

POLL TAXES BY ANOTHER NAME?

The Proliferation of State Voter Access Laws Across the United States

by Vanessa M. Cross, Esq.



Image Credit: Taoty / FreeDigitalPhotos.net

dozen states passage of Republican partisan-led voting access legislation. A recent NAACP report shows a pattern of concerted effort to disenfranchise African American, Latino, elderly and youth voters ahead of 2012's presidential election.

The largest civil rights group in the U.S. presented evidence to the U.N.'s Office of the High Commissioner for Human Rights in December 2011, according to *The Guardian*.¹ In March 2012, the NAACP announced that it will send a legal delegation to Geneva to further its efforts before the U.N., where it holds special status that allows it to make presentations to a committee overseeing race and discrimination.

In this essay, I will set out some of the arguments of the NAACP's U.N. petition. This essay will also revisit a December 13, 2012 complaint filed by the American Civil Liberties Union (ACLU) against Scott Walker, as governor of Wisconsin, for voting rights violations. I will then briefly introduce Section 2 and Section 5 of the Voting Rights Act of 1965 (VRA). Recent voting access laws in the states of Florida, Tennessee, Texas and South Carolina will then be considered, making special note of the office of the United States Department of Justice's December 23,

1 "NAACP warns black and Hispanic Americans could lose right to vote", *The Guardian*, 12/05/11, last visited 01/10/12 <http://www.guardian.co.uk/world/2011/dec/05/civil-rights-naacp-voter-warning>

The National Association for the Advancement of Colored People (NAACP) has petitioned the United Nations (U.N.) alleging human rights violations in the U.S. in connection with more than a

2012 formal VRA objection to South Carolina recent voting access laws.

NAACP Petitions U.N. to Review Voting Laws for International Human Rights Violation

The NAACP released a 73-page report, entitled *Defending Democracy: Confronting Modern Barriers to Voting Rights in America*,² that details 25 voting measures that were recently passed in 14 U.S. states, allegedly as a partisan-driven effort to suppress the votes of individuals who historically vote Democratic. According to the NAACP report, the measures are less overt than Jim Crow laws but would nonetheless strip minority, poor, elderly and young voters of political power in the upcoming 2012 presidential election, a pattern of voter suppression that is also echoed in the nonpartisan report of the Brennan Center for Justice at New York University School of Law.³

According to the NAACP's report, the proliferation of state laws that would have the effect of limiting access to the voting ballot, follows a pattern of record minority turnout for the 2008 presidential election of Barack Obama, as assessed from the 2010 U.S. Census findings of population growth patterns of minority communities across the nation. The new voting measures are concentrated in states with the fastest growing African American populations -- Florida, Georgia, Texas and North Carolina -- and the fastest growing Latino populations -- South Carolina, Alabama and Tennessee.

2 *Defending Democracy: Confronting Modern Barriers to Voting Rights in America*, National Association for the Advancement of Colored People 2011, last accessed 01/10/12 http://naacp.3cdn.net/67065c25be9ae43367_mlbrsy48b.pdf

3 *Voter ID Laws Passed in 2011: Analysis*, Brennan Center for Justice at New York University School of Law, last accessed 01/10/12 http://www.brennancenter.org/content/resource/voter_id_laws_passed_in_2011/http://www.brennancenter.org/content/resource/voter_id_laws_passed_in_2011/

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The Brennan Center estimates that as many as 5 million eligible voters could be barred from choosing the occupant of the White House in 2012 as a result of these new voting box protection initiatives. Another pattern that is worth noting is that the 14 states that have pursued these voter's measures hold two-thirds of the electoral college votes needed to win the U.S. presidency.

U.S. States New Voter Access Measures in 2011



"Well, first you have to talk about the full breadth of the laws that they've been pushing through," states Benjamin Jealous, NAACP president. "It's not just about voter I.D. They've come after same-day registration, early voting, Sunday voting. They've passed laws like they have in Georgia and in Arizona - registration I.D.s, saying that they will not even process your voter registration form unless a copy of your I.D. is attached."

Jealous states that the moves amounted to "a massive attempt at state-sponsored voter suppression." He added that the association will be urging the U.N. "to look at what is a coordinated campaign to disenfranchise persons of color." He states that he personally delivered a copy of the NAACP report to Assistant Attorney General Perez.

The requirement that citizens obtain and display unexpired government-issued photo identification to vote was advanced in 35 states in all, but passed by Republican-led legislatures in Alabama, Minnesota, Missouri and nine other states, notes John Lewis, a Democrat Congressman from Georgia. Florida, Maine, Ohio and Wisconsin passed laws that limit when and where voters can register, according to the NAACP report.

"In the rural South, many people of a certain age have no birth certificate because they were born to a

midwife," said Jealous, president and CEO of the NAACP. Obtaining an ID can be expensive for those without birth certificates, such as older citizens among African Americans who were historically not issued birth certificates in the United States.

"For them, the barriers to getting a state issued ID without birth certificates are tremendous," said Jealous. "Others are dependent on the rides to the polls provided by church-organized Sunday voting drives, which have been shut down in some states."

Many of these voter ID laws require citizens to have identification cards with signatures. For example, Texas proposed law does now accept student IDs, but does allow voting by citizens granted a Texas concealed handgun license. According to a Brennan report, 11 percent of voting-age American citizens—and greater percentages of African American, low-income and older citizens—do not have current and valid government-issued photo IDs, facts confirmed by other independent studies.

Section 2 and Section 5 Requirements under the Voting Rights Act of 1965

The Voting Rights Act amended by Congress in 1970, 1975, and 1982, was enacted by Congress to further protect the right of minority citizens' to vote in the United States.⁴ The VRA has been used as a legal tool to remove voting obstacles and to correct unfair election processes in many parts of the nations. For African Americans, Latinos, Native Americans and Asian-Americans, the VRA swept in significant gains in voting registration, voting access and election of legislative representation from these populations—many of which were historically underrepresented in public office.

Section 2 of the VRA prohibits voting practices or

4 Voting Rights Act of 1965, Our Documents, last visited 01/10/12 <http://ourdocuments.gov/doc.php?flash=true&doc=100>

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procedures that discriminate based on race, color, or membership in one of the language minority groups identified in Section 4(f)(2) of the Act.⁵ Much of the VRA case law arising under Section 2 were challenges to at-large election schemes, but the section also generally prohibits voting standards, practices or procedures that result in the abridgment or denial of any citizen's right to vote on account of race, color or membership in a language minority group. In contrast to certain other VRA provisions, Section 2 is a permanent federal statute that has no expiration date.

Section 5 was enacted in 1965 as temporary legislation that was set to expire in five years. Unlike Section 2's broad application, Section 5 was applicable to certain states. Section 5 jurisdictions were identified in Section 4 by a formula, but generally covers those southern states with historical problems of voting suppression measures targeted at certain protected classes of citizens, such as enacting poll tax requirements that had the effect of limiting access to minority populations with a high nexus of poverty.

In 1982, certain VRA provisions set to expire were extended by Congress. This included Section 5, which requires select U.S. jurisdictions covered by the provision to submit changes in law, practice, or procedure that effects voting access to either the United States Attorney General or a three-judge panel of the United States District Court for the District of Columbia. Voting law changes in these covered jurisdictions may not go into effect until a review has occurred by one of these

federal bodies, ruling that the laws do not have the purpose or effect of discriminating against protected populations.

“If a state passes a new voting law and meets its burden of showing that the law is not discriminatory, we will follow the law and approve the change,” said Thomas Perez, Assistant Attorney General for the Civil Rights Division of the Department of Justice. “And where a state can’t meet this burden, we will object as part of our obligation under Section 5 of the Voting Rights Act.”

Sometimes referred to as the pre-clearance requirement, Section 5 prevents covered jurisdictions from making changes to election laws that would otherwise undermine protected classes voting rights. Section 5 jurisdictions have the burden of proving that changes in the voting laws do not have a discriminatory purpose or effect by a preponderance of the evidence standard. Section 5 remains in effect through 2031.

Non-Section 5 States



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The Justice Department does not have pre-clearance jurisdiction over states that do not fall under Section 4(f)(2) of the Act. As a result, private litigation has been the way civil liberties and community organizations, such as the ACLU, have challenged voting laws allegedly enacted with the intent to suppress certain class of voters.

On Tuesday, December 13, 2011, the ACLU filed a federal lawsuit challenging Wisconsin's voter ID law as the equivalent of a poll tax on certain individuals. In its 54-page complaint, the ACLU lawyers argue that Wisconsin's recently enacted law "imposes a severe and undue burden on the fundamental right to vote under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; violates the Twenty-Fourth and Fourteenth Amendments to the United States Constitution as an

⁵ § 1971 - Voting Rights, Cornell University Law School, Legal Information Institute, last visited 01/10/12, <http://www.law.cornell.edu/uscode/42/1971.html#a>; see also, 58 CFR 51.55 - Consistency with Constitutional and Statutory Requirements, Cornell University Law School, Legal Information Institute, last visited 01/10/12 <http://www.law.cornell.edu/cfr/text/28/51/55><http://www.law.cornell.edu/cfr/text/28/51/55>

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unconstitutional poll tax; and violates the Equal Protection Clause of the Fourteenth Amendment in arbitrarily refusing to accept certain identification documents."

In making their case, the ACLU was not able to rely on VRA's pre-clearance requirement under Section 5.⁶ The ACLU complaint argues that Wisconsin's voter ID law would force individuals to "choose between surrendering their driving privileges to obtain a free Wisconsin state ID card, paying a fee for a Wisconsin driver's licenses, or losing their right to vote." The complaint asserts that the requirement to surrender an out-of-state driver's license "constitutes a material requirement imposed on an eligible voter who refuses to forfeit his/her right to vote without paying an unconstitutional poll tax."

In 2006, Missouri, also a non-Section 5 jurisdiction, had its photo ID law struck down by the Supreme Court of Missouri, which found that Missouri's Constitution had stronger voter protections than the U.S. Constitution. The proposed Missouri voter access law would have provided free voter identifications to Missourians who lacked acceptable ones. It also created "mobile processing units" where identification could be secured by older and disabled voters. The Missouri Supreme Court, however, based its rejection of the law, in part, on the costs that voters without identifications would have to pay to obtain secondary documentation required to secure the free voter identifications. For example, Missouri voter's would have to pay at least \$15 for a birth certificate, or costs for other types of documentation when a birth certificate was not available, a problem frequently faced by elderly voters.⁷

⁶ *Ruthelle Frank v. Scott Walker* (Complaint, Non-Section 5 State), American Civil Liberties Union, last visited 01/10/12 http://www.aclu.org/files/assets/20111213_wisconsin_photo_id_complaint_-_efiled.pdf

⁷ See *Weinschenk v. State*, 203 S.W.3d 201, 213 (Mo. 2006), available at FindLaw, last visited 01/10/12 <http://caselaw.findlaw.com/mo-supreme-court/1361417.html>

Florida Reduces Access to the Voting Box

Florida's African American and Latino populations grew during the past decade and the state is on the verge of becoming a majority-minority state. Florida has led the way in limiting access to the voting box, from hosting some of the harshest rules limiting ex-felons' access to the franchise to more recently cutting its early voting period in half. Florida use to have 96-mandated hours over 14 days of early voting. It was recently reduced to 48 hours over eight days.

The state has also severely restricted voter registration drives, discouraging the efforts of organizations like the League of Women Voters, which ceased its registration efforts in the state due to the growing restrictions. Perhaps not surprisingly, the Brennan Center reports that African Americans and Latinos are more than twice as likely as white voters to register through a voter registration drive.

Additionally, Florida's the new electoral laws have eliminated an important voting day for church communities – last Sunday before Election Day. In 2008, African Americans were 32 percent of the entire statewide turnout on the last Sunday before the election, said Ryan Haygood, director of political participation for the NAACP Legal Defense and Educational Fund.

"It's widely known in Florida that black churches would organize what they called 'Get Your Souls to the Polls' where they urged their members, after fulfilling their spiritual duties on Sundays, to discharge their civic ones by voting," said Haygood.

Tennessee's New Electoral Protection Laws

Tennessee's new voter ID laws provide that the government will provide a photo ID at no charge for registered voters who do not have a government-issued photo ID. In the Summer of 2010, *The New Tri-State Defender* reported that the new voter ID laws in Tennessee would pose a particular problem in

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Memphis because some residents reported standing two hours just to enter the doorway of the local DMV office, where state voter ID's are now made available.

State DMV offices in other regions of Tennessee reported wait times of 20 minutes or less. Shelby County is the Tennessee county where Memphis is located, one of the most concentrated populations of African Americans in the state of Tennessee. The wait for photo identifications are up to four to five hours. The general business hours of the DMV in most states makes it difficult for people working standard business hours to obtain or renew licenses without taking formal time off work.

During the summer of 2011, U.S. Congressman Steve Cohen (D-TN) wrote the Justice Department to request a review of Tennessee's recently strengthened ballot access laws, which were opposed by numerous veteran civil rights and voting rights groups across the state. According to the Defender, as of December 2011, the Justice Department had not replied to Congressman Cohen's request, noting that the Justice Department generally declines to confirm ongoing internal investigations.

While Tennessee's laws may cover the cost of the photo identification it does not cover the cost of the secondary documentation citizens are required to produce for the state photo identification. This typically includes a birth certificate and two original documents that show residency, such as a utility bill, car registration or bank statements. The NAACP's report indicates that residents typically incur a cost in ordering copies of birth certificates, and in some cases, the records simply may not be available – especially for older residents and especially for older African Americans.



Texas New Voter Access Laws

United States Attorney General Eric Holder Jr. left the position of his office on the subject open for interpretation. After the ACLU filed a lawsuit against the state of Wisconsin on December 13, he publicly responded to the swelling chorus of discontent by promising to protect the rights of voters. Attorney General Holder delivered a speech at the Lyndon Baines Johnson Presidential Library & Museum in Austin – delivered on the campus of the University of Texas.⁸ It was not lost on the crowd that President Johnson signed the Voting Rights Act in 1965 and that Holder, the country's first African-American United States Attorney General, was delivering the speech after the Texas legislature has sought federal clearance of two new legislative provisions. The Republican-led Texas legislature seeks to implement both voter redistricting provisions and voter identification requirements on the eve of the 2012 presidential election.

The warning from U.S. Attorney General Eric Holder was polite but firm. Holder said that the redistricting maps Texas legislators drew in 2011 indicate an intent to protect incumbents rather than on having candidates compete for votes. Texas' Republican-dominated legislature drew a map, according to Holder, that failed to reflect its growing Latino population reported by the 2010 U.S. Census.

“Ensuring that every veteran, every senior, every college student, and every eligible citizen has the right to vote must become our common cause,” said Holder. “And, for all Americans, protecting this right, ensuring meaningful access, and combating discrimination must be viewed, not only as a legal issue – but as a moral imperative.”

⁸ The United States Department of Justice, Attorney General Eric Holder Speaks at the Lyndon Baines Johnson Library & Museum, Austin, TX ~ Tuesday, December 13, 2011, last visited 01/10/12 <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-111213.html>

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“Although I cannot go into detail about the ongoing review of these (Section 5 states) and other state-law changes, I can assure you that it will be thorough – and fair. We will examine the facts, and we will apply the law,” said Holder.

South Carolina's Failed Pre-clearance

While no definitive decision on Texas' voter access laws have been announced by the Justice Department, the Department blocked South Carolina's new Voter ID laws on December 23, 2011.⁹ South Carolina is a Section 5 state due to its history of voting rights abuses against African Americans. The rejection of South Carolina's voting laws is the first time the Obama administration has taken an active position in the voter access debate that is developing towards the 2012 presidential elections.

Signed by South Carolina Governor Nikki Halley in May 2011, South Carolina's Republican leaders pushed the voter identification legislation through despite the South Carolina State Election Commission reports that it could affect 240,000 South Carolina voters who were registered to vote but did not have a photo identification.

Assistant Attorney Perez, with the Justice Department's civil rights division, submitted a letter to the South Carolina government that states that the objection to its voter identification laws was because the laws would have “significant racial disparities.” Perez cited data provided by the state that indicated that “81,938 minority citizens who are already registered to vote and who lack” adequate identification were nearly 20 percent more likely to be “disenfranchised” by the change to the voting laws than white voters.

⁹ DOJ letter to South Carolina, dated 12/23/11, last visited 01/10/12 <http://www.documentcloud.org/documents/279907-doj-south-carolina-voting.html><http://www.documentcloud.org/documents/279907-doj-south-carolina-voting.html>.

Legitimate Voting Measures or Sophisticated Poll Taxes?

The escalation of these voting access laws by the Republican-led legislators appears to be a concerted effort to suppress the voting rights of African Americans, Latinos, seniors, students and the poor. Congressman John Lewis (D-GA) in a well-penned opinion piece in *The New York Times* in August 2011 noted that when the Voting Rights Act of 1965 was passed there were only 300 elected officials in the United States. Today there are more than 9,000 – including 43 members of Congress. This growth in minority representation is the fruit of the efforts of many citizens who fought to enact the voting rights laws intended to prevent the intentional use of the legislative process to limit minority access to the polls.

It is ironic indeed, that these recent voting access laws, which allegedly aim to protect the ballot box, are protecting a voting box that is being relied upon less and less by the populous because of disillusionment with the political process, according to recent statistics on voter apathy. It would seem more reasonable when faced with declining voting trends that more money should be spent on bringing people back into the democratic process. Instead, the American public is given more sophisticated strategies which institutionalize second-class citizenship among minorities, seniors, youth and the poor by restricting participation in the voting process solely to those whose aim is to gain power by any means necessary.



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