

The Challenge of Photo ID

Can Legislation Prevent Election Fraud without Disenfranchising Voters?

BY STEPHEN ELZINGA

Inside ALEC | June 2009, pp. 13-14

(Full document: http://images2.americanprogress.org/campus/web/Inside_alec_June09.pdf)

The provision of free ID cards for non-drivers is an essential step in preventing the disenfranchisement of voters according to the U.S. Supreme Court.



In 2002, Congress passed the Help America Vote Act (HAVA), which established ID requirements for first-time voters who register to vote by mail without providing an ID document, a driver's license number, or the last four digits of a social security number. HAVA requires such voters to present a government-issued photo ID or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. Twenty-four states have subsequently adopted voter ID requirements that go beyond HAVA. The most proactive states in this area are Arizona, Georgia, Indiana and Missouri -- all of which have acted to secure the integrity of the election process by requiring all voters to present photo ID at the polls. The experiences of these states provide a helpful guide for other states interested in enacting similar legislation,

Two potential constitutional limitations for voter ID legislation came to light in the court battle over Georgia's 2005 voter ID law. The law required voters to present photo ID at polling locations in order to vote and charged a twenty-dollar fee for obtaining a special ID card for those that did not already possess a photo ID. In 2005, a federal district court issued a preliminary injunction against the enforcement of this law, citing two primary faults. First, the judge found a substantial likelihood that the difficulty of obtaining photo ID -- both in terms of the cost in time and money for obtaining an ID -- amounted to a "severe" restriction on the right to vote. Second, the judge found a substantial likelihood that the law imposed a *de facto* poll tax by requiring someone to sign an affidavit of indigence before being able to obtain an ID card without charge.

A week after this initial district court ruling, the 11th Circuit Court of Appeals upheld the injunction. However, a 2007 rewrite of the law including a new section providing free IDs upon demand was eventually upheld by the same district court judge, who rejected the claim that this was a severe burden on the right to vote or that the incidental costs involved in obtaining an ID amounted to a poll tax. The district court judge also approvingly cited the extensive education efforts made by Georgia to make voters aware of this new requirement. The Eleventh Circuit Court of Appeals has upheld that decision. A similar law in Missouri that provided free IDs was struck down by the Missouri Supreme Court under a provision of the state constitution.

In 2008, the U.S. Supreme Court upheld the photo ID requirement of Indiana's voter ID law in *Crawford v. Marion County Election Board*. In a complex split decision, the court upheld the Indiana law by a 6-3 vote, but issued two separate opinions as to why the law was constitutional.¹ In *Crawford*, the court recognized that "even handed restrictions" protecting the "integrity and reliability of the election, process itself" are constitutional. The three-judge plurality opinion found that Indiana's distribution of free voter ID cards and the availability of provisional ballots for voters without ID satisfied the first part of this test; the second part was met by Indiana's interests in "deterring and detecting voter fraud," safeguarding against registration rolls with a number of "persons who are either deceased or no longer live in Indiana," and "safeguarding voter confidence."²

The three-judge concurring opinion went further by holding that whether or not the law "imposed a special burden on some voters is irrelevant" and that the law was valid because "the overall burden is minimal and justified."³

An analysis of *Crawford* suggests several critical elements that must be present in a voter ID law for it to be constitutional. States can improve the chances of a law being upheld in court by including two key parts in any proposed photo ID legislation:

- **Distribution of free voter ID cards**

The provision of free ID cards for non-drivers is an essential step in preventing the disenfranchisement of voters according to the U.S. Supreme Court.⁴

- **Availability of provisional ballots**

The U.S. Supreme Court held that Indiana law provides an adequate remedy for voters who forget their ID on Election Day by allowing them to cast a provisional ballot and return later with valid photo ID.⁵

Because a key consideration in the *Crawford* decision was that Indiana was able to demonstrate several problems in their election system that a photo ID law would fix -- including highly tainted voter rolls with the names of thousands of persons who had moved, died, or recently been convicted as felons -- other states should carefully consider whether their own unique situation may require additional precautions. However, there was no requirement that Indiana show prior evidence of impersonation fraud in Indiana to justify a voter ID law.

In 2005, the bipartisan Commission on Federal Election Reform, co-chaired by former President Jimmy Carter (D) and former Secretary of State James A. Baker, III (R), issued a report entitled "Building Confidence in U.S. Elections." In addition to recommending photo ID requirements, the report suggests two provisions that can be added to voter ID laws that would not only give such laws more bipartisan appeal, but also alleviate some concerns that lower courts have raised about voter ID laws in the past:

- **Aggressive promulgation of new voter ID requirements**

When it comes to the right to vote, normal means of promoting public awareness of a change in the law may not be enough. An aggressive advertising campaign to notify voters of new ID requirements before the first election in which they take affect could make a big

difference.

- **Comprehensive distribution of ID cards**

A concerted effort to provide ID cards to all citizens, especially to minorities, the elderly and the disadvantaged would mitigate some of the objections that photo ID laws are discriminatory. While a state may find it hard to meet the costs of a sustained push to disperse ID cards, a transitional program that lasts for a year or two and includes mobile office units being sent to disadvantaged communities, nursing homes, and the like is entirely within reason.⁶

Taking these precautions may be the difference between success and failure. Such provisions will not only broaden the appeal of photo ID laws, but also provide an additional layer of protection in the event of a court challenge.

ALEC's model bill on this issue, the Taxpayer and Citizen Protection Act requires qualified electors to present one form of identification that bears the name, address, and photograph of the voter or two different forms of identification that bear the name and address of the voter prior to receiving a ballot. A requirement that voters provide either photo ID or two alternative identification documents (instead of just one non-photo ID like HAVA requires) is a strong step toward the prevention of fraud at the polls. ||

To view ALEC's Taxpayer and Citizen Protection Act, visit the model legislation page of the Public Safety & Elections Task Force at www.alec.org.

ENDNOTES

- 1 *Crawford v. Marion County Election Board*, 553 U.S. ---, 128 S.Ct. 1610, 1613 (2008) (Stevens, J., plurality).
- 2 *Id.* at 1617-1620 (Stevens, J., plurality).
- 3 *Id.* at 1624 (Scalia, J., concurring).
- 4 *Id.* at 1620 (Stevens, J., plurality).
- 5 *Id.* at 1621 (Stevens, J., plurality). 6 Commission on Federal Election Reform, "Building Confidence in U.S. Elections," (American University, 2005), 33-34.

Stephen Elzinga is a research assistant working with ALEC's Public Safety & Elections Task Force. He is currently a senior at Patrick Henry College majoring in government.