



**Testimony of Wendy Noren, County Clerk
Boone County, Missouri**

**Before the U.S. Senate Rules and Administration Committee
Regarding Title I and Title II of S. 1487, the Ballot Integrity Act**

July 25, 2007

Chairwoman Feinstein and Members of the Committee:

Thank you for the opportunity to offer input on behalf of county officials across the nation on Title I and Title II of the Ballot Integrity Act. I am Wendy Noren, County Clerk for Boone County, Missouri. I was first elected clerk in 1982 after serving as elections director for the clerk's office for four years prior to that. Over the past 25 years I have served many times as chair of the legislative committee for the Missouri Association of County Clerks and Election Officials and for the past two years as Legislative Co-Chair for the International Association of Clerks, Recorders, Election Officials and Treasurers. I am also on the Board of Directors of the National Association of County Recorders, Election Officials and Clerks.

I am pleased to testify before you today on behalf of the National Association of Counties. I have been involved with NACo for many years including during the development of the Help America Vote Act and have represented NACo on the Election Assistance Commission Board of Advisors since its inception. I understand that I have been asked to testify on Title I and Title II. I also understand that others will be testifying today regarding election administration issues that arise from provisions of Title III. I look forward to the opportunity to offer separate comment on that section.

Chairwoman Feinstein, your background and service in local government serve you well. County governments have always looked to you as a champion and we have appreciated your leadership and deliberative approach on many issues over the years that require a coordinated approach among all levels of government.

We are grateful to you for taking the time to seek input from state and local election officials before you introduced the Ballot Integrity Act and for your continued receptiveness to our feedback. You not only listened to our concerns, you heard them and addressed many of them in your bill. Your legislation recognizes that wholesale replacement of voting equipment across the nation before the 2008 election would be an invitation to disaster. Provisions of Title I and Title II also recognize that states, not the federal government, must ultimately issue standards for administrative procedures, such as documenting chain of custody for voting materials and

conducting manual audits. There is an appropriate and welcome role for the federal government in issuing model guidelines and disseminating information on best practices. Title I and Title II also recognize that states cannot meaningfully certify the methods by which they will meet new requirements in a 30- or 60-day period. Local election officials and community stakeholders must be at the table in crafting a state plan and your legislation gives states until 2009 to complete that process. You listened to concerns about software disclosure and sought to craft a process for appropriate legal authorities to review software without opening the process to malicious tampering. And you recognize that the courts are not the appropriate body to interpret federal law.

Many of the provisions of Title I and Title II represent a shift back toward the bipartisan consensus that was the underpinning of the Help America Vote Act. Key elements of that consensus included:

- a. That the role of Congress was to set broad concepts for how voting equipment would meet the needs of voters for usability, reliability, security, and accessibility;
- b. That the scientists at NIST would work in conjunction with the Election Assistance Commission to develop standards and testing methodologies to insure the equipment sold to election officials would meet those needs;
- c. That each state would implement uniform procedures for counting votes on any system utilized;
- d. That local election officials and stakeholders would be involved in decisions at the State level about how to implement those procedures; and
- e. That the Federal government would provide sufficient funding to ensure that state and local governments could afford to purchase the mandated equipment.

There are those who suggest that the framework of the Help America Vote Act was flawed and that Congress should dictate nationwide practices in election administration. This would not solve, but would in fact exacerbate, the problems we have today. The real and perceived problems associated with the implementation of voting equipment under HAVA are not a result of a flawed framework but a breakdown in the sequences of the timetables set out in HAVA.

We now see that the approach of the Help America Vote Act was sound; the timetables and funding levels proved to be unrealistic. HAVA anticipated that the equipment used in the 2006 election would be designed, tested and manufactured to a new set of federal standards that would address security, accessibility, reliability and usability. Instead, hundreds of millions were expended without the standards and testing protocols anticipated by the drafters of HAVA. We are still at least a year away from that goal. In that void we have basically field tested new equipment real time on election day.

We fail to heed these lessons of the Help America Vote Act at our peril. I would like to submit into the record a copy of the testimony that NACo offered to the House Administration Committee on legislation in that chamber that would take us back down that path.

Fortunately you understand that none of us, at any level of government, can afford - from a budgetary or a voter confidence standpoint - to push an additional set of reforms through under an inappropriate timetable and out of a rational sequence. Therefore we appreciate provisions of Title I and Title II that steer us back toward a consensus framework:

- a. Identifying the outcomes desired for vote casting and counting equipment but not microlegislating its design components. The development of guidelines is best left to the experts on the Technical Guidelines Development Committee and the EAC.
- b. Setting the requirement for a manual audit process but leaving the process and details to the states. The Election Assistance Commission should develop guidelines and best practices.
- c. Recognizing that the Federal government has a role in funding what it mandates.

You have successfully begun to chart a path for intergovernmental partnership on this issue as originally envisioned by all of us who agreed to the many compromises in the Help America Vote Act. You have opted to pursue a workable solution to the concerns surrounding voting equipment rather than legislating a knee-jerk response to those concerns.

The Ballot Integrity Act also contains some provisions that we cannot support in their current form. However, we recognize that it is a work in progress. The provisions of Title I and Title II as written represent a significant improvement over the House version of this legislation and a good faith effort on your part, with a lot of hard work and heavy lifting by you and your staff. We pledge to work with you on the road that lies ahead and are confident that we can work together through our remaining concerns.

I would like to highlight some of the areas in which we look forward to continuing to work with you:

1. Timetables. It is the clear intent of this legislation to ensure that appropriate research guides the development of a voting system with verifiable ballots that will meet the needs of the disabled community. Under the current version of this bill, however, research and guidelines for the development of this equipment must be completed by January 1, 2010 - the same day that we are required to implement the provisions. This almost surely guarantees that more federal money will be spent on equipment that is not manufactured or tested to those guidelines. In the words of Yogi Berra, this is *deja vu* all over again.

I do not believe any of us wants to back away from our commitment to millions of Americans who are now able to cast an official ballot independently and in private. The National Association of Counties urges you to reconsider setting a statutory mandate for paper ballots to serve as an intermediate component of a front- and back-end electronic interface and to leave the determination of exact specifications for voting equipment – including specifically requiring the use of paper and an electronic conversion from paper to an audio ballot – to the National Institute of Standards and Technology, the Technical Guidelines Development Committee, the Election Assistance Commission and election technology vendors. It may be that a verifiable audit mechanism does not require the use

of pressed wood pulp. It may also be that a tactile ballot can meet the needs of disabled voters without the need for an electronic vote casting and/or verification device.

In any event, a multiyear timeframe may be required between the development of guidelines and implementation to allow for design, testing and manufacturing of equipment. We urge you to consider setting contingent deadlines, rather than a series of dates certain, to protect against the event that standards development or equipment availability lag behind our preconceived implementation deadlines.

I repeat - we cannot afford to waste any more good will of the voters and scarce resources of federal, state and local governments by not getting the timetable sequence right this time.

2. **Clarification of Non-Qualifying Equipment.** To receive funding under the bill as currently written, states must identify and report a number of “remedial precincts” that contain non-qualifying equipment. But we have no clear indication of which equipment currently on the market meets these requirements. To ensure uniform determination of which equipment is “non qualifying” the EAC must notify states of which voting equipment does - and does not - meet the requirements in time for states to provide accurate certification.
3. **Moratorium.** We look forward to working with you to clarify the parameters of the moratorium. Would counties that currently have a noncompliant system in place be prohibited from purchasing replacement units for those that are damaged or require maintenance? Would a county that had long lines in the most recent election be prohibited from expanding their inventory? What about a county that is experiencing double-digit population growth? The result in any such scenario would be shrinking pool of voting units in the short term, leading to longer and longer lines.
4. **Random Manual Audits.** I can attest to the benefit of conducting random manual audits of ballots. I have been conducting them since 1988. The Election Assistance Commission is also reviewing its role as a component of the management guidelines they are currently drafting. However, the current version of the legislation could put local officials in some states in an untenable position. For instance, many states have an extremely short canvassing period. If Congress is going to require that manual audits be conducted during the canvassing period, many county election officials will be unable to perform this function unless states extend the timeframe under state law. I would also urge you to permit states the flexibility to designate alternative audit units, other than a full precinct, for conducting a random manual audit.
5. **Funding.** As a county official who has borne the brunt of the funding shortfall under the Help America Vote Act, I ask that you provide some relief to county governments. We urge you to include language in your bill that either makes the costs associated with this legislation mandatory federal spending, as administrative costs are for many other federal programs such as Medicaid, food stamps, and the Temporary Assistance for Needy Families. In the alternative, you could include a trigger specifying that the deadline would not take effect until Congress appropriates full funding. We recognize and

appreciate that you have tried to avoid authorizing more funds in this legislation than Congress is willing to follow through on. Keeping expectations under control is an important part of avoiding placing an unreasonable and unfounded burden on county governments. Ultimately, however, Congress will have to either ratchet down its expectations – by, for example, keeping in place those voting systems that already offer a paper audit trail – or provide significantly more than \$600 million. In the event that all else fails and the federal government does not fully fund the purchase or retrofitting of equipment, then states should be required to pass funding on to the local governments that are required to pay the costs of these mandates and share the burden of any shortfall.

6. Flexibility. If all voting systems used in federal elections will be required to pass through the federal certification program, many election officials will be placed in the untenable position of either utilizing uncertified equipment or violating state laws. When new state laws are passed in the months leading up to a federal election, state and local election officials do not currently have enough time to undergo federal testing. We hope to work with you to ensure that the emergency certification procedures envisioned in your bill can be used for this purpose. The voluntary nature of existing voting system standards means that states pass laws that many election officials are using equipment with program modifications that undergo state and local, but not federal, retesting and certification in the months leading up to a federal election. You must allow states that flexibility if you are not going to preempt state changes to equipment and counting processes.
7. Residual Vote Benchmark. I firmly believe we need to be studying residual votes at a much higher level. I would hope we will utilize this bill to encourage the study of residual votes, in particular their potential relationship to ballot design. However, we should not be too quick to set benchmarks. I cannot confidently identify the reason for a particular residual vote without physically looking at each ballot. In addition, each election is different and there are many reasons for residual votes, both intentional and unintentional. Intentional undervotes are not limited to distinct communities in certain geographic areas, but also often depend on the relative strengths and weakness of candidates in particular election cycles. Failing to take these complicating factors into account would throw the benchmarks totally out of kilter.

I want to thank you again for your leadership and political courage. We understand that you have absorbed some criticism for recognizing that upending our nation's voting systems before the 2008 Presidential election would have proved disastrous. You have started us down the path toward a bipartisan and intergovernmental consensus. We look forward to working with you to resolve the remaining stumbling blocks on Title I and Title II and to working with you to also apply this framework to the policy issues addressed in Title III.

I appreciate the opportunity to testify today and would be happy to answer any questions.