

Testimony of John Payton

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**Hearing on
“Protecting the Constitutional Right to Vote for All Americans”**

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My name is John Payton, President and Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. (LDF). As the nation's preeminent civil rights law firm, LDF has served as legal counsel for African Americans in numerous federal voting rights cases since the 1940's, including *Smith v. Allwright*, 321 U.S. 649 (1944), in which the Supreme Court invalidated the notorious white primary. More recently, LDF testified in support of the 2006 Congressional reauthorization of key provisions of the Voting Rights Act of 1965, and is now defending the Section 5 preclearance provision from the latest constitutional attack.

The right to vote without unnecessary and unjustifiable restrictions is both a core feature of our democratic structure and a principle that has long shaped LDF's litigation and advocacy efforts in the fight against barriers to political participation. LDF has been engaged in a decades-long fight that has now touched two centuries but the nation's struggle to ensure the centrality of the vote spans back even farther. In light of this long experience, we must view the Supreme Court's decision in *Crawford v. Marion County Election Board*,¹ and the restrictive state legislation that gave rise to it, in its proper perspective. Restrictive photo identification measures are unwarranted erosions of our democracy that, just as their predecessors, will not withstand the test of time. Like the infamous poll taxes and grandfather clauses before them, they are predicated on falsehoods and can be permitted to exist only if we are willing to embrace a cramped notion of democracy intended to introduce a structural caste into our notion of "We the People."

If we wish to be regarded as the world's leading democracy, the role of government must be to encourage greater political participation. In America in 2008, the vote must be treated as a right equally shared by all and not as a special privilege jealously guarded by a few. The Supreme Court's recent decision to uphold the State of Indiana's mandatory voter identification law in *Crawford v. Marion County Election Board* calls for the nation to reexamine the value that we place on the right to vote and to reflect upon the challenges that we still face in the struggle for equal political opportunity for all Americans.

I am pleased to offer testimony on the important issues facing the Senate Judiciary Committee as it considers ways to ensure that all Americans, regardless of race, age, or economic status, maintain the right to participate equally and fully in our political process.

A Snapshot of Political Participation in the United States

Among mature democracies, the United States has one of the lowest participation rates in the most important function of people in a democracy—the election of government officials.² The United States, and every individual state, should aspire to have the highest

¹ 128 S. Ct. 1610 (2008), decided with the companion case *Indiana Democratic Party, et al. v. Todd Rokita, et al.*

² See, e.g., G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17 (1986) (providing comparative discussion of the low level of voter turnout in the United States); see

participation rates of any democracy by identifying effective measures that would help increase current levels of participation. Instead, we have seen a series of efforts that have the conceded effect of placing burdens on citizens' attempts to vote. No one can reasonably claim that increasing the burdens on the exercise of the right to vote does not have the effect of depressing participation rates among voters in the most central aspect of our democratic process.

In the last year, there has been a dramatic surge in registration rates among African-American voters in a number of states including Alabama, Louisiana, Tennessee and North Carolina, among others.³ This presidential election cycle, more than any other in recent time, has energized many citizens who have long been disinterested in or disengaged from electoral politics. In a number of states, African-American and young voters, in particular, are turning out to the polls in significant numbers, exhibiting a tremendous desire to participate in contests now on the ballot. As some commentators have aptly observed, "Democracy has been the real winner of the process."⁴

The success story that has emerged during this election cycle, however, will prove to be a hollow victory if those newly registered voters are ultimately unable to cast their ballots on Election Day because of the onerous burdens imposed by mandatory voter identification requirements or other discriminatory voting tactics. This is an outcome that our democracy cannot tolerate.

The Limited Scope of the Court's Ruling in *Crawford v. Marion County Election Board*

Three weeks ago, the Supreme Court upheld Indiana's mandatory, government-issued voter identification requirement in the case of *Crawford v. Marion County Election Board*. Indiana's law, described as the strictest in the nation, requires voters to present valid, government-issued photo identification in order to cast a ballot on Election Day.⁵ Despite the failure of the State to produce any evidence of voter impersonation at any time in Indiana's history—the claimed basis for the law—and its awareness of the disfranchising effects of this restrictive requirement on minority, elderly and poor voters,⁶ the Court found that the record that had been developed was insufficient to establish that the law was facially unconstitutional. The Court's ruling, however, leaves open for another day the possibility of future challenges that more concretely demonstrate how identification laws burden the rights of voters. Those states without identification laws, or with less restrictive ones, would be wrong to interpret the Court's ruling as a blanket endorsement of mandatory, government-issued identification requirements.

World Policy Institute, Voter Turnout Comparisons, available at <http://www.worldpolicy.org/globalrights/democracy/turnout.html>.

³ Mike Baker, *More than 3.4 million new voters, AP survey finds*, ASSOC. PRESS (May 6, 2008).

⁴ See Alan Wolfe, *The Race's Real Winner*, WASH. POST. at B1 (May 11, 2008).

⁵ Ind. Code. §§ 3-10-1-7.2, 3-11-8-25.1.

⁶ See Brief of the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Petitioners at 4-10, *Crawford v. Marion County Elec. Bd.*, Nos. 07-21, 07-25 (U.S. Nov. 13, 2007).

Six of the Court's nine Justices acknowledged that Indiana's law stands to burden the rights of voters.⁷ Given existing patterns of racial isolation and concentrated poverty, it is not surprising that mandatory voter identification laws would have a particularly stark impact on persons living in poor and vulnerable communities in our country. These communities can least afford to be excluded from the ballot box.

The Threat to Greater Voter Participation

Interestingly, the lead opinion of the Court, delivered by Justice Stevens, notes that "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."⁸ While we generally agree with this observation, LDF's voting rights advocacy and litigation efforts over the last several decades confirm that removing barriers to the ballot box is a far more effective way to encourage political participation in our democracy. Indeed, in periods immediately following passage of the Voting Rights Act of 1965, and following court decisions that invalidated prior barriers to participation, including literacy tests and poll taxes, we witnessed a surge in registration and participation rates among African-American voters.⁹ We have no doubt that the erection of new barriers would have the perverse effect of depressing and discouraging political participation. Plainly, this is a result that our democracy should not tolerate.

LDF's concerns regarding the burden imposed by these laws are supported by a 2007 study presented to the United States Election Assistance Commission, which found a correlation between identification requirements and reduced voter turnout in the 2004 presidential election. According to the study, prepared by scholars at Rutgers and Ohio State Universities, Latinos were 10 percent less likely to vote, Asian Americans 8.5 percent less likely to vote and African Americans 5.7 percent less likely to vote in states requiring documentation establishing their identity at the polls.¹⁰

⁷ 128 S. Ct. 1610, 1621 (2008) (lead opinion of Stevens, J.) (noting that "a somewhat heavier burden may be placed on a limited number of persons . . . includ[ing] elderly persons born out-of-state who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of the birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed"(internal citations omitted)); *id.* at 1643 (Souter, J., dissenting) (finding the Indiana Voter ID law unconstitutional and noting that "the law imposes an unreasonable and irrelevant burden on voters who are poor and old"); *id.* (opinion of Breyer, J., dissenting) (finding the law unconstitutional "because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of ID").

⁸ *Id.* at 1612 (Stevens, J.).

⁹ See e.g., David C. Colby, *THE VOTING RIGHTS ACT AND BLACK REGISTRATION IN MISSISSIPPI* (1986) (noting that the impact of the Voting Rights Act on black registration in Mississippi was dramatic -- Black registration increased from 28,500 in 1965 to 406,000 in 1984).

¹⁰ See Timothy Vercellotti & David Anderson, *Protecting the Franchise, or Restricting It? The Effects of Voter Identification Requirements on Turnout*, presented at the annual meeting of the American Political Science Association, Marriott, Loews Philadelphia, and the Pennsylvania Convention Center, Philadelphia, PA (Aug 31, 2006), available at http://www.eagleton.rutgers.edu/News-Research/VoterID_Turnout.pdf.

In addition, the 2001 Commission on Federal Election Reform determined that six to ten percent of Americans of voting age do not have any state-issued identification, and that these Americans are disproportionately poor and urban.¹¹ Closer analysis of these numbers confirms that the burdens associated with identification requirements fall more heavily upon African Americans and other racial minorities.¹² A recent national survey sponsored by the Brennan Center for Justice at NYU School of Law found that 25 percent of African-American voting age citizens do not possess current government-issued photo identification, compared to 8 percent of white voting-age citizens.¹³ This conclusion accords with the results of the U.S. Department of Transportation's 2001 National Household Travel Survey, which revealed that only 57 percent of African Americans are drivers, as compared to 73 percent of whites.¹⁴

If one focuses on young minority voters, the disparate burden imposed by photo identification requirements is further amplified. For instance, a June 2005 study from the University of Wisconsin-Milwaukee found that only "26 percent of African Americans and 34 percent of Hispanics in Milwaukee County had a valid license compared to 71 percent of young white adults in the [b]alance of State."¹⁵

Voter identification requirements do not pose a challenge for the vast majority of Americans who do possess some form of government-issued identification. But for people who do not possess the identification—those who are less mobile and not reliant upon such identification in the normal course of their daily lives—obtaining such identification may prove difficult. Applying for a driver's license or passport often requires the presentation of a birth certificate or other documents that may be difficult to obtain and costly for those of little economic means.

¹¹ See John Mark Hansen, Coordinator, Task Force on the Federal Election System, *Report*, at VI-4 in *Task Force Reports to Accompany the Report of the National Commission on Election Reform* (Aug. 2001); National Commission on Election Reform, *To Assure Pride and Confidence – Task Force Reports to Accompany the Report of the National Commission on Election Reform*, Chapter I – Verification of Identity, at 4 (2001), available at http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/complete.pdf.

¹² According to a Census 2000 Special Report, of the almost 8 million people who lived in areas of concentrated poverty (more than 40% poor) in 1999, 24.1 % were non-Hispanic White, 39.9% were African-American, and 28.9% were Hispanic. This, despite the fact that non-Hispanic Whites make up over 75% of the general population, African Americans comprise just over 12%, and Hispanics are also just over 12% of the population. Alemayehu Bishaw, *Census 2000 Special Reports: Areas With Concentrated Poverty: 1999*, U.S. Census Bureau, U.S. Dep't of Commerce (July 2005), available at <http://www.census.gov/prod/2005pubs/censr-16.pdf>.

¹³ BRENNAN CENTER FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION* (Nov. 2006), available at http://brennancenter.org/page/-/download_file_39242.pdf.

¹⁴ See Federal Highway Administration, U.S. Dep't of Transportation, *National Household Travel Survey* (2001).

¹⁵ See John Pawasarat, *The Drivers License Status of the Voting Age Population in Wisconsin*, EMPLOYMENT AND TRAINING INSTITUTE, University of Wisconsin-Milwaukee (June 2005).

That the *Crawford* Court seemed to give short shrift to the reality of American poverty, even on the imperfect record before it, recalls Justice Thurgood Marshall's admonition to his Supreme Court colleagues in his dissent in *United States v. Kras*, 409 U.S. 434 (1973). Faced with the question of whether the imposition of a \$50 filing fee for bankruptcy violated the Constitution, Justice Marshall dissented and, in so doing, sought to animate the reality of poverty which other Justices seemed not to fully appreciate. Justice Marshall observed:

"It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have -- like attempting to provide some comforts for a gravely ill child, as Kras must do.

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon the unfounded assumptions about how people live."¹⁶

In 2005, as the full horror of Hurricane Katrina unfolded before our eyes, and we saw tens of thousands of poor African Americans trapped in New Orleans' Lower Ninth Ward by the flood waters, some wondered why they had not simply gotten into their cars and driven to safety. The stark reality of grinding poverty is that they did not have cars, or ATM cards, and many did not have driver's licenses. All of them, however, were part of "We the People" and all of them should have the right to participate in our democracy. The *Crawford* decision all but ignores this critical point.

The *Crawford* ruling suffers from other deficiencies as well. For many voters, particularly elderly persons born outside of hospitals, there may be no formal record of their birth. This socio-economic reality is one that is difficult for more affluent and mobile persons to appreciate but it is painfully real for the underprivileged and poor.

Given the demonstrable and measurable burdens imposed by voter identification requirements, it is important that relevant states and the federal government begin to contemplate the steps that might be taken to reduce the burdens imposed by laws such as Indiana's.

¹⁶ *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting).

Voter Identification Laws Stand to Impact Electoral Outcomes

There is no shortage of recent examples of electoral contests in our country that have been hotly contested and close in outcome. The most recent presidential primary election in Indiana was one such close contest, with a mere 14,419 (1.1%) votes separating the two candidates of 1,276,311 votes cast.¹⁷ It is hard to imagine that Indiana's law did not impact the election given the number of voters who arrived at polling sites without the statutorily required form of identification and given the number of voters who were likely deterred from voting because of the onerous burdens established by the law.

During Indiana's May 6, 2008 presidential primary election, a team of LDF attorneys, in partnership with other civil rights groups, conducted an election monitoring program, and made some worrisome observations on this front. One of the central objectives of placing LDF attorneys on the ground to monitor the election was to determine the extent to which poor African Americans in Gary and surrounding communities in Lake County encountered difficulty casting ballots as result of Indiana's voter identification law. LDF attorneys learned that several voters were turned away after arriving at polling sites without qualifying identification. While LDF attorneys and volunteers were able to help some voters obtain identification from the local Bureau of Motor Vehicles so that they could cast a ballot prior to the closing of the polls, the actual number of voters who appeared at their polling places but were turned away for failing to present statutorily required identification remains unknown. Indiana does not require its poll workers to track how many voters appear at the polls without qualifying identification which would certainly provide the most accurate measure of the law's impact. Indeed, due to resources, we could only cover a very limited number of polling sites on Election Day, thus it stands to reason that other eligible voters in Indiana without this additional assistance and encouragement were thwarted in their efforts to vote. Moreover, we may never know, to any precise degree, how many people were apprised of the law, realized they did not possess valid government-issued identification, and decided to stay home on Election Day as a result.

Most disturbing, however, was that LDF attorneys were informed by poll workers that voters who did not possess qualifying identification were not always informed of their right to cast a provisional ballot. Instead, some of these voters were simply turned away from the polls. The presumed availability of provisional ballots as a fail-safe option was critical to the Court's determination that Indiana's law does not impose excessive burdens on voters.¹⁸ That presumption was incorrect.

¹⁷ Indiana Primary Election May 6, 2008, Turnout by County and Statewide, *available at* http://www.in.gov/apps/sos/primary/sos_primary08?page=office&countyID=-1&partyID=-1&officeID=36&districtID=-1&districtshortviewID=-1&candidate=

¹⁸ Ind. Stat. § 3-11-8-25.2.

Even if poll workers uniformly offered provisional ballots to voters who lacked valid government-issued identification, the extra step required for the ballots to count—a trip to the county seat within 10 days of the election—is excessively burdensome for poor voters. For example, if a voter without photo identification casts a provisional ballot in Gary, a trip to Crown Point (the county seat) requires traveling over thirty miles round trip. In this sense, the provisional ballot option does not stand as an adequate fail-safe measure that would protect the rights of otherwise eligible voters who are simply unable to satisfy the identification requirement at the outset. Thus, individuals who may have long been active participants in Indiana’s elections stand to be disenfranchised by the law. Indiana’s law has no exemption for those voters who may long have been reliable and consistent participants in Indiana’s political process prior to the adoption of the law.

Protecting the Recent and Fragile Gains in Voter Registration and Participation

Affirmative efforts must be made to ensure that more citizens register and vote in our elections. According to U.S. Census Bureau estimates, only 64 percent of voting age citizens cast ballots in the 2004 presidential election, down from 68 percent during the 1992 election.¹⁹ During that same time period, 72 percent of all voting-age citizens were registered to vote, down from 75 percent in 1992.²⁰ This decline is particularly troubling given recent laws that have been passed by Congress, such as the National Voter Registration Act, which aims to make registration opportunities more widely available. In this context, voter identification requirements that would make it more difficult to register and to vote can only be expected to further hasten this decline.

Although recent numbers yielded during this high-interest election cycle suggest that registration rates may now very well be on the rise, these gains remain fragile given the threats imposed by restrictive barriers such as identification requirements. Given this political reality, states should consider ways to achieve full and equal political participation by making it easier for citizens to register and to cast ballots on Election Day, and by tearing down existing barriers that make political participation difficult.

States have the ability to increase turnout and participation rates. For example, voter education programs can help ensure that citizens are aware of the relevant rules and laws concerning voting in their particular state.²¹ Voter outreach programs can help ensure that citizens address any problems that may have arisen concerning their registration status. More effective publicity can help entrench the importance of civic participation. Improving the quality of poll worker training and recruiting sufficient numbers of poll

¹⁹ *Voting and Registration in the Election of November 2004*, US Census Bureau 1 (March 2006), available at <http://www.census.gov/prod/2006pubs/p20-556.pdf>.

²⁰ *Id.*

²¹ One such program which might serve as a model for any state voter education effort, LDF’s Prepared to Vote Campaign, aims to prevent voter disenfranchisement in communities of color on Election Day by equipping voters with an awareness of requirements and deadlines about potential Election Day voting impediments, such as photo identification requirements, provisional balloting requirements, and new voting technology. More information about the Campaign can be found online at www.naacpldf.org.

workers can help improve the experience of voters at the polls. By removing barriers to the ballot box, we increase the likelihood that newly registered voters will choose to remain engaged and be active participants in our civic life. However, states—without any credible justification—are moving in the opposite direction by considering restrictive laws, such as voter identification requirements, which unnecessarily restrict access and impose barriers and hurdles for citizens now entering the political process.

Conclusion

Democracy thrives when it is practiced not prevented. The challenge we now face is determining how to structure the political process in a way that is more inclusive and provides affirmative opportunities for broad and meaningful participation. To do so effectively, we must remain mindful of those who are marginalized in our society—the poor, the elderly and our nation’s racial and ethnic minorities. Voting is a core constitutional right²² and not a privilege to be conferred as a prize after one navigates senseless hurdles. The Congress and the courts must act accordingly.

²² See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (stating that “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights”); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (hailing voting as “a fundamental political right, because preservative of all rights”).