

Statement

Electronic Privacy Information Center

House Committee on Administration

Hearing

June 22, 2006

“You don’t need papers to vote?”

Non-Citizen Voting and ID Requirements in U.S. Elections

The Electronic Privacy Information Center would like to thank Chairman Ehlers, and Ranking Member Millender-McDonald for their attention to our nation’s elections and democratic processes. The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. We have a long standing interest in constitutional values and submit this statement to the committee to further the work of EPIC to educate and inform the public, media, and policy makers on pressing issues that impact the privacy rights of residents.

The Electronic Privacy Information Center oppose the implementation of proof of citizenship and photo identification requirements for eligible electors in American elections as the means of assuring election integrity. Recently, several proposals have been advanced at both the federal and state level to change existing election administration regulations to require eligible electors to provide proof of citizenship in order to register to vote and/or a form of photo identification in order to cast a ballot. The approved forms of proof of citizenship or photo identification vary across jurisdictions but, in general, the options are limited to a few, government issued documents.

There are two conditions that must be satisfied to have a public election declared democratic – an international norm that the United States helped to establish. All those who are legally eligible to participate in a public election must be allowed to vote, while at the same time those who are not legally allowed to participate are not allowed to vote. The dispassionate and objective application of voting law precludes looking at an individual voter and making a determination of eligibility. The voter registration process should determine eligibility, and on Election Day the role of the poll worker is to authenticate voters without consideration of their income, language of origin, education, gender, race, or ethnicity.

Initially, Election Day voting poll locations were a good means of authenticating voters because the people within the community are more likely to know the people who

are casting ballots. Today, that is more difficult because of the mobility of the American population and the disconnected nature of neighborhoods and communities.

The question before you is whether ineligible voters who are non-citizens are participating in public elections, and if this is the case, whether a strict voter identification requirement would address the problem. Non-citizens voting in public elections present a number of questions: first where is the research that provides some measure of the problem identified, and second is the supposed non-citizen voter participation isolated to certain states, regions or is it a national issue.

EPIC finds the ideas of proof of citizenship and photo identification requirements an extreme approach to a yet undefined problem that has yet to be acknowledged by election administration professionals or state attorneys generals as a pressing issue. For this reason, EPIC finds the proposal to increase the burden for voter participation in public elections to include restricted identification requirements to be objectionable, a barrier to the right to vote, and unnecessary in the encroachments on voters' privacy rights. We advise rejection of the ideas on the basis that the proof of citizenship and photo identification requirements: (1) are unnecessary and possibly unconstitutional; and (2) show a disregard of voters' privacy rights.

Proof of Citizenship Requirements for Voter Registration and Photo Identification Requirements for Voting are Unnecessary and Possibly Unconstitutional

In order to increase voter participation in federal elections, Congress enacted the National Voter Registration Act of 1993 ("NVRA" or "Motor Voter Act").¹ The act was designed to enhance voting opportunities for every American and makes it easier for all Americans to exercise their fundamental right to vote. Recently, in reply to the Presidential Election of 2000, the federal government attempted to clarify and codify voting rights in the United States for federal elections through the enactment of the Help America Vote Act of 2002 ("HAVA").² HAVA, for the first time in the nation's history, established a role for the federal government in public elections held to fill federal elected offices.

Under NVRA and HAVA, states retain control of the election process, but they must meet minimum standards set by statute and federal agencies including a prohibition on states adopting alternative standards that are "inconsistent with ... any law described [herein]."³ HAVA was generally popular among members of Congress, yet received some criticism because it required more stringent voter identification procedures. Dissenters feared that the new requirements would repress voter participation by millions of Americans who have no driver's license.

Many ideas for increased voter identification requirements allege to further the principle goals of NVRA and HAVA. Yet, most proposals do the very opposite,

¹ 42 U.S.C. § 1973gg.

² 42 U.S.C. § 15301, *et seq.*

³ 42 U.S.C. § 15484.

stripping from the list of acceptable forms of identification several documents HAVA specifically permits, including: a current utility bill, bank statement, government check or paycheck, or other government documents showing the voter's name and address. Moreover, increased voter identification requirements would disproportionately burden minorities, elderly, physically challenged, and the poor by presenting a significant financial and practical hurdle to poll access. Historically, basing such prerequisites on a desire to facilitate the voting process has been merely pretextual, such as was the case with poll taxes.

EPIC has previously explained in the analogous context of voter registration; voter registration was designed to deny suffrage to those groups that were deemed not to be worthy of equal participation in the democratic process.⁴ From generation to generation the list of the outcasts of American Democracy included women, new citizens, minorities, young adults, first time voters, poor people, and the homeless.⁵ We believe ideas that further increase voter identification requirements, by preventing certain citizens from accessing the polls, will more likely reduce rather than enhance voting integrity. Although we recognize the interest in verifying voter identity, we believe that compelling eligible electors to acquire and present proof of citizenship to register to vote and photo identification to cast a ballot represents an unjustified privacy infringement.

The goal should be to keep the balance of furthering legitimate voter access, while ensuring that only those who may participate in the election do so. The voter access document in the form of voter registration should be the document needed to assure access to the ballot box. The role of that process is to make the necessary checks of identity and assure that those checks are based on real measures that reflect the needs of public election participation. However, the documents that can offer some proof of citizenship could include a birth certificate or a federal government issued passport, however, neither of these documents contain any relevant information for voter registration purposes. A place of birth does not indicate whether someone is a current resident of a community, or answers other questions about eligibility for participating in a public election. The passport is solely for the purpose of identifying citizens as they travel to and from the country and provides even less information that could be used for voter registration purposes.

Nor can ideas for increased voter identification requirements be said to remedy voter fraud, accusations of which have, in recent years, centered on charges of fictitious registration.⁶ HAVA was passed partly on the grounds that requiring identification at the time of registration, rather than at the time of voting, would remedy this very problem.⁷ Moreover, while multiple registrations have occurred in some instances, these incidents

⁴ DENNIS R. JUDD & TODD SWANSTROM, CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY 86 (Addison-Westley Education Publishers Inc.) (2d ed. 1998).

⁵ See ACLU & Dēmos, Purged! How a Patchwork of Flawed and Inconsistent Voting Systems Could Deprive Millions of Americans of the Right to Vote (Oct. 2004), available at <http://www.aclu.org/Files/OpenFile.cfm?id=16844>.

⁶ CNN.com Online News Law Center, Mary Poppins prompts investigation, <http://www.cnn.com/2004/LAW/10/18/mary.poppins.registers.to.vote/>

⁷ See Robert Pear, The 2002 Campaign: Ballot Overhaul: Congress Passes Bill to Clean Up Election System, N.Y. TIMES, Oct. 16, 2002, at A1 (quoting Sen. Bond (MO) as saying, "If your vote is canceled by the vote of a dog or dead person, it's as if you did not have the right to vote.").

do not necessarily reflect an intention by the voter to cast multiple ballots; lack of understanding and poor administration of the registration process itself may induce honest persons to register multiple times in an effort to try to ensure registration.⁸ Another documented reason for multiple registrations is poor governmental recordkeeping.⁹ Regardless of the cause of the problem, compelling voters to present state-issued identification at the polls is unlikely to resolve voter fraud.

Each election there is a small percentage of votes that are cast which raise questions about voter fraud. However, many of these ballots probably do not fit the typical profile most people would expect, they may be voters with residences in more than one state i.e. retirement or vacation homes and a permanent residence. They may be people who initially vote absentee and then find that they can vote on Election Day and do so. There are also concerns about people without the capacity to cast an independent, and informed vote i.e. those in assisted living or nursing homes who may have absentee ballots cast in their names. To be truthful the biggest opportunity for rampant voter fraud are absentee ballots, but little attention is placed on that process.¹⁰ In any regard the evidence of rampant illegal vote casting is just not there.

Mandating presentation of state-issued documents as a condition to the exercise of the right to vote – unquestionably the most fundamental of all democratic freedoms¹¹ – represents a sharp departure from national precedent. Requiring voters to carry such documents could compromise the historic distinction between the United States and those nations requiring citizens to present papers as a condition to free passage. Identity cards have historically been a hallmark of injustice; they were essential to South Africa's apartheid system and proved useful in the Nazi and Rwandan genocides, for which they were powerful tools to identify members of targeted groups.¹² Requiring citizens to present non-voting-related documents, such as a driver's license, at voting polls is akin to demanding citizens to present government-issued food-rationing cards for unrelated purposes, a practice that prompted rebellion in World War II Britain.¹³

Requiring voters to provide the state with information that is unnecessary to verify their identity or citizenship, such as the voter's address and fingerprints, may also raise questions of whether the vote itself is being cast in secret. Such concerns of voters are particularly acute in jurisdictions that use electronic voting machines, such as the State of Georgia.¹⁴ Whenever the state mandates disclosure of personal information, the

⁸ Dennis J. Willard & Doug Oplinger, *Figures Don't Add Up*, AKRON BEACON J., Oct. 2, 2004, at 8A.

⁹ Too Close to Election to Purge Voter Rolls, Editorial, INDIANAPOLIS STAR, Aug. 27, 2004, at A12; Brad Schrade & Anne Paine, and Bloated Registration Rolls Might Mean Long Lines at Polls, TENNESSEAN, June 28, 2004, at 1A.

¹⁰ Maria A. Morales, Karen Branch & David Lyons, *Carollo Headed Back to Court, Commissioners Don't Act to Fill Mayor's Seat*, THE MIAMI HERALD, March 6, 1998, at 1A (documenting the confusion caused when a judge calls a new election due to massive absentee voter fraud).

¹¹ "Other rights—even the most basic—are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

¹² Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 708-09 (Sept. 2004).

¹³ *Id.* at 708.

¹⁴ Georgia uses a touch-screen, direct recording electronic (DRE) voting system, which requires an access card to unlock the voting machine. Significantly, the Secretary of State Elections Web site includes the following statement about the card: "It contains no personal information about you or your vote." Georgia Secretary of State Cathy Cox, Elections, Frequently Asked Questions, http://www.sos.state.ga.us/elections/electronic_voting/faqs.htm (last visited July 25, 2005). For an overview of security of electronic voting in Georgia, see Britain J. Williams, *Security in the Georgia Voting System*, Apr. 23, 2003, <http://www.votescount.com/georgia.pdf>.

possibility arises that the data will be collected, stored in a centralized database to which subjects lack direct access and used for unknown purposes. Such a scheme of identification may thus chill rather than enhance popular confidence in election integrity. As one scholar notes, a system of mandatory identification by documentation raises fears that, “[a]ll human behavior would become transparent to the State, and the scope for nonconformism and dissent would be muted to the point envisaged by the dystopian novelists.”¹⁵ Innocent voters may feel especially intimidated if their information is checked against a database as they have, “no way of knowing the contents of the database against which their identification is being run, whether these contents are accurate or not, or what further impositions might be triggered by the information linked to their identity card. This uncertainty will turn every identification demand into cause for apprehension.”¹⁶

In *Burson v. Freeman*,¹⁷ the Supreme Court described voter privacy as a means of preventing voter fraud while ensuring against undue coercion. Upholding, under strict scrutiny analysis, a Tennessee statute that prohibited political candidates from campaigning within 100 feet of a polling place entrance, the plurality stated:

[A]n examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and timetested consensus demonstrates that some restricted zone is necessary in order to serve the States’ compelling interests in preventing voter intimidation and election fraud.¹⁸

Thus, voting and privacy work in tandem: the latter gives meaning to the former. Compelling voters to present photo identification and to reveal more information than is absolutely necessary to affirm identity before allowing them into the restricted zone will chill voters’ sense of seclusion and infringe on the sanctity of the private vote.

Judicial precedent advises against giving a state wide latitude in the use of personal information for administrative purposes in elections. In *Greidinger v. Davis*,¹⁹ the Fourth Circuit limited the scope of use of Social Security Numbers in the administration of elections after a Virginia citizen seeking to register to vote challenged the state’s publication of the Social Security Numbers in the public voting roles. While allowing the use of Social Security Numbers for the limited purpose of preventing voter

¹⁵ Steinbock, *supra* note 19, at 809 (quoting Roger Clarke, Human Identification in Information Systems: Management Challenges and Public Policy Issues, 7 INFO. TECH. & PEOPLE, (No. 4) 6, 34 (1994), available at <http://www.anu.edu.au/people/Roger.Clarke/DV/HumanID.html>).

¹⁶ Steinbock, *supra* note 19, at 734 (citations omitted).

¹⁷ 504 U.S. 191 (1992).

¹⁸ *Id.* at 206.

¹⁹ 988 F.2d 1344 (4th Cir. 1993).

fraud, the Fourth Circuit held that publishing Social Security Numbers placed an impermissible burden on the right to vote.²⁰

In *Harman v. Forssenius*,²¹ the U.S. Supreme Court struck down a Virginia statute requiring voters to submit an affidavit of residence six months before Election Day as an alternative to paying the customary poll tax. Finding that the statute violated the Twenty-Fourth Amendment, the Court rejected the state's argument that the law was necessary to prevent voter fraud: "[C]onstitutional deprivations may not be justified by some remote administrative benefit to the State.... Moreover, ... the State has not demonstrated that the ... requirement is in any sense necessary to the proper administration of its election laws."²²

The administrative challenge with increased voter identification requirements is the development of lists of approved forms of proof of citizenship. Naturalization papers are clear proof of citizenship but natural born citizens have no equivalent. Birth certificates or passports, under some circumstances, can prove the citizenship of an individual. However, proof of birth at an American hospital may not equate to American citizenship. Every year resident working or student aliens deliver children in American hospitals who will never become citizens of the United States. In addition, members of the American military serving abroad regularly deliver children who are natural born American citizens in foreign hospitals. A passport requires proof of citizenship to obtain but can only be acquired at a cost, a possible violation of the Twenty-Fourth Amendment.

Approved lists of forms of photo identification also have administrative challenges. Although most Americans hold a valid drivers license, many departments of motor vehicles ("DMVs") around the country are no longer issuing new licenses when citizens relocate within a state. Some DMVs do not collect old drivers licenses when a driver changes address. Because of that, many voters may have a photo ID with an outdated address or have several valid drivers licenses with different addresses. In addition, most DMVs charge a processing fee for an individual to obtain a license, to require presentation of a drivers license in order to cast a ballot may be a possible violation of the Twenty-Fourth Amendment.

Proof of Citizenship Requirements for Voter Registration and Photo Identification Requirements for Voting Disregard Voters' Privacy Rights

Increased voter identification requirements as proposed are often equally onerous, requiring voters to obtain at least one form of identification for which the state typically collects a monetary charge. Some states allow persons who cannot afford a card to obtain one for free; however, this, requires not only documented proof of identity, state residency, and citizenship but also submission of proof of indigence and income. Moreover, such applicants are often required to apply for such cards well in advance of an election and to have a current mailing address, an impossibility for the indigent.

²⁰ *Id.* at 1344.

²¹ 380 U.S. 528 (1965).

²² *Id.* at 542-43.

Consideration of increased voter identification requirements should also be informed by the reasoning in *Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County*, in which the Supreme Court declined to hold that law enforcement can mandate that citizens produce documents proving their identity.²³ In that case, the Court upheld a Nevada statute that required a person stopped by police to disclose his or her name when reasonable, articulable suspicion of a crime was present. The Court reasoned that the statute did not violate the Constitution because “[t]he request for identity has an immediate relation to the purpose, rationale, and practical demands of a Terry stop.”²⁴

No such reasonable relation exists here. Increased voter identification requirements would require all citizens presenting themselves at the poll – the vast majority of whom presumably arouse no suspicion whatsoever – to disclose not only their names but also all information that appears on their identification cards. Further, the requirements would require citizens to present the cards not to police but to poll workers, most of whom are neither professionally licensed in law enforcement nor permanent governmental employees. Furthermore, the requirements would mandate self-identification not in the context of criminal apprehension – a state interest that, although strong, must be balanced vis à vis Fourth Amendment rights²⁵ – but as a condition to an innocent person’s exercise of the constitutional right to vote.²⁶

The disclosure of personal information mandated by the increased voter identification requirements could be considerable. The most common form of identification likely to be used – a driver’s license – includes not only the voter’s name and photographic likeness but also may include such information as the voter’s age, height, weight, driver’s license number, restrictions owing to disability or impairment (such as for imperfect vision or a prosthetic limb), and fingerprints. Furthermore, the State, and not the voter, would have sole control over the information placed into a state-issued identification card, and the applicant for such identification cannot choose to withhold certain data. Changes in the design and content of driver’s licenses and other state-issued identification are also at the discretion of the government rather than the data subjects.

The cumulative effects of what many would deem a minor burden on voter rights would be substantial over time because checking papers has “an additional subjective effect on a grand scale: the psychic harm to free people of having to ‘show your papers’.... Not only would people forced to go through identity checkpoints experience some degree of fear and surprise, but also knowing that this has become a permanent part

²³ 542 U.S. 177 (2004) (upholding Nevada statute because “[a]s we understand it, the statute does not require a suspect to give the officer a driver’s license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means—a choice, we assume, that the suspect may make – the statute is satisfied and no violation occurs.”).

²⁴ *Id.* at 177.

²⁵ See, e.g., *Muehler v. Mena*, 125 S. Ct. 1465, 1470 (2005) (holding that no Fourth Amendment violation occurred where officers handcuffed suspect during lawful search: “Inherent in [the] authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention.”).

²⁶ The U.S. Constitution places no such restriction on the right to vote and specifically excludes several restrictions. See U.S. Const. art. XIV, § 2; U.S. Const. amend. XIV; U.S. Const. amend. XV; U.S. Const. amend. XIX; U.S. Const. amend. XXIV; U.S. Const. amend. XXVI.

of the social fabric would diminish their sense of liberty.”²⁷ Such effects are certainly immeasurable, but there can be no question that the effects are compounded where the right at issue – voting – is the very heart of democratic liberty.

We should not assume that all identification requirements would fall equally upon all citizens. One of the largest sources of voter disenfranchisement is poll worker errors, which could be compounded with additional voter identification requirements. In the recent Indiana primary elections Veterans were denied their right to vote because their VA identification cards were not one of few forms of identification approved by the new state law.

Conclusion

According to the CalTech MIT study, *Voting: What Is, What Could Be*, between 4 and 6 million votes were lost in the 2000 election.²⁸ The study attributed the loss in part to problems with voter registration and polling place practices. In 2004, EPIC identified two general problem areas with voter registration during the elections: lack of transparency and voter privacy regarding the public administration of voter registration.²⁹ The solutions to voter registration and Election Day problems lie not in additional legal barriers between American voters and the ballot box but in increased training and funding for local election administration. There is no evidence that local election administrators face drastic challenges to the identification of voters and registering to vote and the act of casting a ballot must, by law, cost nothing to the voter. Therefore, and for the reasons state above, increased voter identification requirements are unnecessary, possibly unconstitutional, and disregard voters’ privacy rights.

Thank you,

Marc Rotenberg
Executive Director
EPIC

Lillie Coney
Associate Director
EPIC

D. Richard Rasmussen
Law Clerk
EPIC

²⁷ Steinbock, *supra* note 19, at 740.

²⁸ THE CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING, WHAT IS, WHAT COULD BE (California Institute of Technology and The Massachusetts Institute of Technology Corporation) (2001) available at http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf.

²⁹ Ralph Vartabedian, LOS ANGELES TIMES, *State Laws Unjustly Bar Voters, ACLU Says*; Oct 19, 2004, at A16.