

## How Do Proof-of-Citizenship Laws Block Legitimate Voters?

by Stuart Naifeh

In 2008, as the state of Missouri was poised to adopt a constitutional amendment to require documentary proof of citizenship of every person wishing to register to vote in the state, the *New York Times* and other media outlets reported on the story of Lillie Lewis. The 78-year old Ms. Lewis, an African American Missourian, was born in Mississippi and had voted in every presidential election she could remember but had no documentary evidence of her U.S. citizenship. As the Missouri amendment was being debated, she wrote to the vital records office in Mississippi seeking a copy of her birth certificate. In response, she received a letter stating that the state had no record of her birth. After decades of voting, she effectively became a non-citizen, excluded from engaging in the voting process that defines a democracy.

Although the amendment failed a vote in the Missouri Senate, a number of other states have passed similar laws demanding that citizens produce documentary evidence of citizenship in order to register to vote. On August 25, 2014, the U.S. Court of Appeals for the Tenth Circuit heard oral arguments in the latest case testing how far such laws can go.



*State laws requiring voters to submit documentary evidence of citizenship in order to register to vote are already having a dramatic and harmful effect on citizens' ability to participate in the political process in the states that have them."*

The case, captioned *Kobach, et al. v. Election Assistance Commission, et al.*, began as a challenge by the states of Kansas and Arizona to the federal Election Assistance Commission's voter registration application form (known as the "federal form").<sup>1</sup> Under the National Voter Registration Act (or NVRA), the EAC issues the federal form and is largely responsible for the form's design and content. However, the federal form may require only information that is *necessary* for the states to assess voter eligibility. The form already includes requirements that each registrant both must check-off a box that states s/he is a U.S. Citizen and must sign, under penalties of perjury, that s/he is a U.S. citizen. Kansas nevertheless requested that the EAC add instructions to the federal form requiring Kansas residents using the form to submit documentary evidence of citizenship, as the state required for its own voter registration forms. Arizona and Georgia, which also have documentary proof-of-citizenship requirements for their state voter registration applications, joined in Kansas's request. The states argued that *documentary* proof-of-citizenship is necessary for them to enforce the requirement that their voters be citizens.

The EAC refused to change the instructions on the federal form because the proposed requirement would impose unnecessary obstacles to voter registration for many citizens. Kansas and Arizona then sued the EAC, arguing that the refusal was "arbitrary and capricious." The District Court in Kansas agreed with the states and ordered the EAC to modify the federal form, but the Tenth Circuit has prevented the District Court's order from going into effect while it considers an appeal of the District Court's decision.

This case has far-reaching implications for voter participation in our democracy because it thwarts so many individuals from registering to vote and therefore voting. In 2004, Arizona was the first state to impose a documentary proof-of-citizenship requirement on its voters, and Kansas passed its proof-of-citizenship law in 2011. Alabama recently joined them, and Tennessee and Georgia have passed similar laws in recent years. In these states, politicians who benefit from reduced voter participation see documentary proof-of-citizenship requirements as a potent tool in their own self-interest and by cloaking these anti-voter policies as a solution to "voter fraud," are increasingly able to find support for them in state legislatures.

## Why Shouldn't A State Ask Individuals to Prove Their Citizenship When They Attempt to Register to Vote?

States already ask for evidence of citizenship. Since states began requiring voters to register prior to voting, every state has required individuals wishing to register to sign a statement under penalty of perjury affirming that they are citizens and that they meet all of the state's other voter eligibility requirements. The federal form also requires such a statement and additionally states that non-citizens who register may be criminally prosecuted and deported.

Statements under penalty of perjury are acceptable evidence in courts of law, and for many decades every state in the nation accepted them as evidence of citizenship for voter registration purposes. What is new is that a handful of states are no longer accepting such statements and are demanding that voters instead provide *documentary* evidence of citizenship, such as birth certificates, naturalization cards, or Native American tribal documents.

These states insist that requiring such evidence is necessary to ensure that non-citizens do not fraudulently register to vote—something that occurs extremely rarely, if at all. In fact, these laws prevent numerous eligible voters from registering simply because they do not have an acceptable document showing their U.S. citizenship. At the same time, documentary proof-of-citizenship requirements do no more to prevent voter registration fraud by non-citizens than the threat of criminal prosecution and deportation has done ever since states began registering voters. Preventing legitimate voters from participating in our democracy is an unacceptable price to pay for stopping at most a tiny number of fraudulent voter registrations.

## Doesn't Everyone Already Have Proof of Citizenship?

No. Many eligible voters lack documentary evidence of their citizenship sufficient to satisfy state proof-of-citizenship laws. Those most likely to be affected by these laws are students, the elderly, the disabled, low-income individuals, the homeless, and naturalized citizens. Aside from these narrow populations, across the board, Native Americans, African Americans and members of other historically disadvantaged and disenfranchised groups are also less likely to have, or have ready access to, documents that will satisfy documentary proof-of-citizenship requirements.

Birth certificates, the most widely recognized documentary evidence of citizenship, pose a number of problems for many individuals. Many elderly people and those born at outside of hospitals may never have had a birth certificate and may be unable to obtain one, as seen in the case of Ms. Lewis. Young people and many low-income people often do not have a copy of their birth certificates at home. Birth certificates can usually be obtained from vital records offices in the state of the voter's birth, but a fee typically applies. In addition, given America's highly mobile work force, many individuals do not live in the city or state in which they were born, and most vital records offices require individuals to appear in person or to already have another form of government-issued identification to order a birth certificate online or by telephone. Even those who do have a birth certificate may not be able to use it to establish their citizenship. For example, many married women do not have a birth certificate that reflects their current name.

Likewise, both Kansas and Arizona will accept a U.S. Passport, but only about 39% of U.S. citizens nationwide have a passport. Worse, this percentage is much lower among those who lack other forms of proof of citizenship.

### **What Kind of Documentation Do Arizona, Kansas, and Other States with a Proof-of-Citizenship Law Require?**

States that require documentary proof-of-citizenship vary in what kinds of documents they will accept. Unfortunately, although the laws on first read appear to permit a wide variety of documents to be accepted, the reality is that many of the acceptable documents either don't exist or are not obtainable for many individuals. Both Kansas and Arizona, for example, claim to accept a driver's license or identification card issued by another state if the document indicates on its face whether the applicant is a citizen. Since no state—including Kansas and Arizona themselves<sup>2</sup>—issues licenses or identification cards containing such a citizenship indicator, these states effectively permit only their own licenses to be used.

Similar problems limit voters' ability to use the other acceptable documents. For example, certificates of naturalization issued prior to 1975 cannot be used to register by mail in Arizona or Kansas. To register by mail in those states, a naturalized citizen must list her naturalization number on the voter registration application. The naturalization number on certificates

issued prior to 1975, however, cannot be used to verify citizenship. As a result, citizens who naturalized prior to 1975 must present the original naturalization certificate to elections officials in person in order to register. Having to make a trip to a county elections office during business hours—when most people have to be at their jobs—rather than simply mailing in a voter registration application makes the process of registering to vote much more difficult and time-consuming for these individuals and may deter many voters from ever registering.

### **How Will Proof-of-Citizenship Laws Affect Voter Registration?**

In addition to making it more difficult for individual citizens to register to vote, documentary proof-of-citizenship laws make voter registration drives by community groups and other organizations virtually impossible. It is easy enough to see why: States like Kansas and Arizona require potential registrants to produce documents that many people do not possess at all or do not carry with them as they conduct their day-to-day affairs—precisely when registration drives seek to reach them.

Since the passage of the NVRA, community-based voter registration drives have added millions of voters to the nation's voting rolls. Such drives have been particularly important for increasing registration among communities of color. Black and Latino voters are much more likely than white voters to register through privately conducted voter registration drives. Community-based voter registration drives aim to eliminate the most common barriers to registration by going to potential voters and facilitating the registration process—including by explaining the requirements and providing assistance filling out forms.

Many of these voter registration drives take place at public locations, such as churches, senior centers, college campuses, and other high-traffic areas. Even when individuals possess one of the required forms of documentation, aside from driver's licenses they do not routinely keep them on their persons and may not have them when they encounter a voter registration drive at one of these locations. Few people carry a birth certificate, passport, naturalization documents, or tribal documentation. In fact, some people keep their birth certificates or passports in safe deposit boxes, requiring a trip to the bank during regular business hours to access them. Likewise, students who move for school may leave important paperwork at their parents' homes and be unable to register until they retrieve it.

Even if the voter does have an acceptable form of proof of citizenship, she may be unwilling to provide even a copy of her driver's license, birth certificate, or passport to a stranger, given very legitimate concerns that it will be lost or stolen or that identity theft will occur.

### **Isn't Documentary Proof of Citizenship Necessary to Prevent Voter Fraud?**

No. Requiring documentary evidence of citizenship has little impact on the incidence of voter registration fraud, first-ly because such fraud by non-citizens is extremely rare in the first place if it even occurs at all, and secondly because states can—and already do—avail themselves of other mechanisms to ensure that non-citizens do not intentionally or inadvertently register. On the other hand, the harmful impact of documentary proof-of-citizenship laws on the ability of eligible citizens to register to vote is dramatic.

In support of their request to the EAC to alter the federal form, Arizona and Kansas both submitted what they claimed was evidence of voter registration by non-citizens but none of this evidence actually demonstrated that a non-citizen had voted. For example, Kansas submitted evidence that, based on a cross-reference of its voter registration list to its driver's license database, a total of 21 individuals had who held a type of driver's license issued to non-citizens had registered to vote between 2009 and 2010. The state did not investigate whether these individuals had become citizens prior to registering to vote, however, but it later admitted that at least one of them was in fact a naturalized citizen. In addition, only four of the 20 possible non-citizens ever actually voted.

As Kansas's own analysis shows, demanding documentary evidence of citizenship from voters is not necessary to ensure that non-citizens do not register. Rather than placing the burden of demonstrating citizenship on voters, the very cross-referencing of driver and voter data the state conducted in support of its request to change the federal form could be used to enforce its citizenship requirement in the first place. In addition to driver's license data, other interstate and federal databases can be used to verify citizenship without asking voters for documentation they may not have. Additionally, the threat of deportation or criminal prosecution has a powerful deterrent effect on non-citizens who have little to gain by falsely registering to vote.

In sharp contrast, during the same period in which 20 alleged non-citizens registered to vote, Kansas received voter registration applications from approximately 20,000 individuals that were not accompanied by documentary evidence of citizenship. As a result, these individuals' registrations were held in suspense—leaving them ineligible to vote—while the state requested the required evidence. At the time of this writing, over 18,000 voter registrations remain in suspense in Kansas, the vast majority of them almost certainly submitted by eligible citizens who will be unable to vote in November.

### **Didn't the Supreme Court Already Decide This Issue?**

Yes and no. In 2013, the Supreme Court decided the case of *Inter-Tribal Council of Arizona, et al. vs. Arizona*, in which advocacy groups and individuals affected by Arizona's documentary proof-of-citizenship law challenged Arizona's refusal to register voters using the federal form unless it was accompanied by documentary evidence of citizenship. The Court held that Arizona must accept the federal form whether accompanied by documentary evidence of citizenship or not, and then went on to say that the state could ask the EAC to alter the form to require documentary proof of citizenship. The current *Kobach* case argued in the Tenth Circuit on August 25 arose after Arizona, along with Kansas and Georgia, made such a request and the EAC rejected it.

In the meantime, Arizona, Kansas, and the other states that require documentary evidence of citizenship have accepted the federal form and registered voters who use it. Kansas, however, currently allows voters using the federal form to vote only for candidates for federal offices, such as President or Senator, unless the form is accompanied by evidence of citizenship the state deems satisfactory.

### **Conclusion**

State laws requiring voters to submit documentary evidence of citizenship in order to register to vote are already having a dramatic and harmful effect on citizens' ability to participate in the political process in the states that have them. Conversely, they do almost nothing to reduce voter registration fraud, a problem that barely exists in the first place.

## Endnotes

1. There are six states that are not required to accept the form because they are exempt from the NVRA: Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. 42 U.S.C. § 1973gg-2(b).
2. Kansas's and Arizona's motor vehicles departments collect and maintain a record of every licensed driver's citizenship status in their driver databases, and can therefore use their own licenses to determine a voter's citizenship, but there is no citizenship information on the face of the licenses themselves.

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