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IADL founded 1946

## **UNITED STATES' FAILURE TO PUT IN PLACE EFFECTIVE MEASURES TO PROTECT THE RIGHT TO VOTE**

### **SUMMARY**

1. Article 21 of the UDHR provides, "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." ICCPR article 25 declares that every citizen shall have the right and opportunity "to take part in the conduct of public affairs... to vote and be elected at genuine periodic elections." Equality of access to these political rights based on race and national origin is guaranteed by the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5).<sup>1</sup> The rights guaranteed in Article 25 of the ICCPR are to be enjoyed without distinctions as set forth in Article 2 of the ICCPR and without unreasonable restrictions. The distinctions in Article 2 include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Human Rights Committee in the General Comment on Article 25 stated that Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. (Paragraph 1).

Although the United States has ratified the ICCPR and the ICERD, the United States has not taken effective measures to ensure that all persons entitled to vote are able to exercise their right. Not only is the United States not taking effective measures to ensure people are able to exercise the right to vote, many States have engaged in actions which impair this right and continue to suppress the rights of many people to vote. The Supreme Court also has either made rulings which promote voter suppression or has refused to hear cases which have challenged voter suppression. Targets of voter suppression have primarily been people of color and those whose ideology tends to be progressive. Thus there has been discrimination based on race, color and national origin as well as political opinion. Many of the laws which impose identification requirements impose costs on those groups least capable of paying them, thus discriminating against people based on property. This UPR submission will address several specific barriers to voting which violate the United States' duty to take effective measures to protect that right.

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<sup>1</sup> Similar rights are protected by regional documents, including article 23 of the American Convention on Human Rights (ACHR) and article 13 of the African Charter on Human and Peoples' Rights (ACHPR). The European Convention on Human Rights (ECHR) mandates free elections by secret ballot to ensure the free expression of the people in choosing their representatives (Protocol 1, Art. 3). The right of women to vote on an equal basis with men is delineated in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). "State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right ... [t]o vote in all elections. It could be said that given the universality of the recognition of these rights they are customary international law.

2. The National Lawyers Guild (NLG) was founded in 1937 in order to unite progressive lawyers throughout the country. It was the first racially integrated bar association in the United States and has championed civil and human rights. For the 82 years of its existence, the NLG has promoted all forms of democratic rights, including fighting to expand the right to vote and to eliminate racial barriers to voting. Recently as there have been major attacks on voting rights including voter suppression, the NLG's International Committee has been promoting education within the NLG on the International Human Rights Instruments and their applicability to voting rights in the U.S.

3. The International Association of Democratic Lawyers (IADL) is an international legal organization with sections and members in more than 50 countries. IADL has consultative status with the UN and is accredited to ECOSOC and UNESCO. It was established to promote international law, understanding among lawyers and their associations and it works to achieve the aims of the UN Charter. The IADL's Constitution calls for defending and promoting human and peoples' rights as well as integrating international human rights covenants into the national laws of each country. The IADL is committed to protecting voting rights in accordance with international human rights covenants worldwide.

4. The information obtained for this submission is based on various documents and research as well as work done by the author seeking to address problems of voter suppression and efforts to stop improper voter roll purges, strict laws requiring costly forms of identification to vote, and other obstacles to voting. Also in 2018, the author in conjunction with investigative reporter Greg Palast made demands for information from 26 US states, which gathered information on ways in which States purge their voter rolls.

## **BACKGROUND**

In 2016, over 108 million people of the over 240 million people eligible to vote either did not show up at the polls or were denied ballots to vote in the presidential election in the United States. That is, about 55% of the eligible electorate voted. In 2012, nearly 219 million people were registered to vote, but only 126 million voted in the presidential election while 93 million did not vote. That is, only 58% voted. The reasons so many people fail to vote are varied but one thing is clear: There are so many obstacles and barriers to people voting that almost half the population of the United States does not vote, even in critical presidential elections.

This report outlines a few of the barriers to voting in the United States:

### **I. IN THE UNITED STATES PEOPLE ARE REQUIRED TO VOTE ON A WEEKDAY WHICH MAKES IT DIFFICULT FOR MANY WORKING PEOPLE TO VOTE**

In 1845, before the emancipation of the slaves and before it was legal for women to vote in the United States the first Tuesday after the first Monday in November was established as the national election day for presidential elections.<sup>2</sup> The rationale for setting this date was based in the agrarian

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2 This same Tuesday date was applied to elections for House of Representatives in 1875 and to the election of Senators in 1914. These other elections also preceded the passage of dates women still could not vote and the freed slaves and their descendants were effectively denied their right to vote either through intimidation or such practices as literacy tests or poll taxes which put the franchise out of reach for most African Americans or other persons of color.

and religious nature of the population at the times. It was convenient for farmers, as November was between planting seasons, allowing people time to travel to polling stations. Weekends were rejected primarily because it was presumed most people would be in church on Sundays.<sup>3</sup>

Today, unlike the overwhelming majority of countries which hold their elections over a few days and/or on weekend days,<sup>4</sup> the United States is still operating with an election day on a weekday in November, which no longer has any rationale for convenience of the population and indeed was set when only white men could vote. Having to vote on a weekday which is not a national holiday and where most employers do not give their workers time off to vote often puts eligible voters in the position of having to choose between their pay or voting, because often voting can only occur in limited hours before or after the regular workday, where long lines can prevent people from actually casting a ballot.<sup>5</sup> Unless a person lives in a State where early voting, either through filing a no excuse absentee ballot or voting at an early voting station is allowed, they must vote on the Tuesday election day.<sup>6</sup> Furthermore, in large cities where voting infrastructure is old and not enough poll workers or voting stations are assigned, long lines occur which cause many people to give up

## **II. REGISTRATION AND IDENTIFICATION REQUIREMENTS ARE BARRIERS TO VOTING**

All States have a requirement that persons must register before they can vote. In the United States, voter registration is often difficult. In 1988 only 50.1% of the voting age population cast a vote in the presidential election. The 1992 elections showed a similarly low turnout of 55.2%.<sup>7</sup> In response to these low turnouts Congress in 1993 passed the National Voter Registration Act of 1993. (NVRA) This law was designed to make it easier for persons of voting age to register to vote in order to protect the fundamental right to vote. The law requires employees at Motor Vehicle offices and other public benefits offices to offer those who have come for those services the ability to register to vote at the same time. Being able to register to vote at the same time as seeking other services such as drivers' licenses or public benefits allows people to register to vote without any other cost. Despite the passage of this law, about 21% of voting age and voting eligible adults are not registered. Although the object of the NVRA was to increase voting participation, especially among lower-educated groups underrepresented in the presidential elections, it is not obvious that the decreased cost of registration has produced the desired result in voting turnout. Only 49% of the voting age population voted in 1996, the first presidential election year after the NVRA. Voter turnout improved only slightly in subsequent elections. Turnout was 51.2% in 2000 and 56.7% in 2004. According to a recent Pew Survey, less than 20% of eligible voters were offered the chance to register at motor vehicle offices or other public agencies.<sup>8</sup>

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3 "Why Do We Vote on Tuesdays?" <https://www.npr.org/2016/11/01/500208500/why-do-we-vote-on-tuesdays>.

4 [https://en.wikipedia.org/wiki/Election\\_day](https://en.wikipedia.org/wiki/Election_day)

5 It is well known that especially in large urban areas where many people of color live, voting infrastructure is not well maintained or supplied with enough ballots or sufficient numbers of trained poll workers cause long lines to vote. This type of problem causes people who want to vote but cannot wait because they have to go to work to leave the lines and not vote.

6 There is a wide variation among states as to how much early voting is allowed and most states still require some type of excuse like illness or infirmity to file an absentee ballot.

7 "Motor Voter and Turnout 15 Years after the NVRA" Joseph Lawler, Department of Economics, University of Notre Dame.

8 "Why are Millions of Citizens Not Registered to Vote" <https://www.pewtrusts.org/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote>.

While there are many reasons people in the United States do not vote or do not want to register to vote, including a belief that their votes do not make a difference, requiring people to register before an election, or cutting off their right to vote if they have not registered by a date in advance of an election is inconsistent with the duty of the United States to take effective measures to ensure people have the right to vote.

When a person registers to vote, they sign an affidavit swearing that they are eligible to vote. Once registered, they should be able to vote on election day. However there has been a big push by many States, especially after 2000, to pass and implement voter identification laws. Most of the proponents of these laws are Republicans who appear to believe that requiring these IDs, which makes it more difficult for low income persons and persons of color to expend the time or money to obtain them, will deter these people from voting. These laws have proliferated at the same time as many of the same opponents of people of color voting attacked the Voting Rights Act's requirement of Justice Department pre-clearance of any changes which might negatively affect voters of color in their jurisdiction.

Many of the ID laws have been challenged in Court but currently 34 of the 50 States have some form of voter ID laws in effect. These laws require various forms of identification at the polling station in order to vote. Several States have strict laws which allow only certain types of State issued photo ID cards to satisfy the ID requirement. In some States, persons are allowed to provide forms of identification other than specific forms of photo ID as in strict ID States, but in each case the requirement to provide some form of identification puts an extra burden on people trying to vote.<sup>9</sup> These identification laws are not supported by any rational basis as in person voter fraud is virtually non-existent. Unfortunately in 2008 the Supreme Court upheld a voter identification law from Indiana holding these laws not unconstitutional on their face.

A most egregious example of this was a law passed in North Dakota leading up to the 2018 elections imposing a requirement that Native Americans have ID with street addresses, when such street addresses rarely exist on reservations because resources have not been allocated to providing such addresses, and they had been voting for years using ID which referenced Post Office boxes as their addresses. A Court challenge to this law was unsuccessful, forcing many Native Americans in North Dakota to lose their vote in 2018<sup>10</sup>

No case has challenged any of these laws based on the measures being contrary to the obligations of the States Parties to the ICCPR to take effective measures to ensure all those eligible to vote can vote.

### **III. PURGES OF MILLIONS OF PEOPLE FROM THE VOTER ROLLS**

According to the Brennan Center for Justice between 2016 and 2018, at least 17 million people were purged from the voting rolls in the United States. This was similar to the number of people purged

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<sup>9</sup> [https://en.wikipedia.org/wiki/Voter\\_ID\\_laws\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Voter_ID_laws_in_the_United_States).

<sup>10</sup> Article dated March 20, 2019 from the Native American Rights Fund "Discriminatory North Dakota Law Still In Effect."

between 2014 and 2016 but considerably higher than between 2006 to 2008.<sup>11</sup> Secretaries of State in each of the States have the job of maintaining the accuracy and currency of voter rolls. When the office of the Secretary of State gets notice that a person in their jurisdiction has died, moved, or is otherwise unqualified to vote, it is appropriate that these persons names are removed from the voter rolls.

One of the purposes of the National Voter Registration Act is to ensure that voter rolls are accurate and current. Unfortunately many States have referred to that purpose to engage in the purge millions of voters from the voter rolls who have not moved or died. They have used the fact that someone has not voted as a basis for claiming that a person has moved even though under the NVRA a person cannot be removed from the voter rolls for not voting.

Thus, where a person has not voted the State may send a confirmation postcard to the person they think has moved and if the person does not return the postcard confirming their addresses, those persons will be removed if they do not vote in two more Federal elections thereafter.

Unfortunately these postcards are often overlooked by people and not returned even if they have not moved. In 2018 a case known as *A. Phillip Randolph Institute v. Husted*, was decided by the Supreme Court, which approved of Ohio's use of non-voting as sufficient evidence that someone moved to trigger sending a confirmation postcard to them. Those who did not return the postcard and then did not vote for two federal election cycles were then removed from the rolls. The Court approved of this program, claiming people were not removed solely for not voting, but for not voting and not returning a postcard. In that case, persons who had not voted and had not returned the postcard but had never moved were removed from the voter rolls and denied the right to vote when they wanted to.

Other States have participated in programs like the Interstate Voter Crosscheck program where names of people who live in different states are matched and then removed if their names appear on two States' lists. The problem with this program is that it only matches first and last names and birth years. It has a racially disparate impact because people of color are over-represented in 85 of the 100 most common names and those common names appear frequently on the Crosscheck lists. It is believed that many people were purged just by virtue of their names being on the Crosscheck lists. Indiana passed a law requiring the Secretary of State to purge the names of people whose names appeared on the Crosscheck list as living in another State without any form of verification of notice. That law was recently struck down.<sup>12</sup>

In 2018 the author on behalf of investigative reporter Greg Palast sent requests to the 26 States which participated at that time in the Crosscheck program and requested the lists of people purged from the voter rolls as well as their lists of people purged from the voter rolls for any reason. The NVRA requires public disclosure of all list maintenance activities.

As a result of these requests, the author obtained records from most of the States which showed that many of them were using some form of postcard notification to voters like that approved of in Ohio to purge hundreds of thousands of people from the voter rolls. In the *Husted* case those challenging

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11 "Voter Purge Rates Remain High", Kevin Morris, August 1, 2019. <https://www.brennancenter.org/print/21979>.

12 *Common Cause of Indiana et. al. v. Lawson*, 2019 U.S. App LEXIS 25773 (7<sup>th</sup> Cir. 2019)

the law had not tested how many of the people who had been purged from the rolls had never moved. We decided to test this issue in Georgia where over 700,000 people had been purged from the voter rolls in 2017 and where over 500,000 were purged based on their failure to confirm their addresses and then not voting for two Federal election cycles. That list was sent to a company which verifies addresses as its business model. The results showed that over 340,000 people who were removed because they were presumed to have moved had never moved from the address where they initially registered.

Mr. Palast posted the purge list on his website and asked people to check their names to see if they needed to re-register. Unfortunately there were only a few days before the registration deadline for voting in the governor's election. Over 100,000 people contacted his website, but he has no idea how many were able to re-register. In 2018 the gubernatorial election in Georgia was very close, and the African American candidate lost by a little more than 50,000 votes out of almost 4 million cast. In that election, there were many examples of people being denied the right to vote based on these voter purges or other issues related to the use of an "exact match" system for registrations. Mr. Palast documented many cases of voters being denied the right to vote or to file provisional ballots. Most egregious was the case of 92 year old Christine Jordan, a cousin of Martin Luther King, who had voted every year since 1968. When she went to the polls to vote in the gubernatorial election in Georgia, her name was no longer on the voter rolls and she was denied the right to vote.<sup>13</sup>

In the case of Georgia, the Secretary of State who had control over the election procedures was also a candidate for governor. He should not have been allowed to control the election procedures when also running, but nothing was done to force him to recuse himself. The Georgia example from 2018 is a good example of how voter roll purges and other forms of blocking people from registering prove the United States has failed to take effective measures to ensure all citizens of voting age who have the right to vote may exercise their right to vote.

## RECOMMENDATIONS

In order to ensure that everyone who has the right to vote can vote it is incumbent on the United States to remove barriers and obstacles to people being able to exercise their rights. It is only through removing these barriers that the United States can be said to take effective measures to ensure people in the United States can exercise the franchise. In this report the author has identified only a few of these barriers. Based on this it is recommended

1. That the United States either move its election day to a weekend date or make election day a national holiday or at least make it mandatory that people could vote over several days including weekend days.
2. That the United States ensure that each State provides sufficient resources to each polling station so as to prevent long lines of people waiting to vote, as these long lines discourage people from voting or make people who cannot wait forgo their vote. This is especially true in the urban areas where many people of color reside.

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<sup>13</sup> <https://www.gregpalast.com/martin-luther-kings-cousin-blocked-from-voting/>

3. The United States should allow for automatic registration of persons upon reaching voting age, or at the very least allow for same day registration.

3. Identification requirements for voting should be eliminated as based on the lack of any data showing in person voter fraud; all those who are registered to vote should be allowed to vote and those who register on the same day as the election should be allowed to register based on the person swearing in an affidavit that they are entitled to vote.

4. Voter roll purging for people who move should only be done based on evidence from change of address forms filed with the Post Office or by voters voluntarily notifying the Secretaries of State that they have moved. Not voting should not be a criterion for assuming someone has moved.

These specific recommendations do not address the full panoply of restrictions on voting but they would go a long way to ensure the United States ensured there were effective measures in place to allow U.S. citizens to exercise their right to vote and participate in public affairs as required by Article 25 of the ICCPR.