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The Voter ID Fraud

GARRETT EPPS

There's a war on across the country over who will be allowed to vote in 2008. One of the key battles in the election was fought on January 9 before the Supreme Court.

The case is called *Crawford v. Marion County Election Board*. It tests an Indiana statute, passed in 2005, requiring voters to present a government-issued ID before they can cast a ballot. The law is aimed at alleged fraudulent voting by unregistered or noncitizen voters. Republicans insist that these voters pose a major problem, despite the fact that every systematic study of the question has concluded that this kind of fraud--called "voter impersonation"--is all but unknown in the United States right now. In fact, authorities in Indiana could not point to a single case of voter impersonation in the state's history.

Voter ID laws span a wide spectrum. The federal Help America Vote Act (HAVA), passed in 2002, provides that all states must require ID from first-time voters who register by mail. But twenty-five states and the District of Columbia have gone beyond this. Eighteen require all voters to produce some form of ID, which may be a bank statement or utility

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Correction: it's Judge Richard Posner of the Seventh (not the Second) Circuit.

about

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bill sent to their address. Two require a photo ID, which may include employee or other unofficial IDs. Arizona requires all voters to produce either one government-issued ID or two other identifications. Indiana stands alone in requiring that the ID have a photo and be issued by the government--the most difficult forms of identification to obtain. Voters who don't have such IDs are supposed to cast "provisional" ballots, which will be counted only if they show up at election headquarters with a proper ID within a few days of the voting.

CONTINUED

The more restrictive the law, the greater the likelihood that it will tip a close election by turning away legal voters--mostly the poor, minorities and the elderly. It's not a coincidence that these voters tend to vote Democratic. In fact, the State of Indiana, in its filings with the Supreme Court, admits that the litigation represents "politics by other means." This flippant attitude toward the right to vote permeates the state's argument. Unfortunately, the Supreme Court has shown signs that it shares the view that turning voters away from the polls is constitutionally unimportant.

A coalition of Democratic Party officials and activists promptly challenged the Indiana law. A federal district court dismissed their challenge on the ground that they had not shown that the law would actually prevent anyone from voting. The plaintiffs presented an exhaustive study by a well-known election expert estimating the number of registered Indiana voters who lacked ID at nearly 1 million; the district judge, however, dismissed the report as "utterly incredible and unreliable."

On appeal, Judge Richard Posner of the Seventh Circuit admitted that "some people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote." He further admits that "no doubt most people who don't have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than

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Republican candidates." But what's the big deal? It's only a few voters.

So what if there's no evidence of voter impersonation? That's the media's fault, Posner says. The lack of cases "may reflect nothing more than the vagaries of journalists' and other investigators' choice of scandals to investigate."

Even without the ID law, voters in Indiana and elsewhere often must show evidence of eligibility. In some states the voter must sign a polling book before receiving a ballot. Election officials compare the signature with an official one on file. In addition, poll watchers from the two parties can look at the book and challenge any voter whose signature doesn't appear to match. Partisan poll watchers have every incentive to check the signatures carefully.

No one on either side of the issue disputes that voter fraud occurs. But study after study has made clear that documented fraud is almost exclusively confined to absentee ballots. Absentee voting is one area where Republicans have traditionally out-organized Democrats; the new voter ID laws make almost no reforms to the absentee-vote system.

The voter-fraud argument comes down to a kind of duel over common sense. Voter ID proponents dismiss the lack of evidence; it stands to reason, they say, that if requirements are not strict, ineligible people will vote. Opponents counter that if it's hard to vote, some legal voters won't go to the polls. Whose votes matter? In recent years, conservative groups have insisted that precedence should go to "legitimate" voters, the kind of people who have ready access to ID. After all, Posner notes, "try flying, or even entering a tall building such as the courthouse in which we sit, without one." The roughly 18 percent of Americans who have never flown on a commercial airline are less worthy of concern.

The Indiana case will likely have an influence on a number of ID cases around the country. Arizona has in place a law requiring voters to prove their citizenship by presenting not just a driver's license but a passport or birth certificate upon registering and a photo ID at the polls. The city of Albuquerque changed its charter to require a photo ID at the polls. In Georgia the Republican legislature voted to require government-issued ID; the same session of the legislature voted to double the fee for such an ID. A federal court in Georgia initially blocked that ID law but then dismissed the challenge after the legislature amended the statute to waive the fee. The Albuquerque charter amendment has been stayed by a federal judge; the Georgia case is on appeal. At stake is the potential margin of victory in a close election.

If you doubt that, consider Missouri. Its law--the most restrictive in the country--was struck down before the 2006 election as a violation of the state Constitution. Senator Claire McCaskill went on to defeat Republican incumbent Jim Talent by a mere 48,314 votes out of 2,128,455 cast, a margin of only 2.3 percent.

The strongest argument *for* ID laws arises from the 1993 National Voter Registration Act,

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also known as the "motor voter" law. This act encourages mail-in voter registration and mandates that the states distribute registration forms at their driver's license bureaus. The result has been an increase in duplicate or obsolete registrations on state voter rolls, which could lead to mischief. The Help America Vote Act requires states to centralize voter lists and eliminate duplicate registrations. But many states haven't done so. Nevertheless, inflated voter rolls are a separate problem, which can be addressed by funding and implementing HAVA. To justify ID requirements, advocates need to provide evidence of voter fraud.

The obsession with voter fraud has been orchestrated by the Republican Party, with Karl Rove playing a significant role. The US Attorney firings scandal under Alberto Gonzales seems to have stemmed, in part, from Republicans' desire to push federal prosecutors into going after voters' rights and poor people's groups like ACORN for their turn-out-the-vote activities. In Wisconsin, voter fraud prosecutions netted convictions of a number of small-fish activists who mishandled registration cards and individual voters who filled out two registration cards or attempted to vote despite being convicted felons or on criminal probation. Prosecutors have lost more than half the cases they've brought. In Washington, where Democrat Christine Gregoire narrowly defeated Dino Rossi for governor in 2004, officials of the Justice Department removed US Attorney John McKay, who refused to bring voter fraud charges tied to the election.

Lacking evidence, the Republicans have shifted their argument. Now it runs: "legitimate voters" will lose confidence in elections if they think there's voter fraud, so the government must clamp down even without evidence. Unfortunately, there are signs that the Supreme Court has bought this New Age-y "voter feelings" argument. In early 2006, voters' rights groups challenged the Arizona law requiring proof of citizenship. The Ninth Circuit enjoined the law pending a full trial; the state appealed to the US Supreme Court, which allowed the law to take effect without a trial. Some voters "who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised," the Court reasoned in an unsigned opinion. The case is awaiting a full trial. A study has shown that some 5,000 voter registrations in Arizona, virtually all for eligible voters, were rejected in a six-month period for failure to provide proof of citizenship.

Folklore pervades the history of voter fraud in the United States. During the era of "live voice" voting, when voters shouted their choices in front of their neighbors, there was rampant bribery, intimidation, miscounting and voter impersonation. Roving gangs of ringers, plied with whiskey and \$2 bills, voted in multiple locations under false names.

During the Gilded Age and the Progressive era, as Alex Keyssar documents in his monumental study *The Right to Vote: The Contested History of Democracy in the United States*, the idea of the fraudulent voter coincided with social anxiety among the "better sort" about the political influence of the uneducated and recent immigrants. Whether or

not they were legally entitled to vote, their votes were seen almost as fraudulent per se. In the turn-of-the-century South, voter restriction was a keystone of the burgeoning segregated system. "Voter fraud" meant votes cast by black and poor white voters. In the West, fraud meant voting by Native Americans.

The current restriction movement preys on a new wave of immigration anxiety. In his 2004 book *Stealing Elections*, John Fund, now an editorialist for the *Wall Street Journal*, warned dramatically that "at least eight of the nineteen hijackers who attacked the World Trade Center and the Pentagon were actually able to register to vote in either Virginia or Florida while they made their deadly preparations for 9/11." (Fund told me that the information came from an interview with Michael Chertoff, now Secretary of Homeland Security, while he was a Justice Department official. Fund suggested that Chertoff's statement may have come from secret information. Two academics--Spencer Overton of George Washington University and Lorraine Minnite of Barnard--have been unable to confirm the "registered hijacker" claim with election officials.)

The issue in *Crawford v. Marion County Election Board* is likely to boil down to a complex legal concept that lawyers call the "level of scrutiny." This refers to the degree of proof that courts require to justify a government action. If a law restricts a trivial right, such as the right to smoke in public, all they need is a decent reason; if it restricts a fundamental right, like the right to travel interstate, officials must offer a convincing explanation and actual facts to support the law.

So the question will be: is making it burdensome or impossible for some people to vote a trivial abridgment or a serious impairment of an important part of full citizenship? Posner's opinion makes clear his view that casting an individual vote is no big deal. He cites a 1992 Supreme Court case, *Burdick v. Takushi*, that upheld a Hawaii ban on write-in voting. In *Burdick*, the Court said that strict scrutiny applied only to "severe" burdens of the individual's right to participate in elections. Regulations that, for example, limit the choice of candidates, however, need only be "reasonable" and "nondiscriminatory." (Interestingly, Justice Anthony Kennedy, whose vote is always decisive in close cases, dissented in *Burdick*, holding that the Hawaii write-in ban did not pass even loose scrutiny.)

But *Burdick* concerned the voters' right to choose a candidate not on the ballot--the Hawaii law did not deprive anyone of the right to cast a vote. Earlier cases have suggested that measures barring voters altogether are subject to "strict scrutiny," the standard that applies to proving government discrimination by race. If strict scrutiny is in effect, then officials in Indiana and elsewhere would actually have to produce facts to support their statute. It would certainly be impossible to be as flippant as Posner was about the flaws in the Indiana statute: "Perhaps the Indiana law can be improved--what can't be?"

The subtext of this case, and of the war over the vote, is a defect in America's patchwork

Constitution. Unlike virtually every modern democratic constitution, ours nowhere explicitly guarantees every competent citizen the right to vote. States can't restrict the vote by race, or sex, or failure to pay a poll tax, or by age for anyone over 18; but the document nowhere says that eligible voters have a right to their vote. In fact, when Supreme Court Justices discuss voting rights, they often refer to this most basic of rights in scare quotes-- "the 'right' to vote." This allows judges to adopt a kind of faux neutrality: some people want to vote; others don't want them to vote--the outcome is merely a matter of expediency.

This is desperately wrongheaded. In virtually every other advanced democracy, voting has a positive value: it is not up to the citizen to seek out a registrar or produce a satisfactory ID. Instead, the government itself is required to find and register every eligible voter and, if necessary, to provide each voter with an official ID without charge.

Amending the Constitution to guarantee the vote is an important long-term goal. But Congress can do much to ensure that this mischief does not grow, spread and become entrenched. Article I, Section 4, declares that the states shall regulate elections, unless Congress steps in. Congress could pass a statute requiring states to conduct fair, nonpartisan registration and to allow citizens to vote with a signature.

Currently before Congress are a variety of piecemeal reforms. Hillary Clinton's wide-ranging Count Every Vote bill would require states to accept an affidavit of citizenship as part of the mail-in registration process and would make it harder for state officials to toss out mail-in registrations for small errors. Barack Obama has a narrower bill aimed at measures that deceive voters about their eligibility. Representative Keith Ellison has offered legislation to block state ID requirements, but his bill has sparked little support.

The ID issue should be higher on the Democratic agenda. Voting is more than a matter of individual preference, like Coke or Pepsi. Free participation protects our political system from a more insidious kind of corruption in which elites govern without undue worry about public repudiation.

Vote suppression in the United States has a long and sordid past and present. Anonymous postcards often warn registered voters in black neighborhoods that they are ineligible. Fliers warn that any voter with an outstanding warrant will be arrested at the polls. Phone calls threaten eligible voters with criminal prosecution.

Thirty years ago, I saw white Southern registrars driving black voters away by threatening them with federal voter fraud charges. In 2004 I received an e-mail from my son, from a Southern election headquarters. He was fielding calls from black voters who were being turned away from the polls for minor errors in registration or failure to show an ID.

It is mortifying that we are passing this mortal flaw in our system down to the next generation. Voting lies at the heart of our national life, and efforts to restrict it to the "right" people corrode our very commitment to freedom. Perhaps we should consider

radical change in our system.

Perhaps we should consider democracy.

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