



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

Senate Judiciary Committee

Testimony of Jenny Flanagan
Director of Voting and Elections
Common Cause

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

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

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

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

¹ Adam Levine, “*Voters Receiving Misleading Robocalls in Ohio*,” CNN.com, Nov. 3, 2008, <http://politicalticker.blogs.cnn.com/2008/11/03/voters-receiving-misleading-robo-calls-in-ohio/>.

² Kristen Gosling, “*Text Messages Spread False Information*,” KSDK.com (NBC St. Louis), Nov. 4, 2008, <http://www.ksdk.com/news/local/story.aspx?storyid=159310&catid=3#%23>.

About S. 1994

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

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

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

State Law Does Not Uniformly Address Deceptive Practices

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

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

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

Examples in the States

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

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

⁴ Peter Hermann, "Schurick Will not Serve Jail Time in Robocalls Case," The Baltimore Sun, Feb. 16, 2012, http://articles.baltimoresun.com/2012-02-16/news/bs-md-ci-schurick-sentenced-20120216_1_schurick-doctrine-judge-lawrence-p-fletcher-hill-robocalls.

⁵ John Wagner, "Ex-Ehrlich Campaign Manager Schurick Convicted in Robocall Case," The Washington Post, Dec. 6, 2011, http://www.washingtonpost.com/local/dc-politics/ex-ehrllich-campaign-manager-schurick-convicted-in-robocall-case/2011/12/06/gIQA6rNsaO_story.html.

⁶ Id.

⁷ Id.

⁸ Peter Hermann, "Schurick Will not Serve Jail Time in Robocalls Case," The Baltimore Sun, Feb. 16, 2012, http://articles.baltimoresun.com/2012-02-16/news/bs-md-ci-schurick-sentenced-20120216_1_schurick-doctrine-judge-lawrence-p-fletcher-hill-robocalls.

- On Election Day in 2008, 35,000 students and staff at George Mason University received an email at 1:16 am from the University Provost. The email falsely stated that the election had been postponed until Wednesday.⁹ Later, the Provost sent another email stating that his email account had been hacked and that the election would take place that day as planned.¹⁰
- In 2008, flyers were distributed in the southern part of Virginia and on the campus of George Mason University claiming to be from the Virginia State Board of Elections. The flyers falsely stated that “[a]ll Republican party supporters and independent voters supporting Republican candidates shall vote on November 4th...All Democratic party supporters and independent voters supporting Democratic candidates shall vote on November 5th.”¹¹
- In Pueblo, Colorado, on Nov. 3, 2008, the eve of the presidential election, voters received robocalls telling them that their precinct had changed and gave them incorrect locations to go to instead. Pueblo County Clerk and Recorder Gilbert Ortiz testified that his office was “inundated” by calls from confused and angry voters who wondered how their precinct could suddenly change the night before an election.¹²
- During Wisconsin’s gubernatorial recall election earlier this month (June 2012), Wisconsin voters received robocalls saying “If you signed the recall petition, your job is done and you don’t need to vote on Tuesday.”¹³ A spokesperson for Governor Scott Walker denied any involvement with the calls and the source of the calls remains unknown.¹⁴
- In 2011, a church pastor in Walnut, Mississippi posted false information on his Facebook page that he “just heard a public service announcement” concerning a vote on a hotly-contested state constitutional amendment on personhood and conception. The Facebook message instructed those voting “YES” to vote on Tuesday (Election Day), and those voting “NO” to vote the following day.¹⁵

⁹ Brian Krebs, “GMU E-Mail Hoax: Election Day Moved to Nov. 5,” The Washington Post, Nov. 4, 2008, http://voices.washingtonpost.com/securityfix/2008/11/gmu_e-mail_hoax_election_day_m.html.

¹⁰ Id.

¹¹ *Lawyers’ Committee Testifies Before Maryland Senate on Deceptive Practices*, Lawyers’ Committee for Civil Rights Under Law, Feb. 16, 2012, http://www.lawyerscommittee.org/projects/voting_rights/clips?id=0445.

¹² Patrick Malone, “Panel Approves Election Fraud Measure,” The Pueblo Chieftain, Feb. 16, 2012, http://www.chieftain.com/news/local/panel-approves-election-fraud-measure/article_2bbd3476-5863-11e1-a4ac-001871e3ce6c.html

¹³ Josh Eidelson, “Nasty Rob-calls in Wisconsin?,” Salon, June 5, 2012, http://www.salon.com/2012/06/05/nasty_robo_calls_in_wisconsin/.

¹⁴ Id.

¹⁵ *Lawyers’ Committee Testifies Before Maryland Senate on Deceptive Practices*, Lawyers’ Committee for Civil Rights Under Law, Feb. 16, 2012, http://www.lawyerscommittee.org/projects/voting_rights/clips?id=0445.

- In Ohio, voters reported being confronted “with a sea of election-related misinformation.”¹⁶ National media reported that some voters received calls stating that Republicans were to vote on Election Day, while Democrats were to vote the following day.¹⁷ Further, an election official reported that she had received multiple reports concerning robocalls that provided incorrect information about polling places.¹⁸
- In 2003, 300 cars with decals resembling those of federal agencies and men with clipboards bearing official-looking insignias were seen travelling around black neighborhoods in Philadelphia asking voters for identification.¹⁹

State Law

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

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

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

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

¹⁶ Adam Levine, “*Voters Receiving Misleading Robocalls in Ohio*,” CNN.com, Nov. 3, 2008, <http://politicalticker.blogs.cnn.com/2008/11/03/voters-receiving-misleading-robo-calls-in-ohio/>.

¹⁷ Id.

¹⁸ Id.

¹⁹ Donna Britt, “*Ensuring that Voting’s Sanctity Win Out*,” The Washington Post, Oct. 1, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A63907-2004Sep30.html>.

²⁰ Va. Code Ann. § 24.2-1005.1 (2007).

²¹ (2010).

²² S.B. 12-147, 68th Leg., 2d Sess. (Colo. 2012).

²³ Id.

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

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

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

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

Conclusion

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

²⁴ S.B. 1009, 2011-2012 Sess. (N.Y. 2011).

²⁵ S.B. 179, 2009-2011 Leg. (Wis. 2009).

²⁶ Id.

²⁷ H.B. 787, 2007 Reg. Sess. (Miss. 2007).

²⁸ S.B. 1283, 82d Leg., Reg. Sess. (Tex. 2011).

²⁹ Id.