Prepared Testimony of Professor Pamela S. Karlan
Before the Senate Committee on the Judiciary
"Protecting the Constitutional Right to Vote for All Americans"
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I appreciate the opportunity to testify before you today. Quite frankly, I worry that the United States Supreme Court's recent decision in *Crawford v. Marion County Election Bd.*, [1] may presage a repudiation of a century's worth of progress and commitment to expanding the right to vote. They mark a return to the attitude espoused by the Court towards the end of the nineteenth century, when it declared itself "unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one."[2]

Eventually, the Supreme Court, which had long acknowledged that the right to vote is a "fundamental political right, because preservative of all rights,"[3] finally began to enforce the Constitution's various protections of the right to vote, by applying heightened judicial scrutiny to state statutes and practices that denied individuals the right to register to vote, to cast a ballot, and to have their votes fairly counted. Most notably, the Supreme Court struck down restrictive registration practices that purported to prevent fraud but in fact erected a huge barrier to political participation[4] and struck down poll taxes that conditioned the right to vote on payment of even a modest fee.[5] Congress did even more to make the Constitution's promises a reality, both by proposing a series of constitutional amendments that dramatically expanded the right to vote[6]

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[1] 128 S. Ct. 1610 (2008). I helped to represent the petitioners before the Supreme Court. The views I express in this testimony are my own alone.

[2] Minor v. Happersett, 88 U.S. 162, 178 (1875). Cf. also Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.").

[3] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); see also, 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).

[4] See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down a Tennessee durational residency requirement).

[5] See, e.g., Harper v. State Bd. of Elections, 383 U.S. 663 (1966); " Harman v. Forssenius, 380 U.S. 528 (1965).

[6] E.g., U.S. Const. amend. XIX (giving women the franchise); XXIII (giving residents of the District of Columbia the right to vote in presidential elections); XXIV (forbidding poll taxes in elections for federal office); XXVI (giving 18-21 year-olds the right to

and by enacting a series of statutes, including the Voting Rights Act of 1965[7] – the crown jewel of the Second Reconstruction – under which special federal registrars enrolled almost as many black voters in the South as had been registered in the entire preceding century.[8]

As this Committee knows, in *Crawford* the Court left in place, at least for the time being, an Indiana statute requiring voters to present currently valid, government-issued, photo ID whose address matches the address at which they are registered to vote before being permitted to vote in person. Today I want both to address the *Crawford* decision and to make some broader comments about protecting the constitutional right to vote.

In *Crawford*, the Supreme Court split three ways. Justices Souter, Ginsburg, and Breyer would (rightly, in my view) have struck down the Indiana statute – one of the most restrictive in the Nation – as an unconstitutional burden on the right to vote. They pointed out a fact that the remaining Justices also acknowledged: the Indiana statute means that tens of thousands of Indiana citizens, including already registered voters whose underlying eligibility to vote has *never* been questioned, could not tomorrow appear at a polling place and cast a ballot that will be counted. Although it is difficult for most middle-aged, middle-class, able-bodied suburban Americans to believe this, there are millions of our fellow citizens who do not hold currently valid drivers' licenses or U.S. passports, the two documents most likely to satisfy the Indiana requirement.[9] Even though the dissenters would have used a sliding-scale form of scrutiny, rather than orthodox strict scrutiny to analyze the Indiana statute, they recognized that the state's purported countervailing interest – prevention of fraud – was something of a make-weight, given the utter absence of evidence of in-person voter impersonation and the state's failure to make other efforts to protect the integrity of the election process that would rightly place the burden on the state, rather than on individual voters.

In an especially troubling move, three Justices would have completely shut the door to any challenge to the Indiana statute. In an opinion by Justice Scalia, they asserted that voter ID laws are valid even if they impose an insurmountable burden on *some* voters – for example, elderly voters born at home who lack access to certified birth certificates or voters who lack the

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vote).

[7] 42 U.S.C. §§ 1973 et seq.

[8] Chandler Davidson, *The Voting Rights Act: A Brief History*, in Controversies in Minority Voting: The Voting Rights Act in Perspective 21 (Bernard Grofman & Chandler Davidson eds. 1992).

[9] Indeed, in an episode whose notoriety has only recently been eclipsed by the famous exclusion of a dozen nuns with expired passports by a pollworker who lived in the same convent with them, Representative Julia Carson spent hours trying to force pollworkers to allow her to use her congressional ID card to vote because the workers could not understand that an ID for a particular Congress in fact contains an implicit expiration date.

money to acquire the underlying identity documents Indiana requires before it issues the nominally free voter ID card .[10] Justice Scalia's opinion even went so far as to characterize as "an indulgence – not a constitutional imperative"[11] – the state's paltry efforts to ameliorate the draconian effects of the voter ID law on elderly citizens, citizens living in long-term care facilities, and voters who possess the requisite ID but forgot to bring it to the polls (and whose votes will only be counted if the voter then completes an arduous process of later verifying her identity).

That left three Justices, led by Justice Stevens, who announced the judgment of the Court, in the middle. These Justices refused to entertain a facial challenge to the Indiana statute, but left open the possibility of as-applied challenges, where individual voters who face a "special burden" in obtaining the documents Indiana requires may obtain a remedy. This result continued a series of cases in which the current Court has rejected facial challenges, even to statutes with conceded constitutional problems and even in cases involving fundamental rights.[12]

What troubles me about Justice Stevens's controlling opinion is both its substance and its practical effect. Facts matter in striking the balance between individuals' right to vote and the government's interest in maintaining the integrity of the election system and the controlling opinion is notably short on facts.

First, a voter ID requirement is quite similar to a poll tax.. As an historical matter, poll taxes were often a substitute for voter registration: an individual wishing to vote was required to pay the tax to obtain a receipt and presentation of a receipt at the polls on Election Day was what entitled this individual to vote.[13] Today, Indiana does something very similar: a voter who wishes to vote is required to obtain a government document – normally, documents that either require payment of a fee themselves (e.g., passports or drivers' licenses) or payment of a fee for the necessary underlying documentation (e.g., a certified birth certificate) – and present that document at the polls in order to vote. And the fee to get a birth certificate is the contemporary equivalent of the $1.50 poll tax that *Harper* struck down.

Moreover, charging individuals to vote is not the same thing as charging them for

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[10] In a stunning footnote, Justice Scalia basically dismissed the Court's poll tax and filing fee cases, dismissing them as "early right-to-vote decisions, purporting to rely upon the Equal Protection Clause." 128 S. Ct. at ___ [*10], n.*.

[11] Crawford, 128 S. Ct. at ___ [*48].

[12] See also Washington State Grange v. Washington State Repub. Party, 128 S. Ct. 1184 (2008); Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

[13] That, incidentally, caused a problem when employers paid poll taxes in their workers' names, then rounded up the workers on Election Day, took them to the polls, provided them with a receipt, and pressured the workers to support the employer's preferred candidate.

discretionary government services – such as admission to public parks or tuition at public colleges. The Supreme Court has consistently recognized that there are some important processes that affect fundamental rights over which the government enjoys a monopoly and that here the government cannot condition access on paying a fee.[14] And requiring individuals to show identification to board an aircraft does not implicate a constitutional right to fly, let alone (given rising fares) a constitutional right to fly for free.

But even if the burden on an individual voter is not invariably significant, the state's interest on the other side of the balance is completely conjectural. Justice Stevens acknowledged that "[t]he record contains no evidence of any [in-person, voter-impersonation] fraud actually occurring in Indiana at any time in its history. "[15] Indeed, he acknowledged that there were only "scattered instances of in-person voter fraud" anywhere in the United States.[16] To buttress his point, he referred to an anecdote involving Boss Tweed and the New York City municipal elections of 1868. That the state was not really committed to addressing the threat of future fraud, all we need to know is that the state has done nothing to address the indisputably more common problem of improper absentee voting, and did nothing to modernize its voting rolls until it was sued by the federal government.

Even more troubling than the controlling opinion's reliance on possible fraud as a justification for placing a significant restriction on the right to cast a ballot was the opinion's identification of a state interest "in protecting public confidence in the integrity and legitimacy of representative government."[17] That claim boils down to the following: once a state has whipped up an illusory fear that there may be in-person voter impersonation fraud, the state can use that manufactured fear as a justification to impose voter ID requirements. Here, I can say nothing more powerful than to paraphrase the great Justice Brandeis in his concurrence in *Whitney v. California*:[18]

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the

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[14] See, e.g., M.L.B. v. S.L.J. 519 U.S. 102 (1996) (discussing various cases involving access to the courts).

[15] 128 S. Ct. at ___ [*22].

[16] *Id.* at___ [*24].

[17] *Id.* at ___ [*26-*27].

[18] 274 U.S. 357, 376 (1927).

evil to be prevented is a serious one.

So, too, with voting. Fear of fraud cannot alone justify preventing thousands of Americans from casting votes. Cynical politicians fear impersonators and disenfranchise the elderly, the disabled, the nonaffluent, college students, and retired nuns. And do not doubt that even if such laws are *written* in ostensibly nondiscriminatory ways, there is a real danger that they will be applied, by cynical, ignorant, undertrained, or harried poll workers in discriminatory ways.

Moreover, public confidence in the integrity of the electoral process can be undermined more dangerously by a perception – a perception far more grounded in empirical evidence – that significant numbers of qualified American citizens have been turned away from the polls or prevented from having their ballots counted. There are already more nuns in Indiana that have been disenfranchised in one election than all the proven in-person vote fraud in Indiana's history. What does that say about public confidence?

To be sure, civil rights groups, individual voters, and political organizations will start bringing – and winning, I expect – as-applied challenges to various states' voter ID laws. But here I agree with what Justice Scalia wrote in his concurrence about a critical problem with as-applied challenges:

> This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. . . . Judicial review of [states'] handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante*, whether the burden they impose is too severe.[19]

One of the reasons we pressed the Supreme Court take up a facial challenge to the Indiana voter ID law was precisely because we have an momentous election upcoming later this year. If the 2008 election is anywhere near as close as the 2000 presidential election or a number of recent congressional elections, there will be a logistical and litigation nightmare. The fallout could do far more to reduce confidence in our election process, not to mention confidence in the judiciary, than any phantom specter of in-person voter impersonation.

Consider, for example, Indiana (or one of the several other states that have recently adopted draconian voter ID requirements) were to be the Florida of 2008, with only a few hundred votes separating the two presidential candidates. Hundreds, or perhaps thousands of voters bring suit, either because their ballots were not counted, or because they were turned away from the polls, or because long lines and tangles made it impossible for them to vote, or because they lacked underlying documentation. Is there *any* reasonable prospect that all their claims could be adjudicated in time to meet the so-called safe harbor provision of the Electoral Count

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[19] Crawford, 128 S. Ct. at ___ [*46-*47].

Act of 1887? Is there not a substantial risk that whatever a court decides with respect to particular ballots, much of a closely divided public will assume that judges are deciding the case based on its effects on the outcome of a particular contest?

So what can be done beyond the kind of piecemeal litigation to which the Supreme Court's decision in *Crawford* consigns us? My own view is that Congress should use its undoubted power under the Elections Clause of Article I, § 4 and the enforcement provision of the Fourteenth Amendment[20] to forbid states from enforcing voter qualifications that require citizens to obtain documents from the government until *all* documents necessary to acquire the documents entitling a citizen to vote are provided by the government at no cost to individual citizens and through processes and procedures that make those documents readily accessible. That is what other advanced western democracies do before requiring voter identification.

More broadly, as this Committee considers how to protect the constitutional right of all qualified American citizens to cast a ballot and have it counted for the candidates and ballot propositions of their choice, it should look for ways to reinforce the treatment of the right to vote as an *affirmative* right that the government has an obligation to foster, and not simply as a private act with which the government cannot interfere.

This laissez-faire vision of voting does not work when citizens' ability to exercise a right depends on governmental action. A citizen who is handed an official ballot written in a language she does not understand is effectively denied the right to vote. A citizen who lives in a county that uses antiquated voting machines that frequently break down may effectively be prevented from voting by other responsibilities that make it impossible for him to wait in line for hours to cast a ballot. If punitive offender disenfranchisement statutes bar over one million black men from voting, despite public opinion surveys that show overwhelming support for reenfranchising offenders who have completed their sentences, their disenfranchisement is not just their own business: it deprives the black community as a whole of political power, and can skew election results sharply to the right, creating legislative bodies hostile to civil rights and economic justice for the franchised and disenfranchised alike. If four-hour lines to vote in urban precincts in Ohio deter voters there from casting their ballots, their absence can swing a presidential election, thus

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[20] For discussions of Congress's power to safeguard the right to vote, see, e.g., Cook v. Gralike, 531 U.S. 510, 523-24 (2001) (Art. I, § 4 "encompasses matters like notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns") (internal quotation marks omitted); Foster v. Love, 522 U.S. 67, 72 n.2 (1997) (Congress has "the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.") (internal quotation marks omitted); Katzenbach v. Morgan, 384 U.S. 641 (1966) (discussing the breadth of Congress' power under section 5 of the Fourteenth Amendment); see also City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (reaffirming congressional enforcement power with respect to voting eligibility requirements like literacy tests).

impairing the political interests of voters across the country. Although we stand by ourselves in the voting booth, and cast a secret ballot, no one really votes alone.

So what would it mean to develop an affirmative conception of the right to vote under which the government has an obligation to facilitate citizens' exercise of the franchise? One concrete context involves voter registration. A bedrock principle of the fourteenth amendment with respect to other government-recognized or -created entitlements is that the notice the government must give someone before it deprives her of life, liberty, or property should be of the type that "one desirous of actually informing" the individual "might reasonably adopt." A "mere gesture" is not enough.[21]

What if we applied this view to voting, and treated the right to vote as a kind of liberty or property that was inherent in the very notion of citizenship? When the government cares about whether a citizen fulfills an obligation – from registering for the draft to staying clean on parole to showing up for jury duty – it makes affirmative efforts to ensure that citizens are informed about their obligations and participate. For example, the government mails jury summonses to individuals' homes with prepaid mailers for returning the forms, and follows up with those individuals who do not respond. It provides Selective Service registration forms at every post office. Probation and parole officers often go out into the community to supervise their charges.

By contrast, when it comes to voting, the government relies largely on individual initiative. And some states have created hurdles that make registration difficult and time consuming. For example, one out of six individuals who tried to register to vote in Maricopa County, Arizona (the state's most populous county) had his registration papers rejected for failure to comply with the state's restrictive new voter identification bill.

Treating voting as an affirmative right of citizenship could also help to reframe the way courts, legislatures, and the public think about the relationship between voter participation and vote fraud. Conservatives often claim that there is an inevitable tradeoff between making it easier for citizens to vote and increasing the likelihood of fraud. Though those tradeoffs might exist as a theoretical matter, the available evidence suggests that the number of qualified citizens who are barred from the polls by so-called "voter integrity" measures far exceeds whatever fraud is actually prevented.[22] And there is no reliable evidence whatsoever that voters stay away from the polls because they believe unqualified individuals are voting. (Indeed, there is a far more structural explanation for low turnout: many voters believe that their votes will not matter because they live in jurisdictions without competitive elections.)

Just as important as the evidence is the way the potential tradeoff is discussed. In the

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[21] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

[22] See, e.g., Spencer Overton, Stealing Democracy: The New Politics of Voter Suppression (2006).

criminal justice system, where individuals' freedom is at stake, the public understands that protections such as the requirement that a defendant be proven guilty beyond a reasonable doubt before he is convicted may occasionally result in acquitting guilty people. But our system is willing to bear that risk in order to protect the innocent – hence the phrase "better a hundred guilty men go free than that one innocent person be convicted." By recognizing that voting, like physical freedom, is a fundamental constitutional right, perhaps we can move towards a similar perspective with respect to the franchise. My colleague Professor Spencer Overton has estimated that photo identification requirements might "deter over 6700 legitimate votes for every single fraudulent vote prevented."[23] Surely we would be unwilling, as a nation, to say "better that 6700 innocent people go to jail" – even for one night – "than that one guilty man go free." Moreover, the many people who are prevented from voting are far likelier to affect election outcomes than the few, if any, ineligible people who impersonate other votes at the polls.

Beyond registration, recognizing that voting is an affirmative right, and that the government must therefore provide individuals with the means to exercise their right could also serve as a springboard for attacking, both politically and through litigation, states' failure to construct efficient, fair, and reliable voting systems. The reforms instituted in the wake of the 2000 election often fail to deliver on this promise. The "Help America Vote Act," almost as euphemistic a moniker as the USA PATRIOT Act, for example, requires states to provide provisional ballots to individuals who appear at a polling place only to find that their names are somehow missing from the rolls, but it says nothing about whether states must ultimately count those ballots, and many elections officials have refused to count such ballots if the voter was entirely qualified to vote but showed up at the wrong polling station. Similarly, the electronic voting machines many jurisdictions adopted in the wake of the butterfly ballot/hanging chad disasters can be difficult for elderly and disabled voters to use, and may lack audit trails that allow the public to be confident that votes are being accurately counted.

The politics we have is itself a function of who votes. That was the point of Dr. Martin Luther King Jr.'s great "Give Us the Ballot" speech in 1957. If America's electorate is more representative of all its people, the people themselves will push for legislation that more fully serves their needs. But if the electorate is skewed against poor or disabled or elderly or immigrant or less affluent citizens, then the government's policies will be skewed as well. And this will do more to undermine public confidence in the legitimacy of our government than any remembrance of Boss Tweed and the 1868 New York mayoral election could ever do.

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[23] Spencer Overton, Voter Identification, 105 Mich. L. Rev. 631, 635 (2007).