

DECEPTIVE PRACTICES AND VOTER INTIMIDATION  
PREVENTION ACT OF 2007

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APRIL 18, 2007.—Committed to the Committee of the Whole House on the State of  
the Union and ordered to be printed

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Mr. CONYERS, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 1281]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1281) to amend title 18, United States Code, to prohibit certain deceptive practices in Federal elections, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

	Page
The Amendment .....	2
Purpose and Summary .....	2
Background and Need for the Legislation .....	2
Hearings .....	4
Committee Consideration .....	4
Committee Votes .....	4
Committee Oversight Findings .....	6
New Budget Authority and Tax Expenditures .....	6
Congressional Budget Office Cost Estimate .....	6
Performance Goals and Objectives .....	8
Constitutional Authority Statement .....	8
Advisory on Earmarks .....	8
Section-by-Section Analysis .....	8
Changes in Existing Law Made by the Bill, as Reported .....	8
Additional Views .....	10

## THE AMENDMENT

The amendment (stated in terms of the page and line numbers of the introduced bill) is as follows:

Page 2, line 10, strike “within 60 days”.

## PURPOSE AND SUMMARY

H.R. 1281, the “Deceptive Practices and Voter Intimidation Prevention Act of 2007,” will prohibit and punish deceptive practices committed with the intent to prevent another person from voting. The bill increases monetary and criminal penalties for deceptive practices and voter intimidation in Federal elections. Significantly, H.R. 1281 requires the Attorney General to respond appropriately to practices that deceive and intimidate voters, such as by ensuring that accurate information is provided to voters to counter any such practices, and referring evidence of such practices to the appropriate Federal and State authorities for prosecution or civil action after the election.

## BACKGROUND AND NEED FOR THE LEGISLATION

At the core of our democracy is the right to vote. Historically, however, the right to vote has been denied on the basis of race, color, gender, and other characteristics. Voting rights have been extended through the 15th, 19th, and 24th amendments to the U.S. Constitution, as well as the Voting Rights Act.<sup>1</sup> Unfortunately, voter suppression schemes still interfere with the exercise of those rights. By increasing monetary and criminal penalties, and directing the Attorney General to respond appropriately, H.R. 1281 will help deter voter suppression schemes, an important step in ensuring overall integrity of our election system.

Instances of deceptive practices and voter intimidation in recent election cycles are well documented.<sup>2</sup> Among them: In 2002, flyers stating voters could cast their ballots 3 days after the election “if the weather is bad” were distributed in New Orleans public housing complexes.<sup>3</sup> In 2004, just weeks before the presidential election, some Lake County voters in Ohio received letters, printed on falsified Lake County Board of Elections letterhead, informing them that their registrations were illegal and that they would be unable to vote.<sup>4</sup> Also in 2004, voters in Milwaukee’s African American neighborhoods received flyers from the fictional “Milwaukee Black Voters League” falsely claiming that individuals could be found ineligible to vote due to traffic violations, the criminal records of family members, or voting in a previous election during the year.<sup>5</sup>

<sup>1</sup> 42 U.S.C.A. §§ 1973 *et. seq.* (2006).

<sup>2</sup> See *e.g.*, People For the American Way & National Association for the Advancement of Colored People, *The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today* (Dec. 2004), available at <http://www.pfaw.org/pfaw/dfiles/file—462.pdf>; Demos, *Challenges to Fair Elections: Voter Intimidation and Vote Suppression*, (Nov. 2006), available at <http://www.demos.org/pubs/CFE—votersuppress—110106.pdf>.

<sup>3</sup> Lee Hockstader & Adam Nossiter, *GOP Outmaneuvered in La. Runoff*, WASH. POST, Dec. 9, 2002, at A4.

<sup>4</sup> Jeff Maynor, *Phony Letters Tell People They Cannot Vote*, WKYC-TV, Oct. 28, 2004, available at <http://www.wkyc.com/news/news—print.asp?id=25556>.

<sup>5</sup> Jo Becker & David Finkel, *Now They’re Registered, Now They’re Not*, WASH. POST, Oct. 31, 2004, at A22.

The civil rights and voting rights communities are rightly concerned about these continued efforts to disenfranchise eligible voters. Hilary Shelton, Director of the National Association for the Advancement of Colored People (NAACP) Washington Bureau has noted that “some people are still so desperate to win elections . . . that they resort to deceptive practices, misinformation and lies.”<sup>6</sup> Ralph Neas, President and CEO, People for the American Way, has observed that “[t]he complexity and sophistication of voter intimidation and suppression tactics has grown” and that “[t]he 2006 elections provided prime examples of these new forms of suppression techniques, and dirty tricks were as pervasive and brazen as ever.”<sup>7</sup> Barbara Arnwine, Executive Director of the Lawyer’s Committee for Civil Rights Under Law, agreed that “[s]ince the 2000 election cycle, it has become clear that deceptive practices and voter intimidation remain a key civil rights issue because these cynical attempts to influence election results are primarily targeted at traditionally disenfranchised voters.”<sup>8</sup>

#### 2006 MIDTERM ELECTION

At the time of the 2006 election, some voters in Virginia received messages from callers on behalf of the non-existent “Virginia Elections Commission.” The callers gave incorrect voter registration information, and told the voters that they might be ineligible to vote.<sup>9</sup> Some Virginians also received phone calls instructing them to vote by phone. Call recipients were told to indicate their candidate of choice by pressing a number and the call ended with a message that voting was complete and there was no need to go to the polls.<sup>10</sup> Deceptive practices involving “information regarding a voter’s registration status and eligibility” and “the time, place, or manner of conducting the election” are prohibited under H.R. 1281.<sup>11</sup>

Also in 2006, eligible Latino voters in Orange County, California, received mailings from the “California Coalition for Immigration Reform,” falsely warning them in Spanish that “if you are an immigrant, voting in a Federal election is a crime that can result in incarceration.”<sup>12</sup> Congresswoman Loretta Sanchez, whose constituents received such letters, told the Committee that “[f]amilies were afraid that their personal information would be shared with anti-immigration groups if they voted. They were afraid of retaliation for casting their vote.”<sup>13</sup> Deceptive practices involving false information regarding “any criminal penalties associated with voting in the election” are prohibited under H.R. 1281.<sup>14</sup>

Also in 2006, certain candidates in Maryland distributed fliers in predominantly African-American neighborhoods that falsely

<sup>6</sup>*Protecting the Right to Vote: Election Deception and Irregularities in Recent Federal Elections: Hearing Before the H. Comm. on Judiciary*, 110th Cong. (2007) [hereinafter *House Hearing*] (statement of Hilary Shelton, Director, NAACP Washington Bureau).

<sup>7</sup>*Id.* (statement of Ralph Neas, President and CEO, People for the American Way).

<sup>8</sup>Press Release, Lawyers’ Committee for Civil Rights Under Law, Lawyers’ Committee Strongly Supports Bill to Prevent Voter Intimidation and Deceptive Practices (Jan. 31, 2007).

<sup>9</sup>Kelli Arena & Ronni Berke, *FBI launches probe of Virginia pre-election calls*, CNN, Nov. 7, 2006, available at <http://www.cnn.com/2006/POLITICS/11/07/deceptivecalls.va/index.html>.

<sup>10</sup>*House Hearing*, *supra* note 6 (statement of Hilary Shelton, Director, NAACP Washington Bureau).

<sup>11</sup>H.R. 1281, 110th Cong. (2007).

<sup>12</sup>Sonya Geis, *Calif. Campaign in Turmoil Over Letters*, WASH. POST, Oct. 20, 2006, at A4.

<sup>13</sup>*House Hearing*, *supra* note 6 (statement of Congresswoman Loretta Sanchez).

<sup>14</sup>H.R. 1281, 110th Cong. (2007).

claimed that the candidates had been endorsed by their opponents' party and by prominent African American figures.<sup>15</sup> Senator Ben Cardin testified that such literature was "clearly designed to mislead African American voters, who have a legal right to vote and pick the candidate of their choice," and therefore that it "was rightfully denounced by civil rights groups as a voter suppression and intimidation effort."<sup>16</sup> Deceptive practices involving "the explicit endorsement by any person or organization of a candidate running for any office voted on in the election" are prohibited under H.R. 1281.<sup>17</sup>

#### HEARINGS

The full Committee on the Judiciary held 1 day of hearings on H.R. 1281 on March 7, 2007. Testimony was received from the Honorable Barack Obama, U.S. Senator from Illinois; the Honorable Benjamin Cardin, U.S. Senator from Maryland; the Honorable Loretta Sanchez, U.S. Representative for the 47th Congressional District of California; the Honorable Brian Bilbray, U.S. Representative for the 50th Congressional District of California; the Honorable Steve King, U.S. Representative for the 5th Congressional District of Iowa; the Honorable Rahm Emanuel, U.S. Representative for the 5th Congressional District of Illinois; Donna L. Brazile, Democratic National Committee Voting Rights Institute Chair and Georgetown University Adjunct Professor; Eve Sandberg, Oberlin College Associate Professor of Politics; Ralph G. Neas, People for the American Way President and CEO; and a written statement was received from John Fund, columnist at the Wall Street Journal.

#### COMMITTEE CONSIDERATION

On March 29, 2007, the Committee met in open session and ordered the bill H.R. 1281 favorably reported, as amended, by voice vote, a quorum being present.

#### COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 1281.

1. An amendment offered by Mr. Smith on behalf of Mr. Chabot, prohibiting deceptive practices that prevent another person from "effectively" exercising the right to vote. The amendment failed by a vote of 9 to 17.

#### ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman .....		X	
Mr. Berman .....		X	
Mr. Boucher .....			

<sup>15</sup>Ernesto Londono, *Sample Ballots in Pr. George's Misidentify Candidates*, WASH. POST, Nov. 7, 2006.

<sup>16</sup>*House Hearing, supra* note 6 (statement of U.S. Senator Ben Cardin).

<sup>17</sup>H.R. 1281, 110th Cong. (2007).

## ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Nadler .....		X	
Mr. Scott .....		X	
Mr. Watt .....			
Ms. Lofgren .....		X	
Ms. Jackson Lee .....		X	
Ms. Waters .....		X	
Mr. Meehan .....			
Mr. Delahunt .....		X	
Mr. Wexler .....		X	
Ms. Sánchez .....		X	
Mr. Cohen .....		X	
Mr. Johnson .....		X	
Mr. Gutierrez .....			
Mr. Sherman .....		X	
Mr. Weiner .....		X	
Mr. Schiff .....		X	
Mr. Davis .....		X	
Ms. Wasserman Schultz .....			
Mr. Ellison .....		X	
Mr. Smith (Texas) .....			
Mr. Sensenbrenner, Jr. ....			
Mr. Coble .....	X		
Mr. Gallegly .....			
Mr. Goodlatte .....	X		
Mr. Chabot .....			
Mr. Lungren .....			
Mr. Cannon .....	X		
Mr. Keller .....	X		
Mr. Issa .....	X		
Mr. Pence .....			
Mr. Forbes .....	X		
Mr. King .....	X		
Mr. Feeney .....	X		
Mr. Franks .....			
Mr. Gohmert .....			
Mr. Jordan .....	X		
Total .....	9	17	

2. A motion to table the challenge to the Chairman's ruling that an amendment regarding non-citizens voting offered by Mr. Forbes was non-germane. The motion to table passed by a vote of 13 to 10.

## ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman .....	X		
Mr. Berman .....	X		
Mr. Boucher .....			
Mr. Nadler .....	X		
Mr. Scott .....	X		
Mr. Watt .....			
Ms. Lofgren .....	X		
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Meehan .....			
Mr. Delahunt .....			
Mr. Wexler .....			
Ms. Sánchez .....	X		
Mr. Cohen .....	X		
Mr. Johnson .....			
Mr. Gutierrez .....			

## ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Sherman .....			
Mr. Weiner .....	X		
Mr. Schiff .....	X		
Mr. Davis .....	X		
Ms. Wasserman Schultz .....			
Mr. Ellison .....	X		
Mr. Smith (Texas) .....			
Mr. Sensenbrenner, Jr. ....			
Mr. Coble .....		X	
Mr. Gallegly .....			
Mr. Goodlatte .....		X	
Mr. Chabot .....			
Mr. Lungren .....		X	
Mr. Cannon .....			
Mr. Keller .....		X	
Mr. Issa .....		X	
Mr. Pence .....			
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Feeney .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....			
Mr. Jordan .....		X	
Total .....	13	10	

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1281, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, April 11, 2007.*

Hon. JOHN CONYERS, Jr., *Chairman,*  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1281, the Deceptive Practices and Voter Intimidation Prevention Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

PETER R. ORSZAG,  
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.  
Ranking Member

*H.R. 1281—Deceptive Practices and Voter Intimidation Prevention Act of 2007.*

CBO estimates that implementing H.R. 1281 would cost less than \$500,000 annually from appropriated funds. Enacting the bill could affect direct spending and revenues, but CBO estimates that any such effects would not be significant.

Section 4 of the Unfunded Mandates Reform Act excludes from the application of the act any legislative provisions that enforce the constitutional rights of individuals. CBO has determined that H.R. 1281 would fall within that exclusion because it would protect voting rights. Therefore, CBO has not reviewed the bill for mandates.

H.R. 1281 would establish a new crime for attempting to deceive voters in federal elections and would require the Department of Justice to issue regulations and prepare reports relating to implementation of the bill's provisions. Because the legislation would establish a new offense, the government would be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that H.R. 1281 would apply to a relatively small number of offenders, however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. We estimate that it would cost less than \$500,000 annually to implement this legislation, including costs to prepare the reports and regulations required by the bill. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 1281 could be subject to criminal fines, the federal government might collect additional fines if the legislation is enacted. Criminal fines are recorded as revenues, then deposited in the Crime Victims Fund and later spent. CBO expects that any additional revenues and direct spending would not be significant because of the small number of cases likely to be affected.

The CBO staff contact for this estimate is Mark Grabowicz, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

#### PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1281, will provide the District of Columbia with full representation in the U.S. House of Representatives.

## CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 4, clause 1.

## ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1281 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

## SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

*Section 1. Short Title.* Section 1 sets forth the short title of the Act as the “Deceptive Practices and Voter Intimidation Prevention Act of 2007.”

*Section 2. Prohibition on Deceptive Practices in Federal Elections.* Section 2 defines deceptive practices as knowingly communicating false information with the intent to prevent another from voting. It also prohibits such deceptive practices as felonies subject to fines up to \$250,000, 5 years imprisonment, or both.

*Section 3. Modification of Penalty for Voter Intimidation.* Section 3 amends title 18 of the United States Code to increase the maximum prison term for voter intimidation from 1 year to 5 years.

*Section 4. Sentencing Guidelines.* Section 4 directs the United States Sentencing Commission to review and amend the Federal sentencing guidelines in accordance with the new criminal penalty for deceptive practices.

*Section 5. Reporting Violations and Remedial Action.* Section 5 directs the Attorney General to correct specific instances of deceptive practices by providing voters with accurate election information, and specifies that the Attorney General should work with interested entities to determine how to best take such corrective actions. Section 5 also directs the Attorney General to refer deceptive practice violations to State and Federal authorities for criminal or civil action after the election; requires the Attorney General, the Federal Communications Commission, and the Elections Assistance Commission to study the feasibility of using public broadcast systems to provide corrective election information; requires the Attorney General, after each Federal election, to report to Congress on allegations of deceptive practices, the actions taken to correct deceptive practices, and any prosecutions resulting from such allegations; and authorizes the Attorney General to establish a Voting Integrity Task Force to which the Attorney General may delegate his or her responsibilities under this section.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):



## CHAPTER 29 OF TITLE 18, UNITED STATES CODE

## CHAPTER 29—ELECTIONS AND POLITICAL ACTIVITIES

Sec.						
592.	Troops at polls.	*	*	*	*	*
618.	<i>Deceptive practices in Federal elections.</i>	*	*	*	*	*

**§ 594. Intimidation of voters**

Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, at any election held solely or in part for the purpose of electing such candidate, shall be fined under this title or imprisoned not more than **[one year]** 5 years, or both.

\* \* \* \* \*

**§ 618. Deceptive practices in Federal elections**

(a) *Whoever, before a Federal election, knowingly communicates false election-related information about that election, with intent to prevent another person from exercising the right to vote in that election, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.*

(b) *As used in this section—*

(1) *the term “Federal election” means any general, primary, run-off, or special election for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Commissioner from a territory or possession; and*

(2) *the term “election related information” means information regarding—*

(A) *the time, place, or manner of conducting the election;*

(B) *the qualifications for or restrictions on voter eligibility for the election, including—*

(i) *any criminal penalties associated with voting in the election by ineligible voters; or*

(ii) *information regarding a voter’s registration status or eligibility;*

(C) *with respect to a closed primary election, the political party affiliation of any candidate for office, if the communication of the information also contains false information described in subparagraph (A) or (B); or*

(D) *the explicit endorsement by any person or organization of a candidate running for any office voted on in the election.*

## ADDITIONAL VIEWS

We support this bill as far as it goes. We want to stamp out voter fraud as much as the sponsors of the bill. However, we are disappointed that the Democrats on the Committee repeatedly opposed efforts to strengthen the bill.

## NONCITIZEN VOTING

It is illegal for noncitizens to vote in federal elections. Yet Rep. Brian Bilbray's election opponent last November made national news when she was asked by someone, "I want to help, but I don't have papers," and she replied "Everybody can help, yeah, absolutely, you can all help. You don't need papers for voting, you don't need to be a registered voter to help."<sup>1</sup>

The illegal population in America is likely around 12 to 20 million illegal aliens, but the number could certainly be higher. In addition to the illegal aliens already in the country, the Census Bureau estimates that the illegal alien population is growing by a minimum of 500,000 per year. Combining the number of legal and illegal aliens, there are likely at least 26 million non-U.S. citizens in the United States at any given time, and the majority of them are legal and illegal residents.<sup>2</sup>

With the passage of the National Voter Registration Act of 1993 (NVRA), known as the "Motor-Voter Law," the process of registering to vote became nearly automatic for anyone applying for a state driver's license. Under that law, the information supplied by the applicant for a license doubles as information for voter registration unless the applicant indicates they do not want to be registered to vote. In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, making it a federal crime for noncitizens to vote in any federal election (or any state election, unless authorized by state law). As a penalty, ineligible noncitizens who knowingly vote may be deported.<sup>3</sup> Additionally, a noncitizen who falsely claims to be a United States citizen is in violation of this law. Still, despite these provisions, there have been many documented reports of illegal noncitizen voting.

Last Congress, the House Administration Committee reported out H.R. 4844, the "Federal Election Integrity Act of 2006." In House Report 109-666, the House Administration Committee reported as follows:

<sup>1</sup>Dani Dodge, "Busby on Defense, Says She Misspoke," *San Diego Union-Tribune* (June 3, 2006).

<sup>2</sup>Written Testimony of Dan Stein, President, Federation for American Immigration Reform, on "Non-Citizen Voting and ID Requirements for Elections," before the Committee on House Administration (June 23, 2006).

<sup>3</sup>8 U.S.C. § 1227 provides that:

## (6) Unlawful voters

## (A) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.

## (B) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such violation.

The U.S. Census Bureau estimated 8.7 million illegal aliens were in the U.S. in 2000. Immigration officials estimate that the illegal alien population grows by as many as 500,000 every year. These non-citizen population growth rates increase the potential for non-citizens to exploit and manipulate the outcome of elections.

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act was enacted, making it a federal crime for non-citizens to vote in any federal election. Enforcement of the statute is hampered by the difficulty involved in detecting violations. As no proof of citizenship is required prior to voting, violations by persons falsely presenting themselves as citizens can go unnoticed. Even when evidence of a violation presents itself, finding the perpetrators and gathering sufficient evidence to prosecute them is very difficult.

Despite the law that prohibits it, documented reports of non-citizen voting have increased. During the June 22, hearing before this Committee, Dan Stein, President of the Federation for American Immigration Reform, presented the following documented cases of illegal voting: (1) In the 2000 election, 'election observers reported that a 'sizable number' of votes may have been cast by ineligible felons, illegal immigrants, and non-citizens' in Florida; (2) In Utah, Legislative Auditor General John Schaff said in a February 8, 2005 report to the President of the Utah Senate that more than 58,000 illegal immigrants had Utah drivers' licenses, nearly 400 of them used their license to register to vote in Utah, and a sampling of that group revealed at least 14 actually voted in an election; and (3) Hawaiian election officials found 543 Oahu residents who were not U.S. citizens had registered to vote. Moreover, an investigation by the Immigration and Naturalization Service into alleged fraud in a 1996 Orange County, California congressional race revealed that non-citizens were registered to vote in the 46th Congressional District in the disputed election between Republican Robert Dornan and Democrat Loretta Sanchez. The Task Force established by the Committee on House Oversight found clear and convincing evidence that 748 invalid votes were cast in that election.<sup>4</sup> Further, state officials found that over 300 non-citizens illegally voted in that contest. These figures did not exceed the margin of victory, but they clearly demonstrate this problem is real and can impact the outcome in a close election. Patrick Rogers, a New Mexico attorney, proffered compelling examples of illegal and fraudulent voting at the Committee's hearing on June 22, 2006. In support of this testimony, Mr. Rogers presented to the Committee the voter identification card of a woman holding a green card, who claimed she was pressured to register while standing in line to receive government services. Mr. Rogers also provided the Committee with several documented examples of illegal voting by non-citizens in the United States as follows:

(1) In Maryland, a 2006 e-mail from a member of the Montgomery County Board of Elections in Montgomery

<sup>4</sup>U.S. House of Representatives Report 105-416 "Dismissing the Election Contest Against Loretta Sanchez," 105th Congress 2d Session, February 12, 1998.

County, Maryland was made public indicating he was going to register people to vote ‘regardless of status.’ (2) Donna Hope, a non-citizen immigrant from Barbados who resides in Philadelphia, was told by a representative of the voter registration group ‘Voting is Power,’ the voter mobilization arm of the Muslim American Society, that she could register to vote if she has been in the United States at least 7 years. Ms. Hope completed the registration form and was added to the voting rolls. In November of 2004, Ms. Hope did not vote because she was not a citizen, but someone illegally cast a ballot in her name. (3) In 1998, California Secretary of State Bill Jones referred to the INS claims by nearly 450 people called for jury duty in Orange County, California who claimed they were exempt from jury duty because they were non-citizens. The jury duty lists are pulled from driver’s license and registered voter files.

The Committee’s field briefing in Arizona also revealed accounts of voter fraud perpetrated by non-citizens. The Honorable Andrew Thomas, Maricopa County Attorney, advised the Committee of indictments of ten individuals who were non-citizens who nevertheless registered to vote. His testimony states in relevant part:

They were charged with filing false documents, a class 6 felony. Maricopa County Recorder Helen Purcell referred these matters to the County Attorney’s Office after her office received jury questionnaire forms from the county jury commissioner. These forms were filled out by potential jurors who claimed they were unable to serve on a jury because they were not citizens. The county recorder’s office found that they had claimed to be citizens when they filled out a voter registration form. Four of these defendants voted in at least one election. In addition to the ten charged defendants, the County Attorney is reviewing 149 other cases in which non-citizens have allegedly illegally registered to vote.

The county recorder has received inquiries from people seeking to become U.S. citizens who have been told by Immigration and Customs Enforcement to obtain a letter from her office confirming they have neither registered to vote nor voted. To date, a review of these matters has turned up 37 non-citizens who have registered to vote. Fifteen of these individuals have voted. And these numbers come from a relatively small universe of individuals—legal immigrants who seek to become citizens. These numbers do not tell us how many illegal immigrants have registered and voted.

The United States Department of Justice has also investigated and prosecuted several cases of non-citizen voting.<sup>5</sup> In Colorado, U.S. Attorneys convicted an individual of providing false information concerning U.S. citizenship for voter registration

<sup>5</sup> Election Fraud Prosecutions & Convictions Ballot Access & Voting Integrity Initiative, Criminal Division, Public Integrity Division, United States Department of Justice, October 2002-September 2005.

purposes.<sup>6</sup> In Alaska, a non-citizen was charged and found guilty of voting in the 2000, 2002 and 2004 elections in violation of 18 U.S.C. Section 611.<sup>7</sup> Additionally, 15 non-citizens were charged and 10 were convicted of voting in Federal elections conducted in counties located in South Florida.<sup>8</sup>

While these examples demonstrate the need for additional protections to ensure only citizens are voting, the facts also reveal that eligible citizens are able to prove their eligibility and are not dissuaded from voting if required to do so. States that have implemented an identification requirement for voting have experienced positive results. At the Committee's field briefing in Arizona, Secretary of State Jan Brewer discussed the effects of the newly enacted identification law known as Proposition 200. Under Proposition 200, all voters are required to present identification at the polls before casting a ballot and all new voter registration applications must be accompanied by sufficient proof of citizenship. While identification is required in all Arizona jurisdictions, 15 jurisdictions have successfully implemented a proof of citizenship requirement. Secretary Brewer testified that Arizona has experienced a 15.4 percent increase in voter registration since the requirements of Proposition 200 went into effect.

Currently, state and local governments do not have any effective way to prevent non-citizens from registering to vote and voting. Section 303(b)(4)(A) of HAVA requires inclusion of a citizenship box on the National Voter Registration Form. When applying to register to vote, individuals must check the box affirming their citizenship. The law provides that registration forms that do not have the box checked should be rejected and returned to the individual. However, some states are not enforcing this requirement. Even in states that do enforce the citizenship requirement, it is still done on an honor system that relies on the truthful response of the registrant. While the present state of the law leaves the system open to abuse, H.R. 4844's identification and proof of citizenship requirement will ensure that only eligible citizens are voting.

While there may be disputes about the nature and extent of voter fraud, there can be no dispute that it occurs. In close elections, even a small amount of fraud can affect the outcome. More importantly, reports of fraud can cause people to lose confidence in the integrity of the system and thereby discourage participation. People must be encouraged to vote with confidence that their vote will be counted and will not be cancelled out by an illegal vote.

In North Carolina, recent investigations into illegal noncitizen voting led one resident agent in charge of the Immigration and

<sup>6</sup>*United States v. Shah*, Case No. 04-CR-00458.

<sup>7</sup>*United States v. Rogelio Mejorada-Lopez*, Case No. 05-CR-074.

<sup>8</sup>*United States v. McKenzie*, Case No. 04-CR-60160; *United States v. Francois*, No. 04-CR-60159; *United States v. Exavier*, No. 04-CR-60161; *United States v. Lloyd Palmer*, No. 04-CR-60159; *United States v. Velrine Palmer*, No. 04-CR-60162; *United States v. Shivdayal*, No. 04-CR-60164; *United States v. Rickman*, No. 04-CR-20491; *United States v. Knight*, No. 04-CR-20490; *United States v. Sweeting*, No. 04-CR-20489; *United States v. Lubin*, No. 04-CR-60163; *United States v. Bennett*, No. 04-CR-14048; *United States v. O'Neil*, No. 04-CR-60165; *United States v. Torres-Perez*, No. 04-CR-14046; *United States v. Phillip*, No. 04-CR-80103; *United States v. Bain Knight*, No. 04-CR-14047.

Customs Enforcement agency's local office to say "It goes to the integrity of the entire democratic system when we have . . . aliens registering to vote."<sup>9</sup> As the *Charlotte News and Observer* reported:

Voter registration laws in most parts of the country don't require written proof of citizenship . . . It is so easy to register that Attracta Kelly of the Immigrant Legal Assistance Project at the N.C. Justice Center warns clients against even taking the form when going to the Division of Motor Vehicles office because it could hurt their chances of ever getting citizenship. "Especially if they don't speak English very well. They just think it's a part of their [driver's license] test," she said. "It's handed oftentimes to people who are just legal residents."<sup>10</sup>

Patrick Rogers, the attorney in New Mexico, testified as follows before the House Administration Committee on June 22, 2006:

Voting by illegal immigrants is one of the toughest issues to study in the election and voting area. This is because there is no centralized or accessible list of illegal immigrants that can be compared to voter registration lists or lists of persons who actually cast ballots. The closest "list" I am aware of that could be used as a basis for systematic research is a list maintained by the Bureau of Immigration and Customs Enforcement ("ICE") at the Department of Homeland Security. This is a list of those illegal immigrants who have overstayed their Visas or are "deportable." But the list is not available to election officials to check or validate voter registration rolls . . . A Congressional Research Service report from September of 2005 indicated that more than 25 states did not require proof of legal presence in the United States in order to apply for and obtain a driver's license.

The essential problem is that there is no national citizenship registry, so state and local officials are unable to confirm citizenship, and no jurisdiction requires voters to show proof of citizenship at the polls. "There is no way of checking," said Maryland State Board of Elections Administrator Linda H. Lamone. "We have no way of doing that. We have no access to any information about who is in the United States legally or otherwise."<sup>11</sup> The REAL ID Act does not require proof of citizenship. It requires proof of lawful presence, as there is no prohibition from issuing driver's licenses to foreign visitors, legal immigrants, or even illegal immigrants, although the REAL ID Act does limit states to issuing only temporary licenses of no longer than one year's duration and state ID cards to illegal immigrants.

In 2005, a prominent group of bipartisan leaders and scholars, led by former President Carter and Secretary of State James Baker, III, issued a very influential report.<sup>12</sup> One of the chief recommendations of the bipartisan Carter-Baker Commission on Voting was as follows:

<sup>9</sup>Jessica Rocha, "Voter Rolls Risky for Aliens," *The Charlotte News and Observer* (December 7, 2006).

<sup>10</sup>Jessica Rocha, "Voter Rolls Risky for Aliens," *The Charlotte News and Observer* (December 7, 2006).

<sup>11</sup>Christina Bellantoni, "Little to Stop Illegal Aliens from Voting," *The Washington Times* (September 24, 2004).

<sup>12</sup>"Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform" (September 2005) (the "Carter-Baker Report").

Instead of creating a new card, the Commission recommends that states use “REAL ID” cards for voting purposes. The REAL ID Act, signed into law in May 2005, requires states to verify each individual’s full legal name, date of birth, address, Social Security number, and U.S. citizenship before the individual is issued a driver’s license or personal ID card. The REAL ID is a logical vehicle because the National Voter Registration Act established a connection between obtaining a driver’s license and registering to vote. The REAL ID card adds two critical elements for voting—*proof of citizenship* and verification by using the full Social Security number. The REAL ID Act does not require that the card indicates citizenship, but that would need to be done if the card is to be used for voting purposes.<sup>13</sup>

#### HOW H.R. 1281 ADDRESSES NONCITIZEN VOTING

We believe that H.R. 1281 does address noncitizen voting in an indirect way. We explain that reasoning below.

H.R. 1281 provides that whoever “knowingly communicates false election-related information about that election, with intent to prevent another person from exercising the right to vote in that election, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.”<sup>14</sup> The National Voter Registration Act of 1993<sup>15</sup> requires that a person registering to vote affirm that they are a U.S. citizen.<sup>16</sup> If a noncitizen signs, or attempts to sign, any form that can be used for voting purposes—including a voting registration form—and that form states that they are a citizen when they are not a citizen, then that is a false statement. The bill also specifically defines “election related information” to include “information regarding a voter’s registration status or eligibility.”<sup>17</sup> If such a noncitizen who makes a false statement on a voting registration form is consequently allowed to vote, and they vote for, say, Candidate Brown, they will necessarily negate the legitimate vote of someone else who was a citizen and voted for rival Candidate Jones. If someone votes illegally and negates a legal voter’s vote, the illegal vote has effectively denied the legal voter’s right to vote. In the landmark case of *Reynolds v. Sims*, the Supreme Court stated “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”<sup>18</sup> So an illegally voting noncitizen in that case would violate the clear terms of H.R. 1281 and be subject to up to five years in jail.

The bill also provides that “[i]mmediately after receiving a report [of a violation of the bill], the Attorney General shall consider and review such report and, if the Attorney General determines that

<sup>13</sup> Carter-Baker Report, at 19 (emphasis added). The card mandated by the REAL ID Act includes a person’s full legal name, date of birth, a signature captured as a digital image, a photograph, and a person’s Social Security number. We are bemused by the statement of Rep. Jerrold Nadler at the markup that “The Carter-Baker Commission was grossly mistaken in many of its findings and should not be given any credence in the area of voting fraud.” Members of the Carter-Baker Commission on Federal Election Reform included former President Jimmy Carter, former Democratic Senate Majority Leader Tom Daschle, and former Democratic House Member Lee Hamilton.

<sup>14</sup> Sec. 2(a) of H.R. 1281.

<sup>15</sup> 42 U.S.C. § 1973gg.

<sup>16</sup> 42 U.S.C. § 1973gg-3(a)(2)(C)(i).

<sup>17</sup> Sec. 2(a) of H.R. 1281.

<sup>18</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

there is a reasonable basis to find that a violation has occurred, the Attorney General shall . . . undertake all effective measures necessary to provide correct information to voters affected by the false information.”<sup>19</sup> “All effective measures necessary to provide correct information” to the voting public affected by illegal noncitizen voting includes the creation of a citizenship registry that will prevent voting fraud and ensure that only citizens can vote in Federal elections. In the absence of a database that ensures only citizens are voting, it would not be truthful to keep telling voters that their legal votes will be counted, and not be negated by an illegally cast vote.

Regarding the issue of intent, Blacks’s Law Dictionary defines “constructive intent” as “A legal principle that actual intent will be presumed when an act leading to the result could have been reasonably expected to cause that result.” Further, Professors LaFave and Scott, in their authoritative treatise on criminal law, write, “The meaning of the word ‘intent’ in the criminal law has always been rather obscure, largely as a result of its use in such phrases as ‘criminal intent,’ ‘general intent,’ ‘specific intent,’ ‘constructive intent,’ and ‘presumed intent.’”<sup>20</sup> If someone knows they are not a citizen, but they sign a voter registration form that states they are a citizen, and then that person votes illegally, and knows they are voting illegally, then they obviously know that their illegal vote is going to cancel out the vote of another, legally voting citizen. That knowledge would constitute an intent to deny another voter their right to exercise their vote. Intent can be read at least that expansively in the criminal context, and it can be read even more expansively in the civil context where large monetary fines are at issue.

Reading those concepts together, we believe this bill does prohibit false claims of citizenship that are made to register to vote. But we also think that concept could have been made clearer.

#### REPUBLICAN AMENDMENTS

First, we are glad that Ranking Member Smith’s amendment was adopted at committee. It struck the part of the bill that limits the prohibition on voting fraud to fraud committed “within 60 days” of a federal election. Illegal voting by non-citizens can occur when voting registration forms are filled out *more than* 60 days before a federal election. Nothing the Supreme Court has said indicates that there is any constitutional problem with Congress’s prohibiting lying on voting registration forms at all times, not just 60 days before an election. Voting fraud is voting fraud, regardless of what page of the calendar it occurs on.

However, we made several attempts to make it clearer that the bill addresses the serious problem of noncitizen voting. We wanted to broaden the bill to make it clear that the bill covers not only fraud that directly denies the right to vote, but also fraud that has the effect of denying the right to vote. We are disappointed that the Democratic majority, on a party line vote, opposed Mr. Chabot’s amendment to the bill that would have simply added the word “effectively” before the words “exercising the right to vote” in H.R. 1281 as introduced, such that the bill would prohibit people from

<sup>19</sup> Sec. 5(b)(1) of H.R. 1281.

<sup>20</sup> W. LaFave & A. Scott, *Criminal Law* § 3.5, at 216 (2d ed. 1986), and most recent 2007 update.



preventing other people from “*effectively* exercising the right to vote.”

Clearly, the right to vote means nothing if it cannot be effectively exercised. Again, in the landmark case of *Reynolds v. Sims*, the Supreme Court stated “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”<sup>21</sup> And in *Williams v. Rhodes*, the Supreme Court struck down a law because it infringed on “the right of qualified voters . . . to cast their votes *effectively*.”<sup>22</sup>

Chairman Nadler of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties stated in the first sentence of his opening statement on this bill at the Judiciary Committee markup that “[t]he right to vote and *the right to cast an effective vote in a free and fair election* is the fundamental pillar of any democratic country.”<sup>23</sup> At the markup of H.R. 1281, Chairman Conyers said, “by inserting the word ‘effectively,’ it would add vagueness creating constitutional due process questions in a criminal context.”

But the Supreme Court itself has used the term “effectively” to describe “the right of qualified voters . . . to cast their votes effectively.”<sup>24</sup> Clearly the Supreme Court does not find that word unconstitutionally vague. Mr. Chabot’s amendment would have made it a crime to communicate false election related information with the intent to effectively deny someone else’s right to vote.

At the markup, Mr. Davis said “[t]he principal concern with [the] amendment is that I believe it would shift the focus of prosecution from the intent to the effect of the wrongful action.” That statement does not withstand examination. If the bill’s subject were people who act “with *intent* to prevent another person from *effectively* exercising the right to vote,” anyone with the intent to effectively deny the right to vote would be subject to prosecution. The amendment would not alter the requirement that intent be present. We do not understand why anyone would oppose an amendment prohibiting people from acting “with *intent* to prevent another person from *effectively* exercising the right to vote.” If someone communicates false election related information with the intent to effectively negate someone else’s legal vote, they should also be punished with up to five years in prison.

The Fifteenth Amendment itself states that “The right of citizens of the United States to vote shall not be denied or *abridged* . . . on account of race.”<sup>25</sup> One of the most respected law professors in the country, John Hart Ely, has written that he was unable “to read the Fifteenth Amendment as meaning anything other than that no one person’s vote is to be *intentionally made less effective* than another’s because of his race or color.”<sup>26</sup>

Chairman Conyers ruled several other amendments non-germane, including an amendment offered by Mr. Forbes that would have provided that “If the offense results in voting in a Federal

<sup>21</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>22</sup> 393 U.S. 23, 30 (1968).

<sup>23</sup> House Judiciary Committee Markup of H.R. 1281 (March 29, 2007) (remarks of Rep. Nadler).

<sup>24</sup> 393 U.S. 23, 30 (1968).

<sup>25</sup> U.S. Const. Amendment XV.

<sup>26</sup> John Hart Ely, “Gerrymanders: The Good, the Bad, and the Ugly,” 50 *Stan. L. Rev.* 607, 632 (1998) (emphasis added).

election by more than 10 persons who are not citizens of the United States, the offender shall be fined under this title or imprisoned not more than 10 years, or both.” Other amendments Chairman Conyers ruled non-germane included an amendment offered by Mr. Feeney that would have created a uniform system of voting eligibility verification and an amendment offered by Mr. King that would have required the Department of Justice to conduct a study on the feasibility of the creation of a national citizenship database for use in verifying voting eligibility and preventing voting fraud. We believe that all of these amendments were germane. They would have improved the bill by addressing the serious problem of noncitizen voting more directly and comprehensively. We all want to eliminate the problem of voter fraud and we are disappointed that the Democrats opposed our efforts to strengthen this bill.

LAMAR SMITH.  
STEVE CHABOT.  
RIC KELLER.  
TOM FEENEY.  
TRENT FRANKS.

