

RESPONSE TO THE REPORT OF THE 2005 COMMISSION ON FEDERAL ELECTION REFORM

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
WENDY R. WEISER
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and

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AT GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW



on behalf of

THE NATIONAL NETWORK ON
STATE ELECTION REFORM

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ABOUT THE AUTHORS AND THE NETWORK

The Brennan Center for Justice at New York University School of Law unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The organization's mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action in the areas of Democracy, Poverty, and Criminal Justice, promoting equality and human dignity while safeguarding fundamental freedoms. The Center's Democracy Program supports practical and administrable election reforms that foster full and equal political participation.

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The National Network on State Election Reform is a newly-formed collective of civil rights, voting rights, civic participation and legal organizations dedicated to advancing meaningful election reform. The foundation of the collaboration is the organizations' mutual commitment to ensuring that all eligible voters have the opportunity to cast meaningful ballots that are accurately counted. The National Network represents a diverse group of organizations with longstanding experience in analyzing and advocating for electoral practices that expand voter participation. The Network's members include the Brennan Center for Justice; Demos: a Network for Ideas and Action; the Lawyers' Committee for Civil Rights Under Law; the People for the American Way Foundation; and over a dozen other civil and voting rights organizations.

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On September 19, 2005, the Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James Baker III, issued a report with recommendations for reforming the administration of U.S. elections.¹ Unfortunately, the Commission did so after only two limited hearings and no call for public comment. The Commission's final report betrays the cursory nature of its study, proceeding in places based on anecdote and supposition, rather than on rigorous analysis and empirical fact. As a result, although a number of its recommendations could improve our electoral system, several of its suggestions would be damaging and should not be included in any proposal for election reform.

Election reform should seek to ensure that every eligible American citizen has a meaningful opportunity to participate in a fair political process. If that opportunity is to be restricted, it must be absolutely clear that the benefits of such a restriction outweigh its costs. The sections of the Commission's report addressed in this paper depart from this fundamental standard.

While our election system is undeniably in need of substantial structural and administrative improvement, the burden of reform must not be borne by voters. The problems with American elections are *not* caused by American voters. They are caused by inadequate attention to election administration, insufficient resources, and unfair and unreasonable rules and procedures often designed and administered by elected or partisan individuals with an interest in the outcome of elections. Unfortunately, several sections of the Commission's report seem to shift the blame to regular Americans, and as a result, make recommendations that are likely to exclude a significant number of citizens from the political process—especially those who have traditionally been disadvantaged by restrictions at the polls.

Commissions can serve a vital public purpose in focusing the nation's attention on issues of national importance. Final action on those issues, however, deserves more careful study than was provided by the Carter-Baker Commission. The Commission's report, though helpful in some respects, should be viewed as no more than a contribution to the national conversation on election reform—and a call for further research, analysis, participation, and discussion on those issues. Nonetheless, because the Commission's report delivers specific recommendations on many pressing issues of election administration—describing itself as “a comprehensive proposal for modernizing our electoral system”²—it is necessary to confront directly several of its conclusions.

This paper addresses the main substantive flaws in the Report, refuting in detail its recommendations that “Real ID” cards be used for voter identification, that Social Security numbers be spread through interstate databases and on ID cards, and that states restore voting rights to people convicted of felony convictions only in certain cases and only after they have completed all the terms of their sentence.³ These recommendations are ill-advised and should not set the standard for election reform in the states.

Chapter I

THE IDENTIFICATION RECOMMENDATIONS (SECTION 2.5) WILL UNJUSTIFIABLY EXCLUDE MILLIONS OF LEGITIMATE AMERICAN VOTERS

The Report's most troubling recommendation is that states require voters to present a "Real ID" card or a similar "template" ID as a condition of voting. Recommendation 2.5.1 provides:

To ensure that persons presenting themselves at the polling place are the ones on the registration list, the Commission recommends that states require voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005. The card includes a person's full legal name, date of birth, signature (captured as a digital image), a photograph, and the person's Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back whether the individual is a U.S. citizen. States should provide an EAC-template ID with a photo to non-drivers free of charge.⁴

This recommendation is more onerous than the photo ID proposal rejected by the Commission's predecessor in 2001 and is more restrictive than any ID requirement adopted in any state to date.⁵ It would impose substantial—and for some, insurmountable—burdens on the right to vote.

Unfortunately, the Report fails to undertake a serious cost-benefit analysis of the advantages that would supposedly be realized by a "Real ID" requirement and the harms it will produce. This ID requirement is purportedly intended to prevent "voter fraud," and yet the Report itself concedes that "[t]here is no evidence of extensive fraud in U.S. elections or of multiple voting" before asserting, without any meaningful support, that "both occur."⁶ As discussed at length below, the forms of fraud that could be prevented by voter ID are exceedingly rare and risky. In contrast, compelling evidence shows that the "Real ID" proposal will disenfranchise countless eligible voters. Rather than analyzing the empirical data to assess whether its recommendations are sensible, however, Section 2.5 of the Report begins and ends with anecdote and supposition. The lack of rigor exhibited in the Report on this politically controversial issue undermines its credibility and appearance of objectivity. And while it might be true that in a close election "a small amount of fraud could make the margin of difference,"⁷ it is equally true that the rejection of a much larger number of eligible voters could make a much bigger difference in the outcome. In the end, the exclusion of voters through restrictive ID requirements will erroneously determine the outcome of many more elections than any speculative fraud by individual voters at the polls.

Not only does the Report fail to justify the creation of stringent identification requirements, but it also does not explain why the goals of improved election integrity will not be met through the existing provisions in the Help America Vote Act of 2002 (HAVA),⁸ which have only recently been implemented in the states, and the effects of which have not yet been

fully analyzed. Nor does the Report consider alternative measures to advance its goals that are less restrictive to voters.

For the reasons discussed below, it is apparent that the Commission has not adequately examined the real impact of its ID recommendations. The costs of those recommendations far outweigh any benefits they may achieve.

A. THE PROPOSED ID REQUIREMENTS WILL SEVERELY BURDEN VOTERS

The Commission's recommendation that eligible citizens be barred from voting unless they are able to present a souped-up "Real ID" card is a proposal guaranteed to disenfranchise a substantial number of eligible voters.

Millions of Americans currently do not have driver's licenses or government-issued photo ID cards. Millions more may never get the new "Real ID" card, which requires substantially *more* cost and effort. The Report's proposal to use "Real ID" as a condition of voting is so excessive that it would prevent eligible voters from proving their identity with even a valid U.S. passport or a U.S. military photo ID card. While Americans of all backgrounds would be excluded by the Report's ID proposal, the burden would fall disproportionately on the elderly, the disabled, students, the poor, and people of color.

The exclusionary effects of the Commission's ID proposal are most vividly illustrated by some of the people it is most likely to disenfranchise—the victims of Hurricane Katrina. Many who were left behind in hurricane-torn New Orleans are poor and did not have access to a car, and thus are among those least likely to have a driver's license. The hundreds of thousands of displaced citizens will find it difficult, if not impossible, to secure the identity papers they left behind or to obtain new records from government offices and hospitals that have been destroyed. These forgotten Americans—and many like them across our nation—are the ones the Commission's ID proposal will leave out of our democracy.

1. Many Americans Do Not And Will Not Have The Requisite State-Issued Photo ID

As the Report estimates, twelve percent of voting-age Americans do not have driver's licenses.⁹ The research collected by the 2001 National Commission on Federal Election Reform shows that between six and ten percent of voting-age Americans do not have driver's licenses or state-issued non-driver's photo ID.¹⁰ That translates into as many as 20 million eligible voters.¹¹

The Commission's recommendation is even more restrictive than other photo ID standards. Under the Real ID Act, as of 2008, a state may not issue a driver's license or non-driver's ID card unless the individual presents *documentary proof* of: (a) her full legal name and date of birth, (b) her Social Security number (or the fact that she is not eligible for one), (c) the address of her principal residence, and (d) her citizenship.¹²

Although there are no studies showing how many Americans lack readily available proof of citizenship, Arizona's recent experience under the state's Proposition 200 (which requires

proof of citizenship in order to register to vote) suggests that the number is extremely high. For instance, one county reported in February 2004 that it was forced to reject nearly 75% of new voter registration forms for failure to provide adequate proof of citizenship.¹³ The percentage of Americans without the documentary proof of citizenship necessary to obtain “Real IDs” is likely to remain high because, as discussed below, the requisite documents are both expensive and burdensome to obtain.

The percentage of citizens that do not have, and will not obtain, the enhanced state-issued photo identification cards is even greater for the elderly, students, people with disabilities, urban residents, low-income individuals, and people of color. According to the Georgia chapter of the AARP, 36 percent of Georgians over age 75 do not have a driver’s license.¹⁴ In Wisconsin, approximately 23 percent of persons aged 65 and older do not have driver’s licenses or photo ID, and fewer than 3 percent of students have driver’s licenses listing their current address.¹⁵ Across the country, more than 3 million Americans with disabilities do not have a driver’s license or other form of state-issued photo ID.¹⁶ In the sections that follow, this paper examines the expense of IDs to low-income voters,¹⁷ and documents the enormous racial disparities in access to state-issued photo ID.¹⁸

Moreover, given the frequency with which Americans move residences,¹⁹ it is likely that a far greater percentage of citizens lack driver’s licenses or photo IDs bearing their current addresses.²⁰ Since voting generally depends on the voter’s address, and since many states will not accept IDs that do not bear an individual’s current voting address, an additional 41.5 million Americans each year²¹ will have ID that they may not be able to use to vote.²²

The Report’s “Real ID” proposal will only exacerbate these existing disparities between communities with the requisite identification and those without; once the Real ID Act has been implemented, those who have traditionally had difficulty obtaining state-issued photo identification will find that the difficulty has significantly increased.

2. The ID Recommendations Will Operate as a Poll Tax Because “Real IDs” Are Expensive and Difficult to Obtain

As the Report recognizes, government-issued photo identification costs money. Thus, if required as a precondition for voting, photo identification would operate as a *de facto* poll tax that could disenfranchise low-income voters. To alleviate this burden, the Report appropriately recommends that the “Real ID” card itself be issued free of charge. This safeguard, however, does not address some of the most significant predicate costs in obtaining photo identification—costs incurred whether or not the card itself is free.

First, each of the documents that an individual is required to show in order to obtain a “Real ID” card or other government-issued photo ID card costs money or presumes a minimal level of economic resources. A certified copy of a birth certificate costs from \$10.00 to \$45.00, depending on the state; a passport costs \$85.00; and certified naturalization papers cost \$19.95. Unless the federal and all state governments waive the cost of each of these other forms of identification, the indirect costs of photo IDs will be even greater than their direct costs.

In addition, since government-issued IDs may only be obtained at specified government offices, which may be far from voters' residences and workplaces, individuals seeking such IDs will have to incur transportation costs and the costs of taking time off from work to visit those offices during often-abbreviated business hours. These are not insignificant burdens. For example, as the Report notes, there are only 56 locations in the state of Georgia that issue IDs for residents of all the state's 159 counties.²³ Of the ten Georgia counties with the highest percentage of minority residents, only one has an office where driver's licenses and other photo IDs are available.²⁴ In fact, there is no office that issues driver's licenses and non-drivers' IDs in the city of Atlanta.²⁵ Moreover, although most states prohibit employers from penalizing employees for taking time off to vote, no state has similar protections for individuals taking time off to obtain government-issued identification. These costs must also be considered in conjunction with the significant burden the identification requirements will impose on voters' time.²⁶

In short, the Report's "Real ID" proposal would introduce substantial additional costs to voting; these naturally fall most harshly on low-income voters. As the earlier Commission's Task Force on the Federal Election System found in its August 2001 report, a photo ID requirement would "impose an additional expense on the exercise of the franchise, a burden that would fall disproportionately on people who are poorer and urban."²⁷

3. The "Real ID" Recommendations Will Disproportionately Burden People of Color

Strong empirical evidence also shows that photo ID requirements disproportionately burden people of color.

In 1994, the U.S. Department of Justice found that African Americans in Louisiana were 4 to 5 times less likely to have government-sanctioned photo ID than white residents. As a result, the Department denied pre-clearance for that state's proposed photo ID requirement because it "would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."²⁸ Similarly, a June 2005 Wisconsin study found that the rate of driver's license possession among African Americans was half that for whites.²⁹ The disparity increased among younger drivers, where white adults aged 18-24 were three times as likely as their black peers to possess a driver's license. Only 22% of black males in that age group had a driver's license.³⁰

The lack of government-issued photo ID is also particularly acute among Native Americans, many of whom have religious objections to such ID. Reports of the 2004 primary in South Dakota showed that voters in the predominantly Native American counties of Shannon, Todd, Corson, Dewey and Zieback were 2 to 8 times more likely to not bring IDs to the polls than other voters in the state.³¹

In addition, the ID recommendations reduce the benefits of voter registration at disability and other social service agencies provided by the National Voter Registration Act of 1993.³² Individuals who seek to register at those offices—which generally do not issue IDs—will also have to make an additional visit to the motor vehicle department in order to obtain the

documentation necessary to vote. Census data demonstrate that African Americans and Latinos are more than three times more likely than whites to register to vote at a public assistance agency, and that whites are more likely than African Americans and Latinos to register when seeking a driver's license.³³ Accordingly, the voter registration procedure far more likely to be used by minorities than by whites will no longer provide Americans with full eligibility to vote.

Not only are minority voters less likely to possess the requisite ID, but they are also more likely than white voters to be asked to furnish ID at the polls. As the Task Force Report of the prior Commission found, identification requirements create the opportunity for selective enforcement—either innocuous or invidious—when poll workers request photo ID only from voters unknown to them.³⁴ This discretion has often led to special scrutiny of minority voters at the polls. In New York City, for example, which has no photo ID requirement, a study showed that poll workers illegally asked one in six Asian Americans for ID at the polls, while white voters were permitted to vote without showing ID.³⁵ There is little reason to think that universal ID requirements would not be similarly undermined by exemptions for white voters who arrive at the polls without ID.

Even in the extremely unlikely event that the discriminatory application of identification requirements will disappear in the future, its history cannot be ignored. Significant populations of minority voters justifiably *believe* that identification requirements will be used to harass them, notwithstanding the general call for new and untested ombudsmen institutions as a stopgap.³⁶ This may further discourage voter participation among those that have traditionally faced barriers to the franchise. Although the Report is quick to cite the perception of fraud as a basis for recommending ID, it fails to acknowledge the perception that ID requirements will be unjustly applied as a valid reason for second thoughts. The latter perception just as surely “undermines confidence in the system” among populations that have previously been subjected to discriminatory application of ID requirements.

In part because of the disparate impact that a photo identification requirement would have on minority voters, Congress rejected such a requirement in HAVA,³⁷ opting instead for a more expansive list of identification documents (such as a current utility bill, bank statement, paycheck, government check, or other government document), for a smaller category of voters (first-time voters who registered by mail), coupled with fail-safe provisional voting for those voters who cannot meet HAVA's less stringent identification requirements.³⁸ The facts giving rise to Congress's concerns have not changed. Indeed, no new evidence provides any basis for challenging Congress's conclusion—and the conclusion of this Commission's predecessor—that photo identification requirements are ill-advised.

4. The Report's Efforts to Mitigate the Exclusionary Effects of Its “Real ID” Proposal Fall Short

Faced with overwhelming evidence that “Real IDs” are both costly and difficult to obtain, the Report suggests that “Real ID” cards be made “easily available and issued free of charge.”³⁹ While this is a laudable goal, the evidence suggests that it will not be attained. First, no state currently issues photo IDs free of charge to all voters.⁴⁰ And even if the card itself were free, the

“Real ID” would not be “free of charge” unless all documents required to obtain the “Real ID” were also “free of charge.”

In addition, no state makes photo IDs “easily available” to all its citizens. As discussed above, photo IDs are issued by driver’s license bureaus, which are located far from the residences and work places of many state residents. The Report suggestion that states use mobile offices to issue driver’s licenses.⁴¹ Such a program would not solve the problem. Despite the fact that Michigan has a mobile ID program that the Report praises, at least eight percent of voting-age citizens in Michigan are still without driver’s licenses and non-driver’s photo IDs.⁴² Moreover, the implementation in Michigan is the result of a relatively robust “mobile office” program. Far more likely in cash-strapped states is a “program” like the one recently implemented in Georgia: one bus, traveling to one location for a day or two at a time, available from 9 a.m. until 3 p.m., during the heart of the work day.⁴³ A spokesperson for Georgia Governor Sonny Perdue aptly described some of the barriers to implementing an effective mobile ID program. Discussing the state’s plan to use a hand-me-down bus from another agency, Heather Hendrick said: “We’ve got to start with the resources we’ve got and can’t spend money we don’t have.”⁴⁴

Far too many American citizens already suffer for their lack of government-issued photo IDs. Ensuring that those citizens have access to free IDs is an important goal that should be pursued by every state. But the solution is not to pile another hardship on those citizens – the denial of their right to vote – especially when it has not yet been shown that states can meaningfully reduce the number of citizens without photo IDs.

It is also troubling that the Report fails to include in its recommendations an effective “safety net” for eligible voters who do not have or are unable to obtain “Real IDs” and proof of citizenship, who have had their cards lost or stolen, or who have simply forgotten to bring their IDs to the polls and are unlikely to track down an election official within the Report’s 48-hour deadline. Virtually all states that require identification as a condition of voting have some alternative option for voters who lack identification, such as an option to show a utility bill or to sign a sworn affidavit containing information that can later be verified by election officials.⁴⁵ Even the recent and controversial Florida voter ID law was pre-cleared by the Department of Justice with such a safety net: the law permits voters who cannot meet the ID requirements to sign an affidavit on the envelope of a provisional ballot, which will be counted if the signature matched that on the voter’s registration form.⁴⁶ The Report’s attempt to support its extreme proposal by reference to the minority of states that require some form of identification for voting – without even mentioning that few of these states make identification an absolute condition of voting – is misleading.⁴⁷

Although the Report recognizes this problem, the solution it proposes—a signature match option only until January 1, 2010⁴⁸—is woefully inadequate. Since the Real ID Act goes into effect in 2008, this recommendation will provide a safety net only for *one* federal election.⁴⁹ There is no evidence that the states will ever correct the differential access to Real IDs, let alone in only two years. More important, there is no valid reason why the signature-match failsafe should ever be discarded.

After the brief two-year window, the Report recommends that a voter who does not furnish ID at the polls may cast a provisional ballot that can be counted if the voter returns “to the appropriate election office within 48 hours with a valid photo ID.”⁵⁰ A voter who does not have “Real ID” will find no comfort in a two-day extension, which is not sufficient time to obtain ID and which will not alleviate the costs of the ID. Even those voters who have but forgot to bring their Real IDs to the polls will face the difficulty of determining “the appropriate election office” to which to bring their IDs.

The real empirical data show that a substantial percentage of Americans will not be able to meet the Commission’s proposed ID requirements. The defect is no simple matter to overcome. No state in the union has yet succeeded in ensuring that all (or even almost all) of its voting-age citizens possess government-issued photo identification or proof of citizenship. Until most states demonstrate that they have successfully undertaken such steps, it is premature to consider such identification as a prerequisite to voting.

**B. THE LIMITED TYPES OF FRAUD THAT COULD BE PREVENTED
BY “REAL ID” REQUIREMENTS ARE EXTREMELY RARE**

The Report premises its burdensome identification proposals on the need to ensure ballot integrity and on the existence of or potential for widespread fraud. There is no question that fraud and misconduct—such as purges of eligible voters from voter rolls, distribution of false information about when and where to vote, and even occasional stuffing of ballot boxes or tampering with registration forms—persist in American elections. But as the Report admits, there is simply “no evidence” that the type of fraud that could be solved by stricter voter identification—individual voters who misrepresent their identity at the polls—is a widespread problem.⁵¹ Indeed, the evidence that does exist shows that this sort of fraud occurs only at an extremely low rate.

The Commission’s recommended photo identification requirements do not prevent fraud by absentee voting. Nor do they prevent voting by ineligible persons with felony convictions who are misinformed of their voting rights. They do not prevent unsubstantiated purges or stuffing of ballot boxes by election officials. Rather, the Report’s photo ID proposal guards against only one type of fraud: individuals arriving at the polls to vote using false information, such as the name of another registered voter, or a recent but not current address. These are extraordinarily inefficient means to influence the results of an election. Since the costs of this form of fraud are extremely high (federal law provides for up to five years’ imprisonment⁵²), and the benefits to any individual voter are extremely low, it is highly unlikely that this will ever occur with any frequency.

The barriers to fraud by individual voters at the polls have rendered such fraud a statistical anomaly in practice. The limited types of fraud that could be prevented by a “Real ID” requirement are, in fact, extremely rare. The Report concedes that “the evidence of multiple voting is thin”⁵³ and cites no meaningful evidence of identity misrepresentation at the polls. Independent research confirms the fact that the hypothetical specter of fraud raised in the Report is without basis.

In the most comprehensive survey of alleged election fraud to date, Professor Loraine Minnite and David Callahan have shown that the incidence of individual voter fraud at the polls is negligible.⁵⁴ A few prominent examples support their findings. In Ohio, a statewide survey found four instances of ineligible persons voting or attempting to vote in 2002 and 2004, out of 9,078,728 votes cast—a rate of 0.00004%.⁵⁵ Earlier this year, Georgia Secretary of State Cathy Cox stated that she could not recall one documented case of voter fraud relating to the impersonation of a registered voter at the polls during her ten-year tenure as Secretary of State or Assistant Secretary of State.⁵⁶ A similar finding prompted the Michigan Attorney General to find that the state's proposed identification requirement would violate the U.S. Constitution by unduly burdening the right to vote without a compelling state interest.⁵⁷

The Report attempts to support its burdensome identification requirements on four specific examples of purported fraud or potential fraud. ***None of the Report's cited examples of fraud stand up under closer scrutiny.*** Because similar examples have been used in the past to invoke the need for photo identification requirements, it is worthwhile to address each cited example in turn.

The Report first cites voting by ineligible persons with felony convictions and votes cast in the names of the dead in Washington State in 2004.⁵⁸ Photo identification requirements, of course, do not solve the first problem; they merely prevent a person from fabricating his name or address, and have absolutely no impact on an ineligible person arriving at the polls to vote under his own name. Moreover, *both* circumstances are addressed by HAVA provisions that had not yet been implemented in Washington (or, for that manner, in most states) in 2004: HAVA requires regular cleaning of the registration lists to remove persons rendered ineligible by felony conviction or death.⁵⁹ Once HAVA's provisions are implemented, persons who have been rendered ineligible by a felony conviction or death will simply not be listed on the voter rolls as eligible voters. Thus, if such persons—or others purporting to be them—show up at the polls, they will not be able to cast a regular ballot. Finally and most importantly, further investigation in Washington State—one of the most substantial investigations into voter fraud in recent history—uncovered only six cases of alleged double voting and 19 cases of alleged voting in the name of deceased individuals (several by recently deceased family members), out of a total 2,812,675 ballots cast.⁶⁰ The rate of ineligible voting that could possibly have been remedied by identification requirements was 0.0009%.

The Report also cites a Milwaukee investigation into alleged voting by ineligible persons with felony convictions, votes cast in the name of the dead, double-voting, and voting in another's name.⁶¹ The Report, however, cites only the investigation's preliminary findings. Further investigation has *completely* cleared the first nine cases to be resolved, attributing the suspected irregularities to clerical errors, mismatches, and computer glitches.⁶² There are, thus far, *no* proven cases of fraud in Milwaukee that might have been remedied by identification requirements.

The Report next cites the general potential for fraud from inactive or ineligible voters left on voter registration lists.⁶³ As noted above, this is precisely what HAVA's database-cleansing requirements were specifically intended to solve. The Report in no way suggests that these requirements have failed or will fail to address the issue.

Finally, the Report cites the conviction of 52 individuals since October 2002 for federal crimes relating to election fraud and ineligibility, including vote buying, submitting false voter registration information, and “voting-related offenses” by non-citizens.⁶⁴ Vote buying cannot be addressed by an identification requirement, as it does not involve misrepresentation of the voter’s identity. And the Report fails to examine the records of any of the other crimes to determine whether any of them could have been prevented by mandating photo ID. But even if every single such crime could have been deterred by photo identification, the overall context is critical; during the same period in which these 52 individuals voted illegally (or procured an illegal vote), 196,139,871 ballots have been cast in federal elections—yielding a proven fraud rate of 0.00003%.⁶⁵ Statistically, Americans are more likely to be killed by a bolt of lightning.⁶⁶

Thus, even those examples cited by the Report show that individual election fraud of the sort deterred by photo identification requirements at the polls is extremely rare. In contrast, there is hard evidence that such requirements will unduly burden millions of eligible voters who currently do not have photo ID and for whom restrictive photo ID will be difficult to obtain. As discussed above, more than ten percent of eligible Americans will likely face difficulty in obtaining ID conforming to the Commission’s recommendations. And these individuals will also disproportionately be members of groups that have traditionally faced barriers to voting: the poor, the elderly, the disabled, students, the transient, and people of color.

Perhaps recognizing the weakness of the fraud justification, the Report deploys a crafty rhetorical device to attempt to shift the rationale for the ID requirement. The Report states: “Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.”⁶⁷ There is no question, of course, that voting is important. The importance of the act, however, has absolutely nothing to do with an ID requirement. At least since “Publius” and “Brutus” publicly debated the wisdom of the Constitution, American citizens have been engaging in activities critically “important” to personal and civic life without needing to provide documentary proof of their identity. Identification requirements for activities like boarding a plane, entering a federal building, and cashing a check have been imposed only to the extent that they are necessary and proportional responses to a real and empirically demonstrated security threat. As shown in this report, the sort of fraud remedied by identification requirements rests on no such foundation. Moreover, a burden on a privilege like boarding a plane is not nearly as troubling as a burden on the exercise of a right so fundamental as voting. Indeed, voting differs from air travel, check-cashing, and entering federal buildings. Airlines, for example, have no incentives to exclude legitimate travelers, while some politicians have incentives to exclude legitimate voters who are likely to cast ballots for their opponents (as we see in the redistricting context). The very purpose of voting is to ascertain the will of the people, and the Report’s exclusionary ID requirement would do much more to thwart that goal than to advance it.

The Report’s effort to justify its ID proposal by a need for national uniformity is similarly unavailing. There is no reason to believe that statewide differences in identification requirements are any more discriminatory or problematic than any other election procedures and requirements that vary from state to state, such as voter registration requirements or mail-in voting availability. The Report does not recommend that we abandon state control over election

procedures and federalize all aspects of election administration, possibly because the Commission recognizes the benefits of state experimentation in expanding access to the franchise. While national uniformity at times is desirable, uniformity does not always promote fairness. A rule that uniformly excludes certain classes of voters is not an improvement over disparate state rules that are more protective of the franchise.

C. THE COMMISSION UNJUSTIFIABLY APPLIES A DOUBLE STANDARD TO ABSENTEE VOTERS

The Report's lack of attention to the empirical impact of its recommendations—and the shoddy logic of the enhanced photo identification requirement—is shown most clearly in the Report's differential treatment of absentee ballots and ballots voted in-person at the polls.

The Report provides no reason to create greater hurdles for voters who vote at the polls than for those who vote absentee. Yet despite the fact that absentee ballots are *more* susceptible to fraud than regular ballots,⁶⁸ the Report exempts absentee voters from its proposed “Real ID” and proof of citizenship requirements. The Report does not propose that state officials go out to collect ballots and check the photo IDs of absentee voters, nor does it recommend that absentee ballots (or ballots in a mail-in state like Oregon) be certified by a notary public who has checked the photo ID of the absentee voter. Instead, the Report permits absentee voters to be identified by matching the voter's signature on the absentee ballot envelope with a digitized version maintained by election officials. An absentee voter must produce only his signature; an individual voting in person must submit photo identification. The Report fails to explain why Americans who travel to the polls to vote should be denied the same opportunity to establish their identity through signature verification.

This double standard is especially disturbing in light of data, examined by the Commission's predecessor, that white voters are about twice as likely as black voters to cast an absentee ballot.⁶⁹

D. THE SPECULATIVE PROBLEMS CAN BE ADDRESSED BY LESS BURDENSOME ALTERNATIVES

As shown above, the identification proposal is in fact an unwarranted “solution” in search of a problem. It will not correct or deter any practice widely manifest in American elections, or even any practice with the realistic potential to corrupt an election. It will not prevent misconduct using absentee ballots. It will not prevent voting by ineligible persons with felony convictions who are misinformed of their voting rights. It will not prevent the intentional dissemination of misinformation about polling times, places, and procedures. It will not prevent unsubstantiated purges of eligible voters. It will not prevent stuffing of ballot boxes by election officials. It *will*, however, burden a substantial segment of the eligible voting population.

Individual voter fraud at the polls is largely a problem of perception, and perception alone. The appropriate—and proportional—remedy is education, not barriers to the ballot.

To the extent that any limited fraud by individuals at the polls does trickle into the system, it can be addressed by far less restrictive alternatives. The first step is to recognize that only voters who appear on the registration list may vote a regular ballot. Proper cleaning of registration lists—and proper use of the lists at the polls—will therefore go a long way toward ensuring that every single ballot is cast by an eligible voter.

Existing law has *already* accounted for this need—with proper safeguards for individual voters—and needs only adequate implementation. If inflated rolls create the specter of potential fraud, for example, the problem will be addressed by proper execution of the registration list-related provisions of NVRA and HAVA, which are designed in part to remove ineligible voters from the rolls. In addition to the better registration lists that full implementation will provide, better recordkeeping and administration at the polls will reduce the limited potential for voting by ineligible persons.

In the unlikely event that implementation of current law is not able to wipe out whatever potential for individual fraud remains, there are several effective and less burdensome alternatives to the Report’s “Real ID” recommendation that received wholly insufficient consideration. As discussed above, one less restrictive alternative was even recognized in the Report in a different context: verifying identity by matching the voter’s signature on the absentee ballot envelope with a digitized version maintained by election officials. Other proposals that have been advanced by election law scholars such as Edward Foley and Rick Hasen expressly condition identification requirements on a substantial affirmative government effort to reach out to underserved populations, and make accommodations for voters who do not bring a photo ID to the polls to cast a vote that will be counted.⁷⁰

The Report’s failure to consider these and other less restrictive alternatives for preventing the negligible problem of individual voter fraud further calls into question the legitimacy of its conclusions.

E. THE REPORT DRAMATICALLY UNDERESTIMATES THE FINANCIAL COST OF ITS “REAL ID” PROPOSAL

The Report dramatically – and dangerously – underestimates the cost of its identification recommendations. As an attempt to compensate for the burden that strict ID requirements tend to place on traditionally marginalized groups, the Report recommends that government-issued photo identification be made “available without expense to any citizen” and that government efforts be made “to ensure that all voters are provided convenient opportunities to obtain” the ID in question.⁷¹ More specifically, the Report recommends that the government affirmatively deploy “mobile offices,” to reach out to individuals who do not currently have the ID that they will need, and establish new “ombudsman institutions” to address concerns regarding abuse or mismanagement of the ID card system.⁷²

It is quite costly to fully implement all of these mechanisms, which are admittedly necessary to ensure that the government affirmatively provides ID to those who find it difficult to acquire the ID on their own, and that the ID requirement is deployed with minimal discrimination or misuse. In addition to the production and delivery cost associated with the

turbo-charged photo ID card itself, the government will have to provide for increased staff and staff training, for a variety of mobile offices and the new and underarticulated ombudsman institutions, as well as for each existing registrar's office.

These costs far exceed the costs delineated in the Commission's report. The report estimates the cost of its identification card proposal at \$115 million, at \$5 per card, and states that this \$5 estimate includes approximate administrative, infrastructure, and issuance costs.⁷³ However, this lowball estimate is belied by the very sources cited in the report itself. In 1997 testimony before the U.S. House of Representatives, Stephen Moore of the Cato Institute predicted that mass production of smart ID cards could cost \$5.00 per person, but included none of the administrative or infrastructure costs—much less the cost of “mobile offices,” ombudsmen, staff, and training—in this estimate.⁷⁴ Five years later, Tova Wang of the Century Foundation cited several sources stating that smart cards would cost *at least* \$5-\$8 per person for the card itself, without any consideration of administrative costs, as well as others estimating the cost at \$10-\$35 per person.⁷⁵

Furthermore, real-world experience shows that the total costs of a new ID system will far exceed initial estimates. Even three years before its effective date, states are already encountering problems with implementing the Real ID Act—which is more limited than the Commission's affirmative proposal to provide enhanced ID to those who find it difficult to acquire on their own. For example, the National Conference of State Legislatures estimated that the actual cost for implementing the Real ID Act would be between *nine and thirteen billion dollars*,⁷⁶ a stark contrast to the Congressional Budget Office's original estimate of only \$120 million.⁷⁷ Indeed, some states struggling with the Real ID Act have discovered that their initial start-up costs exceed the figure initially projected as the total cost *nationwide*.⁷⁸

Similarly, the real costs of the Commission's proposal will be much higher than the figures provided by the Commission. At a recent National Conference of State Legislatures conference, cost estimates for a non-driver's ID card of the sort recommended here were 7-10 times larger than the amount listed in the Commission's report.

In this circumstance, the cost estimate is not merely artificially low, but also extremely dangerous. A high price tag is of minor concern if the government is willing to provide the necessary funding. But a low price tag risks consequently meager appropriations. Underfunding of implemented ID programs would seriously compromise any limited merit—and legality—of the Commission's recommendation. If sufficient money is not appropriated to ensure that the government affirmatively provides ID to those who find it difficult to acquire, this Commission's recommendation will create two stark categories of citizens: those who have the means to procure ID and may vote; and those who do not, and are barred from voting solely by virtue of their limited means.

This is not merely speculation. States with existing strict ID requirements are already reluctant to ensure adequate access for poor and rural voters to the necessary ID. Georgia, for example, recently passed the strictest photo identification law in the country, despite the fact that there are only 56 offices in 159 counties where this ID can be acquired, that only one of the ten counties with the highest percentage of African-American residents has an office where this ID

can be acquired, and that no location where this ID can be acquired is within the Atlanta city limits.⁷⁹ To remedy the disparate impact that this new law will have on minority voters and those of limited means, Georgia has announced its own “mobile office” program: one bus, traveling to one location for a day or two at a time, available from 9am until 3pm, during the heart of the work day.⁸⁰

Such a program is patently insufficient to fulfill the government’s obligation “to ensure that all voters are provided convenient opportunities to obtain” the ID they need. If this is the solution envisioned at the outset of the budgeting process for a new program, the slapdash solution provided in the event of underfunding will be, *a fortiori*, even more limited. The low cost estimate in the Commission report risks a dramatically underfunded program – which, in turn, will only increase the burdens on those who do not currently have sufficient identification: the poor, elderly, disabled, and people of color.

F. THE “REAL ID” RECOMMENDATIONS WILL MAKE THE UNITED STATES AN OUTLIER AMONG THE WORLD’S DEMOCRACIES

As the Report acknowledges, the United States has one of the lowest voter participation rates among the world’s democracies. Our nation trails many other developed and developing democracies in voter turnout by 20 to 30 points.⁸¹ The identification recommendations will further depress voter participation.

The Report seeks to justify its proposed identification requirement in part by asserting that voter registration in many other countries is tied to photo identification.⁸² But most of the established democracies with which we usually compare the United States—such as the United Kingdom, Australia, Canada, Ireland, New Zealand, Sweden, and Denmark—do not require identification as a condition of voting.⁸³ A few established democracies that require identification for voting do so only in special circumstances. Germany, for instance, requires identification only of those voters who do not furnish their “notice of polling” or who appear to vote in a polling place other than that in which they are registered.⁸⁴ As a recent book surveying the election procedures of 62 countries found, unlike emerging democracies, “established democracies are less likely to require voters to identify themselves other than verbally.”⁸⁵

The Report’s claim that citizens of “nearly 100 democracies use a photo identification card” in order to vote is contrary to fact and wholly without support. The sole document the Report cites in support of that assertion does not even mention voting (except to note that India has a voter registration card).⁸⁶ What is more, that document says that “virtually no common law country” —like the United States—has an identification card, and only a minority of those countries with identification cards include photographs on those cards.

The Report also fails adequately to address the other ways in which the United States is distinct from those foreign countries that do require photo ID. For example, unlike the United States, France currently issues its government ID cards to all citizens free of charge.⁸⁷ In addition, unlike the United States, most other nations do not have an election system that is administered at the local level, often by partisans, with minimal oversight. This would allow for inconsistent and unequal application, and perhaps even partisan abuse, of ID requirements.

Moreover, as the Report does note, most other countries “have more effective voter registration” systems than the United States because election authorities abroad “take the initiative to contact and register voters and conduct audits of voter registration lists to ensure that they are accurate.”⁸⁸ These affirmative measures, which are not undertaken in the United States, counterbalance the depressive effects of voter ID requirements. They do, however, cost much more than Americans have been willing to spend on elections thus far. Mexico, for example, spent *twice* what California spent for its most recent general election per registered voter, and *four times* what Wyoming spent.⁸⁹ Finally, unlike the United States, many other countries with national identification cards also have established privacy laws, with government structures specifically devoted to vigorous enforcement of those laws, to safeguard against abuse of the information contained on the cards.⁹⁰

G. THE “REAL ID” RECOMMENDATIONS ARE INCONSISTENT WITH RIGHTS GUARANTEED IN THE U.S. CONSTITUTION AND FEDERAL STATUTES

The Report’s identification proposals will not only exclude millions of legitimate American voters; they are also inconsistent with the rights guaranteed by the U.S. Constitution and federal statutory law.

First, restrictive identification requirements would unconstitutionally deprive many Americans of their right to vote. The right to vote has long been recognized as a fundamental right protected by the First and Fourteenth Amendments of the U.S. Constitution.⁹¹ Voting is a primary avenue through which most citizens express their support or opposition to government policies. A government regulation that severely burdens the right to vote for some or all voters is presumptively invalid unless the state can show that the regulation is “narrowly drawn to advance a state interest of compelling importance.”⁹²

There is no question that the proposed identification requirements would impose severe burdens on the right to vote. Indeed, as explained above, the millions of Americans who will not have “Real IDs” would be absolutely denied their right to vote under the Commission’s proposed scheme. Regulations which present an absolute bar to a citizen’s ability to vote represent the most severe burden on the right to vote and trigger heightened scrutiny under the Constitution.⁹³

This significant barrier to voting is by no means narrowly tailored to serve a compelling state interest. While the interest in preventing voter fraud is an important one, the incidence of the types of fraud targeted by ID requirements is negligible. A rule that would bar millions of citizens from the franchise in an attempt to prevent a tiny fraction of them from attempting to commit a rare form of fraud cannot be said to be “narrowly drawn,” especially when less restrictive alternatives can accomplish the same goal. The Constitution does not sanction the use of such a blunt instrument against our most cherished right.

Second, the Report’s identification proposals would create an unconstitutional poll tax. The Constitution and the Voting Rights Act forbid attaching a monetary cost to voting.⁹⁴ By preventing those without means to procure the costly proof of identity necessary to obtain “Real IDs” from voting, the ID requirement would “make[] the affluence of the voter or payment of any fee an electoral standard” and would be unconstitutional.⁹⁵

Third, because of the disproportionate effects that ID requirements have on minority voters, they undermine the principles of the federal Voting Rights Act. Section 2 of the Voting Rights Act prohibits any voting procedure that has, in the totality of circumstances, a discriminatory effect on the ability of minority voters to participate in the political process, even if the procedure is adopted and applied without the intent to discriminate.⁹⁶ Since “Real ID” requirements will exclude African Americans, Native Americans, Latinos, and Hispanics to a much greater extent than they will white voters, they contravene this important legal protection. Moreover, to the extent that ID requirements are applied in a discriminatory manner—as they have been throughout American history—they may also run afoul of the Constitution’s prohibition of intentional racial discrimination.⁹⁷

Finally, the Report’s identification proposals will undermine the careful balance Congress crafted in the Help America Vote Act to enhance states’ ability to verify the accuracy of their voter registration lists without unduly infringing on voters’ rights. Indeed, it is irresponsible to recommend ID requirements at a time when states are first implementing some of the most important provisions of HAVA—provisions designed to remedy the same problem the Report claims to address. Moreover, as noted above, the ID recommendations will also undermine important provisions of the National Voter Registration Act designed to provide low-income individuals with greater access to voter registration.

* * *

The Report’s zeal for an identification requirement at any cost reflects a general misconception of election integrity. An election with integrity is one that allows every eligible voter—and only eligible voters—the opportunity to cast a ballot and to have that ballot counted accurately. The Report’s ID recommendation fails this standard. It is unjustified as a matter of both policy and law, and must not be included in any legitimate proposal for meaningful election reform.

Chapter II

THE RECOMMENDATIONS THAT FULL SOCIAL SECURITY NUMBERS BE USED IN VOTER DATABASES (SECTION 2.2) AND ON ID CARDS (SECTION 2.5) POSE SERIOUS PRIVACY AND SECURITY PROBLEMS

With regard to the Report's interoperability recommendations, it is unquestionably beneficial to account for voters who move across state lines. Nonetheless, the Report fails to consider the serious efficacy, privacy, and security concerns raised by a nationally distributed database of the magnitude it contemplates. These problems are exacerbated by the Report's recommendation that an individual's Social Security number be used as the broadly disseminated unique voting identifier.

The Report's recommendation creates substantial privacy and security hazards. Social Security numbers unlock a vast array of information regarding private financial, employment, and medical data – and, as a result, must be kept with ironclad security. Unfortunately, existing legal limitations on and protections for Social Security numbers have been consistently whittled away over time and frequently disregarded in practice. The media regularly reports on breaches of security concerning public and private data files containing Social Security numbers. Hackers, however, are not the only concern. Social Security numbers are also disclosed by officials entrusted with their safekeeping, despite criminal penalties against distribution.⁹⁸ For example, in 1997, Georgia's Secretary of State contracted with a credit reporting corporation in an effort to "capture" the Social Security numbers of some 400,000 registered voters without such a number on file. In due course, Georgia's entire voter registration list—records for more than four million citizens, and the associated Social Security numbers of those who had provided their number upon registration—was disclosed to the corporation, with no restrictions on the corporation's use of those numbers.⁹⁹

The Report's recommendation to use the Social Security number as the unique identifier for tracking voters across state lines would only increase the general circulation of this financial keystone—and there is no reason to believe that new legal protections would be any more effective than their existing counterparts. The potential for improper use and disclosure will only increase.

Moreover, the Report recommends not only that the Social Security number be used as a unique interstate identifier, but also that it be placed physically on the voting ID card.¹⁰⁰ A misplaced or stolen card would contain, readily available on the face of the card, all information necessary to perpetrate identity theft with ease: name, signature, date of birth, current address, and Social Security number. Similarly, such personal information would be contained on photocopies of drivers licenses maintained for other purposes: for example, copies held (and potentially misplaced) by clerks at car rental agencies or volunteer poll workers. Such a card would become a treasure chest for wrongdoers, and would expose countless Americans to privacy violations, identity theft, and variety of other crimes.

In addition to the substantial privacy concerns, the Social Security number is a flawed key for tracking (and potentially purging) voters across states. The Social Security

Administration was not established to construct a system of national identification, and its database contains substantial errors. For example, the SSA's Director of Information Exchange and Computer Matching has admitted that at least ten percent of the information obtained when attempting to match identifying information in the SSA database with identifying data collected in other systems by other government entities may be inaccurate.¹⁰¹ The SSA's systems may be adequate for disbursing funds, but they were never intended to track individuals from one state to another for voting purposes.¹⁰²

Finally, the Report recommends—without any discussion—that the information used as an individual's unique fingerprint to track a voter across state lines include not merely the date of birth, but also the person's "place of birth."¹⁰³ As with the Social Security number, this information is often used as a key to private information wholly unrelated to voting, and as such, disclosure presents a substantial security hazard. Moreover, this information seems particularly susceptible to use in harassing legitimate voters, particularly naturalized citizens. The reasons to protect against broad disclosure of a voter's place of birth are at least as serious as those confronting the widespread distribution of a voter's full Social Security number. Yet, as with many other issues, the Report wholly fails to consider these important concerns.

Chapter III

THE RECOMMENDATION ON RE-ENFRANCHISEMENT OF PERSONS WITH FELONY CONVICTIONS (SECTION 4.6) IS OVERLY RESTRICTIVE, OUT OF STEP, AND UNWORKABLE

The section of the Report on felony re-enfranchisement lacks the strong language, found in much of the rest of the Report, concerning individual rights and the perception of a fair process. The substance of the Commission's principal recommendation reflects this apparent indifference to the voting rights of people with criminal convictions.¹⁰⁴ The Report recommends that states restore voting rights only to certain people with criminal convictions, and only after they have "fully served their sentence." This overly restrictive standard places the Commission out of step with the states, the American public, and the laws of other nations.

Recommendation 4.6.1 provides:

States should allow for restoration of voting rights to otherwise eligible citizens who have been convicted of a felony (other than for a capital crime or one which requires enrollment with an offender registry for sex crimes) once they have fully served their sentence, including any term of probation or parole.

This recommendation would set a standard more generous than the policies of the most regressive thirteen states in the nation but more restrictive than the remaining thirty-seven. The thirteen regressive states permanently disenfranchise some or all people with criminal convictions even after they have completed their sentences. The thirty-seven other states either leave intact the voting rights of people with criminal convictions or re-enfranchise them, without exception, upon completion of sentence or sooner.¹⁰⁵ Adoption of the Commission's principal recommendation would, therefore, be a step backward for the large majority of states.

The trend in the states is toward extension of the franchise. Since 1997, twelve states have reformed their laws or policies to allow more people with convictions to vote.¹⁰⁶ In 2005 alone, Nebraska repealed a permanent ban on voting and restored the franchise to people with felony convictions two years after the completion of sentence;¹⁰⁷ Iowa's governor issued an executive order restoring voting rights to people with criminal convictions when they complete their sentences;¹⁰⁸ and the Rhode Island General Assembly passed and sent to referendum a resolution to amend the state constitution to re-enfranchise people with felony convictions upon their release from prison.¹⁰⁹

These reforms are driven by some startling numbers. Approximately 4.7 million Americans have lost the right to vote because of a criminal conviction.¹¹⁰ This number includes 1.4 million African-American men, whose 13% rate of disenfranchisement is seven times the national average.¹¹¹ More than 670,000 of the disenfranchised are women;¹¹² more than 580,000 are veterans;¹¹³ and 1.7 million have completed their sentences.¹¹⁴ This astonishing rate of criminal disenfranchisement is a blot on our democracy, an affront to racial justice, an

impediment to rehabilitation, and a quagmire for election officials. The Report's recommendation does not improve the situation.

The Report suggests that its regressive recommendation is in line with the views of “proponents of re-enfranchisement.” This is a mischaracterization. On the contrary, mainstream proponents of re-enfranchisement reject the notion that re-enfranchisement should await the completion of *all* terms of a criminal sentence, and generally favor restoration of voting rights when a person reenters the community as a citizen and taxpayer. The American Bar Association is but one of many organizations to support this position, urging re-enfranchisement immediately following incarceration.¹¹⁵ A person convicted of a crime must and will serve all terms of a sentence, but disenfranchisement is not part of criminal sentencing, and voting is a civic duty that a person should reassume as he or she reintegrates into society. As to victim restitution, it should be paid, but a person's voting rights should never depend on the ability to pay this or any other sum of money.¹¹⁶

The American people also support more generous re-enfranchisement than the Commission Report recommends. In a 2002 telephone survey of 1,000 Americans nationwide, researchers found that substantial majorities (64% and 62% respectively) supported allowing probationers and parolees to vote.¹¹⁷ Fully 80% favored restoring the franchise to people who had completed felony sentences.¹¹⁸ Even when questions were asked about certain unpopular offenses, majorities supported voting rights. Two-thirds of respondents supported allowing violent ex-felons to vote; 63% supported allowing ex-felons convicted of illegal stock-trading to vote; and 52% supported restoring the franchise to ex-felons who had been convicted of a sex crime.¹¹⁹

International norms are even more favorable to voting rights. Inmates may cast ballots while incarcerated in many democracies, including Australia, Canada, Denmark, France, Germany, Israel, Ireland, Japan, Peru, Poland, Spain, South Africa, and Sweden.¹²⁰ Others—including Argentina, Brazil, Egypt, India, Portugal, Russia, and the United Kingdom—restore the franchise to prisoners once they have completed their sentences.¹²¹ Florida, Kentucky, and Virginia now stand alone with Armenia as the only democracies in the world that permanently disenfranchise all citizens who have committed a felony.¹²² The United States accounts for 5% of the world's population—and almost half of those who cannot vote because of a felony conviction.¹²³

The Report advises exceptions even to the narrow post-sentence re-enfranchisement it recommends. Under the Report's rule, capital offenders and those whose names are entered in a sex crimes registry would never vote. These exceptions may be politically expedient, but they are unjustified. A “capital crime” is one for which the death penalty may, but need not necessarily, be imposed. When a person is executed, there is of course no question of re-enfranchisement. Even when a capital offender is not sentenced to death, however, he or she is increasingly unlikely ever to get out of prison and even more unlikely ever to be released from parole. Forty-eight states, plus the District of Columbia and the federal government, employ some form of sentence of life imprisonment without parole.¹²⁴ For those capital offenders not serving such a sentence, the minimum time in prison still stretches into multiple decades.¹²⁵ Those few offenders who may complete parole as older adults after serving twenty-five to fifty

years in prison ought to regain the franchise, as should those who are exonerated and pardoned after years of wrongful confinement on death row. Likewise, sex offenders who have served their sentences are no less entitled to vote than others. Studies show that voting advances rehabilitation,¹²⁶ and no past or potential victim is endangered when a former offender votes.

Moreover, the Report's recommendation is unworkable. The general rule—that re-enfranchisement should follow the completion of a criminal sentence—is itself difficult to administer. In Washington State, this rule caused much controversy in the dead-heat gubernatorial election of 2004. Scores of people with felony convictions apparently voted without knowing that it was illegal, and others were prevented from voting although their rights should have been restored.¹²⁷ The confusion was attributable in part to the multiplicity of government agencies involved, including the courts, the department of corrections, the offices of parole and probation, and the county boards of elections. With the relevant information for maintaining the voter rolls divided among so many, errors were inevitable. As Washington Secretary of State (and current president of the National Association of Secretaries of State) Sam Reed concluded, “the simplest way to fix confusion over tracking felons would be to automatically restore voting rights when people are released from prison, regardless of whether they’ve paid all their court debts.”¹²⁸

Add to this base-level confusion the difficulties of tracking the exceptions the Report recommends, and the errors will compound. Not all states have capital offenses, and in those that do, there is variation in which crimes are punishable by death. For example, Florida punishes certain types of sexual battery and drug-trafficking as capital offenses, whereas in Arizona, the death penalty is available only for aggravated first-degree murder.¹²⁹ There are similar inconsistencies in the states' designations of crimes requiring registration as a sex offender. In Arkansas, for example, a person convicted of “distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child” or of “computer exploitation of a child,” among many other crimes, must register as a sex offender.¹³⁰ In Rhode Island, however, only people who have been convicted of violent or aggravated sex offenses or who have been designated “sexually violent predators” or recidivists must register.¹³¹ In Delaware, adult and juvenile sex offenders must register; in Alabama, only adult (and not juvenile) sex offenders must register.¹³² Because a capital offender in one state may not be one in another, and because a person who must register as a sex offender in one state need not do so in another, maintaining accurate voter rolls as people move from state to state would present nearly insurmountable challenges under the Report's recommendation.

Any rule other than one that restores voting rights to all citizens upon completion of incarceration creates the opportunity for erroneous—and even malicious—purges of eligible citizens from the voting rolls. Take for example the infamous purges of the Florida voter rolls of supposedly ineligible felons. In 2000, Katherine Harris, who was both the Secretary of State and the state co-chair of George W. Bush's presidential campaign, implemented a program purging any Florida voter whose name shared 80 percent of the letters of a name in a nationwide felon database; a California felon named John Michaelson would cause an eligible Floridian named John Michaels to be purged. Unsurprisingly, over half of those who appealed the purge after the 2000 election were deemed eligible.¹³³ In 2004, the state again developed a now-discredited “list of suspected felons” for the purpose of facilitating purges. Fortunately, the state was forced to

withdraw that list before the election when it was revealed that the list included many citizens who had never been convicted of a felony; included many whose voting rights had been restored; and was racially biased, containing 22,000 African-Americans but only 61 Hispanics.¹³⁴ These problems would not have arisen had Florida law restored voting rights to its citizens upon release from incarceration. In that case, one single agency—the department of corrections—would be responsible for notifying the state’s chief election official both when people lost their rights upon sentencing, and when they regained their rights upon release; any person who showed up at the polls to vote would clearly be a person who was not in prison. Thus, the systems for purges and restorations would be streamlined, avoiding the kinds of abuses much publicized in Florida. A well-functioning system would inform election officials only of the names of all persons in prison; others would not be rendered ineligible by a felony conviction.

The Commission missed an important opportunity to recommend that states automatically restore the franchise to people with criminal convictions when they have served their time in prison. This rule would: (1) strengthen our democracy by encouraging broader and more equitable participation in electing our leaders; (2) encourage the rehabilitation of those most in need of building connections to their communities; and (3) streamline the restoration process by making the state departments of correction the exclusive sources of the relevant information to be transmitted to election officials. Instead, the Report adopted a disappointing and unworkable recommendation that the states should leave behind as they continue to move in the right direction on this issue. For its part, Congress should pass legislation permitting people with criminal convictions to vote in federal elections as soon as they are released from incarceration.

ENDNOTES

¹ Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (Sept. 2005) [*hereinafter* “Report”].

² Report at iv.

³ Although the Report’s section on provisional ballots (Section 2.3) is also deficient in that it fails to address many of the problems with state administration of provisional ballots and makes too weak a recommendation for counting provisional ballots cast by eligible voters in the wrong precinct, we do not address that section in this white paper since the Commission’s report does not purport to comprehensively analyze provisional balloting.

⁴ *Id.* at 21.

⁵ “Real ID” cards are driver’s licenses and non-driver’s identification cards issued to those who meet rigorous documentation requirements. See section A.1.

⁶ Report at 18.

⁷ *Id.*

⁸ 42 U.S.C. § 15481 *et seq.*

⁹ Report at 73 n.22.

¹⁰ See John Mark Hansen, Coordinator, Task Force on the Federal Election System, *Report*, at VI-4 in *Task Force Reports to Accompany the Report of the National Commission on Election Reform* (Aug. 2001); National Commission on Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at 32 (Aug. 2001) (“5-7% of adults do not possess a driver’s license or other photo identification, and are disproportionately poor and urban”) [*hereinafter* “Ford-Carter Report”].

¹¹ A comparison of national driver’s license records and the most recent census data shows that approximately 23 million voting-age individuals in the United States do not have driver’s licenses; using 2000 citizenship rates, about 22 million of those individuals are citizens. See Fed. Highway Admin., U.S. Dep’t of Transp., *Licensed Total Drivers, By Age 2003* tbl. DL-22 (Oct. 2004), <http://www.fhwa.dot.gov/policy/ohim/hs03/htm/dl22.htm>; U.S. Census Bureau, *Annual Estimates of the Population by Selected Age Groups and Sex for the United States: April 1, 2000 to July 1, 2004* (June 2005), <http://www.census.gov/popest/national/asrh/NC-EST2004-sa.html>; U.S. Census Bureau, *Census 2000 PHC-T-31 Voting-Age Population and Voting-Age Citizens*, tbl. 1-1, <http://www.census.gov/population/www/cen2000/phc-t31.html>. Other means to triangulate the figure yield similar results. For example, in 2000, there were 193 million voting-age citizens; at the country’s 3.3% national growth rate from 2000 to 2003, that would yield 200 million voting-age citizens in 2003. As noted above, the Ford-Carter Commission estimated that up to ten percent of these Americans – or approximately 20 million -- do not have driver’s licenses or state-issued photo ID. U.S. Census Bureau, *Census 2000 PHC-T-31 Voting-Age Population and Voting-Age Citizens*, tbl. 1-1, <http://www.census.gov/population/www/cen2000/phc-t31.html>; U.S. Census Bureau, *USA QuickFacts from the US Census Bureau*, at <http://quickfacts.census.gov/qfd/states/00000.html>. In New York City, as many as three million registered voters do not have a driver’s license, and 1990 census data revealed that more than fifty percent of voting-age city residents overall did not have a license. See Elizabeth Daniel, *The New Voter Identification Requirement*, THE GOTHAM GAZETTE, April 2002, at <http://www.gothamgazette.com/article/20020401/17/728>.

¹² Real ID Act of 2005, Pub. L. No. 109-13, Div. B, Title II, § 202(c), 119 Stat. 231, 302. The Report understates the burdens of acquiring Real ID. The Real ID Act does more than require states to “verify an individual’s full legal name, date of birth, address, Social Security number, and U.S. citizenship,” Report at 19; it requires individuals to present documentary proof of each such fact.

¹³ Press Advisory, Maricopa County Recorder and Elections Department, Voter Registration is Different Following DOJ Approval (Feb. 4, 2005), <http://recorder.maricopa.gov/pressrelease.aspx>.

¹⁴ See Deanna Wrenn, *Three States Debate Requiring Voters to Show ID*, VENTURA COUNTY STAR, Mar. 31, 2005, at 6.

¹⁵ John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin* 1, 11 (June 2005), available at <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>.

¹⁶ See American Association of People with Disabilities et al, *Statement in Opposition to a National Voter Identification Card*, at 2 (June 29, 2005), http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/NATIONAL_ID_STATEMENT.PDF.

¹⁷ See section A.2.

¹⁸ See section A.3.

- ¹⁹ According to the U.S. Census Bureau, “[a]bout 1 in 6 Americans move each year.” Kristin A. Hansen, U.S. Census Bureau, *Geographical Mobility* (Jan. 2001), <http://www.census.gov/population/www/pop-profile/geomob.html>. Students and people of color move even more frequently than the average. *Id.*
- ²⁰ Based on the figures cited in the Report, approximately 75% of the moving individuals move within the same state. Report at 9. The vast majority of individuals moving would therefore have no reason unrelated to voting to obtain a new driver’s license or state-issued ID.
- ²¹ Report at 9 (citing average number of Americans who move each year).
- ²² Although the Report does not specifically recommend that Real ID cards include an individual’s address, the Real ID Act does. See Pub. L. No. 109-13, Div. B, Title II, § 202(b)(6) (minimum requirements for Real ID cards).
- ²³ Report at 10.
- ²⁴ See Letter from Adam Cox et al. to John Tanner, Chief, Voting Section, Civil Rights Div., U.S. Dep’t of Justice (Aug. 18, 2005), at 3.
- ²⁵ See Ga. Dep’t of Driver Servs., *Driver’s License Customer Service Centers*, at <http://www.dds.ga.gov/locations/index.aspx> (office locator on Georgia Department of Driver Services web site).
- ²⁶ There are other collateral costs to the Commission’s proposal. For example, many states revoke driver’s licenses when drivers fail to pay fines associated with traffic violations; a citizen who cannot pay the fine will not be able to renew his or her driver’s license. Thus, by relying on Real IDs, the vast majority of which will be driver’s licenses, the Commission’s identification proposal incorporates the cost of maintaining a current and valid driver’s license. In practice, this means that the fundamental right to vote could well be denied due to an eligible voter’s unpaid parking ticket.
- ²⁷ Ford-Carter Report at 77.
- ²⁸ Letter from Deval L. Patrick, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Sheri Marcus Morris, La. Assistant Att’y Gen. (Nov. 21, 1994). Louisiana now allows voters to establish their identity through signed affidavit.
- ²⁹ Pawasarat, *supra* note 15.
- ³⁰ *Id.*
- ³¹ Tova Wang, *2004: A Report Card*, AM. PROSPECT, Jan. 2004, at A5.
- ³² 42 U.S.C. §§ 1973gg *et seq.*
- ³³ U.S. Census Bureau, Voting and Registration in the Election of November 2000, tbl. 14, <http://www.census.gov/population/www/socdemo/voting/p20-542.html>.
- ³⁴ See Hansen, *supra* note 10, at VI-4 (“Poll workers with the worst of motives might deliberately use the requirement to confront and intimidate ‘strangers.’ Either way, voters who were asked to show identification when others were not might come to feel that they were singled out.”).
- ³⁵ See Asian American Legal Defense and Education Fund, *The Asian American Vote 2004* (April 2005) (documenting discriminatory application of ID rules to Asian-Americans), http://www.aaldef.org/images/04-20-05_exit_poll_report.pdf; Editorial, *Lessons of the Ballot Box*, N.Y. TIMES, Nov. 4, 2004, at A24 (complaining that “voter identification requirements were arbitrarily, and often incorrectly, enforced” in 2004 election); cf. Chandler Davidson *et al.*, *Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both?* 93-95 (Sept. 2004) (describing reports of Native Americans not being informed of option to sign an affidavit instead of furnishing photo ID in South Dakota).
- ³⁶ See Report at 20-21 & Recommendation 2.5.4.
- ³⁷ See, e.g., 148 Cong. Rec. S1227 (daily ed. Feb. 27, 2002) (statement of Sen. Landrieu) (“History has shown that requiring photo identification or certain other documents most significantly impacts minority voters.”); 148 Cong. Rec. S1224 (daily ed. Feb. 27, 2002) (statement of Sen. Schumer) (“The intent of this legislation is to take people, particularly those who live in the corners of America who do not fly airplanes and use their credit cards all the time but rather people who may not have a driver’s license, who may not have a utility bill, and allow them to vote, our most sacred right.”).
- ³⁸ States vary widely in how they treat provisional ballots cast by first-time voters who do not present some form of identification at the polls: some count such provisional ballots unless there is affirmative evidence that the voter is ineligible; some count them if election officials match the signature on the provisional ballot envelope with the signature the voter provided at registration; some count them only if the voter returns with ID within a specified period; and some refuse to count them under any circumstances. Regardless of whether HAVA permits states to refuse to count provisional ballots cast by eligible and registered first-time voters who do not have the requisite ID, it is clear that HAVA does not prohibit the counting of such ballots.
- ³⁹ Report at 19.

⁴⁰ While some States do not require payment from individuals who sign an affidavit of indigence, few Americans are willing to call themselves indigents or to face the collateral consequences of signing such an oath.

⁴¹ Report at 33.

⁴² Affidavit of Christopher M. Thomas in *Michigan State Conf. of NAACP Branches v. Land*, No. 04-CV-10267 (E.D. Mich. Oct. 7, 2004), ¶ 36 (asserting that 92% of Michigan voting age population has driver's license or non-driver's ID); Tel. Conf. with Christopher Thomas, Michigan Director of Elections, Sept. 21, 2004 (estimating that 90% of eligible voters in Michigan possess driver's licenses or state-issued ID).

⁴³ [georgia.gov](http://www.georgia.gov), *DDS Begins Mobile Licensing Tours & Center Reservations for Photo IDs*, at http://www.georgia.gov/00/article/0,2086,4802_4961_41800330,00.html.

⁴⁴ Nancy Badertscher, *State Bus Will Roll for Voter IDs*, ATLANTA J.-CONST., Aug. 9, 2005, at 1B.

⁴⁵ See Nat'l Conference of State Legislatures, *State Requirements for Voter Identification* (July 26, 2005), at <http://www.ncsl.org/programs/legman/elect/taskfc/voteridreq.htm> (summary of state laws regarding voter ID).

⁴⁶ See FLA. STAT. ch. 101.048 (2005); Letter from Martha R. Mahoney, Chair, Racial Impact Committee, Miami Dade Election Reform Coalition, to Timothy Lambert, Civil Rights Div., U.S. Dep't of Justice (Oct. 2, 2003), <http://www.reformcoalition.org/Ressources/MDERC%20Preclearance%20Letter1.pdf>.

⁴⁷ See Report at 18.

⁴⁸ The text of this recommendation is as follows: "We recommend that until January 1, 2010, states allow voters without a valid photo ID card (REAL or EAC-template ID) to vote, using a provisional ballot by signing an affidavit under penalty of perjury. The signature would then be matched with the digital image of the voter's signature on file in the voter registration database, and if the match is positive, the provisional ballot should be counted. Such a signature match would in effect be the same procedure used to verify the identity of voters who cast absentee ballots. After January 1, 2010, voters who do not have their valid photo ID could vote, but their ballot would only count if they returned to the appropriate election office within 48 hours with a valid photo ID." Report at 21 (Recommendation 2.5.3).

⁴⁹ While the Report claims that its proposal will provide a safety net for two election cycles, that claim ignores the fact that the Real ID Act does not go into effect until 2008.

⁵⁰ Recommendation 2.5.3.

⁵¹ Report at 18.

⁵² 42 U.S.C. § 1973i(c).

⁵³ Report at 18.

⁵⁴ Lorraine Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud* (2003), available at <http://www.demos.org/pubs/EDR - Securing the Vote.pdf>.

⁵⁵ Coalition on Homelessness & Hous. in Ohio & League of Women Voters Coalition, *Let the People Vote* (2005), available at <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf>.

⁵⁶ Letter from Cathy Cox, Ga. Sec'y of State, to Sonny Perdue, Ga. Governor (Apr. 8, 2005), available at <http://www.aclu.org/Files/OpenFile.cfm?id=18651>.

⁵⁷ Mich. Op. Att'y Gen. No. 6930, 1997 WL 37560, at *3 (Jan. 29, 1997).

⁵⁸ Report at 4.

⁵⁹ 42 U.S.C. § 15483(a)(2)(A)(ii).

⁶⁰ *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 24, 2005), available at <http://www.secstate.wa.gov/documentvault/694.pdf>. Of these cases, at least two individuals voted on behalf of spouses who had died earlier in 2004, one voted on behalf of a roommate who had died earlier in 2004, and two were a mother and daughter who voted on behalf of their father who had died earlier in 2004. Gregory Roberts, *Six More Charged With Offenses in 2004 Election*, SEATTLE POST-INTELLIGENCER, June 22, 2005, at B1.

⁶¹ Report at 4.

⁶² Greg J. Borowski, *Nothing Points to Fraud in 9 Double Voting Cases*, MILWAUKEE J.-SENTINEL, Aug. 22, 2005, at B1.

⁶³ Report at 4.

⁶⁴ Report at 45.

⁶⁵ Office of the Clerk, U.S. House of Representatives, *Election Statistics* (2005), <http://clerk.house.gov/members/electionInfo/elections.html>.

⁶⁶ In 1990, there were 89 lightning fatalities, out of 248,709,873 Americans, for a rate of 0.00004%. stats at George Mason University, *How Likely Are You to Be Struck by Lightning?*, May 1, 1995, available at <http://www.stats.org/record.jsp?type=news&ID=402>.

⁶⁷ Report at 18.

⁶⁸ According to Hans A. von Spakovsky, Counsel to the Assistant Attorney General of the Civil Rights Division, “absentee ballots represent the easiest way to steal an election.” Memorandum from Hans A. von Spakovsky, Attorney and Government Affairs Consultant, on No Fault Absentee Balloting, p. 1 (Mar. 29, 2001), available at http://www.hss.caltech.edu/~voting/von_spakovsky-1.pdf.

⁶⁹ See Hansen, *supra* note 10, at V-1 (2001 analysis comparing the relative rates of absentee voting by race using 1996 data); Kimball W. Brace & Michael P. McDonald, *Final Report of the 2004 Election Day Survey*, submitted to the U.S. Election Assistance Commission (Sept. 27, 2005), at 5:8 (analysis of 2004 election survey data showing that jurisdictions with predominantly non-Hispanic White populations reported an absentee ballot request rate of 10.9%, while jurisdictions with predominantly non-Hispanic Black populations reported a rate of 5.7%).

⁷⁰ Edward B. Foley, *Is There a Middle Ground in the Voter ID Debate?*, available at <http://moritzlaw.osu.edu/electionlaw/comments/2005/comment0906.html>; Rick Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. ____ (forthcoming 2005), available at <http://electionlawblog.org/archives/margin.3.pdf>.

⁷¹ Report at 20.

⁷² Report at 20-21.

⁷³ Report at 71 & n.81.

⁷⁴ *Legislation Concerning Immigrant Issues: Hearing on H.R. 231, H.R. 429, H.R. 471 and H.R. 1493 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 105th Cong. 107 (1997) (statement of Stephen Moore, Economist, Cato Institute), http://commdocs.house.gov/committees/judiciary/hju43829.000/hju43829_of.htm.

⁷⁵ Tova Andrea Wang, Century Found., *The Debate Over a National Identification Card* (May 10, 2002), available at http://www.tcf.org/Publications/HomelandSecurity/National_ID_Card.pdf.

⁷⁶ Brad Shannon, *Federal Practices Hurt States, Officials Say*, THE OLYMPIAN, Aug. 17, 2005, at 1B.

⁷⁷ Cong. Budget Office, H.R. 418: REAL ID Act of 2005, CBO Cost Estimate (Feb. 9, 2005).

⁷⁸ Dibya Sarkar, *States May Face Higher Costs for Real ID*, FEDERAL COMPUTER WEEK, Aug. 19, 2005, <http://www.fcw.com/article90196-08-19-05-Web>.

⁷⁹ Letter from Adam Cox et al., to John Tanner, Chief, Voting Section, Civil Rights Div., U.S. Dep’t of Justice (Aug. 18, 2005).

⁸⁰ See Georgia.gov, *supra* note 43.

⁸¹ See Rafael López Pintor et al., International IDEA, *Voter Turnout since 1945: A Global Report 78-85* (2002), http://www.idea.int/publications/vt/upload/VT_screenopt_2002.pdf.

⁸² Report at 5.

⁸³ LOUIS MASSICOTTE, ANDRE BLAIS & ANTOINE YOSHINAKA, *ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES* (2004).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Privacy International, *Identity Cards: Frequently Asked Questions* (Aug. 24, 1996) (cited in Report at 5), at http://www.privacy.org/pi/activities/idcard/idcard_faq.html (cited in Report at 5).

⁸⁷ See Ministère de l’intérieur, *Votre carte nationale d’identité* (May 24, 2004), at http://www.interieur.gouv.fr/rubriques/b/b8_teleservices/ENTAM.

⁸⁸ Report at 5.

⁸⁹ Report at 59; EPIC Project, Election Process Information Collection, *What Was the Spending (in USD) per Registered Voter ...?*, [http://epicproject.org/ace/compepic/en/getAnswer\\$ALL+EM10](http://epicproject.org/ace/compepic/en/getAnswer$ALL+EM10).

⁹⁰ See Mark Rotenberg & Cedric Laurant, *Privacy & Human Rights 2004: An International Survey of Privacy Laws and Developments* (2004), at <http://www.privacyinternational.org/survey/>.

⁹¹ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

⁹² *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

⁹³ See generally *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (“[A]t the least, [] States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.”); *Ayers-Schaffner v. Distefano*, 37 F.3d 726, 729 (1st Cir. 1994) (total denial of the right to vote for some citizens in an election is “obviously severe”).

⁹⁴ U.S. CONST. amend. XXIV, § 1 (“The right of citizens of the United States to vote in any [federal election] shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”); U.S. CONST. amend. XIV, § 1, cl. 4 (“... nor shall any State ... deny to any person within its jurisdiction the equal protection of the law”); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966); 42 U.S.C. § 1973h.

⁹⁵ *Harper*, 383 U.S. at 666.

⁹⁶ 42 U.S.C. § 1973(a) (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color”); *see also* 42 U.S.C. § 1973(b); S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 *et seq.*; *Thornburg v. Gingles*, 478 U.S. 30, 43-45 (1986); *Black v. McGuffage*, 209 F. Supp. 2d 889, 892 (D. Ill. 2002).

⁹⁷ *See, e.g., Washington v. Davis*, 426 U.S. 229, 241 (1976) (“A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race”).

⁹⁸ 42 U.S.C. §§ 408(a)(8), 405(c)(2)(C)(vii)(I).

⁹⁹ *See Schwier v. Cox*, No. 1:00-cv-2820-JEC (N.D. Ga. Jan. 31, 2005), slip op. at 5, 21 & n.9, *available at* <http://www.acluga.org/briefs/ssn/SSNotoVoteOrder.pdf>.

¹⁰⁰ Report at 21.

¹⁰¹ Remarks of Pete Monaghan, Director of Information Exchange and Computer Matching of the Social Security Administration, at the February 2004 meeting of the National Association of Secretaries of State.

¹⁰² Hearing, *supra* note 74.

¹⁰³ Report at 12.

¹⁰⁴ As elsewhere, although the principal recommendation in this section of the Report is deeply flawed, not all of the Commission’s recommendations in this area are uniformly bad. For example, Recommendation 4.6.2 proposes two measures that would affirmatively improve the restoration process. First, the states should inform people with criminal convictions regarding voter registration rules and procedures when they become eligible to vote. And second, the state departments of corrections should notify state election officials when a person regains the franchise.

¹⁰⁵ Two states and Puerto Rico do not disenfranchise on the basis of criminal convictions at all. Twelve states and the District of Columbia permit people with convictions to vote as soon as they are released from prison. An additional five states allow probationers to vote, disenfranchising people with felony convictions only while they are in prison or on parole. Eighteen more restore the franchise, without exception for any class of offender (other than, in some cases, those convicted of election-related crimes), when a person completes probation or prison and parole. The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (Sept. 2005), <http://www.sentencingproject.org/pdfs/1046.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; 2005 Neb. Laws L.B. 53, § 1 (codified at NEV. REV. STAT. § 29-112 (2005)).

¹⁰⁸ The Sentencing Project, *supra* note 105; Exec. Order No. 42 (July 4, 2005), *available at* http://www.johnson-county.com/auditor/voter/EO_42.pdf.

¹⁰⁹ H.J.R. 6579, 2005 Leg. (R.I. 2005).

¹¹⁰ The Sentencing Project, *supra* note 105.

¹¹¹ *Id.*

¹¹² *Id.*; *see also* The Sentencing Project, *Felony Disenfranchisement Rates for Women* (Aug. 2004), <http://www.sentencingproject.org/pdfs/fvr-women.pdf>.

¹¹³ The Sentencing Project, *Disenfranchised Veterans in the United States* (June 2003), <http://www.sentencingproject.org/pdfs/1023.pdf>.

¹¹⁴ The Sentencing Project, *supra* note 105.

¹¹⁵ ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d ed. Aug. 2003), Standard 19-2.6(a), <http://www.abanet.org/leadership/2003/journal/101a.pdf>.

¹¹⁶ *Cf.* 42 U.S.C. § 1973h (“The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color.”).

¹¹⁷ Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Towards Felon Disenfranchisement in the United States* (2002), Summary, *at* <http://www.sentencingproject.org/pdfs/ManzaBrooksUggenSummary.pdf>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Brandon Rottinghaus, Int’l Found. for Election Sys., *Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform 20-26* (2003), <http://www.sentencingproject.org/pdfs/Rottinghaus.pdf>.

¹²¹ *Id.*

¹²² Alabama also permanently disenfranchises individuals who have been convicted of crimes of “moral turpitude,” ALA. CONST. art. VIII, § 5, but not all felonies in Alabama meet this definition, *see* Ala. Op. Atty. Gen. No. 2005-092, and thus some citizens who have committed a felony are not disenfranchised under Alabama law. In addition, although Iowa’s constitution permanently disenfranchises all individuals with felony convictions who have not received executive clemency, IOWA CONST. art. II, § 5, an Executive Order issued by the Governor restores voting rights to all individuals convicted of felonies once they complete their sentences. Exec. Order No. 42 (July 4, 2005), available at http://www.johnson-county.com/auditor/voter/EO_42.pdf. Thus, neither Alabama nor Iowa permanently disenfranchises all citizens with felony convictions.

¹²³ *Id.*

¹²⁴ Death Penalty Info. Ctr., *Life Without Parole News and Developments (2001-2004)*,

<http://www.deathpenaltyinfo.org/article.php?did=555&scid=59>.

¹²⁵ The Sentencing Project, *The Meaning of “Life”: Long Prison Sentences in Context* (May 2004),

<http://www.sentencingproject.org/pdfs/lifers.pdf>.

¹²⁶ Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 205-08 (2004) (noting that people who have been arrested and who vote are only half as likely as those who do not vote to be rearrested or to self-report criminal activity).

¹²⁷ Seattle Times Staff, *Scores of Felons Voted Illegally*, SEATTLE TIMES, Jan. 23, 2005, at A1.

¹²⁸ *Id.*

¹²⁹ Compare FLA. STAT ANN. §§ 794.011(2)(a), 893.135(1)(b) with ARIZ. REV. STAT. § 13-703(A),(E).

¹³⁰ ARK. CODE ANN. §§ 12-12-903(12)(A)(i)(w), (y), 12-12-905(a)(1).

¹³¹ R.I. GEN. LAWS § 11-37.1-3.

¹³² Compare DEL. CODE ANN. tit. 11, § 4120 with ALA. CODE § 13A-11-200.

¹³³ John Lantigua, *How the GOP Gamed the System in Florida*, NATION, Apr. 30, 2001, at 11.

¹³⁴ See, e.g., Ford Fessenden, *Florida List for Purge of Voters Proves Flawed*, N.Y. TIMES, July 10, 2004, at A13; Bob Kemper, *Carter Rips Florida’s Election Fixes*, ATLANTA J.-CONST., Sept. 28, 2004, at A14; Maya Bell, *Campaign 2004, Is Florida Ready?*, ORLANDO SENTINEL, Aug. 25, 2004, at A1.