] Adam Levine, "*Voters Receiving Misleading Robocalls in Ohio*," CNN.com, Nov. 3, 2008, http://politicalticker.blogs.cnn.com/2008/11/03/voters-receiving-misleading-robo-calls-in-ohio/.
[17] Id.
[18] Id.
[19] Donna Britt, "*Ensuring that Voting's Sanctity Win Out*," The Washington Post, Oct. 1, 2004, http://www.washingtonpost.com/wp-dyn/articles/A63907-2004Sep30.html.
[20] Va. Code Ann. § 24.2-1005.1 (2007).
[21] (2010).
[22] S.B. 12-147, 68th Leg., 2d Sess. (Colo. 2012).
[23] Id.

In 2011, the New York State Senate had a bill pending in the Senate Elections Committee that would prohibit "knowingly communicat[ing] . . . deceptive information, knowing such information to be false and, in acting in the manner described, prevents or deters another person from exercising the right to vote in any election."[24]

In 2009, the Wisconsin State Senate considered a bill that prohibited any person from "intentionally induc[ing] another person to refrain from registering or voting at an election by knowingly providing that person with false election-related information."[25] The bill failed to pass.[26] Similarly, the Mississippi House of Representatives failed to pass H.B. 787 in 2007, which prohibited "knowingly deceiv[ing] any other person regarding the time, place, or manner of conducting any election or the qualifications for or restrictions on voter eligibility for any election."[27]

Texas has very few voter protection laws. Texas law does not explicitly prohibit making intentionally false statements concerning the time, place or manner of voting and does not have broader statutes that would cover deceptive practices in voting. In 2011, the Texas State Senate introduced S.B. 1283, which prohibited providing "false information to a voter about voting procedures, resulting in the voter refraining from voting . . . or . . . being prevented from casting a ballot that may legally be counted."[28] S.B. 1283 and an identical bill in the Texas State House of Representatives, H.B. 3103, both failed in committee.[29]

Because states have inadequately provided voters with protection from intimidation and other deceptive practices, Congress should pass legislation to address this nationwide problem. Critically, S. 1994 would provide a private right of action to anyone aggrieved by deceptive practices and would require the Attorney General to take action to correct false statements relating to voting. S. 1994 would not only be stronger than existing state laws, but would also provide needed uniformity among the states and lead to better defenses against deceptive practices.

Conclusion

Our democracy is at a crossroads. We are seeing a concerted effort to limit, rather than expand, voter participation. New restrictions have been put into place which could impact the participation of millions of voters – many of them elderly, low income, youth and minority voters. It's time to bring honor back to elections - let them be about the merits of the candidates and the ideas rather than lies and deceit.

[24] S.B. 1009, 2011-2012 Sess. (N.Y. 2011).
[25] S.B. 179, 2009-2011 Leg. (Wis. 2009).
[26] Id.
[27] H.B. 787, 2007 Reg. Sess. (Miss. 2007).
[28] S.B. 1283, 82d Leg., Reg. Sess. (Tex. 2011).
[29] Id.