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Crawford v. Marion County

Online Debate



Crawford v. Marion County, argued in front of the Supreme Court on January 9th 2008, challenges an Indiana law requiring all voters who cast a ballot in person to present a photo ID issued by the United States or the State of Indiana.

George Mason University School of Law professor and former Chief of Staff and Counsel in the office of Federal Election Commission Commissioner Bradley A. Smith, **Allison Hayward**, and Director of People For the American Way's Democracy Campaign, and former Senior Trial Attorney in the Voting Section of the U.S. Department of Justice, **David Becker**, discuss whether the law unduly burdens a citizen's right to vote.

This debate is LIVE and will be continuously updated with each participants' posts.

Updated on 2/4/2008.

Questions and Answers

Allison Hayward: The argument in *Crawford v. Marion County Board of Elections*, before the Supreme Court January 9, has attracted almost 40 briefs from outside groups. Why? Not, I believe, because this law is mission critical – either for “ballot integrity” Republicans or “voting rights” Democrats -- but because the state’s meager justification for it offers supporters of expanded federal power over voting a legal wedge to create precedent that undermines state voting regulations.

Summary: Indiana's law requires voters to present a government-issued photo ID before voting (or vote provisionally, then swear indigency or other inability to obtain an ID). Supporters argue that ID requirements are necessary to prevent “impersonation” voter fraud. Opponents argue that ID requirements attack a phantom problem, because there is little (if any) impersonation fraud. The laws disproportionately impact the poor, elderly, and other voters from groups (disproportionately Democratic in registration) that are less likely to have the necessary ID.

But the question before the Court in *Crawford* is not whether Indiana’s voter ID requirement is good policy or canny politics. The question is whether it is facially unconstitutional for a state to impose this specific ID requirement on voters.

Administration of elections, even elections to federal office, is a task the Constitution commits to state lawmakers. This doesn't give states discretion – the Constitution has very specific things to say about voting discrimination by race, sex, or age, or conditioning voting on payment of a tax or fee. States have long imposed laws restricting the voting rights of felons, mentally incapacitated persons, aliens, short-term residents, and every state but one requires that voters register before voting. So, to the extent individuals have a “right” to vote, it is a “right” that is in great part a creature of state law. Many states have some form of identification requirement for in-person voting at the polls. This is true notwithstanding that it is difficult to demonstrate anywhere a consistent threat to election integrity from “impersonation” fraud.

What’s the burden? In the first election to use the new Indiana law, in populous Marion County 34 voters (out of 166,103) voted provisionally because they lacked the proper ID. This amounts to not even a fraction of a percent.

Respondents can point to the negligible burden imposed by the ID requirement, the existence of voter fraud generally in select contexts, and the popularity of the law in the state to argue that the Court should respect state discretion here. Partisan motives? Those can be found behind many laws (redistricting, anyone?), and do not necessarily undermine a law’s constitutionality. With evidence that no more than a miniscule fraction of legitimate voters are burdened by the requirement, at worst the law is ineffective, and merely a sap to public opinion. Were the Court to



David J. Becker



Allison R. Hayward

reject on Constitutional grounds state laws because they are ineffective (yet politically popular), the volume of such challenges would soon become immense.

David Becker: Ms. Hayward nicely summarizes the broad arguments for and against Indiana's law – the most restrictive in the nation. The outcome of these arguments has great constitutional and democratic import, not because some are seeking to expand federal power over states' rights, but because the legitimacy of our democracy is grounded in every eligible voter having access to the vote.

As an initial matter, contrary to the suggestions of those who support the Indiana law, the Constitution, by its express language, does not exclusively commit the administration of elections, particularly federal elections, to the states, with Art. I, Sec. 4 giving Congress the power to trump states' regulations. This federal power has been used in bipartisan ways to protect voters from state action or inaction, protecting minorities under the Voting Rights Act, and protecting our men and women in uniform under the Uniformed and Overseas Citizens Absentee Voting Act.

Thus, rather than being about some federal power grab, the challenge to Indiana's burdensome law is about something much more vital – the fundamental right of all eligible citizens, regardless of party, race, or socioeconomic status, to have a voice in our democracy. The Supreme Court has recognized this in *Burdick v. Takushi*, 504 U.S. 428 (1992), where it made clear (unanimously on this point) that the more severe the burdens imposed on eligible voters, the more narrowly tailored the law has to be to achieve an important governmental interest.

The constitutional analysis thus turns on three important factors – the severity of the burdens imposed, the legitimacy of the governmental interest, and the degree to which the law is narrowly tailored to serve that interest.

Indiana's law imposes very severe burdens, not only because it affects what can hardly be called a “negligible” amount of legitimate voters, but also because the character of the burden on each voter – disenfranchisement in many cases – is the most severe that can be imposed on any eligible voter. And the numbers are hardly negligible. While challengers have evidence to suggest that there may be as many as more than 400,000 eligible Indiana voters who do not have the requisite ID, even the state admits that thousands are impacted. Indeed, even the 32 eligible voters who were recently disenfranchised by the law in the 2007 municipal elections in Marion County alone equate to more than twice the percentage margin of the presidential election in Florida in 2000 – a margin which is also comparable to the margin in several presidential and Congressional races in the last decade. I would think that partisans and ideologues on both sides of this issue can agree that the bureaucratic disenfranchisement of any number of eligible voters, whether they be poor or black voters in Indianapolis, or soldiers fighting overseas and voting absentee in Florida, must be justified by a very serious government interest or need in order to be constitutional. I'll address the (lack of) evidence of the need for Indiana's barriers in my next post.

Allison Hayward: I don't so much as disagree with David as I feel we are talking about two different things. First off, David is completely correct that states do not have sole authority to set the time, place and manner of elections, because Congress can trump states by statute. I was trying to be brief and didn't mean to overstate the case.

Has Congress occupied the field on the question of what voter identification is proper? No. In the Help America Vote Act, Congress stipulated some identification requirements, but left states free to enact their own provisions, provided their laws weren't inconsistent with HAVA. The argument has been made that HAVA preempts Indiana's law, but I think for various reasons that argument doesn't win the day. To avoid pulling our readers any further into the weeds I'll leave it at that. (I don't understand David to be making that argument in any case.)

But as to burden, we face the challenge of how to describe in legal terms a burden felt acutely by a few. That, here, is a problem because of the posture of the case as a facial challenge. An as-applied challenge would have a factual record judges could use to evaluate whether the burden on the Amish, for example, is severe or modest, or outweighed by some state interest in having them restate their religious objections each time they vote.

No one disputes that for the vast majority of Indiana voters, this law is not burdensome. It would be an odd thing to successfully assert, given this, that the law is facially unconstitutional in essentially all its applications.

David also notes that even a small number of votes can be critical in a close race. Yes, but that doesn't affect the burden the law places on anybody, does it? I prefer to think of a close election as essentially dead, and must admit I'm more interested in a prompt, legitimate, and final

as essentially a draw, and must admit I'm more interested in a prompt, legitimate, and final declaration of the winner than some doomed pursuit of the "real" result. But that's a topic for another day!

David Becker: To address Allison's points re: burden, I see two potential problems with her approach. First, it's interesting to hear the facial vs. "as-applied" argument used by those, mostly conservatives favoring judicial restraint, supporting the Indiana law. Even the state concedes that the law will result in the effective disenfranchisement (as opposed to the mere inconveniencing) of approximately 10,000 eligible voters (challengers believe that number to be much higher), certainly a number that raises sufficient constitutional concerns on its face. More importantly, however, to argue against facial challenges in this context is to argue against judicial economy, and in favor of multiple, potentially conflicting judgments. Imagine the logical result of the "as-applied" argument – each individual voter who believes they are unconstitutionally burdened, must bring an individual lawsuit before a federal district court. As members of the Court alluded during oral argument, the courts could hear from one person who must travel 10 miles to get an ID, and another who must travel 25 miles, and have to weigh the respective burdens, perhaps in separate cases. Cases would literally flood the courts. No, the proper way to address a statute like this, which clearly places severe burdens on a significant number of eligible voters, is to get sufficient evidence to apply the Burdick test, and be done with it. If the evidence is not yet sufficient, as appears to be the case in Indiana, then the proper course for the Court to take is to remand with instructions.

Second, while Allison acknowledges that the burden is acute on those who suffer it, she states that the burden is felt only by a few, and not by the vast majority of voters. But where does one draw the line when it comes to these severe burdens? I think few would say that it's OK if it only effectively disenfranchises 49% of voters, or 20%, or maybe even 10%. But with elections as close as they have been, can a burden that undeniably disenfranchises any number of eligible voters be held to be constitutional? (More on this later).

Many supporters of the law, including Allison, recognize that the law serves no legitimate interest. While the prevention of voter impersonation fraud at the polls may seem like a worthy goal in the abstract (the law does nothing to prevent voter impersonation in absentee ballots, which every side of this debate admits is far more likely), the fact remains that such systemic fraud is a myth. Don't trust me on this – Indiana's Republican Secretary of State Todd Rokita, Missouri Governor Matt Blunt, Georgia officials, and others admitted that they could not identify any fraud that would be addressed by these laws. And as for whether this law is tailored at all (let alone narrowly-tailored) to address the potential for such fraud, even if it exists, I will address that point in my next post.

Allison Hayward: Just to be clear, I'm not the source for the notion that facial challenges are hard. The Court is. If you take *Salerno* and *McConnell* seriously, it seems to me that the *Crawford* challenge is in trouble.

Perhaps this means piecemeal adjudication of the relevant Constitutional standard. Typically, an as-applied decision speaks not simply to the specific litigant, but those in similar situations. Legislatures and administrators respond with new laws and rules. Sure, those may be open to litigation as well, but reasoning by analogy courts apply the Court's reasoning and develop precedents and whatnot. That's the American way, no?

The notion that the Court would only reluctantly declare a law facially unconstitutional is an important component of judicial restraint, which is about whether the courts should assume a lawmaking legislative role, not about whether courts hear a certain number of cases.

Congress can step in, you know, and articulate a uniform ID requirement, complete with exceptions for whatever situations Congress believes should be honored. If (when) that law is challenged, then we could at least observe the Court considering the specifics of a law of national scope. This would address some of David's concern about multiplicity. Speaker Pelosi? Hel-lo?



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