SYMPOSIUM

Demands for Voter Identification Require a Constitutional Standard of Reasonable Suspicion of Illegal Activity

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"It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure'" (*Burdick v. Takushi* 1992, 433). Voting is particularly foundational "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights" (*Harper v. Virginia Bd. of Educ.* 1966, 667). As Justice Kennedy dissented in *Burdick* (1992, 434), even depriving one voter of the exercise of the fundamental right to vote is too substantial an impact to withstand constitutional scrutiny.

In order to preserve every citizen's constitutional right to vote, there must be a predictable, constitutionally sound standard that regulates when, and to what degree, the government may require a citizen to furnish identification before being allowed to exercise the right to vote. As a demand for ID constitutes a search (*Kolender v. Lawson* 1983), the most appropriate standard is the reasonable suspicion that applies when analyzing warrantless searches or seizures under the Fourth Amendment: only those people suspected of committing fraud can be required to furnish identification any more intrusive than simply stating one's name and address or signing a poll book. Only upon probable cause of voter fraud could a citizen be required to furnish photo identification. By their very general nature, across-the-board demands for IDs lack standards for application.

The Indiana voter-ID law contradicts this reasonable standard because it is overbroad and lacks any basis for intrusion in requiring every citizen wanting to vote in person to furnish photo identification, even absent suspicion of wrongdoing. Requiring photo identification is not the least intrusive means to prevent in-person voter fraud. Moreover, requiring all in-person voters to present photo identification has a disparate impact on the right to vote, particularly of minority groups.

THERE SHOULD BE A CONSTITUTIONALLY SOUND STANDARD FOR WHEN THE GOVERNMENT CAN REQUIRE AN OFFICIAL ID TO EXERCISE THE RIGHT TO VOTE.

Because voting is so fundamental and empowering a right, the Supreme Court must ensure that a predictable, proportional, constitutionally sound standard regulates when, and to what degree, the government may require that a citizen self-identify as a pre-requisite to exercising the fundamental right to vote. The Court must also indicate when that standard is triggered by suspicious evidence before depriving a person of the opportunity to vote.

The requirement that in-person voters present photo identification in order to vote infringes upon the fundamental electoral right by failing to comply with any proportional, constitutionally justifiable standard. While voters identify themselves to election officials in some manner, the extent the government may require citizens to identify themselves must be carefully tailored. For example, many states, including Indiana before the voter-identification law, require voters to state their names and addresses and sign a poll book. There are many steps on the spectrum of identification, from requiring a name, address, and signature, or presenting a piece of U.S. mail, to requiring government-issued photo identification. The simpler steps are effective but not burdensome. Requiring a government-issued photo identification is at the ultimate end of the spectrum of identification and the most intrusive form. Because a government photo ID contains more information than needed for the electoral process, the requirement therefore also constitutes an invasion of privacy.

The government should not be permitted to require more intrusive forms of identification unless it can articulate a reasonable grounds for questioning the voter's identity. Even then, the government should not be permitted to require official photo identification based upon less-than-probable cause that the voter is attempting to commit fraud. As *Hiibel v. Nevada* (2004, 187–89) holds, only upon reasonable suspicion of criminal conduct may government require citizens to state their names.

The reasonable suspicion standard is analogous to that developed in Fourth Amendment jurisprudence in *Terry v. Ohio* (1968, 21), which expresses the type of balancing test to be used for evaluating the constitutionality of electoral laws (see, e.g., *Burdick* 1992, 434) tied to the constitutional right to vote. This reasonable-suspicion standard effectively ferrets out in-person voter fraud, Indiana's purported basis for requiring photo ID at the polls (*Crawford* 2007a, 953–54), while imposing

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less infringement on any citizen's right to vote. As judge Diane Wood recognized in dissent in *Crawford*, "voting is a complex act that both helps to decide elections and involves individual citizens in the group act of self-governance … Even if only a single citizen is deprived completely of her right to vote … this is still a 'severe' injury for that particular individual" (*Crawford* 2007b, 438). Justice Kennedy aptly noted in dissent in *Burdick* (1992, 447), "For those who are affected by [write-in] bans, the infringement on their right to vote for the candidate of their choice is total … The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government"[1] and the ability to exercise their electoral franchise.[2]

Absent probable cause, the government cannot infringe upon the Fourth Amendment by requiring citizens to identify themselves to any degree more intrusive than stating their names (*Hiibel* 2004, 187–89). By not requiring reasonable suspicion of fraud before imposing more intrusive identification, voter-identification laws contradict the reasonable standard because they arbitrarily allow the government to impose restrictions on exercising the right to vote without cause.

The voter-identification law creates a system whereby citizens are required to obtain a license to vote in order to exercise their right in the electoral franchise. Any system of licensing of voting contradicts the values embedded in our Constitution: in *Hynes* (1976), the Court struck down as unconstitutional a statute requiring canvassers, including those in connection with political campaigns, to identify themselves, and to register with, the municipality (611, 622). The purported justification was crime prevention.

Concurring in the decision, Justice Brennan wrote that "offensive to the sensibilities of private citizens, identification requirements … even in their least intrusive form, must discourage … participation [in the political process]" (*Hynes* 1976, 638). Brennan stated that "a requirement that one must register before he undertakes to make a public speech for a lawful movement is quite incompatible with the requirements of the First Amendment" (629).

Requiring a (driver's) license to vote is more offensive than requiring the registration of door-to-door political campaigners because "the Indiana law will deter some people from voting" (*Crawford* 2007a, 951). To avoid serious injuries, the Court needs to require that laws like the voter-identification law comport with a predictable, constitutionally sound standard, such as reasonable suspicion, which *Terry* announced as a balance.

The reasonable-suspicion standard was further defined in *Kolender v. Lawson* (1983). There, the Court invalidated a statute that allowed police to demand identification without suspicion of criminal conduct. Justice O'Connor called the requirement for "credible and reliable" identification "unconstitutionally vague on its face because it encourages arbitrary enforcement." In concurring, Justice Brennan explained that, absent probable cause, the circumstances under which the state may infringe upon a citizen's Fourth Amendment rights are "strictly defined by the legitimate requirements of law enforcement and by the limited extent of the resulting intrusion on individual liberty and privacy" (363). Moreover, in discussing the expansion of the power to detain absent probable cause, Brennan noted that "the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion" (365).

In upholding the constitutionality in *Hiibel* of a Nevada statute that required citizens subjected to a reasonable-suspicion stop identify themselves by stating their names, the Court recognized that the government may not require citizens to identify themselves to any degree more intrusive than stating their names, absent probable cause to arrest (2004, 187–89). By analogy, any infringement upon a fundamental right—whether freedom from unreasonable searches or to vote—must be considered by balancing the intrusion on the protected right against the importance of the governmental interests. Any government intrusion upon individual liberty and privacy should be as limited and narrow as possible to fulfill the governmental interests. Both citizens and governments have as strong an interest in protecting constitutional rights as the bedrock of "ordered liberty" as the police maintain in pursuing effective law enforcement.

THE VOTER-IDENTIFICATION LAW IS OVERBROAD

Besides conflicting with the reasonable-suspicion standard in requiring identification, the voter-identification law is overbroad in requiring photo identification from everyone who wishes to vote in person. Although the Indiana voter-identification law is claimed to combat in-person voter fraud, the law requires *every* potential in-person voter to furnish a photo identification. This is the requirement even when there is no suspicion that the person wishing to vote is intending to commit voter fraud. Absent suspicion, the government may not require intrusive identification. Because the voter-identification law arbitrarily and disproportionately requires the most invasive forms of identification, the overbroad statute also fails the reasonable-suspicion standard.

Simply put, the voter-identification law casts too wide a net. Such an overbroad and disproportional law essentially creates a system whereby the state requires a license to vote.

REQUIRING PHOTO IDENTIFICATION IS NOT THE LEAST INTRUSIVE WAY TO SERVE THE STATE'S INTEREST IN PROHIBITING VOTER FRAUD.

Any intrusion on constitutionally protected rights must be the most narrowly tailored one that serves government interests. However, by requiring that every voter provide photo identification, the Indiana law is not the least intrusive means to achieve the stated goal of preventing in-person voter fraud.

Indeed, a more narrowly tailored approach would serve the state's interest. This includes additional questioning or requests for corroborating documentation from voters whom election officials reasonably suspect of breaking the law.

There are many means by which election officials can and have identified voters short of requiring photo identification. The best method of identification is personal recognition, a purpose of precinct voting. Asking voters to sign poll books and comparing those signatures to those on file has been

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employed as a non-intrusive, yet effective, means to identify voters in Indiana, and many other states, for many years (Groth et al. 2007, 4–5). Moreover, election officials could ask potential voters their addresses or length of residency to develop a reasonable certainty as to whether or not people are who they say they are. If potential voters are unable to answer legitimate identifying questions like current address or their signature clearly does not match that on file, the election official may reasonably suspect that those people are not who they claim to be. At that point, the official could investigate a voter's identity by requesting a more intrusive form of identification, such asking for an identification document. Only upon probable cause to arrest for voter fraud, however, should the government be permitted to require that a voter furnish photo identification (*Hiibel* 2004, 188–89).

These alternative measures are less intrusive and more narrowly tailored than requiring every voter to furnish government-issued photo identification. Yet, the measures will just as effectively discourage and detect voter fraud. Indeed, modest identification measures and criminal penalties for misrepresentation in voting have worked for many years before the passage of the voter-identification law. Despite misperceptions, there has never been a reported instance of in-person voter fraud in Indiana history (*Crawford* 2007a, 955). As another dissenting judge affirmed, "the defenders of this law candidly acknowledged that no one . . . had ever been charged with" voter fraud (2007a, 955).

CONCLUSION

In sum, the U.S. Supreme Court should adopt a predictable, constitutionally sound standard to regulate when, and to what degree, the government can require citizens to identify themselves to exercise the right to vote. There are many levels of identification, from stating one's name and address to providing a piece of mail, that meet the standard. If there is reasonable suspicion about a voter's identity, more intrusive identification may be asked. But photo- or government-issued identification may only be requested if there is probable cause that a voter is attempting to commit fraud. Absent that constitutional threshold, the government should only be permitted to require less intrusive forms of identification-corroborative documentation.

The voter-identification law contradicts this reasonable-suspicion standard, because it arbitrarily requires that every citizen wishing to vote in person furnish official photo identification without suspicion of voter fraud. This constitutes requiring a license to vote. Totally depriving even one voter of the opportunity to exercise this fundamental right to vote is too substantial a burden to withstand constitutional scrutiny. ■

NOTES

An earlier version of this article appeared as part of an amicus brief for Crawford *(Albano et al. 2007).*

1. Nationally, in the 2004 election, voter turnout declined 3% (6% for African Americans; 10% for Hispanic Americans) in states that imposed identification requirements (Drew 2007).
2. The voter-identification law also conflicts with Ninth Amendment reservation to the people of unenumerated rights. In a democracy, the people's consent legitimates the government's exercise of power; the government's exercise of power should not be required to legitimate the identities of the people (Sobel and Fennel 2007).

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