

**PROHIBITING THE USE OF DECEPTIVE PRACTICES
AND VOTER INTIMIDATION TACTICS IN FED-
ERAL ELECTIONS: S. 1994**

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

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Deceptive Practices 2.0: Legal and Policy Responses—issued by Common Cause, The Lawyers’ Committee for Civil Rights Under Law, and The Century Foundation:

[http://www.commoncause.org/research-reports/
National_102008_Report_Deceptive_Practices_2-0.pdf](http://www.commoncause.org/research-reports/National_102008_Report_Deceptive_Practices_2-0.pdf)

Deceptive Election Practices and Voter Intimidation—The Need for Voter Protection—issued by Common Cause and The Lawyers’ Committee for Civil Rights Under Law, July 2012:

[http://www.commoncause.org/research-reports/
National_070612_Deceptive_Practices_and_Voter_Intimidation.pdf](http://www.commoncause.org/research-reports/National_070612_Deceptive_Practices_and_Voter_Intimidation.pdf)

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

TUESDAY, JUNE 26, 2012

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Schumer, Whitehouse, Coons, Grassley, and Lee.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Thank you all for being here. We are holding a hearing to consider the Deceptive Practices and Voter Intimidation Prevention Act of 2011. It 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 the bill. Actually, in 2007, I joined on similar legislation by then-Senator Barack Obama.

The legislation has the support of the Justice Department. The Attorney General has identified it as one of three areas “crucial in driving progress” to protect all Americans and their right to vote. I think we have to be doing all we can to protect people’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. Also, you have to be assured that everybody has the right to vote to give legitimacy of our Government. Attempts to deny Americans access to voting undermine our democracy.

I am fortunate to be from a State like Vermont where most places you vote are very small areas, and everybody knows everybody. We never had any indication of a suppression of voters. But that does not happen everywhere.

Protecting access for people is ever more important in the aftermath of the *Citizens United* decision by the Supreme Court, but we now know that as a result of the fact that corporations rather than individuals are wielding more and more influence over our electoral processes. In fact, just yesterday, without even a hearing, the Supreme Court doubled down on *Citizens United* by summarily strik-

ing down a 100-year-old Montana State law barring corporate contributions to political campaigns, even though the record was very complete that the reason the law had been passed was because of the corrupting influence and the—actually, the corruption that occurred in Montana because of those same corporate contributions.

I think that those on the Court 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 hard-working Americans. I am not one who thinks of corporations as being persons in that regard. If they were, we could say just because we elected General Eisenhower as President, why can't we elect General Electric as President? Unfortunately, the way this is going, that may not be too far-fetched.

Like Montana, Vermont is a small State, and we take our civic duties seriously and cherish our vital role in the democratic process. And I think the wave of corporate money we are seeing being spent around the country is a matter of concern, certainly in my State, and I think the Court dealt 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, and I worry that we forget our history when we never should. We should never forget the significant areas 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 even have a Member of the House of Representatives who nearly died when he tried to vote during that time. He was saved at the last minute by having his skull crushed by the clubs of the police officers.

We remember a time when discriminatory practices such as poll taxes, literacy tests, and grandfather clauses were commonplace. But brave Americans struggled long and hard to get rid of that, and some did pay with their lives for their right to vote. I do not want to see this country backtrack on hard-won progress.

Recently, rather than increasing access, we have seen restrictive voting laws. 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 do not have a voter ID law and did not consider voter ID legislation last year. One of those States is my own State of Vermont. But we are seeing laws that make it significantly harder for millions of eligible voters to cast ballots. I am not talking about people who would have been ineligible otherwise, but eligible voters, millions of them, are finding it harder to cast ballots. These include young voters, African Americans, those earning \$35,000 per year or less, and the elderly.

I will put all my statement in the record, but I remember the recall election in Wisconsin when voters got a robocall telling them, "If you signed the recall petition, your job is done and you do not need to vote on Tuesday." In the 2010 midterm elections, a robocall went out to over 110,000 Democratic voters in Maryland before the polls had closed stating that Democratic Governor Martin O'Malley

and President Obama had been successful and that there was no need to vote. No need to vote. It said, "Our goals have been met. The polls were correct. . . . We are okay. Relax. Everything is fine. The only thing left is to watch on TV tonight." I mean, this is Orwellian in the evilness, and it is evil as well as illegal.

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. 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 whole ticket.

So I think the need for the Deceptive Practices and Voter Intimidation Prevention Act is documented, it is real. The bill would prohibit any person from purposely misleading voters regardless of qualifications or restrictions.

The bill offers new ways to enforce these prohibitions, and it 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.

And I might note that the first witness will be Senator Benjamin Cardin. Senator Cardin, we found gripping the stories you told of what happened in Maryland. These are the things we read about in our history books, but to see it in a recent time, it is evil and wrong.

I yield to Senator Grassley and then to Senator Cardin, and I will put my full statement in the record.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

**STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA**

Senator GRASSLEY. Mr. Chairman, to paraphrase Justice Scalia, frequently a bill raises a First Amendment issue "clad, so to speak, in sheep's clothing." The potential harm is understood only after careful study, and then to quote again, "But this wolf comes as a wolf."

This bill represents a frontal attack on First Amendment freedom of speech. The bill before us today was originally proposed by then-Senator Obama. At the 2007 hearing on this bill, a Maryland county executive complained about campaign literature and statements that were made supposedly by his opponent. In supporting this bill, he testified that he was "offended and outraged" that his opponent had displayed signs with what he terms the false statement, "We are not slaves to Democrats." That statement is core political speech, fully protected by the First Amendment, no matter how much it might offend and outrage politicians.

Unfortunately, that witness is unable to appear before us today as he is now serving a lengthy sentence in federal prison for engaging in extortion and conspiracy.

President Obama has inaccurately attacked the Supreme Court rulings that protect core political speech, and now we hear that the same majority that claims to reverse the Constitution plans a hearing this summer on a constitutional amendment that would repeal

part of the First Amendment protection of political speech, and this should deeply trouble all Americans.

The bill's unconstitutionality goes beyond this criminalizing of what one of today's witnesses refers to as "arguably fraudulent information." Its structural unsoundness would create not a chilling effect but a freezing effect. How can anyone know in advance what is "arguably fraudulent"? That effect is there even if the Public Integrity Section of the Justice Department cannot obtain any convictions.

Proponents of this bill seem not to understand the dangers of having the Justice Department inject itself at the behest of politicians into prosecuting other politicians. Again quoting Justice Scalia from his same opinion, "Nothing is so politically effective as the ability to charge that one's opponent and his associates are in all probability crooks, and nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution."

Even worse are the bill's provisions for private right of action. The bill's proponent erroneously believe that private suits can only be shields and never swords. No intermediary is necessary to file a civil suit against a political opponent on the eve of an election. Those claims will force your opponent to spend money on lawyers rather than against you. The press will report the claim of dirty tricks on the eve of an election. The victim will be unable to respond effectively to refute claims. Once again, the forces pushing for self-censorship would be enormous.

No one condones the violation of criminal law, and although one would not know it from the bill's supporters, the kinds of activities that occurred in Maryland and elsewhere that are on the bill's findings are already prohibited by federal law. That is the conclusion of the Justice Department manual for criminal election prosecutions. Those who set up robocalls that jam phone banks were prosecuted. Maryland successfully prosecuted the makers of the "Relax, the election is won" calls.

Existing federal law is violated by prohibiting false information on dates of election or polling place locations or false claims of eligibility to vote among other practices that witnesses rightfully decry. The constitutionality of prohibiting various claims of endorsement will have to wait until the Supreme Court's decision in *Alvarez* is handed down, hopefully Thursday.

This bill is also notable for what it omits. Voter dilution through allowing ineligible voters to vote is a serious constitutional violation. None of the proponents of this bill want to do anything about that. The Obama administration first denied Florida access to its database of illegal aliens for 9 months and then sued the State for trying to remove ineligible voters supposedly too close to the election. Florida and other States should be able to use the database to remove ineligible voters after the election and to prosecute those who voted illegally.

If we want to go after deceptive statements in federal elections and existing law is insufficient, why doesn't this bill criminalize voting by people here illegally or use the voter database to make sure that voter registration rolls do not contain such people who are here illegally? And why doesn't this bill criminalize inten-

tionally deceptive statements made by candidates themselves, such as whether or not they are Native Americans or whether they served in the military when they did not? This bill is a potential Pandora's box that threatens First Amendment rights.

Thank you.

Chairman LEAHY. Well, Senator Cardin, you have seen firsthand what happens when we do not have the ability to stop these things, and I would note that you have had a great deal of experience both in the Maryland Legislature but also in the U.S. Senate and as a former member and valued member of this Committee. We are delighted to have you here. Please go ahead.

Senator GRASSLEY. Before he speaks, can I have a statement by Senator Sessions included in the record?

Chairman LEAHY. We will keep the record open until the end of the day for any statements by any Senators.

[The prepared statement of Senator Sessions appears as a submission for the record.]

**STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR
FROM THE STATE OF MARYLAND**

Senator CARDIN. Chairman Leahy, thank you very much, Senator Grassley, Senator Klobuchar. It is a pleasure to return to the Judiciary Committee.

Senator Leahy, I want to thank you and your Committee for its leadership on these issues, Senator Durbin and the Constitution Subcommittee holding hearings on what is happening in our States that are disenfranchising voters, and your continued leadership. Senator Grassley, I look forward to working with you. It looks like I have a little bit more work to do, but we are going to continue to try to find ways that we can advance the ability of all Americans to be able to cast their votes who are eligible to vote.

As the Chairman pointed out, this legislation has been previously heard by the Judiciary Committee in 2007, and I was proud to be a cosponsor with Senator Obama at that time and Senator Schumer. The bill was reported out of the Judiciary Committee, and a similar bill was passed in the U.S. House of Representatives by a voice vote.

Let me just give a little bit of the history here. It has been nearly a century and a half since Congress and the States ratified the 15th Amendment to the Constitution in 1870, which states that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race or color." The amendment also gives Congress the power to enforce the Article by appropriate legislation.

African Americans suffered through nearly another 100 years of discrimination at the hands of Jim Crow laws and regulations designed to make it difficult, if not impossible, for African Americans to register to vote due to literacy tests, poll taxes, and outright harassment and violence.

It took Congress and the States nearly another century until we adopted the 24th Amendment to the Constitution in 1964, which prohibited poll taxes or any tax on the right to vote. And in 1965, Congress finally enacted the Voting Rights Act, which once and for

all was supposed to prohibit discrimination against voters on the basis of race or color.

It is time for Congress to once again take action to stop the latest reprehensible tactics that are being used against African Americans, Latinos, and other minorities to interfere with their right to vote or their right to vote for the candidate of their choice as protected by the Constitution and in the civil rights statutes. These tactics undermine and erode our very democracy and threaten the very integrity of our electoral system.

Mr. Chairman, our 2007 hearing record contains numerous examples of deceptive practices, so I will not repeat them in detail today. Suffice it to say the hearing record contained numerous examples, including listing the wrong day for the election, intentionally aimed at minority communities so that they would not show up to vote; telling Republicans to vote on Tuesday and Democrats to vote on Wednesday; warning recent immigrants not to vote due to the possibility of deportation; warning voters with unpaid parking tickets not to vote or face prison terms or loss of custody of their children. And as the Chairman pointed out, in my own election in 2006, I woke up on the morning of the election to see a piece of literature put out by my opponent who claimed to be the Democrat and endorsed by prominent African Americans who had endorsed me in an effort to confuse the African American vote.

Mr. Chairman, this is not freedom of speech. These are deceptive practices that have no place in our election system. We know elections are rough businesses, but there need to be limits, and it is important for Congress to point it out.

I want to bring to your attention deceptive practices that have happened since the last hearing. In 2008, Ohio residents reported receiving misleading automated calls giving voters incorrect information about the location of their polling place. In the same year, flyers were distributed, predominantly in African American neighborhoods in Philadelphia, falsely warning that people with outstanding warrants or unpaid parking tickets could be arrested if they showed up at polls on election day. In the same year, messages were sent to users of the social media website, Facebook, falsely stating that the election had been postponed a day.

Students at some universities, including Florida State University, received a text message also saying the election had been postponed for the day. In the same year, a local registrar of elections in Montgomery County, Virginia, issued two releases incorrectly warning that students at Virginia Tech who registered to vote at their college could no longer be claimed as dependents on their parents' tax returns or could lose scholarships or coverage under their parents' car or health insurance.

In the 2010 elections, in African American neighborhoods in Houston, Texas, a group called Black Democratic Trust of Texas distributed flyers falsely warning that a straight ticket vote for the Democratic Party would not count and that a vote just for a single Democratic candidate would count for the entire Democratic ticket. And as you pointed out, the 2010 elections in Maryland where the robocalls were made by the Republican candidate, but not identified that way, saying this was a call from the Democratic candidate

for Governor and from Barack Obama, there was no need to vote because the election already had been won.

Senator Grassley, you are correct, that person was prosecuted under State law, not under federal law, prosecuted and a conviction was had. We want to make sure that in federal elections we have the protection that these types of fraudulent, deceptive communications will not be tolerated. This legislation is carefully drafted to comply with the First Amendment of the Constitution. It is carefully timed as to when the communications occur and the types of communications, and it gives the Department of Justice the tools they need to ensure the integrity of our election process and to make it clear that we will not tolerate that type of communication in a federal election which is aimed at disenfranchising minority voters.

We thought those days were over, but they are not, and it is important for Congress to act to give the tools the Department of Justice they need.

I am proud that Attorney General Holder supports this legislation. He believes it is needed as a tool so that they can do their jobs on behalf of the American people, and I would urge the Committee to favorably consider this legislation once again.

Chairman LEAHY. Would you agree with me that simply putting up a First Amendment argument is not enough? If you could have deceptive—if deceptive statements were protected by the First Amendment, then somebody selling, for example, prescription drugs that had been proven to be totally unsafe could say, well, this has been certified as being very safe for your heart condition, for example, and if somebody then dies from it, they would say, well, we have a First Amendment right to say that. Is that too absurd an example?

Senator CARDIN. The Chairman is absolutely right. The Supreme Court has said on numerous occasions that none of the rights in the Bill of Rights are absolute, that they are all subject to reasonable interpretation since we know that there is speech that is not protected under the First Amendment.

Chairman LEAHY. Thank you. Thank you very much, Senator Cardin. I appreciate your being here. We still miss you on this Committee, but I am proud of your work on the other committees you are on.

Senator CARDIN. I would ask that my entire statement be made part of the record.

Chairman LEAHY. Of course, it will be made part of the record.

Senator CARDIN. Thank you.

[The prepared statement of Senator Cardin appears as a submission for the record.]

Chairman LEAHY. As I have noted, statements by any Senators who wish to be added will be made part of the record. Thank you.

Senator GRASSLEY. Thank you, Senator Cardin.

Chairman LEAHY. I would like to ask Tanya House, John Park, and Jenny Flanagan to please come forward and take their seats. I do not know if those name plates have the same name on the back, but I think you are all in the right place.

I am going to ask each of you to give your statements. Your full statements will be made part of the record. I apologize for the

voice. The allergies or whatever is in the air in Washington do not agree with me quite as much as in Vermont, and I seem to be reactive to the pollens. But nobody could complain about what a beautiful day it is.

Ms. House is the director of the Public Policy Department at the Lawyers' Committee for Civil Rights Under Law, where she focuses on a variety of voting rights and social justice issues. She received her law degree from the University of Texas Law School.

Ms. House, it is good to have you here. Please go ahead.

STATEMENT OF TANYA CLAY HOUSE, DIRECTOR OF PUBLIC POLICY, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, DC

Ms. HOUSE. Thank you. Mr. Chairman, Ranking Member Grassley, and everyone here today, thank you so much for allowing us to be here to talk about protecting the voting rights of all Americans. My name is Tanya Clay House. I am the director of public policy at 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, and we strongly support the Deceptive Practices and Voter Intimidation Prevention Act of 2011, and we want to thank particularly Senator Leahy as well as Senators Schumer and Cardin for reintroducing this bill that we have consistently supported since its inception in 2005.

In the limited time I have, I want to focus primarily on why current federal and State laws are insufficient, also the particular importance of the corrective action provisions in Senate Bill 1994, as well as how this bill addresses actual and documented fraud against voters. During the questions and answers, I am happy to respond to any questions regarding the First Amendment protections.

As previously stated by Senator Cardin, deceptive practices intentionally disseminate false and misleading information with the express purpose of influencing the outcome of elections. As technology becomes increasingly sophisticated, deceptive practices reach wider audiences, including taking the form of such things as flyers, robocalls, as well as text messages and even through the Internet.

I want to showcase here—examples of a couple of flyers—some of which have already been mentioned by Senator Cardin, one in particular here in Texas. This does speak to the challenges that are faced particularly in certain communities, telling people when to vote, telling them the wrong information about voting on a Republican ticket versus a Democratic ticket.

Additionally, we have another flyer here claiming to be from the Virginia State Board of Elections, stating that due to a larger expected voter turnout, the Democrats must vote on November 5th and that Republicans and their supporters may vote on November 4th.

Once again, this is a deceptive practice. This is false and misleading information. This is not protected speech.

For years, the Lawyers' Committee has documented this type of rise in deceptive tactics throughout our leadership of the Election

Protection non-partisan coalition, which is the largest type of protection and voter education effort. In fact, it was out of these efforts that we realized that there was a need for legislation such as the deceptive practices bill.

Through our 866-OUR-VOTE hotline, which is also a way in which we receive calls and information about reports throughout this country, we have already received calls from over half a million people complaining about problems in their elections. This includes deceptive tactics like we have mentioned here today.

My colleague, Jenny Flanagan, will speak further to the instances that we encountered in the Wisconsin recall election.

Recently, we have also released a report, a 2012 report, on deceptive practices, again, with Common Cause. In this report, we do provide recommendations on how to move forward, and in this particular report, we discuss the insufficiencies of federal and State law.

Now, while we agree that there must be proper enforcement of current voting rights statutes—and that proper enforcement can provide 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 as an adequate measure in preventing deceptive tactics. However, this section, commonly known as the “anti-intimidation provision,” does not contain the necessary criminal penalties to punish deceptive practices.

Moreover, only a few States actually have laws protecting voters from these types of practices, and those that have done so, it is not completely clear exactly what type of deceptive practices would be criminalized.

In sum, because these current laws do not uniformly address variations of these types of deceptive tactics, prosecutions are, therefore, rare. Ensuring that misinformation is immediately corrected and disseminated in a timely manner may often actually be the best remedy, especially when Election Day is near, and this is why not only the private right of action but also the corrective action component of this bill is particularly important.

This immediate dissemination of information, of corrective information, will mitigate the confusion experienced by voters, particularly as expressed by Senator Cardin earlier, as encountered in Maryland.

I would like to briefly address the claims of massive voter fraud, including false and multiple registrations. In short, the evidence does not substantiate this to be a true claim. Actual voter fraud is extremely rare, and often it is not intentional. On the other hand, deceptive practices indeed are intentional efforts to disenfranchise entire communities.

The Lawyers’ Committee strongly supports the deceptive practices bill, and we urge this Committee to move forward with all deliberate speed in order to pass this law. As we come upon our 50th anniversary in 2013, we hope that we will also be celebrating the progress that this Nation has taken to protect the voting rights of all. As our Grand Marshal John Lewis often says, “The time to act is now.” We urge this Committee to fulfill our country’s democratic promise of fair and equal elections and pass the Deceptive Practices and Voter Intimidation Prevention Act of 2011.

Thank you.

[The prepared statement of Ms. House appears as a submission for the record.]

Chairman LEAHY. Thank you. Every time I see my friend John Lewis, I cannot help but think it was not that long ago when Congressman Lewis was a young man marching for the right to vote and nearly died because he wanted to exercise his right to vote.

Ms. HOUSE. Exactly.

Chairman LEAHY. Our next witness is John Park, Jr. He is of Counsel with Strickland Brockington Lewis in Atlanta. He specialized in election, redistricting, and legislative government affairs. He received his law degree from Yale University.

Mr. Park, delighted to have you here. Please go ahead, sir. And your whole statement will be made part of the record.

STATEMENT OF JOHN J. PARK, JR., OF COUNSEL, STRICKLAND BROCKINGTON LEWIS LLP, ATLANTA, GEORGIA

Mr. PARK. Mr. Chairman, Senator Grassley, thank you for the opportunity to speak this morning on Senate Bill 1994. As I indicated, I have concerns about this bill because it raises serious constitutional questions and because it is underinclusive, not because I approve of or condone the use of deceptive practices, voter intimidation, or both.

The first point I would like to make is that before Congress creates new tools for the Department of Justice and private individuals to use, it should encourage the use of the ones that are presently existing. Those tools, including Section 11(b) of the Voting Rights Act, are generally underutilized and should be put to use before new criminal penalties are created.

We are talking about regulating political speech which we know to be at the core of the First Amendment's protection, and we know that regulation chills speech. The bill under consideration may chill legitimate expressions of opinion. It may chill statements on unsettled grounds of fact or law. It may chill the making of even truthful statements, and it will do so within 90 days of an election, and that is both federal and State elections because they frequently coincide.

During that time, anyone who wishes to speak will have to think about not simply whether what they are saying is truthful but, rather, whether that statement could expose them to an action from the opposing party. And what we know is coming on probably Thursday, we are talking about false statements, and the Court in *Alvarez* will address the power of Congress to impose criminal penalties for statements that are untruthful. And we know we cannot read anything into an oral argument, but it is going to be an interesting decision one way or the other.

What you propose to do is give the Department of Justice and lawyers new tools, and when lawyers get tools, they put them to use, and frequently they put them to use trying to pound round pegs into square holes and square pegs into round holes.

When you talk about knowing, what do we understand knowing to be? Do we know knew, somebody knew it? But we also think about whether they should have known it. So we are going to back up to should have known. We are going to back up to reckless. Somebody makes a statement that may be—that someone will

deem reckless. Is that knowing? Is a statement that is made negligently a knowing statement?

We are also likely to see, if a private right is created, a movement from effect to impute intent and from intent to impute knowledge. And all of this has an obvious effect on the opposing campaign and the opposing parties.

In my experience in Alabama, as I talk about in my statement, with the Judicial Inquiry Commission, the canons that govern the conduct of judicial candidates regulated their ability to make statements that were neither known 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.

While there was no private right of action and only the Judicial Inquiry Commission could initiate charges, individuals would flyspeck the ads of their opposing candidates and make complaints to the Judicial Inquiry Commission in the hope that it would have an effect on the candidate. It would knot them up, require them to come in and explain the basis for their statement, and that had a pernicious effect in at least one campaign.

I would note that you are talking about 90 days before an election. That is a sensitive time, and that should be read to heighten constitutional concerns.

With respect to underinclusion, I have noted that Senate 1994 does not address fraudulent registration, multiple registrations, or compromised absentee ballots, and I encourage the Committee to address those.

Thank you for this opportunity, and I will be happy to answer any questions you may have.

[The prepared statement of Mr. Park appears as a submission for the record.]

Chairman LEAHY. Well, thank you. As I said your statement will be made part of the record.

I notice that in that you—I want to put something else in the record. You said that the part of your opposition is based on that the bill is underinclusive because it does not address fraud, and you identified testimony which raised some of the same concerns raised in this Committee in 2007. But I would also note that in 2007 the *New York Times* article reported that at that point 5 years into the Bush administration's crackdown on voter fraud, they turned up virtually no evidence of any organized effort at voter fraud, and so I will put that article also in the record.

[The article appears as a submission for the record.]

Chairman LEAHY. Our next witness will be Ms. Jenny Flanagan. Ms. Flanagan is the director of voting and elections at Common Cause. Prior to that time, she worked with the New York State Legislature to implement the Help America Vote Act. She received her law degree and her master's in social work from the University of Denver.

As with all witnesses, Ms. Flanagan, your full statement will be made part of the record. Please go ahead.

**STATEMENT OF JENNY FLANAGAN, DIRECTOR OF VOTING
AND ELECTIONS, COMMON CAUSE, WASHINGTON, DC**

Ms. FLANAGAN. Thank you, Mr. Chairman, Senator Grassley, for the opportunity to testify here today about the Deceptive Practices and Voter Intimidation Prevention Act and how this bill provides proactive means to guard against this most heinous form of voter suppression we are talking about today.

Common Cause is a nonpartisan, nonprofit organization dedicated to empowering citizens, ordinary people, to make their voices heard in our political process. Common Cause, along with its coalition partners, including the Election Protection Coalition, have received numerous complaints over the years at our State offices around the country, from Colorado to Wisconsin, from Ohio to Pennsylvania. We have been responding to the kinds of intimidation and misleading acts that are being discussed here this morning.

“Voter suppression” has become a household phrase in recent months, and this is nothing to be proud of. There is a gap between the rhetoric and the reality of voter fraud, and that cannot go unnoticed. What we are focused on today is a real threat to our elections—coordinated, intentional efforts to intimidate and deceive voters to suppress turnout in our elections.

The single most fundamental right of all Americans is to cast a ballot in an election and be counted in our democratic process, so it is disheartening that today we are here to address a crisis in our elections where partisan operatives utilize trickery, lies, and deceit to change election outcomes.

Most Americans are shocked and appalled when they hear that these campaigns exist, but we know that they do, and we cannot stand by and wait for it to get worse.

I want to focus my few minutes here to talk about some recent examples of deceptive practices that have affected voters and how this bill will address those problems, because the impact of spreading false information is very real. When we receive a call from a voter who has been misled or is confused because of a deceptive flyer or robocall, we do everything in our power to help them access the correct information so that they can vote. But we do not hear from every affected voter.

In Pueblo, Colorado, on November 3, 2008, on the eve of the Presidential election, voters in a heavily Latino Community received robocalls telling them that their precinct had changed and gave them incorrect precinct locations to go to instead. The clerk and recorder found out about this call from a family member and immediately called the local media and held an impromptu press conference on his front lawn.

On election day, his office was still inundated by calls from confused and angry voters who wondered how their precinct could have changed so suddenly the night before an election. Without other tools for corrective action, Clerk Ortiz in Pueblo took the necessary steps to make sure that his voters were able to vote on election day. That is not the case around the country.

Earlier this month, voters in Wisconsin, as has been discussed already, reported receiving robocalls on election day giving them false information. Specifically, voters stated that the calls said, “If

you signed the recall petition, your job is done and you do not need to vote on Tuesday.”

Well, to counter these calls, elected officials, civic engagement groups locally and nationally, including Common Cause and the Lawyers’ Committee through our Election Protection Coalition, we issued statements, we reached out to the media, calls for immediate corrective action, and let voters know what their rights were, and responsibilities, in order to participate in the election.

The time for federal reform is now. Many States do not have statutes that adequately address deceptive practices, and where they do exist, they vary greatly in scope and strength. The prevention and redress of deceptive practices should be addressed uniformly.

As I just told you about the Colorado clerk, immediate corrective action in the wake of deceptive practices must take place as soon as reports come in. This legislation establishes the framework to do just that on or prior to election day because after the election it is simply too late.

Once enacted, this bill will be stronger and more comprehensive than existing State laws, and the critical components to combating deceptive practices requires the strong penalties, the immediate corrective action, and a true assessment of the problems that voters face each and every election. With these actions, we can assure that Americans can enjoy the free exercise of elections.

Deceptive practices are among the worst forms of voter suppression where we intentionally mislead voters about the process and prevent them potentially from voting. It often goes unaddressed, and perpetrators are virtually never caught. Therefore, it is time to do something about it here and now so that our elections really can be of, by, and for the people.

I appreciate the opportunity to testify today, and I look forward to the questions you may have.

[The prepared statement of Ms. Flanagan appears as a submission for the record.]

Chairman LEAHY. I appreciate you being here. I appreciate all three of you being here.

I am going to direct this to Ms. House. As I read the legislation, I see a very narrow carveout to avoid infringing on constitutionally protected speech. I am the son of a printer from Vermont, and I remember my parents one time as a child telling me to protect and revere the First Amendment, the right of free speech, the right to practice any religion you want, or none if you want, guaranteeing diversity of thought and views in America and guaranteeing our democracy. So I watch that very carefully.

But let me ask you, you are a civil rights lawyer. You have had a lot of experience in this field. Do you have any concerns this legislation might have a chilling effect on speech?

Ms. HOUSE. Thank you for that question, and the answer to your question is no. We have specifically put in place, working with your office and with Senator Schumer and Senator Cardin, language that would ensure that this is not indeed chilling political speech. It is narrowly tailored, and it serves a compelling interest of the State in order to protect this fundamental right to vote. And, by specifically putting an intent standard in there—we have to show

that there is an intent to provide misleading and false information and that they knowingly did so, additionally providing that there is a timeline limiting this speech, so that this type of speech is only limited within that 90-day period before the election, and also ensuring that there is a limitation on the type of speech that we are actually regulating, which is time, place, manner. That is the type of tailoring that is necessary to conform to the standards which the Supreme Court has set forth in order to ensure that the First Amendment protections are provided.

Chairman LEAHY. Well, you know, one of the things we always look at in any legislation that comes up is: Is this necessary? And one of the arguments we are hearing against this legislation is there are plenty of remedies currently available to protect voters from intimidation and deception. I take it you do not agree with that.

Ms. HOUSE. You are right. I do not agree with that, and the evidence does not bear that. We have documented this and have put together this report with Common Cause looking at the State laws that are currently in effect, and I believe only about 10 of the States currently, I think upwards of 10 or so, that actually have some form of deceptive practices laws on the books. And, in fact, they are not very vigorous and not everyone is actually enforcing those laws in a way that is going to ensure that we are protecting people's rights when they do have these types of deceptive tactics and flyers that are occurring within their State.

Maryland is an anomaly, and we are very encouraged and happy that there was proper enforcement that took place after what happened, particularly during Senator Cardin's race. However, that is not the case across the board. And as Jenny indicated earlier, we need a uniform law, particularly on the federal level, to ensure that we do have this type of enforcement by the Federal Government and that we are able to provide corrective action.

Chairman LEAHY. I looked at some of the material getting ready for this, the letters in Spanish targeting California Latino voters stating that it was a crime for immigrants to vote. I think of my grandparents who were immigrants from Italy and very, very proud American citizens, and I remember as a little boy going with them into the small town hall in Vermont where they lived to watch them vote.

This letter did not point out that naturalized citizens like my parents and my grandparents or my wife's parents can vote just as any of the rest of us.

Is this just one very rare example of intimidation, or do you have others?

Ms. HOUSE. Unfortunately, that is not a rare example of intimidation. We have experienced that in other States as well. We have experienced those types of flyers, also other things in Arizona. We have also experienced types of flyers telling people that they will be criminalized or sent to jail, if they have a traffic ticket, therefore they cannot vote, they are ineligible, things like that in Wisconsin.

It is particularly discouraging to have these types of flyers that are occurring across the country, and particularly when we know that they are being targeted to a certain demographic of voters. As you mentioned, the flyer that you spoke about was targeted to im-

migrants. Well, unless I know my history lessons wrong, I believe everyone is an immigrant except the Native American population here. I may not be an immigrant because my family was brought here as slaves, but, anyway, the point is that it is not something that we need to allow to continue in this country because this, in fact, is an attempt to undermine a very core value that we have in the democratic process, which is the right to vote.

Chairman LEAHY. My time has expired, and I have other questions and, Ms. Flanagan, I have a couple questions for you for the record, which I would like answered.

Chairman LEAHY. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman. Thanks to all the witnesses.

Mr. Park, you have experience in private right of action litigation involving political candidates. Most of the witnesses today see only very positive results that could come from private right of action suits under the bill. Could you describe some of the negative effects of private right of action in practice and under the Constitution against deceptive statements in the context of a political campaign?

Mr. PARK. Going back to my experience with the Alabama Judicial Inquiry Commission, one of the effects of bringing charges against a candidate who was then a judge was to disqualify that judge from further service, and the Judicial Inquiry Commission brought charges against one of the candidates for chief justice in a campaign with respect to certain statements made in advertisements. That affected the court's business and affected his ability to do his job, and as it turned out, the canons were substantially unconstitutional, the regulated speech that was within the scope of the First Amendment.

Moving to this bill, you are empowering people to file lawsuits to seek to stop speech with which they disagree, and that speech may or may not be knowingly false, but the lawsuit is available for them to do that, and that will have a chilling effect on them. It will give them a tool that they can use to knot up opposing campaigns, and for those reasons I think Congress should hesitate before it creates this private right of action.

Senator GRASSLEY. Your prepared testimony mentions that many of the practices in the bill seek to prohibit what are already violations of federal criminal law. One of the few that is not is endorsement provisions. Could you outline how federal law already criminalizes many of the deceptive and intimidating practices that have been offered to supposedly justify the law?

Mr. PARK. There are several federal statutes, including one criminal statute, 18 U.S. Code 241. There is Section 11(b) of the Voting Rights Act, which is civil. And there is 42 U.S. Code 1971(b).

In New Hampshire, the successful prosecution was brought under 18 U.S. Code 241, is my understanding. In Maryland, I believe it was under State law.

If the Department of Justice does not want to use the existing remedies, it should explain why it has not used them to date.

Senator GRASSLEY. The bill would prohibit claims that a candidate or party has endorsed a candidate that it has not. Could you explain First Amendment problems with that prohibition?

Mr. PARK. A claim that someone has endorsed a candidate is not always easy to determine whether that is, in fact, true. Endorsements are sometimes subtle. Can you endorse by presence at a campaign event? And can you claim the support of someone with whom you have spoken privately? And the bill would give somebody a tool to file suit and say you were not, in fact, endorsed by that other person whose support you claim. And you are entitled to make truthful statements, and you would have to defend the truthfulness of the statement that you made.

Senator GRASSLEY. One of the witnesses today favors this bill because it affects only “unprotected speech” and would prohibit “the dispersal of arguably fraudulent speech.” Is arguably fraudulent speech unprotected speech under the First Amendment?

Mr. PARK. I do not think so. One of the points you can draw from the oral argument transcript in *Alvarez* is the Court seems to disagree with the notion that there is no—that the First Amendment does not prohibit all statements that are false, much less statements that are arguably false.

Senator GRASSLEY. Could you describe the unconstitutional chilling effect the enactment of this bill would create?

Mr. PARK. In the 90-day period before an election, someone who wishes to speak about any of the subjects that are in the bill, and in that regard there are things you can say that are truthful. Some people cannot vote. Some non-citizens in particular are not entitled to vote.

You have to consider whether your expression of opinion, your expression with respect to an unsettled question, or simple truthful speech with which an opponent may disagree could bring you a lawsuit, and you have to weigh the value of that speech and your making that speech against the possibility that you will be sued, and the chilling effect is one to which the Supreme Court has repeatedly pointed to in First Amendment cases.

Senator GRASSLEY. Thank you.

Chairman LEAHY. Well, thank you. I am going to submit for the record statements in support for the bill from the NAACP, the National Urban League, the National Bar Association, the Leadership Conference, Brennan Center, Project Vote.

[The statements appear as a submission for the record.]

Chairman LEAHY. I have to go to the floor. I am going to yield to Senator Whitehouse and then Senator Lee, and Senator Schumer is coming to take over the gavel. Thank you all for being here. We will chat more.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

I wonder if I could ask any of the witnesses to speak for a mom about the procedure known as “voter caging” and the history of that kind of activity and the extent to which this would be addressed by the measure you are describing. Ms. House.

Ms. HOUSE. Voter caging is another type of deceptive and intimidation tactic that has also been occurring and—

Senator WHITEHOUSE. Could you describe it for the record of this hearing?

Ms. HOUSE. Sure, absolutely. It is essentially kind of a term of art that is usually used in marketing, but now it is essentially

when people—when organizations attempt to send materials or documentation to verify people’s residency, and if that information is sent back and is not verified by no fault of their own, then they are challenged at the voting booth as not being a resident or eligible to vote. And this is something that we have been seeing that also has been on the rise, that we have encountered through Election Protection, particularly even in the last federal elections. Especially in 2008, we encountered a lot of voter caging that was occurring in Michigan, in Ohio, challenges that were happening particularly because of the foreclosure crisis. That is ongoing, and this is particularly sad because we know that we are in such a stark economic situation, even as we are getting better. However, people are still having challenges in the housing arena. Therefore, people are taking advantage of that situation and claiming that simply because a person or a family may be in the process of foreclosure proceedings, that therefore they are not eligible to vote. And that could not be further from the truth. They are——

Senator WHITEHOUSE. On the evidence of the mail having been returned.

Ms. HOUSE. Exactly.

Senator WHITEHOUSE. It could also signify that they are a student away at school, a soldier, away on assignment.

Ms. HOUSE. It could signify numerous things.

Senator WHITEHOUSE. There could be any number of reasons.

Ms. HOUSE. That is right.

Senator WHITEHOUSE. And the reason that this is pernicious is because political organizations do it targeting specific neighborhoods in order to challenge the vote out of that neighborhood, and they choose neighborhoods that are associated with strong votes for the opposing party, correct?

Ms. HOUSE. That is correct. That is correct.

Senator WHITEHOUSE. Would this bear on the voter caging problem?

Ms. HOUSE. This particular bill?

Senator WHITEHOUSE. Yes.

Ms. HOUSE. Well, this bill would address on some level the false—you know, challenges to inhibiting registration. It does not address, I think, as much as we need to, voter caging. I think that is one area in which we also support other types of legislation that you have introduced and we have supported in the past.

Senator WHITEHOUSE. I just wanted to be clear that this did not displace my legislation.

Ms. HOUSE. No, it does not.

Senator WHITEHOUSE. It does not. It will be a supplement to it. Very good.

Ms. HOUSE. We still support it.

Senator WHITEHOUSE. I will yield my time back. I see that Senator Schumer——

Senator SCHUMER [presiding]. The Chair will note that no one ever displaces Sheldon Whitehouse or his legislation.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman, and thanks to all of you for joining us.

Ms. HOUSE, I wanted to start with you and just ask if you wanted to respond to Mr. Park's assertion that federal law in this area is sufficient as it now exists, or at least could cover much or most of the conduct that we are concerned about.

Ms. HOUSE. Sure. Well, as Mr. Park indicated, correctly, 11(b) is civil and so it does not criminalize and does not actually address deceptive tactic, and neither do other federal statutes, in fact. I mean, there are other conspiracy laws, and they deal with intimidation. They have not been utilized in a manner that is necessary in order to get to specific issues regarding flyers such as this.

Senator LEE. Is their non-utilization due to the fact that the law itself is inadequate or is it just that the prosecutors have not—

Ms. HOUSE. It is inadequate. It is both inadequate, and it has not been utilized by law enforcement authorities in order to prosecute these types of claims. And, in fact, the Department of Justice has indicated as such, that is why they support this type of legislation because it would enable them to be very directed in addressing these types of deceptive tactics and flyers.

Senator LEE. With regard to State law, anytime I look at expanding our existing body of federal law, I instinctively tend to ask the question, you know, is State law adequate, particularly if we are talking about a criminal provision.

When you referred to the fact that State law is not covering it, is this because State laws are themselves inadequate? Or is it the manner of their implementation that is inadequate?

Ms. HOUSE. Well, it is both. For the most part, they are inadequate, and I think I misstated earlier, there are not 10 deceptive practices bills. There are a number of States upwards of, I think, eight or so that actually have types of either fraud or other statutes in place that could be utilized to prosecute deceptive practices.

Senator LEE. Garden variety fraud.

Ms. HOUSE. Garden variety fraud statutes. They are not being utilized in that manner, and there are only a couple that actually have specific deceptive practices on the books, and they still are not clear in their definition of exactly what types of deceptive practices would be covered under that. And, therefore, it does make it very difficult to prosecute, and also it does not necessarily provide the required corrective action component that we are suggesting here today within Senate Bill 1994.

Senator LEE. And do you believe that—let us suppose States were to adopt those. Is it your position that States should not be the ones focused on protecting federal elections, protecting the honesty and integrity of federal elections, that that ought to be a federal function because we are talking about federal offices?

Ms. HOUSE. So you are asking whether or not if the States do everything, therefore we do not need the federal law?

Senator LEE. Could States—if you had States adopting legislation that was more robust, would you still prefer to have federal legislation on the books to cover elections involving federal offices?

Ms. HOUSE. Yes. Yes, I mean, we are working on both fronts. We are working both to try to work in the States to provide more robust statutes in the State legislatures, but we also believe that it is necessary on the federal level to have a more uniform requirement.

Additionally, it is not always the case that State and local authorities will prosecute, nor is it the case that they will also provide the necessary information to disseminate if we do have deceptive flyers. And that is something that we do oftentimes rely upon the Federal Government to do, especially when you have targeted communities, particularly communities of color and those who are vulnerable that may not otherwise be protected by the State and local authorities.

Senator LEE. Okay. Do you care to respond to Mr. Park's comments regarding the concerns that he has raised regarding the private right of action and how that might be abused?

Ms. HOUSE. I think that as an attorney myself, a private right of action is a necessary vehicle in order to protect—in order to ensure that people's rights are protected, I think any law can be abused, and I do not think that it is justifiable to suggest that simply because there is potential for abuse that, therefore, you should not enact a law or provide a provision that could be so effective in protecting a fundamental right, which is the right to vote.

Senator LEE. I understand that. I understand that, but you would agree with the fact that as law makers we have to look at each bill that we look at and try to figure out whether we would be creating as many or more problems as we are solving with it.

Ms. HOUSE. Sure.

Senator LEE. And so that is a legitimate thing for—

Ms. HOUSE. It is a legitimate question to ask, and I think that in this regard we do not feel, the Lawyer's Committee does not feel that we would be creating more harm than good. In fact, it would be the complete opposite, that, in fact, we would be really providing those vehicles—a vehicle to deter and stop some of these deceptive tactics that are taking place across the country.

Senator LEE. Okay. I see my time has expired. Thank you very much.

Thank you, Chairman.

Senator SCHUMER. Well, thank you, Senator Lee.

First, I have a statement that I am going to put in the record.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Senator SCHUMER. I have cared long about this. In fact, I am the lead cosponsor with Senator Cardin on the legislation. It is absolutely despicable what some people do. And to say that the First Amendment protects anything but threats does not make any sense whatsoever. The First Amendment is not absolute. Our Supreme Court should know that also. No amendment is absolute. We have libel laws. You cannot falsely scream "Fire" in a crowded theater. We have antipornography laws. I take it you support some of these things, Mr. Park. Do you support antipornography laws?

Mr. PARK. Yes, Senator Schumer.

Senator SCHUMER. And you support libel laws?

Mr. PARK. Yes, Senator Schumer.

Senator SCHUMER. Right, Okay. So the First Amendment is clearly not absolute. We know that because we all—no amendment is absolute. And, by the way, I believe that of all the amendments. Balancing is very important. It is easy to be an absolutist, and it

is wrong, because life is shades of gray in just about every area. And in our Constitution as well, there are always balancing tests.

So I just think some of these practices are just despicable, sending on what looks like official letterhead, “Your date of voting has changed to Wednesday,” just to Democrats and not to Republicans. These things—to me, people like this really belong in jail because they are really violating the fabric of our democracy. I just find them despicable. Despicable.

One of the things we are facing in this democracy is less and less faith in it, and one of the reasons is because people have found ways to interfere with democracy that nobody would support.

There is a movement to suppress voting. ALEC and other groups have done this, and, again, I find that to just be corrosive of democracy.

So no amendment is absolute. Obviously, there is a 15th Amendment, there is a First Amendment. So I guess my question—this is to Mr. Park—is: You would agree that a specific threat, it is verbal, “If you vote, I am going to shoot you”—Okay, let us take a bald, horrible one—could be prohibited federally? Is that true?

Mr. PARK. I think it could be prohibited—

Senator SCHUMER. Under the 15th Amendment?

Mr. PARK [continuing]. Under existing law.

Senator SCHUMER. What?

Mr. PARK. I think it could be prohibited under existing law.

Senator SCHUMER. Well, maybe it could, but let us say some State does not have a law that covers that specific situation. Just hypothetically, I am asking you could the 15th Amendment—would the 15th Amendment trump the First Amendment—because obviously it is just speech, but speech that we have always prohibited—in that instance? Assuming the State had no law, let us just agree for the sake of argument.

Mr. PARK. Assuming that there was neither federal or State law, I think that you could criminalize that conduct.

Senator SCHUMER. Okay. So then the question is: The conduct we are talking about prohibiting here, which is not direct threat but a step down, two steps down—you can define it as you will—why is that protected—or why does not the 15th Amendment trump that type of activity as well? I would like to hear that out from you. I know some people have talked in similar questions, but I would like to hear a direct answer on that. It has the same effect, by the way, of prohibiting people from voting, getting them not to vote, and by being deliberate—you know, there are stringent requirements in the bill—by deliberately lying to them. There is no intent to inform or anything else.

Mr. PARK. I understand that, Senator Schumer. My argument was that existing federal law, which is underutilized, already provides the possibility of deterring and punishing that kind of—

Senator SCHUMER. No, I understand that, sir, but my question to you is whether this law is unconstitutional or violative of the First Amendment. And you are arguing that it is, I presume.

Mr. PARK. My argument is that it raises serious constitutional concerns in that it may chill protected speech. And we do not know yet what the U.S. Supreme Court is going to do in *United States v. Alvarez*, the Stolen Valor case. It will speak one way or another

and may provide substantial guidance on the ability of Congress to punish speech that is not truthful.

Senator SCHUMER. Right. And here we are not disputing that the speech is not truthful. We are not disputing that it was done maliciously. We are not disputing that the intent was to prevent people from voting. To me, the distinction on a constitutional basis between the direct threat, which we would all agree would be constitutionally—the law going after that would be constitutionally protected, and this is not—it is not a real distinction. It is not a difference that makes a difference, as the professors used to say at law school.

Do either Ms. House or Ms. Flanagan want to comment on that?

Ms. FLANAGAN. Thank you. I think this is an important discussion, and let us remember what we are talking about. We are talking about lying. We are talking about intentionally lying to deceive an eligible from participating in an election, our most fundamental right to access our democracy.

So I do not think that this can or should be protected. I mean, as you said in your opening comments, you cannot yell “Fire” in a crowded theater. There are—

Senator SCHUMER. Falsely.

Ms. FLANAGAN. Falsely. There are limitations.

[Laughter.]

Ms. FLANAGAN. And that is the point here, too, right?

Senator SCHUMER. Yes.

Ms. FLANAGAN. False information, lies about our right to vote cannot be protected, and we have got to do something about it. And I think what is important about this bill is not just penalizing those actions, but doing something about it by requiring this corrective action so we have an immediate response and by gathering more information through the reporting requirement. You know, groups like ours, we have been researching and talking with voters over the years, but we need to create a congressional record so we can truly make the changes necessary.

Senator SCHUMER. All right. Ms. House.

Ms. HOUSE. I would simply agree with what Ms. Flanagan has stated. We completely believe that this is not protected speech, that deceptive flyers and tactics cannot go unaccounted for and unaddressed. It is particularly pernicious because we are targeting these vulnerable communities. And so, I mean, I do not know that there is much else to say other than this has to be addressed, that we are talking about protecting a fundamental right. And if we simply state that we cannot provide for this protection of a fundamental right because we are worried that somewhere down the line there may be a potential—some possibility that speech may be chilled is simply unacceptable because there are limitations on speech. And this is false speech. These are false claims, misrepresentations and misinformation, and, therefore it is not protected. And we do believe that there is Supreme Court precedent to substantiate that. And even with *Alvarez* coming in the near future, that case does provide still some guidance as to what we are talking about within this bill.

We indeed provide that there has to be an intent. The information has to be shown to be materially false, and knowingly. And so,

therefore, that actually still is within the guidelines of what we are talking about in *Alvarez*, either way it goes.

And so, regardless, we do believe that this is a bill that we can move forward with and that would not only protect the fundamental right to vote, but not chill political speech.

Senator SCHUMER. Thank you, Ms. House. And I see Senator Coons is here. But we drafted it very carefully that way, and, you know, you can always make the argument against any intentional tort or intentional—or in criminal law, with intent, “Well, you are going to chill something because some people might do something carelessly,” or whatever. That is why we have intent. And if you do not believe that intent works, you are going to throw out, you know, 20 percent of the laws in this country. And I think it is a subterfuge, to be honest with you. I think it is people who—some of the people who argue this are not really appalled by the kind of behavior we have talked about, and so they hide behind an example that would not fit under the intentional clause.

Ms. HOUSE. Right. If I could add briefly, I want to be very clear that the Lawyer’s Committee has always vigorously supported the right to freedom of speech, and so this is not about a preference of one particular amendment over another. We are here because we believe in the importance of enforcing all of these rights, and this right is fundamental, the right to vote, and we do have these limitations on false speech.

Senator SCHUMER. Okay. Well, thank you all.

I am going to call on Senator Coons, but, again, I want to thank Senator Cardin for his leadership, and I am proud to be his partner in this effort.

Senator Coons.

Senator COONS. Thank you, Senator Schumer.

To Ms. Clay House, if I might, I just want to thank you for your testimony, which I had the chance to read. I have been presiding for the last hour, thus my late arrival. I want to thank the Lawyers’ Committee for the great work it has done since President Kennedy urged its formation, now a generation ago, and to thank you for the work you have done to defend the rights of voters across America as well as to ensure Section 5 of the Voting Rights Act endures.

You have also been instrumental in ensuring compliance with the National Voter Registration Act, and that has resulted in hundreds of thousands of citizens being able to vote.

You made some reference to recent efforts, techniques to advance voter suppression in particularly chilling or disturbing ways, and I am interested in ways that new media, including social media, has been used to suppress voter participation in very targeted ways. Could you talk in a little more detail about that, about those trends, and about what you think we can and should be doing to deter that?

Ms. HOUSE. Sure, I am happy to. Once again, we have addressed some of these issues in our report that we will be releasing, but with the new technology—Facebook, Twitter, something that I barely know much about, but my son will teach me very soon—this type—text messaging is going out across the country in which we have noticed particular targeting against students, by those who

are utilizing this type of technology. On the Internet, we have seen messages going out throughout college campuses giving them false information. Because there is an ability to reach these wider audiences, it is particularly distressing, and it is much more difficult to try to stop some of these types of tactics if we do not have laws that are in place that are very specific to these types of acts.

And so, again, they are really targeting particularly those communities that are really utilizing these types of media, as I mentioned, Facebook and Twitter accounts, and through smartphones and text messaging.

And so we have taken the deliberate action of trying to make sure that we are doing our best to get the right information out if we are finding out about these types of incidents through Election Protection and even through a new app coming out on smartphones to also make sure that we have an ability to get information to those who have this.

So, you know, this is something that we have encountered, and we are really trying to address this as best as possible.

Senator COONS. So the good old-fashioned practices of voter misinformation and voter suppression through flyers or hand-distributed leaflets have continued in the modern age.

Ms. HOUSE. It has continued in the modern age, yes. It is the same type of misinformation, now just through the Internet and now through other types of social media.

Senator COONS. An example that was cited, I think, in prepared testimony of students at George Mason, thousands of them, literally thousands of them receiving mistaken information about the timing of the vote.

Ms. HOUSE. Yes.

Senator COONS. Have there been other examples of that, or is that really the sole example in the country?

Ms. HOUSE. No, there are other examples. I cannot pull them all out from memory at the moment. I apologize. But there are, I believe, other examples, and that is just one of them that we wanted to particularly illuminate.

I will say that, you know, I think we mentioned—correct information was sent out in order to make sure the students did get the right information, and that is something we want to encourage and happen, but it is not guaranteed. And so, therefore, that is why we need to have this type of legislation to mandate that corrective action, by different authorities.

Senator COONS. I also understand there has been more active, in some cases more aggressive, use of challengers at polling places that seem to be specifically targeted at raising concerns or fears amongst those voting in particular districts or areas. Can you speak a little bit more about that?

Ms. HOUSE. Absolutely. There has been this wave of this type of voter suppression tactics that have been taking place across the country, and deceptive tactics is one of them we have seen in addition to other types of intimidation tactics. People being challenged at the polling place is distressing, again, targeted at certain communities, communities of color, immigrant communities, targeted at students. We know of an organization, True the Vote, who has already determined that they are going to send, I believe, a million

people across the country to be challengers and to specifically challenge people at the polling place as they are attempting to exercise this right to vote. And what that does is it creates or it puts in place a whole round of restrictions or requirements that a voter is now going to have to jump through in order to vote.

Under many State laws, once you have been challenged, you have to provide additional State ID or additional identification. And fortunately we do have the Help America Vote Act, which does allow for people, if they do not have the necessary identification, that they are allowed to vote by provisional ballot. However, because of the loopholes that are in place in some State laws, they are not able to necessarily have that vote counted. It is not guaranteed.

So the reason that these challengers are put in place is in order to create that type of confusion and because people are not aware of the types of IDs and other types of information they are going to need to have in order to vote, and it creates this confusion at the polling place and also could ultimately change the election because you have many voters who thought that they were going to be able to have their vote counted but no longer are. And that is a very distinct form of voter suppression that has to be addressed.

Senator COONS. Last, if I might, the Help America Vote Act, the ability to vote on a provisional ballot, this process of challengers at polls and demanding identification and proof of citizenship and so forth, the argument for why that is legitimate or necessary activity is allegations of widespread voter impersonation fraud.

How many demonstrated, proven cases of voter impersonation fraud are there? How widespread a problem is this in keeping our electoral process legitimate, free, fair, and open?

Ms. HOUSE. Right. Well, the numbers are so minimal that it is not massive, it is not widespread, as I think even Senator Leahy indicated earlier. Even during the Bush administration, the Department of Justice conducted its own investigation over a period of 5 years and did not find any type of massive voter impersonation fraud taking place across this country.

In fact, what was instead found was that many people might have had multiple registrations only because they moved or it was unintentional or there were administrative errors by election officials. And so this was not an attempt, particularly of immigrants and those who are ineligible to vote, to try to commit voter fraud at the polling place, which, again, is not reasonable considering that anyone, if they are undocumented, would not go to the polling place to subject themselves to the potential to be deported over voting. It is not a reasonable assumption or claim that I think is being made to state that there are attempts at massive voter fraud.

Senator COONS. Well, thank you, Ms. Clay House. Thank you for your testimony today.

Just in closing, I think we have a balance we have to strike. We need to, I think, be vigorous and engaged in preventing disenfranchisement of those who are eligible to vote, who are entitled to vote, and who we want to vote by restrictive ID laws, and to strike a fair and appropriate balance where there are very few cases of demonstrated voter impersonation fraud. We should instead be investing the resources and the time in ensuring that those who can

vote are registered to vote, that the process of voting is free and fair and open. We hold ourselves out to the rest of the world as sort of a beacon of democracy, and I think we can all agree that what we should be doing is protecting the right to vote and ensuring that everyone who has a right to vote is able to exercise that franchise freely.

Thank you to all the members of the panel, and thank you, Senator Schumer, for holding the hearing open for a few moments so that I could join you.

Senator SCHUMER. Well, thank you, Senator Coons. It was worth it given your questions.

I would just make one point. Our legislation applies no matter who is targeted. You could target the poorest people in town, the richest people in town. If you do these kinds of things for whatever your political purpose, it would apply.

With that, I want to thank our witnesses. This is important stuff. It goes to the wellspring of our democracy, and the hearing record will be open for 7 days for people to submit statements and additional questions for the witnesses.

Thank you, and the hearing is adjourned.

[Whereupon, at 11:29 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary

On

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

Tuesday, June 26, 2012
Dirksen Senate Office Building, Room 226
10:00 a.m.

Panel I

The Honorable Benjamin Cardin
United States Senator
State of Maryland

Panel II

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

John J. Park, Jr.
Of Counsel
Strickland Brockington Lewis LLP
Atlanta, GA

Jenny Rose Flanagan
Director of Voting and Elections
Common Cause
Washington, DC

PREPARED STATEMENT OF HON. PATRICK LEAHY

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Hearing on Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in
Federal Elections: S.1994”
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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PREPARED STATEMENT OF HON. CHARLES E. SCHUMER

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.

PREPARED STATEMENT OF HON. BENJAMIN L. CARDIN

OPENING STATEMENT ON

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

S. 1994, DECEPTIVE PRACTICES AND VOTER INTIMIDATION PREVENTION ACT

SENATOR BENJAMIN L. CARDIN

JUNE 26, 2012

Mr. Chairman, thank you for calling this hearing today. In particular I want to thank Senator Schumer, whom I have been pleased to work with on this legislation since I first came to the Senate in 2007.

The use of deceptive practices and voter intimidation tactics are not new. After having served in elective office in both Annapolis and Washington, I understand that campaigns are a rough and tumble business. I expect that candidates will question and criticize my record and judgment, and voters ultimately have a right to choose their candidate.

What goes beyond the pale, however, is when a campaign uses deceptive tactics to deliberately marginalize and disenfranchise minority voters. These tactics seem to deliberately target minority neighborhoods and are blatant attempts to reduce minority turnout.

In previous elections we have seen deceptive literature distributed which gave the wrong date for the election, the wrong times when polling places were open, and even suggested that people could be arrested if they had unpaid parking tickets or unpaid taxes and tried to vote. Other literature purported to give a different general election day for Republicans and Democrats.

Mr. Chairman, this is not a new issue for the Judiciary Committee. In fact, it was over 5 years ago that the Judiciary Committee last held a hearing on this specific subject. I chaired that hearing in May 2007, and at that time we took testimony from Senator Obama and Senator Schumer on this subject. After the hearing, this Committee favorably reported the legislation to the floor. And the full House of Representatives passed similar companion legislation by voice vote. But the full Senate failed to act.

Let me also say that I am pleased that the Judiciary Committee, and in particular Senator Durbin and the Constitution Subcommittee, has continued to shine a spotlight efforts to restrict the franchise, including measures in various states designed to make it more difficult to register to vote and exercise one's constitutional right to vote.

It has been nearly a century and a half since Congress and the states ratified the Fifteenth Amendment to the Constitution in 1870, which states that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race [or] color..." The Amendment also gave Congress power to enforce the article by "appropriate legislation." African-Americans suffered through nearly another 100 years of discrimination at the hands of Jim Crow laws and regulations, designed to make it difficult if not impossible for African-Americans to register to vote due to literacy tests, poll taxes, and outright harassment and violence. It took Congress and the states nearly another century until we adopted the Twenty-Fourth Amendment to the Constitution in 1964, which prohibited poll taxes or any tax on the right to vote. In 1965 Congress finally enacted the Voting Rights Act, which once and for all was supposed to prohibit discrimination against voters on the basis of race or color.

It is time for Congress to once again take action to stop the latest reprehensible tactics that are being used against African-American, Latino, and other minority voters to interfere with (a) their right to vote or (b) their right to vote for the candidate of their choice, as protected in Constitution and in civil rights statutes. These tactics undermine and corrode our very democracy and threaten the very integrity of our electoral process.

Our 2007 hearing record contains numerous examples of deceptive practices, so I will not repeat them in detail here. Suffice it to say that the hearing record contains examples including: listing the wrong day for the election; promoting false endorsements of candidates, including from my own election as Senator in 2006; telling Republicans to vote on Tuesday and Democrats to vote on Wednesday; warning recent immigrants not to vote due to the possibility of deportation; warning voters with unpaid tickets parking not to vote, or face prison terms and loss of custody of their children.

I do want to bring to the committee's attention more recent examples of the use of deceptive practices since our 2007 hearing.

In 2008, Ohio residents reported receiving misleading automated calls giving voters incorrect information about the location of their polling places. In the same year, fliers were distributed in predominantly African-American neighborhoods of Philadelphia, Pennsylvania, falsely warning that people with outstanding warrants or unpaid parking tickets could be arrested if they showed up at the polls on Election Day. In the same year, messages were sent to users of the social media website Facebook falsely stating that the election had been postponed a day.

Students at some universities, including Florida State University, received text messages also saying the election had been postponed for a day. In the same year, a local registrar of elections in Montgomery County, Virginia, issued two releases incorrectly warning that students at Virginia Tech who registered to vote at their college could no longer be claimed as dependents on their parents' tax returns and could lose scholarships or coverage under their parents' car and health insurance.

In the 2010 election, in African-American neighborhoods of Houston, Texas, a group called the 'Black Democratic Trust of Texas' distributed flyers falsely warning that a straight-ticket vote for the Democratic Party would not count and that a vote just for a single Democratic candidate would count for the entire Democratic ticket.

In the 2010 election, in my own state of Maryland, a political consultant paid for robocalls on election night to thousands of African-American households in the state's two largest majority-black jurisdictions that said, while the polls were still open, '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 . . . We're okay. Relax. Everything is fine. The only thing left is to watch on TV tonight.'. These Maryland robocalls led to several criminal convictions, including jail time and civil fines for some of the parties involved.

The legislation I have introduced with Senator Schumer would: (1) prohibit deceptive practices in federal elections; (2) create a civil right of action and criminal penalties for violations; (3) allow for corrective action; and (4) require regular reporting to Congress.

This legislation is narrowly tailored – consistent with the First Amendment – to apply only to a small category of communications within 90 days before a federal election. Under the legislation, prohibited communications include false information on: the time or place of the election; explicit endorsements; voter qualifications; criminal penalties associated with voting; and a voter’s registration status or eligibility.

The legislation only criminalizes distribution of these types of false voting information when an individual knows such information to be materially false, and an individual has the intent to mislead, discourage, or prevent another person from exercising their right to vote.

This legislation properly respects the First Amendment's guarantee of freedom of speech while recognizing the power of Congress to prohibit the use of racially discriminatory tactics in elections under the Fifteenth Amendment, Voting Rights Act, and the general power of Congress under Article I, Section 4 of the Constitution to regulate the "times, places, and manner" of federal elections.

This legislation creates tough new criminal and civil penalties for those who create and distribute this type of false and deceptive literature. The bill authorizes a process to distribute accurate information to voters who have been exposed to false and deceptive communications. The bill requires the Attorney General to submit to Congress a report compiling and detailing any allegations of false and deceptive election communications.

I am very pleased that the Department of Justice is supportive of our efforts and this legislation. In December 2011, Attorney General Eric Holder gave a major voting rights speech at the LBJ Library and Museum in Austin, Texas.

Attorney General Holder acknowledged, just before our legislation was introduced, that deceptive practices are still being used, and said:

“Over the years, we’ve seen all sorts of attempts to gain partisan advantage by keeping people away from the polls – from literacy tests and poll taxes, to misinformation campaigns telling people that Election Day has been moved, or that only 1 adult per household can [vote]...”

“In an effort to deter and punish such harmful [deceptive voting] practices, during his first year in the U.S. Senate, President Obama introduced legislation that would establish tough criminal penalties for those who engage in fraudulent voting practices – and would help to ensure that citizens have complete and accurate information about where and when to vote. Unfortunately, this proposal did not move forward. But I’m pleased to announce that...Senators Charles Schumer and Ben Cardin [have] re-introduce[d] this legislation, in an even stronger form. I applaud their leadership – and I look forward to working with them as Congress considers this important legislation.”

Our former colleague Senator Ted Kennedy often said that civil rights was part of the great unfinished business of America. I ask this committee to therefore to consider and favorably report this legislation once again to the full Senate. Thank you.

PREPARED STATEMENT OF TANYA CLAY HOUSE



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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



**LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
UNDER LAW**

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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

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Gregory P. Landis

Chesapeake Region

Michael H. Chantiri

James P. Joseph

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

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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 voted, 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 undermine 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 as 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.

PREPARED STATEMENT OF JOHN J. PARK, JR.

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 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.

PREPARED STATEMENT OF JENNY FLANAGAN

**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 Schurick 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-ehrllich-campaign-manager-schurick-convicted-in-robocall-case/2011/12/06/g1QA6rNsaO_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

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

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.*

QUESTIONS SUBMITTED BY SENATOR LEAHY FOR JENNY FLANAGAN

**Questions for the Record for Ms. Jenny Rose Flanagan
Chairman Patrick Leahy
“Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal
Elections: S.1994”
June 26, 2012**

Ms. Jenny Rose Flanagan – Common Cause

1. In recent years we have seen hundreds of voter ID bills introduced in state legislatures around the country in an effort to combat the same alleged voter fraud the Bush Justice Department could not find.
 - A. Is the need for the Deceptive Practices and Voter Intimidation Prevention Act based on assertions or on real documented attempts to infringe American’s right to vote?**
 - B. How would this legislation lead to proactive efforts that protect the vote?**
 - C. In your opinion, how would this bill help us better respond to deceptive practices in the future?**

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR TANYA CLAY HOUSE

QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY

“Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections: S. 1994”**Questions for Ms. House**

1. At the hearing you testified, “We have specifically put in place working with your offices ... language that would ensure that this is not indeed chilling political speech.”
 - a. To which individuals or groups were you referring when you used the term “we”?
 - b. Please provide copies of all drafts of language that the individuals or groups referenced in your answer to (a) above provided to the offices of any members of the Senate Judiciary Committee.
2. At the hearing, you testified that the bill “ensure[s] that there’s a limitation on the type of speech that we’re actually regulating, which is time, place, manner.”
 - a. To which individuals or groups were you referring when you used the term “we”?
 - b. How is possible for a bill that is “actually regulating” a “type of speech” to be a time, place, or manner restriction on speech? Is it not true that S. 1994, in the words of the Supreme Court’s plurality opinion at page 4 in *United States v. Alvarez*, “restricts expression because of its message, its ideas, its subject matter or its content,” and is therefore a conduct-based restriction on speech and not one based on time, place, or manner? If you continue to believe that S. 1994 is a time, place, or manner based restriction on speech, and is not content-based, what case law supports your conclusion?
 - c. If you now conclude that S.1994 in fact is a content-based regulation of speech, and not one that regulates a type of content the Supreme Court has held is permissible under the First Amendment, plurality op. at 5-6, how does S.1994 satisfy the “most exacting scrutiny,” *id.* at 12, that such content-based restrictions of speech must withstand under the First Amendment?
3. At the hearing, you testified that “the Department of Justice has indicated... they support this type of legislation because it would enable them to be very directed in addressing these types of deceptive tactics and fliers.” I have asked the Department of Justice for any public statements it has made in support of S. 1994. On July 2, 2012, the Department provided me a copy of a letter on this subject, issued on that same date, that they had sent to Chairman Leahy.

- a. On what basis were you able to make on June 26, 2012, the statement that “the Department of Justice has indicated ... they support this type of legislation....”?
 - b. Please provide copies of any documents, communications, or records of conversations that form the basis for your testimony that the Department of Justice had indicated support for legislation similar to S. 1994 prior to July 2, 2012.
4. You raised concerns about the inability of federal law to address allegations of so-called deceptive statements in connection with the recent Wisconsin recall election.
 - a. If enacted, would S. 1994 cover any conduct by anyone not acting under color of law in connection with a state election in which no federal candidate appeared on the ballot?
 - b. If not, why would S. 1994 be relevant to such elections?
 - c. If so, on what basis does Congress have the constitutional authority to regulate conduct by individuals not acting color of law in connection with elections in which only state candidates appear on the ballot, unless the matter involves fraudulent registrations or voting by noncitizens?
 - d. If so, how do you account for the conclusion to the contrary that is contained on page 7 of the Department of Justice Manual, “Federal Prosecution of Election Offenses”?
5. According to the Department of Justice Manual, “Federal Prosecution of Election Offenses,” page 36, current federal law, 18 U.S.C. 594 and 42 U.S.C. 1973gg-10(1), already prohibit intimidation of voters in federal (including mixed) elections.
 - a. Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?
 - b. Overruling the recommendations of career prosecutors, Department of Justice political appointees refused to prosecute members of the New Black Panther Party on charges of voter intimidation in violation of existing federal law. Given that the Department refuses to use the voter intimidation statutes already on the books, and has identified no inadequacy in those laws as a purported justification for its failure to bring the prosecution against the New Black Panthers, why should the Department be given new authorities to prosecute voter intimidation?
6. According to the Department of Justice Manual, “Federal Prosecution of Election Offenses,” page 38, 18 U.S.C. 241 already permits federal prosecutions of schemes to intimidate voters in federal or mixed elections as well as to jam telephone lines of a

political party that were used to get out the vote. The same manual, page 61, states that section 241 applies to “providing false information to the public – or a particular segment of the public – regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct.” Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

7. According to the Department of Justice Manual, “Federal Prosecution of Election Offenses,” page 80, 2 U.S.C. 441(h) “prohibits fraudulently representing one’s authority to speak for a federal candidate or political party.” Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?
8. S.1994 criminalizes a range of false statements, whether successful in dissuading voters from voting and whether the statements are made in public or in private. In its recent *Alvarez* decision, the plurality opinion stated, at page 11, “Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?
9. S.1994 criminalizes speech that is not made to obtain a financial benefit. In its recent *Alvarez* decision, the plurality opinion stated at page 11, “Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?
10. S.1994 requires no showing of harm before the statements at issue can form the basis for a criminal prosecution. The plurality opinion in *Alvarez*, page 13, stated that “[t]here must be a direct causal link between the restriction imposed and the injury to be prevented.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?
11. One of the reasons that the Supreme Court struck down the Stolen Valor Act as violative of the First Amendment was an absence of a showing that counter-speech would not work to remedy the false speech at issue in *Alvarez*. The plurality opinion stated at page 15, “The remedy for speech that is false is speech that is true. That is the ordinary course in a free society.” And Justice Breyer in his concurrence, at page 10, expressly agreed with the plurality that “in this area more accurate information will normally counteract the lie.” Why is counter-speech by political opponents of those alleged to have made the false statements at issue in S.1994 not an effective alternative to criminalizing the making

of those statements? Are these statements relevant in analyzing the constitutionality of S.1994 on First Amendment grounds?

12. S.1994 would require the Attorney General, upon receipt of a credible report of the dissemination of certain materially false information, to communicate “accurate” information to “correct” the false information. In *Alvarez*, the plurality opinion stated, pages 16-17, “Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates....Only a weak society needs government protection or intervention before its resolve to preserve the truth.” Do you agree with this statement? To what extent does it bear on the constitutionality of the “corrective action” provisions of S.1994?
13. Justice Breyer’s concurrence in *Alvarez* may also bear on the constitutionality of S.1994. He stated at page 3, “[A]s the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby ‘chilling’ a kind of speech that lies at the First Amendment’s heart.” Do you agree? If so, how does his statement relate to S.1994?
14. Justice Breyer professed concern in his *Alvarez* concurrence about false statement statutes that gave government the broad power to prosecute falsity without more. He voiced concern on page 5 that such statutes may lead “those who are unpopular [to] fear that the government would use that weapon selectively.” Do you believe that such a concern is applicable to S.1994? If not, why not?
15. Justice Breyer’s *Alvarez* concurrence noted at page 5 that other false statement statutes “tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to cause harm.” And he added, *id.*, that fraud statutes “typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?
16. Justice Breyer’s *Alvarez* concurrence, pages 7-8, recognized that when a false statement statute applies only to “knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker, ... [this] reduc[es] the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?
17. Justice Breyer noted in his *Alvarez* concurrence, page 8, that for false statements prohibited by statutes that apply in the political context, “although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is high.” Additionally, he noted that in applying such statutes in the political context, “there

remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

18. Justice Breyer stated in his *Alvarez* concurrence, page 9, “In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.” Does this statement have any bearing on the constitutionality of S.1994 as introduced? If not, why not?
19. Section 3(b) of S.1994 creates a private right of action, which creates a “civil action for preventive relief, including an application in a United States district court for a permanent or temporary injunction, restraining order, or other order.”
 - a. Does section 3(b) permit a United States district court that finds that an individual or entity may have committed or may be about to commit a violation of subsections (b)(2), (b)(3), or (b)(4), to issue an order restraining that individual or entity from committing any future violations of those provisions so as to prevent any such future violations? If not, why not?
 - b. Would such an order constitute a prior restraint on speech? If not, why not?
 - c. If so, why would such an order be consistent with the First Amendment guarantee of freedom of speech?

FOLLOW UP QUESTION FOR THE RECORD FOR MS. HOUSE FROM SENATOR GRASSLEY

1. I originally asked you a three-part question, number 19, that inquired whether the bill's private right of action permitted a court to issue an order restraining an individual from committing any future violations; whether such an order would constitute a prior restraint on speech; and, if so, whether such an order would be consistent with the First Amendment guarantee of free speech. In each instance, you responded that the Attorney General under current law may bring such an action; that S.1994 simply allows a private civil action to seek such an order in the same fashion as the Attorney General; and therefore, such an order would not be affected by the First Amendment.

Respectfully, your answers did not respond to the questions. Regardless of what remedies the Attorney General may bring under the current statute, does S.1994's private right of action enable a United States District Court to restrain an individual from future statutory violations, would such an order constitute a prior restraint of speech, and, if so, would such an order be consistent with the First Amendment's guarantee of free speech?

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR JOHN J. PARK, JR.

QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY

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

Questions for Mr. Park

1. At the hearing, Senator Schumer stated to you, “And we’re not disputing that the speech is not truthful. We’re not disputing that it was done maliciously. We’re not disputing that the intent was to prevent people from voting. To me, the distinction, on a constitutional basis, between the direct threat, which we would all agree would be constitutionally – the law going after that would be constitutionally protected and this is not – it’s not a real distinction that makes a difference as the professors used to say at law school.”
 - a. How does the Supreme Court’s recent decision in *United States v. Alvarez* bear on Senator Schumer’s defense of the constitutionality of S.1994 that the statements at issue are not truthful, were done maliciously, and were made with an intent to prevent people from voting?
 - b. In light of *Alvarez*, is there no constitutional distinction between a “direct threat” and the types of statements that would be criminalized by S. 1994?
2. S.1994 criminalizes a range of false statements, whether successful in dissuading voters from voting and whether the statements are made in public or in private. In its recent *Alvarez* decision, the plurality opinion stated, at page 11, “Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?
3. S.1994 criminalizes speech that is not made to obtain a financial benefit. In its recent *Alvarez* decision, the plurality opinion stated at page 11, “Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?
4. S.1994 requires no showing of harm before the statements at issue can form the basis for a criminal prosecution. The plurality opinion in *Alvarez*, page 13, stated that “[t]here must be a direct causal link between the restriction imposed and the injury to be prevented.” To

what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

5. One of the reasons that the Supreme Court struck down the Stolen Valor Act as violative of the First Amendment was an absence of a showing that counter-speech would not work to remedy the false speech at issue in *Alvarez*. The plurality opinion stated at page 15, “The remedy for speech that is false is speech that is true. That is the ordinary course in a free society.” And Justice Breyer in his concurrence, at page 10, expressly agreed with the plurality that “in this area more accurate information will normally counteract the lie.” Why is counter-speech by political opponents of those alleged to have made the false statements at issue in S.1994 not an effective alternative to criminalizing the making of those statements? Are these statements relevant in analyzing the constitutionality of S.1994 on First Amendment grounds?
6. S.1994 would require the Attorney General, upon receipt of a credible report of the dissemination of certain materially false information, to communicate “accurate” information to “correct” the false information. In *Alvarez*, the plurality opinion stated, pages 16-17, “Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates....Only a weak society needs government protection or intervention before its resolve to preserve the truth.” Do you agree with this statement? To what extent does it bear on the constitutionality of the “corrective action” provisions of S.1994?
7. Justice Breyer’s concurrence in *Alvarez* may also bear on the constitutionality of S.1994. He stated at page 3, “[A]s the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby ‘chilling’ a kind of speech that lies at the First Amendment’s heart.” Do you agree? If so, how does his statement relate to S.1994?
8. Justice Breyer professed concern in his *Alvarez* concurrence about false statement statutes that gave government the broad power to prosecute falsity without more. He voiced concern on page 5 that such statutes may lead “those who are unpopular [to] fear that the government would use that weapon selectively.” Do you believe that such a concern is applicable to S.1994? If not, why not?
9. Justice Breyer’s *Alvarez* concurrence noted at page 5 that other false statement statutes “tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to cause harm.” And he added, *id.*, that fraud statutes “typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

10. Justice Breyer's *Alvarez* concurrence, pages 7-8, recognized that when a false statement statute applies only to "knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker, ... [this] reduc[es] the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm." Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?
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12. Justice Breyer stated in his *Alvarez* concurrence, page 9, "In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas." Does this statement have any bearing on the constitutionality of S.1994 as introduced? If not, why not?
13. Section 3(b) of S.1994 creates a private right of action, which creates a "civil action for preventive relief, including an application in a United States district court for a permanent or temporary injunction, restraining order, or other order."
 - a. Does section 3(b) permit a United States district court that finds that an individual or entity may have committed or may be about to commit a violation of subsections (b)(2), (b)(3), or (b)(4), to issue an order restraining that individual or entity from committing any future violations of those provisions so as to prevent any such future violations? If not, why not?
 - b. Would such an order constitute a prior restraint on speech? If not, why not?
 - c. If so, why would such an order be consistent with the First Amendment guarantee of freedom of speech?

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR JENNY FLANAGAN

QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY

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

Questions for Ms. Flanagan

1. You raised concerns about the inability of federal law to address allegations of so-called deceptive statements in connection with the recent Wisconsin recall election.
 - a. If enacted, would S. 1994 cover any conduct by anyone not acting under color of law in connection with a state election in which no federal candidate appeared on the ballot?
 - b. If not, why would S. 1994 be relevant to such elections?
 - c. If so, on what basis does Congress have the constitutional authority to regulate conduct by individuals not acting color of law in connection with elections in which only state candidates appear on the ballot, unless the matter involves fraudulent registrations or voting by noncitizens?
 - d. If so, how do you account for the conclusion to the contrary that is contained on page 7 of the Department of Justice Manual, “Federal Prosecution of Election Offenses”?
2. According to the Department of Justice Manual, “Federal Prosecution of Election Offenses,” page 36, current federal law, 18 U.S.C. 594 and 42 U.S.C. 1973gg-10(1), already prohibit intimidation of voters in federal (including mixed) elections.
 - a. Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?
 - b. Overruling the recommendations of career prosecutors, Department of Justice political appointees refused to prosecute members of the New Black Panther Party on charges of voter intimidation in violation of existing federal law. Given that the Department refuses to use the voter intimidation statutes already on the books, and has identified no inadequacy in those laws as a purported justification for its failure to bring the prosecution against the New Black Panthers, why should the Department be given new authorities to prosecute voter intimidation?
3. According to the Department of Justice Manual, “Federal Prosecution of Election Offenses,” page 38, 18 U.S.C. 241 already permits federal prosecutions of schemes to intimidate voters in federal or mixed elections as well as to jam telephone lines of a political party that were used to get out the vote. The same manual, page 61, states that section 241 applies to “providing false information to the public – or a particular segment

of the public -- regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct.” Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

4. According to the Department of Justice Manual, “Federal Prosecution of Election Offenses,” page 80, 2 U.S.C. 441(h) “prohibits fraudulently representing one’s authority to speak for a federal candidate or political party.” Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?
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if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

15. Justice Breyer stated in his *Alvarez* concurrence, page 9, “In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.” Does this statement have any bearing on the constitutionality of S.1994 as introduced? If not, why not?
16. Section 3(b) of S.1994 creates a private right of action, which creates a “civil action for preventive relief, including an application in a United States district court for a permanent or temporary injunction, restraining order, or other order.”
 - a. Does section 3(b) permit a United States district court that finds that an individual or entity may have committed or may be about to commit a violation of subsections (b)(2), (b)(3), or (b)(4), to issue an order restraining that individual or entity from committing any future violations of those provisions so as to prevent any such future violations? If not, why not?
 - b. Would such an order constitute a prior restraint on speech? If not, why not?
 - c. If so, why would such an order be consistent with the First Amendment guarantee of freedom of speech?

ADDITIONAL QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY FOR MS.
FLANAGAN

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

1. In your answer to a previous question for the record, you contended that page 11 of the Alvarez plurality opinion supported your view that S.1994 would be constitutional on the ground that government can suppress “fraud.” While government can indeed target fraud, the speech at issue does not fall within that category. The plurality opinion on p. 11, found constitutionally problematic with the Stolen Valor Act the same point that applies to S.1994: its applicability “without regard to whether the lie was made for personal gain.” As the Court plurality at page 11 stated and I quoted in my earlier question to you, “Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a *material advantage*, it would give the government a broad censorial power unprecedented in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom” (emphasis added). In your earlier answer, you contended that the plurality opinion raised no issues for S.1994 because the bill requires that the information be “materially false.” But the plurality found that the Stolen Valor Act was unconstitutional not because the speech might not be *material* in the sense of being relevant to the listener, as you suggested, but because the speaker was not making the statement for his own *material advantage, i.e.,* financial gain. Does not S.1994 suffer from the same constitutional defect as the Stolen Valor Act in that it punishes a new category of false speech and unconstitutionally chills speech because it targets speech not made to “gain a material advantage” and “without regard to whether the lie was made for personal gain”?
2. With respect to your position that S. 1994 can be constitutionally justified as an anti-fraud measure, Justice Breyer’s concurrence in Alvarez stated that fraud statutes “typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.” How is S. 1994 based not on mere supposition, but requires proof that a victim relied on a misrepresentation and that such reliance caused actual injury of the kind the Alvarez Court demanded?
3. As I noted in my earlier question, the plurality, at page 11, concluded that allowing criminalization of false statements that were not within a traditionally proscribed category of speech “would endorse government authority to compile a list about which false statements are punishable.” The Court did not uphold the Stolen Valor Act as prohibiting such a traditionally proscribed category of speech, even though the misrepresentation made in that case occurred in an effort to affect the outcome of an election. Is it not the case that the speech that would be proscribed by S.1994 would represent an unprecedented content-based restriction and thus would fail the strict

scrutiny that such novel content-based speech restrictions would face under the plurality's analysis?

4. In your answer to a previous question for the record, you argued that S. 1994's prohibition on false statements was constitutional under Alvarez because the bill requires the speaker to know of the statement's falsity and to "ha[ve] the *intent* to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote." But as I asked you to comment on earlier, the concurrence stated at pages 7-8 that even though a statute's applicability only to "knowing and intentional acts of deception" "reduc[es] the risk that valuable speech is chilled... it still ranges broadly. And that breadth means that it creates a significant risk of First Amendment harm." Nonetheless, your answer to my earlier question did not address the applicability of that statement from the concurring opinion to S.1994. Please address whether this statement means that S.1994 "creates a significant risk of First Amendment harm" despite the bill's intent requirement.
5. Earlier, I asked you to address the applicability of the following statement from page 13 of the Alvarez plurality to the constitutionality of S.1994: "There must be a direct causal link between the restriction imposed and the injury to be prevented." You responded that the bill's restriction of a false statement was directly connected to "the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote)." But your discussion of the supposed injury to be prevented is not an injury at all. Rather, it repeats the bill's standard of intent of the speaker who made the false statement. As noted above, the Court stated that the injury to be prevented is the material gain of the speaker. How are the restrictions on false statements in S. 1994 connected to the material gain of the speaker?
6. As noted, the plurality at page 15 and the concurrence at page 10 found First Amendment violations with the Stolen Valor Act because there was no showing that counter-speech would not work to remedy the false speech at issue in Alvarez. What factual support that would satisfy the strict scrutiny test applied by the plurality or intermediate scrutiny of the concurrence can you offer for your statements that in the context of S.1994, "[c]ounter-speech by political opponents of those alleged to have made false statements *alone* is inadequate" and that "'[s]peech that is true' fails to fully remedy the scope of the harm in this case"?
7. You stated that the government should respond when individuals utilize false information to confuse voters about the place, manner, or qualifications of voting. You state that the "Attorney General communicating correct information" "is in keeping with our highest American values." How do you square that point of view with the position of the Alvarez plurality, at page 11, that "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth"? What if the statement is made honestly in error or was in fact true even if that were not known to the Attorney General or to the private party that sought such corrective speech?

8. Earlier, you argued that counter-speech was ineffective in combating certain forms of deceptive political speech, and was a justification for the Department of Justice to provide some official “corrective action” against such speech. You wrote, “Counter-speech by political opponents of those alleged to have made false statements *alone* is inadequate. Deceptive election practices often impersonate official government officials [sic].”
- a. Are S. 1994’s content-based speech restrictions limited only to deceptive practices in which an individual impersonates a government official?
 - b. Is it not the case that S. 1994 applies to individuals who are not government officials and do not hold themselves out to be government officials, as well as to endorsements other than from government officials?
 - c. How do you reconcile your justification of S. 1994 on grounds of impersonation of government officials with this statement from page 6 of the Alvarez concurrence (citation and quotations omitted): “Statutes forbidding impersonation of a public official typically focus on *acts* of impersonation, not mere speech, and may require a showing that, for example, someone was deceived into following a course of action he would not have pursued but for the deceitful conduct”?
9. You dismissed the fear expressed at page 3 of the concurring opinion that “the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby ‘chilling’ a kind of speech that lies at the First Amendment’s heart.” You claimed that under S. 1994, the elements of knowledge, materiality, and intent “should not chill true speech.” Justice Breyer, however, wrote at page 8 of his concurring opinion, “[G]iven the haziness of individual memory..., there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to make him liable.” What basis do you have for disagreeing with the Supreme Court’s view that prosecutions of false statements, even when intent is required, will produce a chilling effect? Would not speakers fear that they might misspeak and be prosecuted for violating S. 1994, even if an actual conviction could not be obtained, despite their lack of intent?
10. S. 1994 applies to core political speech related to election for office in the period preceding an election. A person who would violate S. 1994 would be subject to prosecution for making false statements about politics, which is, as the concurrence said in Alvarez at page 3, “a kind of speech that lies at the First Amendment’s heart.” On what basis do you rest your earlier response that “S. 1994 is not merely about false statements in general, nor even about politics. S. 1994 is about protecting voters from deliberate misinformation campaigns that intend to confuse voters about the requirements and process of voting”?

11. Justice Breyer's concurrence, at pages 7-8, wrote that when a false statement statute applies only to "knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker... [this] reduc[es] the risk that valuable speech is chilled. But it still ranges very *broadly*. And that *breadth* means that it creates a significant risk of First Amendment harm" (emphasis added).
- (a) In response to my previous question, you said that "S. 1994 gives the government a rather *narrow* power to prosecute false statements," (emphasis added), and referred to intentionally false statements. How do you square that characterization with the belief stated in the concurrence that even false statement statutes limited to knowing and intentional acts of deception within the knowledge of the speaker "range very broadly[,] and that breadth means that it creates a significant risk of First Amendment harm"?
 - (b) When I asked you earlier about this statement, you replied that S. 1994's limitations to knowing and intentional acts of deception about readily verifiable facts meant that the bill raised no free speech concerns. How do you reconcile that statement with the language of the concurrence quoted above?
12. In your earlier responses, you wrote that S. 1994 did not raise any concerns of selective enforcement. You relied on the bill's requirements of knowledge and intent to support your conclusion. However, Justice Breyer's concurrence, page 5, raised concerns that a false statement statute concerning political speech, even with knowledge and intent requirements, may lead "those who are unpopular [to] fear that the government would use that weapon selectively," and on page 8, that "a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to make him liable" (emphasis in original). Given the political advantage that would be available to a prosecutor to bring charges of violation of S.1994 against his opponent, whether or not well-founded, and the ability of private parties to bring lawsuits in the period immediately before the election against candidates with whom they disagreed, how does S.1994 withstand Justice Breyer's constitutional concerns of "censorious selectivity by prosecutors"?
13. In responding to Justice Breyer's concern expressed at page 8 of his concurrence that a false statement statute, even one requiring knowledge and intent, "may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like," you wrote that the statements prohibited by S.1994 "are different from the substance of voting or 'bar stool braggadocio.'"
- a. Justice Breyer's point in this excerpt was the chilling effect that false statement statutes cause in contexts in which they should not apply, such as "in the political arena," as S. 1994 undoubtedly does. Given that S. 1994 applies to statements made by campaigns in the period leading to an election, how is your claim that S. 1994 is inapplicable to "statements about the substance of politics" at all responsive to Justice Breyer's point?

- b. Justice Breyer also wrote that false statement statutes could not constitutionally be applied to “bar stool braggadocio” because of the absence of the kind of harm arising from such statements that could justify such a prohibition. Your earlier answer stated that the statements at issue in S. 1994 “are different than statements about ... ‘bar stool braggadocio.’” Does not section 3(b) of S. 1994 apply to prohibited communications made “by any means,” including statements made in barrooms?
14. The Alvarez concurrence at page 5 stated that other false statements statutes “tend to be narrower .. sometimes by specifying that the lies be made in contexts in which a tangible harm is likely to occur....” You wrote that you believed that this statement “counseled in ... favor” of the constitutionality of S. 1994 since the bill “specifies that the lies be made in contexts in which a tangible harm is especially likely to occur. In this case, voting.” But inherent in anything having a status as “tangible” is that it can be touched. How is a lie about voting “made in contexts in which a tangible harm is likely to occur”?
15. Your earlier response denied that the following statement from page 9 of Justice Breyer’s concurrence had any bearing on S. 1994: “In the political arena a false statement is likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.” Your rationale was that “S. 1994 is not aimed at the political arena of ideas, but at the criminal arena that seeks to prevent citizens from exercising their right to vote.” Whatever its aims, S. 1994 criminalizes political speech on the basis of its content in the period before an election, and without regard to whether such speech actually prevents any citizens from exercising their right to vote. And, in any event, any effects on voting are not the kinds of tangible harm or material gain that the Court required for the constitutionality of a false statements statute. Would you care to revise your answer?
16. Previously, you agreed that section 3(b) of the bill “grants the power to issue restraining orders.” You did not answer directly my question whether such an order would constitute a prior restraint on free speech. You replied, “Such an order would prohibit someone from engaging in the communication of knowingly materially false information when the speaker intends to mislead voters or impede, hinder, discourage, or prevent voters from exercising their right to vote.” Does such an order constitute a prior restraint on free speech?
17. In response to my question whether such an order would be consistent with the First Amendment guarantee of free speech, you replied that such an order would be consistent. You stated that “the Supreme Court has long held that the scope of the Amendment is not absolute. Content-based laws concerning imminent lawless action; obscenity; speech integral to criminal conduct; so-called fighting words; and grave & imminent threats are all consistent with the First Amendment.”

- a. How do you reconcile your response with the Alvarez plurality, which, while acknowledging the categories of unprotected speech contained in your answer, refused to add as an additional category “any general exception to the First Amendment for false statements,” page 5, and from page 10 (citation omitted), that “[b]efore exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with ‘persuasive evidence that a novel restriction is part of a long (if heretofore unrecognized) tradition of proscription’”?
- b. If such an order would constitute a prior restraint on speech, please explain how such an order would be constitutional under established First Amendment jurisprudence.

RESPONSES OF TANYA CLAY HOUSE TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY**“Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections: S. 1994”****Questions for Ms. House**

1. At the hearing you testified, “We have specifically put in place working with your offices ... language that would ensure that this is not indeed chilling political speech.”
 - a. To which individuals or groups were you referring when you used the term “we”?

Response: The Lawyers’ Committee for Civil Rights Under Law worked with Common Cause and others to provide guidance to the offices of Senators Schumer, Cardin, and Leahy during the drafting stages of S. 1994, the Deceptive Practices and Voter Intimidation Prevention Act of 2011. These are the groups and individuals I was referring to when I used the word “we” in my testimony.

- b. Please provide copies of all drafts of language that the individuals or groups referenced in your answer to (a) above provided to the offices of any members of the Senate Judiciary Committee.

Response: Please see attachments for the initial drafts of the language now included in Section 3. Prohibition on Deceptive Practices in Federal Elections, of S. 1994.

2. At the hearing, you testified that the bill “ensure[s] that there’s a limitation on the type of speech that we’re actually regulating, which is time, place, manner.”
 - a. To which individuals or groups were you referring when you used the term “we”?

Response: Again, as Public Policy Director at the Lawyers’ Committee for Civil Rights Under Law, my staff and I collaborated with Common Cause and others to provide guidance to the offices of Senators Schumer, Cardin, and Leahy during the drafting stages of S. 1994, the Deceptive Practices and Voter Intimidation Prevention Act of 2011. These are the groups and individuals I was referring to when I used the word “we” in my testimony.

- b. How is possible for a bill that is “actually regulating” a “type of speech” to be a time, place, or manner restriction on speech? Is it not true that S. 1994, in the words of the Supreme Court’s plurality opinion at page 4 in *United States v. Alvarez*, “restricts expression because of its message, its ideas, its subject matter or its content,” and is therefore a conduct-based restriction on speech and not one based on time, place, or manner? If you continue to believe that S. 1994 is a time, place, or manner based restriction on speech, and is not content-based, what case law supports your conclusion?

Response: Respectfully, I believe you have misunderstood my statement. My statement regarding “time, place, and manner” was a reference to the model legislation proposed by the Lawyers’ Committee for Civil Rights and Common Cause, which prohibits materially false speech regarding the time, place, or manner of an election.

- c. If you now conclude that S.1994 in fact is a content-based regulation of speech, and not one that regulates a type of content the Supreme Court has held is permissible under the First Amendment, plurality op. at 5-6, how does S.1994 satisfy the “most exacting scrutiny,” *id.* at 12, that such content-based restrictions of speech must withstand under the First Amendment?

Response: Not all content-based restrictions of speech must satisfy “most exacting scrutiny,” commonly called “strict scrutiny.” In *Alvarez v. United States*, the Supreme Court acknowledged that “Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.” Plurality op. at 7. This strict scrutiny standard only applies to laws, like the Stolen Valor Act, that outlaw false speech “entirely without regard to whether the lie was made for the purpose of material gain.” Plurality op. at 11. As the plurality acknowledges, “[w]here false claims are made to effect a fraud . . . it is well established that the Government may restrict speech without affronting the First Amendment.” *Id.*

Following *Alvarez*, the Fourth Circuit recently upheld a statute that criminalized, without more, “falsely assum[ing] or pretend[ing] to be” a law enforcement officer. *United States v. Chappell*, No. 10-4746, slip op. at 2 (4th Cir. Aug. 14, 2012) (Wilkinson, J.). As the Fourth Circuit explained, “the Supreme Court [in *Alvarez*] distinguished the Stolen Valor Act, which criminalized ‘pure speech,’ from a number of constitutionally permissible statutes that regulate speech in a manner that ‘implicate[s] fraud or speech integral to criminal conduct.’” *Id.* at 13. Such “statutes, *Alvarez* explains, are constitutional because they do more than ‘merely restrict false speech’; they also ‘protect the integrity of Government processes’ and ‘maintain the general good repute and dignity of government service itself.’” *Id.* at 14.

For the same reason, laws like the DPVI that regulate false speech in a more limited context are not subject to strict scrutiny. In addition to a false statement, the DPVI requires the showing of intent to deprive another of the right to vote through a misleading statement of material fact. Under the proposed law, first, the proposed law requires the statement to be *materially* false, that is, it must be either a false endorsement, a false statement regarding the time or place of an election, or a false statement regarding the qualifications for or restrictions on voter eligibility (such as false criminal penalties associated with voting). Second, the statement must be made with knowledge of its falsity. Third, the speaker must intend to mislead voters.

Like the law at issue in *Chappell*, the DPVI “has a plainly legitimate sweep,” *Chappell*, slip op. at 5, serving the nation’s critical interest in free and fair elections. The restriction here “protects the integrity of Government processes” and “maintains the general good repute and dignity of government service itself.” *Alvarez*, plurality op. at 9 (quoting *United States v. Lepowitch*, 318

U.S. 702, 704 (1943)). The law applies only to speech made to mislead voters on material facts and so implicates only unprotected speech. It is therefore not subject to the strict scrutiny standard.

Further, under *Alvarez*, laws restricting false speech irrespective of fraud or other material gain are subject to intermediate, not strict scrutiny. Under *Marks v. United States*, 430 U.S. 188, 193 (1977), “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” Here, two Justices concurred, but on the grounds that the Stolen Valor Act was subject to, and could not withstand, intermediate scrutiny. Concurring op. at 3. The Fourth Circuit in *Chappell* described this as the “controlling concurring opinion.” *Chappell*, slip op. at 16. With the three dissenting Justices who would hold that no protection applied to the Act, this constitutes five Justices who would uphold a law on a showing that it met intermediate, rather than strict scrutiny.

Even if analyzed under strict scrutiny, much less intermediate scrutiny, the law would pass constitutional muster because the government has a compelling interest in protecting the right to vote. In *Burson v. Freeman*, the Court upheld a provision of the Tennessee Code prohibiting the solicitation of votes and the 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. *Id.* It clearly follows from this holding that the state has a compelling interest in protecting the actual act of voting, which S. 1994 is narrowly tailored to protect.

3. At the hearing, you testified that “the Department of Justice has indicated... they support this type of legislation because it would enable them to be very directed in addressing these types of deceptive tactics and fliers.” I have asked the Department of Justice for any public statements it has made in support of S. 1994. On July 2, 2012, the Department provided me a copy of a letter on this subject, issued on that same date, that they had sent to Chairman Leahy.

- a. On what basis were you able to make on June 26, 2012, the statement that “the Department of Justice has indicated ... they support this type of legislation...”?

Response: This was based on statements by the Attorney General during his speech at the LBJ School of Public Policy in December of 2011.

- b. Please provide copies of any documents, communications, or records of conversations that form the basis for your testimony that the Department of Justice had indicated support for legislation similar to S. 1994 prior to July 2, 2012.

Response: Please see the copy of the Attorney General’s speech located at - <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-111213.html>

4. You raised concerns about the inability of federal law to address allegations of so-called deceptive statements in connection with the recent Wisconsin recall election.
- a. If enacted, would S. 1994 cover any conduct by anyone not acting under color of law in connection with a state election in which no federal candidate appeared on the ballot?

Response: No. As federal law, S. 1994 would only apply to elections in which federal candidates are on the ballot.

- b. If not, why would S. 1994 be relevant to such elections?

Response: I cited the Wisconsin recall election on June 5, 2012 to highlight recent examples of deceptive practices in order to demonstrate that this issue is a very real and ongoing problem, and will threaten the integrity of the election results this November. I also chose to focus on the Wisconsin recall to demonstrate that current state and federal laws fail to address deceptive practices. For example, Wisconsin law provides that “[n]o person may personally or through an agent, by abduction, duress, or any fraudulent device or contrivance, impede or prevent the free exercise of the franchise at an election,”¹ but the definition of a “fraudulent device or contrivance” has not been clarified through statutory or case law.² Additionally, Wisconsin law addresses false statements about candidates through a statute prohibiting false representation “pertaining to a candidate or referendum which is intended or tends to affect voting at an election,” but does not address the time, place, and manner of voting.³ Further, no remedy currently exists at the federal level to effectively address deceptive election practices. Passing S. 1994 would be an important step in implementing provisions to combat deceptive practices, and we hope that Congressional action will then influence states to pass similar legislation.

- c. If so, on what basis does Congress have the constitutional authority to regulate conduct by individuals not acting color of law in connection with elections in which only state candidates appear on the ballot, unless the matter involves fraudulent registrations or voting by noncitizens?

Response: Please see response to question 4a.

- d. If so, how do you account for the conclusion to the contrary that is contained on page 7 of the Department of Justice Manual, “Federal Prosecution of Election Offenses”?

Response: Please see response to question 4a.

¹ Wis. STAT. § 12.09 (West, Westlaw through 2011 Act 286, published April 26, 2012).

² COMMON CAUSE & THE LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW, DECEPTIVE ELECTION PRACTICES AND VOTER INTIMIDATION: THE NEED FOR VOTER PROTECTION 19 (2012).

³ Wis. STAT. § 12.05 (West, Westlaw through 2011 Act 286, published April 26, 2012); COMMON CAUSE ET AL., *supra* note 1.

5. According to the Department of Justice Manual, “Federal Prosecution of Election Offenses,” page 36, current federal law, 18 U.S.C. 594 and 42 U.S.C. 1973gg-10(1), already prohibit intimidation of voters in federal (including mixed) elections.
- a. Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

Response: S. 1994 would cover a broader range of deceptive election practices than either 18 U.S.C. 594 and 42 U.S.C.1973gg-10(1). The language of 18 U.S.C. 594 institutes criminal penalties of one year imprisonment, a fine, or both for any person who “intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce” any other person for the purpose of influencing his or her vote for a federal candidate.⁴ As the Department of Justice Manual, “Federal Prosecution of Election Offenses,” notes, the operative words are “intimidates, threatens, or coerces” in this statute.⁵ These words indicate that the statute covers actions that are intended to raise a voter’s fear of loss if he or she does not cast a ballot for the preferred candidate of the perpetrator of the deceptive practice.⁶ Indeed, as the DOJ Manual further highlights, the legislative history of Section 594 indicates that “Congress intended Section 594 to apply when persons were placed in fear of losing something of value for the purpose of extracting involuntary political activities.”⁷ Thus, Section 594 does not cover practices that provide voters with misleading information, such as deceptive flyers or robocalls, because they do not create a fear of loss among voters.

Further, 42 U.S.C. 1973gg-10(1) imposes a penalty of up to five years imprisonment or a fine for any person who “knowingly and willfully intimidates, threatens, or coerces” or attempts to do so, another person for registering to vote, assisting other persons in voting, or exercising his or her right to vote. Again, the language “intimidates, threatens, or coerces” contained within 42 U.S.C. 1973gg-10(1) would apply only to deceptive practices which place direct pressure on a voter, and not deceptive practices which instead spread misleading information.

Instead, S. 1994 contains language that would also encompass misleading practices. Sections 3(a)(2)(A)(ii), 3(a)(3)(A)(ii), and 3(b)(1)(C) directly address misleading practices. Further, the language of Section 3(a)(4), stating that “[n]o person . . . shall corruptly hinder, interfere with, or prevent another person from voting, registering to vote, or aiding another person to vote or register to vote” in a federal election also would cover misleading as well as explicitly coercive deceptive election practices. Without this broad language, perpetrators who spread misleading flyers, organize deceptive robocalls, or otherwise propagate false information about elections will go unpunished, disenfranchising millions of Americans on Election Day.

- b. Overruling the recommendations of career prosecutors, Department of Justice political appointees refused to prosecute members of the New Black Panther Party on charges of voter intimidation in violation of existing federal law. Given that the Department refuses to use the voter

⁴ 18 U.S.C. 594 (West, Westlaw through P.L. 112-139 approved June 27, 2012).

⁵ UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 57 (2007).

⁶ *See id.*

⁷ *Id.* (citing 84 CONG. REC. 9596-611 (1939)).

intimidation statutes already on the books, and has identified no inadequacy in those laws as a purported justification for its failure to bring the prosecution against the New Black Panthers, why should the Department be given new authorities to prosecute voter intimidation?

Response: Congress is charged with supporting the Department of Justice in fulfilling the agency's mission. The deceptive election practices which would be prohibited under S. 1994 will significantly increase the ability of the DOJ to fulfill its mission in assuring the integrity of our elections and prosecute individuals or organizations who seek to undermine the vitality of our democracy.

6. According to the Department of Justice Manual, "Federal Prosecution of Election Offenses," page 38, 18 U.S.C. 241 already permits federal prosecutions of schemes to intimidate voters in federal or mixed elections as well as to jam telephone lines of a political party that were used to get out the vote. The same manual, page 61, states that section 241 applies to "providing false information to the public – or a particular segment of the public – regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct." Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

Response: Section 241 contains several shortcomings that limit its effectiveness in combating deceptive election practices. First, a suit under Section 241 can only be brought if "two or more persons" are engaged in a conspiracy to injure, oppress, threaten, or intimidate" any person in the exercise of their right to vote.⁸ Therefore, Section 241 cannot be used as a tool for prosecuting perpetrators of deceptive practices when there is only sufficient evidence against one individual to bring a case. S. 1994 would allow the prosecution of individuals who have been engaged in a deceptive practice. Additionally, as the Department of Justice Manual notes, not all deceptive practices, including bribery, are covered under the language of Section 241, but would be covered under S. 1994.⁹ Finally, Section 241 does not permit a voter to bring a private cause of action when they feel that their voting rights have been infringed upon by a deceptive practice, which would be implemented in Section 3(b) of S.1994.

7. According to the Department of Justice Manual, "Federal Prosecution of Election Offenses," page 80, 2 U.S.C. 441(h) "prohibits fraudulently representing one's authority to speak for a federal candidate or political party." Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

Response: Section 441(h) of Title 2 of the U.S. Code, although covering statements providing false information about the standpoint of a candidate or political party, does not cover misleading statements about elections, which will be included under S. 1994.

8. S.1994 criminalizes a range of false statements, whether successful in dissuading voters from voting and whether the statements are made in public or in private. In its recent *Alvarez*

⁸ 18 U.S.C. 241 (West, Westlaw through P.L. 112-139 approved June 27, 2012).

⁹ UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 5, at 39.

decision, the plurality opinion stated, at page 11, “Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

Response: The cited statement is not relevant to the constitutionality of S. 1994 because the speech prohibited by the law at issue in *Alvarez* is far different from the speech prohibited by S. 1994, both in substance and effect. “The [Stolen Valor Act] seeks to control and suppress *all* false statements on this one subject in almost limitless times and settings.” Plurality op. at 10-11 (Emphasis added.) As explained above in response to Question 2c, the DPVI is far narrower and captures only unprotected speech. First, the proposed law requires the statement to be *materially* false, that is, it must be either a false endorsement, a false statement regarding the time or place of an election, or a false statement regarding the qualifications for or restrictions on voter eligibility (such as false criminal penalties associated with voting). Second, the statement must be made with knowledge of its falsity. Third, the speaker must intend to mislead voters. And unlike the speech addressed in the Stolen Valor Act, the false statements at issue in S. 1994 will result in an irreparable harm to voters by depriving them of the fundamental right to vote – once the opportunity to cast a ballot is lost due to a false statement, it is lost forever. The harm is equally harmful whether the false statement is made in public or private.

9. S.1994 criminalizes speech that is not made to obtain a financial benefit. In its recent *Alvarez* decision, the plurality opinion stated at page 11, “Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

Response: The cited statement does not render S. 1994 a violation of freedom of speech. The passage does not stand for the proposition that a financial benefit must be realized for false speech to be unconstitutional. Indeed, there are numerous examples of unprotected speech where the harm to be protected against is not financial in nature, many of which were enumerated by the plurality. Some obvious examples include obscenity, defamation, and incitement. *See* plurality op. at 5. The plurality also clearly distinguished between statements effecting fraud and those made to secure moneys, stating clearly that both may be regulated: “Where false claims are made to *effect a fraud or secure moneys* or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment.” Plurality op. at 11 (emphasis added). The Court was simply making the point that there must usually be some cognizable harm for false speech to be prohibited. This is reinforced by the Fourth Circuit’s recent decision in *Chappell*, discussed above in response to Question 2c. In that case, the court upheld a law banning impersonation of police officers that contained no

financial benefit requirement. *See id.*, slip op. at 2-4. In the cited statement, the Court was using the gain of a material advantage as one such example. Clearly, protecting the right to vote is a legitimate goal that the government may legislate to protect. *See Alvarez*, plurality op. at 9 (describing legitimacy of laws that “protect the integrity of Government processes” and that are directed at “maintaining the general good repute and dignity of government service itself”).

10. S.1994 requires no showing of harm before the statements at issue can form the basis for a criminal prosecution. The plurality opinion in *Alvarez*, page 13, stated that “[t]here must be a direct causal link between the restriction imposed and the injury to be prevented.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

Response: The cited statement is from the plurality’s discussion of whether the Stolen Valor Act could withstand strict scrutiny, not whether it was subject to it. Specifically, the Court was explaining the requirement under strict scrutiny that “the Government’s chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest.” Plurality op. at 13. As discussed at length above, particularly in response to Question 2c, the DPVI would not be subject to strict scrutiny, and therefore the cited statement is not applicable.

Moreover, even if strict scrutiny applied (or as is more likely, for the reasons discussed above in response to Question 2c, intermediate scrutiny), there is a direct causal link between the prohibition on deceptive election information contained in DPVI and the injury to be prevented: voters losing the opportunity to vote by innocent reliance on those false communications. There is ample evidence demonstrating this causal link in the findings section of S. 1994 which shows how voters are harmed by false election information.

11. One of the reasons that the Supreme Court struck down the Stolen Valor Act as violative of the First Amendment was an absence of a showing that counter-speech would not work to remedy the false speech at issue in *Alvarez*. The plurality opinion stated at page 15, “The remedy for speech that is false is speech that is true. That is the ordinary course in a free society.” And Justice Breyer in his concurrence, at page 10, expressly agreed with the plurality that “in this area more accurate information will normally counteract the lie.” Why is counter-speech by political opponents of those alleged to have made the false statements at issue in S.1994 not an effective alternative to criminalizing the making of those statements? Are these statements relevant in analyzing the constitutionality of S.1994 on First Amendment grounds?

Response: These statements are not relevant in analyzing the constitutionality of S. 1994 on First Amendment grounds. They were made in the course of the Court’s review of whether the Stolen Valor Act met the requirement of strict scrutiny that the Act be necessary to the government’s stated interest, plurality op. at 15, or the requirement of intermediate scrutiny that the government’s object can be met in a less burdensome way, concurring op. at 8-9. As discussed above in response to Question 2c, the DPVI would not be subject to either.

Further, as explained in *Chappell*, counterspeech is not capable to achieve the Government’s interest in all cases. Slip op. at 15-16. In this area, counter-speech would simply not be

sufficient to counteract the false information; even one citizen not hearing the counterspeech and so attempting to vote a day late would be too many. The plurality in *Alvarez* made clear that “any true holders of the Medal [of Honor] who had heard of Alvarez’s false claims would have been fully vindicated by the community’s expression of outrage.” Plurality op. at 17. Here, any persons misled by the regulated false statements into either casting a vote for the wrong candidate or losing their votes altogether could not be vindicated by any amount of community outrage. As noted in Justice Breyer’s concurrence, “[i]n the political arena a false statement is more likely to make a behavioral difference” Concurring op. at 9. The behavioral difference made by those who hear false claims of military awards is not remotely comparable to those who hear false claims of election dates, polling locations or of fake candidate endorsements.

Further, *post facto* correction alone, though a helpful and necessary countermeasure, is not by itself adequate to counter the invidious harm created by the lie. There is no way to know whether the correction ever reached the voter, and once polls close on Election Day there is nothing that a victim of deceptive election practices can do; that person has lost his or her vote and that loss cannot be recovered or remedied.

12. S.1994 would require the Attorney General, upon receipt of a credible report of the dissemination of certain materially false information, to communicate “accurate” information to “correct” the false information. In *Alvarez*, the plurality opinion stated, pages 16-17, “Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates....Only a weak society needs government protection or intervention before its resolve to preserve the truth.” Do you agree with this statement? To what extent does it bear on the constitutionality of the “corrective action” provisions of S.1994?

Response: These statements are not relevant in analyzing the constitutionality of S. 1994 on First Amendment grounds. They were made in the course of the Court’s review of whether the Stolen Valor Act met the requirement of strict scrutiny that the Act be necessary to the government’s stated interest. Plurality op. at 15. As discussed above in response to Question 2c, the DPVI would not be subject to strict scrutiny.

As to the statement in *Alvarez*, I agree with the first part and disagree with the second part as it relates to the corrective action provision of S. 1994. Empowering the Attorney General to give voters accurate election information does not, in my view, evince the weakness of those voters or of American society.

13. Justice Breyer’s concurrence in *Alvarez* may also bear on the constitutionality of S.1994. He stated at page 3, “[A]s the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby ‘chilling’ a kind of speech that lies at the First Amendment’s heart.” Do you agree? If so, how does his statement relate to S.1994?

Response: I agree with Justice Breyer’s statement. However, the DPVI does not implicate speech regulated by the First Amendment, for the reasons described above in response to

Question 2c. Moreover, the limitations within the DPVI requiring a knowingly false statement made with the intent to abridge the right to vote provide an adequate safeguard against the chilling of true speech.

14. Justice Breyer professed concern in his *Alvarez* concurrence about false statement statutes that gave government the broad power to prosecute falsity without more. He voiced concern on page 5 that such statutes may lead “those who are unpopular [to] fear that the government would use that weapon selectively.” Do you believe that such a concern is applicable to S.1994? If not, why not?

Response: I do not believe that statement applies here. First, the DPVI does not give the government power to prosecute falsity without more. Second, Justice Breyer was discussing laws that criminalize statements “made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm.” Concurring op. at 5. None of these statements apply to the DPVI, that regulates only speech where the speaker “knows such information to be materially false; and . . . has the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election.” S. 1994 at 9.

15. Justice Breyer’s *Alvarez* concurrence noted at page 5 that other false statement statutes “tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to cause harm.” And he added, *id.*, that fraud statutes “typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

Response: These statements do have bearing on the constitutionality of S. 1994, in that the DPVI is a limited statute in the manner described by Justice Breyer, not unlimited in the manner of the Stolen Valor Act. The DPVI limits the scope of its application to contexts in which a tangible harm is especially likely to occur – that is, the loss of the right to vote – and to those lies particularly likely to cause that harm. It does this by requiring materially false statements, that the speaker knows to be materially false, and that are made with the intent to mislead voters or impede another person from exercising the right to vote. The DPVI is therefore narrower on its face than the law upheld by the Fourth Circuit against a challenge based on *Alvarez*. See *Chappell*, slip op. at 2-4. For these reasons, among others, the DPVI is not subject to the same strict scrutiny analysis as the Stolen Valor Act, which is without any comparable limitations.

16. Justice Breyer’s *Alvarez* concurrence, pages 7-8, recognized that when a false statement statute applies only to “knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker, . . . [this] reduc[es] the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

Response: These statements have bearing on the constitutionality of S. 1994, by demonstrating its constitutionality through its distinctions from the Stolen Valor Act. The limitations on S. 1994, far more stringent than those on the Stolen Valor Act, ensure little to no chance that valuable speech is chilled. The DPVI does not “range[] very broadly,” as the Stolen Valor Act did, because it regulates highly specific false factual statements made within a prescribed period of time and with the intent to harm voters and deprive them of their right to vote. For these reasons, among others, the DPVI is not subject to the same strict scrutiny analysis as the Stolen Valor Act.

17. Justice Breyer noted in his *Alvarez* concurrence, page 8, that for false statements prohibited by statutes that apply in the political context, “although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is high.” Additionally, he noted that in applying such statutes in the political context, “there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

Response: If the suggestion is that deceptive election information constitutes “political speech,” these questions have little bearing on the constitutionality of S. 1994. False factual statements made about the time or place of an election or voter qualifications are not, in my view, the kind of “political context” contemplated by the quoted passage. That the false election information simply *relates* to an election is a red herring and does not convert the false election information into “political speech.” Even if considered as being within made within the “political arena,” the DPVI is more than adequately restricted: It requires a speaker to make materially false statements, that the speaker knows to be materially false, and that are made with the intent to mislead voters or impede another person from exercising the right to vote. The Stolen Valor Act had no comparable restrictions, and these restrictions are sufficient safeguard against the potential effects Justice Breyer describes.

18. Justice Breyer stated in his *Alvarez* concurrence, page 9, “In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.” Does this statement have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

Response: This statement has some bearing on the constitutionality of S. 1994, in that it highlights how carefully balanced and therefore constitutionally sound the proposed law is. The false statements regulated by S. 1994 are undeniably likely to make a behavior change by, for example, convincing voters that the Election Day is a Wednesday instead of a Tuesday and therefore permanently depriving them of the right to vote. At the same time, it is carefully limited to false statements of material fact such as time, place, and manner of holding elections

and the endorsement of other figures. The limitations of S. 1994 demonstrate its careful balance of the concerns expressed by Justice Breyer.

19. Section 3(b) of S. 1994 creates a private right of action, which creates a “civil action for preventive relief, including an application in a United States district court for a permanent or temporary injunction, restraining order, or other order.”

- a. Does section 3(b) permit a United States district court that finds that an individual or entity may have committed or may be about to commit a violation of subsections (b)(2), (b)(3), or (b)(4), to issue an order restraining that individual or entity from committing any future violations of those provisions so as to prevent any such future violations? If not, why not?

Response : Section 3(b) of S. 1994 amends 42 U.S.C. § 1971(c). Under current 42 U.S.C. § 1971(c), “the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.” Section 3(b) of S. 1994 neither enlarges nor shrinks the remedies that may be sought from a United States district court, but merely allows a private civil action to seek such an order.

- b. Would such an order constitute a prior restraint on speech? If not, why not?

Response : An order issued under Section 3(b) of S. 1994 through a private civil action implicates the same speech rights as through an action instituted by the Attorney General of the United States, and so such an order is not affected by the amendment cited above.

- c. If so, why would such an order be consistent with the First Amendment guarantee of freedom of speech?

Response : An order issued under Section 3(b) of S. 1994 through a private civil action implicates the same speech rights as those implicated in an action instituted by the Attorney General of the United States, and so such an order not affected by the amendment cited above.

Common Cause/Lawyers' Committee
MODEL DECEPTIVE PRACTICES STATUTE

Section 1. Short title.

This act shall be known and may be cited as the 'Deceptive Practices and Voter Intimidation Prevention Act'

Section 2. Declaration of Policy

The General Assembly finds and declares as follows:

- (1) Deceptive practices, which 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, have been perpetrated in order to suppress voting, intimidate the electorate, and skew election results.
- (2) This type of voter suppression often goes unaddressed by authorities and perpetrators are rarely caught. New technology makes the spread of these false information campaigns particularly widespread and egregious through the use of robocalls, electronic mail, and other new social media such as Facebook, Twitter, and microblog websites.
- (3) The right to vote is a fundamental right and the unimpeded exercise of this right is essential to the functioning of our democracy.
- (4) Those responsible for deceptive practices and similar efforts must be held accountable, and civil and criminal penalties must be available to punish anyone who seeks to keep voters away from the polls by providing false information.
- (5) Moreover, this State's government must take a proactive role in correcting such false information and preserve the integrity of the electoral process, assist voters in exercising their right to vote without confusion and provide correct information.

Section 3. The law is amended to read:

- (1) It shall be unlawful for any person within 90 days before an election:
 - A. Intentionally communicate or cause to be communicated by any means (including written, electronic, or telephonic communications) materially false information regarding the time, place, or manner of an election, or the qualifications for or restrictions on voter eligibility (including any criminal penalties associated with voting, voter registration status or other) for any such election with the intent to prevent a voter from exercising the right to vote in such election, when the person knows such information is false.
 - B. Make to the public, or cause to be made to the public, a materially false statement about an endorsement if such person intends to mislead any voter and knows that the statement is false.
- (2) Immediately after receiving a credible report concerning materially false information described in subsection (1) or is otherwise aware of false information described in subsection (1), the [Attorney General or other chief law enforcement official designated by the Attorney General] shall investigate all claims and [the Attorney General or other chief law enforcement official designee .or Secretary of State] shall undertake all effective measures including where available public service announcements, emergency alert systems, and other forms of public broadcast,

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necessary to provide correct information to voters affected by the deception, and refer the matter to the appropriate federal, state, and local authorities for civil and criminal prosecution.

- a. The Attorney General shall promulgate regulations concerning the methods and means of corrective actions to be taken under paragraph (2).
- b. Such regulations authorized by (2)(a) shall be developed in consultation with civil rights organizations, voting rights groups, State and local election officials, voter protection groups and other interested community organizations.

(3) Definitions

- a. For purposes of this Section, an election is a general, primary, run-off, or special election held for the purpose of nominating or electing a candidate for the federal, state, or local elected office.
- b. For purposes of this Section, a statement about an endorsement is materially false if:
 - i. In an upcoming election, the statement states that a specifically named person, political party, or organization has endorsed the election of a specific candidate for an elected office; and
 - ii. Such person, political party, or organization has not stated that it supports the election of a candidate, or supports the election of another candidate.

(4) CIVIL RIGHT OF ACTION: Any person aggrieved by a violation of this section may institute a civil action or other proper proceeding for preventive relief, including a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. The court, in its discretion, shall have the power to include in its judgment recovery by the party from the defendant of all court costs and reasonable attorney fees incurred in the legal proceeding [as well as punitive damages where consistent with state law].

(5) CRIMINAL PENALTY: Any person who violates paragraph (1) shall be fined not more than [\$100,000], imprisoned not more than 5 years, or both.

Section 4. Reports to State Legislature

- (1) In General, Not later than 90 days after any general election, the Attorney General shall submit to the appropriate committees of the state legislature a report compiling and detailing all allegations of deceptive practices received pursuant to this Act that relate to elections held in the previous two years.
- (2) Contents – In general – each report submitted shall include:
 - a. Descriptions of each allegation of a deceptive practice, including the geographic location and the racial and ethnic composition, as well as language minority group membership, of the persons toward whom the alleged deceptive practice was directed;
 - b. Descriptions of each corrective actions taken in response to such allegations;
 - c. Descriptions of each referrals of such an allegation to other Federal, State, or local agencies;
 - d. Descriptions of any civil litigation instituted in connection with such allegations; and
 - e. Descriptions of any criminal prosecution instituted in connection with the receipt of such allegations.

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- (3) Report Made Public – On the date that the Attorney General submits the report required under this subsection, the Attorney General shall also make the report publicly available through the Internet and other appropriate means.

Section 5. Effective date

This act shall take effect within 90 days of its passage.

Section 6. Severability

If any provision of this Act or any amendment made by this Act, or the application of a provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the amendments made by this Act, and the application of the provisions and amendments to any person or circumstance, shall not be affected by the holding.

FOLLOW UP QUESTION FOR THE RECORD FOR MS. HOUSE FROM SENATOR GRASSLEY

1. I originally asked you a three-part question, number 19, that inquired whether the bill's private right of action permitted a court to issue an order restraining an individual from committing any future violations; whether such an order would constitute a prior restraint on speech; and, if so, whether such an order would be consistent with the First Amendment guarantee of free speech. In each instance, you responded that the Attorney General under current law may bring such an action; that S.1994 simply allows a private civil action to seek such an order in the same fashion as the Attorney General; and therefore, such an order would not be affected by the First Amendment.

Respectfully, your answers did not respond to the questions. Regardless of what remedies the Attorney General may bring under the current statute, does S.1994's private right of action enable a United States District Court to restrain an individual from future statutory violations, would such an order constitute a prior restraint of speech, and, if so, would such an order be consistent with the First Amendment's guarantee of free speech?

Response: To the extent the question is asking whether S.1994 would make injunctive relief available to private plaintiffs pursuant to 42 U.S.C. §1971, the answer is yes, S. 1994 would enable a federal court, in appropriate circumstances, to issue an injunction prohibiting or removing false statements that are in violation of S.1994. Whether or not an injunction would constitute a prior restraint depends on the parameters of the injunction. Based on my understanding of your question, which is asking whether an injunction that by its terms would prohibit "future violations of S. 1994," this would not be considered a prior restraint since S.1994 itself is consistent with the First Amendment's guarantee of free speech.

RESPONSES OF JOHN J. PARK, JR. TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Response of John J. Park Jr. to
 Questions for the Record from Senator Grassley
 Regarding S. 1994

1. At the hearing, Senator Schumer stated to you, “And we’re not disputing that the speech is not truthful. We’re not disputing that it was done maliciously. We’re not disputing that the intent was to prevent people from voting. To me, the distinction, on a constitutional basis, between the direct threat, which we would all agree would be constitutionally – the law going after that would be constitutionally protected and this is not – it’s not a real distinction that makes a difference as the professors used to say at law school.”
 - a. How does the Supreme Court’s recent decision in *United States v. Alvarez* bear on Senator Schumer’s defense of the constitutionality of S.1994 that the statements at issue are not truthful, were done maliciously, and were made with an intent to prevent people from voting?
 - b. In light of *Alvarez*, is there no constitutional distinction between a “direct threat” and the types of statements that would be criminalized by S. 1994?

RESPONSE: The Supreme Court’s recent decision in *United States v. Alvarez* casts doubt on the validity of Senator Schumer’s defense of the constitutionality of S.1994 in several ways. First, six members of the majority of the Court concurred in concluding imposing criminal sanctions for an “intended, undoubted lie,” as the plurality put it (Slip op. at 2), which the Stolen Valor Act prohibited, violated the First Amendment. Those lies were made in an attempt to influence the election process, so Congress does not have carte blanche in that area. For those reasons, the decision reinforces the notion that Congress cannot constitutionally criminalize speech solely because it is untrue. S. 1994 does not do that, but the decision in *Alvarez* is pertinent nonetheless.

More specifically, I note that the plurality would likely see S. 1994 as a content-based regulation of speech. Even with its knowledge and intent elements, such a regulation would be presumed invalid and subjected to strict scrutiny. And, the plurality explained, “[b]efore exempting [another] category of speech from the normal prohibition on content-based restrictions, ... the Court must be presented with ‘persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.’” Slip op. at 10 (Quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. __, __ (2011)(slip op. at 11)). Without such persuasive evidence, the plurality would be unlikely to find S. 1994 constitutional because it would create a new content-based restriction on a category of speech.

Justice Breyer, joined by Justice Kagan, would look at “whether the statute works speech-related harm that is out of proportion to its justifications.” Slip op. at 23 (Breyer, J., concurring in the judgment). He would also likely demand that “substantial public harm be foreseeable or, if not, involve false statements that are very likely to bring about that harm.” *Id.*, at 28 (discussing statutes prohibiting false statements of terrorist attacks). Because of the availability of other statutory tools, to which I pointed in my testimony, and the apparent effectiveness of counter-speech discussed below, it is not clear that S.1994 would satisfy the standard set by Justices Breyer and Kagan.

If anything, *United States v. Alvarez* reinforces the constitutional distinction between a direct threat and the types of statements that would be criminalized by S. 1994. I understand a direct threat to suggest imminent and foreseeable harm to specific individuals. S. 1994 targets statements that are presumed to injure a widespread and diffuse group of victims. The difference between direct threats and the statements targeted by S. 1994 suggests that S.1994’s prohibition is not part of a “long (if heretofore unrecognized) tradition of proscription.”

2. S.1994 criminalizes a range of false statements, whether successful in dissuading voters from voting and whether the statements are made in public or in private. In its recent *Alvarez* decision, the plurality opinion stated, at page 11, “Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

RESPONSE: In its current form, S.1994 represents a new entry in the government’s list of subjects about which false statements are punishable. As the plurality held, the government lacks the power to create such a list. Instead, before such a new entry could be held constitutional, it would have to be shown to be part of “a long (if heretofore unrecognized) tradition of proscription.” *Alvarez*, slip op. at 10.

3. S.1994 criminalizes speech that is not made to obtain a financial benefit. In its recent *Alvarez* decision, the plurality opinion stated at page 11, “Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

RESPONSE: The *Alvarez* plurality's observation that allowing Congress to protect an interest in truthful speech without a showing that untrue speech was used to gain a material advantage would give Congress an "unprecedented" power suggests that S. 1994 in its present form is not constitutional. The advantage that someone speaking in violation of S. 1994 presumptively seeks to gain is akin to the interest in honest governmental services that the Supreme Court addressed in *Skilling v. United States* (2010). There, the Court observed that, in contrast to traditional fraud which involves tangible interests like money or property, the federal honest services statute was being used to protect an intangible interest. The Court limited the scope of that statute to bribery and kickbacks and held that Skilling's conduct was not within the scope of that statute.

In the S. 1994 context, the interest the government seeks to protect is an intangible interest in good campaign practices. As noted in my testimony and my response to other questions, I believe that S. 1994 will have the effect of chilling constitutionally protected speech beginning 90 days before a federal election. In seeking to protect an intangible interest, S. 1994 would give the government, and private parties, a "broad censorial power" the chilling effect of which the First Amendment cannot likely permit.

4. S.1994 requires no showing of harm before the statements at issue can form the basis for a criminal prosecution. The plurality opinion in *Alvarez*, page 13, stated that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

RESPONSE: S.1994 rests on a presumption that there is a causal link between the content-based restrictions on speech that it proposes and the injury to intangible interests it seeks to prevent. The directness of that causal link is subject to doubt. As noted elsewhere in these responses, S. 1994 aims to protect a large group of potential voters without any showing of detrimental individual reliance or individual injury. Without evidence to support reliance and injury, the causal link is necessarily presumed. The *Alvarez* plurality opinion stands for the proposition that, in the First Amendment context, more than a presumptive causal link is required. Justices Breyer and Kagan would also likely look for more than a presumptive causal link in applying their intermediate scrutiny.

5. One of the reasons that the Supreme Court struck down the Stolen Valor Act as violative of the First Amendment was an absence of a showing that counter-speech would not work to remedy the false speech at issue in *Alvarez*. The plurality opinion stated at page 15, "The remedy for speech that is false is speech that is true. That is the ordinary course in a free society." And Justice Breyer in his concurrence, at page 10, expressly agreed with the plurality that "in this area more accurate information will normally counteract the lie." Why is counter-

speech by political opponents of those alleged to have made the false statements at issue in S.1994 not an effective alternative to criminalizing the making of those statements? Are these statements relevant in analyzing the constitutionality of S.1994 on First Amendment grounds?

RESPONSE: In my judgment, the proponents of S. 1994 have not shown that counter-speech is ineffective. Rather, the proponents suggest that they have resorted to counter-speech in response to some of the incidents at issue and have not shown that their efforts were unsuccessful. Given the emphasis that both the plurality and the concurring opinion place on the value of counter-speech, greater proof of its ineffectiveness should be presented, and, in the absence of such proof, there is a significant possibility that the courts might find S. 1994 unconstitutional.

6. S.1994 would require the Attorney General, upon receipt of a credible report of the dissemination of certain materially false information, to communicate “accurate” information to “correct” the false information. In *Alvarez*, the plurality opinion stated, pages 16-17, “Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates....Only a weak society needs government protection or intervention before its resolve to preserve the truth.” Do you agree with this statement? To what extent does it bear on the constitutionality of the “corrective action” provisions of S.1994?

RESPONSE: S. 1994’s requirement that the Attorney General, upon receipt of a credible report that certain materially false information has been disseminated, communicate “accurate” information to “correct” the false information turns the government into a Ministry of Truth. That poses several risks. The Attorney General will have to speak truthfully in order to communicate “accurate” information. If an assertedly untrue statement is one of opinion or pertains to an unsettled question, any “corrective” statement by the government would itself be an expression of opinion or relate to an unsettled question. But, by speaking, the Attorney General would become a truth czar.

Second, what about carelessly made or mistaken statements? If the Attorney General “corrects” those statements, the Ministry of Truth will be ranging widely and be at risk of overreaching.

Third, will S. 1994 require the Attorney General to correct the incorrect portions of statements that are partially true? Finally, if private counter-speech is effective, as it appears to have been, the need for the Attorney General to speak is unclear.

7. Justice Breyer’s concurrence in *Alvarez* may also bear on the constitutionality of S.1994. He stated at page 3, “[A]s the Court has often said, the threat of criminal

prosecution for making a false statement can inhibit the speaker from making true statements, thereby ‘chilling’ a kind of speech that lies at the First Amendment’s heart.” Do you agree? If so, how does his statement relate to S.1994?

RESPONSE: I agree with Justice Breyer’s observation and believe it supports my testimony regarding S. 1994. As he explains, “[G]iven the haziness of individual memory ..., there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to make him liable.” Slip op. at 30 (Breyer, J., concurring in the judgment)(emphasis in original).

In my testimony, I suggested that S. 1994 would likely have a chilling effect on political speech that is at the core of the First Amendment’s protection. Expressions of opinion, statements regarding unsettled issues, and some truthful speech would likely be chilled by S. 1994 in its current form. In addition, because of the ambiguity in some endorsements, claims of endorsement are likely to be chilled. The chilling of protected speech would weigh against a finding that S. 1994 is constitutional.

Justice Breyer does say, “[*Mens rea* requirements [can] provide ‘breathing room’ for more valuable speech by reducing an honest speaker’s fear that he may accidentally incur liability for speaking.” Slip op. at 27 (Breyer, J., concurring in the judgment). As introduced, S. 1994 does include knowledge and intent elements, but the risk of chilling speech remains. As I testified, the Attorney General and the empowered private parties are likely to work backward from statements they see as arguably false to the knowledge and intent elements.

8. Justice Breyer professed concern in his *Alvarez* concurrence about false statement statutes that gave government the broad power to prosecute falsity without more. He voiced concern on page 5 that such statutes may lead “those who are unpopular [to] fear that the government would use that weapon selectively.” Do you believe that such a concern is applicable to S.1994? If not, why not?

RESPONSE: I believe that Justice Breyer’s expression of concern that a governmental power to punish false statements like that contained in S. 1994 might lead to the selective use of that power against those who are unpopular applies to S. 1994. Even though S. 1994 in its current form requires more than falsity standing alone, it still presents a substantial risk that it would be used against those who are unpopular and those on the other side of the political aisle. S. 1994 both empowers the government and creates a private right of action and is likely to lead to governmental actions, lawsuits, or both directed at political opponents during the campaign season. The potential for mischief at a sensitive time cannot be overstated.

9. Justice Breyer's *Alvarez* concurrence noted at page 5 that other false statement statutes "tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to cause harm." And he added, *id.*, that fraud statutes "typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury." Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

RESPONSE: Justice Breyer's statements bear on the constitutionality of S. 1994 as introduced in several ways. First, in contrast to fraud statutes, the statements prohibited by S. 1994 do not have specifically identifiable victims. Rather, a widely broadcast statement like "Democrats vote on Wednesday" presumes that all prospective Democrat voters are injured without necessarily showing detrimental individual reliance or actual harm. Similarly, the provisions dealing with claims of endorsement rest on a presumption that such endorsements are sufficiently significant to voters that a false claim of endorsement produces a general injury without a showing of detrimental individual reliance or actual harm. And, with respect to chilling, a mistaken claim of endorsement could be treated by the government or an opponent as a violation of S. 1994 without a showing of reliance by voters or actual harm.

10. Justice Breyer's *Alvarez* concurrence, pages 7-8, recognized that when a false statement statute applies only to "knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker, ... [this] reduc[es] the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm." Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

RESPONSE: As noted above, even though S. 1994 is more narrowly drafted than the Stolen Valor Act, it is still likely to have a chilling effect on constitutionally protected speech. As introduced, S. 1994 is likely to chill expressions of opinion, statements pertaining to unsettled issues, and truthful statements covering the content identified in S. 1994. Thus, it reaches more broadly than its drafters might expect, and that breadth should be seen to create "a significant risk of First Amendment harm."

11. Justice Breyer noted in his *Alvarez* concurrence, page 8, that for false statements prohibited by statutes that apply in the political context, "although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is high." Additionally, he noted that in applying such statutes in the political context, "there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted*

for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

RESPONSE: The statements by Justice Breyer noted above bear on the constitutionality of S. 1994 as introduced because that bill prohibits certain content-based political speech in the 90 days before a federal election. The first statement above suggests that he sees the risk of censorious prosecutorial behavior to be greater than the recognized harm that flows from untrue political speech. The second statement, which relates to the chilling effect of a content-based restriction on speech, also applies to S. 1994 as I have noted. A careless false statement can become the basis for governmental or private action when it concerns a subject area covered by S. 1994. As I suggested in my testimony, if the Attorney General or a private litigant views the statement as false, they are likely to work backward to knowledge and intent.

12. Justice Breyer stated in his *Alvarez* concurrence, page 9, “In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.” Does this statement have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

RESPONSE: Justice Breyer’s statement on page 9 of his *Alvarez* concurrence bears on the constitutionality of S. 1994 as introduced. Action by the Attorney General or by a private party that is empowered to file suit will necessarily take place within 90 days of an election and may have an effect on the outcome. If wrongly directed, such governmental or private legal action will be difficult and time-consuming to undo. In contrast, the false statement by a candidate or speaker can be met with counter-speech and the falsehood defused as it was in *Alvarez*. Congress should take the Court’s view of the value of counter-speech into account before taking further action on S. 1994.

13. Section 3(b) of S.1994 creates a private right of action, which creates a “civil action for preventive relief, including an application in a United States district court for a permanent or temporary injunction, restraining order, or other order.”
- a. Does section 3(b) permit a United States district court that finds that an individual or entity may have committed or may be about to commit a violation of subsections (b)(2), (b)(3), or (b)(4), to issue an order restraining that individual or entity from committing any future

violations of those provisions so as to prevent any such future violations? If not, why not?

- b. Would such an order constitute a prior restraint on speech? If not, why not?
- c. If so, why would such an order be consistent with the First Amendment guarantee of freedom of speech?

RESPONSE: In my judgment, subsections (b)(2), (b)(3), or (B)(4) of S. 1994 can be read to authorize an action seeking to stop a future violation of those provisions. Such an order would operate as an unconstitutional prior restraint on political speech. For that reason, I do not think a district court would be likely to enter such an order unless already presented with evidence of a violation. In that case, the order might bar future statements of that nature.

RESPONSES OF JENNY FLANAGAN TO QUESTIONS SUBMITTED BY SENATORS LEAHY AND GRASSLEY

**Responses for the Record from Ms. Jenny Rose Flanagan
Chairman Patrick Leahy
“Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections:
S.1994”
June 26, 2012**

Ms. Jenny Rose Flanagan – Common Cause

1. In recent years we have seen hundreds of voter ID bills introduced in state legislatures around the country in an effort to combat the same alleged voter fraud the Bush Justice Department could not find.

A. Is the need for the Deceptive Practices and Voter Intimidation Prevention Act based on assertions or on real documented attempts to infringe American’s right to vote?

1. RESPONSE: The need for the Deceptive Practices and Voter Intimidation Prevention Act is based on real, documented attempts to infringe on the rights of everyday Americans to vote. The recently published joint report by Common Cause and the Lawyers’ Committee for Civil Rights Under Law, *Deceptive Election Practices and Voter Intimidation* details numerous, documented attempts to infringe on the right to vote. Scores of calls come in to the Election Protection hotline with attempts to confuse voters about their rights. The full report can be found at:

http://www.commoncause.org/research-reports/National_070612_Deceptive_Practices_and_Voter_Intimidation.pdf

B. How would this legislation lead to proactive efforts that protect the vote?

1. RESPONSE: This legislation includes a critical component: corrective action. It requires the Attorney General to, pursuant to written procedures, communicate to the public, by any means (including written, electronic, telephonic communications) accurate information designed to correct materially false information when the Attorney General receives credible reports about deceptive practices and the State and local elections officials’ responses are inadequate. Pursuant to the statute, in formulating written procedures, the Attorney General must consult with the Election Assistance Commission, State and local election officials, civil rights organizations, voting rights groups, voter protection groups and other interested community organizations. It also requires the Attorney General to submit a report to Congress compiling all deceptive practices allegations. These are concrete examples of how this legislation will lead to proactive efforts to protect the vote.

C. In your opinion, how would this bill help us better respond to deceptive practices in the future?

I. RESPONSE: This legislation not only requires immediate corrective action to minimize the impact of deceptive voting practices, but also requires the Attorney General to take a hard look at deceptive practices, study how they are perpetrated, and formulate channels through which to issue corrective action for future elections. It also will also serve to deter some actors by strengthening penalties and clarifying the law. Importantly, S1994 will set up systems that states can look to in their efforts to combat these nefarious acts of voter suppression. The components of this legislation working in combination will put voters in a much better position to know their rights and responsibilities concerning voting than they are in now.

JENNY FLANAGAN'S RESPONSES TO QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY

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

United States Senate Committee on the Judiciary

1. You raised concerns about the inability of federal law to address allegations of so-called deceptive statements in connection with the recent Wisconsin recall election.
 - a. If enacted, would S. 1994 cover any conduct by anyone not acting under color of law in connection with a state election in which no federal candidate appeared on the ballot?
 - a. RESPONSE: S. 1994, as currently drafted, applies to elections in which federal candidates appear.
 - b. If not, why would S. 1994 be relevant to such elections?
 - a. RESPONSE: S. 1994 is plainly relevant to elections in which no federal candidates appear. It will, among other things, require the Attorney General to publish written procedures and standards for determining when and how corrective action will be taken in the wake of deceptive election practices that may be used by other jurisdictions formulating similar programs. Such written procedures and standards, including consultations with the Election Assistance Commission, State and local election officials, civil rights organizations, voting rights groups, voter protection groups, and other interested community organizations – as is mandated by Section 4(b) of S. 1994 – will be relevant to addressing deceptive practices in non-federal elections. S. 1994 is also relevant to non-federal state elections because it requires the Attorney General to submit a public report to Congress on deceptive practices after each election. Compiling such a report will assist local and state authorities combat deceptive practices that appear in non-federal elections, because they will have a broader perspective on the types of deceptive election practices that perpetrators deploy.
 - c. If so, on what basis does Congress have the constitutional authority to regulate conduct by individuals not acting color of law in connection with elections in which only state candidates appear on the ballot, unless the matter involves fraudulent registrations or voting by noncitizens?
no answer
 - d. If so, how do you account for the conclusion to the contrary that is contained on page 7 of the Department of Justice Manual, “Federal Prosecution of Election Offenses”? no answer
2. According to the Department of Justice Manual, “Federal Prosecution of Election Offenses,” page 36, current federal law, 18 U.S.C. 594 and 42 U.S.C. 1973gg-10(1), already prohibit intimidation of voters in federal (including mixed) elections.

- a. Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?
- a. RESPONSE: S. 1994 clarifies federal law with respect to communication of information that is knowingly materially false about the time or place of holding a federal election or the qualifications or restrictions on voter eligibility for any such election, with the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election. It also strengthens penalties for those that seek to interfere with the right to vote. Moreover, it mandates certain corrective action mechanisms that the Attorney General will undertake to respond to deceptive election practices, create written procedures and standards for taking corrective action, and within 180 days after a general election, submit a report to Congress compiling all allegations received by the Attorney General of deceptive election practices.
- b. Overruling the recommendations of career prosecutors, Department of Justice political appointees refused to prosecute members of the New Black Panther Party on charges of voter intimidation in violation of existing federal law. Given that the Department refuses to use the voter intimidation statutes already on the books, and has identified no inadequacy in those laws as a purported justification for its failure to bring the prosecution against the New Black Panthers, why should the Department be given new authorities to prosecute voter intimidation?
- a. RESPONSE: For the reasons discussed in my answer to Question 2(a), the Department of Justice should be required to take corrective action in the wake of deceptive election practices, author written procedures and standards for taking corrective action, and report to Congress after each election with a compilation of allegations of deceptive election practices. It also addresses the communication of knowingly false material information about voting with the intent to mislead, impede, hinder, discourage, or prevent persons from exercising the right to vote.
3. According to the Department of Justice Manual, "Federal Prosecution of Election Offenses," page 38, 18 U.S.C. 241 already permits federal prosecutions of schemes to intimidate voters in federal or mixed elections as well as to jam telephone lines of a political party that were used to get out the vote. The same manual, page 61, states that section 241 applies to "providing false information to the public – or a particular segment of the public – regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct." Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?
- a. RESPONSE: S. 1994 clarifies federal law with respect to communication of information that is knowingly materially false about the time or place of holding a federal election or the qualifications or restrictions on voter eligibility for any such election, with the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election. It also strengthens penalties for those that seek to interfere with the right to vote. Moreover, it mandates certain corrective action mechanisms that the Attorney General will undertake to respond to deceptive election practices, create written procedures and standards for taking corrective action, and within

180 days after a general election, submit a report to Congress compiling all allegations received by the Attorney General of deceptive election practices.

4. According to the Department of Justice Manual, "Federal Prosecution of Election Offenses," page 80, 2 U.S.C. 441(h) "prohibits fraudulently representing one's authority to speak for a federal candidate or political party." Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

RESPONSE: S. 1994 clarifies federal law with respect to communication of information that is knowingly materially false about the time or place of holding a federal election or the qualifications or restrictions on voter eligibility for any such election, with the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election. It also strengthens penalties for those that seek to interfere with the right to vote. Moreover, it mandates certain corrective action mechanisms that the Attorney General will undertake to respond to deceptive election practices, create written procedures and standards for taking corrective action, and within 180 days after a general election, submit a report to Congress compiling all allegations received by the Attorney General of deceptive election practices.

5. S.1994 criminalizes a range of false statements, whether successful in dissuading voters from voting and whether the statements are made in public or in private. In its recent *Alvarez* decision, the plurality opinion stated, at page 11, "Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

- a. RESPONSE: To no extent does this statement render S. 1994 in its current form a "violation of the freedom of speech protected by the First Amendment." The very same paragraph cited in this question from *Alvarez* says that "[w]here false claims are made to effect a fraud ... it is well established that the Government may restrict speech *without affronting the First Amendment.*" *United States v. Alvarez*, 567 U.S. ___, slip op. at 11 (2012) (emphasis added). The plurality also held that "falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." *Id.*, slip op. at 7. S. 1994, unlike the statute at issue in *Alvarez*, prohibits the communication of specific information if a person *knows* such information is *materially false* and has the *intent* to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote. The information must be regarding the time or place of holding an election or the qualifications for or restrictions on voter eligibility. Thus, S. 1994 comports with the First Amendment, because it includes false claims that are made to effect a fraud, and because falsity alone is not required. It requires a *knowing* falsehood about materially false information with specific intent.

6. S.1994 criminalizes speech that is not made to obtain a financial benefit. In its recent *Alvarez* decision, the plurality opinion stated at page 11, "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the

exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

- a. RESPONSE: To no extent does this statement render S. 1994 in its current form a “violation of the freedom of speech protected by the First Amendment.” S. 1994 is not justified by the government’s interest in truthful disclosure alone. It is justified by the government’s interest in protecting the right to vote. The very same paragraph cited in this question from *Alvarez* says that “[w]here false claims are made to effect a fraud ... it is well established that the Government may restrict speech *without affronting the First Amendment.*” *United States v. Alvarez*, 567 U.S. ___, slip op. at 11 (2012) (emphasis added). The plurality also held that “falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.” *Id.*, slip op. at 7. S. 1994, unlike the statute at issue in *Alvarez*, prohibits the communication of specific information if a person *knows* such information is *materially false* and has the *intent* to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote. The information must be regarding the time or place of holding an election or the qualifications for or restrictions on voter eligibility. Thus, S. 1994 comports with the First Amendment, because it includes false claims that are made to effect a fraud, and because falsity alone is not required. It requires a knowing falsehood.
7. S.1994 requires no showing of harm before the statements at issue can form the basis for a criminal prosecution. The plurality opinion in *Alvarez*, page 13, stated that “[t]here must be a direct causal link between the restriction imposed and the injury to be prevented.” To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?
 - a. RESPONSE: To no extent does this statement render S. 1994 a “violation of the freedom of speech protected by the First Amendment.” In accordance with *Alvarez*, there is a direct causal link between the restrictions imposed (on the knowing communication of materially false information concerning the time or place of holding an election or the qualifications for or restrictions on voter eligibility) with the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote).
 8. One of the reasons that the Supreme Court struck down the Stolen Valor Act as violative of the First Amendment was an absence of a showing that counter-speech would not work to remedy the false speech at issue in *Alvarez*. The plurality opinion stated at page 15, “The remedy for speech that is false is speech that is true. That is the ordinary course in a free society.” And Justice Breyer in his concurrence, at page 10, expressly agreed with the plurality that “in this area more accurate information will normally counteract the lie.” Why is counter-speech by political opponents of those alleged to have made the false statements at issue in S.1994 not an effective alternative to criminalizing the making of those statements? Are these statements relevant in analyzing the constitutionality of S.1994 on First Amendment grounds?
 - a. RESPONSE: S. 1994 will lead to the dissemination of speech that is true, and will provide more accurate information to counteract a lie. Counter-speech by political opponents of

those alleged to have made false statements *alone* is inadequate. Deceptive election practices often impersonate official government officials. S. 1994 would install a process by which the Department of Justice would issue corrective action and establish procedures for corrective actions. Moreover, S. 1994 does not merely remedy “speech that is false,” it remedies attempts to use fraud to prevent and impede people from exercising their right to vote. “Speech that is true” fails to fully remedy the scope of the harm in this case. Corrective procedures, reports to Congress, and an official response are necessary to remedy the harm. Moreover, those affected by deceptive election practices alone are often not in the best position to provide “counter-speech” correcting false information. S. 1994 would mandate DOJ procedures to provide the adequate “counter-speech.”

9. S.1994 would require the Attorney General, upon receipt of a credible report of the dissemination of certain materially false information, to communicate “accurate” information to “correct” the false information. In *Alvarez*, the plurality opinion stated, pages 16-17, “Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates....Only a weak society needs government protection or intervention before its resolve to preserve the truth.” Do you agree with this statement? To what extent does it bear on the constitutionality of the “corrective action” provisions of S.1994?
 - a. RESPONSE: When perpetrators knowingly and intentionally impersonate government officials, or otherwise act on their own behalf, by utilizing materially false information to confuse voters about the place and manner of voting, or qualifications for voting, the government should respond. Deceptive election practices *prohibit* society from engaging in the civic duty of open, dynamic, rational discourse as expressed at the ballot box and in our political campaigns. The act of an Attorney General communicating correct information upon receipt of credible reports of the dissemination of materially false information does not in any way render our society “weak” and “in need of government protection.” It is in keeping with our highest American values. It bears in favor of the constitutionality of S. 1994.
10. Justice Breyer’s concurrence in *Alvarez* may also bear on the constitutionality of S.1994. He stated at page 3, “[A]s the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby ‘chilling’ a kind of speech that lies at the First Amendment’s heart.” Do you agree? If so, how does his statement relate to S.1994?
 - a. RESPONSE: This relates to S. 1994 only to the extent to which this legislation prohibits the communication of information that a speaker knows is materially false, when the speaker intends to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote. The materially false information must be regarding the time or place of holding an election or the qualifications for voting. The threat of criminal prosecution for *materially false statements* about the process of voting – with the requirements of *knowledge, materiality, and intent* – should not chill true speech that lies at the heart of the First Amendment. S. 1994 is not merely about false statements in general, nor even about politics. S. 1994 is about protecting voters from deliberate misinformation campaigns that intend to confuse voters about the requirements and process of voting.
11. Justice Breyer professed concern in his *Alvarez* concurrence about false statement statutes that gave government the broad power to prosecute falsity without more. He voiced concern on page 5

that such statutes may lead “those who are unpopular [to] fear that the government would use that weapon selectively.” Do you believe that such a concern is applicable to S.1994? If not, why not?

- a. RESPONSE: It is not applicable to S. 1994, because this legislation does not give government the broad power to prosecute falsity “without more.” S. 1994 gives the government a rather narrow power to prosecute false statements – those that seek to knowingly use materially false lies - intentionally – to mislead voters or impede them from exercising their right to vote based on specific information that is further defined by the legislation, including the time or place of holding an election or the qualifications for voting.

12. Justice Breyer’s *Alvarez* concurrence noted at page 5 that other false statement statutes “tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to cause harm.” And he added, *id.*, that fraud statutes “typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

- a. RESPONSE: Yes. These statements have a bearing on the constitutionality of S. 1994 as introduced and counsel in its favor. S. 1994 specifies that the lies be made in contexts in which a tangible harm is especially likely to occur. In this case, voting. It requires materiality; it requires intent; it requires a knowing *mens rea*.

13. Justice Breyer’s *Alvarez* concurrence, pages 7-8, recognized that when a false statement statute applies only to “knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker, ... [this] reduc[es] the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

- a. RESPONSE: Yes. These statements have a bearing on the constitutionality of S. 1994 as introduced and counsel in its favor. S. 1994 is about knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker, and thus reduces the risk that valuable speech is chilled.

14. Justice Breyer noted in his *Alvarez* concurrence, page 8, that for false statements prohibited by statutes that apply in the political context, “although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is high.” Additionally, he noted that in applying such statutes in the political context, “there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like.” Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

- a. RESPONSE: Yes, these statements have a bearing on the constitutionality of S. 1994 and counsel in its favor. S. 1994 is about intentionally lying to voters with information that one

knows is materially false to impede their *right to vote* because the statements involve the *time or place of voting* or the *qualifications* of voting. These are different than statements about the substance of politics or “bar stool braggadocio” – these are lies about the right to vote.

15. Justice Breyer stated in his *Alvarez* concurrence, page 9, “In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.” Does this statement have any bearing on the constitutionality of S.1994 as introduced? If not, why not?
 - a. RESPONSE: No, this statement does not bear on the constitutionality of S. 1994, because S. 1994 is not aimed at the political arena of ideas, but at the criminal arena that seeks to prevent citizens from exercising their right to vote.

16. Section 3(b) of S.1994 creates a private right of action, which creates a “civil action for preventive relief, including an application in a United States district court for a permanent or temporary injunction, restraining order, or other order.”
 - a. Does section 3(b) permit a United States district court that finds that an individual or entity may have committed or may be about to commit a violation of subsections (b)(2), (b)(3), or (b)(4), to issue an order restraining that individual or entity from committing any future violations of those provisions so as to prevent any such future violations? If not, why not?
 - a. RESPONSE: Yes, section 3(b) grants the court the power to issue restraining orders.
 - b. Would such an order constitute a prior restraint on speech? If not, why not?
 - a. RESPONSE: Such an order would prohibit someone from engaging in the communication of knowingly materially false information when the speaker intends to mislead voters or impede, hinder, discourage, or prevent voters from exercising their right to vote.
 - c. If so, why would such an order be consistent with the First Amendment guarantee of freedom of speech?
 - a. RESPONSE: This comports with the First Amendment because the Supreme Court has long held that the scope of the Amendment is not absolute. Content-based laws concerning imminent lawless action; obscenity; speech integral to criminal conduct; so-called fighting words; and grave & imminent threats are all consistent with the First Amendment. As the plurality of the Court held in *Alvarez* on page 7 of its slip opinion, “falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.” Here, S. 1994 deals squarely with *knowing* falsehoods and for the other reasons discussed above, and in the record, comports with the First Amendment.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD FROM SENATOR
GRASSLEY FOR MS. FLANAGAN

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

1. In your answer to a previous question for the record, you contended that page 11 of the Alvarez plurality opinion supported your view that S.1994 would be constitutional on the ground that government can suppress “fraud.” While government can indeed target fraud, the speech at issue does not fall within that category. The plurality opinion on p. 11, found constitutionally problematic with the Stolen Valor Act the same point that applies to S.1994: its applicability “without regard to whether the lie was made for personal gain.” As the Court plurality at page 11 stated and I quoted in my earlier question to you, “Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a *material advantage*, it would give the government a broad censorial power unprecedented in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom” (emphasis added). In your earlier answer, you contended that the plurality opinion raised no issues for S.1994 because the bill requires that the information be “materially false.” But the plurality found that the Stolen Valor Act was unconstitutional not because the speech might not be *material* in the sense of being relevant to the listener, as you suggested, but because the speaker was not making the statement for his own *material advantage*, *i.e.*, financial gain. Does not S.1994 suffer from the same constitutional defect as the Stolen Valor Act in that it punishes a new category of false speech and unconstitutionally chills speech because it targets speech not made to “gain a material advantage” and “without regard to whether the lie was made for personal gain”?
 - a. **RESPONSE:** S. 1994 (112th Congress) does not suffer from the same constitutional defect as the Stolen Valor Act. “Personal gain” and “material advantage” are not dispositive. The Alvarez plurality recognized that “[e]ven when considering some instances of defamation and fraud, the United States Supreme Court has been careful to instruct that falsity alone may not suffice to bring speech outside the First Amendment. **The statements must be a knowing or reckless falsehood.**” United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) (emphasis added). S. 1994 clarifies federal law, and consistent with First Amendment jurisprudence, including Alvarez, requires the speech to be knowingly made and materially false.
2. With respect to your position that S. 1994 can be constitutionally justified as an anti-fraud measure, Justice Breyer’s concurrence in Alvarez stated that fraud statutes “typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.” How is S. 1994 based not on mere

supposition, but requires proof that a victim relied on a misrepresentation and that such reliance caused actual injury of the kind the Alvarez Court demanded?

- a. **RESPONSE:** The Alvarez Court made no such demand of post-hoc injury. Moreover, Justice Breyer's concurrence recognizes the constitutionality of prohibiting false statements where "someone was deceived into following a 'course of action he would not have pursued but for the deceitful conduct,'" such as statutes forbidding impersonation of public officials. Alvarez, 132 S. Ct. at 2554 (Breyer, J., concurring) (internal citation omitted).
3. As I noted in my earlier question, the plurality, at page 11, concluded that allowing criminalization of false statements that were not within a traditionally proscribed category of speech "would endorse government authority to compile a list about which false statements are punishable." The Court did not uphold the Stolen Valor Act as prohibiting such a traditionally proscribed category of speech, even though the misrepresentation made in that case occurred in an effort to affect the outcome of an election. Is it not the case that the speech that would be proscribed by S.1994 would represent an unprecedented content-based restriction and thus would fail the strict scrutiny that such novel content-based speech restrictions would face under the plurality's analysis?
 - a. **RESPONSE:** No. It is my opinion that S. 1994 would survive strict scrutiny and is consistent with Alvarez. In accordance with the decision, S. 1994 provides a direct causal link between the restrictions imposed (on the knowing communication of materially false information concerning the time or place of holding an election or the qualifications for or restrictions on voter eligibility) with the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote). There is nothing "novel" about regulating speech related to fraud or integral to criminal conduct, particularly when such speech "undermines the function and province of the law and threatens the integrity" of our democratic form of government. See Alvarez, 132 S. Ct. at 2540.
 4. In your answer to a previous question for the record, you argued that S. 1994's prohibition on false statements was constitutional under Alvarez because the bill requires the speaker to know of the statement's falsity and to "ha[ve] the *intent* to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote." But as I asked you to comment on earlier, the concurrence stated at pages 7-8 that even though a statute's applicability only to "knowing and intentional acts of deception" "reduc[es] the risk that valuable speech is chilled... it still ranges broadly. And that breadth means that it creates a significant risk of First Amendment harm." Nonetheless, your answer to my earlier question did not address the applicability of that statement from the concurring opinion to S.1994. Please address whether this statement means that S.1994 "creates a significant risk of First Amendment harm" despite the bill's intent requirement.

- a. **RESPONSE:** For the reasons discussed in my response to Question 3, the statement from Justice Breyer’s concurrence does not mean that S. 1994 creates a significant risk of First Amendment harm.
5. Earlier, I asked you to address the applicability of the following statement from page 13 of the Alvarez plurality to the constitutionality of S.1994: “There must be a direct causal link between the restriction imposed and the injury to be prevented.” You responded that the bill’s restriction of a false statement was directly connected to “the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote).” But your discussion of the supposed injury to be prevented is not an injury at all. Rather, it repeats the bill’s standard of intent of the speaker who made the false statement. As noted above, the Court stated that the injury to be prevented is the material gain of the speaker. How are the restrictions on false statements in S. 1994 connected to the material gain of the speaker?
- a. **RESPONSE:** Material gain is not dispositive of S. 1994’s constitutionality. See, for example, Alvarez, 132 S. Ct. at 2544 (outlining content-based restrictions on speech with no requirement of material gain such as speech “to incite imminent lawless action”; “obscenity”; “defamation”; and “speech integral to criminal conduct”). Deceptive voter practices are intended to prevent people from exercising their right to vote, thereby skewing election results and undermining the legitimacy of our democratic processes.
6. As noted, the plurality at page 15 and the concurrence at page 10 found First Amendment violations with the Stolen Valor Act because there was no showing that counter-speech would not work to remedy the false speech at issue in Alvarez. What factual support that would satisfy the strict scrutiny test applied by the plurality or intermediate scrutiny of the concurrence can you offer for your statements that in the context of S.1994, “[c]ounter-speech by political opponents of those alleged to have made false statements *alone* is inadequate” and that “[s]peech that is true” fails to fully remedy the scope of the harm in this case”?
- a. **RESPONSE:** For factual support, please see the following reports, *Deceptive Election Practices and Voter Intimidation: The Need for Voter Protection* and *Deceptive Practices 2.0*. [Links provided on CONTENTS page.] Both reports provide numerous examples of deceptive practices that would be better addressed with comprehensive legislation such as S. 1994.
7. You stated that the government should respond when individuals utilize false information to confuse voters about the place, manner, or qualifications of voting. You state that the “Attorney General communicating correct information” “is in keeping with our highest American values.” How do you square that point of view with the position of the Alvarez plurality, at page 11, that “Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth”? What if

the statement is made honestly in error or was in fact true even if that were not known to the Attorney General or to the private party that sought such corrective speech?

- a. **RESPONSE:** Our constitutional tradition stands against deliberate attempts to deprive or impede eligible Americans from exercising their right to vote.

If someone lies about the time or place of holding an election, or the qualifications of voting, then disseminating truthful information in the lie's wake is not an illegitimate, Orwellian exercise of power. Rather, providing truthful information about voting is in keeping with bedrock democratic values of civic participation.

It would be bizarre, indeed, if correcting lies about the time or place of an election led to hyperbolic accusations of installing Oceana's Ministry of Truth.

If a statement is "honestly" made in error or is "in fact true," then the statement not be made with an intent to mislead voters or materially false, respectively, as required by S. 1994.

8. Earlier, you argued that counter-speech was ineffective in combating certain forms of deceptive political speech, and was a justification for the Department of Justice to provide some official "corrective action" against such speech. You wrote, "Counter-speech by political opponents of those alleged to have made false statements *alone* is inadequate. Deceptive election practices often impersonate official government officials [sic]."
- a. Are S. 1994's content-based speech restrictions limited only to deceptive practices in which an individual impersonates a government official?
- a. **RESPONSE:** No.
- b. Is it not the case that S. 1994 applies to individuals who are not government officials and do not hold themselves out to be government officials, as well as to endorsements other than from government officials?
- a. **RESPONSE:** Yes.
- c. How do you reconcile your justification of S. 1994 on grounds of impersonation of government officials with this statement from page 6 of the Alvarez concurrence (citation and quotations omitted): "Statutes forbidding impersonation of a public official typically focus on *acts* of impersonation, not mere speech, and may require a showing that, for

example, someone was deceived into following a course of action he would not have pursued but for the deceitful conduct”?

- a. **RESPONSE:** Deceptive practices sometimes focus on acts of impersonation, not mere speech, and may deceive voters into following a course of action – for example, voting on the wrong day or driving to the wrong polling place – that the voter would not have pursued but for the act of impersonation. For example, sometimes deceptive practices take the form of phony mailings or phony memos using the official seal of a state government or agency, falsely informing voters of Election Day, or warning voters that they may not be registered to vote. These are acts of impersonation and would be covered by S. 1994.
9. You dismissed the fear expressed at page 3 of the concurring opinion that “the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby ‘chilling’ a kind of speech that lies at the First Amendment’s heart.” You claimed that under S. 1994, the elements of knowledge, materiality, and intent “should not chill true speech.” Justice Breyer, however, wrote at page 8 of his concurring opinion, “[G]iven the haziness of individual memory..., there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to make him liable.” What basis do you have for disagreeing with the Supreme Court’s view that prosecutions of false statements, even when intent is required, will produce a chilling effect? Would not speakers fear that they might misspeak and be prosecuted for violating S. 1994, even if an actual conviction could not be obtained, despite their lack of intent?
 - a. **RESPONSE:** It is my opinion that S. 1994 will not chill genuine political speech, because S. 1994 is not about false statements in general, nor even about politics and policy. S. 1994 is about protecting voters from deliberate misinformation campaigns that intend to confuse voters about the requirements and process of voting.
 10. S. 1994 applies to core political speech related to election for office in the period preceding an election. A person who would violate S. 1994 would be subject to prosecution for making false statements about politics, which is, as the concurrence said in Alvarez at page 3, “a kind of speech that lies at the First Amendment’s heart.” On what basis do you rest your earlier response that “S. 1994 is not merely about false statements in general, nor even about politics. S. 1994 is about protecting voters from deliberate misinformation campaigns that intend to confuse voters about the requirements and process of voting”?

- a. **RESPONSE:** I based my response on the text of S. 1994. The bill would prohibit false statements about information s/he knows to be materially false and has the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote. The information must be about the time or place of holding certain elections or the qualifications for or restrictions on voter eligibility for certain elections or in other circumstances information concerning public endorsements.

11. Justice Breyer's concurrence, at pages 7-8, wrote that when a false statement statute applies only to "knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker... [this] reduc[es] the risk that valuable speech is chilled. But it still ranges very *broadly*. And that *breadth* means that it creates a significant risk of First Amendment harm" (emphasis added).

- (a) In response to my previous question, you said that "S. 1994 gives the government a rather *narrow* power to prosecute false statements," (emphasis added), and referred to intentionally false statements. How do you square that characterization with the belief stated in the concurrence that even false statement statutes limited to knowing and intentional acts of deception within the knowledge of the speaker "range very broadly[,] and that breadth means that it creates a significant risk of First Amendment harm"?

- a. **RESPONSE:** Justice Breyer "concede[s] that many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful. Those prohibitions ... tend to be narrower than the statute before us, in that they limit the scope of their application ... sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm. *Alvarez*, 132 S. Ct. at 2554-55 (Breyer, J., concurring). Unlike the Stolen Valor Act, S. 1994 is far narrower because the bill provides a direct causal link between the restrictions imposed (on the knowing communication of materially false information concerning the time or place of holding an election or the qualifications for or restrictions on voter eligibility) with the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote).

- (b) When I asked you earlier about this statement, you replied that S. 1994's limitations to knowing and intentional acts of deception about readily verifiable facts meant that the bill raised no free speech concerns. How do you reconcile that statement with the language of the concurrence quoted above?

- a. **RESPONSE:** S. 1994 is not nearly as broad as the statute at issue in *Alvarez*; it is a far narrower statute and does not raise the "breadth" concerns of Justice Breyer's concurrence.

12. In your earlier responses, you wrote that S. 1994 did not raise any concerns of selective enforcement. You relied on the bill's requirements of knowledge and intent to support your conclusion. However, Justice Breyer's concurrence, page 5, raised concerns that a false statement statute concerning political speech, even with knowledge and intent requirements, may lead "those who are unpopular [to] fear that the government would use that weapon selectively," and on page 8, that "a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to make him liable" (emphasis in original). Given the political advantage that would be available to a prosecutor to bring charges of violation of S.1994 against his opponent, whether or not well-founded, and the ability of private parties to bring lawsuits in the period immediately before the election against candidates with whom they disagreed, how does S.1994 withstand Justice Breyer's constitutional concerns of "censorious selectivity by prosecutors"?
- a. **RESPONSE:** Speculation about an overzealous prosecutor could be cited to defeat passage of a whole host of bills. Fortunately, for the reasons discussed in my oral testimony, in my previous answers to questions for the record, and in these questions for the record, S. 1994 is narrowly tailored to address intentional efforts to disseminate materially false information about the process of voting and, in my view, comports with the First Amendment.
13. In responding to Justice Breyer's concern expressed at page 8 of his concurrence that a false statement statute, even one requiring knowledge and intent, "may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like," you wrote that the statements prohibited by S.1994 "are different from the substance of voting or 'bar stool braggadocio.'"
- a. Justice Breyer's point in this excerpt was the chilling effect that false statement statutes cause in contexts in which they should not apply, such as "in the political arena," as S. 1994 undoubtedly does. Given that S. 1994 applies to statements made by campaigns in the period leading to an election, how is your claim that S. 1994 is inapplicable to "statements about the substance of politics" at all responsive to Justice Breyer's point?
- a. **RESPONSE:** S. 1994 is not merely applicable to "statements made by campaigns" – it is a generally applicable law. S. 1994 applies to materially false, intentionally disseminated statements that concern the *process and qualifications for voting* – not substantive policy matters.
- b. Justice Breyer also wrote that false statement statutes could not constitutionally be applied to "bar stool braggadocio" because of the absence of the kind of harm arising from such statements that could justify such a prohibition. Your earlier answer stated that the statements at issue

in S. 1994 “are different than statements about ... ‘bar stool braggadocio.’” Does not section 3(b) of S. 1994 apply to prohibited communications made “by any means,” including statements made in barrooms?

- a. **RESPONSE:** Yes, S. 1994 would apply to communications made – even in barrooms - that are knowingly materially false about the time or place of holding a federal election or the qualifications or restrictions voter eligibility for any such election, with the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election could include communications made in barrooms. However, such communications are not, in my view, “bar stool braggadocio” – they are deliberate efforts to confuse voters about the process of voting.

14. The Alvarez concurrence at page 5 stated that other false statements statutes “tend to be narrower .. sometimes by specifying that the lies be made in contexts in which a tangible harm is likely to occur...” You wrote that you believed that this statement “counseled in ... favor” of the constitutionality of S. 1994 since the bill “specifies that the lies be made in contexts in which a tangible harm is especially likely to occur. In this case, voting.” But inherent in anything having a status as “tangible” is that it can be touched. How is a lie about voting “made in contexts in which a tangible harm is likely to occur”?

- a. **RESPONSE:** Merriam-Webster’s *Dictionary* defines “tangible” as a) “capable of being perceived especially by the sense of touch,” and b) “**capable of being precisely identified or realized by the mind**” (emphasis added). Lying about the time or place of an election could absolutely lead to a tangible harm of impeding or preventing someone from voting – the harm being tangible in that reliance on the lie, which results in not voting, is “capable of being precisely identified or realized by the mind.”

15. Your earlier response denied that the following statement from page 9 of Justice Breyer’s concurrence had any bearing on S. 1994: “In the political arena a false statement is likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.” Your rationale was that “S. 1994 is not aimed at the political arena of ideas, but at the criminal arena that seeks to prevent citizens from exercising their right to vote.” Whatever its aims, S. 1994 criminalizes political speech on the basis of its content in the period before an election, and without regard to whether such speech actually prevents any citizens from exercising their right to vote. And, in any event, any effects on voting are not the kinds of tangible harm or material gain that the Court required for the constitutionality of a false statements statute. Would you care to revise your answer?

- a. **RESPONSE:** No, except to say that “material gain” is not the sole determinative factor on a speech-related law’s constitutionality.

16. Previously, you agreed that section 3(b) of the bill “grants the power to issue restraining orders.” You did not answer directly my question whether such an order would constitute a prior restraint on free speech. You replied, “Such an order would prohibit someone from engaging in the communication of knowingly materially false information when the speaker intends to mislead voters or impede, hinder, discourage, or prevent voters from exercising their right to vote.” Does such an order constitute a prior restraint on free speech?

- a. **RESPONSE:** No. If S. 1994 were law, such orders would constitute restraints on lies about the process of voting if the lies fall within the contours of the statute. By withstanding First Amendment scrutiny, restraints on these lies would not constitute a prior restraint on free speech.

17. In response to my question whether such an order would be consistent with the First Amendment guarantee of free speech, you replied that such an order would be consistent. You stated that “the Supreme Court has long held that the scope of the Amendment is not absolute. Content-based laws concerning imminent lawless action; obscenity; speech integral to criminal conduct; so-called fighting words; and grave & imminent threats are all consistent with the First Amendment.”

a. How do you reconcile your response with the Alvarez plurality, which, while acknowledging the categories of unprotected speech contained in your answer, refused to add as an additional category “any general exception to the First Amendment for false statements,” page 5, and from page 10 (citation omitted), that “[b]efore exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with ‘persuasive evidence that a novel restriction is part of a long (if heretofore unrecognized) tradition of proscription’”?

- i. **RESPONSE:** S. 1994 does not add a “general exception to the First Amendment for false statements.” It is prescriptive in what it prohibits, and comports with Alvarez because it provides a direct causal link between the restrictions imposed (on the knowing communication of materially false information concerning the time or place of holding an election or the qualifications for or restrictions on voter eligibility) with the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote).

Nor is it a “novel proscription.” As you pointed out in Question 3 of your original questions for the record, there

are “current statutory prohibition[s] of this conduct” proscribed by S. 1994, albeit in less comprehensive statutes.

- b. If such an order would constitute a prior restraint on speech, please explain how such an order would be constitutional under established First Amendment jurisprudence.
 - i. **RESPONSE:** As I wrote in my original responses to your questions for the record, the Supreme Court has long held that the scope of the First Amendment is not absolute, and S. 1994 complies with the requirements of Alvarez for the reasons discussed in my answer to Question 17(a) and Question 3.

BRENNAN
CENTER
FOR JUSTICE

Written Testimony of

Brennan Center for Justice at NYU School of Law

Submitted to the

**U. S. Senate
Committee of the Judiciary**

Regarding

**The Deceptive Practices and Voter Intimidation Prevention Act of 2011
(S.1994)**

June 25, 2011

Chairman Leahy, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit testimony for the record on the critical issue of deceptive practices and voter intimidation. The Brennan Center for Justice at NYU School of Law writes to express its support of the Deceptive Practices and Voter Intimidation Prevention Act of 2011 (S.1994), introduced by Senators Ben Cardin and Charles Schumer.

The Brennan Center for Justice is a nonpartisan think tank and legal advocacy organization that focuses on issues of democracy and justice. Among other things, we seek to ensure fair and accurate voting procedures and systems and to promote policies that maximize citizen enfranchisement and participation in elections.

S.1994 would criminalize the knowing and intentional communication of false and misleading information about the time, place, or manner of elections, and the rules governing voter eligibility and voter registration. It would also ensure that voters affected by deceptive or intimidating practices are provided with correct information from a reliable source in a timely manner. This would fill a significant gap in the laws that safeguard the integrity of our elections.

Unfortunately, every election cycle, many voters—disproportionately those in minority communities—are confronted with information designed to prevent them from voting or casting meaningful ballots. In Maryland in 2010, a political consultant paid for robocalls on election night to thousands of African-American households that told voters, while the polls were still open, they should “relax,” because Governor O’Malley had won re-

BRENNAN CENTER FOR JUSTICE

election. In 2008, messages were sent to users of the social media website Facebook falsely stating that the election had been postponed a day. Students at some universities, including Florida State University received text messages stating the same thing. In 2006, voters with Latino surnames in Orange County, California were sent letters wrongly suggesting it is illegal for naturalized citizens to vote. These are not isolated incidents. They reflect a rash of voter deception and intimidation wholly at odds with the spirit of our democracy.

These incidents are bad enough. Worse still is that today in most states they are simply not against the law. Nor is there any authority charged with investigating these incidents and providing voters with corrected information. S.1994 would correct these oversights, helping to ensure that ill-intentioned individuals do not effectively deprive others of their right to vote. Fairness and democracy require no less.

In introducing this bill, Senators Cardin and Schumer recognize the federal government's compelling interest in preserving the integrity of its election process by protecting voters deception and intimidation. While the First Amendment protects political speech, it does not protect speech that is designed to intentionally interfere with the ability or intention of American citizens exercising their right to vote. Passage of this Act will give federal law enforcement agencies and private citizens the opportunity to stop bad actors from undermining America's elections. We therefore respectfully urge you to pass S. 1994.

Demos

IDEAS & ACTION

June 25, 2012

United States Senate
Washington, DC 20510
Via e-mail

Dear Senator:

We want to applaud the members of the Judiciary Committee for holding a hearing tomorrow on deceptive practices and urge the members of the Committee to support the passage of the Deceptive Practices and Voter Intimidation Prevention Act of 2011 (S.453).

The ability to cast a ballot free from interference protects the other essential freedoms that Americans hold dear. Unfortunately, recent elections have seen a proliferation of "deceptive practices" leading up to the vote. In Maryland in 2011, for instance, robocalls with erroneous information were made to more than 50,000 potential voters on Election Day. In 2006, also in Maryland, a number of paid campaign workers distributed inaccurate voter guides and sample ballots that misidentified candidates as an opposing party's preferred choices.

Often these deceptive practices include threats of legal retaliation against individuals who show up to vote. During the 2004 election season, fliers were circulated in black neighborhoods of Milwaukee from the nonexistent "Milwaukee Black Voters League" falsely informing voters that if they had voted in other elections that year, they were ineligible to vote in the Presidential election. These fliers stated, "If you've already voted in any election this year, you can't vote in the presidential election. . . If you violate any of these laws, you can get ten years in prison and your children will get taken away from you."

Similar deceptive practices are frequently targeted at students. In 2004, a county district attorney in Texas, attempting to impose unlawful requirements for proof of address, wrote a letter to the local election administrator stating that students at the Prairie View A&M University were ineligible to vote in the county and did not enjoy the same presumption of residency for voting purposes as other county residents. The district attorney's letter, which was subsequently published in a local paper, threatened to prosecute students who cast a ballot without meeting these unlawful requirements. And in 2008, flyers were posted around

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INFO@DEMOS.ORG

POLICYSHOP.NET (THE DEMOS BLOG)

NEW YORK
220 FIFTH AVE, 2ND FLOOR
NEW YORK, NY 10001
1.212.633.1405

WASHINGTON DC
1710 RHODE ISLAND AVE NW, 12TH FLOOR
WASHINGTON, DC 20036
1.202.559.1543

BOSTON
358 CHESTNUT HILL AVE, SUITE 303
BRIGHTON, MA 02135
1.617.232.5885

the Drexel University campus in Philadelphia warning that undercover officers would be at polling locations to arrest students with outstanding warrants or traffic violations.

The above is only a short sampling of the types of violations that are taking place. These practices suppress voter turnout, discourage civic participation, and do long-term damage to our democracy. The Deceptive Practices and Voter Intimidation Prevention Act of 2011 would protect the right to vote, the indisputable cornerstone of our democracy, without interfering with rights granted under the First Amendment. Congress should act quickly to pass this needed legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Brenda Wright". The signature is fluid and cursive, with the first name "Brenda" being more prominent than the last name "Wright".

Brenda Wright
Vice President, Legal Strategies

Statement for the Record
Senate Judiciary Committee
Hearing

Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal
Elections: S.1994
June 26, 2012

The Electronic Privacy Information Center (EPIC) is pleased to submit this statement for the record on the topic of deceptive practices and tactics in federal elections.

In 2008, EPIC identified electronic deceptive campaign tactics as a high priority voter privacy issue. EPIC released the e-Deceptive Campaign Practices Report: Internet Technology & Democracy 2.0, which examined the potential for deceptive campaigns that used Internet communication services.¹ In 2010, the potential for deceptive election tactics and Internet information services remained an issue. In 2012, EPIC will release a report on the use of smartphone technology and this year's national election.

Deceptive campaigns are attempts to misdirect targeted voters regarding the voting process or in some way affect their willingness to cast a vote. Deceptive election activities include false statements about poll place opening and closing times, the date of the election, voter identification rules, or the eligibility requirements for voters who wish to cast a ballot. The goal of deceptive campaigns is, by attrition, to reduce the total number of voters who would without interference cast a vote in a public election. Voter suppression activity is believed to be most effective in disrupting voters' participation in elections that are highly contested. Over time, some voting blocks may have demonstrated preferences that could decide the outcome of very close elections. These voters may be deemed to be non-persuadable and their participation could influence the final results of an election.

Historically, disinformation and misinformation efforts have been intended to suppress voter participation among low-income, racial and language minorities, young, disabled, and elderly voters.²

¹ Computers Freedom and Privacy, Tutorial, E-Deceptive Campaign Practices 2.0, May 20, 2008, http://www.cfp2008.org/wiki/index.php?title=E-Deceptive_Campaign_Practices:_Elections_2.0&redirect=no; see also EPIC, E-DECEPTIVE CAMPAIGN PRACTICES REPORT: INTERNET TECHNOLOGY & DEMOCRACY 2.0, October 2010, available at http://votingintegrity.org/pdf/edeceptive_report.pdf.

² Brian Freeman, Michael Fields, Raymond Rodriguez, VOTER SUPPRESSION: *NEW HAMPSHIRE'S RESPONSE TO A NATIONAL PROBLEM*, The Center for Public Policy and the Social Sciences, Rockefeller Center at Dartmouth College, March 9, 2009, <http://rockefeller.dartmouth.edu/shop/#fy11briefs>.

Deceptive techniques have typically relied on telephone calls, ballot challenges, direct mail, and canvass literature drops to keep voters from the polls.³ The telephone or smartphones continue to be reliable means to reach voters before and on Election Day.

A major challenge for voters this election season is the effect of large sums of untraceable funds entering the political process that may be used to develop unique and more effective deceptive campaigns.⁴ Messages intended to suppress or discourage voter participation may come from digital wolves dressed in social networking sheep's clothing.

An important aspect of election deceptive campaign attacks is the ability of attackers to effectively identify targets for messages. Voter profiling for targeting campaign messages is nothing new. For decades, campaigns have collected information in order to create profiles. Campaigns collect this data from voter registration applications, voters' history of participation, state-issued professional licenses, and low-level elected office holders. Profiles are used to develop expectations regarding the behavior of individuals based on their activities, preferences for a wide range of products and services, personal associations, religious beliefs, past political participation, type of work, neighborhood, place of birth, and level of education.⁵ In 2010, the list of voter profiling categories included active military service membership, foreclosure status of a primary home, employment status, as well as emotional or mental state regarding the economy.

Few voters are aware of how much information about the details of their lives is in the hands of third parties.⁶ Law enforcement, businesses, and political campaigns are making great progress in mastering the ability to create detailed profiles on individuals.⁷ Each of the major political parties and their candidates are spending billions of dollars in the race to gain greater knowledge of the voters they seek to persuade. In 2006, it was

³ Election Protection, Incidents of Deceptive Practices and Voter Intimidation in the 2006 Elections, available at http://lccr.3cdn.net/d6af26cb31ff5ee166_vdm6bx6x5.pdf.

⁴ Ruth Marcus, Opinion, Court's campaign finance decision a case of shoddy scholarship, Washington Post, January 23, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/22/AR2010012203897.html>

⁵ Bill Blaemire, Catalyst LLC, "Campaigns and Voter Profiles," December 29, 2009, <http://www.c-spanvideo.org/program/290960-3>.

⁶ T.W. Farnam and Dan Eggen, "Interest-group spending for midterm up fivefold from 2006; many sources secret," *The Washington Post*, October 4, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303664.html>.

⁷ Jacqui Cheng, "Govt relies on Facebook 'narcissism' to spot fake marriages, fraud," October, arstechnica.com, available at <http://arstechnica.com/tech-policy/news/2010/10/govt-takes-advantage-of-facebook-narcissism-to-check-on-users.ars>; see also Michael D. Shear, "Va. Gubernatorial Hopefuls Use Data to Zero In On Voters," CO1, *Washington Post*, August 28, 2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/08/27/AR2005082700990_pf.html.

reported that Voter Vault, political software developed by Filpac, a Republican firm, contained data on 160 million Americans.⁸

The information on voters can help campaigns and voters determine issues that are of mutual interest and facilitate communication. However, that same voter profile could be used to target voters for deceptive campaign messages.

Most notable activity in 2010-2011:

- In September 2010, Maryland's Attorney General obtained a restraining order to halt the distribution of a fraudulent and deceptive campaign ballot distributed in Prince George's County.⁹
- Special interest group increased by five times over 2006 levels. In 2010, many of these sources of the additional campaign related funding secret.¹⁰
- In 2010, "Team Themis" planned to entrap and discredit Change to Win a detractor of the US Chamber of Commerce.¹¹ The Chamber was heavily engaged in the mid-term Federal election.
- The May 2, 2011 Canadian National Elections saw massive robo-call activity to suppress voting among certain voting blocks is currently under investigation by Elections Canada¹²

The two incidents that are most telling about the sophistication of voter suppression in 2012 is the 2010 Team Themis incident and the Canadian elections in 2011.

The Team Themis incident hints that the targets for voter suppression efforts may go beyond suppressing voter turn out during an election, but may extend to challenges to organizations that champion voting rights. According to the Los Angeles Times: HBGary, Palantir Technologies and Berico Technologies proposed a plan to monitor and manipulate critics of the US Chamber of Commerce during the 2010 election.

⁸ Thomas Fitzgerald, "Parties pin hopes on voter profiling," *Bradenton Herald*, 3, November 2, 2006; see also <http://www.filpac.com/votervault.htm>.

⁹ Maryland Attorney General's Office, "Attorney General Gansler Obtains Restraining Order Halting Distribution of Fraudulent Campaign Ballot," September 7, 2010, <http://www.oag.state.md.us/Press/2010/090710.htm>.

¹⁰ T.W. Farman and Dan Eggen, "Internet-Group spending from midterm up fivefold from 2006; many sources secret," May 4, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303664.html>

¹¹ Eric Lipton and Charlie Savage, "Hackers Reveal Offers to Spy on Corporate Rivals," February 12, 2011. <http://www.nytimes.com/2011/02/12/us/politics/12hackers.html>

¹² Glen McGregor and Stephen Maher, Elections Canada diving into phone records to track suspicious election calls. 1,042 words with 321 in optional trims, DesiWireFeed, April 25, 2012, available at <http://vancouverdesi.com/news/elections-canada-diving-into-phone-records-to-track-suspicious-election-calls-1042-words-with-321-in-optional-trims/>

The effort included identifying activists and providing photographs, information on family members and correlating relationships with other liberal or labor leaders.¹³

The 2011 Canadian election robo-call incidents are under investigation by Elections Canada, however, on June 22, 2012, the lead investigator Commissioner William Corbett in a surprise announcement resigned his position, and Yves Cote, the former associate deputy minister of justice will continue the investigation.¹⁴ Voters during Canada's major elections held in 2011 received calls (posing as coming from Elections Canada) directing voters to the wrong polling locations.¹⁵

The management Canadian elections are the responsibility of the federal agency "Elections Canada." When testifying before the Standing Committee on Procedure and House Affairs on March 29, 2012, Marc Mayrand said, "These are very serious matters that strike at the integrity of our [Canadian] democratic process. As a result, of telephone calls that suppressed voter participation or harassed voters there are legal challenges in seven electoral districts. In Canada an election can be overturned if voter suppression is proven. Section 524(1) of the Canadian Elections Act states:

Any elector who was eligible to vote in an electoral district, and any candidate in an electoral district, may by application to a competent court, contest the election in that electoral district on the grounds that there were irregularities, fraud, or corrupt or illegal practices that affected the result of the election.

Canada does not have an established election protection effort because they have no history of well-organized and resourced voter suppression. Canadian authorities estimate they it will take until 2013 to complete their investigation of the robo-call incidents that occurred in 2011.

EPIC will continue to follow developments in the Canadian robo-call incident and track the use of voter profiling in the US. We appreciate the ability to submit a statement regarding this important issues, and we look forward to working with the committee regarding matters of this nature in the future.

Lillie Coney
Associate Director EPIC
EPIC's Voting and Privacy Project

¹³ Tom Hamburger and Matea Gold, "Government contractors targeted Chamber of Commerce's critics," Los Angeles Times, February 15, 2011, available at <http://articles.latimes.com/2011/feb/15/nation/la-na-chamber-20110215>

¹⁴ Stephen Maher and Glen McGregor, "Elections Canada commissioner William Corbett quits in surprise move," The Gazette, June 22 2012

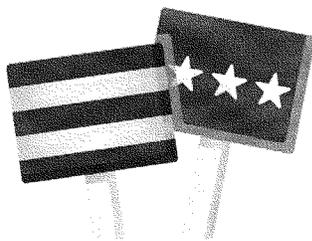
¹⁵ EKOS Research Associates, Inc, "A Study of the Incidence and Effects of Misleading Calls in the 41st National Election, Final Report," April 23, 2012 available at http://www.canadians.org/election/documents/Ekos_research-paper-0412.pdf

EXECUTIVE SUMMARY

Almost fifty years after the passage of the Voting Rights Act, historically disenfranchised voters remain the target of deceptive election practices and voter intimidation. The tactics employed, however, have changed; over time, they have become more sophisticated, nuanced, and begun to utilize modern technology to target certain voters more effectively.

The right to vote should be unimpeded by deception and intimidation. Yet, the freedom to exercise this right is compromised when voters encounter tricky, fraud, or intimidation before and during the voting process. Deceptive election practices occur when individuals, political operatives, and organizations intentionally disseminate misleading or false election information that prevents voters from participating in elections.

These tactics often target traditionally disenfranchised communities – communities of color, persons with disabilities, persons with low income, eligible immigrants, seniors, and young people. These “dirty tricks” often take the form of flyers or robocalls that give voters false information about the time, place, or manner of an election, political affiliation of candidates, or criminal penalties associated with voting. Today, with a majority of Americans receiving information via the Internet and social media platforms like Facebook and Twitter, and given the viral nature of such communication tools, the potential is greater than ever that these tactics will deprive even more voters of the right to vote.



State and federal lawmakers have an obligation to create strong laws that protect voters from deceptive election practices and voter intimidation so that these schemes do not undermine the integrity of elections. Congress and some states have made attempts to address deceptive election practices, but few laws have passed that directly address this type of conduct.¹

A small number of states prohibit conduct that interferes with an individual's ability to vote, which may result in ambiguity about its application to the intentional dissemination of materially false information about the time, place, or manner of voting.² While other states narrowly proscribe only certain kinds of deceptive election practices (such as false statements about a candidate or ballot initiative), the majority do not have any law which captures this type of voter suppression.³ Regardless, law enforcement authorities often fail to investigate and prosecute deceptive election practices.

¹ The Deceptive Practices and Voter Intimidation Prevention Act of 2011, S. 1094, was reintroduced by U.S. Senators Charles Schumer (D-NY) and Ben Cardin (D-MD) in December of 2011. See also S.D. 12-147, 68th Leg., 2009ss. (Dak. 2012); S.B. 1009, 2011-2012 Sess. (N.Y. 2011); and S.B. 1265, 2009 Leg., Reg. Sess. (Tex. 2011).

² See e.g., Ark. Rev. Stat. § 16-1006.

³ See e.g., Colo. Rev. Stat. § 1-13-109.

EXAMPLES OF DECEPTIVE ELECTION PRACTICES AND INTIMIDATION

Deceptive election practices take many different forms, and it is critical that reform proscribes the various ways deceptive election practices can deceive or confuse voters. The following are examples of the types of misinformation that voters have been forced to deal with during recent elections:



Flyers with bogus election rules.

In 2004, flyers were distributed in minority neighborhoods in Milwaukee, Wisc., from a non-existent group called the "Milwaukee Black Voters League claiming that, "If you've already voted in any election this year, you can't vote in the presidential election; if anybody in your family has ever been found guilty of anything, you can't vote in the presidential election; if you violate any of these laws, you can get ten years in prison and your children will get taken away from you."



Flyers advertising the wrong election date.

In 2008, fake flyers alleging to be from the Virginia State Board of Election were distributed 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."



Deceptive online messages.

In 2008, 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.



Robocalls with false information.

On Election Day in 2010, robocalls targeted minority households in Maryland. The calls told voters: "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."

RECOMMENDATIONS/MODEL LEGISLATION

Such nefarious tactics often target certain voters and result in depriving these citizens of their fundamental right to vote and the perpetrators of these pernicious forms of voter suppression must be held accountable. In order to address ongoing suppression practices, state election laws must be amended to directly target the dirty tricks that disenfranchise voters year after year.

To this end, we propose a model statute which:

Explicitly makes it unlawful, within 90 days of an election, to intentionally communicate or cause to communicate materially false information regarding the time, place, or manner of an election, or the qualifications for voter eligibility with the intent to prevent a voter from exercising the right to vote when the perpetrator knows the information is false:

Requires the Attorney General of the state to:

- Investigate all claims of deceptive voter practices;
- Use all effective measures to provide correct election information to affected voters, such as public service announcements and emergency alert systems; and
- Refer the matter to the appropriate federal, state, and local authorities for prosecution;

Provides a private right of action for any person affected by these practices; and

Requires the state Attorney General to provide a detailed report within 90 days of an election describing any deceptive election practice allegations, a summary of corrective actions taken, and other pertinent information.

Given the hyper-polarized political climate, technology providing new and innovative ways of communication, and narrow election margins, we have seen a rise in attempts to disseminate false and misleading information and expect this trend to continue through the 2012 election cycle. For these reasons, it is more important than ever that state and national legislators take action to strengthen current laws and fill existent gaps so that their constituents are not prevented from fully participating in our democracy.

This report focuses exclusively on the power of state election laws to effectively combat deceptive election practices. Having reviewed data reported from all fifty states about deceptive election activity and the relevant state laws, we conclude that not only has law enforcement largely failed to prosecute this conduct under existing statutory frameworks, but that more action is needed – including the passage of additional laws to ensure that voters are fully protected.

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**STATEMENT OF
WADE HENDERSON, PRESIDENT & CEO
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**“DECEPTIVE PRACTICES AND VOTER INTIMIDATION: THE NEED FOR VOTER
PROTECTION”**

SENATE COMMITTEE ON THE JUDICIARY

JUNE 26, 2012

Chairman Leahy, Ranking Member Grassley, and Members of the Committee: I am Wade Henderson, president & CEO of The Leadership Conference on Civil and Human Rights. Thank you for the opportunity to submit testimony for the record regarding the problem of deceptive practices and voter intimidation. We support the Deceptive Practices and Voter Intimidation Prevention Act of 2011, and applaud Senators Schumer and Cardin for introducing this legislation and for standing as champions of the right to vote for all Americans.

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference’s more than 200 national organizations represent persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups.

The Leadership Conference is committed to building an America that is as good as its ideals – an America that affords everyone access to quality education, housing, health care, collective bargaining rights in the workplace, economic opportunity, and financial security. The right to vote is fundamental to the attainment and preservation of each of these rights. It is essential to our democracy—indeed it is the language of our democracy.

Thankfully, in securing the right to vote, the days of poll taxes, literacy tests, and brutal physical intimidation are behind us. But today’s efforts at disfranchisement, while more subtle, are no less pernicious.

In the past several years, several states have waged an assault on our constitutional right to vote that is nothing short of a concerted effort to decide the outcome of the 2012 elections before any ballot is cast. Recently, a coordinated national effort was launched by the American Legislative



Exchange Council (ALEC) to restrict the rights of voters. These measures have taken the form of photo ID requirements, shortened early voting periods, limits on poll worker assistance, proof of citizenship requirements, restrictions on same day and community-based registration, and the disenfranchisement of former felons.

In addition to these anti-voter initiatives, the nation has seen a troubling increase in deceptive practices and voter intimidation, which have posed barriers to ensuring access to the vote for all Americans, undermining the integrity of our electoral process.

The Problem

Like many of the recent voting law restrictions being employed in states throughout the country, deceptive election practices and voter intimidation are intended to target, and have a disproportionate impact on, historically disenfranchised voters—predominantly minorities, older voters, student voters, low-income individuals, and individuals with disabilities. These practices take many forms and include the dissemination of false or misleading information about voter qualifications; the distribution of false information about the time, place, or manner of voting; and threats to voters at a polling place.

From the early 2000's until now, we have seen a proliferation of numerous tactics, such as fliers, emails and robocalls, employed to hinder the full participation of all eligible voters in the democratic process. For example, during the June 5, 2012 recall election in Wisconsin, reports surfaced of automated calls notifying voters who signed the recall petition that they didn't need to cast a vote to oust the controversial governor. On Election Day in 2010, voters in Baltimore City and Prince George's County received automated "robocalls" telling them to stay home and "relax" because Gov. Martin O'Malley had already won re-election, while in fact, the polls were still open. Two campaign operatives working on the campaign of former Gov. Robert L. Ehrlich Jr., were charged with ordering the calls. Finally in 2008, an email was circulated on Election Day to students and staff at George Mason University in Virginia, purportedly from Provost Peter Stearns, misinforming them that the election had been postponed until Wednesday. These are just a few instances in which these insidious tactics were employed within specifically targeted communities.

The Solution

Given the many different forms these barriers to vote take, it is critical that reform efforts take into account the varying ways that deceptive practices can deceive or confuse voters and keep them from casting their ballots. The Deceptive Practices and Voter Intimidation Prevention Act, S. 1994, provides a comprehensive solution by specifically addressing each type of deceptive practice, and affords a private right of action to individuals in an attempt to ensure unhindered access to voting throughout the country. S. 1994 criminalizes the usage of racially discriminatory tactics to keep minorities from voting and deters any action meant to prevent an eligible citizen



from fully enjoying their right to vote. S. 1994 addresses the challenge that many voters experience as a result of deceptive practices and voter intimidation by:

- Prohibiting deceptive practices in federal elections, including false statements, interference with voting or voter registration, and paying individuals not to vote;
- Providing strong enforcement by creating a private right of action, as well as criminal penalties for deceptive practices;
- Requiring corrective action by the Attorney General of any false information not corrected at the state or local level; and
- Requiring reporting to ensure that all instances of reported deceptive practices or voter intimidation are investigated.

These measures will enable full and informed participation of all eligible voters in the electoral process and provide the important protection necessary to ensure historically disenfranchised voters can adequately exercise their right to vote.

Conclusion

Voting is the cornerstone of our democracy, and our system of government must ensure that every single citizen has a voice. Any measure that restricts the right to vote or hinders the ability of certain groups to exercise their right to vote is an all-out assault on the progress of the last century – indeed, on the very legacy of the civil and human rights movement. Congressional action will ensure that all Americans have sufficient protection at the voting booth and access to the ballot. This legislation provides effective solutions to combat flagrant attempts to disenfranchise Americans, a problem that has plagued the electoral process for years, and we urge its prompt enactment.

Thank you for your leadership on this critical issue.



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STATEMENT OF

THE NATIONAL BAR ASSOCIATION

Submitted to:

United States Senate Committee on the Judiciary

Hearing:

**“Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics
in Federal Elections: S.1994”**

On

June 26, 2012

Submitted by the National Bar Association

Submitted before the
United States Senate Committee on the Judiciary

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

Introduction

The National Bar Association (“NBA”) thanks the Senate Committee on the Judiciary for convening this important hearing to examine the importance and necessity of legislation like the *Deceptive Practices and Voter Intimidation Prevention Act of 2011*. The right to vote is a fundamental right accorded to United States citizens by the Constitution; the unimpeded exercise of this right is essential to the functioning and integrity of our democracy.

The NBA is the oldest and largest organization of attorneys and judges of color in the world representing more than 44,000 lawyers, judges, legal scholars and law students domestically and abroad. While the legal profession and the needs of our constituency have greatly evolved, the NBA remains committed to the objectives it established at its formation:

“to advance the science of jurisprudence; improve the administration of justice; preserve the independence of the judiciary and to uphold the honor and integrity of the legal profession; to promote professional and social intercourse among the members of the American and the international bars; to promote legislation that will improve the economic condition of all American citizens, regardless of race, sex or creed in their efforts to secure a free and untrammelled use of the franchise guaranteed by the Constitution of the United States; and to protect the civil and political rights of the citizens and residents of the United States.”

Voter intimidation includes any behavior intended to deter an eligible voter from casting a ballot. Those targeted are overwhelmingly minorities, notably Black and Latino voters, often low income or groups that are likely to be less informed about their rights and are more easily intimidated by the presence of law enforcement or threat of legal consequences. Voter intimidation efforts in present day elections have contributed to rampant disillusionment in minority communities, the African American community is especially sensitive to these tactics given our community’s historical struggle with exercising our right to vote. Today, explicit intimidation of voters is subject to criminal penalties at both the state and federal levels under the Voting Rights Act. As a result, voter suppression often involves more subversive tactics that are more difficult for aggrieved parties to remedy, as they do not involve explicit intimidation and thus may not give rise to an actionable claim under the Voting Rights Act.

Present-day voter intimidation tactics typically fall into one of three categories: disinformation or scare tactics, disruption of an opponent’s lines of communication, and

challenging someone's right to vote. The *Deceptive Practices and Voter Intimidation Prevention Act of 2011* is a clear and purposeful legislative response to this more subversive form of voter suppression. The Act prohibits deceptive practices in federal elections, creates a civil right of action and criminal penalties for violations, allows for corrective action by the Attorney General, and requires the Department of Justice to report to Congress on such activity. This legislation recognizes the power of Congress to prohibit racially discriminatory tactics in elections under the Fifteenth Amendment, Voting Rights Act, and the general power of Congress under Article I, Section 4 of the Constitution to regulate the "times, places, and manner" of federal elections.

As a Presidential Election year, 2012 will serve as a crucial year in the fight to protect voter's rights. As a major legal partner in the Election Protection Coalition, the NBA established its own Election Protection Task Force within the Bar to work closely with non-partisan and non-profit organizations such as the Lawyers' Committee for Civil Rights Under Law to galvanize attorneys to confront this attack on the rights of voters. As we have done in past elections, the NBA will train non-partisan teams of lawyers throughout the United States. Our members and our 44 affiliate chapters will work across the country and lead on the ground efforts to inform the public on new election laws, participate in legal field deployments on Election Day, serve as poll watchers, and hotline call center volunteers on or before Election Day.

Voter Suppression and the African American Community – Past and Present

The United States' struggle to guarantee equal voting liberties to all of its citizens dates back to the conclusion of the Civil War. As society increasingly integrated minorities and Congress passed landmark civil and voting rights legislation, political operatives continued to engage in subtle tactics aimed at discouraging minorities from reaching the polls. Jim Crow legislation and "legalistic barriers," such as poll taxes, grandfather clauses, and literacy tests prevented African Americans from voting.

Even after Congress eradicated the barriers put in place during the Jim Crow era and passed the Voting Rights Act of 1965, officials in many states exercised other techniques to keep African Americans from the polls. In the years immediately following the passage of the Voting Rights Act, African Americans faced vote dilution, the inability to run for office, vote fraud, and intimidation at the polls. Such barriers, in less overt forms, persisted into the 1980s and continue today.

Today, explicit intimidation of voters is now subject to criminal penalties at both the state and federal levels under the Voting Rights Act. As a result, voter suppression often involves less direct tactics. Voter suppression campaigns exploit feelings of distrust within historically disadvantaged communities. These campaigns commonly utilize methods of indirect threats of intimidation, disinformation campaigns, and scare tactics to deter the targeted groups from casting their votes. These suppression methods are difficult for aggrieved parties to remedy, as they do not involve explicit intimidation and thus may not give rise to an actionable claim under the Voting Rights Act.

Examples of voter suppression tactics can be found in both state and national elections. In the 2004 national election, fliers that contained inaccurate information about Election Day

were distributed in predominantly African-American communities.¹ During the 2006 election in California, 14,000 Latino voters received a deliberately inaccurate letter threatening them with arrests if they attempted to vote.² During the 2004 election in Milwaukee, approximately one week before the election, fliers from a fictitious group called the “Milwaukee Black Voters League” flooded an African-American neighborhood. The informational leaflets provided inaccurate “warnings” about election-day procedures that were designed to prevent African Americans from coming to the polls. During the recall election in Wisconsin this past June, there were several reports of deceptive robocalls telling voters who signed the recall petitions or voted in the recall primary that they did not need to vote that day.³ Recently in Florida, voters that were removed from the registration rolls were disproportionately made up of voters of color.⁴

Voter Intimidation Undermines the Legitimacy of the Right to Vote

A 2006 poll indicated that skepticism towards the electoral process had increased dramatically among African Americans since the 2004 election.⁵ Specifically, the percentage of black voters who believed that their votes would be accurately counted dwindled to less than one-third.⁶ Furthermore, the poll indicated that the percentage of black voters who expressed little or no confidence in voting procedures had approximately doubled in only two years while the confidence of their white counterparts remained the same.⁷ These factors, along with, ill-equipped polling stations typically found black neighborhoods only add to the distrust of the electoral process and disenfranchisement in the African-American community.

A well-functioning democracy requires that all of its eligible citizens have equal opportunities to vote; the eroding confidence of many African Americans indicates that the United States is not ensuring this requirement. The United States prides itself as being a democracy that derives its powers from the consent of the governed. However, African American communities throughout the country have lost faith in the voting process and have ultimately experienced marginalization.

These evolved more subtle methods of voter intimidation are just as detrimental as their more violent predecessors. The United States’ democracy depends for its success on the consent of all its citizens, which in turn, relies on the preservation of equality under law. The voting system becomes corrupted not only when laws are repeatedly broken but also when voters perceive that they are being victimized by a voting system that is vulnerable to coercive and discriminatory effects. The NBA believes that the *Deceptive Practices and Voter Intimidation Prevention Act of 2011* is a necessary step towards combatting this perception, protecting the right to vote, and enfranchising the African American community.

¹ Ian Urbina, *Democrats Fear Disillusionment in Black Voters*, N.Y. TIMES, Oct. 27, 2006, at A1.

² Christian Berthelsen & Jennifer Delson, *Orange County Elections: Letter Inquiry Focuses on Candidate*, L.A. TIMES, Oct. 19, 2006, at B3.

³ <http://www.866ourvote.org/newsroom/news?id=0446>

⁴ <http://www.866ourvote.org/newsroom/news?id=0451>

⁵ See THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, DEMOCRATS HOLD ENTHUSIASM, ENGAGEMENT ADVANTAGE: NOVEMBER TURNOUT MAY BE HIGH (2006), <http://people-press.org/reports/pdf/291.pdf>.

⁶ See THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, DEMOCRATS HOLD ENTHUSIASM, ENGAGEMENT ADVANTAGE: NOVEMBER TURNOUT MAY BE HIGH (2006), <http://people-press.org/reports/pdf/291.pdf>.

⁷ See THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, DEMOCRATS HOLD ENTHUSIASM, ENGAGEMENT ADVANTAGE: NOVEMBER TURNOUT MAY BE HIGH (2006), <http://people-press.org/reports/pdf/291.pdf>.

Conclusion

Our country's history is beleaguered with restrictive voting laws that have been used to keep women, students, and people of color from the ballot box. Even today, the wave of voter suppression laws being enacted across the country is shocking. In 2012, we must be committed to protecting the rights of all people to vote and confront attempts that threaten the fundamental democratic right of citizens to elect their leaders.

The NBA believes that the *Deceptive Practices and Voter Intimidation Prevention Act of 2011* will aggressively protect every citizen's right to vote and send a, very much needed, message to a surging marginalized African-American community that their vote counts. The NBA greatly appreciates the opportunity to testify and the Committee's continued oversight and concern for the integrity of the electoral process. We are eager to continue working with the Senate Committee on the Judiciary in protecting the right to vote for all American citizens.

TESTIMONY OF THE NATIONAL CONGRESS OF AMERICAN INDIANS
ON
THE SENATE JUDICIARY COMMITTEE'S HEARING

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

JUNE 26, 2012

On behalf of the National Congress of American Indians (NCAI), thank you for the opportunity to submit this testimony regarding the Committee's Hearing, "Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections: S. 1994."

NCAI has a long history of protecting the voting rights of Native Americans within the United States. Section 2 (7) of S. 1994 mentions that "[i]n 2004, Native American voters in South Dakota were prevented from voting after they did not provide photographic identification upon request, *despite the fact that they were not required to present such identification in order to vote under State or Federal law.*" This egregious use of voter intimidation against such historically disenfranchised communities must be curtailed. For these reasons, NCAI stands behind the principles of Senate bill 1994.

S.1994 would criminalize the knowing and intentional communication of false and misleading information about the time, place, or manner of elections, and the rules governing voter eligibility and voter registration. This type of safeguard is necessary to ensure that each registered voter is afforded a fair opportunity to vote. It is unfortunate that previous elections have been marred by circumstances where false and misleading information affected voter turnout. But, with the introduction of S. 1994, and its swift passage, Congress can assure that these types of voter disenfranchisement do not occur in the future. If they do, the law will have teeth to prosecute those that seek to mislead registered voters about their voting rights.

As the Brennan Center notes in its testimony before this Committee, every election cycle, historically disenfranchised voters "are confronted with information designed to prevent them from voting or casting meaningful ballots." During our non-partisan Native Vote campaign NCAI has had the opportunity to work closely with other communities of color. In doing so, we have recognized that the issues we face are not uncommon within traditionally-labeled "minority" communities, *e.g.*, the African American community, the Latino Community, and the Native American community, as well as others. We feel as if our voting communities are frequently targeted with various tactics, including voter identification laws, new restrictions on voter registration drives, and felony disenfranchisement laws, which aim to decrease our voter turnout.

While collectively, we feel there is much voter protection reform to be accomplished through Congress, S. 1994 is a huge step in the right direction because it sends a clear message to those that would detract from the political system in a dishonest manner that this type of behavior has no place in 'Our American Democracy.'

Furthermore, NCAI stands with its partners in stating that while the First Amendment protects political speech, it does not protect speech that is designed to intentionally interfere with the ability or intention of American citizens exercising their right to vote. For these reasons, we respectfully urge the swift passage of S. 1994. Thank you for your time and consideration.



National
Urban League

*Empowering Communities.
Changing Lives.*

STATEMENT FOR THE HEARING RECORD OF

**MARC H. MORIAL
PRESIDENT AND CEO
NATIONAL URBAN LEAGUE, INC.**

**Before the
SENATE JUDICIARY COMMITTEE**

On

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

June 26, 2012

Mr. Chairman, as President and CEO of the National Urban League (NUL) and on behalf of the 2.6 million Americans served by our 97 affiliates in 36 states and the District of Columbia, I am pleased to submit a statement for the hearing record to lend our overwhelming support for S.1994, the "Deceptive Practices and Voter Intimidation Prevention Act of 2011." I congratulate you, Senator Schumer and Senator Cardin for your strong leadership on this issue, as well as Senators Kirsten Gillibrand, Tom Harkin and Sheldon Whitehouse who have cosponsored this crucially needed voting rights enforcement legislation. I look forward to working with you to move S. 1994 swiftly towards enactment this year.

In our 2012 annual report, *The State of Black America*,¹ *Occupy The Vote To Educate, Employ & Empower*," I made the point that, more than the economy, more than jobs, more than an excellent education for all children, the single issue that arguably stands to have the greatest impact on the future of Black America in 2012 is *the vote*. Indeed, more than half a century after the Voting Rights Act of 1965 was passed, protecting the Constitutional right to vote from poll taxes, literacy tests or other barriers, we face today a nationwide strategic campaign to suppress the vote of African Americans, other minority groups, students, the elderly, those on low incomes and other vulnerable populations. We are therefore still fighting the very same battle. As a 102-year old civil rights and human services organization, the National Urban League remains committed to this fight. *Protecting each individual's fundamental right to vote, and the implications of the power of the vote, is inextricably linked to every individual's economic and social wellbeing and essential to preserving the very functioning of our democracy.* Attempts to disenfranchise American citizens, by a mal-intentioned or renegade few therefore presents an extreme and serious threat to every individual's economic and social wellbeing.

¹The State of Black America is the signature publication of the National Urban League and it has been published continuously for the past 35 years.

The onslaught of pernicious voting law changes sought or enacted in the states throughout the country since 2011 is well documentedⁱ - laws that would require a government-issued photo ID, shortened voting hours, curtailing early voting, and/or imposing absurd penalties limiting the registration process, proof of citizenship, and making it harder to restore voting rights for citizens with past felony convictions. It is estimated that 5 million Americans could be impacted by these laws – largely people of color, new Americans, students, ex-offenders and the elderly.

Added to this strategic assault on voting rights within the past two years, is the added practice of intentional deceptive practices and intimidation tactics that aim to further suppress the vote of especially African Americans and other persons of color. The use of deception and intimidation to prevent African Americans from exercising their right to vote is of course not new. Threats of, and the use of violence and even death were used in post-Civil War, Reconstruction, post-Reconstruction and Jim Crow eras to deny African American citizens their right to freely participate in the electoral process.ⁱⁱ Modern era voter deception and intimidation tactics, while not as violent, carry the same intent and goal – to deny targeted voters of their fundamental right to vote.

While the practice of voter deception and intimidation has occurred prior to 2000, there is extensive research and documentation that, "In every federal election since the year 2000, suppressors have falsely instructed citizens under the guise of governmental authority and in some instances using threats and penalties to disseminate false information in predominantly minority areas."ⁱⁱⁱ Examples of such practices cited in S. 1994's Findings include:

- Postcards providing false information about voter eligibility and a warning about criminal penalties for voter fraud directed primarily at African Americans.
- A request for photo ID directed at Native American voters when such ID was not required in order to vote.
- Fliers distributed in minority neighborhoods stating that if a voter had previously voted in any election during the year, they were ineligible to vote in the presidential election, and any violation of certain laws would result in 10 years in prison and children taken away.
- Latino voters receiving mailings warning of incarceration if they were an immigrant and voted in a federal election, despite the fact that an immigrant who is a naturalized citizen of the United States has the right to vote.
- Automated phone messages falsely warning voters that they were determined ineligible to vote and would face severe criminal penalties if they tried to cast a ballot.
- Misleading automated calls giving voters incorrect information about the location of their polling places.
- Fliers in predominantly African American neighborhoods falsely warning that persons with outstanding warrants or unpaid parking tickets could be arrested at the polls.
- The dissemination of false information about the date of an election through the use of social media.

In addition, some of the reports that the National Urban League has received from our affiliates include the following:

- According to the President and CEO of the Urban League of Nebraska (Omaha), for the 2012 spring primary, in Douglas County, an Elections Commissioner shut down 30% of the polling places in an attempt to save money. These polling places were located in underserved communities and in areas where people have trouble with transportation. Additionally, erroneous postcards were sent, giving the wrong polling locations. After town hall meetings and a public outcry, the Commissioner decided to reinstate the polling locations.
- Through information provided to them through the local NAACP Branch, the President and CEO of the Pinellas County Urban League (St. Petersburg, FL), informed that:
 - Individuals who have been registered voters have had their signatures labeled as invalid during a recent petition drive. Those persons were told during the gathering of petitions for qualifying earlier this season to come down and re-sign a voter card. They are being told that the signature does not match the one on file that was a legitimate signature in 2008 and 2010. This [even] occurred to the wife of a former elected official and avid voter.
 - Some are being told that if they registered to vote recently, their cards will be available for them at the precinct where they are registered. This is quite hideous.
 - While not concretely validated, we have received reports that persons (staff) in the nursing homes were filling out ballots for the residents and just asking the residents to sign.
- During the May 2012 primary, our President and CEO from the Urban League of Northwest Indiana (Gary) informed that their affiliate received a complaint from a person in the Northwest Indiana region who lived in the area for several years, but was told to go to another voting location that was incorrect. Also, the person had only one ID, and was told that they needed two IDs when they got there. The Urban League advised the person to register their complaint with the NAACP and the County Voters Review Board.
- The President and CEO from the Urban League of Madison County (Anderson, IN), informed that during the 2008 election, postcards were mailed out concerning voter eligibility. This had an impact on felons. In Indiana, a person can vote as a felon, but the biggest problem is letting felons know that they are eligible to vote. In addition, the President and CEO had a personal experience of arriving at his polling place that he had been voting for a long time and was told, without notice, that it had changed location. He informed that this has been a big problem – voting places changed without proper communication.
- We've learned from the Urban League of Hampton Roads (Norfolk, VA) that a member from a local church informed them that, about two weeks ago,

she received an email stating that she would have to re-register to vote if she had not voted since the 2008 election in order to qualify to vote on November 6, 2012. The Urban League checked with the Newport News Election Registrar's office and learned that this information was totally incorrect.

Currently, the power to disenfranchise voters through deceptive and intimidating practices lies on the side of the voter suppressors, given that existing statutes are "dramatically underperforming" where no penalties for such tactics exist.^{iv} The *Deceptive Practices and Voter Intimidation Prevention Act of 2011* is sorely needed as it would bring a balance of power to the voting process in federal elections by *empowering the voter*, especially through the imposition of criminal penalties tied to such practices and the creation of a private right of action. In addition, the legislation authorizes any person to report to the Attorney General the existence of false election information. It then requires that the Attorney General, if receiving a credible report that materially false information has been or is being communicated, to publicly correct the false information if state and local election officials have not taken adequate steps to promptly do so.

Mr. Chairman, the coordinated attack on the rights of citizens to participate in their government comes at a particularly perilous time for the poor and communities of color. With an African American unemployment rate still hovering above 13% and a Latino unemployment rate at 11%, the Washington, DC obsession with slashing the federal budget is premature at best. The ongoing foreclosure crisis, staggering student loan debt and a failure to invest in education and training to prepare today's and tomorrow's workforce to thrive in an increasingly competitive global marketplace have stripped too many Americans of supports that are absent from the trickle-down economic framework. The wealth gap and the system of privilege that has given advantage to the richest 1% of Americans at the expense of the other 99% gave rise to the Occupy Wall Street movement. Hence, there was no better theme for this year's annual State of Black America publication than the one we chose – Occupy the Vote to Educate, Employ & Empower.

It is my firm belief that if we are to address the challenges facing those served by the National Urban League, we must start with the vote! Protecting that right from deceptive practices and intimidation tactics is paramount. That is why enactment of S. 1994 is so imperative. We must fight voter suppression at every turn, we must educate citizens so that new laws won't catch them unaware on Election Day, and we must empower them to get to the polls and block any effort to deny them their right to exercise their fundamental right to vote. The National Urban League wholeheartedly supports S.1994 and will do its part to secure its enactment.

Thank you for the opportunity to present our views and I ask that our statement be included in the hearing record.

ⁱ Brennan Center for Justice, At New York University School of Law, http://www.brennancenter.org/content/resource/2012_summary_of_voting_law_changes/

ⁱⁱ Voter Deception," by Gilda Daniels, University of Baltimore – School of Law, University of Baltimore Legal Studies Research Paper No.2010-12, April 18, 2010, p.346.

ⁱⁱⁱ Ibid., at p.353; see also Note 49. ELECTION PROTECTION 2008, p. 353

^{iv} Voter Deception," by Gilda Daniels, University of Baltimore – School of Law, University of Baltimore Legal Studies Research Paper No.2010-12, April 18, 2010, p.381.

The New York Times
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April 12, 2007

In 5-Year Effort, Scant Evidence of Voter Fraud

By [ERIC LIPTON](#) and [IAN URBINA](#)

Correction Appended

WASHINGTON, April 11 — Five years after the Bush administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews.

Although Republican activists have repeatedly said fraud is so widespread that it has corrupted the political process and, possibly, cost the party election victories, about 120 people have been charged and 86 convicted as of last year.

Most of those charged have been Democrats, voting records show. Many of those charged by the Justice Department appear to have mistakenly filled out registration forms or misunderstood eligibility rules, a review of court records and interviews with prosecutors and defense lawyers show.

In Miami, an assistant United States attorney said many cases there involved what were apparently mistakes by immigrants, not fraud.

In Wisconsin, where prosecutors have lost almost twice as many cases as they won, charges were brought against voters who filled out more than one registration form and felons seemingly unaware that they were barred from voting.

One ex-convict was so unfamiliar with the rules that he provided his prison-issued identification card, stamped "Offender," when he registered just before voting.

A handful of convictions involved people who voted twice. More than 30 were linked to small vote-buying schemes in which candidates generally in sheriff's or judge's races paid voters for their support.

A federal panel, the Election Assistance Commission, reported last year that the pervasiveness of fraud was debatable. That conclusion played down findings of the consultants who said there was little evidence of it across the country, according to a review of the original report by The New York Times that was reported on Wednesday.

Mistakes and lapses in enforcing voting and registration rules routinely occur in elections, allowing thousands of ineligible voters to go to the polls. But the federal cases provide little evidence of widespread, organized fraud, prosecutors and election law experts said.

"There was nothing that we uncovered that suggested some sort of concerted effort to tilt the election," Richard G. Frohling, an assistant United States attorney in Milwaukee, said.

Richard L. Hasen, an expert in election law at the Loyola Law School, agreed, saying: "If they found a single case of a conspiracy to affect the outcome of a Congressional election or a statewide election, that would be significant. But what we see is isolated, small-scale activities that often have not shown any kind of criminal intent."

For some convicted people, the consequences have been significant. Kimberly Prude, 43, has been jailed in Milwaukee for more than a year after being convicted of voting while on probation, an offense that she attributes to confusion over eligibility.

In Pakistan, Usman Ali is trying to rebuild his life after being deported from Florida, his legal home of more than a decade, for improperly filling out a voter-registration card while renewing his driver's license.

In Alaska, Rogelio Mejorada-Lopez, a Mexican who legally lives in the United States, may soon face a similar fate, because he voted even though he was not eligible.

The push to prosecute voter fraud figured in the removals last year of at least two United States attorneys whom Republican politicians or party officials had criticized for failing to pursue cases.

The campaign has roiled the Justice Department in other ways, as career lawyers clashed with a political appointee over protecting voters' rights, and several specialists in election law were installed as top prosecutors.

Department officials defend their record. "The Department of Justice is not attempting to make a statement about the scale of the problem," a spokesman, Bryan Sierra, said. "But we are obligated to investigate allegations when they come to our attention and prosecute when appropriate."

Officials at the department say that the volume of complaints has not increased since 2002, but that it is pursuing them more aggressively.

Previously, charges were generally brought just against conspiracies to corrupt the election process, not against individual offenders, Craig Donsanto, head of the elections crimes branch, told a panel investigating voter fraud last year. For deterrence, Mr. Donsanto said, Attorney General Alberto R. Gonzales authorized prosecutors to pursue criminal charges against individuals.

Some of those cases have baffled federal judges.

"I find this whole prosecution mysterious," Judge Diane P. Wood of the United States Court of Appeals for the Seventh Circuit, in Chicago, said at a hearing in Ms. Prude's case. "I don't know whether the Eastern District of Wisconsin goes after every felon who accidentally votes. It is not like she voted five times. She cast one vote."

The Justice Department stand is backed by Republican Party and White House officials, including Karl Rove, the president's chief political adviser. The White House has acknowledged that he relayed Republican complaints to President Bush and the Justice Department that some prosecutors were not attacking voter fraud vigorously. In speeches, Mr. Rove often mentions fraud accusations and warns of tainted elections.

Voter fraud is a highly polarized issue, with Republicans asserting frequent abuses and Democrats

contending that the problem has been greatly exaggerated to promote voter identification laws that could inhibit the turnout by poor voters.

The New Priority

The fraud rallying cry became a clamor in the Florida recount after the 2000 presidential election. Conservative watchdog groups, already concerned that the so-called Motor Voter Law in 1993 had so eased voter registration that it threatened the integrity of the election system, said thousands of fraudulent votes had been cast.

Similar accusations of compromised elections were voiced by Republican lawmakers elsewhere.

The call to arms reverberated in the Justice Department, where [John Ashcroft](#), a former Missouri senator, was just starting as attorney general.

Combating voter fraud, Mr. Ashcroft announced, would be high on his agenda. But in taking up the fight, he promised that he would also be vigilant in attacking discriminatory practices that made it harder for minorities to vote.

"American voters should neither be disenfranchised nor defrauded," he said at a news conference in March 2001.

Enlisted to help lead the effort was Hans A. von Spakovsky, a lawyer and Republican volunteer in the Florida recount. As a Republican election official in Atlanta, Mr. Spakovsky had pushed for stricter voter identification laws. Democrats say those laws disproportionately affect the poor because they often mandate government-issued photo IDs or driver's licenses that require fees.

At the Justice Department, Mr. Spakovsky helped oversee the voting rights unit. In 2003, when the Texas Congressional redistricting spearheaded by the House majority leader, [Tom DeLay](#), Republican of Texas, was sent to the Justice Department for approval, the career staff members unanimously said it discriminated against African-American and Latino voters.

Mr. Spakovsky overruled the staff, said Joseph Rich, a former lawyer in the office. Mr. Spakovsky did the same thing when they recommended the rejection of a voter identification law in Georgia considered harmful to black voters. Mr. Rich said. Federal courts later struck down the Georgia law and ruled that the boundaries of one district in the Texas plan violated the Voting Rights Act.

Former lawyers in the office said Mr. Spakovsky's decisions seemed to have a partisan flavor unlike those in previous Republican and Democratic administrations. Mr. Spakovsky declined to comment.

"I understand you can never sweep politics completely away," said Mark A. Posner, who had worked in the civil and voting rights unit from 1980 until 2003. "But it was much more explicit, pronounced and consciously done in this administration."

At the same time, the department encouraged United States attorneys to bring charges in voter fraud cases, not a priority in prior administrations. The prosecutors attended training seminars, were required to meet regularly with state or local officials to identify possible cases and were expected to follow up accusations

aggressively.

The Republican National Committee and its state organizations supported the push, repeatedly calling for a crackdown. In what would become a pattern, Republican officials and lawmakers in a number of states, including Florida, New Mexico, Pennsylvania and Washington, made accusations of widespread abuse, often involving thousands of votes.

In swing states, including Ohio and Wisconsin, party leaders conducted inquiries to find people who may have voted improperly and prodded officials to act on their findings.

But the party officials and lawmakers were often disappointed. The accusations led to relatively few cases, and a significant number resulted in acquittals.

The Path to Jail

One of those officials was Rick Graber, former chairman of the Wisconsin Republican Party.

"It is a system that invites fraud," Mr. Graber told reporters in August 2005 outside the house of a Milwaukeean he said had voted twice. "It's a system that needs to be fixed."

Along with an effort to identify so-called double voters, the party had also performed a computer crosscheck of voting records from 2004 with a list of felons, turning up several hundred possible violators. The assertions of fraud were turned over to the United States attorney's office for investigation.

Ms. Prude's path to jail began after she attended a Democratic rally in Milwaukee featuring the Rev. Al Sharpton in late 2004. Along with hundreds of others, she marched to City Hall and registered to vote. Soon after, she sent in an absentee ballot.

Four years earlier, though, Ms. Prude had been convicted of trying to cash a counterfeit county government check worth \$1,254. She was placed on six years' probation.

Ms. Prude said she believed that she was permitted to vote because she was not in jail or on parole, she testified in court. Told by her probation officer that she could not vote, she said she immediately called City Hall to rescind her vote, a step she was told was not necessary.

"I made a big mistake, like I said, and I truly apologize for it," Ms. Prude said during her trial in 2005. That vote, though, resulted in a felony conviction and sent her to jail for violating probation.

Of the hundreds of people initially suspected of violations in Milwaukee, 14 — most black, poor, Democratic and first-time voters — ever faced federal charges. United States Attorney Steven M. Biskupic would say only that there was insufficient evidence to bring other cases.

No residents of the house where Mr. Graber made his assertion were charged. Even the 14 proved frustrating for the Justice Department. It won five cases in court.

The evidence that some felons knew they that could not vote consisted simply of a form outlining 20 or more rules that they were given when put on probation and signs at local government offices, testimony shows.

The Wisconsin prosecutors lost every case on double voting. Cynthia C. Alicea, 25, was accused of multiple voting in 2004 because officials found two registration cards in her name. She and others were acquitted after explaining that they had filed a second card and voted just once after a clerk said they had filled out the first card incorrectly.

In other states, some of those charged blamed confusion for their actions. Registration forms almost always require a statement affirming citizenship.

Mr. Ali, 68, who had owned a jewelry store in Tallahassee, got into trouble after a clerk at the motor vehicles office had him complete a registration form that he quickly filled out in line, unaware that it was reserved just for United States citizens.

Even though he never voted, he was deported after living legally in this country for more than 10 years because of his misdemeanor federal criminal conviction.

"We're foreigners here," Mr. Ali said in a telephone interview from Lahore, Pakistan, where he lives with his daughter and wife, both United States citizens.

In Alaska, Rogelio Mejjorada-Lopez, who manages a gasoline station, had received a voter registration form in the mail. Because he had applied for citizenship, he thought it was permissible to vote, his lawyer said. Now, he may be deported to Mexico after 16 years in the United States. "What I want is for them to leave me alone," he said in an interview.

Federal prosecutors in Kansas and Missouri successfully prosecuted four people for multiple voting. Several claimed residency in each state and voted twice.

United States attorney's offices in four other states did turn up instances of fraudulent voting in mostly rural areas. They were in the hard-to-extinguish tradition of vote buying, where local politicians offered \$5 to \$100 for individuals' support.

Unease Over New Guidelines

Aside from those cases, nearly all the remaining 26 convictions from 2002 to and 2005 — the Justice Department will not release details about 2006 cases except to say they had 30 more convictions— were won against individuals acting independently, voter records and court documents show.

Previous guidelines had barred federal prosecutions of "isolated acts of individual wrongdoing" that were not part of schemes to corrupt elections. In most cases, prosecutors also had to prove an intent to commit fraud, not just an improper action.

That standard made some federal prosecutors uneasy about proceeding with charges, including David C. Iglesias, who was the United States attorney in New Mexico, and John McKay, the United States attorney in Seattle.

Although both found instances of improper registration or voting, they declined to bring charges, drawing criticism from prominent Republicans in their states. In Mr. Iglesias's case, the complaints went to Mr. Bush. Both prosecutors were among those removed in December.

In the last year, the Justice Department has installed top prosecutors who may not be so reticent. In four states, the department has named interim or permanent prosecutors who have worked on election cases at Justice Department headquarters or for the Republican Party.

Bradley J. Schlozman has finished a year as interim United States attorney in Missouri, where he filed charges against four people accused of creating fake registration forms for nonexistent people. The forms could likely never be used in voting. The four worked for a left-leaning group, Acorn, and reportedly faked registration cards to justify their wages. The cases were similar to one that Mr. Iglesias had declined to prosecute, saying he saw no intent to influence the outcome of an election.

"The decision to file those indictments was reviewed by Washington," a spokesman for Mr. Schlozman, Don Ledford, said. "They gave us the go-ahead."

Sabrina Pacifici and Barclay Walsh contributed research.

Correction: April 14, 2007

A front-page article on Thursday about the scant evidence of voter fraud that has been found since the Bush administration began a crackdown five years ago misstated a court ruling on a 2003 Texas Congressional redistricting law. While the Supreme Court ruled that the Texas Legislature violated the Voting Rights Act in redrawing a southwestern Texas district, the court upheld the other parts of the plan. It did not strike down the law.

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TESTIMONY IN SUPPORT OF S. 1994
 UNITED STATES SENATE
 COMMITTEE ON THE JUDICIARY
 "PROHIBITING THE USE OF DECEPTIVE PRACTICES AND VOTER INTIMIDATION
 TACTICS IN FEDERAL ELECTIONS: S. 1994"
 JUNE 26, 2012

Project Vote appreciates the opportunity to express its support for S. 1994, the Deceptive Practices and Voter Intimidation Prevention Act of 2011. We are grateful to the sponsors for recognizing the pernicious effect of deceptive practices on our elections, and the undermining impact of such practices on Americans' confidence in the integrity of our electoral system.

Project Vote is a national nonpartisan, nonprofit organization that promotes voting in historically underrepresented communities. Project Vote takes a leadership role in nationwide voting rights and election administration issues, working through research, litigation, and advocacy to ensure that our constituencies can register, vote, and cast ballots that count.

S. 1994 recites in some detail in its Findings section the pervasive history of deceptive practices in recent federal elections. It seems that the abolition of poll taxes and literacy tests in earlier decades gave way to more and more subtle, and therefore more insidious, methods of excluding minority voters from participation in our democracy. For many years, law enforcement has been without adequate tools to combat these practices, and S. 1994 will close that gap in our complex statutory system of remedies for voting rights violations.

Project Vote wishes to add to the record of this Committee one incident that is not included in the Findings section of the legislation and to call the Committee's attention, in addition, to what appears to be a lapse in law enforcement's duty to investigate serious allegations of violations of federal law. We are hopeful that this hearing will call much-needed attention to this problem, and that the passage of S. 1994 will help to clarify law enforcement's obligation to bring its authority to bear to combat it.

Just before the November federal election in 2006, postcards were mailed to voters in low-income, African-American neighborhoods in Dallas, TX informing voters that "a national political group suspected of voter fraud" was conducting "get out the vote" activities in their neighborhood and that victims of voter fraud could be subject to jail time, an obvious falsehood. It warned that law enforcement officials would be at the polls, ostensibly to enforce this threat. (A copy of both sides of the card is appended to this testimony.) There can be no doubt that the sender of this mailing knew its contents to be materially false and that the intent was to intimidate voters.

Project Vote wrote to the FBI's Dallas Field Office to ask for an investigation of this incident, citing a clear-cut violation of the National Voter Registration Act of 1993 (NVRA), specifically Section 1973gg-10 (popularly known as Section 12), which states:

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A person, including an election official, who in any election for Federal Office who—

(1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for—

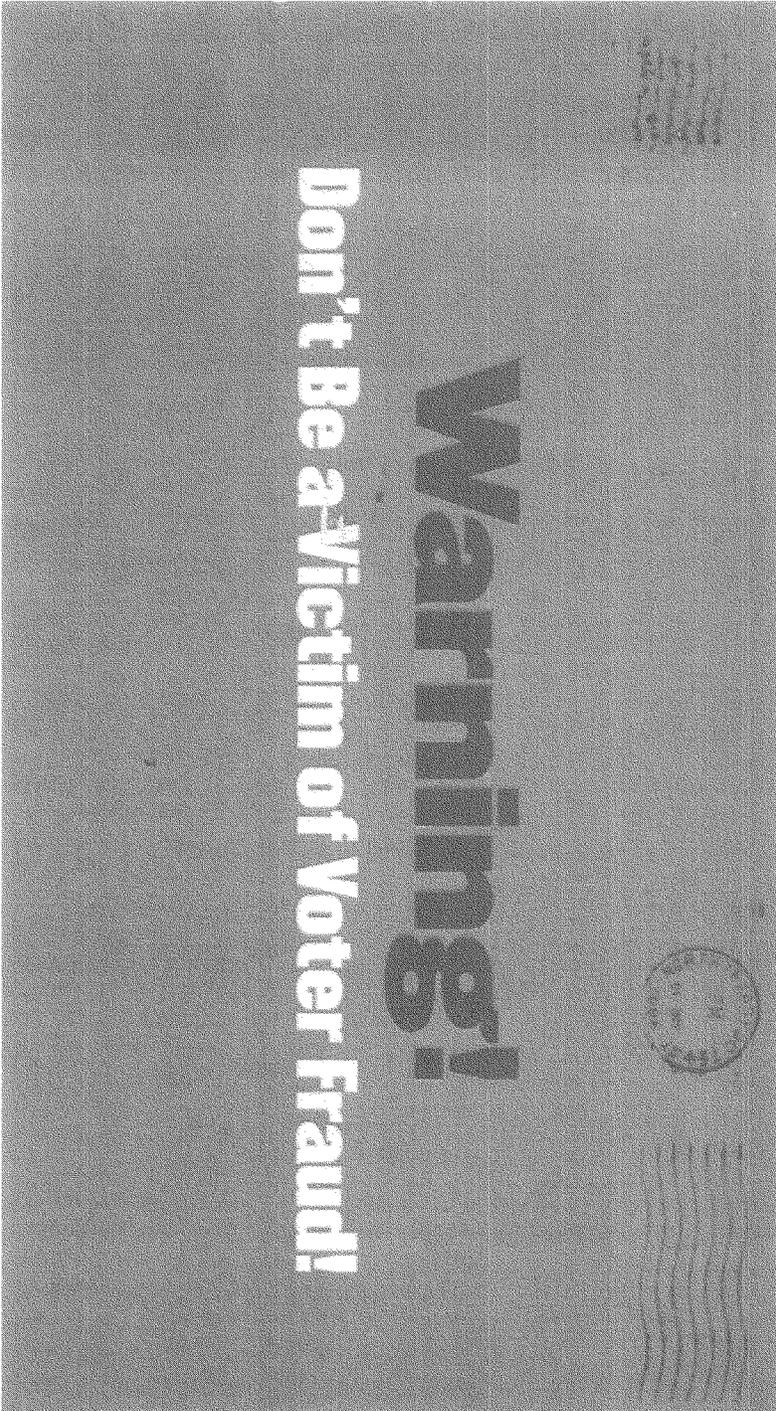
(A) registering to vote, or voting, or attempting to register to vote;

—shall be fined in accordance with title 18...or imprisoned not more than 5 years, or both.

Nevertheless, the FBI declined to investigate this matter at all, citing its requirement that “specific facts must be present to indicate that a violation of Federal law within the FBI’s investigative jurisdiction has occurred.” According to the letter, the Dallas Field Office, in concert with FBI headquarters and the Department of Justice, determined that “no factual predication [sic] of voter intimidation was established.”

It is difficult to conceive of a more blatant example of unlawful voter intimidation under the NVRA than the threatening postcard sent to Dallas voters, but if a more explicit criminal statute is needed, then the *Deceptive Practices and Voter Intimidation Prevention Act of 2011* is such a statute, providing for fines and imprisonment up to five years. Moreover, S. 1994 gives the Department of Justice authority to issue corrective information when it finds that local officials have failed to do so. In other words, anyone contemplating the dissemination of deceptive information is not only deterred by a significant criminal penalty, but also likely to see the plan foiled by the dissemination of valid information.

Project Vote applauds you, Chairman Leahy, as well as Senators Schumer and Cardin and the cosponsors, for introducing and advocating for this important legislation. If we can assist you in any way, or if you wish further details about the 2006 Dallas voter intimidation incident, please contact Estelle H. Rogers, our Legislative Director, at 202-546-4173, extension 310, or erogers@projectvote.org. Again, we appreciate your holding this hearing to shed light on the serious damage done to our democratic values by deceptive voting practices.





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STATEMENT OF MR. HILARY O. SHELTON
DIRECTOR, NAACP WASHINGTON BUREAU &
SENIOR VICE PRESIDENT FOR ADVOCACY AND POLICY
 ON
Prohibiting Deceptive Practices and
Intimidation in Federal Elections

A HEARING BEFORE THE SENATE JUDICIARY COMMITTEE

June 26, 2012

Good afternoon. My name is Hilary Shelton and I am the Director of the NAACP Washington Bureau, the federal legislative and national public policy arm of our Nation's oldest, largest and most widely-recognized grassroots-based civil rights organization. I would like to extend the deep thanks and appreciation to all the members of this committee for holding this important hearing and for your activism on this very important issue.

The right to vote has always been of the utmost priority to the NAACP. For more than a century, the NAACP has fought against those who wish to suppress the votes of African Americans and other racial or ethnic minority Americans through unfair or unjust laws, deception and/or intimidation.

With the enactment of the *Voting Rights Act* of 1965, it became illegal for states or local municipalities to pass laws that in any way infringed on a person's constitutionally protected right to register and cast an unfettered vote and be assured that vote will count. Subsequent laws and reauthorizations of the *Voting Rights Act* have further addressed these tactics and made it harder for a state or a local government to infringe on a citizen's right and ability to cast an unfettered vote, and to be assured that vote will be counted.

Unfortunately, some people are still so desperate to win elections – elections that they fear they cannot rightfully win – that they resort to deceptive practices, misinformation and lies, to try to keep legitimate voters away from the polls or to support candidates whom they might

not otherwise vote for. It is even more unfortunate that these practices often target and exploit many of the same populations who have historically been excluded from the ballot box. Specifically, vulnerable populations, such as racial and ethnic minorities, the disabled and / or the poor and senior citizens are often targeted by those perpetuating these deceptive practices.

To put it bluntly, it is now against the law to use official means to prevent whole communities of American citizens from casting a free and unfettered ballot. Yet there are still people and organizations in our country who are so afraid of the outcome of our democratic process that they must stoop to lies, duplicitous behavior and intimidation to try to keep certain segments of our community away from the voting booth.

That is why the NAACP so ardently supports the S. 1994, the *Deceptive Practices and Voter Intimidation Prevention Act of 2011*, introduced by Senators Schumer, Cardin, and others. This legislation seeks to address the real harm of these crimes – people who are prevented from voting by misinformation or intimidation – by establishing a process for reaching out to those voters with accurate information so they can cast their votes in time and ensure a more genuine outcome of the election. The bill also makes voter intimidation and deception punishable by law, and it contains strong penalties so that people are deterred from committing these crimes, knowing that they will suffer more than just a slap on the wrist if caught and convicted.

The fact of the matter is that if an individual wins an election by a few votes, even when it can be proven that many potential voters were kept away from the voting booth by deceptive or intimidating behavior, the winner remains in office for the duration of the term. That is why it is so important to correct the misinformation before the election is over, and the damage has been done.

As you will hear, examples of malicious deceptive practices, almost all of which targeted racial or ethnic minority populations, are sadly rampant in almost every election. Most recently, as part of an investigation into deceptive “robocalls” which were made during the election for governor of Maryland in the 2010 contest, a document was unearthed which outlined a statewide effort whereby the African-American vote concentrated in 472 precincts was targeted for voter suppression efforts.

Also in the 2010 election, Kansas voters reported that they received calls that they could vote on November 3, but that they would need to provide proof of home ownership in order to cast a ballot. With lower homeownership rates and higher foreclosure rates, minority voters would be among those voters disproportionately affected by this misinformation.

In Ingham County, Michigan, in the general election of 2006, a partisan poll challenger confronted every African American attempting to vote that day. There were no reports of any Caucasian voters even being questioned.

In Orange County, California, 14,000 Latino voters got letters in Spanish saying it was a crime for immigrants to vote in a federal election. It did not state or even clarify that immigrants who are citizens have the right to vote and indeed should.

In Baltimore Maryland, misleading fliers were placed on cars in predominantly African American neighborhoods giving the wrong date for the upcoming Election Day.

In Virginia, registered voters received recorded (robotic) calls that falsely stated that the recipient of the call was registered in another State and would face criminal charges if they came to the polls to vote. It was also in Virginia that voters received phone calls stating that because they were such regular voters they could vote this time by telephone, by simply pressing a number at that time for the candidate of their choice. The call ended by repeating that they had now voted, and did not need to go to the polls. The disenfranchisement continues.

In all of these cases, a quick response to expose the lies that were told and provide corrected information to get legitimate voters to the polls in time to have their vote counted was clearly warranted. Unfortunately, nothing was done by the federal government to aid clearing-up these lies. It was therefore up to the local and national media, as well as advocacy groups, to scramble to try to undo the damage. While it is difficult to conclusively demonstrate that these specific misdeeds had an impact on an election, it is the position of the NAACP that if even one lawful voter was deceived or intimidated and therefore did not cast a legitimate vote, that is one too many and the federal government must act.

When presidential elections can be won or lost by a few hundred votes, it is up to the federal government to do all it can to ensure that every eligible person who wants to vote can and that every vote legitimately cast, will be counted.

It is unfortunate yet necessary that the *Deceptive Practices and Voter Intimidation Prevention Act* needs to be passed now, before another election comes, more lies are told and more voters are locked out of our democratic process.

The NAACP would like to thank the sponsors and co-sponsors of S. 1994, the companion bills in the House, H.R. 108 and H.R. 5799, as well as Senators Schumer and Cardin for their leadership and demonstrated commitment to this crucial issue. The NAACP stands ready to offer the assistance of our members, staff and leadership to do all we can to encourage the quick enactment of the *Deceptive Practices and Voter Intimidation Prevention Act*.

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

JUL 02 2012

Dear Chairman Leahy:

This letter presents the views of the Department of Justice on S. 1994, the "Deceptive Practices and Voter Intimidation Prevention Act of 2011," as introduced on December 14, 2011. This bill would ban deceptive election-related practices and allow the Department of Justice to better protect the voting rights of all Americans. The Department supports the enactment of legislation to address such practices, and agrees with the goals and overall approach of S. 1994. However, we recommend one important modification, discussed below.

When persons or organizations seek to gain an unfair advantage in a Federal election by engaging in deceptive practices, it undermines our system of democratic governance. These practices include, but are not limited to, mass communications that make misleading or outright dishonest claims to manipulate voters. Such incidents of deceptive practices, especially when targeting historically disenfranchised communities, undermine democratic government – which relies on a fair electoral process for its legitimacy.

S. 1994 would take important steps to prevent a wide range of deceptive practices in Federal elections. The bill would prohibit knowingly communicating misleading information about an election's time or place, voter eligibility, or public endorsements. Moreover, the bill would prohibit any person from "hindering, interfering with, or preventing another person from voting, registering to vote, or aiding another person in voting or registering to vote in a Federal election." These strong provisions would prohibit the deceptive practices that have been most common in recent years.

The bill gives private actors and the Department of Justice important tools to enforce prohibitions on deceptive practices. It criminalizes the deceptive practices listed above, penalizing violations with monetary fines and imprisonment of up to five years. For private citizens, it creates a right of action for anyone aggrieved by deceptive practices. Additionally, it requires the Attorney General, after receiving a credible report that materially false information has been communicated, to communicate to the public accurate and objective information in response.

The Honorable Patrick J. Leahy
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There is one way in which we believe this strong bill can be improved. The bill's corrective action provision (section 4) requires the Attorney General to take corrective action – in the form of communicating accurate information to the public – when deceptive practices take place. We believe it would be more appropriate to authorize, rather than require, such action. Given the multiple enforcement tools provided for by the bill and the importance of maintaining flexibility in responding to a diverse range of deceptive practices, we believe discretion is an important tool for the Attorney General in this context.

Finally, with respect to the bill's requirements regarding a biennial report from the Attorney General to Congress (section 5), we note that the Department's long-standing policy is not to disclose information regarding specific sources of evidence, litigation preparations, and work product, given that doing so could undermine the Department's charge of effectively and independently enforcing Federal law. We applaud the bill's sponsors for including an "exclusion from reporting" provision that effectively prevents disclosure of this type of information. The Attorney General should continue to be afforded latitude in choosing not to disclose information that the Department has a legitimate interest in protecting.

The strong prohibitions set out in the bill, along with the multiple means of redressing violations, will be a key tool in protecting the voting rights of all Americans. The Department is firmly committed to preventing deceptive election-related practices and voter intimidation. We thank you for your leadership on this bill and look forward to working with you on this bill and in the future, to protect the voting rights of all Americans.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Judith C. Appelbaum
Acting Assistant Attorney General

cc: The Honorable Charles E. Grassley
Ranking Minority Member