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LEGISLATIVE TESTIMONY

NEW STATE VOTING LAWS: BARRIERS TO THE BALLOT?

**Testimony before the Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human
Rights
United States Senate**

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Chairman Durbin, Ranking Member Graham, and members of the Committee, thank you for the opportunity to testify today. In the pages that follow, I will explain how recent measures by states have enhanced the election process and voter integrity.

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¹ The title and affiliation are for identification purposes. The staff of The Heritage Foundation testify as individuals discussing their own independent research. The views expressed here are my own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees, and do not reflect support or opposition for any specific legislation. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under § 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from government at any level; nor does it perform any government or other contract work. Heritage is also the most broadly supported think tank in the United States, with over 710,000 supporters in every state, 78% of whom are individuals, 17% are foundations,

Heritage Foundation. By way of background, I have extensive experience in voting matters, including both the administration of elections and the enforcement of federal voting rights and campaign finance laws. I had the privilege of serving as a Commissioner for two years on the Federal Election Commission (2006-2007). Before that, I spent four years at the Department of Justice as a career lawyer, including three years as Counsel to the Assistant Attorney General for Civil Rights (2001-2005), where I coordinated the enforcement of federal laws that guarantee the right to vote.

Additionally, I was a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia, a county that is almost half African-American. In Virginia, I am currently the Vice Chairman of the Fairfax County Electoral Board, which administers elections in the largest county in the state. I have also served on the Virginia Advisory Board to the U.S. Commission on Civil Rights.

I have published extensively on election and voting issues. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981.²

This hearing could not be more timely. As the country once again prepares to elect a President, it is critically important to discuss the importance of states implementing measures that improve the security and integrity of our elections. One of the key principles in any fair election is ensuring that the person who casts a ballot is legally eligible to vote. And the fairest way to do that is by requiring individuals to authenticate their citizenship when they register to vote and their identity when they show up at the polls by producing photographic identification. Such measures increase public confidence in our election process.

Fortunately, a number of state legislatures have implemented such requirements. Their legislators understand that the United States has an unfortunate history of voter fraud and that such requirements are a fundamental and necessary component of ensuring the security of the election process. As Governor Lincoln Chafee, an independent, said when he signed Rhode Island's new voter ID law: "requiring identification at the polling place is a reasonable request to ensure the accuracy and integrity of our elections."

It is important that every individual who is eligible have the opportunity to vote, but it is equally important that the votes of eligible voters are not stolen or diluted by a fraudulent or bogus vote cast by an ineligible or imaginary voter. The evidence from academic studies and actual turnout in elections is also overwhelming that – contrary to

and 5% are corporations. Heritage has almost 31,000 members in Pennsylvania. The top five corporate givers provide The Heritage Foundation with 2% of its 2010 income.

² More information on my background and a list of publications is available at <http://www.heritage.org/About/Staff/V/Hans-von-Spakovsky?query=Hans+von+Spakovsky>.

the near hysterical claims of opponents – voter ID does *not* depress the turnout of voters, including minority, poor, and elderly voters. Proof of citizenship requirements also do not prevent eligible Americans from registering and voting. Despite the message in the not-so-subtle title of this hearing, these new state voting laws are not barriers to the ballot. To the contrary, they will ensure the integrity and honesty of elections going forward, and act to root out voter fraud.

The Need for Voter ID

Guaranteeing the integrity of elections requires having security throughout the entire election process, from voter registration, to the casting of votes, to the counting of ballots after the polls have closed. For example, jurisdictions that use paper ballots seal their ballot boxes when all of the ballots have been deposited, and election officials have step-by-step procedures for securing election ballots and other materials throughout the election process.

Everyone would agree that the integrity and security of elections would be severely endangered if county election officials allowed world-wide Internet access to the computers used in their election headquarters to tabulate ballots and count votes – allowing that kind of outside access to the computers used to tabulate votes would invite computer hackers to attempt to steal an election by changing the results.

Requiring voters to authenticate their identity at the polling place is equally necessary to protect the integrity of elections and access to the voting process. Every illegal vote steals or dilutes the vote of an actual legitimate voter. Opponents of voter ID claim that it can only prevent impersonation fraud at the polls, which rarely happens. That assertion is incorrect. Voter ID prevents and deters:

- impersonation fraud at the polls;
- voting under fictitious voter registrations;
- double voting by individuals registered in more than one state or locality; and
- voting by illegal aliens, or even legal aliens who are still not entitled to vote since state and federal elections are restricted to U.S. citizens.

As the Commission on Federal Election Reform headed by President Jimmy Carter and Secretary of State James Baker said in 2005:

“The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.”

Voter fraud exists, and criminal penalties imposed after the fact are an insufficient deterrent to protect against it. In the 2008 case of *Crawford v. Marion County Election Board* in which Justice John Paul Stevens wrote the majority opinion upholding Indiana’s voter ID law, the Court said that despite such criminal penalties:

“It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation’s history by respected historians and journalists, that occasional examples have surfaced in recent years ...that...demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.”

Election officials around the country do a good job overall of administering our elections especially given their lack of resources. But there are recurring problems with our voter registration system because many states do not do an adequate job of checking the accuracy and validity of new voter registrations. The potential for abuse and the casting of fraudulent ballots by ineligible voters (like illegal aliens or persons registered in more than one state) or in the names of fake voters, dead voters, or voters who have moved but whose names remain on the registration list exists – and has occurred in reported cases. I provide a more detailed explanation of such matters (with examples of actual voter fraud cases) in my new Heritage publication, “Voter Photo Identification: Protecting the Security of Elections.”³

As the Supreme Court recognized, there is a real risk that voter fraud could affect the outcome of a close election. There are enough incidents and reported cases of actual voter fraud to make it very clear that we must take the steps necessary to make such fraud harder to commit. Requiring voter ID is just one such common sense step that can stop or deter many of these problems.

Voter ID Does Not Reduce Turnout

States must protect the security of the election process, but they must also ensure that every eligible individual is able to vote. Not only does voter ID help prevent fraudulent voting, but where it has been implemented, it has *not* reduced turnout. Despite tiresome false claims to the contrary, there is no evidence that voter ID decreases the turnout of voters or has a disparate impact on minority, poor, or elderly voters – the overwhelming majority of Americans have photo ID or can easily obtain one. State Senator Harold Metts, the Democratic African-American who cosponsored Rhode Island’s new voter ID law, noted that “very few adults lack one of the forms of identification that will be accepted, and the rare person who does can get a free voter ID card.” He added that as “a minority citizen and a senior citizen, I would not support anything that I thought would represent obstacles or limit protections.”

Numerous studies – including those by The Heritage Foundation, the University of Missouri, the University of Delaware, and the University of Nebraska-Lincoln – have looked at turnout data from many states and several elections and concluded that voter ID does not depress turnout. In fact, the Delaware-Nebraska study said that “concerns about voter-identification laws affecting turnout are much ado about nothing.” Democratic

³ Legal Memorandum No. 70 (July 13, 2011); <http://www.heritage.org/Research/Reports/2011/07/Voter-Photo-Identification-Protecting-the-Security-of-Elections>.

Texas state representative Joe Pickett certainly agreed – he said that “If I really, truly thought that this would disenfranchise somebody, I would’ve voted against. In these days and times, it’s just not the case...Having a basic identification is a function of everyday life.”

Polls show overwhelming support for voter ID across all ethnic and racial lines – Rasmussen reports that “This is a sentiment that spans demographics, as majorities in every demographic agree.” That is no doubt because Americans have to use a photo ID to obtain a library card, drink a beer, cash a check, board an airplane, buy a train ticket, or check into a hotel. They understand that requiring voter ID is a common-sense reform and a requirement the vast majority of voters can easily meet and approve. Those in the leadership of organizations opposed to such common-sense reforms are clearly not in touch with their constituents.

Actual election results also confirm that voter ID does not hurt minority turnout. Voting in both Georgia and Indiana *increased* more dramatically in 2008 in both the presidential preference primary *and* the general election in the first presidential elections held *after* their photo ID laws went into effect than in some states *without* photo ID.

There was record turnout in Georgia in the 2008 presidential primary election – over 2 million voters, more than twice as many as in 2004 when the photo ID law was not in effect (the law was first applied to local elections in 2007). The number of African-Americans voting in the 2008 primary also doubled from 2004. In fact, there were 100,000 more votes in the Democratic Primary than in the Republican Primary.

In the 2008 general election when President Obama was elected, Georgia, with one of the strictest voter ID laws in the nation, had the largest turnout in its history – more than 4 million voters. Democratic turnout was up an astonishing 6.1 percentage points from the 2004 election when there was no photo ID requirement, the fifth largest increase of any state. Overall turnout in Georgia went up 6.7 percentage points, the second highest increase in the country, a striking increase even in an election year where there was general increase in turnout over the prior presidential election. The black share of the statewide vote increased from 25% in 2004 to 30% in 2008 according to the Joint Center for Political and Economic Studies. According to Census Bureau surveys, 65% of the black voting age population voted in the 2008 election compared to only 54.4% in 2004, an increase of over 10 percentage points.

By contrast, the Democratic turnout in the nearby state of Mississippi, also a state with a high percentage of black voters but without a voter ID requirement, increased by only 2.35 percentage points. Turnout in the 2010 congressional election in Georgia was over 2.6 million voters – an increase of almost 500,000 voters over the 2006 election. While only 42.9% of registered black Georgians voted in 2006, 50.4% voted in 2010 with the voter ID law in effect, an increase of over seven percentage points. As Georgia’s Secretary of State recently pointed out, when compared to the 2006 election, voter turnout in 2010 “among African Americans outpaced the growth of that population’s pool of registered voters by more than 20 percentage points.”

The Georgia voter ID requirement was upheld in final orders issued by every state and federal court in Georgia that reviewed the law, including the Court of Appeals for the Eleventh Circuit and the Supreme Court of Georgia. These courts held that such an ID requirement is not discriminatory and does not violate the Constitution or any federal voting rights laws, including the Voting Rights Act of 1965.

Just as has happened in every state that has considered voter ID legislation, organizations in Georgia like the ACLU and the NAACP made apocalyptic claims that there were hundreds of thousands of Georgians without photo ID. Yet when the federal district court dismissed all of their claims, the court pointed out that after two years of litigation, none of the plaintiff organizations had been able to produce a single individual who did not have a photo ID or could not easily obtain one. The district court judge concluded that this “failure to identify those individuals ‘is particularly acute’ in light of the Plaintiffs’ contention that a large number of Georgia voters lack acceptable Photo ID...the fact that Plaintiffs, in spite of their efforts, have failed to uncover anyone ‘who can attest to the fact that he/she will be prevented from voting’ provides significant support for a conclusion that the photo ID requirement does not unduly burden the right to vote.”

In Indiana, which the U.S. Supreme Court said has the strictest voter ID law in the country, turnout in the Democratic presidential preference primary in 2008 quadrupled from the 2004 election when the photo ID law was not in effect – in fact, there were 862,000 more votes cast in the Democratic primary than the Republican primary. In the general election in November, the turnout of Democratic voters increased by 8.32 percentage points from 2004, the largest increase in Democratic turnout of any state in the nation. According to Census Bureau surveys, 59.2% of the black voting age population voted in the 2008 election compared to only 53.8% in 2004, an increase of over 5 percentage points.

The neighboring state of Illinois, with no photo ID requirement and President Obama’s home state, had an increase in Democratic turnout of only 4.4 percentage points – only half of Indiana’s increase. Turnout in the 2010 congressional election in Indiana was almost 1.75 million voters – an increase of more than 77,000 voters over the 2006 election. According to the Joint Center for Political and Economic Studies, Indiana was one of the states with a “large and impressive” increase in black turnout in the 2010 election: “the black share of the state vote was higher in 2010 than it was in 2008, a banner year for black turnout.” In fact, the black share of the total vote went from only seven percent in 2008 to 12 percent in 2010.

Just as in Georgia, the federal court in Indiana noted the complete inability of the plaintiffs to produce anyone who would not be able to vote because of the photo ID law:

“Despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to [the photo ID law] because of

his or her inability to obtain the necessary photo identification. Similarly, Plaintiffs have failed to produce any evidence of any individual, registered or unregistered, who would have to obtain photo identification in order to vote, let alone anyone who would undergo any appreciable hardship to obtain photo identification in order to be qualified to vote.”

Some erroneously claim that requiring an ID, even when the state will provide a free ID, amounts to a “poll tax” because of the incidental costs like possible travel to a registrar’s office or obtaining a birth certificate that may be involved. The federal court in Georgia dismissed this claim, agreeing with the Indiana federal court that concluded that such an:

“argument represents a dramatic overstatement of what fairly constitutes a ‘poll tax.’ Thus, the imposition of tangential burdens does not transform a regulation into a poll tax. Moreover, the cost of time and transportation cannot plausibly qualify as a prohibited poll tax because those same ‘costs’ also result from voter registration and in-person voting requirements, which one would not reasonably construe as a poll tax.”

As a general matter, statistics from the U.S. Department of Transportation show that there are currently 205,781,457 valid driver’s licenses issued by states across the country for individuals 18 years of age or older, while the U.S. Election Assistance Commission cites 186,874,157 total registered voters.⁴ That means there are almost 19 million *more* driver’s licenses than registered voters nationwide. This number does not even include the additional 3 or 4 percent of individuals who, according to a Federal Election Commission study, have an identification card issued by state motor vehicle agencies in lieu of a driver’s license.

These statistics on driver’s licenses and non-driver’s license ID cards do not include the more than 85 million passports issued by the federal government as reported by the Government Accountability Office. These passports are acceptable forms of identification under state voter ID laws. Furthermore, government employees—whether federal, state, or local; whether full-time or part-time—also have valid IDs. In Georgia, for example, the voter ID requirement can be met by a “valid employee identification card containing a photograph” issued by any entity of federal, state, or local government. The same is true in Indiana. Nationwide there are another 22,632,381 people who work for public institutions, all of whom may have this type of ID.

Military ID cards can also be used to satisfy voter ID requirements under most state laws. Active duty military personnel and reservists all possess a military ID with a photograph (Common Access Card or CAC) and veterans have a similar ID card. In states like Georgia and Indiana, there are over 130,000 active members of the military who are eligible to vote using their CAC cards. The Veterans Administration reports that

⁴ See “Without Proof: The Unpersuasive Case Against Voter Identification,” Legal Memorandum No. 72 (August 24, 2011); <http://www.heritage.org/Research/Reports/2011/08/Without-Proof-The-Unpersuasive-Case-Against-Voter-Identification>.

there are about 22.7 million veterans age 17 and over in the U.S, each of whom would have an acceptable ID card under the voter ID laws in Georgia and Indiana, as well as the bills recently passed in Rhode Island and Kansas.

Proof of Citizenship

A number of states such as Arizona, Kansas, and Georgia have also implemented requirements that an individual provide proof of citizenship when registering to vote. This is needed to prevent individuals who are not U.S. citizens from registering and voting in our elections. This problem is explained in extensive detail in a paper published by The Heritage Foundation, "The Threat of Non-Citizen Voting."⁵

The evidence is indisputable that aliens, both legal and illegal, are registering and voting in federal, state, and local elections. In 2005, the U.S. Government Accountability Office found that up to three percent of the 30,000 individuals called for jury duty from voter registration rolls over a two-year period in just one U.S. district court were not U.S. citizens.

Following a mayor's race in Compton, California, in another example, aliens testified under oath in court in 2002 that they voted in the election. In that case, a candidate who was elected to the city council was permanently disqualified from holding public office in California for soliciting non-citizens to register and vote. The fact that non-citizens registered and voted in the election would never have been discovered except for the fact that it was a very close election and the incumbent mayor, who lost by less than 300 votes, contested it.

Similarly, the House of Representatives investigated a 1996 congressional race in California. Democrat Loretta Sanchez won the election by just 979 votes over Republican incumbent Bob Dornan. It is true that his challenge was dismissed – but only after the House Committee on Oversight and Government Reform turned up at least 624 invalid votes by non-citizens who were present in the U.S. Immigration and Naturalization Service (INS) database because they had applied for citizenship, as well as another 124 improper absentee ballots. The investigation, however, could not detect *illegal* aliens who were not in the INS records. As the Oversight Committee pointed out: "[I]f there is a significant number of 'documented aliens,' aliens in INS records, on the Orange County voter registration rolls, how many illegal or undocumented aliens may be registered to vote in Orange County?"

I recently received a copy of an order dated October 13, 2010 from removal proceedings filed in a federal immigration court in Orlando, Florida. The order concerned an immigrant from Cuba who arrived in the United States in April of 2004 and

⁵ Legal Memorandum No. 28 (July 10, 2008); <http://www.heritage.org/Research/Reports/2008/07/The-Threat-of-Non-Citizen-Voting>.

promptly registered and voted illegally and without detection in the November 2004 election.

America has always been a nation of immigrants and we remain today the most welcoming nation in the world. Newly minted citizens, like my parents, assimilate and become part of the American culture very quickly. New citizens should all be encouraged and assisted in registering to vote and taking part in our election process. But allowing noncitizens to register and vote effectively disenfranchises legitimate voters whose votes are diluted. Requiring voters to provide proof of citizenship is a requirement that is easily met that will help protect the integrity of our elections.

Military Voters

The voters who are really being disenfranchised continue to be overseas military voters. A study recently released by The Heritage Foundation found that despite the passage of the MOVE Act in 2009, only an anemic 4.6 percent of eligible military voters were able to cast an absentee ballot that was counted in the 2010 election.⁶ Many states acted promptly to implement the changes required by the MOVE Act; unfortunately, others like New York and Illinois did not. At least 14 states had one or more counties that failed to mail absentee ballots at least 45 days before the election as required by the MOVE Act.

In New York and Illinois, some local election officials waited until October 5, 2010 – more than two weeks after the deadline and less than 30 days before the election – to mail out absentee military ballots. These violations affected more than 45,000 military and overseas voters who requested an absentee ballot in these two states and resulted in lawsuits filed against election officials by the Department of Justice.

Conclusion

Voter ID and proof of citizenship requirements do not affect the turnout of voters. The claims that the implementation of such laws is vote suppression is completely unsupported and a libel on the American people and their elected representatives who understand these are common-sense reforms easily complied with. If these were the equivalent of “Jim Crow” as has been outrageously and inaccurately claimed, then the security requirements imposed by the TSA and Congress itself must also be categorized as “Jim Crow.”

The ability to travel freely within the United States is a basic right. Yet no one can board an airplane at any airport in the United States without showing government-issued photo identification. There have been no claims that such a requirement is somehow “discriminatory” and an imposition of “Jim Crow.” No individual can enter most federal buildings to exercise the First Amendment right to “petition the

⁶ “A President’s Opportunity: Making Military Voters a Priority,” Legal Memorandum No. 71 (July 19, 2011); <http://www.heritage.org/Research/Reports/2011/07/A-Presidents-Opportunity-Making-Military-Voters-a-Priority>

Government” without a government-issued photo ID – yet there have been no comparisons of that requirement to “Jim Crow.”

Similarly, the right to seek employment to support oneself and one’s family is a fundamental and basic right, as important as the right to vote. That right is protected by federal and state anti-discrimination laws. And yet under federal law, no individual can be employed anywhere in the United States without producing documentation authenticating his identity and his U.S. citizenship or legal authorization to work as a legally-admitted noncitizen. Employers must complete the federal I-9 form issued by the Department of Homeland Security “since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986” and “an individual may not begin employment unless this [I-9] form is completed.” States are simply implementing a similar requirement to authenticate identity and citizenship for registering and voting.

Such reforms are supported by the vast majority of voters of all races and ethnic backgrounds and help protect the integrity and reliability of the electoral process. All states have a valid and legitimate state interest not only in deterring and detecting voter fraud, but in maintaining the confidence of their citizens in the security of our elections. As Rhode Island Democratic state representative Jon Brien, who sponsored the state’s voter ID law, said, “Voting is one of the most important rights and duties that we have as Americans and it should be treated accordingly.”