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The Honorable Patrick Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510-6275
By mail and email

Dear Senator Leahy,

It was an honor to testify before your committee on May 20, 2008, regarding protecting the right to vote of all Americans. It is reassuring that Congress is considering how to fulfill its role under Article I of the Constitution and the enforcement provisions of the Reconstruction Amendments in making sure that all American citizens are able to exercise their rights.

You have sent me two sets of written questions from Committee members. I have attached my answers to this letter.

If you, other members of the Committee, or your staff have any additional questions, please contact me.

Sincerely,

Pamela S. Karlan

Answers to Senator Leahy's questions
(I have put the questions in italics and my answers in roman type)

1. *At the Judiciary Committee hearing on Protecting the Constitutional Right to Vote for all Americans, Ms. Cleta Mitchell cited inflated and inaccurate voting rolls as a justification for restrictive photo identification voting laws. Would the irregularity of voter rolls be prevented by states implementing proof of identity or proof of citizenship requirements as a precondition to voters casting a ballot?*

The quality and accuracy of voter rolls is independent from the question whether individual voters whose names appear on the rolls should be required to provide proof of identity in order to cast a ballot and have that ballot counted.

The problem with inflated voting rolls is that they contain the names of individuals – "phantom voters" – who are no longer eligible to vote (because, for example, they have died, moved out of the jurisdiction, or been disqualified from voting because of a conviction for a crime). To be sure, inflated rolls provide an opportunity for election fraud, since a malefactor could seek to cast ballots in the names of these individuals.

But requiring proof of identity before permitting someone to cast a ballot does nothing to change the data on the rolls themselves. The names remain on the rolls. Moreover, proof-of-identity laws may create a false sense of security about the integrity of the election system. All of the available evidence suggests that election fraud of the ballot box-stuffing sort is committed almost entirely by people with access to the election machinery – partisan poll officials. Requiring individual citizens who physically appear at the polls to present identification will not stop corrupt officials from surreptitiously checking off the names of phantom voters and casting fraudulent ballots on their behalf.

The only way to effectively prevent this kind of fraud is to focus on ways of keeping the voting rolls themselves accurate. This is, as I am sure you are aware, a technically complicated

and complex task, because periodic purges can be misused and many of the techniques for keeping rolls updated are themselves flawed. But if we want to have accurate voting rolls, the way to do this is to focus on the rolls themselves, rather than to be lulled into complacency about the presence of phantom names on the list by the belief that no one can exploit those names.

Moreover, voter identification laws can, as we discussed during the hearing, prevent many legitimate voters from casting their ballots and having those ballots counted. Thus, while voter identification laws will do nothing to create more accurate voter data bases, they will undermine the integrity of elections by excluding many qualified citizens from participating.

2. *In her written testimony, Ms. Mitchell analogized voting to other contexts where photo identification is required. Ms. Mitchell mentioned that individuals cannot enter federal buildings, board a plane or a train, access a key to a hotel room, claim luggage from a bellman, use a credit card, or rent golf clubs without producing photo identification. Is there any reason why voting sufficiently resembles these activities that require photo identification and therefore should require identical treatment? If not, why not*?

Ms. Mitchell's analogies are incorrect as both a matter of fact and a matter of law. I do not golf, so I cannot comment on renting a golf cart. But I have, in the past five years, done <u>every one</u> of the other activities she mentions without providing valid, government issued photographic identification. I enter federal buildings frequently without showing any form of identification at all (including to testify before your committee and to attend oral arguments at the Supreme Court of the United States). I travel by train both in California on Caltrans and on the D.C. Metro as well as on Amtrak, and I have not been asked for identification. I traveled from California to Chicago by airplane in 2003 having forgotten to bring a valid driver's

license.[1] While some hotels in which I have stayed have asked for photo ID, the majority have not. And I have never been asked for identification when claiming luggage from a bellman – the stub I received when I checked the luggage has always sufficed – or when using a credit card.

More fundamentally, none of the activities she cites, with the exception of entering federal buildings, involves the exercise of a core constitutional right. (Entering federal buildings may be necessary to exercise the First Amendment right to petition the government for redress of grievances. *Cf. Tennessee v. Lane*, 541 U.S. 509 (2004) (describing the fundamental right of access to the courts.)) Many of the activities involve entirely private transactions. For example, as a matter of solely constitutional law, there are literally no constraints on the right of a hotel, a merchant, or a golf club. To be sure, federal and state public accommodations laws and consumer protection laws enforce a variety of norms of fair treatment on private businesses. But the Constitution itself does not.

Even as to the transactions Ms. Mitchell identifies that involve the government, the due process calculus is quite different than it is in the context of voting. When the government infringes upon a fundamental constitutional right, it must show that the infringement was necessary to the achievement of a compelling governmental interest. By contrast, when the government interferes with a less fundamental interest, it need show only that the challenged practice is rationally related to fulfilling a legitimate governmental interest. The Supreme Court

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[1] I did, to be accurate, have my expired license with me, but the official Transportation Security Agency website, after stating that air travelers must present photographic identification, goes on to state that "passengers who do not present an acceptable ID may be subject to additional screening," http://www.tsa.gov/travelers/airtravel/acceptable_documents.shtm (last visited July 11, 2008), not that such travelers are categorically excluded from flying.

has repeatedly held that the right to vote is a fundamental right. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Harper v. State Board of Elections*, 383 U.S. 663, 667 (1966); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). To the best of my knowledge, the Court has never held that the right to use public mass transit or to gain access to the secure areas of a public airport or to purchase government services with a credit card is similarly fundamental. Thus, the government can use administrative convenience or cost saving as a justification for imposing burdens in those areas in a way that it cannot when it comes to voting.

Answers to Senator Feinstein's Questions

(I have put the questions in italics and my answers in roman type)

1. What can Congress do to make sure that states with voter ID laws also ensure that all voters, including low-income voters, disabled voters, and elderly voters, have full access to ID cards?

Congress can use its power under the elections clause of Art. I, § 4, to provide that states cannot use any ID requirement in any election in which a candidate for Congress appears on the ballot unless satisfactory ID is provided to all citizens free of charge. Congress could set out more detailed specifications for determining when a state is in fact making such ID readily available. For example, states could be required to provide access to such ID from places other than Departments of Motor Vehicles (for example, through social service offices that have contact with disabled, elderly or low-income individuals.) The experience with the National Voter Registration Act of 1993 as well as earlier federal statutes shows that because states generally hold their elections for most other offices in conjunction with elections for

congressional office, Congress's plenary power over the latter effectively sets the parameters within which nearly all elections are conducted.

2a. In the Rules Committee's recent hearing on voter photo identification, there was not a scintilla of evidence that anyone has been convicted of voter impersonation fraud. Do you know of any case in which someone has been convicted of voter impersonation fraud?

I am unaware of any case where an individual has been convicted of in-person voter impersonation fraud – that is, where the person was convicted of showing up at a polling place, purporting to be a different individual, and casting or attempting to cast a ballot in that other individual's name. I am aware of a number of cases where individuals have been convicted of fraudulently casting absentee ballots in other individuals' names.

2b. In your opinion, what is the impact of voter photo ID laws?

As I described in my initial testimony, the likely impact of voter ID laws will be to disenfranchise a substantial number of eligible citizens and to have little, if any, effect whatsoever on preventing fraud, since the modal methods of fraud involve the manipulation of absentee ballots by election officials or partisan operatives, rather than improper in-person voting by individuals.

2c. What, in your view, is the strongest evidence that voter photo ID laws pose a burden on low-income voters, elderly voters, and/or disabled voters?

The evidence about the potential burden of voter ID laws is collected in a number of places. Spencer Overton's book, Stealing Democracy: The New Politics of Voter Suppression (2006), contains a wide range of useful information about the impact of voter ID laws. A number of the amicus briefs in the *Crawford* litigation describe a variety of statistics that are

helpful in assessing the burden on low-income, elderly, and disabled voters. The briefs of Former State Secretaries of State, the Mexican American Legal Defense And Educational Fund and the AARP and National Senior Citizens Law Center in support of petitioners do a particularly good job of laying out some of these statistics.

How the actual burden will play out, though, is a bit of an unknown at this point because the laws are so new.

3. Please state whether requiring a photo ID when voting in person would prevent people from:

(a) Filing fictitious voter registrations.

A requirement to show ID when voting does nothing to prevent filing fictitious voter registration documents. To be sure, requiring proof of identity when registering might have such an effect, although limiting such proof to particular forms of identification (rather than either permitting a broad array of documentation or permitting signature under penalty of perjury) could preclude many legitimate registrations as well.

(b) Selling their votes.

None whatsoever.

(c) Voting when they are disqualified on account of a felony conviction.

If such individuals were removed from the rolls upon election administrators' being notified of the conviction, it would not matter whether or not the individuals had identification. Similarly, if all individuals who presented themselves to vote were informed when conviction of a felony disqualified them, then whether a particular individual were disqualified would be

completely independent of whether he or she had photo ID.

(d) Voting in two neighboring states (such as Kansas and Missouri) by crossing state lines on election day.

It could well prevent such voting, since most individuals do not possess currently valid photo IDs from two separate jurisdictions.

4. Given that we cannot compare the number of provisional ballots cast to the number of people who were turned away altogether because they lacked a photo ID, is the number of provisional ballots cast a meaningful indicator of the extent to which voter ID laws cause disenfranchisement?

The number of provisional ballots cast will not provide an accurate indicator of the number of individuals who are precluded from voting by voter ID laws.

First, individuals who both know they lack the requisite ID and know or believe that a provisional ballot will not be counted unless they can produce such an ID will likely not even go to the polls to cast a provisional ballot. There is no point in their doing so. Other voters, when informed at the polls of the steps necessary to have their provisional ballot counted, will likely forgo casting one since there is no point to doing so.

Second, there will be individuals, including eligible individuals with satisfactory ID, who will be precluded from casting ballots or provisional ballots if they experience delays at their polling places due to confusion and wrangling over other voters' eligibility to cast ballots.

Third, some pollworkers will likely fail to provide provisional ballots, in violation of federal law, because they do not understand their legal obligations.

Fourth, not every jurisdiction accurately reports the number of provisional ballots cast.

5. Can you distinguish the current debate about voter photo ID laws from the previous debate

about the poll tax? What are the similarities and differences between the legal analysis of the poll tax (prior to the enactment of the 24th Amendment) and the legal analysis of voter photo ID laws?

Beyond the obvious similarities that the prefatory materials in your question highlight, and the fact that in both situations otherwise eligible citizens are precluded from voting because they cannot pay the government a fee (either for a poll-tax receipt or for an ID or, in some jurisdictions, for the underlying documentation [such as a birth certificate] necessary to obtain an ID), there is one additional, and troubling similarity. In both situations, there is an undercurrent suggesting that people without the means to pay poll taxes or possess satisfactory IDs are somehow less qualified to participate in the political process because they are outside the mainstream. For example, there is a disturbing parallel between Robert Bork's description of the Virginia poll tax ultimately struck down in *Harper v. State Board of Elections*, 383 U.S. 663 (1966), as a "very small tax" that he doubted "had much impact on the welfare of the nation one way or the other" and Judge Richard Posner's view that virtually everyone who "maneuver[s] in today's America" – that is, who is a real member of society – has satisfactory ID.

The disturbing feature of the Supreme Court's decision in *Crawford* was the failure of the six Justices who joined the lead opinion or Justice Scalia's concurrence to see the parallels between the poll tax and the ID requirement in a world in which individuals must effectively pay the government to obtain the requisite ID.