VOTER IDENTIFICATION, PROOF OF CITIZENSHIP & VOTER REGISTRATION:
CURSE OF SUPPRESSION OR CURE FOR FRAUD?

August 5, 2012
ABA Section of State & Local Government Law
ABA Presidential Showcase Program
Hyatt Regency, Chicago, IL

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Introduction

A quip was attributed to Louisiana Governor Earl Long years ago: "When I die, I want to be buried in Louisiana, so I can stay active in politics."1 Cynics have often reminded us on the eve of an important election to “vote early and vote often.”2 The quips and cynical humor have been replaced during the last couple of years, however, with concrete legislative action restricting voter eligibility, imposing new voter qualifications or more stringent requirements for photo identification, and requiring in some jurisdictions proof of citizenship.

In response to a perceived need to curb voter fraud and related electoral abuses, a wave of state legislation has now been enacted, much of it in 2011, and is now on the books. More is on the way. Much of this legislation contains similar features, and collectively it has the potential to change the political and electoral landscape of the Nation though restrictions on voter eligibility. Specifically, many of these legislative provisions relate to voter ID and proof of citizenship as mandatory requirements for voters to be eligible to cast a ballot on election day.

According to the Brennan Center for Justice’s analysis set forth in a 2012 Summary of Voting Law Changes issued June 28, 2012,3 (1) at least 180 restrictive bills introduced since the beginning of 2011 in 41 states; (2) 47 restrictive bills are currently pending in 12 states, (3) 24 laws and 2 executive actions have passed since the beginning of 2011 in 19 states (Alabama, Florida, Georgia, Illinois, Iowa, Kansas, Maine, Mississippi, New Hampshire, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin); (4) 16 states have passed restrictive voting laws that have the potential to impact the 2012 election (Florida, Georgia, Illinois, Iowa, Kansas, Mississippi, New Hampshire, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin, and West Virginia). These states account for 214 electoral votes, or nearly 79
percent of the total needed to win the presidency. Further, the Brennan Center analysis points out that of these enacted laws and executive actions, 13 laws and executive actions are currently in effect in 9 states (Florida, Iowa, Illinois, Kansas, Ohio, Pennsylvania, South Dakota, Tennessee, West Virginia).

Fraud, Fraud Everywhere

When our nation witnesses watershed elections, in their wake one often sees an uptick in claims of fraud. Some say it is as predictable as birds in spring. This is a very American phenomenon, but not unique to America. Coordinated efforts in a significant number of states have led to enactment of legislation to require voter ID and/or proof of citizenship in order to be eligible to vote, and these efforts are being countered through organized and well-coordinated resistance from the Democratic Party, civil rights organizations, and self-described nonpartisan entities devoted to protecting the right to vote on the part of minority voters. Expressing outrage over vote suppression efforts, former President Bill Clinton recently said at a Campus Progress conference in Washington: “There has never been in my lifetime, since we got rid of the poll tax and all the Jim Crow burdens on voting, the determined effort to limit the franchise that we see today.”

So who is right? And who is wrong? And is someone exaggerating?

Applewhite et al. v. Commonwealth of Pennsylvania

Pennsylvania’s voter ID law is currently the centerpiece of a state court trial in which the ACLU and other civil rights organizations are seeking to have the law declared violative of the state constitution. Plaintiffs include eligible citizens who will not be able to vote in November under this new law, even though they have voted for years. Maybe as many as 1 million registered voters in the state do not have the necessary ID to vote under Pennsylvania’s voter ID law, and they will allegedly be disenfranchised if the law’s constitutionality is upheld.

Republican supporters of the Pennsylvania Voter ID law say the law is needed to ensure that only eligible voters vote. The parties have stipulated that there have been “no investigations of prosecutions of in-person voter fraud and the parties do not have direct personal knowledge of such investigations or prosecutions in other states,” and the State has also agreed not to argue that “in person voter fraud is likely to occur in November 2012.”

Poster Child For Voter ID

The DOJ is investigating the voter ID law at the federal level, analyzing state voter registration data to determine if those lacking ID are disproportionately African-American or Hispanic. The focus isn’t on federal court, however, and the trial that began on July 25 is in state court, and was
expected to last about 7 days. One of the individual plaintiffs, Viviette Applewhite, a 93-year old grandmother, is the poster child for voter ID disenfranchisement.

Viviette cast her vote for JFK the first time she went to the polls, and she has voted for decades since that time, up until now at least. Now, the plaintiffs allege, she will be denied her right to vote since she doesn’t have a proper voter ID, and she doesn’t have a proper voter ID because she was adopted and does not have a copy of her birth certificate and doesn’t have a driver’s license. Under the new voter ID law, without either of those two things she will be ineligible to vote.

**Opening Day of Trial**

While opponents of the Pennsylvania voter ID law argued that "[t]he integrity of the electoral process is not enhanced by turning people away from the polls," the Senior Deputy State Attorney General, Patrick Cawley, argued on behalf of the voter ID law that "Voter fraud will go undetected unless a tool, voter ID, is there to detect it." The Pennsylvania AG’s office has argued in pretrial briefs that plenty of time remains before the election for voters to obtain a valid photo ID, and the state has removed obstacles in the way of citizens seeking to acquire them. During the first day of trial, Judge Robert Simpson noted "This is a high-profile case. There’s a lot of anxiety here. There will be a lot of people very unhappy with my decision no matter what I do." But he also told the parties and courtroom spectators to "take heart," because the case would likely go to higher courts before it is over.
Plaintiffs’ Expert Testimony

During the second day of trial, Professor Matt Barreto from the University of Washington testified that over one million registered voters lacked the kind of ID that would allow them to vote in November. According to Barreto, his study showed that 13% of registered voters in the state don’t have proper voter ID, and voters living in cities, who are less educated or poor, are less likely to have proper voter ID. Barreto noted that adding obstacles to voting decreased voter participation, citing a lengthy history of research dating back to the Jim Crow laws of the 1930s, stating "[t]he more hurdles you put before a person, the research only points in one direction."

Brennan Center Report

A July 17, 2012 study by the Brennan Center for Justice at New York University's Law School reported that 985,414 voting-age citizens in Pennsylvania do not have access to a vehicle. Addressing the likelihood of voter fraud, the presumed target of the voter ID law, former Brennan Center scholar Justin Levitt, now Assistant Professor of Law at Loyola Law School Los Angeles, concluded in a 2007 study that “by any measure, voter fraud is extraordinarily rare.” Levitt put voter fraud in the form of voter impersonation in perspective:

It is more likely that a person will be struck by lightning than he will impersonate another person at the polls. … When every problem with an election is attributed to ‘voter fraud,’ it appears that fraud by voters is much more common than is actually the case. This, in turn, promotes inappropriate policy. By inflating the perceived prevalence of fraud by voters, policy-makers find it easier to justify restrictions on those voters that are not warranted by the real facts. Moreover, mislabeling problems as ‘voter fraud’ distracts attention from the real election issues that need to be resolved.

Long before the Pennsylvania state court proceedings got underway, a phalanx of Section 5 challenges were initiated at the administrative level, and then at the judicial level in the form of Section 5 Declaratory Judgment Actions, each filed in the D.C. District Court. The key states involved in this trio of litigation are South Carolina, Texas and Florida. More will likely follow.

South Carolina v. United States

The South Carolina General Assembly enacted Act R54, H. 3003, on May 11, 2011, providing a photo ID requirement in 2011 for in-person voting, and Governor Nikki Haley signed the bill into law a week later. Under the new law, eligible voters would be required to present one of five types of valid and current photo identification in order to vote: a S.C. driver’s license, any other form of ID issued by the DMV, a U.S. passport, a U.S. military ID, or a S.C. voter registration card that contains a photograph. The State of South Carolina offers to provide photo identification cards at DMV offices free of
charge. South Carolina originally sought Section 5 preclearance of its voter ID law from the Justice Department, and on December 23, 2011, the Department issued an objection, concluding that the voter ID requirement would have a discriminatory effect.

**Comment Letters from the Coalition**

Before the DOJ issued its objection, the Lawyers’ Committee for Civil Rights Under the Law and its coalition partners filed comment letters with the DOJ asking it to object, arguing that the photo ID requirement would have a prohibited retrogressive effect on minority voting rights and that the state had failed to meet its burden under Section 5 of demonstrating the absence of a discriminatory purpose. The comment letters went further, arguing that the justification for the voter ID law was unfounded and pretextual, based on the fact that the ID requirement would prevent a person from going to a polling place on Election Day, fraudulently requesting a ballot under the name of a qualified voter of that precinct who has registered to vote but has not voted prior to the fraud, and casting that ballot, but the ID requirement would not prevent any other type of fraud, such as double-voting, felon voting, non-citizen voting, absentee fraud, registration fraud, vote buying, or negative vote buying. The comment letters pointed out that there were no South Carolina-focused studies to determine the existence or pervasiveness of voter fraud, and no legislative record showing other evidence of convictions or prosecutions for voter impersonation fraud, in contrast to a 2003 Demos report that “voter fraud appears to be very rare in the 12 states examined,” and little evidence that “voter fraud was more than a minor problem.”

**Free Photo ID Cards Tantamount to Literacy Test**

The comment letters argued that it was not enough for South Carolina to offer to provide free photo ID cards at DMV offices, and that a disproportionate number of minority voters lacked their own transportation, or did not have access to public transportation, or otherwise faced disproportionate transportation obstacles to obtaining a free ID card. The comment letters also argued that South Carolina African-Americans are more likely than whites to rely upon public transportation, that illiteracy rates within the African-American community were higher than among whites, that the State’s DMV offices were not within walking distance for most minority voters, and the State did not have an extensive mass transit system, so that if the only locations where a voter could obtain a free photo ID card were DMV offices, then African-Americans would be more disadvantaged than whites when it comes to obtaining the free card. Finally, the comment letters argued that by requiring illiterate South Carolinians to navigate a newly established voter identification system, the state legislature was essentially imposing a literacy test on South Carolina voters.

South Carolina then sought judicial preclearance by filing a declaratory judgment action in the D.C. District Court.
**Intervention by the Coalition**

The Coalition Partners with the Lawyers Committee, including the Brennan Center for Justice, intervened in this litigation on behalf of the League of Women Voters of South Carolina to oppose preclearance under Section 5 of the Voting Rights Act of South Carolina’s photo ID requirement for in-person voting, enacted in 2011. The Intervenors opposed preclearance on the ground that the photo ID requirement would disproportionately limit the voting opportunities of African American voters in South Carolina. Similar to the evidence before the state court in *Applewhite v. Commonwealth of Pennsylvania*, the Intervenors have presented data on ID ownership in an effort to show that minority registered voters lack the identification required by the new S.C. law to a significantly greater extent than white registered voters. Trial is set for August 27-31, 2012.

**League of Women Voters’ Arguments**

Noteworthy is the argument of the League of Women Voters in support of its motion to intervene. The League argued that many concerned citizens lack the newly mandated photo ID, don’t understand how they can acquire it, or are frustrated by the expensive and complicated procedures involved in obtaining a photo ID acceptable under the 2011 state law. The League also argued that if the state voter ID law is precleared, the League’s limited resources would be drained by expending money and resources to educate the public about the new voter ID requirements and in assisting eligible voters in securing proper ID, crippling the League’s mission of promoting full civic participation in elections and deterring volunteer participation in election drives. The League also argued that the photo ID requirement would further aggravate the stark socioeconomic disparities between South Carolina’s white and minority residents resulting from historical discrimination, and would burden minority voters’ participation in the electoral process.

**Texas v. Holder**

The State of Texas enacted legislation requiring voter ID for in-person voting in 2011 and originally sought administrative preclearance of its voter ID law from the Justice Department. The voter ID legislation passed in Texas provides for an identification procedure by requiring the use of one of the following types of voter identification: a Texas driver’s license, a personal ID card issued by the Texas Department of Public Safety and featuring the voter’s photograph, an election ID certificate, a U.S. military ID card featuring the voter’s photograph, a U.S. citizenship certificate featuring the voter’s photograph, a U.S. passport, or a concealed handgun permit issued by the Texas Department of Public Safety. On March 12, 2012 the DOJ issued an objection to the photo ID provision on the ground that it would have a discriminatory effect. Prior to the Department issuing its Section 5 objection, the Lawyers’ Committee, The Brennan Center, the NAACP, and the Mexican American Caucus of the Texas House of Representatives (MALC) filed comment letters similar to those submitted in opposition to the South Carolina voter ID bill to the DOJ urging it to interpose an objection under Section 5.
Following the DOJ’s objection, the State of Texas filed a Section 5 declaratory judgment action in the D.C. District Court seeking judicial preclearance. Following expedited discovery, trial commenced in July 2012 and is still underway.

*Florida v. Holder*

The State of Florida enacted legislation in 2011 that placed new restrictions on voting and voter registration. Following the DOJ’s Section 5 objection to the state’s submission of the legislation, the State of Florida initiated a declaratory judgment action in the D.C. District Court seeking judicial preclearance of the legislation under Section 5. The State of Florida also challenged the constitutionality of Section 5.

The election provisions at issue in the Section 5 judicial preclearance action fall into three categories:

1. multiple limitations have been imposed on the ability of citizens and grassroots organizations to conduct voter registration drives, including pre-registration with the state before conducting voter registration activities, monthly accounting of all registration forms used and not used in voter registration drives, and a requirement that completed registration forms generally be delivered to election officials within 48 hours of receipt from the voter;
2. the legislation reduced the number of “early voting” days before elections; and
3. the legislation provided that registered voters who move between Florida counties, and who do provide a change-of-address notice to election officials prior to an election, may only vote by casting a provisional ballot and no longer may cast a regular ballot.

*New Hampshire’s Voter ID Legislation*

On June 7, 2012, the New Hampshire General Court enacted a voter ID bill that would require voters to show a photo ID before voting. The voter ID bill was not of the "strict" variety passed in other states over the past two years. A voter without an ID would be permitted to vote after executing an affidavit of identity. The New Hampshire secretary of state would be required to send a letter to each voter who executed an affidavit in lieu of showing ID, asking the person to confirm that s/he did in fact vote. Any such letters returned as undeliverable, or returned by people saying they did not vote, would be turned over to the Attorney General for investigation of voter fraud.
After the voter ID bill was sent to the Governor and vetoed, the New Hampshire General Court overrode the gubernatorial veto on June 27, 2012. Since New Hampshire is a covered jurisdiction under Section 5 of the Voting Rights Act, the new voter ID law cannot take effect unless and until Section 5 preclearance is granted by the U.S. Department of Justice. New Hampshire's new voter ID law differs in several important ways from the South Carolina and Texas laws rejected by the U.S. Department of Justice in recent months. One important difference is that voters who are unable to present photo ID at the polls will still be allowed to vote after signing an affidavit of identity.

Kansas’ SAFE Act

Kansas Secretary of State Kris Kobach, whose office drafted the comprehensive SAFE Act, recently observed that proponents of laws requiring voter ID as a condition for voter eligibility and laws requiring proof of citizenship at the time of registration “are winning the debate in the court of public opinion.” Kobach is one of the strongest proponents of Voter ID legislation and other voter security legislation. He points out that “carrying a photo ID has become a part of American life” and that individuals “cannot cash a check, board a plane, or enter a federal courthouse without one.” Kansas was the first state to enact legislation that combined a requirement that voters present photo ID when voting in person at a polling place, a requirement that absentee voters present a driver’s license number with a verified signature, and a requirement for proof of citizenship for newly registered voters.

Contrary to a vast right-wing conspiracy by Republicans to enact vote suppression and voter disenfranchising legislation, Kobach notes that two-thirds of the Democrats in the Kansas House of Representatives and three-fourths of the Democrats in the Kansas Senate voted in favor of the SAFE Act. These are some key features of its three key provisions:

1. The photo ID requirement allows voters 65 or over to use an expired photo ID document, and the state will provide a free non-driver ID to any voter who signs an affidavit that the voter desires an identification card to vote in Kansas and does not possess a valid form of ID.

2. The absentee ballot provision of the SAFE Act requires a voter who requests an absentee ballot to provide his or her Kansas driver’s license or non-driver ID on the absentee ballot application, and a county election official must verify that the signature on the application form matches the signature on file in the electronic record of the voter.

3. The proof of citizenship provision requires newly registered Kansas voters to provide proof of citizenship at the time they register to vote, which may consist of a birth certificate, a passport, a naturalization document, a driver’s license if the license indicates citizenship, or a photocopy of any of these documents. Currently-registered Kansas voters are exempt from the proof of citizenship requirement. According to Kobach, implementation
of the SAFE Act will be facilitated by the Kansas DMV’s scanning of photocopies of birth certificates into Kansas driver’s license holders’ files when the Act takes effect.

Finally, in response to the critics of Kansas’s legislation who argued that voter fraud was not significant enough to warrant these measures, that many Americans do not possess photo IDs, and that such legislation will depress voter turnout among the poor and minorities, Kobach, while conceding that most forms of voter fraud are difficult to detect, noted that 221 incidents of voter fraud were reported in Kansas elections between 1997 and 2010, including absentee ballot fraud and impersonation of another voter, and that by 2011 the Kansas Secretary of State’s office had found 67 aliens illegally registered to vote in Kansas. In a 2008 incident in Johnson County, Kansas, a voter appeared at the polls and was unregistered, allegedly picked another name off the poll book and registered to vote as that person and cast a ballot.12

Uphill Battle for Plaintiffs

The U.S. Supreme Court’s 2008 decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), has admittedly made challenges to state voter ID laws more difficult. In fact, the voter ID law upheld in the 6-3 *Crawford* decision was cited by South Carolina legislators as the model for R54. In upholding the Indiana voter ID law, the majority opinion in *Crawford* was written by Justice Stevens, not exactly an ultraconservative. Moreover, Justice Scalia in a concurring opinion acknowledged that the reasons underlying the law reflected “important regulatory interests” and that the overall burden on persons seeking to vote was “minimal and justified.”

Among the most vocal and effective opponents of Voter ID laws is Professor Justin Levitt, Associate Professor of Law at Loyola Law School in Los Angeles. Levitt testified before the Senate Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Human Rights on September 8, 2011,13 and later authored an article adapted from his testimony, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*14. Professor Levitt notes that voting is “a fundamental right for more than just most of us,”15 and that the electoral participation in the November 2008 Presidential Election represented real progress in “closing the gap”16 between non-Hispanic white voter turnout and minority turnout, a new spate of election regulations entailing restrictions on voter registration, restrictions on early voting, and restrictions on how voters prove their identity at the polls threatens to reverse course. While regulation of voter registration, early voting and eligibility to vote are undeniably necessary, this flurry of election legislation enacted in 2011 will exact real burdens on real Americans.17 According to Levitt, while government-issued photo identification does make life and many practices easier for those who have it,

the ability of Americans to function in modern society without government-issued photo identification is frequently exaggerated. Proponents of restrictive ID laws often assert that it is impossible to board an airline, drink a beer, check in at a hotel, or enter a federal building without government-issued photo Id. These claims are both untrue and irrelevant.18
Levitt’s personal experience in navigating through the TSA security gauntlet at LAX en route to testify before a Senate subcommittee, boarding a plane, drinking a beer, checking into his hotel in Washington, D.C., and getting to the subcommittee’s hearing room in the Dirksen Senate Office Building, all without a photo ID, proves the falsity of claims about the indispensable nature of government-issued photo ID.

The precedential value of *Crawford v. Marion County Election Board* is also questioned by opponents of voter ID laws, who argue that of the over 250 examples of fraud cited by the State of Indiana and its allied amici in *Crawford*, not one proven instance of voter fraud would have been prevented by the voter ID law, and in any event, existing state and federal criminal penalties for voter impersonation are adequate and render any additional safeguards such as voter ID unnecessary. And then for the coup de grâce, opponents argue that the disparate racial impact that voter ID has in Section 5 covered jurisdictions distinguishes *Crawford* and renders it inapplicable. Proponents of voter ID laws, like Kansas Secretary of State Kobach, say the facts do not support such claims of depressed minority voter registration and turnout, pointing to Georgia’s photo ID requirement that was in effect for the 2008 and 2010 elections, when minority voter turnout was higher than average.19

Until we reach a resolution of at least one of the pending Section 5 dec actions through a clear and definitive decision by the U.S. Supreme Court, or in the unlikely but plausible event that the Court finally decides to address the constitutionality of Section 5 of the Voting Rights Act, we will be left with a hodgepodge of contradictory results, some in proceedings decided during the final months of the Bush Administration, as in the case of the Justice Department’s preclearance under Section 5 of the State of Georgia’s voter ID legislation, and others now being litigated by a newly invigorated Justice Department, in tandem with a Coalition consisting of the Lawyers Committee for Civil Rights Under the Law, the Brennan Center for Justice, the NAACP, MALC, and other civil rights organizations in a death struggle over the continued viability of voter ID laws and proof of citizenship requirements.

**Conclusion**

Whether one adheres to the presumption that all voter security laws are constitutionally suspect and inherently operate to suppress minority voting, or whether one identifies with the growing public sentiment favoring adoption of measures to assure secure and fair elections and strengthening of the American electoral process by “keeping it easy to vote, but making [it] hard to cheat,”20 only time will tell whether “The Map of Shame”21 prepared by the Lawyers’ Committee for Civil Rights Under the Law will expand or be replaced by the Map of Electoral Reform. Only time will tell whether these legislative measures carry the curse of suppression of votes or provide the cure for vote fraud in its many subtle and not-so-subtle forms.
Election Fraud is a Big Fraud, June 20, 2012, http://pbcommercial.com/sections/opinion/opinion/editorials/election-fraud-big-fraud.html

(Concluding that the most likely origin of this quote was Chicago Mayor William Hale Thompson, Mayor from 1915–1923 and 1931–1935, and that Al Capone and Mayor Richard J. Daley later repeated it.)


Access to interactive format at http://www.lawyerscommittee.org/page?id=0042


Kris Kobach, Why Opponents Are Destined to Lose the Debate on Photo ID and Proof of Citizenship, 62 Syracuse L. Rev. 1, 2 (2012) [hereinafter Destined to Lose the Debate].

Id. at 7.

Id. at 8.

Id. at 10-11.


Election Deform at 105.

Election Deform at 97.

Election Deform at 98.

Election Deform at 104.

Election Deform at 10.

Election Deform at 8.

Election Deform at 6.

Election Deform at 2.

Election Deform at 1.

Election Deform at 96.

Election Deform at 95.

Election Deform at 94.

Election Deform at 93.

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Election Deform at 83.