

THE BROOKINGS INSTITUTION

THE POLITICS AND LAW OF VOTER ID:

PREVIEWING THE SUPREME COURT ARGUMENTS IN

*CRAWFORD V. MARION COUNTY ELECTION BOARD*

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## P R O C E E D I N G S

MR. MANN: Ladies and gentlemen, we're going to begin on time. I'm Tom Mann, a Senior Fellow here at Brookings, and I'm very pleased to welcome you to this symposium on the Politics and Law of Voter ID: Previewing the Supreme Court Arguments in *Crawford v. Marion County Election Board*.

As you know, the Supreme Court will hear oral arguments on Wednesday on this case. Some analysts have called this the most controversial political case before the court since *Bush v. Gore*; others -- the most important election law case since that time, although we've had a Supreme Court campaign finance case or two that have been important, as well as some on redistricting. Nonetheless, there is no question but that this case has attracted extraordinary interest.

The record that's been assembled by the petitioners and the defendants is really quite extraordinary. The Brennan Center has pulled together all of the relevant documents on their website, and I find I could spend a lot of time there just going through all of the aspects of the case. As Mike was saying, there's a fairly thin lower court record on this, and much of the material that's been assembled has been a way of trying to brief out the many questions that weren't fully vetted in the District Court trial and in the Court of Appeals. I suppose there are many things to be said by way of introduction about this case, some are a little depressing.

For example, one can't help but be struck by the threadbare

evidence on most of the key issues that are before the Court, either on the extent to which fraud by impersonation is a problem in practice, in addition to in theory, also on the question of whether requirements, stiff requirements for government issued photo identification effectively suppresses votes.

Little systematic evidence on both, and I think analysts and commentators from whichever perspective they come from have reached that conclusion.

Another thing to be said about this whole area is the dominance of partisan considerations. At virtually every level it looks as if you could have a one variable model predicting one's position on this issue, whether in a legislative body, a judicial body, or in the court of public opinion, namely, are you a Democrat or a Republican. The legislatures that passed the new ID requirements are strikingly legislatures controled by Republicans. Democratic legislatures did not feel occasion to pass such laws. And we get, often times, pretty close to perfect party line voting when it happens. If you look at the judges who have been ruling on these, you do well in forecasting their votes if you know the partisanship of the president who selected them.

If you look at the groups advocating for and against them, their sort of past positions on a set of issues relating to voting rights and voting participation will give you a head start on where they come out.

And the fact that so many people predict, even lament the likelihood of a 5/4 decision by the Supreme Court, one very similar to *Bush v.*

Gore in 2000, is another indicator of that.

I think it's also fair to say that the salience and prominence of this case has less to do with the fact that if we were to set aside our partisan and ideological views and sit around a table and say what are the really high priority election administration issues before the country, that instituting new voter identification requirements and fighting the institution of those requirements would not be at the absolute top of the list. I think the salience and priority is more an indicator of the partisan polarization and parody that exists in this country. There's an extraordinary amount of distrust between the parties, leading to efforts to keep the others from gaining some tactical advantage in the elections through the legislative or judicial process. But it goes well beyond that; it has fostered a lot of conspiracies.

Now, occasionally paranoids have enemies, and sometimes conspiracies exist in reality, but again, I think if we looked honestly at say the controversies surrounding electronic voting machines and the call for voter verified paper audit trails, we again would see that relative to areas in which error can occur in the whole election administration process, perhaps that isn't the one at the very top, and yet it has been at the top of the political agenda.

So it is an unusual case in that in all of those respects, and somewhat discouraging, but it has a life now of its own and takes on real importance, and because of that, the AEI Brookings Election Reform Project, which I co-direct with my colleague, Norman Ornstein, and with John Fortier

of AEI, and with the active, energetic work and participation of Tim Ryan, and Matt Wile, and Molly Reynolds, thought that this was an important subject to take on and to bring before this audience. And we teamed up with Stuart Taylor's Brookings Judicial Issues Forum in bringing it before you. We have three terrific panelists who are going to try their best to shed some light on this case.

On my right is Mike Carvin, a partner at Jones Day. Mike was here at a conference we had on redistricting some years ago, he's well known in Washington and in the country, he's been an active litigator before the U.S. Supreme Court, Federal Appeals Courts.

I seem to remember a Supreme Court in the state of Florida, somewhere along November of 2000, in which Mike played an important role. He also, while not being a counsel to any of the defendants and respondents, has certainly counseled with a range of people on this case and is fully up to speed on it.

Then on my far left, Wendy Weiser, who is Deputy Director of Democracy Program at the Brennan Center for Justice, at NYU Law School. She has been active in recent years in leading the Brennan Center work on voting rights and elections. The Brennan Center has been active in this case from the beginning. They have done original research on charges of election fraud, and as I said earlier, have assembled on their website the most comprehensive collection of materials on the case. And finally on my left is Stuart Taylor, Jr., who is a columnist with *National Journal* and *Newsweek*, a

long time legal affairs reporter, also a Nonresident Senior Fellow here at Brookings, and most recently the co-author of a book called *Until Proven Innocent*, which is a very important and forceful book on the Duke Lacrosse rape case.

Our format will be as follows; Stuart is going to get us off to a running start by providing an overview of the case itself. Then we're going to turn to Wendy for the petitioner's perspective on this case, roughly ten to 15 minutes. I'll then ask Mike to give us the perspective of the respondents.

Then Stuart is going to have a chance to respond to our first two panelists. We will have a little conversation up here amongst ourselves, and then turn to you for questions, wrapping it all up by 3:30. So we have a plan, and that plan begins with Stuart.

MR. TAYLOR: Thanks very much, Tom. Well, an overview of the case; of course, since time immemorial, Republicans have been accusing Democrats of trying to steal elections through fraud, and Democrats have been accusing Republicans of using anti-fraud laws as a pretext to discourage turn-out by poor people, racial minorities, old people and others who are seen as skewing Democratic, and this case is the first time lately that, and the first time clearly that the Supreme Court will have a shot at that issue.

As Tom mentioned, the breakdown of the lower courts has been depressingly along party lines, to the point that I did a count of the 11 judges -- 12 judges in the Seventh Circuit U.S. Court of Appeals, including

one, the 12th being the District judge; the division on this case was eight Republicans voting to uphold the Indiana law, photo ID law, three Democrats, and one Republican voting the other way. That one guy must not have been vetted very carefully. And the Michigan Supreme Court, in a somewhat similar case, divided 5/2 along party lines, five Republicans, two Democrats. And there is a discouraging expectation that we may see something similar in the Supreme Court. I have a plan for avoiding that, but let me get to the facts first.

Since the 2000 election litigation, amid general concern about the need to strengthen the integrity of elections, 20 states, and as Tom mentioned, I think 20 or so states, all of them along party lines, have passed one type of law: laws tightening up voter identification requirements. Traditionally, all you had to do was show up, be registered, sign your name, theoretically the election folks could compare your signature with the one on file. Often they don't get around to doing that, and these laws passed because Republicans mostly thought they were necessary to prevent impersonation fraud at the polls.

There are lots of kinds of election fraud. Absentee ballot fraud, which is easier to do, has been a lot more common than impersonation fraud at the polls. Impersonation fraud would be, I go and I know that somebody is dead or moved out of the state or hasn't gotten out of bed yet, and I present myself as Tom Mann and vote in his name, that's impersonation fraud at the polls. And it's pretty clear that if it happens much, a photo ID requirement

would be a pretty good safeguard against it.

The Indiana law, which was passed in 2005, is the toughest apparently of all these laws. Not all of them require a photo identification; only a few, Indiana does. And there are exceptions in all these laws, but Indiana's are not quite as generous to people who don't have photo IDs as others. It should be mentioned that although studies show, I think the argument in the case shows that there are many millions of voters nationwide, maybe ten percent of the electorate lack photo IDs. In Indiana, perhaps in part because of the Bureau of Motor Vehicles will give you for free a photo ID for the asking, 99 percent of voters have photo IDs. But, of course, that one percent who don't is still 45,000; it's a lot of people. And if a large percent of the one percent is discouraged for voting, that's a real consequence.

The rhetoric has been very -- oh, I forgot to mention exceptions. Suppose somebody is poor, doesn't have a photo ID, this is one of the exceptions, shows up at the polls, sorry, I don't have a photo ID, but I am registered, what happens?

They can cast a provisional ballot, and under the Indiana law, they have ten days to go to a government office. It can be sort of a pain to go to a government office, and either show a photo ID, they get one in the meantime perhaps, or which -- or sign an affidavit that they cannot afford the documentation needed to get a photo ID.

The Bureau of Motor Vehicles will give you the photo ID for



free, but you might have to present a birth certificate or some other form of identification, it costs about \$20 to get a birth certificate, so there's a theoretical problem. And a lot of the argument in the case is, well, are significant numbers of people deterred from voting by this requirement. And there is no clear record answering that question.

The weakness of the Democratic case here, one of the weaknesses is, they were unable to find a single voter to sign up as a plaintiff who would actually say, I was going to vote in the last election, but because of this photo ID requirement, I was prevented from doing so. And so the Republicans in this case can harp on the fact that the Democrats haven't found any damage at all.

The Democrats, on the other hand, can harp on the fact that in the history of Indiana, nobody has ever been prosecuted for impersonation fraud at the polls. Therefore, the Democrats can argue the theoretical fraud problem that's being prevented here, this very specific kind of impersonation fraud at the polls, it's the only kind of fraud of photo ID, a crime it will guard against, it doesn't exist, or at least is rare, and it's fairly clear that it is rare.

Even some Republican advocates are defending the law; like Brad Smith, former Federal Election Commissioner, admits that it's an exceedingly rare phenomenon, and even though they go on to say the law should be upheld because the impact on voters is so slight. Judge Richard Posner, who wrote the Seventh Circuit opinion and is a pretty famous Reagan-appointed judge, conceded that there must be at least some

Democratic voters, more Democratic than the Republican, more poor than rich, more minority than white, who are discouraged from voting by this law, even though the studies are inconclusive, or at least the studies that were in the record at the time it was litigated were inconclusive.

But Judge Posner said, of course, there's going to be an impact, of course, it's going to hurt the Democratic party, of course, there going -- people skew low on the income scale are going to be the ones who are discouraged from voting, but held Judge Posner and the majority of the Seventh Circuit, these effects are pretty small and the need for protection against voter fraud is significant.

And by the way, these laws, although the activists skew along party lines, in polls, when people are asked in polls, do you think there ought to be a photo ID requirement to vote, they say yes by overwhelming margins across party lines, Democrats, Republicans, blacks, Hispanics, whites. There's a real disconnect here between the voters perceptions and the experts perceptions, which may just reflect that the voters haven't had the opportunity to think through exactly what the impact is. But Judge Posner in the Seventh Circuit upheld the law on the ground that, well, it may not be perfect, it may impose more restraints than necessary, but the courts aren't supposed to be running the country. If every law had to be perfect, the courts would be rewriting election codes very often, and therefore, this is okay.

Now it's up to the Supreme Court, and we will see what they

do, and we have two great advocates here to tell them what they should do.

MR. MANN: Thank you, Stuart. Wendy.

MS. WEISER: Thank you very much. I've been asked to present the petitioner's position. I'd like to start by focusing not on the case -- on the voter ID law, but actually on the broader significance of the case.

On its basic level, the case is about the constitutionality of Indiana's photo ID law, the most restrictive such law in the country, but on a broader level, it's about much more. To decide the case, the court will have to clarify the legal standards for determining when it's okay and when it's not okay for a state to place direct obstacles between eligible voters and the ballot box. And in doing so, it's going to set the constitutional ground rules for deciding all cases that challenge election rules that have the effect of suppressing votes. And so -- and that could be sweeping challenges to sweeping purges of voter rules, it could be restrictions on voter registration, it could be provisional ballot counting rules, anything that might have the effect of suppressing the vote.

And so this will have a significant impact on the law, and it may also have a significant impact on the upcoming elections and in elections for years to come, as to who actually gets to vote and who will be blocked from voting.

And so I'm going to focus a lot of my remarks on this legal standard, since that is really, you know, one of the most important things at

stake here, and it hasn't gotten as much play as the policy arguments on both sides. And the evidence on both sides is the voter ID and voter fraud, and that standard is naturally hotly contested in this case.

The broad contours of that standard are actually quite clear and agreed upon, that any burden on the fundamental right to vote must be sufficiently justified by a count of state interest, and this is known as the verdict balancing test, and it requires courts to weigh, on the one hand, the burden that the law places on voters, and on the other hand, against the state interest served by the law. And the great burden on voters, the more compelling the justification the state has to show, and the more closely the law has to be tailored to meeting that justification.

And if the burden is severe, the court will apply what is called strict scrutiny, which is a level of argue that is very hard to pass. And that much the parties agree on, and that's where the agreement breaks down.

But to decide this case, a range of issues relating to the application of the legal framework that are going to be decided, and that will effect all future cases. First, the parties disagree on how you determine when a burden on a right to vote is severe, and so the strict scrutiny standard will apply.

They also disagree on what test has to apply if the -- if the law burdens voters, but does not impose a severe burden. And finally, they disagree on what the state needs to show in order to justify placing a restriction or a burden on the right to vote. So how the court resolves each

of those issues will determine the outcome of the case and many other cases going forward. So I'm going to go through each of these aspects of the standard quickly from petitioner's perspective. The petitioners first argue that the burden that the law imposes on Indiana voters is severe. And I wanted to just respond to a few statements that were just made, first, that the petitioners point of range of evidence, some of the evidence is that huge numbers of Indiana voters actually do not have the kinds of ID that are required by this law.

And the 99 percent figure that was cited in the -- is actually not a proven figure of the percent of Indiana voters that have -- that is derived from the District Court opinion, and it was based on evidence that the court itself found unreliable, it was just saying under, you know, even under this unreliable study, the most that it was shown was that one percent don't have it.

So it is not agreed upon that 99 percent of Indiana voters don't have this ID. And in fact, a more recent study by the University of Washington, since the law has been in effect, shows that 13 percent of registered voters and 16 percent of eligible voters in Indiana don't have the kind of ID that the law requires. Now, this is -- this has been presented to the court in briefs, it was not presented in the lower court record, but the impact of the law, you know, is still likely to be much bigger than 99 percent. That said, one percent of voters is still tens of thousands of voters in Indiana, so that would -- this law would conceivably effect tens of thousands of voters,

and even under that factual scenario, the petitioners claim that is -- that the burden is severe.

I also wanted to respond to the point that the petitioners haven't found one individual that would be unable to vote because of the law. In the first instance, the plaintiff actually brought this case before the law was in effect, and so they actually couldn't find individuals who are actually disenfranchised by the law because the law had not yet been in place, and they brought it as a facial challenge claiming that, you know, claiming that as a legal matter, this law can't be constitutional and it will have a -- based on the broad impact that the law has.

But since the case has been litigated, there have been a lot more individuals who have been identified who have actually been disenfranchised because of the law. And I wanted to point out in particular the brief by the respondent, the Marion County Board of Elections, who actually cited to 32 individuals whose votes were not counted in a recent low salience, low turnout municipal election because they didn't have -- didn't show the ID that's required by the law. So there are at least those voters, the legal voters of Indiana, also presented individuals who were affected by the law. So as a factual matter, that is not the case.

But what's really more important is, you know, the standard for determining when a burden is severe. So according to the petitioners, the burden -- any burden that directly restricts the ability of eligible citizens to vote, and to such an extent that it deters the citizens from voting is severe.

This is because the right to vote is a fundamental right, and voters should not be blocked from voting. There is no question in this case, and as Judge Posner found, there will be voters who will be blocked from voting in this case. And there's also no question that even though this law might not make it impossible for all of these voters without ID to vote, it certainly makes it much harder, and so it burdens their right.

And the standard, again, is the burden on voting, not whether or not the law makes it impossible. But the -- and that's the petitioner's position. And so we have, you know, at least, even under the most restrictive interpretation of the evidence, at least 43,000 Indiana citizens who don't have these kinds of voter IDs, who would have to either go through -- who would either be blocked for voting or would have to face significant hurdles in order to vote.

On the other side of the equation, the law supporters are urging the courts to make a standard -- to make that standard for determining when a burden is so stringent that no voter ID law and almost no other restriction on voting would be able to pass it. And so the Court of Appeals is saying that the burden is severe only if petitioners can prove some undetermined threshold in number of voters actually disenfranchised by the law.

But the Indiana is going even farther and saying that a -- and the petitioners claim that they've actually shown that a huge number of voters would be disenfranchised. But Indiana is going even farther and claiming

that any generally applicable voting law -- voter ID law can never be found to have a severe burden, because it regulates procedures as opposed to voting qualifications. And that's wrong, it's a legal matter, but it could also have an enormous impact on other voting rights cases since very few of the restrictions on the vote of suppressive measures we've seen are directed at voter qualifications. They are typically -- it could lead to -- this could insulate a lot of these restrictions from any judicial scrutiny.

The second area in which the -- where there's a contest over the standard is, what's the test when the burden is not severe. Let's say the plaintiff's have shown, as they have, that this burden is -- that -- burden is the right to vote, but it's -- but that the burden is not severe.

The plaintiffs argue, correctly in my view, that under the verdict test, that even if the law is not severe, the court may not apply strict scrutiny, but the state still must justify the laws burdens and show that the burdens are outweighed by the laws benefits, and that the law is reasonably tailored to serve those state interests. And the Supreme Court's language directly supports that standard.

But the state is actually taking a much more restrictive view and a big departure from election -- existing election law and saying that the courts should apply rationale basis review, which is a form of review that is essentially toothless if the burden is not severe. And that would really -- if this standard is adopted, then that would make -- that would make the right to vote -- that would water down the right to vote significantly. And the most



important area where there's a real dispute over what's the legal standard in this case, and the area that's likely to have the biggest impact on future cases, is what is it that the state needs to show in order to justify the restrictions that it poses on voters.

The petitioners claim that the state's justifications are bogus, that there hasn't been not one incident of in person vote fraud in Indiana, and in fact, the Brennan Center has gone through all of the allegations of voter fraud that were presented in all of the briefs before the court, Tom, and there were about 250 such citations, and has studied them in documents that I'd be happy to make available, and found that there's not one proven incident of in person voter fraud, the kind of fraud that's targeted by these laws in all of the briefs brought before the court, and found that there's only a handful, nine in particular, of even allegations of conduct that could have been prevented by a photo ID requirement like Indiana, and again, these are unproven allegations out of more than 400 million votes that were cast since 2000. And so the petitioners are arguing that the state actually must show that there is a real problem, that the burden, that the law is designed to prevent, that this problem is documented, that there is real evidence, it's not based on speculation or allegation, and that the problem exists.

The state, on the other hand, is arguing that the, again, to water down the standards so that it doesn't need to prove that any problem exists, in fact, it's arguing that it's entitled to pass laws to prevent even a hypothetical problem that has never existed.

And even more perniciously, it argues that the fear of in person voter fraud, even if it's irrational, would justify laws restricting voting. And taken to this logical extreme, this could justify a whole host of restrictions on voting in addition to voter ID law and could enable states to justify them with -- and avoid judicial review simply by claiming that it's designed to prevent voter fraud or to address the fear of voter fraud.

So really what we are looking at is a range of ways in which the standard of review in this case could be watered down to make it really, really easy to pass measures that suppress the right to vote and that avoids constitutional review and judicial review in the future.

And so we urge the courts to stick to the standard and to require that the state actually justify any restriction on voting with real evidence and real facts and not based on just speculation.

MR. MANN: Wendy, thank you very much. Mike, to you.

MR. CARVIN: Thank you. Yeah, I think the state's case is actually -- I know there's been a lot of inflammatory rhetoric surrounding this issue, but the state is making a very straight forward, very simple argument, which is, every sensible person agrees that you should be able to verify that the voter is who he or she says he is.

You can't have people coming up and voting who haven't properly registered and aren't quality to vote. So the only question is, what are the means by which you enforce that assurance against voter impersonation fraud, and what did Indiana choose?

It chose the most reliable, the most common, and the most prevalent form of proving who you are, a photo ID, possessed by, call it 99, 97, 98 percent of the elector is going to have this ID.

It is used every time you get on a Greyhound bus, every time you cash a check, every time you try and do fundamental rights, like right to travel, access to courts, access to marriage, the new federal law requires that employers look at photo IDs to ensure that these people have them. So they've chosen the most prevalent form of ID that's possible, and it's the most reliable because you can look at the person's name and face and see if it marries up with the person standing in front of you.

So what you have here is a completely legitimate form of voter regulation, anti-fraud measure, using a means that everybody has to concede is at least a reasonable means of trying to sort out voter qualification.

Well, that's a classic description of the kind of measures that courts frequently say states in a democracy have discretion in terms of running their elections. There's nothing nefarious or disenfranchising about it.

And if you don't believe me, just think about all the kinds of regulations and inconveniences that states routinely erect that no one has ever thought are disenfranchising or bad, solely to assure against voter fraud, or really even just for the administrative convenience of the board.

Why do we have to register 90 to 120 days in advance, which

is what the courts upheld? Because the states want to make sure that the people that show up at the precincts, at the polling places are the proper people. We want some means of assuring that people are not showing up on the same day and registering that day because that creates the distinct possibility of fraud. Why do we require you to come to the polling place, to the precinct? Why can't we vote over the internet or through mail?

Any system designed, and of course, this is the prevalent system throughout the country, that doesn't allow same day registration or voting from any place you choose is necessarily going to inconvenience a substantial segment of the population.

But no one has ever thought the states had to engage in the kind of justification for those routine administrative devices that a state would have to use to justify racial discrimination, which is what the Brennan Center and the petitioners are urging upon the court.

And finally, let's think about the most obvious inconvenience, the disenfranchises, to use the Brennan Center's nomenclature, hundreds of thousands of people. We have elections on Tuesdays, why, why not on Saturdays, when people aren't working, why not two days? Why can people close their election places at 7:00 instead of 9:00 or 10:00, when working people would actually have a better opportunity to get to the polls? There's not even an anti-fraud rationale there, it's pure convenience, and that's because in a democracy, and in the text of the Constitution called the Elections Clause, state legislatures are expressly empowered to regulate the

time, place, and manner of elections, subject to whatever exemptions Congress decides to make.

So the framers were not naive about this. They knew that they were giving the states enormous amount of power to regulate elections, and the check was not a bunch of federal judges reading their values into the Constitution, but if Congress thought the states were being too strict, Congress could fix the problem, as they did in motor voter, where they expanded the registration rules and prevented all these purging requirements that were discussed, which of course, has exacerbated the problem, because now you have these hugely inflated voter rules with all these dead people, and people have moved out of the state, are still on the rolls, which, of course, enhances the opportunity for fraud in states like Indiana, which has an enormous voter inflation problem.

And finally, the court has recognized, look, if you force the states to under-regulate through judicial micro-management, the kind that petitioners are doing here, that's going to severely affect the right to vote, right, because every time you minimize your anti-fraud efforts and allow an illegitimate voter to slip through the cracks, you have disenfranchised a legitimate voter.

Any illegitimate voter who cast a Bush vote disenfranchised the legitimate voter who cast a Gore vote, you cancel it out. So voting delusion is on both sides of the calculus, and if you under regulate and allow too much fraud to go forward, you are going to disenfranchise as many

people as if you over regulate.

And finally, of course, there's the question of, we can focus on these documented instances of voter fraud, which I'll get to in a minute, but there's a huge perception in the United States, which is why you have 80 percent support, bipartisan support for voter ID laws out there.

There's a huge perception that there is a voter integrity problem. And I know from *Bush v. Gore* and redistricting and all of these things, that cynicism about the legitimacy of elections affects the candidate's ability to govern and it affects equally turnout. If people think the game is rigged, that's going to create a disincentive for them to participate in the process. And it's a little ironic, which the Brennan Center, which uses the appearance of corruption, peoples' perception of the problems of soft money at the Republican National Committee, is sufficient to justify a real restriction on people spending money to get their message out to voters, forgets about the appearance of corruption when it comes to the rationales for these kinds of things.

There's no documented instances where any Senator or Congressman said under oath, yeah, Fed Ex gave me \$100,000 so I can change my vote in transportation. Nobody asked for that kind of specific documented instances of actual corruption before they upheld what my views are, stark restrictions on the right to carry out political campaigns, of the kind that the Brennan Center is insisting on here.

So what is exactly the argument on the other side? I mean I

think we've heard it pretty well today, which is, it's an urban myth. The notion that people are showing up at polling places and voting twice or voting in a dead person's name is akin to thinking that Elvis is still alive.

All our sophisticated folks who have done our regression analysis know that these stories you've heard out of Cook County and out of Brooklyn are simply untrue. Nobody ever cheats at elections, so you can simply rely on the good faith of Mayor Richard Daly and political machines across the country not to ever engage in this sort of thing. And we know that because Indiana hasn't come up with a documented instance in Indiana.

Well, there's three pretty obvious points; one is, no one ever looks at this stuff unless you're in a very rare recount situation where there's 1,000 or a couple of hundred votes separating candidates.

And every time in recent history when you have looked at these kinds of things, whether it be Missouri, or the run off in Washington, and you actually lift that rock, you find out that there are all kinds of dead people voting and all kinds of voter tallies and individual precincts which exceed the number of registered voters.

Now, do we have those people in handcuffs? No. Why? Because who in the world is going to expect some 67 year old poll worker to engage in the -- has never had the means to figure out whether or not somebody's signature matches the signature on the registration form, but if they're at all suspicious, expects them to call the FBI and arrest this person. It just never becomes an issue because people are not worried about it. Or

worse yet, in these urban areas, of course, the poll workers are not exactly disinterested civil servants either, and they are blinking at the fraud that may appear in front of them. So I can't think of a less persuasive argument, that since we don't have a documented instance of voter fraud, we can engage in anti-fraud measures.

It's like saying you've got to allow a certain amount of 911's or hijackings to occur before you can start checking IDs at places at the airport. We don't wait for the disaster to happen before we allow states to regulate against what is clearly a potential and serious problem of voter fraud.

Moreover, of course, if you ever did adopt this other worldly standard of making the state take the corruption, catch the perpetrators before they can engage in prophylactic measures, then every law I described at the opening would be, of course, unconstitutional.

Because nobody has ever justified a 90 day registration in advance, or showing up at your polling places by documenting that if they didn't have people showing up at the polling places, there would be more people voting fraudulently through the mail. So what this is is a relatively straight forward and transparent effort to use so called evidentiary standards to subject what is otherwise an extraordinarily reasonable measure to prevent if from happening, and to deputize the courts to judicially micromanage every election measure in the United States.

Now, let's think about on the other hand of the calculus; what is the real burden on the voters? We've already heard Stuart describe about



how they couldn't find one voter in the state of Indiana who thought this was too much of a burden.

Their own evidence, not our evidence, not Indiana's evidence, the Democrat's evidence showed that 99 percent of the people had valid voter ID. The other evidence they put on was a telephone survey by AARP which came to 97 percent.

So in all events, this is a reasonable measure to -- that most people possess that doesn't inconvenience them in the slightest. Now, there is this notion, which is a real urban myth that this somehow has a desperate racial impact, that this will severely disenfranchise African Americans and Latinos because they purportedly possess fewer forms of photo ID than non-minorities.

Well, again, the record in this case affirmatively disproves that. They didn't even allege a desperate racial impact because their expert, strenuous efforts to find it proved completely unavailing. Georgia, which has routinely tried it out as the Justice Department's worst avocation of its responsibility under the Voting Rights Act because they allowed this photo ID law, no evidence of any desperate racial impact in Georgia on blacks. The percentage of blacks that possess the requisite ID roughly reflected their percentage in the voting age population.

So if we want to talk about real evidence as opposed to urban myth, that, to me, would be the greatest canard that can be put to sleep today.

Now, finally, there is the common sense notion I think that poor people are obviously going to be -- have a more difficult time getting ID than some other people, and I think there's some common sense appeal to that.

In a capitalist society, there's no regulation that doesn't disproportionately affect people who don't have the means that's required to do it. Again, going to a polling place is going to disproportionately affect them because they can't pay the bus or the cab or the whatever it is to get there as easily as some other people.

But again, that's never been thought to invalidate regulations, and they're, of course, not a protected group in terms of what you -- in terms of traditional 14th amendment analysis. And then the other way to look at this, of course, is if there's any group that -- if we start going through this game of identifying each group that's sort of disproportionately inconvenienced by every voting law and striking it down on that basis, then people who are employed are going to have a hell of a challenge to these laws that require you to vote between 9:00 and 7:00 at night.

Those are the people who have to try and get out from under their employment responsibilities. The people who can do it are either very rich and self-employed or nobody is really watching them, or conversely, very poor people who are unemployed. The one thing that poverty does allow you to do is have the full day to go and vote and wait in a long line.

And the more we pile on to registration and polling places, this

kind of extra requirement for doing some of the alternatives that have been advocated, like allowing them to fill out affidavits at the polling place and that kind of thing, the more we're going to ensure that the voting process itself at the precinct is slower, longer lines, particularly in hotly contested elections. And if you want to think about disenfranchising effects, think about the effects of the long lines in 2004 on peoples' willingness to cast the vote. We don't want to turn these people into having a little mini-trial every time everybody shows up to vote. We want a simple, convenient way of verifying information so that we can process the lines.

Everything Indiana has done has been sensitive to that need. They have, as Stuart pointed out earlier, told everybody, if you want an ID and you're not a driver, go to the DMV and you'll get it for free, you don't have to pay the normal \$19 that drivers do.

If you're indigent, fill out an affidavit saying you can't afford the \$10 to \$15 for a birth certificate, and we'll allow you to vote. You can do that one trip before the election or a trip after the election.

The actual effectiveness law was pointed out; 32 people in all of Marion County, out of 160 odd thousand that voted on that day, didn't have their ID. By my calculator, that means 0.02 percent of the electorate was even potentially effected, and not one of them, of course, suggested that they couldn't go and do -- all of whom filled out provisional ballots and all of whom could have verified their vote by showing up within ten days or so to fill it out. So I don't think a system which has been endorsed by President

Carter, by Congressman Hamilton from Indiana -- the Carter Baker Commission was quite clear that photo ID was a very effective anti-fraud measure, it's endorsed on a bipartisan basis, and I think it would be unfortunate for the Constitution and unfortunate for the court's perception if it decided to wait until this partisan battle and elect itself, the voting commission for all 50 states.

MR. MANN: Thank you, Mike. I'm going to put you down as neutral on this issue. I was going to say my understanding of Carter Baker Commission is, their preference actually was for a public authority to assume responsibility to provide all voters with IDs so as not to suffer the disparity impact that occurs when you try to phase this in over time, because there inevitably is such a disparity impact, but we'll come back to that; Stuart.

MR. TAYLOR: Well, I don't know about the rest of you, but I listened to Wendy and I thought she made a very compelling case, then I listened to Mike, and he made a very compelling case, so it's easy, except that they can't both win.

And I often find that in a matter that divides people ideologically like that, it's a pretty good bet that the Supreme Court is going to divide 5/4 along conservative lines when it gets up there, the usual four on each side, and Justice Kennedy doing whatever he decides to do as the tie breaker. I may be wrong, and I could, in particular, imagine perhaps Justice Breyer breaking ranks and possibly being persuaded Mike's argument, but I wouldn't bet on it.

And so I think in the first vote, it's likely to be 5/4 with Justice Kennedy. I think that would be extraordinarily unfortunate. It would just be an echo of the 2000 election litigation, when you had this -- the five conservatives just happen to come down for Bush and the four liberals just happen to come down for Gore, and the country is thinking, these people are voting their -- along party lines, they're not judges, they're politicians.

Now, in fact, Rick Kaison who runs the election law blog and is a very astute professor who's on the Democratic side of this case, but he's written and said, yes, they tend to break along party lines, even the judges, but that's not because they have a rooting interest for the Republicans or the Democrats, it's a matter of world view.                   Something about the way the Republican appointed judges tend to look at the world and the Democrat appointed judges leads them to these opposite views. And, in particular, I think solidarity is part of it, too. More and more in the bitterly polarized world we live in, particularly even judges, if it's headed towards the four conservatives over here and the three liberals -- four liberals over there, and you're one of them, do you break ranks with your colleagues? We don't see it happen very often.

As I said, I think such a division would be very unfortunate, and I think there's two ways they could avoid it and I hope would avoid it if it's on its way down, would be -- I mean it comes down to two headlines.

One headline might be, "justices split along party lines again," that's not a very fortunate headline I think in terms of the court's image. The

other would be, "justices split the difference in voter ID case." I like that one better. After they split the difference two ways, the more Republican-friendly way would be to say, this is a facial attack, as Wendy said, and in lawyer jargon, that means the Democrats are asking that the law be struck down for all purposes, never used again, that's the end of it. And if they do that, that's the end of all similar proposals. And I think a more reasonable, and this might appeal to some Democrats, too, would be to say either we're not going to strike this law down on its face, but if any voters can show in any future case that they are personally disadvantaged by this and have been prevented from voting, then they can bring what's called an as applied challenge; in other words, we're not saying this law is valid for all purposes, we're just saying it's not invalid for all purposes, they could do that.

The second and more Democratic friendly way they could do it would be to say, let's -- we don't have a good record in this case, the Democrats have all kinds of studies, the Republicans have all kinds of studies, they mostly haven't been peer reviewed, they weren't in the record, there wasn't cross examination of the expert witnesses in the court below, we don't have a good enough record to pass judgment on an issue this important, send it back to the lower courts, run it through again, and then we'll think about it two years from now or one year from now. I would -- I'm not betting on one of those outcomes, but I guess I'm hoping for one of those outcomes.

MR. MANN: Let me -- I'm going to turn to you all in just a

minute. But as you all are thinking about Stuart's possibilities of getting other than a 5/4 decision, I wanted to raise with Mike a question and then ask Wendy to think if there really is a, if you will, a legal or a constitutional solution to it. The question I want to pose to you is, it seems to me it requires suspending disbelief to take your public interest description of the Indiana legislature and comparable ones and suddenly being motivated at this particular time with 20 sister states to pass new voter ID requirements.

I keep asking, A, why did they do it now, why didn't they all do it together, why were they all controlled by Republican majorities, that's A; B, why didn't they deal with what the research does indicate, which is that the greatest source of voter fraud is to be found elsewhere?

Absentee balloting, most importantly, gee, do you stay away from that, because the evidence suggests maybe Republicans take greater advantage of absentee ballots than Democrats? I don't know.

Ballot box stuffing is still -- seem to be a greater source. And that, in general, election officials, as opposed to individual voters are more the source of voter fraud, and therefore, the notion that individuals impersonating a legitimate voter is "potentially a serious problem, doesn't pass the test of common sense", even though you were relying on common sense. And Wendy is, yeah, they clearly didn't go after the major sources of fraud. If they're legitimately concerned with fraud, apart from possible partisan impact, they would have done something else. But is there anything in the Constitution that prevents them from having that priority and doing so?

MR. CARVIN: Well, let's start with your first question as to why now. Well, I mean we had a pretty controversial election in 2000. Why did Congress pass -- in 2002? Because we've been having this argument, as Stuart indicated, for a long time, public attention has turned on how elections work and how people actually show up to vote, given the Florida situation, and legislatures at all levels, national and federal, have looked at that.

The Democrats have traditionally sought to ease all barriers to voting, which, of course, also eases all barriers to fraud. The Republicans largely as an outgrowth I think of the fact that Democrats disproportionately cheat more because they disproportionately control the urban sorts of machines that engage in that, have always been jealous -- suspicious of that and have always sought to try and bring more electoral integrity, accompanied at every step by the traditional Democratic argument, you're trying to disenfranchise. So it's not a new debate, and there's nothing suspicious about the fact that people started taking action on this problem post-2000, just like they did a whole host of other electoral reforms. In terms of absentee ballots, it's a completely different issue with a completely different problem. Indiana legislature did address it.

The most common abuse of absentee ballots in terms of fraud is the undue influence on the elderly and the poor, where you're trying to get people who are supposedly disinterested from sticking an absentee ballot in front of them and getting them to vote that way. So they did put restrictions



on the kinds of people who could interact with absentee ballot voters or who could vouch for the fact that this was an absentee ballot.

In terms of the other stuff, I'm wide open to listening to what electoral reforms there are out there that people haven't paid attention to in terms of corrupt officials and ballot stuffing.

As far as I know, and this may just be a gap in my knowledge, there's always been obvious laws and procedures designed to stop that. Whether they work or not depends on whether or not your entire electoral system is corrupt. If it is, like in Cook County or something, I don't suppose it works. But I don't know that there's any gap in the law, at least none that I've heard about, where -- that needs to be addressed. Therefore, I don't think you can attach any negative inference for them not filling that gap, because I don't know that there's any gap to fill.

My general point is, of course, if you're dealing with an identifiable, obvious problem, you don't need to deal with every conceivable problem that falls under the same -- at the same time. But as far as I can tell, Indiana proceeded in a very good government, comprehensive way to implement sensible reform.

The fact that the Democrats, as Democrats do, uniformly opposed it doesn't suggest that the level of judicial review should change just because Democrats remain unanimous on an issue anymore than you should review every budget that comes out of Congress on a party line vote and view that with suspicion.

There are reasons people are Republicans and Democrats. Anything touching on the electoral or political process is done on a party line vote, so that's certainly no indicia of either partisan motivation or suspicion.

MR. MANN: Wendy.

MS. WEISER: I want to first just address the question that wasn't addressed to me about the motivations of legislature that's adopting the law and whether they're public spirited. Because all election procedures are passed by legislators, and many of whom will have self-interested motives in passing them, that's one really important reason why we have a judicial review, to effect the right to vote, because the right to vote belongs to voters, not to political parties, not to legislatures, and so that's really what the big here is, is whether or not the court will serve as a check on self-interested legislators, you know, where it is self-interested.

And if the standard is so differential as to be toothless, then we'll lose any ability to check any mischief like that. And now I guess the flip side of the argument that they didn't address, the kinds of fraud that do exist is your question to me as to whether there's anything that requires them to address the kinds of fraud that are more prevalent, like absentee ballot fraud, like ballot stuffing, or vote buying.

No, there's nothing that constitutionally requires them to address any particular problem. The fact that they didn't does -- did go after those kinds of fraud is constitutionally significant to the extent that it -- it undermines the strength of their interest in preventing fraud. It raises

suspicion as to whether really that was the motive underlying the decision, and that's an argument the court has found persuasive and definitive in other cases like *Republican Party of Minnesota v. White*. So that is legally significant that they didn't go after it.

And just as a factual matter, I just wanted to throw in that, you know, it doesn't pass the -- test that voter fraud doesn't exist. That's true when you're talking about all these other kinds of fraud. And this law is not targeting those kinds of fraud.

That actually -- that kind of election misconduct, it targets only in person voter fraud at the polls, and that is something that does not happen, and in fact, would be irrational to do. Your risk of getting caught is high, and the ability to make any difference in the election by an individual showing up and trying to vote in the name of another registered voter is really minimal.

MR. MANN: All right. Do we have microphones back there that we're going to be using? Okay. We'd entertain your questions. We'll first hear from Bob Pastor up front. Identify yourselves, please, and proceed.

MR. PASTOR: Thank you, thank you very much, Tom. Bob Pastor, Director of the Center for Democracy and Election Management, American University, and also was Staff Director and member of the Carter Baker Commission. So I wanted to start by correcting three facts and then ask a question for our three lawyers.

We've just completed a survey, which we hope to have out by

the end of the week, of views in three states, Indiana, Maryland, and Mississippi, that looked at the question of, who has photo IDs, that look at public opinion, as well, and frankly, I was surprised by the results.

The results suggested that roughly one percent of the registered voters in the three states did not have photo IDs. Now, beyond that, of course, there's another problem of registration, but that's with regard to the registered voters.

It also showed that 97 percent of registered voters had proof of citizenship. And it also showed a lack of confidence in the system, and more than two-thirds of the registered voters, the respondents, believe the U.S. electoral system would be more trusted if voters were required to have photo IDs. With regard to trying to find the voters who could not vote because they didn't have photo IDs, the Marion County referred to actually 34 people who did vote, but they voted provisionally, and only two of those is counted, and that has to do with the application of provisional balloting, not just for IDs, but there's a broader problem with the application there.

The third point in the Carter Baker Commission, we concluded very much where Stuart Taylor did. We heard both -- and said you're both right, that an election should not only require identification of voters, but it should also make sure that all voters are accessible, and that this doesn't disenfranchise anyone, and therefore, the recommendation called for not just photo IDs, but for an affirmative role by the state, as Tom mentioned, to go out and to make sure those additional people that didn't have photo IDs

would get them for free.

And it also called for a five year transition, neither of which is true in the case of Indiana, and that gets to my question. Is this really a constitutional issue, or is it not just a question of application and implementation?

There are ways that you could spell out a voter ID process that would ensure that more people would be voting than are currently voting, and I think the Carter Baker Commission tried to do that. Therefore, it would not be a constitutional issue at stake, it would be a question of the application of the law and the -- of law.

MR. CARVIN: If Indiana had adopted the exact particulars of the Carter Baker Commission, all the same groups would be suing; all the same groups would be making precisely the same argument, because they are arguing that it's tough to get the ID.

Indiana, I think, essentially -- the commission recommended, which was to make it available for free at the most common place where people get ID. Now, that's -- and they've engaged in a public education campaign.

So the -- between their law and what the commission recommended is very slight. Plus, people generally don't have five year transitions for any kind of law, particularly since -- if they had done that, then, of course, the Brennan Center would be coming in and arguing, see, there's not really a problem because we can wait for five years.

This is what happens when you start getting lawyers involved and nit picking, state legislative laws. Now, I can't -- I can defend what Indiana did a lot better than I could if they refused to keep their polls open from 7:00 to 7:30. But if you want every federal judge in the United States going through every election code with his editing pencil and say, gee, you know, the precinct should be over there and they should be open until 7:30 and this would be more inclusive, then you have engaged in a massive shift of power from our democratically elected representatives to a unelected judiciary without constitutional warrant for that kind of second guessing.

If there's a problem that rises to a level that most people think is a problem, as opposed to the overwhelming support for the photo ID laws that we've seen, Congress can correct that problem.

MR. MANN: Stuart.

MR. TAYLOR: I think the question is, it is an administration problem or is it a constitutional issue is a very good one. And the way I parse that is, the law in Indiana is not perfect. I think it could be made more voter friendly without loss of fraud, and yet if we demand perfection, the already vastly increased amount of election litigation, there are figures showing a huge increase in the last decade or so, *Bush v. Gore* inspired perhaps, there's going to be more and more and more of it. So at some level I think the courts need to say enough already, this law may not be perfect, we need to draw a line that basically requires more than a speculative showing that voters are being suppressed than you have here. However, I

think there's one thing that might be even worse than too much election litigation, and that would be a 5/4 conservative over liberal slam dunk here that generates headlines that say, justices vote along party lines again.

MR. MANN: Wendy.

MS. WEISER: In response to the constitutional versus administrative question, the decision in the case need not be a decision that determines whether voter ID can be used for all time. I mean right now, and our dispute with the Carter Baker Commission, for example, has not been whether, in theory, there could be a reality in which voter IDs might be able to be possible, but looking at the reality that we do live in and who does and does not have those kinds of IDs right now, this would create a constitutional burden that would deprive peoples' right to vote.

So this is -- the answer is, if the administration could be changed, then maybe sometime in the future the constitutional answer would be different. But that hasn't happened yet, and it would put the cart before the horse to start with the burden before ensuring that the -- that it could actually be mitigated properly.

MR. MANN: Now for data from the non-lawyer on the panel on the argument about implementation administration. A fascinating finding that Steve Ansulibahar found in his sort of mega survey of 35,000 respondents is that almost half of the survey respondents reported being asked for a photo ID at their voting precincts, even though the law requires a fraction of that, all of which is to say what happens out there in the world of voting does not

have a perfect correlation with the law itself.

SPEAKER: Let me correct one thing. I think there is a fair amount of space between Carter Baker. I agree with you that lawyers should probably stay out of it, but -- that's not going to happen. But --

MR. MANN: You've got to earn a living.

SPEAKER: -- there is a difference between Carter Baker and what you -- and the key difference is that Carter Baker, and Baker took the lead on this, said that the registration -- should go out to the people and give them -- and Indiana says they should come in, a traditional passive role, whereas more affirmative role on the part of --

MR. MANN: Yeah; listen, how about the more ambitious proposal for you, Mike, to get behind, which Rick Aston and others have proposed, which is, why doesn't the government here, as in many, if not most democracies around the world take the responsibility for enrolling all eligible citizens on the registration list, and at the same time, providing them with a photo ID, which would solve all of the problems, presumably those concerned with fraud and those concerned with access.

MR. CARVIN: One of the ironies of this entire debate is, this is the one time the liberals on the court are not looking to foreign analogs for what the American Constitution should do, because the vast majority, I think the entire majority of western democracies do require some kind of photo identification at the poll.

MR. MANN: But they also provide it, but that's another story.



Norm.

MR. ORNSTEIN: Norm Ornstein from the American Enterprise Institute. Just two factual questions for you, Mike. You indicated that there had not been prosecutions of individual voter fraud of this sort because we don't have close elections, but when we do have close elections, we find all kinds of examples. So the first question is, in those cases, Washington State, for example, or others, after where, as you indicated, they found numerous instances of people voting for dead people and others, were there any prosecutions? The second question is, what is Indiana's ID requirement for absentee voting?

MR. CARVIN: Yeah; in terms of the Washington situation, as I understand the way that very contentious litigation wound up was that there was, I may be wrong on the particulars, say 1,500 very suspicious ballots, but the court said -- just threw up its hands and said it couldn't get to the bottom of. And so trying to recreate history three months in the past and identify who had committed a crime, et cetera, was too much of a job to go out and initiate a criminal prosecution.

In preparing for this, I should tell you that I did just go through my files. The year I happened to graduate from law school, it was 1982, and in that year, Elizabeth Holston a very liberal Democratic congresswoman from Brooklyn, who then became the Brooklyn DA, indicted 15 people who had been engaging in a 14 year pattern of raw voter impersonation fraud, where people were voting ten times in the same election by sending in voter

registration names, the same year the Northern District of Illinois Federal Grand Jury issued a number of indictments in Cook County. That was a product of about an hour of me digging through my files to come up with these two examples of where it happened. But you need to devote an enormous amount of posture or resources, under no circumstances, probably have an insider to bring any of this about.

So it can happen, but it's not -- doesn't arise in the context where you have a recount, you realize your problem, and then you try two months later to grab the wrong doers.

In terms of the absentee ballot requirement, as I understand it, it's purely a signature match, but they do have people who can actually look at the signatures without the press of time that you would have in a precinct, and look at it, and of course, sending the photo along with your absentee ballot wouldn't do any good in terms of fraud because you have -- you don't have a person to compare the photo to, so it's sort of an apples and oranges situation.

MR. MANN: Yes, right here.

SPEAKER: (off mike) were deducted from the Republican candidate. There was no showing of any false ID --

MR. MANN: So there were improper voters.

SPEAKER: (off mike)

MR. MANN: No, I'm sorry, the second category. Maybe I --

SPEAKER: (off mike) that some people -- even though they

are ineligible, perhaps they vote in the wrong precinct, perhaps they don't have a status -- but it doesn't hurt.

MR. MANN: It's illegal.

SPEAKER: (off mike) over the years, I have done one or two recounts around the country, and I personally have never encountered a question of voters -- but be that as it may -- now, depending whether I was trying to overturn or protect, I was --

MR. CARVIN: Yeah, no, and actually help clarify the two points that I probably wasn't particularly clear on. The first one is, that recount situation revealed the existence of a problem. But for all the reasons you've talked about, it's not going to give you the suspects who created the problem. In other words, you can --

SPEAKER: (off mike)

MR. CARVIN: Okay, all right.

SPEAKER: (off mike)

MR. CARVIN: All right. Well --

MS. WEISER: May I just --

MR. CARVIN: -- maybe if I can just finish this point and then you can disagree. The point would be, if John Jones voted under John Smith's name, that could well result in a tally of more votes than you would otherwise expect, but you wouldn't know where John Jones, the fraud impersonator, was two months later when you start sorting through these ballots.

We shouldn't be at all surprised, was what I was trying to say, that it doesn't result in a conviction, nor for people voting in the wrong precincts, which, of course, is a way of voting more than once in the same election. You could vote under your correct name in your precinct, vote under a phony name in some other precinct, and if you found that person, they've voted improperly, nobody, I take it, sought to prosecute those people in those circumstances even though they had cast an invalid vote, which is technically illegal, which again, it illustrates my second point, which is, it's not as if after the fact you're going to try and bring a lot of onerous prosecutions unless you've identified some kind of conspiratorial effort.

And then the third point is, you're right, the courts properly do assume that all ballot tallies reflect legitimate voters. There's an extraordinarily strong presumption on that, even though we know that there may be some wiggle room in that, which is why states should be all the more vigilant in ensuring that that presumption is a valid one, which is why they need to take prophylactic steps before you get into a highly charged recount or other kind of electoral litigation situation, where you have ensured that people come to the system and behave honestly and are being perceived as having an honest election system in front of you.

MR. MANN: Wendy.

SPEAKER: (off mike)

MR. MANN: No, just wait. We want to really move it along.

We only have a few minutes.

MS. WEISER: I wanted to make -- Washington State -- a range of others that were -- have all been thoroughly -- in a recent -- fraud that's available on our website. There were no instances of in person voter fraud -- ineligible person that's voting -- that they, in fact, had --

In addition, I also wanted to -- and despite the really -- searches for in person voter fraud over the past four or five years, and especially in light of a new initiative that was with the Department of Justice, they -- despite this very extensive search around the country, as well, they've not identified any in person voter fraud regardless of whether or not --

MR. MANN: Stuart.

MR. TAYLOR: I'm just saying one way of looking at this might be to say, well, it's very simple, let's figure out whether the number of people who would vote fraudulently in the absence of this law is larger or smaller than the number of valid voters who are deterred from voting if we have this law.

And you could look at it that way, and if I -- my hunch would be that the number of valid voters deterred is probably higher. It's only a hunch. But I suppose the point is, I'm not sure that's quite the end of the matter, even if a factual inquiry bore out my hunch.

There's a study, it's a Republican study, I'm not claiming I trust it, but I throw it out for what it's worth, that says the number of voters in Indiana actually increased after this law, and the theory is, well, why -- there could be a lot of reasons it increased that have nothing to do with the law, the

theory is, voters had more confidence. The appearance that the process was being policed gave more voters confidence to participate in the election. Only about 50 percent of people participate in the election; there can be all sorts of reasons not to. One reason might be, well, it's all -- there's so much fraud going on, I don't want to do it. And I suppose the bottom line that leads to is, it's -- if the court does what I'm suggesting and sends it back to figure out which effect is -- whether the discouraging valid votes effect or the fraudulent vote effect is higher is going to be a very complicated inquiry, and they should take several years to work it out.

MR. MANN: Sir, just a note of caution on that finding about the voters increased; as any social scientist will tell you, let's hope that's relative to what was happening in the country as a whole, relative to what the competitive races in the state were compared to other states, it means nothing to say that they --

MR. TAYLOR: Now, there you go again with permanencies.

MR. MANN: I know. Mike.

MR. McDONALD: Michael McDonald at George Mason University, Brookings, as well, you know what we need to do, we really need to get the Washington election administrators in here and discuss their system, because it's actually fascinating, it's robust, they do most of it by mail, they digitize the signatures that are coming in on the envelopes, they do a duplicate match, and they're looking for double voters, they're looking at the signatures, the digitized signatures against the digitized signatures on the

registration, and I think they're even doing more than that. This is just what I know from the whole process. So it's really fascinating what they do. And a lot of the technology here may be able to address some of the issues that are being raised here I think actually on both sides.

But since I have Michael on the stand and I love to, you know, press it to him a little bit, I think I've caught you in a logical flaw here. Because at one point --

MR. CARVIN: Well, that's --

MR. McDONALD: Yeah, I think -- at one point you said, we can't have the affidavits at the polling place because it's going to create long lines and log jams, and then you said, oh, it was only 32 people that were affected by it. So if it was only 32 people, I think we can handle 32 people.

I do wonder why, you know, we're spending millions and millions of dollars on this, and all these studies and everything else, why can't we just have the affidavits at the polling place for people who don't have the IDs? We can do the signature match. It just makes a lot of sense to me, and honestly I think that the turnout effects are rather low, because the people with the IDs are going to be low propensity voters, so whatever turnout effects are minuscule, and we can just split the difference, we can have the voter ID. Maybe I'm just in la la land thinking that we can all live together, kumbaya, but what about that as a solution here?

MR. CARVIN: Yeah, I'll give you the kumbaya response to my allegedly logical flaw. What I would -- just to be clear, it's not just the affidavit

at the polling place. One of the principal arguments on the other side has been, look, there's all kinds of other ID, you've got utility bills, you've got these other kinds of things that some of the states have worked on, and isn't that really better in the long run than having a photo ID, and the truth is that, if anything, some evidence indicates that has a larger impact on minorities than just the photo ID, but that was the point I was making, in addition to the affidavit.

Look, I don't know if anybody has looked at the experience we've had with the latest electoral reform to make honest elections, the touch screen voting machines. The people who are at these polling places, no disrespect intended, are not the most highly motivated, sophisticated people in the world. They work, you know, sometimes four days a year, and they don't get paid a whole lot. And so the notion that they could do signature matches on site, go through alternative forms of identification, take an affidavit, explain all of this to a voter who, if he's going through the process, is going to be relatively agitated in the first place, without delaying a vote for an appreciable amount of time I think is highly unlikely.

Now, we only -- now, they didn't have that system in Marion County, so it's not really a laboratory test for my thesis, but when you have challenges at polling places, one of whom is a Republican, one of whom is a Democratic, you can turn every little discrepancy into World War III, and that definitely can slow up the pace of voting. It's just a cautionary note. I'm not - that's something we need to be concerned about.



SPEAKER: North Carolina has a separate register --

MR. CARVIN: You can add to the bureaucracy and the expense.

SPEAKER: Just like you do with --

MR. MANN: Lenny.

MR. SHAMBAUGH: Lenny Shambaugh, I'm a participant in the Election Reform Project. This is a question mostly for Stuart to bring us back to Wednesday and the oral argument. It's my understanding that this case is a facial challenge case, the Justice Department has called it that. And therefore, is it true that the plaintiffs were not under any obligation to produce any disadvantage to voters because that's an as applied issue?

Second, in order for the state to pass this legislation, was there any obligation under any of the court standards to show that there was impersonation fraud before passing legislation? And third, how common is it for the Supreme Court to populate a record with post-district court trial facts in order to get to where they really want to be? Do they do this as a general rule or do they usually adhere to what the District Court did or didn't see?

MR. TAYLOR: Three good questions, and I may lose track of them. But, no, there was -- because it's a facial challenge, there was no obligation on the plaintiff's part, there was no technical legal obligation to identify any individual who had been disenfranchised. So the relevance of their failure to do that, in Judge Posner's opinion at least, is, well, there can't be, you know, if they haven't even come forward with one, that suggests that

it's not that easy to find people who have been disenfranchised, for whatever that's worth, do know there wasn't any obligation on the part of the state, if I understood the second part of your question correctly, to come forward and show that there was any voter fraud.

In fact, there's lots and lots of Supreme Court doctrine that says states are, as Mike said, allowed to act prophylactically. You can act to try and make sure a problem doesn't happen; you don't have to prove that it's happened.

So part three, I think the question is, you know, is it usual for the Supreme Court to grab a couple of bunch of studies out of the air and make speculative judgments on facts such as how much fraud is there, how much disenfranchise is there, and I think the answer is, no, it isn't very usual, they do it sometimes, but it's not a very good way of doing business, which is one way -- one reason I think -- the most logical outcome of this case would be some kind of, you know, however they -- there are lots of ways of writing an opinion, some kind of kick it down the road outcome that says either let individual voters come in and can say, I was disenfranchised in the last election and I want an injunction that shows people like me won't be disenfranchised in the next election, or send it back to have the lower court develop a full factual record so that we can reconsider it from the ground up.

MR. MANN: Am I correct in interpreting that front page story in the New York Times this morning that -- two such individuals who would have a basis for making an as applied challenge?

MR. TAYLOR: You're ahead of me; I haven't read that story yet.

MR. MANN: Wendy, you've seen the story?

MS. WEISER: Yes; if I recall correctly, I have a copy of the story right here, that these are two individuals who actually were disenfranchised under the law, and therefore, would have an as applied challenge, though I don't know that this is a sustainable solution or one that would be available to all the people or to many of the people who would be disenfranchised by the -- to bring individuals by challenges.

MR. MANN: Stuart, the tactical terms, do the clerks clip stories like that and get them to their justices, and does that have any bearing on how they treat a case like this?

MR. TAYLOR: Well, they probably do. I doubt it would have any bearing, because I think what the justice would say is, well, sure, somewhere somebody is being prevented from voting. Posner said that and upheld the law anyway. The question is whether the numbers are large enough really to effect many elections, or any election, because although there's a lot of rhetoric about the precious individual right to vote, it's not important to people, to more than half of the people that bother to exercise it most of the time.

And if there was a lottery, if you got something that says there's \$1,000 lottery winnings waiting for you if you just go down to this government office within ten days, I think you wouldn't have trouble getting

people to do it.

So the real problem is, are enough voters being discouraged? It doesn't take much to discourage a voter sometimes from being voting to have a big impact. And I think on that issue, what the justices would think would, you know, should be thinking is, who knows, we don't have a record in front of us that answers that question.

Maybe in some future case, whether it's remand and continue the facial challenge, or whether it's, you know, we uphold it on its face, let's see an as applied challenge, maybe in some future case we can get a record that gives us a better basis for ruling. What's clear in this case is, the record isn't very strong as a basis for ruling, and any answer they give, they're taking some risk that the factual assumptions underlying their answer are going to turn out to be wrong.

MR. MANN: Yeah; Wendy.

MS. WEISER: Just a minor correction for audience members that -- it is not an agreed upon standard in the case that the case will turn on whether more voters will be disenfranchised or more fraud will be prevented, that is one of the -- that is a position that Judge Posner took, that is not a position that the petitioners in the case take, though they do take the position that, in fact, that is the case, that it will deter many more voters than it will prevent voter fraud.

So the -- and it is the petitioner's position that would actually be a substantial break from existing voting rights laws. The right to vote is a

personal right, and that it doesn't turn on whether or not in the past an individual has exercised that right to vote. They should be able to exercise it in, you know, the next election, should they so choose.

MR. TAYLOR: Well, let me just make sure I got that. Does that mean that conceding for the sake of argument that the number of voters disenfranchised by this law is smaller than the numbers who would successfully commit fraud without this law, even if you assume that, the law should be struck down?

MS. WEISER: Well, if that was the case, well, even assuming that the law would have to be justified, that does -- still would impose a severe burden on the right of those individual voters, and then it would have to be justified. If it so turns out that there are huge number of voters --

MR. TAYLOR: Well, the justification, I assume, would be, we're getting a more accurate tally because we're getting rid of more fraud than we're adding to disenfranchise.

MS. WEISER: Well, they would have to show both of that. But there's a real serious documented problem that this law is addressing, which there isn't now, but taking the case of argument that there is, then that would certainly weigh in favor of upholding the law, but also that this is the least restrictive way of furthering that interest, that there isn't a way of achieving that goal that doesn't burden those individuals ability to vote, and so --

MR. MANN: Okay. John, this could -- the last question.

MR. FORTIER: John Fortier the AEI Brookings Election

Reform Project. A question for Wendy; a question about what else gets swept up under your test. Mike raised this issue of a number of other things that might be seen as restrictive, in particular, registration. With most states, over 40 states not having same day registration and having some sort of registration, do you foresee a test, could you lay out a test that would apply just to voter ID, or would you see anything the court did in this regard, striking down voter ID, as automatically being able to be used against many voter registration laws and pushing towards same day registration, or do you -- can you distinguish the two cases so that the test would just be about voter ID?

MS. WEISER: I mean I don't know how to -- off all other restrictions on the franchise. I mean the question really is, is the -- are the voter registration restrictions justified, and in light of their, you know, in light of a -- the court might consider that there's been a long history of them in place, that this might be -- or at least at some point was the only way in which the state could achieve the objectives that they were trying to achieve with the voter registration law, that might be a way of differentiating voter registration rules. But each restriction would be considered on its own face. This doesn't -- just because a voter ID law doesn't pass muster doesn't mean that there aren't state interests that are furthered by voter registration restriction that couldn't be better -- that could only be best furthered by that kind of restriction. So it would really be more as a -- a difference in how the standard is applied in the particular case, not in whether the same legal

standards in general is used. So I don't know if that answered your question.

But the -- right now we're looking at a new burden on the right to vote that is unprecedented. The voter registration restrictions have been in place for some time, you know, and then previously have been subjected to constitutional challenges, and the court -- there are voter -- there were residency requirements where voters had to register far more than 30 days in advance to establish residency, and the court actually struck some of those down, and then held that 30 days was reasonable applying a constitutional standard, very similar to the one that petitioners are seeking to have applied in this case.

So they would really have to consider the really specific registration laws at issue and whether or not they're justified.

MR. MANN: All right. Thank you all very much for coming. If you're not already on the AEI Brookings Election Reform list, please sign up. We're going to stay on top of this issue and related ones. And we will continue to pray for healthy, lop sided election victories in November of this year. Thank you, Mike, Stuart, and Wendy.

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