

Executive Summary of Testimony of

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The United States has made great strides in the area of voter registration in recent years, but the 2008 election displays how much further we must go. Controversies surrounding voter registration appear to have been *the* problem in the 2008 election, producing more litigation than any other single topic. Many of these problems are a product of the progress made in this area, for example, with the innovation of statewide voter registration databases that have now been used to create purge or challenge lists. In other respects, the problems have been known to political scientists for a generation, such as the effect of registration on depressing voter turnout among residentially mobile populations.

The United States continues to make voting more difficult than any other industrialized democracy. This is not the result of registration, per se – many other countries require registration. Rather, the effect of the registration system comes from its interaction with the high mobility of the American population and the lack of any affirmative government effort to register voters who change their address. 90 million eligible voters (45 percent of the population) move every five years. Given that each voter is required to re-register each time he or she moves, it comes as no surprise that the longer someone resides at an address, the more likely they are to be registered and vote. This requirement has a disproportionate impact on certain populations, such as active military servicemembers residing in the United States. Because they are more likely to be recent arrivals at their residence, they are also less likely to vote and more likely to experience problems with their registration on Election Day.

Both Election Day complaints and the litigation leading up to Election Day illustrate the problems of the registration system. Registration problems represented 31 percent of the incidents reported to CNN on its Election Day hotline, for example. The number of provisional ballots cast also hint at the failings of the registration system. 1.9 million such ballots were cast in the 2004 election and a third went uncounted. Although we do not know how many such ballots were cast in 2008, the Associated Press reports 800,000 provisionals were cast in just 14 states alone. Finally, the litigation in 2008 over mismatch lists, third party registration efforts, and disputes over registration applications indicates the evolution and magnitude of the registration problem.

With all that said, we still need to learn much more about the scope of the registration problem. We do not really know how many voters are registered or even how many, in fact, voted in 2008. In order to assess problem areas and evaluate reforms, analysts need data at the precinct level concerning the basic metrics of how many people are registered and voted, whom they voted for and by what mode (early, absentee, in-person, military, or provisional ballot). Such data gathering would be a first step toward describing the registration problem in full and prescribing a direction for reform.

**Testimony of Professor Nathaniel Persily
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**Before the United States Senate Committee on Rules and Administration on
“Voter Registration: Assessing Current Problems”**

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Thank you, Mr. Chairman and Members of the Committee, for inviting me today to testify on the problems with the nation’s current system of voter registration. My name is Nate Persily. I am the Charles Keller Beekman Professor of Law and Political Science at Columbia Law School. I teach and write in the areas of voting rights, election law, constitutional law and the regulation of politics. Perhaps of most relevance to my testimony here today is my ongoing research on Americans’ experience and opinions with respect to the fundamental workings of our electoral system.

Whereas punch card ballots were the problem for the 2000 election and long lines were the problem for the 2004 election, the voter registration system appears to have been the problem for the 2008 election. Whether one judges election law problems by the amount of litigation they produce or the volume of complaints by voters, registration appears to have been at or near the top of the list for 2008. This most recent election revealed the serious shortcomings of the registration in its attempt to achieve its most basic goals. Moreover, the registration system provides a lens through which we can view many of the current dysfunctions of our electoral system: in particular, the difficulties discrete populations face in voting, the problems with provisional ballots, and the need for data to assess the geography of election-day problems.

By way of introduction, we should recognize that we have made great gains in terms of registration with legislation such as the National Voter Registration Act and the Help America Vote Act. In fact, most recent estimates suggest an increase in voter registration from 2004 of about 5.4 percent, or ten million names.¹ Despite these gains, however, the United States continues to make it more difficult to vote than any other industrialized democracy. The registration system is largely responsible for our comparatively low voter turnout. This is not because of the mere fact of requiring registration – many other countries do so. Rather, it is the interaction of our registration system with the high mobility of our population, the requirement that voters re-register

¹ See Michael McDonald, 2008 General Election Voter Registration Statistics, available at http://elections.gmu.edu/Registration_2008G.html (last visited March 7, 2009) (noting the total number of people listed as registered as 187 million). Registered voter numbers are notoriously inflated due to “deadwood” on the rolls – that is, duplicate registrations, registrations of dead voters and registrations of those no longer living in the given state. Survey data suggest that the number of voters reporting themselves to be registered is closer to 168 million, which is probably more accurate.

each time they change address, and the limited role that the government takes in affirmatively registering voters.

The effect of registration on specific populations illustrates this interaction between the legal system and the mobility of the American population. According to Census figures, approximately 45 percent of the U.S. population moves every five years. This translates into about 90 million eligible voters moving every five years—many, more than once. If they wish to vote, virtually all of those 90 million “movers” must re-register when they change their address. The mere fact that these movers must re-register is the chief reason that the longer someone has lived at a given residence the more likely they are to be registered and to turn out to vote.² The 2004 Election Supplement to the Census Current Population Survey demonstrate this linear relationship. Whereas only 53 percent of respondents who lived in their residence for less than a year reported voting, 76 percent of those who have lived in their residence for five years or more reported voting.³

It should come as no surprise then, that the population groups most likely to move are therefore less likely to be registered and therefore vote. Much has been made about the effect of registration laws on turnout of the young and less educated (both groups that are more likely to change residence), but other groups, such as active military, are also disproportionately affected by registration problems. According to the 2008 Cooperative Congressional Election Survey (CCES) servicemen and women living in the United States report voting at a rate 10 percent lower than the general population. And those who do vote cite having registration problems at 1.7 times the rate of those not in the military. These figures are completely separate from the often severe registration problems that military voters stationed overseas experience.

As the experience of military voters delineates, the registration “problem” extends well beyond the fact of requiring registration or the effect of registration on turnout. The problems with the registration system extend further to the experience of voters on Election Day and the likelihood that their votes will be counted. In incident reports to CNN on Election Day this past November, for example, 31 percent of the reported complaints involved problems with registrations – far larger than any other individual category.⁴ As Professor Stephen Ansolabehere’s testimony before this Committee also reports, the results from the 2008 CCES confirm registration problems as both a major reason for a failure to turn out to vote and as a source of major problems for those who, in fact, turned out and tried to vote on Election Day. The aggregate effect is hard to pin down, but the data suggest such problems account for several million votes not being cast.

² See Benjamin Highton, “Residential Mobility, Community Mobility, and Electoral Participation,” *Political Behavior* (22:109), June 2000 (demonstrating that the chief effect of mobility on turnout derives from the need to register at a new address, not movers’ lack of connectedness to a new community).

³ Kelly Holder, Current Population Reports, *Voting and Registration in the Election of November 2004 Available*, March 2006, available at <http://www.census.gov/prod/2006pubs/p20-556.pdf> (noting also that 68 percent of respondents who lived in their residence for less than a year report being registered, whereas 84 percent of those living in their residence for five years or more report being registered).

⁴ See CNN, Voter Hotline, available at <http://www.cnn.com/ELECTION/2008/voter.hotline/> (last visited March 7, 2009).

Even among those ballots cast, registration problems account for a sizable number not being counted. One way to get a handle on such a problem is to examine the number of provisional ballots cast and counted in an election. Complete data for the 2008 election will only be available in a few months. However, the Associated Press reports that in just fourteen states, the number of provisionals amounted to over 800,000 ballots. In the 2004 election, 1.9 million provisional ballots were cast, which represented about 2.5 percent of the total ballots cast.⁵ Fully a third (or over 670,000) went uncounted. However, the rate of rejection of provisional ballots varied considerably between states, with Delaware, Hawaii and Oklahoma rejecting more than 90 percent of provisional ballots and Alaska and Maine rejecting less than five percent of provisional ballots. Unfortunately, we do not know for sure how many such ballots went uncounted because of a registration problem; we only know that the most frequently cited reason by state officials as the cause for not counting such ballots was to say the voter was not registered.

One other useful metric to gauge the magnitude of the voter registration “problem” is the amount of registration-related litigation surrounding an election. On that score, the 2008 election may have broken records. Although the lawsuits surrounding the 2008 election revolved around a variety of state-specific concerns, three general categories account for much of the litigation: (1) problems concerning purges or mismatch-lists generated by comparisons with the voter registration database; (2) problems associated with third-party registration drives; and (3) complaints against technical defects in voter registration applications.⁶ Litigation of the first category occurred in Colorado, Florida, Ohio, Georgia, Michigan, Montana, Washington, and Wisconsin, among other states. The complaints in such cases ranged from allegations of wrongful or overinclusive purges of voters to threats of unwarranted challenges on Election Day due to questioned registration status. The lawsuits involving third party registration drives included an investigation by the Department of Justice, as well as legal action taken in Florida, Indiana, Louisiana, and Nevada with the intended effect of restraining the actions of such groups or questioning the authenticity of the registration of voters such groups gathered. The final category, which included lawsuits filed in Indiana, Michigan and Ohio, among other states, encompasses what might be seen as run-of-the-mill litigation concerning voter registration applications. In such cases, voters or parties argue about the defects in particular voter registration applications.

The amount of litigation concerning voter registration indicates both the progress and shortcomings of the relevant law. The much-needed innovation of statewide voter registration databases brought about by the Help America Vote Act has proven to be a mixed blessing. On the one hand, the requirement and development of statewide databases has allowed for greater centralization and consistent administration of voter registration at the state level. It has provided for much-needed reform in the direction of

⁵ Kimball W. Brace and Michael P. McDonald, Final Report of the 2004 Election Day Survey: Submitted to the U.S. Election Assistance Commission, September 27, 2005, available at <http://www.eac.gov/clearinghouse/2004-election-day-survey>.

⁶ For a review of these lawsuits and others see Daniel P. Tokaji, “Voter Registration and Institutional Reform: Lessons from a Historic Election,” *Harvard Law and Policy Review Online*, Jan. 22, 2009, available at http://www.hlpronline.com/Tokaji_HLPR_012209.pdf; Daniel P. Tokaji, “Voter Registration and Election Reform,” *William and Mary Law Review* (17(2): 453-506), Dec. 2008.

addressing error-prone and duplicative lists managed by localities, which applied often inconsistent and sometimes nonexistent standards in maintaining their lists. On the other hand, ambiguities in HAVA and the NVRA have led to great variation between states concerning the latitude they exercise in purging the rolls or creating mismatch lists that serve as a basis for challenging a voter's registration status. As is true with many government databases, the information the voter database assembles can be used for functions the law may not have intended.

It would be unfortunate if the litigation that indirectly grew out of the development of these databases retarded additional efforts to gather much-needed data on the workings of our electoral system. Indeed, the bottom line when it comes to assessing the problems with our registration system is that we need to know much more. We do not know how many voters are actually registered to vote; the estimates differ by close to twenty million. We do not even know – and may never know – how many people actually voted in the 2008 election, given that twelve states do not provide certified vote totals. Most importantly, states rarely provide the data at the precinct level – vote totals for each candidate for federal office, the number of registered voters, or the number of early, absentee, military, and provisional ballots cast – which would be necessary to identify problem areas, to generate the correlations of electoral data with census data, or to evaluate the success of reforms.

The 2008 election brought into full view the problems with our voter registration system. As we have known for some time, the requirement of re-registration of voters who change their address decreases turnout given the high mobility of the American population, and does so unequally among population subgroups. The problems with the registration system do not limit themselves to the failure to register or turn out, however. Voters who do attempt to vote often experience problems due to dysfunctions in the registration system. In some cases, it might lead to voters leaving the polls without voting or in others to the casting of a provisional ballot. The large number of provisional ballots cast in the last two presidential elections provides some glimpse into the magnitude of the registration problem. Moreover, if rates of litigation are any indicator of shortcomings in the registration system, the 2008 election illustrated the number of unsettled questions left open by well-meaning developments in federal law. Finally, the 2008 election has indicated how much we do not know and how much we need to know about the workings of the voter registration system. The first stage in any effort to understand the full extent of the registration problem ought to be the collection of the data necessary to identify the precise dysfunctions and to assess the geographic and demographic patterns in the shortcomings Americans experience in their attempts to participate in the democracy.

Bio for Nathaniel Persily

Nathaniel Persily is the Charles Keller Beekman Professor of Law and Political Science at Columbia Law School. He is also the founder and director of the Center for Law and Politics at Columbia Law School. Professor Persily is a nationally recognized expert on election law and a frequent practitioner and media commentator in the area. He has published dozens of articles on voting rights, political parties, redistricting, election law, American politics, and public opinion. He has been appointed by courts as a nonpartisan expert to draw legislative redistricting plans in New York, Georgia, and Maryland, has testified before both the House and Senate Judiciary Committees, and this year alone, has filed amicus briefs on behalf of himself and other political scientists in two voting rights cases before the Supreme Court. Professor Persily received a B.A. and M.A. in political science from Yale, his J.D. from Stanford, where he was president of the *Stanford Law Review*, and his Ph.D. in political science from U.C. Berkeley.