

U.S. Commission on Civil Rights Briefing Report • April 2006

Reauthorization of the Temporary Provisions of The Voting Rights Act

An Examination of the Act's Section 5 Preclearance Provision

U.S. Commission on Civil Rights
Washington, DC 20425

Official Business
Penalty for Private Use \$300

Visit us on the Web:
www.usccr.gov

Voter Fraud and Voter Intimidation

A Briefing Before
The United States Commission on Civil Rights
Held in Washington, DC, October 13, 2006

Briefing Report

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

Members of the Commission

Gerald A. Reynolds, *Chairman*
Abigail Thernstrom, *Vice Chairman*
Todd Gaziano
Gail Heriot
Peter N. Kirsanow
Arlan D. Melendez
Ashley L. Taylor, Jr.
Michael Yaki

Martin Dannenfels, *Staff Director*

U.S. Commission on Civil Rights
624 Ninth Street, NW
Washington, DC 20425
(202) 376-8128 voice
(202) 376-8116 TTY
www.usccr.gov

This report is available on disk in ASCII Text and Microsoft Word 2003 for persons with visual impairments. Please call (202) 376-8110.

Table of Contents

Executive Summary	1
Summary of the Proceedings	4
Findings and Recommendations.....	16
Dissenting Statement of Commissioner Melendez	19
Dissenting Statement of Commissioner Yaki	27
Statement of Robert A. Pastor.....	29
Statement of Mark F. “Thor” Hearne II	39
Statement of Donna L. Brazile	57
Statement of John Fund	72
Speaker Biographies	76

**U.S. Commission on Civil Rights
Briefing: Voter Fraud and Voter Intimidation**

Executive Summary

On October 13, 2006, a panel of experts briefed members of the U.S. Commission on Civil Rights on Voter Fraud and Voter Intimidation. The panel consisted of the following individuals: Robert Pastor, Professor of International Relations at American University and former Executive Director of the Carter-Baker Commission on Federal Election Reform; Thor Hearne, a member and principal of the law firm of Lathrop & Gage and former national election counsel for the Bush-Cheney 2004 campaign and General Counsel to the American Center for Voting Rights; Donna Brazile, Chair of the Democratic National Committee's Voting Rights Institute and former campaign manager for the Gore-Lieberman campaign; and John Fund of *The Wall Street Journal* and author of the 2004 book *Stealing Elections: How Voter Fraud Threatens Our Democracy*. Each of these individuals made presentations and offered their expertise on voter fraud and voter intimidation, offering critiques of past approaches to addressing these problems and making recommendations for election reform. The briefing was held in Room 540 at the Commission's national headquarters at 624 Ninth Street, NW, Washington, D.C.

Robert Pastor characterized voter fraud and voter intimidation as assaults on our democracy, and urged paper audits and electronic security for voting machines, as well as more accurate, up-to-date registration lists. On the issue of voter identification cards, Mr. Pastor pointed out that many other advanced democracies use voter identification cards, and urged that, in a country where 40 million people move annually, some form of identification is needed.

Thor Hearne addressed what he sees as a major confidence problem in our nation's elections. Addressing possible solutions to voter fraud and voter intimidation, Mr. Hearne urged that state election officials fund efforts to ensure that every eligible, registered voter have his or her name appear properly on the voter roll. On the issue of voter identification, Mr. Hearne argued that there is strong public support for some form of government-issued identification, but urged that steps be taken to ensure that such identification is made available to the indigent.

Donna Brazile focused on barriers to voter participation. She listed barriers ranging from difficulties finding information on how to register to more insidious barriers such as the spreading of misinformation regarding the day of an election or a particular voter's eligibility to vote. She also stressed the importance of accurate registration lists, and stated that requirements of proof of eligibility to vote should not be imposed in a manner that would erect additional barriers to voting.

John Fund characterized the United States' election system as haphazard and sloppy. He remarked that other countries have more secure election systems than ours, and stated that only 25 states require some form of documentation in order to vote. He noted that

approximately 80 percent of those surveyed support the requirement of a photo-ID in order to vote, and remarked that this included two-thirds of African-Americans, Democrats, and Hispanics.

The four panelists fielded questions from the Commissioners dealing with issues including:

- Whether the imposition of a national photo identification standard raised any 14th Amendment concerns
- The problems associated with certain groups, such as Native Americans, that may tend not to carry official identification
- Concerns relating to the training of poll workers, and the difficulty in obtaining poll workers with both the time and the technological savvy to serve, and providing adequate training to those poll workers
- Problems inherent in the use of electronic voting machines

Based on the record, the Commission finds, among other things, that

- Real and perceived flaws in the election system have resulted in concern and mistrust in the voting process in the United States
- Both voter fraud and voter intimidation disenfranchise voters and weaken our political system
- Achieving an accurate voter roll is a key step in assuring accurate elections with full participation
- Expanded absentee voting, same-day registration, voting exclusively by mail, and the fact that large numbers of Americans relocate each year all pose difficulties in verifying voter identity.

Based on these findings, the Commission recommends, among other things, that

- State and local government must undertake efforts to improve and expand training of poll workers
- States and the federal governments should strengthen public confidence that votes will be counted accurately by ensuring that all voting machines are certified accurate and tamper-proof, and by creating a physical record of votes and employing a voter-verified paper audit trail
- In order to enhance ballot integrity without raising barriers to voting, states should adopt a photo identification requirement for both registration and voting. This

requirement should be coupled with outreach to register qualified voters and the provision of identification cards at no cost to the indigent. Those without photo identification should be permitted to vote by provisional ballot.

- Absentee ballots pose special challenges; accordingly, states should adopt a requirement that voters' signatures on the absentee ballot be matched with a digitalized version of the signatures maintained by election officials.

A transcript of this briefing is available on the Commission's website, www.usccr.gov, and by request from Publications Office, U.S. Commission on Civil Rights, 624 Ninth Street, NW, Room 600, Washington, DC, 20425, (202)376-8128, publications@usccr.gov.

Summary

Robert A. Pastor

Dr. Pastor spoke of his experience working to improve the electoral process in the United States and around the world for the past 20 years.¹ He began by highlighting the political nature of the issue, stating that for Republicans the principal problem is electoral fraud, while for Democrats the main concern is voter intimidation and impediments to voting. He similarly noted that many Republicans view voter IDs as the solution, while many Democrats view voter IDs as the problem. Mr. Pastor expressed his opinion that voter IDs can be part of the solution, but that they cannot be the entire solution. He suggested other potential solutions to voter fraud and intimidation, including increased voter education, providing voter IDs free of charge and expanding the base of registered voters.²

Noting that any fraud or intimidation represents egregious assaults on our democracy, Dr. Pastor urged that we need paper audits and electronic security for voting machines, as well as more accurate, up-to-date and interoperable registration lists. He averred that we must expand efforts to provide greater access to Americans with disabilities as well as those working or serving abroad. He also urged that we must restore voting rights to those who have been convicted of felonies and stressed the need for increased voter education.³

On the issue of voter fraud, Dr. Pastor first observed that election fraud is difficult to measure, and generally attracts public attention and investigation only in the event of very close elections. He pointed to absentee ballots as the largest source of potential voter fraud, and said that the practice of allowing party workers to deliver absentee ballots should be eliminated.⁴

Turning to ID cards, Dr. Pastor noted that, in a country where 40 million people move each year, some form of identification is needed. He stated that the Carter-Baker Commission on Federal Election Reform recommended a single uniform ID using the Real ID card, which also requires proof of citizenship or lawful status. He noted that in the case of absentee voters, who would not be presenting IDs, the voter's signature on the absentee ballot could be matched with a digitalized version of the signature that the election administration maintains. Addressing concerns that IDs might be a step towards a police state, Dr. Pastor pointed out that most advanced democracies have national identification cards. Nonetheless, he stated that the Carter-Baker Commission recommended new institutional and procedural safeguards, including ombudsmen to

¹ Robert A. Pastor, Testimony before the U.S. Commission on Civil Rights, briefing, 624 Ninth Street, NW, Room 540, Washington, D.C., Oct. 13, 2006, transcript, p 111.

² Pastor Testimony, Briefing Transcript, pp. 111-112.

³ Pastor Testimony, Briefing Transcript, pp. 113-114.

⁴ Pastor Testimony, Briefing Transcript, p. 114.

assure people that their privacy, security and identity will not be compromised by ID cards.⁵

Mark F. “Thor” Hearne II

Mr. Hearne addressed what he sees as a major confidence problem in our nation’s elections.⁶ He stated that both confidence and participation must be addressed, and that the most important initial step to this is a current and accurate voter roll. Mr. Hearne said that the Help America Vote Act (HAVA)⁷ took significant strides in this direction, but noted that the most likely reason an eligible citizen will be denied an opportunity to vote is that their name is not on the voting roll when they go to their polling place.⁸

On the issue of voter fraud, Mr. Hearne provided examples of recent instances of fraudulent registration in St. Louis and Kansas City, noting that registration cards were submitted for Dick Tracy and Mary Poppins. He remarked that, regardless of whether anyone actually casts a ballot in the name of those fraudulent registrations, the registrations themselves undermine public confidence.⁹

Addressing possible solutions to voter fraud and voter intimidation, Mr. Hearne urged that state election officials properly fund efforts to ensure that every eligible, registered, legitimate voter has his or her name appear properly on the voter roll. He also spoke to the timing of this process, asserting that voter registration forms should be submitted within several days after being collected to decrease the likelihood of fraud or manipulation.¹⁰

On the issue of voter identification, Mr. Hearne noted that polls put public support of government issued photo IDs at between 80 and 90 percent. Mr. Hearne stated that we must not impose the requirement of IDs unless we provide everyone with the means to meet the requirement. He observed that there is bipartisan support for photo identification, and said that civil rights leaders also see a photo identification card as a way to increase participation. He pointed to a study by economist John Watt that found that when we have greater confidence in the election process, we have greater participation.¹¹

Mr. Hearne placed a high premium on public confidence in the voting process, including in election technology, and concluded by stating that we must put provisions in place to eliminate arbitrary decisions of election officials determining the outcome of elections.¹²

⁵ Pastor Testimony, Briefing Transcript, pp. 116-117.

⁶ Mark F. Hearne, Testimony before the U.S. Commission on Civil Rights, briefing, 624 Ninth Street, NW, Room 540, Washington, D.C., Oct. 13, 2006, transcript, pp. 118-119.

⁷ 42 USC §§ 15301-15545.

⁸ Hearne Testimony, Briefing Transcript, pp. 119-120.

⁹ Hearne Testimony, Briefing Transcript, pp. 120-121.

¹⁰ Hearne Testimony, Briefing Transcript, pp. 122-123.

¹¹ Hearne Testimony, Briefing Transcript, pp. 123-124.

¹² Hearne Testimony, Briefing Transcript, pp. 125-126.

Donna L. Brazile

Ms. Brazile first addressed barriers to voter participation.¹³ She mentioned barriers in finding out how to get involved and how to register, as well as more insidious barriers such as the spreading of misinformation regarding the day of an election or a particular voter's eligibility to vote. She noted that her own sister had been told at her polling place that her name was not on the voting list, and that she had to present a third form of identification after producing her voter registration card and her driver's license.¹⁴

Ms. Brazile also addressed the significant problems that occurred in Ohio in 2004. She mentioned inoperable voting machines and voters who stood in line for five to ten hours waiting to vote. She stated that Ohio may have been the most extreme example, but said that other states experienced an array of problems as well, including non-first-time voters being required to show ID in states where that was not a requirement. She stated that many African-Americans were required to produce ID even when this was not required by law.¹⁵

Ms. Brazile suggested that we commit to a policy of voting as a civil right for all US citizens and that we create policies that further that right rather than erect more barriers. She said that 25 days before the mid-term election, over 54 million Americans were not registered to vote, the highest percentage of whom were Hispanic-Americans and African-Americans.¹⁶

Ms. Brazile completed her presentation by addressing a variety of barriers, including citizens being inadvertently or improperly purged from the voting rolls, voting machine manipulation, and the practice of asking for proof of ID or proof of citizenship where it is not required. She indicated that these practices have been used to suppress and intimidate voters. She stressed the importance of clean voter registration lists and said that we should encourage other proof of eligibility to vote, but not in a manner that would erect additional barriers to voting.¹⁷

John Fund

Mr. Fund began by stating that it was time to acknowledge that the United States has a haphazard election system that is more characteristic of an emerging nation than that of the world's leading democracy.¹⁸ Calling our voting system sloppy, he noted a recent Maryland primary election in which thousands of voters gave up and went home without

¹³ Donna L. Brazile, Testimony before the U.S. Commission on Civil Rights, briefing, 624 Ninth Street, NW, Room 540, Washington, D.C., Oct. 13, 2006, transcript, p. 126.

¹⁴ Brazile Testimony, Briefing Transcript, pp. 126-129.

¹⁵ Brazile Testimony, Briefing Transcript, pp. 130-132.

¹⁶ Brazile Testimony, Briefing Transcript, p. 132.

¹⁷ Brazile Testimony, Briefing Transcript, pp. 133-135.

¹⁸ John Fund, Testimony before the U.S. Commission on Civil Rights, briefing, 624 Ninth Street, NW, Room 540, Washington, D.C., Oct. 13, 2006, transcript, p. 135.

voting when the electronic voting machines could not be activated. Subsequently, so complete was the lack of confidence in the election system, both candidates for governor in that state called on voters to use absentee ballots.¹⁹

Mr. Fund emphasized that absentee ballots present significant opportunity for voter intimidation by spouses, relatives, employers, union officials or others who urge the voter to vote in a certain way. He called absentee ballots the easiest way to commit voter fraud.²⁰

Mr. Fund stated that the 2000 Florida recount left a scar on the American political psyche. He acknowledged that the 2000 election resulted in some reforms, including HAVA, but pointed to continuing problems such as flawed voting rolls, voter ignorance, lackadaisical law enforcement, and a shortage of trained volunteers at the polls. On the issue of poll workers, he stated that close to 70 percent of the nation's poll workers will be retiring in the next few years, and urged that we need to bring young people into the process.²¹

Mr. Fund noted the recent trend of election day turning into election month via protracted election litigation. He stated that every close election brings the prospect of demands for recounts, lawsuits and seat challenges in Congress.²²

Comparing the United States to the rest of the world, Mr. Fund remarked that Mexico and other countries have more secure election systems than ours. Highlighting some of the defects in the American system, he noted that Philadelphia's voter rolls have grown 24 percent in the last decade while the city's population has decreased by 15 percent in the same time frame. He said that only 25 states require some form of documentation in order to vote, while observing that over 81 percent of those surveyed supported the requirement of a photo ID, including two-thirds of African-Americans, Democrats, and Hispanics. He stated that even former civil rights activist, ambassador, and elected official Andrew Young believes that a photo ID requirement would help the poor by bringing them into the mainstream and enabling them to fully participate in American life.²³

Mr. Fund also spoke about voter fraud, the investigations of which he deemed inherently political. He asserted that when voters are disenfranchised by the counting of improperly cast ballots or outright fraud, their civil rights are being violated just as if they had been prevented from voting. He said that the refusal to make procedural changes like the requirement of a photo ID, improving absentee ballot procedures, and securing technology results in greater chaos and more contested elections. He concluded by noting that things had gotten so bad that officials in places such as Miami were hiring the Center for Democracy, an organization that he claims normally oversees voting in places like

¹⁹ Fund Testimony, Briefing Transcript, pp. 135-136.

²⁰ Fund Testimony, Briefing Transcript, p. 136.

²¹ Fund Testimony, Briefing Transcript, pp. 136-137.

²² Fund Testimony, Briefing Transcript, p. 138.

²³ Fund Testimony, Briefing Transcript, pp. 138-140.

Guatemala or Albania, to send election monitors to south Florida in the 2002 and 2004 elections.²⁴

Discussion

Commissioner Kirsanow began the substantive discussion by turning to the 14th Amendment, which gives the states the prerogative to set standards for voting qualifications. He asked whether the panelists saw any 14th Amendment problem with having a national uniform photo ID standard.²⁵ Mr. Hearne pointed to two recent bills in Congress that would have established a uniform federal ID, and stated that he did not believe that the use of such an ID would be inconsistent with the Constitutional scheme of delegating the responsibility of conducting elections to the states. There was some discussion of a Georgia case in which a judge struck down a photo ID requirement when the election was two months after the imposition of the ID requirement.²⁶ Mr. Hearne explained that it was the short time period for obtaining the ID that doomed the law, not the concept of a mandatory photo ID per se.²⁷

Commissioner Melendez pointed out that many Native Americans do not carry official ID. He noted other difficulties, including that Native Americans might not be able to use mail-in voting procedures due to the need for language assistance, and the remoteness of many tribes making it particularly hard to procure official identification. He asked how voter ID requirements could be tailored to allow Native Americans to vote.²⁸ Ms. Brazile responded that the Ninth Circuit Court of Appeals rejected a law that would require voter identification at the polls in November.²⁹ She remarked that the problem with many

²⁴ Fund Testimony, Briefing Transcript, pp. 141-144.

²⁵ Commissioner Kirsanow, Briefing Transcript, pp. 144-145.

²⁶ In *Common Cause v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006), Judge Harold Murphy stayed the implementation of a photo identification requirement for in-person voting (H.B. 244), finding that plaintiffs had a substantial likelihood of succeeding on their claim that the photo ID requirement unduly burdens the right to vote and constitutes a poll tax. Subsequent to the Commission's briefing, the case was dismissed and judgment was entered on behalf of the state defendants. The court noted that plaintiffs did not demonstrate that the photo ID requirement places an undue or significant burden on the right to vote, and that plaintiffs had further failed to demonstrate that the photo ID requirement is not reasonably related to the State's interest in preventing fraud in voting. *Common Cause v. Billups*, 504 F. Supp. 2d 1333, 1382-1383 (N.D. Ga. 2007).

²⁷ Hearne Testimony, Briefing Transcript, pp. 145-147.

²⁸ Commissioner Melendez, Briefing Transcript, pp. 148-149.

²⁹ In *Gonzalez v. Arizona*, 2006 U.S. Dist. LEXIS 76638 (D. Ariz. Oct. 11, 2006), an Arizona identification law requiring voters to show a government-issued ID at the polls was barred by a Ninth Circuit interlocutory injunction. However, subsequent to this briefing, on October 20, 2006, the Supreme Court reversed the Ninth Circuit in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006), lifting the injunction and remanding the case to the lower court. The Ninth Circuit heard the case on remand in January 2007, and issued an opinion denying preliminary injunctive relief. *Gonzales v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

Since the Commission's briefing, courts in Michigan, Missouri, New Mexico and Indiana have issued opinions on voter identification as well. The Michigan Supreme Court issued an advisory opinion upholding a state voter identification statute as passing muster under both the Michigan and United States Constitutions. Note, however, that the statute in question provided for voters without identification cards to vote after signing an affidavit indicating that they do not possess identification cards. *In Re Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1 (Mich. 2007).

proposals to stop voter fraud was that they impede citizens' access to the ballot.³⁰ Mr. Fund suggested that there may be a way for tribal voters to provide proof of ID if they forgot their ID card, and he urged that unusual cases in small rural areas not become a basis for a blanket condemnation of a photo ID law.³¹

Dr. Pastor observed that of roughly 120 democracies in the world, over 100 have fraud-proof voter ID.³² He said that Mexico had it, as did Haiti and Iraq. Dr. Pastor said that we need to adopt a voter ID, but that we need to have a longer lead time and to make very certain that people who don't have driver's licenses can get free photo IDs. He stated that it would be expensive and would not be easy, noting, for example, that many people do not have birth certificates. He explained that the Carter-Baker Commission's recommendation was to use the Real ID card, which he described as a driver's license that is upgraded by law. He said that approximately 88 percent of eligible Americans have driver's licenses and that a smaller percentage of those were registered to vote, possibly 72 to 73 percent. He also stressed the role of the state in affirmatively seeking

In Missouri, the state's supreme court affirmed the trial court's judgment enjoining enforcement of a photo-ID requirement, finding it to be an unconstitutional infringement on the right to vote. The court stated that the photo-ID requirement was not necessary and was not narrowly tailored to meet the state's compelling interest in preventing impersonation fraud at the polling place. *Weinschenk v. Missouri*, 203 S.W. 3d 201 (Mo. 2006). Note that the Missouri law would have required obtaining the necessary identification through a bureaucratic process that the court found would not be completed prior to the upcoming election. Additionally, the court noted that Missourians lacking the necessary identification might be deterred by the cost of obtaining a driver's license or passport, or by the time required to acquire a free "non-driver's license." *Weinschenk v. Missouri* at 206.

The United States District Court for the District of New Mexico permanently enjoined enforcement of an amendment to the Albuquerque City Charter requiring Albuquerque voters to display a current and valid photo identification card in order to be able to vote at all future municipal elections, unless they chose to vote by means of an absentee ballot. *ACLU v. Santillanes*, 506 F. Supp. 2d 598. The City contended that the new law helped advance its interest in preventing voter fraud, but the court found that the amendment violated the Equal Protection Clause by imposing a significant burden on the fundamental right to vote while failing to adequately tailor the amendment to meet the City's interest in preventing voter impersonation fraud at the polls. The court explained, "[t]he law is not likely to have a prophylactic effect in future elections because it contains many loopholes through which a person seeking to steal another's vote could pass." *ACLU v. Santillanes* at 641. The court also noted that the "the evidence of record contains conflicting interpretations of the new law by the City's own election officials ... this lack of clear guidance, and the unbridled discretion it leaves to election officials at each particular polling place, will likely result in arbitrary and inconsistent treatment of similarly situated voters." *ACLU v. Santillanes* at 641-42.

Finally, the 7th Circuit upheld an Indiana law requiring, with certain exceptions, that persons wanting to vote in person in either a primary or a general election must present a government-issued photo-ID unless the person either wants to vote by absentee ballot or lives in a nursing home. In September 2007 the U.S. Supreme Court granted cert. in this case. *Crawford v. Marion County Election Board*, 484 F.3d 436 (7th Cir. 2007), *aff'd*, 472 F.3d 949 (7th Cir. 2007), *cert. granted*, 2007 U.S. LEXIS 9064 (U.S. 2007).

³⁰ Brazile Testimony, Briefing Transcript, pp. 149-150.

³¹ Fund Testimony, Briefing Transcript, pp. 150-151.

³² According to the Carter-Baker Commission on Federal Election Reform, "[v]oters in nearly 100 democracies use a photo identification card without fear of infringement on their rights." (Carter-Baker Report at p.5).

out and visiting old-age homes, minority communities, and other places where there is under-registration, in order to further expand the number of registered voters.³³

Ms. Brazile responded by noting that some groups tend not to have driver's licenses as commonly. She stated that over 30 percent of Georgians over 75 do not have a driver's license, and that fewer than 3 percent of Wisconsin students have driver's licenses listing their current addresses. She also stated that African-Americans have driver's licenses at half the rate of whites, and, looking to young voters, that only 22 percent of black men age 18 to 24 had a valid driver's license. These numbers suggest to Ms. Brazile that the Real ID and its connection to the driver's license could result in discrimination and disenfranchisement unless the process is fair and open to everyone.³⁴

Commissioner Reynolds asked whether states have standards for hiring poll workers.³⁵ Mr. Fund again noted the shortage of poll workers, and observed that the growing complexity of elections and the burdens of complying with laws and regulations are pushing out some of the older poll workers who make up the majority of volunteers. Mr. Fund stated that we need to invest more in poll workers. He said that many states pay poll workers \$20 cab fare, but noted that some do better than that, a trend he believes is to be encouraged. He also said that the easiest way to avoid misinterpretation of the rules is to have more than one poll worker at each site who has been adequately trained. He observed that it is highly unusual in sophisticated precincts, where there are several poll workers, that a poll worker will turn someone away without being countermanded by a supervisor or another poll worker who has had a higher level of training.³⁶ Ms. Brazile noted that many states and counties do not have the resources to properly train poll workers on new election procedures and technology, and that many poll workers are overwhelmed by the number of people who are showing up to vote.³⁷

Mr. Hearne addressed the issue of poll workers as well, stating that some states have rules that make it difficult to attract good poll workers, requiring, for example, that poll workers work from 7:00 am to 7:00 pm. He said when poll workers are responsible for a voting problem, it is often because of poor training.³⁸ Mr. Pastor noted that the average time for training of poll workers is about two hours, and that, given that the rules differ dramatically among states and counties, it is impossible for poll workers to know all of the rules well. He said that we need to focus on poll workers, and pointed to countries such as Mexico, where he said being a poll worker is seen as a civic obligation.³⁹

Commissioner Taylor turned to the issue of electronic voting machines. He asked the panelists to share their thoughts on the machines and whether some sort of paper trail should be required for purposes of recounts or otherwise questioning a voting tally.⁴⁰ Dr.

³³Pastor Testimony, Briefing Transcript, pp. 151-155.

³⁴ Brazile Testimony, Briefing Transcript, p. 155.

³⁵ Commissioner Reynolds, Briefing Transcript, p. 157.

³⁶ Fund Testimony, Briefing Transcript, pp. 157-159.

³⁷ Brazile Testimony, Briefing Transcript, p. 159.

³⁸ Hearne Testimony, Briefing Transcript, pp. 159-161.

³⁹ Pastor Testimony, Briefing Transcript, pp. 161-162.

⁴⁰ Commissioner Taylor, Briefing Transcript, pp. 162-164

Pastor replied that since 2000, the number of electronic machines has increased from 10 to 40 percent of all voting mechanisms, and that, if optical scans are included, the number is 80 percent. He stated that the Carter-Baker Commission recommended that there be a voter-verifiable paper audit trail when electronic machines are used. The Commission also recommended an audit of a small percentage of these machines, to assess whether the machines and the paper coincide. Dr. Pastor also commented that voting machines are produced on a cheaper, less sophisticated basis than, for example, ATM machines, and noted that the average electronic voting machine costs about 15 percent what a local ATM machine costs. In his view, votes are at least, if not more, valuable than money. Accordingly, he argued that we need to spend more money to make sure electronic voting machines function properly.⁴¹

Dr. Pastor cautioned, however, that the issue of electronic voting machines needed to be kept in perspective, noting that optical scan computing equipment has been used for 20 to 30 years and that there has not been one documented case of these machines being manipulated to change an election result. He noted that former Democratic National Committee Chair Joe Andrew had also cautioned against disproportionate concern over electronic voting machines. According to Dr. Pastor, the Leadership Conference of Civil Rights has generally supported electronic voting because studies have found that electronic machines are most likely to assist the disabled, the less educated, lower socioeconomic groups and the elderly.⁴²

Commissioner Reynolds turned to the issue of federalism and the shifting of responsibility from localities to the states and to the federal government. He asked the panelists about possible barriers in the form of localities wanting to maintain control of the voting process.⁴³ Dr. Pastor responded that this issue goes to the heart of the electoral problems in the United States, in which control of elections has become so decentralized as to be dysfunctional. He stated that we do not have one election for President, or even fifty elections for President, as envisioned by the founding fathers. Instead, Dr. Pastor maintained that we actually have 13,000 elections for President, with the counties in charge often implementing basic standards in very different ways. He stated that HAVA was intended to help encourage the states to impose uniform standards and a single registration list. Dr. Pastor noted that all of the states have accepted HAVA money, but not all have implemented it in the way he believes was intended with regard to registration lists, which he said were planned to be statewide, interactive, top-down lists.⁴⁴

Commissioner Yaki turned back to the issue of voter fraud, and asked what hard evidence we have that problems with voter registration rolls have resulted in widespread voting by people who are on the registration lists, but who should not be voting.⁴⁵

⁴¹ Pastor Testimony, Briefing Transcript, pp. 164-166.

⁴² Pastor Testimony, Briefing Transcript, pp. 166-168.

⁴³ Commissioner Reynolds, Briefing Transcript, p. 169.

⁴⁴ Pastor Testimony, Briefing Transcript, pp. 169-171.

⁴⁵ Commissioner Yaki, Briefing Transcript, pp. 172-174.

Commissioner Yaki asked how an ID card prevents absentee voter fraud.⁴⁶ Mr. Fund said that both voter ID and absentee ballots are problems. He said that today between 25 and 30 percent of Americans vote absentee or early, and stated that Oregon has abolished the polling place. He also indicated that Washington State is moving in that direction, and that in California over 40 percent of the ballots are cast absentee. He asked: when did Election Day become election month? He then questioned whether such changes are constitutional.⁴⁷

Returning to Commissioner Yaki's question about voter fraud, Mr. Hearne cited a study in Michigan in which 120 people were found to have cast ballots in the name of dead people.⁴⁸ Mr. Fund noted that not all allegations of voter fraud pan out, and that we must be discriminating.⁴⁹ Commissioner Yaki then asked about a photo ID bill in the Senate, and whether lower-income people, minorities, and people for whom English is not a first language will be most affected by photo ID requirements.⁵⁰ Commissioner Yaki also noted the problem of requiring voter IDs without adequately funding its implementation.⁵¹ Mr. Fund stated that the Real ID is the driver's license, and that those without driver's licenses should be given free ID equivalents. He said that the states must take an affirmative role in registering voters, noting that the United States is one of the few democracies that registers voters passively rather than going out to register them.⁵²

Ms. Brazile observed that the Constitution prohibits requiring payment for the privilege of voting, and stated that as long as there are millions of Americans who do not have access to the required form of ID to be eligible to vote, we should not impose the burden of providing photo IDs on states and local governments.⁵³

Commissioner Melendez asked what criminal laws are needed to address voter intimidation.⁵⁴ Mr. Fund replied that he believes that adequate resources are spent on tracking down voter intimidation. He indicated, however, that very few resources exist to prevent voter fraud. On that point, he noted that there are close to 200 attorneys in the Civil Rights Division of the Justice Department making sure the Voting Rights Act of 1965 is being enforced, while there is only one attorney whose sole job is to investigate allegations of voter fraud at the federal level.⁵⁵ Ms. Brazile challenged the notion that there is an imbalance. She spoke of instances of voter intimidation and voter suppression in both 2000 and 2004, and noted that Senator Barak Obama had introduced a bill called the Deceptive Practices and Voter Intimidation Prevention Act of 2005, which would make it a crime, punishable by up to one year in prison and a fine of up to \$100,000, to

⁴⁶ Commissioner Yaki, Briefing Transcript, pp. 175-176.

⁴⁷ Fund Testimony, Briefing Transcript, p. 176.

⁴⁸ Hearne Testimony, Briefing Transcript, p. 180.

⁴⁹ Fund Testimony, Briefing Transcript, p. 182.

⁵⁰ Commissioner Yaki, Briefing Transcript, pp. 183-184.

⁵¹ Commissioner Yaki, Briefing transcript, p. 185.

⁵² Fund Testimony, Briefing Transcript, p. 188.

⁵³ Brazile Testimony, Briefing Transcript, pp. 188-189.

⁵⁴ Commissioner Melendez, Briefing Transcript, p. 189.

⁵⁵ Fund Testimony, Briefing Transcript, p. 190.

knowingly deceive a person regarding the time, place, or manner of any federal election.⁵⁶

Commissioner Kirsanow discussed the Civil Rights Commission's trip to Florida after the 2000 election to look at reports of voter intimidation and fraud. He said that they saw only two instances in which there may have been blockage of voting and that one was an empty State Trooper car across the street from a polling place and the other was a traffic check point two miles away from another polling place, on a different road from the polling place. He said that the Commission did not find anything else, and that the Justice Department was similarly unable to find anything additional.⁵⁷

Dr. Pastor elaborated on his experiences in Mexico, stating that they now have a system that is far more advanced than the United States, including the use of biometric identification cards, which he said 99 percent of the voting population have. He indicated that these cards are so fraud-proof that they are used for everything now in Mexico. He also said that Mexico has photos in the registration list as well. Dr. Pastor stated that 40 million Americans now need biometric cards for security-related reasons, and noted that they are expensive.⁵⁸

Commissioner Kirsanow asked how identification would work in the case of absentee ballots.⁵⁹ Dr. Pastor indicated that voters would register with a signature that can be digitalized and can be matched with the signature on the absentee ballot that is sent in.⁶⁰ Commissioner Kirsanow inquired as to whether there were any libertarian objections to this procedure.⁶¹ Dr. Pastor indicated that the Carter-Baker Commission had recommended a series of procedural and institutional safeguards relating to basic privacy laws, but acknowledged that there is certainly a risk.⁶²

Ms. Brazile noted that the majority of calls that the Democratic National Committee gets on its toll-free voting number are from people who are lost – their polling place has changed, they don't know where to go, and no one has told them that they can cast a provisional ballot. She stated that there is a place for both political parties to work to educate their supporters, and that all citizens must be confident that they, the citizens, are the ones who make the decision in an election.⁶³

Commissioner Kirsanow observed that the United States was a month away from the 2006 midterm elections, and asked whether we were better prepared for having a cleaner election than we were in the past or whether we still faced significant problems.⁶⁴ Mr. Hearne replied that we have some tools in place with HAVA, such as single statewide

⁵⁶ Brazile Testimony, Briefing Transcript, pp. 190-191.

⁵⁷ Commissioner Kirsanow, Briefing Transcript, pp. 194-195.

⁵⁸ Pastor Testimony, Briefing Transcript, pp. 196-198.

⁵⁹ Commissioner Kirsanow, Briefing Transcript, p. 198.

⁶⁰ Pastor Testimony, Briefing Transcript, p. 198.

⁶¹ Commissioner Kirsanow, Briefing Transcript, p. 198.

⁶² Pastor Testimony, Briefing Transcript, p. 199.

⁶³ Brazile Testimony, Briefing Transcript, p. 203.

⁶⁴ Commissioner Kirsanow, Briefing Transcript, pp. 205-206.

voter rolls, improved processes, and new technology. However, he stated that we would be using an immense new system of conducting elections, and that the novelty alone raised the likelihood of real problems. He pointed to potential problems in both the voter rolls and the voting machines.⁶⁵ Dr. Pastor stated that we are not prepared for November 2006, and predicted that there could be major problems.⁶⁶ Ms. Brazile stated that one of her major concerns was the new voting systems, and pointed to the recent difficulties with voting machines in Maryland. She also noted equipment problems in Massachusetts, Ohio, Illinois, and Texas.⁶⁷

Commissioner Reynolds sought the panelists' views on allowing felons to regain the right to vote.⁶⁸ Ms. Brazile noted that over a third of African-American men in the Deep South are ineligible to vote because they lost their voting rights when they had a felony or misdemeanor conviction, and stated her belief that it is time to re-enfranchise these Americans. She pointed to a study from the Brennan Center for Justice, which estimated that 5.3 million Americans are barred from voting due to felony convictions, which Ms. Brazile said disproportionately impacted African-American and Latino communities. She said that states like Iowa and Virginia were finding ways to have citizens reapply for their citizenship so that they can once again participate in the electoral process.⁶⁹ Dr. Pastor replied that the Carter-Baker Commission came out clearly in favor of restoration of voting rights for convicted felons, but noted that this would not apply to capital crimes or crimes requiring enrollment on a sex offender registry.⁷⁰ Ms. Brazile again cited the Brennan Center report, which she said showed that 80 percent of Americans favor restoring voting rights once felons have completed their sentences. Ms. Brazile also stated that the United States is the only democracy in the world that disenfranchises people who have completed their sentences.⁷¹

Panelists offered additional thoughts on a range of topics. Dr. Pastor addressed studies indicating that people are intimidated by voting with electronic machines and by the complexity of the process, so much so that some are afraid to vote because they do not want to be embarrassed. He said that civic education is the key.⁷² Ms. Brazile agreed on the importance of education. She said that the burden of election protection and voter education is placed on candidates and the major two-party system, and that we generally don't have third-party organizations willing to register, educate, and turn out voters.⁷³

Mr. Fund further discussed voter IDs, which he said should be free for those who need it, but not necessarily for those who can easily afford it. He said that the vast majority of

⁶⁵ Hearne Testimony, Briefing Transcript, p. 206.

⁶⁶ Pastor Testimony, Briefing Transcript, pp. 206-207.

⁶⁷ Brazile Testimony, Briefing Transcript, pp. 207-208.

⁶⁸ Commissioner Reynolds, Briefing Transcript, p. 209.

⁶⁹ Brazile Testimony, Briefing Transcript, pp. 209-210.

⁷⁰ Pastor Testimony, Briefing Transcript, p. 210.

⁷¹ Brazile Testimony, Briefing Transcript, p. 211.

⁷² Pastor Testimony, Briefing Transcript, pp. 214-215.

⁷³ Brazile Testimony, Briefing Transcript, p. 216.

Americans have some form of photo identification.⁷⁴ Commissioner Yaki noted his concern that the vast majority does not include the non-majority.⁷⁵

Turning to the issue of participation, Mr. Fund observed that the United States ranks 139th out of 163 democracies in the rate of voter participation.⁷⁶ Ms. Brazile stated that less than 12 percent of Americans participated in the past year's primary election.⁷⁷ Mr. Fund further noted that only 11 percent of 18 and 19 year-olds vote in their first election, which he said indicates that they are telling us that the process is not meaningful to them.⁷⁸

Commissioner Kirsanow asked the panelists whether an assessment had been done on the impact of inexact translation of complex ballot propositions, and whether translation presents a vehicle for either voter error or fraud. It appeared that little study of this issue had been done.⁷⁹

⁷⁴ Fund Testimony, Briefing Transcript, pp. 218-219,

⁷⁵ Commissioner Yaki, Briefing Transcript, p. 219.

⁷⁶ Fund Testimony, Briefing Transcript, p. 221.

⁷⁷ Brazile Testimony, Briefing Transcript, p. 221.

⁷⁸ Fund Testimony, Briefing Transcript, p. 222.

⁷⁹ Commissioner Kirsanow, Briefing Transcript, pp. 222-223.

Voter Fraud and Voter Intimidation Findings and Recommendations

Findings

1. In recent years, real and perceived flaws in the election system have resulted in concern and mistrust of the voting process in the United States. These allegations include: misplaced and/or indiscernible votes, long waits at polling places, confusing or malfunctioning voting mechanisms, uncertainty regarding identification and other voting requirements. They also include voter fraud and voter intimidation.
2. Both voter fraud and voter intimidation disenfranchise voters and seriously weaken our political system.
3. Allegations of voter fraud have included claims of multiple voting, voting by dead people, providing false information regarding felon status, vote-buying and submitting false voter registration information.
4. Allegations of voter intimidation have included claims regarding the imposition of unauthorized identification requirements and the intentional misrepresentations of voter eligibility, the misuse of provisional ballots and misinformation about the time and place of elections and the requirements to vote.
5. Among the difficulties faced by election officials is the fact that the pool of qualified voters is constantly changing, with almost 40 million people moving each year. As a result, many jurisdictions have flawed or outdated voter rolls.
6. In addition, the growing use of unofficial third-party voter registration drives has led to a rise in reports of voter registration fraud, especially fraud committed by those who have been paid by the piece to register voters.
7. At the same time, such practices as expanded absentee voting, same-day registration and voting exclusively by mail, while providing greater voter access, have posed difficulties in verifying voter identity and qualifications as well as protecting against voter intimidation.
8. There is a need for improved administration of elections to assure that votes are accurately counted and verified. This requires qualified and competent election officials and trained poll workers in place well in advance of elections..
9. In recently upholding Indiana's voter ID law, the Supreme Court affirmed the state's legitimate and important interest in preventing voter fraud and promoting public confidence in the integrity of the electoral process to encourage citizen participation in

the democratic process. *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008).

Recommendations

1. State and local governments should undertake efforts to improve and expand training of election officials and poll workers on issues of voting eligibility, identification, the use of provisional ballots, voting machine operations and standards, and the prevention of voter fraud and voter intimidation.
2. Rules concerning poll workers should be modified to facilitate a larger and more qualified pool of poll volunteers, including active recruitment of volunteers who are familiar with digital technology. For example, removing requirements that poll workers staff the polls for an entire day might enable more students and persons who work part-time to assist at the polls.
3. State and local governments, as well as civic groups and political parties, should take active steps to advise the public of basic voting procedures, including information on the times and places of elections.
4. The Department of Justice should remain actively involved in, and devote adequate resources to, the investigation of voter fraud and voter intimidation.
5. States should improve public confidence that votes will be counted accurately by a) ensuring that all voting machines are accurate and tamper-proof and b) creating a physical record of votes and employing a voter-verified paper audit trail.
6. States need to ensure that HAVA is properly enforced and take special precautions to make sure that all voter registration forms are accounted for and that voter registration rolls are as up-to-date as possible by taking steps such as: (i) assigning each registration form and its receipt with a unique number that can be tracked; (ii) requiring that forms be returned within 14 days after they have been signed; (iii) prohibiting third-party organizations from paying for voter registrations by the piece; and (iv) making their best effort to coordinate voting information with such materials as death records, drivers' licenses, jury duty responses, and local tax rolls. Where possible, states should also coordinate their voter registration data with the voter registration and other data available from other states.
7. There are a number of proposals pending in Congress that purport to deal with the problem of voter intimidation or voter fraud. In order to prevent voter intimidation or voter fraud, Congress should pass legislation to strengthen or improve prohibitions against intentional voter deception, intimidation, and voter fraud. Any legislative proposal should treat both problems in tandem if those proposals are to have the intended effect of promoting electoral reform and restoring confidence in the electoral process.

8. Prior to an election, appropriate authority should be put into place for the standards for conducting voting in the event of voting machine malfunctions, and instruction should be provided as to the proper use of provisional ballots.

9. States should adopt a photo identification requirement for both registration and voting by, for example, requiring all citizens who register to vote with a mail-in form where the form is actually sent by mail or hand delivered to provide proof of their identity with their registration application or when they appear at the polling station. Such a requirement would increase voter confidence, deter fraud and extend to the voting process the same security commonly required to board a flight or enter many federal buildings.

10 To avoid unnecessary barriers to voting, any required photo identification should be provided without cost to the indigent, and active outreach should be made to register and qualify those who are currently without such identification. Those without photo identification should be allowed to vote by provisional ballot.

11. To address the special challenges posed by absentee ballots, states should adopt requirements that voters' signatures on the absentee ballots be matched with a digitalized version of the signature maintained by election officials.

DISSENTING STATEMENT OF COMMISSIONER MELENDEZ

The Commission's process for assembling this and other such "briefing reports" is broken. Hard fact-finding has been replaced by either a repetition of problems and solutions already in the public sphere, or else speculative, unsupported policy statements.

Readers will see that some of the findings and recommendations in this report are sound, uncontroversial, and repeat the established views of most nonprofits and government entities. General recommendations about more training for poll workers or the Department of Justice enforcing the law, however true and important, lack the specificity or creativity needed to galvanize change.

On the other hand, this report contains characterizations of and recommendations about voter fraud that are not widely held views and were not established by our agency's briefing. Most experts believe that in-person voter fraud has not been proven to be a significant problem and that proposals to require photo identification at the ballot box may create far greater problems than they solve.

Both practices—repetition of the already established and unsupported policy assertions—result from the Commission's failure to conduct a new, thorough, independent investigation. Without such serious fact-finding, the only sources for Commission reports are a smattering of news articles and published reports, the opinions of a few experts selected for their opposing views rather than their ability to present a full inquiry into the matter, and the personal opinions of Commission staff and Commissioners. This is unacceptable. The Commission should itself be talking with complainants, collecting data in the field, analyzing claims, and making findings and recommendations based on new facts rather than re-announcing as its own a slice of what is already in the public sphere. The mission of this agency requires more thorough, higher-quality work.

I find this report's assertions about the need for voter identification requirements irresponsible given the lack of evidence that there is significant in-person voter fraud and poignant evidence that identification requirements will disfranchise eligible elderly, poor, and minority voters. I also note with concern the report's failure to investigate or recommend specific measures to protect individuals who become targets of voter intimidation and deception because of their race, color, or national origin.

A more complete description follows of my objections to the substantive positions this report takes with respect to voter fraud, as well as an explanation of the flawed process used in developing the report.

Unfounded Findings and Recommendations on Voter Fraud

The Commission's lack of fact-finding and the unbalanced perspectives of its contributors are prominent in several findings and recommendations about voter fraud in this report. The Commission majority asserts that voter fraud seriously weakens our political system (Finding 2), that no Congressional action should be taken to combat

voter intimidation unless it also addresses voter fraud (Recommendation 7), and that all states should adopt a photo identification requirement for voting (Recommendation 9). Such assertions, unfortunately, are unsupported by the record and merely repeat politically-charged allegations.

It is common knowledge that Congressional and state Republicans have repeatedly stated that voter fraud is a grave problem and called for strict voter identification laws. Meanwhile, their Democratic counterparts have voiced concern that such laws will not stop the main types of fraud but could prevent elderly, Native American, indigent, and other eligible voters less likely to have official photo identification from having their votes counted. The Indiana Democratic Party, in fact, was one of the parties that recently challenged that state's identification requirement and Federal Circuit Judges Posner⁸⁰ and Evans⁸¹ wrote bluntly about the partisan implications of such a voter identification law. Perhaps, then, it won't surprise many that all six of the Commission's Republican-appointed Commissioners now say that voter fraud "seriously weakens" our political system, while I and my Democrat-appointed colleague reject this notion.

Often lost in the partisanship around this issue, however, are the facts. It is to those facts that I hope readers will turn in discerning the truth about this highly politicized issue of voter fraud.

Voting rights experts of all stripes agree there is hardly any evidence in the United States of the kind of in-person voter fraud that photo identifications is meant to stop. Some, such as the two conservative speakers invited to the Commission briefing, claim that there "must be" such fraud and it just hasn't been adequately investigated or discovered. Some, such as the moderate speaker at our briefing who helped develop the bipartisan Carter-Baker report, say that while there is little evidence of voter fraud, as a matter of political compromise any electoral reform must address this issue. Some, such as the lone progressive speaker who appeared before the Commission, think that problems like increasing voter turnout and addressing voter intimidation demand attention first. But no one can point to substantial evidence of in-person voter fraud or provide data showing it is a serious national problem. Our briefing did nothing to change this. In fact, there is little evidence that voter fraud of any kind constitutes a serious national problem, as my Republican-appointed colleagues have themselves stated more recently.⁸² On the contrary, the few reports and investigations of voter fraud launched in the last decade

⁸⁰ See *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007) ("No doubt most people who don't have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates.").

⁸¹ See *id.* at 954 ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

⁸² Commissioners Thernstrom and Gaziano, both of whom voted for this report's finding that voter fraud "seriously weakens our political system," recently acknowledged that there is little or no data available establishing the extent of voter fraud. See U.S. Commission on Civil Rights, *Transcript of June 6, 2008 Proceedings* at pgs. 49-50, 67.

have mostly evaporated upon serious scrutiny.⁸³ While any instance of voter fraud must be condemned and seriously redressed, we do a disservice to overstate the threat that fraud—particularly “in-person” voter fraud—poses compared to other barriers to participation in our voting system.

In the absence of evidence that “in-person” voter fraud is a serious problem, I am concerned that calling for voter identification requirements will *not* stop *ineligible* voters but *will* stop *eligible* voters from having their vote counted.

In the wake of the Supreme Court’s ruling allowing the Indiana legislature to try out a voter identification law, there will be intense scrutiny of whether *implementation* of that and similar laws results in excessive burdens on a class of voters. Six Justices signaled that they could revisit and strike down the Indiana voter identification law if in practice it results in denial of an equal opportunity to participate in the election process per Section 2 or has the purpose or effect of discriminating against minorities in Section 5 jurisdictions under the Voting Rights Act of 1965. Objective, independent investigations (apparently, by someone other than our agency) will have to be done to determine whether these new voter identification laws specially burden classes of voters as implemented. However, based on what I have heard, I am very concerned that the implementation of such voter identification laws already is disenfranchising some eligible voters.

I am most familiar with how Native Americans can be specially burdened by voter identification laws because they live in rural areas, may not speak English, or may not even have birth records necessary to get photo identification. The 2006 experience of an elderly Navajo woman, Agnes Laughter, is particularly moving and informative of the problems with identification requirements. Agnes made a long journey from her reservation home to the Chilchinbeto Chapter House. She was greeted there in her Navajo language by people who knew her. But because she did not have the identification required by Arizona, she was only given a provisional ballot and told to return in three days. She protested that she simply could not obtain the necessary identification in such time and lacked transportation, but she was never given a regular ballot and never made any choices for her leaders. An affidavit further describing what happened to Agnes is attached to this statement. How many elders are effectively disfranchised by such voter identification laws in Native and minority communities? Are we willing to risk disfranchising eligible voters when we aren’t sure the barrier of voter identification laws is *necessary*?

The Commission did not use its authority to investigate whether in-person voter fraud is a significant problem or whether mandating the use of photo identification at polling places would do more harm than good. Instead, the Commission majority has referred to unspecified allegations of voter fraud and issued findings and recommendations without first establishing a factual basis. More than a missed opportunity, I fear that the

⁸³ See, e.g., Justin Levitt, *The Truth About Voter Fraud*, The Brennan Center For Justice, 2007 (available online at http://www.brennancenter.org/content/resource/policy_brief_on_the_truth_about_voter_fraud/) (analyzing the underlying causes and specific examples of misperception of voter fraud).

Commission majority's recommendation to require voter identification could lead to the disfranchisement of more minority voters like Agnes, whose civil rights this body was supposed to protect.

The Commission's Flawed Project Reporting Process

Readers should understand that the Commission's new process for generating this and other briefing reports does not ensure quality, objectivity, or comprehensiveness. It is no surprise that our reports sometimes are inadequately supported, incomplete, or biased given the way reports are assembled. The findings and recommendations in these briefing reports do not involve new, independent fact finding and do not necessarily reflect even the consensus view on known facts. I suggest anyone using the Commission's briefing reports seriously consider whether the Commission's means of producing Presidential and Congressional findings and recommendations deserve the same weight as compared to other investigative bodies like the General Accountability Office (GAO) or the National Academy of Sciences (NAS):

- Topics of agency briefings are selected by their general interest to Commissioners and, almost without exception, are not based on specific complaints of discrimination received by the agency. Preparation for briefings involves staff (career and political) selection of speakers in a manner that is intended to provide numerically "balanced" representation of different viewpoints, regardless of prevailing expert or public opinion on the matter. Staff preparation also includes producing a "briefing book" for Commissioners with a range of publicly available materials on the topic that is distributed a few days before the briefing.
- Briefings themselves consist of a morning discussion between attending Commissioners and three to eight invited speakers who are willing and able to appear for free. The agency has not subpoenaed witnesses or records in over four years, and only once in that time have Commissioners met outside our Washington DC headquarters. Speakers invited to the briefing share their prepared testimony then answer questions.
- Commission staff (career and political) then prepare a draft report with findings and recommendations based on the meeting record and their expectation of what the majority of Commissioners will approve. There are some subsequent quality checks on draft briefing reports. However a recent decision by the Commission majority reduced the quality reviews required for draft briefing reports below what is required for other agency publications. Commissioners and their personal staff (for those few Commissioners allotted staff) review the final draft they are presented and, relying on their experiences and background, vote out the final report language.
- At no point in this process is there investigation to follow-up on claims made by briefing speakers. There is no consultation with the briefing speakers, experts, or other government agencies about proposed findings or recommendations. There is no external (let alone peer) review required for the substance of briefing report findings or recommendations, and unclear guidelines for internal editorial reviews. Unlike other reports there is no requirement that invited briefing speakers, as a whole, have expertise sufficient to offer a full inquiry into the topic.

In my opinion such a report process at best repeats common wisdom or publicly amplifies the expertise and viewpoints of the few invited speakers, staff, and Commissioners. But, the information provided to the Commission is not necessarily representative of expert or public views. (At worst, the process lets the unbalanced views of only a few speakers and Commissioners through, with inadequate checks on quality.) This is not to say that the Commission's briefing reports do not have some benefit, but their value is greatly constrained by the agency's lack of new, independent fact finding, few contributors, and abbreviated quality-review process. Unfortunately, the Commission majority continues to rely almost exclusively on briefing reports such as this one to fulfill its statutory mandate to collect, study, and disperse information about civil rights violations.

This briefing report on Voter Fraud and Intimidation is no exception to this flawed process. The experiences of individual voters, election officials, and prosecutors were not heard firsthand. As is typical, the agency here did no systematic or new, independent research to determine the frequency or extent of in-person voter fraud or the effectiveness of voter identification laws. Instead it heard only from four invited speakers. Federal and state agencies that routinely oversee and investigate aspects of the issue (here the Department of Justice and the Federal Election Commission) were never consulted. There can be no comparison between the scope of our briefing report and the much more comprehensive analysis already published by the Commission on Federal Election Reform (commonly known as the Carter-Baker Commission).⁸⁴ Indeed, our agency did not adequately consider its own past letters, reports, and the work of its state affiliates who described problems of voter intimidation that are not reflected in the report findings and recommendations. The result is an incomplete report that is a mix of unsupported assertions and common knowledge.

The right to vote freely is the core of our democracy, the greatest of our civil rights. While the Commission did no new, on-the-ground fact finding to determine the extent of voter fraud and voter intimidation, I hope the Commission may again take on such work in the future. Our country can and must increase voter confidence, access, and interest in the electoral process.

Attachments: 10/02/06 Affidavit of Agnes Laughter
12/12/06 Affidavit of Agnes Laughter

⁸⁴ The Commission's website, containing its thorough report on election reform, is available online at: <http://american.edu/ia/cfer/>.

AFFIDAVIT OF AGNES LAUGHTER

STATE OF ARIZONA) ss)
COUNTY OF NAVAJO)

I, Agnes Laughter, declare and state as follows:

1. I have personal knowledge of the facts stated below.
2. I am registered and eligible to vote in Arizona Elections. My voter register number is 483.
3. On September 12, 2006, I went to the polling precinct located at the Chilchinbeto Chapter House to cast my ballot in the Primary Elections.
4. When I entered the seventy-five feet voting area, I was immediately greeted by two poll officials. These poll officials asked me if I had identification. I told them "no." They seemed puzzled. Then I told them in Navajo that "I am here standing before you. Am I not proof enough that I am a human being here to vote?" They had no answer for me. The poll officials told me that I had to wait outside of the building while they went inside the building to speak with someone. After approximately five minutes of waiting outside, the poll officials returned and told me that I had permission to enter the Chilchinbeto Chapter House which was the polling place for the Primary Election.
5. Upon entering the Chilchinbeto Chapter House, I was directed in Navajo to the first station. I was greeted by Mary Yazzie who greeted me in Navajo as her older sister. We are related through our maternal clan, Red-Running-Into-The-Water Clan. I was also greeted by another poll official but I did not remember her name, but I know she is from the community. I was asked to sign my name on the voter roll. I do not read or write or speak English. Instead of signing the roll with a signature, I signed with my thumbprint. I was assigned number 483 and was given a yellow paper with that number listed on it. I was instructed to go to another station. I was told in Navajo that this station was the conditional provisional balloting area. I was asked by the poll workers at this station whether I had identification. I told them "no." The poll workers then filled out a form, which was affidavit number 3202, and told me to sign it. The purpose of the form was never explained to me. But because I did not read or write or speak English, I used my thumbprint again to sign the document. I was told to sign it even though I did not what was on the form because it was not explained to me. In Navajo, the poll workers took away the paper that I put my thumbprint on and told me to return in three days to bring an identification so I can vote. In response, I told the poll workers in Navajo mat I do not have identification and that I would be unable to bring identification within three days. The poll workers then told me, "well just go to the hospital in Kayenta and get a medical record and we would consider this for you as well." I then told them that I have difficulty in obtaining transportation. They then told me to just try and bring something back. I told them that I may not be able to bring something back. The poll workers then told me to

just walk outside. I took with me the yellow paper I was given at the first table. All of the communications that I had with the poll workers were conducted in the Navajo language.

6. At no time was I given a ballot during the September 12, 2006 Primary Elections.

7. At no time did I make any choices for who I wanted to be my leaders on September 12, 2006 Primary Election.

8. I feel that the voter identification requirement denies me the right to vote when my identity can be easily determined by Navajo people working at the polls.

9. I have been told that the Navajo County officials have noted that I voted and that my ballot was counted. I do not understand how the County's records can so reflect as I never received or completed a ballot. I did receive affidavit number 3202 and I made my mark on the document in English provided to me, but the form was not filled out by me. The document was filled out by the poll officials, and I received no interpretation about the purpose of this document. Nor did I provide any identification to the poll workers or County officials either on the primary election day or the three days thereafter. Nor did I make any choices for who I wanted to be my leaders on the primary election day or the three days thereafter.

10. I am concerned that I will not be able to cast a ballot in the General Election.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

By:
Agnes Laughter

SUBSCRIBED AND SWORN TO before me, by Agnes Laughter, this 2nd day of October, 2006.

OFFICIAL SEAL

JAYME PLATERO
NOTARY PUBLIC - State of Arizona
APACHE COUNTY

My Commission Expires July 20, 2009

AFFIDAVIT OF AGNES LAUGHTER

STATE OF ARIZONA) ss)
COUNTY OF NAVAJO)

I, Agnes Laughter, declare and state as follows:

- 1. I have personal knowledge of the facts stated below.
- 2. I am registered and eligible to vote in Arizona Elections.
- 3. I did not vote on November 7, 2006, Election Day, because I was so afraid to be turned away at the polls. I did not want to be left in that embarrassing moment as I experienced on September 12, 2006. On September 12, 2006, I was not given a ballot.
- 4. Even before that day, November 7, 2006, my restless came in my sleep and the restlessness I am talking about is the fear of being rejected again.
- 5. When Election Day came, my family and relatives departed to vote in this election. As I pondered this opportunity for them, I felt so alone knowing that these opportunities are not available to me because I do not have identification to vote. It is my hope that some day the doors will open for me to experience the opportunity of voting without the fear of being rejected again.

I declare under penalty of perjury under the that the foregoing is true and correct.

By:
Agnes Laughter

SUBSCRIBED AND SWORN TO before me, by Agnes Laughter, this 12th day of December, 2006.

OFFICIAL SEAL

JAYME PLATERO
NOTARY PUBLIC - State of Arizona
APACHE COUNTY

My Commission Expires July 20, 2009

DISSENTING STATEMENT OF COMMISSIONER MICHAEL YAKI

I join in Commission Melendez' dissenting statement and wish to add a few words of my own.

It must be emphasized, over and over again, that despite multiple instances of testimony before the Commission and before the Congress there is not a single documented instance of voter fraud being prosecuted. Indeed, identification has been one of the single most documented means of racial profiling of voters. The Asian American Legal Defense and Education Fund conducted exit polls during the 2004 presidential election in various localities, and even though most jurisdictions did NOT have an identification requirement, over two-thirds (2/3) of New York and New Jersey Asian-American voters were required to show identification.⁸⁵

On the other hand, there are numerous examples, cited before the Commission, before the Congress, and in pleadings filed by the Department of Justice, showing instances of voter intimidation and suppression among minority communities in our nation.

In 2004 there were documented instances of voter harassment by individuals videotaping the license plates of Mexican Americans as they went to vote. According to one witness "it is very intimidating...to be videotaped and to have their license plates videotaped by Anglos standing outside the polling place."⁸⁶

In one report on Midwestern states, there were allegations made in 10 out of the 14 states involving false information about election timing or voter qualifications; aggressive challenging of voters at the polls; unduly restrictive and illegal identification requirements announced by election officials; and rudeness to minorities by election workers.⁸⁷

These examples I cite are but a tip of the intimidation iceberg that lurks in the waters of the American voting system. To state that enforcement of voter fraud should receive equal treatment (and, I presume, resources) is to make a mockery of a real problem and elevate a false one. It would divert badly needed and scarce resources to chase a phantom that does not exist. Which, I am sure, is exactly what the conservative right wishes to do with the scarce funding given to the Justice Department.

The franchise is a constitutional privilege given to every citizen of this country. It is the building block of the great American experiment of democracy that has been a beacon of hope to the world for over two centuries. Rather than throw obstacles such as untested, ill-conceived voter identification requirements in the way of our citizenry, particularly new Americans, we should be doing everything we can to encourage participation in our democracy.

⁸⁵ Highlights of Hearings of the National Commission On the Voting Rights Act 2005, a report by the National Commission on the Voting Rights Act, February 2006, p. 21.

⁸⁶ *Id.* at 15.

⁸⁷ *Id.* at 27.

In a recent briefing before the Commission regarding the readiness and ability of the Justice Department's efforts to prepare for instances of voter intimidation and other means of chicanery that could influence the November Presidential election, one of the witnesses from the Justice Department stated:

"Another criteria that we have used in the past is that in local elections involving minority candidates and white candidates, many times that kind of black, white, Hispanic, anglo contests will create antagonisms, frictions, tensions in a community and we would weigh that kind of evidence to determine whether or not observers or monitors would be sent . . .

"we should be mindful of the fact that there have been jurisdictions in the past where bi-racial contests have caused some frictions and tensions, be mindful of that and that will be something that we will be looking at along with other factors in making determinations about what we should do in 2008."

In a few short months, this nation will have an historic opportunity to vote in a Presidential election that involves an African-American candidate for President. Of all the elections in the history of this country since the passage of the 1965 Voting Rights Act, if there's any election for which the Act and the Justice Department cannot fail us in any way, shape or form it is this election. If, as the Justice Department has noted, the presence of an African American in an election is a factor in determining resource allocation, then surely the presence of an African American running for the highest office in the land mandates the highest level of resources, vigilance, and integrity.

In this historic election, there cannot be any doubt, there cannot be any barrier, to voting. For the African-American community, for the entire nation, there cannot be any second-guessing about the Justice Department's efforts to eradicate intimidation, to rectify errors, to ensure to the highest degree the legitimacy of this election. Simply put, we cannot, we must not, fail.

Dr. Robert A. Pastor
Director, Center for Democracy and Election Management
Executive Director, Commission on Federal Election Reform
American University
Washington, D.C.

Impediments to a Free and Fair Electoral Process:
The Urgency for Reform

Members of the Commission, it is an honor to be asked to testify before you on the issues of voter fraud and intimidation in the context of broader election reform. The right to vote is the fundamental bedrock of democracy, and we need to continuously monitor the electoral process to ensure that right is protected and expanded.

As a word of introduction, I have spent the last two decades promoting the expansion and deepening of democracy in the United States and throughout the world. At The Carter Center from 1985-2000, I worked with former President Jimmy Carter to develop techniques of election observation and mediation, which we applied in more than 30 countries, including the United States. In 1992, I organized a group from Mexico to observe the U.S. presidential elections, and discovered - to my dismay - that the U.S. election system would score poorly on any assessment as compared even to new democracies in poor countries. Indeed, in the year 2000, I organized the observation of elections in Mexico and the United States, and Mexico's was judged by a fleet of international and domestic observers as superb. A similar conclusion did not emerge from an assessment of the U.S. election. After that, I worked with Presidents Carter and Gerald Ford on the National Commission on Federal Election Reform, and that report, issued in August 2001, helped shape the historic "Help America Vote Act (HAVA)."

In 2002, I established and continue to direct the Center for Democracy and Election Management (CDEM) at American University where I also am Vice President of International Affairs and a Professor. Under the auspices of the Center, I organized a small observation mission in Washington, D.C., Virginia, and Maryland. Our conclusions coincided with those of many other groups: HAVA was not enough. Under AU's Center, I invited former President Carter and former Secretary of State James A. Baker, III to co-chair the Commission on Federal Election Reform. Joined by 21 other distinguished Americans, the Commission recommended 87 proposals aimed at re-building the electoral system and America's confidence in it. I served as both a member and Executive Director of the Commission, which issued its report in September 2005. Today, I would like to summarize the report and use excerpts from it to address your questions about fraud and intimidation.⁸⁸

Regrettably, Congress, the President, and state governments have made almost no progress toward implementing the reforms needed to secure the 2006 election. The subject of your hearing today demonstrates why and also what we on the Commission

⁸⁸ The full report of the Commission on Federal Election Reform is available at:
http://www.american.edu/ia/cfer/report/full_report.pdf

tried to do. For many Republicans, the principal problem is electoral fraud and, for many Democrats, the issue is voter intimidation and the impediments to voting. This division has played out recently with Republicans believing that “voter ID” is the solution to fraud, and Democrats believing that, by denying access, it is the problem. For our Commission, which was roughly divided between Republicans, Democrats, and independents, it was imperative to respond fully to concerns with both integrity and access, and we tried to structure a set of recommendations accordingly. As long as one party tries to pass legislation that responds to only one set of concerns, true electoral reform will remain elusive, and confidence in the electoral process will not return.

In the course of observing elections all over the world, I have seen crude efforts to manipulate elections and intimidate voters on a national scale. Fortunately, this does not occur in the United States, and one reason is that our system is so decentralized that it is impossible to manipulate the electoral system nationally. Indeed, it is hard to persuade the states to accept uniform requirements that Congress has mandated.

There is some fraud and intimidation in U.S. elections, and the perception may be growing – albeit from each group - that each problem is getting worse. Any fraud and intimidation represent egregious assaults on our democracy, and we need to take steps to stop both, but we also need to recognize that we face a wider range of election-related problems. We need to establish nonpartisan, autonomous professional election administration. We need paper audits and electronic security, and more accurate, up-to-date, and interoperable registration lists. We need to undertake all these reforms to build greater confidence in elections.

EXPANDING ACCESS TO ELECTIONS

The vitality of America’s democracy depends on the active participation of our citizens. Yet, even in the presidential election in 2004, when voter interest was higher than normal, more than one in three eligible voters did not participate. We need to do more to increase voter participation, and the Commission considered numerous methods. None of them will solve the problem, but we encourage states to experiment with alternatives to raise the level of voter participation.

Recent elections have seen a substantial increase in early voting and in voting by mail. While only 8 percent of ballots were cast before Election Day in 1994, by 2004 the percentage of ballots cast before Election Day had risen to 22 percent. This increase in early and convenience voting has had little impact on voter turnout, because citizens who vote early or by mail tend to vote anyway.⁸⁹ Early and convenience voting are popular, but there is little evidence that they will significantly expand participation in elections.⁹⁰

⁸⁹ Curtis Gans, "Making it Easier Doesn't Work: No Excuse Absentee and Early Voting Hurt Voter Turnout," Center for the Study of the American Electorate, September 13, 2004, available at http://www.american.edu/ia/cfer/research/csae_09132004.pdf.

⁹⁰ Testimony before the Commission by Robert Stein, Dean of Social Sciences at Rice University, June 30, 2005.

There are other measures that can be taken to expand participation, particularly for military and overseas voters and for citizens with disabilities. There is also much to do with regard to civic and voter education that could have a long-term and lasting effect, particularly on young people. However, we first need to reach out to all eligible voters and remove any impediments to their participation created by the registration process or by identification requirements.

All citizens, including citizens with disabilities, need to have access to polling places. Polling places should be located in public buildings and other semipublic venues such as churches and community centers that comply with the Americans with Disabilities Act (ADA). Additionally, polling places should be located and protected so that voters can participate free of intimidation and harassment. Polling places should not be located in a candidate's headquarters or in homes or business establishments that are not appropriately accessible to voters with disabilities.

Recommendations on Improving Access to Elections

1. States should undertake their best efforts to make voter registration and ID accessible and available to all eligible citizens, including Americans with disabilities. States should also remove all unfair impediments to voter registration by eligible citizens.
2. States should improve procedures for voter registration efforts that are not conducted by election officials. Because there have been reports that some people did not deliver registration forms of those who expressed a preference for another party, states need to take special precautions to assure that all voter registration forms are fully accounted for. A unique number should be printed on the registration form and also on a detachable receipt so that the voter and the state election office can track the status of the form.⁹¹ In addition, voter registration forms should be returned within 14 days after they are signed.
3. States should modify current election law to allow experimentation with voting centers. More research, however, is needed to assess whether voting centers expand voter participation and are cost effective. Voting centers need a higher quality, computer-based registration list to assure that citizens can vote at any center without being able to vote more than once.
4. To improve accessibility of polling places for voters with disabilities, the U.S. Department of Justice should improve its enforcement of the Americans with Disabilities Act and the accessibility requirements set by the Help America Vote Act.
5. States should make their voter registration databases interoperable with social-service agency databases and facilitate voter registration at social-service offices by citizens with disabilities.

⁹¹ Balancing Access and Integrity: The Report of the Century Foundation Working Group on State Implementation of Election Reform (N.Y. the Century Foundation Press, 2005), pp. 25-26.

6. States and local jurisdictions should allow voters with disabilities to request an absentee ballot when they register and to receive an absentee ballot automatically for every subsequent election. Local election officials should determine which voters with disabilities would qualify.

7. States should allow for restoration of voting rights to otherwise eligible citizens who have been convicted of a felony (other than for a capital crime or one which requires enrollment with an offender registry for sex crimes) once they have fully served their sentence, including any term of probation or parole. States should provide information on voter registration to ex-felons who have become eligible to vote. In addition, each state's department of corrections should automatically notify the state election office when a felon has regained eligibility to vote.

8. States should engage in appropriate voter education efforts in coordination with local election authorities to assure that all citizens in their state have the information necessary to participate in the election process. The federal government should provide matching funds for the states to encourage civic and voter education and advertisements aimed to encourage people to vote.

Improving Ballot Integrity

Because the integrity of the ballot is a hallmark of democracy, it is imperative that election officials guarantee eligible voters the opportunity to vote, but only once, and tabulate ballots in an accurate and fair manner.

While election fraud is difficult to measure, it occurs. The U.S. Department of Justice has launched more than 180 investigations into election fraud since October 2002. These investigations have resulted in charges for multiple voting, providing false information on their felon status, and other offenses against 89 individuals and in convictions of 52 individuals. The convictions related to a variety of election fraud offenses, from vote buying to submitting false voter registration information and voting-related offenses by non-citizens.⁹²

In addition to the federal investigations, state attorneys general and local prosecutors handle cases of election fraud. Other cases are never pursued because of the difficulty in obtaining sufficient evidence for prosecution or because of the low priority given to such cases. One district attorney, for example, explained that he did not pursue allegations of fraudulent voter registration because it is a victimless and nonviolent crime.⁹³

Election fraud usually attracts public attention and comes under investigation only in close elections. Courts may only overturn an election result if there is proof that the number of irregular or fraudulent votes exceeded the margin of victory. When there is a

⁹² U.S. Department of Justice press release, "Department of Justice to Hold Ballot Access and Voting Integrity Symposium," August 2, 2005.

⁹³ U.S. Government Accountability Office, Elections: Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists, GAO-05-478, June 2005, pp. 59-60.

wide margin, the losing candidate rarely presses for an investigation. Fraud in any degree and in any circumstance is subversive to the electoral process. The best way to maintain ballot integrity is to investigate all credible allegations of election fraud and otherwise prevent fraud before it can affect an election.

Investigation and prosecution of election fraud should include those acts committed by individuals, including election officials, poll workers, volunteers, challengers or other nonvoters associated with the administration of elections, and not just fraud by voters.

Recommendations on Investigation and Prosecution of Election Fraud

1. The U.S. Department of Justice should issue a public report on its investigations of election fraud that should specify the numbers of allegations made, matters investigated, cases prosecuted, and individuals convicted for various crimes. Each state's attorney general and each local prosecutor should issue a similar report.
2. The U.S. Department of Justice's Office of Public Integrity should increase its staff to investigate and prosecute election-related fraud.
3. In addition to the penalties set by the Voting Rights Act, it should be a federal felony for any individual, group of individuals, or organization to engage in any act of violence, property destruction (of more than \$500 value), or threatened act of violence that is intended to deny any individual his or her lawful right to vote or to participate in a federal election.
4. To deter systemic efforts to deceive or intimidate voters, the Commission recommends federal legislation to prohibit any individual or group from deliberately providing the public with incorrect information about election procedures for the purpose of preventing voters from going to the polls.

ABSENTEE BALLOT AND VOTER REGISTRATION FRAUD

Fraud occurs in several ways. Absentee ballots remain the largest source of potential voter fraud.⁹⁴ A notorious recent case of absentee ballot fraud was Miami's mayoral election of 1998, and in that case, the judge declared the election fraudulent and called for a new election. Absentee balloting is vulnerable to abuse in several ways: Blank ballots mailed to the wrong address or to large residential buildings might get intercepted. Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation. Vote-buying schemes are far more difficult to detect when citizens vote by mail. States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting "third-party" organizations, candidates, and political party activists from handling absentee ballots. States also should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted.

⁹⁴ Balancing Access and Integrity: The Report of the Century Foundation Working Group on State Implementation of Election Reform (N.Y. the Century Foundation Press, 2005), pp. 67-69.

Non-citizens have registered to vote in several recent elections. Following a disputed 1996 congressional election in California, the Committee on House Oversight found 784 invalid votes from individuals who had registered illegally. In 2000, random checks by the Honolulu city clerk's office found about 200 registered voters who had admitted they were not U.S. citizens.⁹⁵ In 2004, at least 35 foreign citizens applied for or received voter cards in Harris County, Texas, and non-citizens were found on the voter registration lists in Maryland as well.⁹⁶

The growth of "third-party" (unofficial) voter registration drives in recent elections has led to a rise in reports of voter registration fraud. While media attention focused on reports of fraudulent voter registrations with the names of cartoon characters and dead people, officials in 10 states investigated accusations of voter registration fraud stemming from elections in 2004 and, between October 2002 and July 2005, the U.S. prosecuted 19 people charged with voter registration fraud.⁹⁷ Many of these were submitted by third-party organizations, often by individuals who were paid by the piece to register voters.

States should consider new legislation to minimize fraud in voter registration, particularly to prevent abuse by third-party organizations that pay for voter registration by the piece. Election offices should check the identity of individuals registered through third-party voter registration drives and to track the voter registration forms.

HAVA requires citizens who register by mail to vote in a state for the first time to provide an ID when they register or when they vote. Some states have interpreted this requirement to apply only to voter registration forms sent to election offices by mail, not to forms delivered by third-party organizations. As a result, neither the identity nor the actual existence of applicants is verified. All citizens who register to vote with a mail-in form, whether that form is actually sent by mail or is instead hand-delivered, should comply with HAVA's requirements or with state requirements on voter ID, by providing proof of identity either with their registration application or when they appear at the polling station. In this way, election offices will be obliged to verify the identity of every citizen who registers to vote, whether or not the registration occurs in person.

⁹⁵ John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (San Francisco: Encounter Books, 2004), p. 103.

⁹⁶ Joe Stinebaker, "Loophole lets foreigners illegally vote," *Houston Chronicle*, January 16, 2005, and Robert Redding, "Purging illegal aliens from voter rolls not easy: Maryland thwarted in tries so far," *Washington Times*, August 23, 2004.

⁹⁷ Susan Greene and Karen E. Crummy, "Vote Fraud Probed In State," *Denver Post*, March 24, 2005; Brendan Farrington, "Fla. Officials Asked To Probe Vote Fraud," Associated Press, October 7, 2004; Dawson Bell, "Campaign Workers Suspected Of Fraud," *Detroit Free Press*, September 23, 2004; "Man Pleads Guilty In Voter Registration Scam," Associated Press, December 7, 2004; Robert Patrick, "Jury Finds Montgomery Guilty In Vote Fraud Case," *St. Louis Post-Dispatch*, February 11, 2005; Nevada Secretary Of State, "Alleged Vote Fraud Investigations Ongoing," Press Release, October 28, 2004; Dan McKay, "Election 'Mischief' Under Scrutiny," *Albuquerque Journal*, September 10, 2004; "Voter Registration Investigation One Of Largest In Recent Years," Associated Press, September 23, 2004; Greg J. Borowski, "Inquiry Finds Evidence Of Fraud In Election," *Milwaukee Journal Sentinel*, May 11, 2005; U.S. Department of Justice, Criminal Division, Public Integrity Section, *Election Fraud Prosecutions and Convictions: Ballot Access & Voting Integrity Initiative*, October 2002 - July, 2005.

In addition, states should introduce measures to track voter registration forms that are handled by third-party organizations. By assigning a serial number to all forms, election officials will be able to track the forms. This, in turn, will help in any investigations and prosecutions and thus will serve to deter voter registration fraud.

Many states allow the representatives of candidates or political parties to challenge a person's eligibility to register or vote or to challenge an inaccurate name on a voter roll. This practice of challenges may contribute to ballot integrity, but it can have the effect of intimidating eligible voters, preventing them from casting their ballot, or otherwise disrupting the voting process. New procedures are needed to protect voters from intimidating tactics while also offering opportunities to keep the registration rolls accurate, and to provide observers with meaningful opportunities to monitor the conduct of the election. States should define clear procedures for challenges, which should mainly be raised and resolved before the deadline for voter registration. After that, challengers will need to defend their late actions. On Election Day, they should direct their concerns to poll workers, not to voters directly, and should in no way interfere with the smooth operation of the polling station.

Recommendations on Absentee Ballot and Voter Registration Fraud

1. State and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials. The practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated.
2. All states should consider passing legislation that attempts to minimize the fraud that has resulted from "payment by the piece" to anyone in exchange for their efforts in voter registration, absentee ballot, or signature collection.
3. States should not take actions that discourage legal voter registration or get-out-the-vote activities or assistance, including assistance to voters who are not required to vote in person under federal law.

Identification and Access

A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own apartment building let alone their precinct, some form of identification is needed.

The voter identification requirements introduced by HAVA are modest, but after HAVA was enacted, efforts grew in the states to strengthen voter identification requirements. While 11 states required voter ID in 2001, 26 states now require voters to present an ID at

the polls.⁹⁸ In addition, bills to introduce or strengthen voter ID requirements are under consideration in as many as 12 other states.⁹⁹

Our Commission was concerned that the different approaches to identification cards might prove to be a serious impediment to voting. There are two broad alternatives to this decentralized and unequal approach to identification cards. First, we could recommend eliminating any requirements for an ID because the evidence of multiple voting is thin, and ID requirements, as some have argued, are "a solution in search of a problem." Alternatively, we could recommend a single national voting identification card. We considered but rejected both alternatives.

We rejected the first option — eliminating any requirements — because we believe that citizens should identify themselves as the correct person on the registration list when they vote. While the Commission is divided on the magnitude of voter fraud — with some believing the problem is widespread and others believing that it is minor — there is no doubt that it occurs. The problem, however, is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference. And second, the perception of possible fraud contributes to low confidence in the system. A good ID system could deter, detect, or eliminate several potential avenues of fraud — such as multiple voting or voting by individuals using the identities of others or those who are deceased — and thus it can enhance confidence. We view the other concerns about IDs — that they could disenfranchise eligible voters, have an adverse effect on minorities, or be used to monitor behavior — as serious and legitimate, and our proposal below aims to address each concern.

We rejected the second option of a national voting identification card because of the expense and our judgment that if these cards were only used for each election, voters would forget or lose them.

We therefore propose an alternative path. Instead of creating a new card, the Commission recommends that states use "REAL ID" cards for voting purposes. The REAL ID Act, signed into law in May 2005, requires states to verify each individual's full legal name, date of birth, address, Social Security number, and U.S. citizenship before the individual is issued a driver's license or personal ID card. The REAL ID is a logical vehicle because the National Voter Registration Act established a connection between obtaining a driver's license and registering to vote. The REAL ID card adds two critical elements for voting — proof of citizenship and verification by using the full Social Security number.

The REAL ID Act does not require that the card indicate citizenship, but that would need to be done if the card is to be used for voting purposes. In addition, state bureaus of motor vehicles should automatically send the information to the state's bureau of elections. (With the National Voter Registration Act, state bureaus of motor vehicles ask drivers if they want to register to vote and send the information only if the answer is affirmative.)

⁹⁸ ID is required of all voters in 24 states and of all first-time voters in another two states, according to Electionline.org, <http://electionline.org/>

⁹⁹ Provided by Electionline.org, www.electionline.org/Default.aspx?tabid=473.

Reliance on REAL ID, however, is not enough. Voters who do not drive,¹⁰⁰ including older citizens, should have the opportunity to register to vote and receive a voter ID. Where they will need identification for voting, IDs should be easily available and issued free of charge. States would make their own decision whether to use REAL ID for voting purposes or instead to rely on a template form of voter ID. Each state would also decide whether to require voters to present an ID at the polls, but our Commission recommends that states use the REAL ID and/or an EAC template for voting, which would be a REAL ID card without reference to a driver's license.

For the next two federal elections, until January 1, 2010, in states that require voters to present ID at the polls, voters who fail to do so should nonetheless be allowed to cast a provisional ballot, and their ballot would count if their signature is verified. After the REAL ID is phased in, i.e., after January 1, 2010, voters without a valid photo ID, meaning a REAL ID or an EAC-template ID, could cast a provisional ballot, but they would have to return personally to the appropriate election office within 48 hours with a valid photo ID for their vote to be counted.

To verify the identity of voters who cast absentee ballots, the voter's signature on the absentee ballot can be matched with a digitized version of the signature that the election administrator maintains. While such signature matches are usually done, they should be done consistently in all cases, so that election officials can verify the identity of every new registrant who casts an absentee ballot.

The introduction of voter ID requirements has raised concerns that they may present a barrier to voting, particularly by traditionally marginalized groups, such as the poor and minorities, some of whom lack a government-issued photo ID. They may also create obstacles for highly mobile groups of citizens. Part of these concerns are addressed by assuring that government-issued photo identification is available without expense to any citizen and, second, by government efforts to ensure that all voters are provided convenient opportunities to obtain a REAL ID or EAC-template ID card. The Commission recommends that states play an affirmative role in reaching out with mobile offices to individuals who do not have a driver's license or other government-issued photo ID to help them register to vote and obtain an ID card.

There are also longstanding concerns voiced by some Americans that national identification cards might be a step toward a police state. On that note, it is worth recalling that most advanced democracies have fraud-proof voting or national ID cards, and their democracies remain strong. Still, these concerns about the privacy and security of the card require additional steps to protect against potential abuse. We propose new

¹⁰⁰ A comparison of driver's license records and census data for 2003 suggests that about 88 percent of Americans aged 18 and over have a driver's license. See U.S. Department of Transportation, Federal Highway Administration, Licensed Total Drivers, By Age, 2003, Table DL-22, Oct. 2004, at www.fhwa.dot.gov/policy/ohim/hs03/htm/dl22.htm, and U.S. Census Bureau, Annual Estimates of the Population by Selected Age Groups and Sex for the United States: April 1, 2000 to July 1, 2004, (June 2005), available at www.census.gov/popest/national/asrh/NC-EST2004-sa.html.

institutional and procedural safeguards to assure people that their privacy, security, and identity will not be compromised by ID cards. The cards should not become instruments for monitoring behavior. Legal protections would prohibit any commercial use of voter data and impose penalties for abuse. Data-management procedures would include background checks on all officials with access to voter data and requirements to notify individuals who are removed from the voter registration list. The establishment of ombudsman institutions at the state level would assist individuals to redress any cases of abuse. The ombudsman would be charged with assisting voters to overcome bureaucratic mistakes and hurdles.

CONCLUSION

Fraud and intimidation of any kind and magnitude is unacceptable in a free electoral process, and, if the perception is growing that both are getting worse, then additional safeguards are essential. The Carter-Baker Commission offered dozens of recommendations to address these two issues as well as others that confront the full gamut of problems facing the U.S. electoral process, including the need to establish non-partisan, professional, and autonomous election systems in each state and oversight of the source codes and verifiable paper audits for electronic machines. To implement these goals requires that party leaders in each Congressional or legislative body recognize that access and integrity are two sides of the same problem, and both need to be protected.

Mark F. (Thor) Hearne, II
Voter Fraud and Voter Intimidation at Polls

Before the U.S. Commission on Civil Rights

Friday, October 13, 2006

Mr. Chairman, members of this Commission, I appreciate your invitation to address this Commission and I applaud its consideration of measures to assure that every eligible citizen enjoys the opportunity to participate in our election process and that all Americans are confident that the outcome of our elections represents the accurate and honest expression of the will of American voters. As many have noted, free, fair and honest elections are the very foundation of our Democracy.

My name is Thor Hearne and I am an attorney in private practice in St. Louis, Missouri with the firm Lathrop & Gage.¹⁰¹ In addition to other experience in election law and related civil rights and constitutional issues, I served as academic advisor to the bi-partisan Commission on Federal Election Reform co-chaired by President Carter and former Secretary of State James A. Baker, III (the “Carter-Baker Commission”). I also serve as counsel to the American Center for Voting Rights – Legislative Fund. ACVR-LF is a national, non-partisan, non-profit organization that was founded on the belief that public confidence in our electoral system is the cornerstone of our democracy. ACVR-LF supports election reform that protects the right of all citizens to participate in the election process free of intimidation, discrimination or harassment. ACVR-LF is committed to election reform that will make it “easy to vote but tough to cheat”. Specifically, ACVR-LF supports election reforms such as those proposed by the Carter-Baker Commission. I have also, as noted in my biography, represented various political candidates and campaigns in election law matters.

The Importance of Restoring Public Confidence In Our Elections

The Carter-Baker Commission noted that, “The vigor of American democracy rests on the vote of each citizen. Only when citizens can freely and privately exercise their right to vote and have their vote recorded correctly can they hold their leaders accountable. Democracy is endangered when people believe that their votes do not matter or are not counted correctly.”¹⁰² I would add that a lack of confidence in the election process decreases citizen participation. Conversely, increased confidence in our elections will increase citizen participation.

Two important principles form the central premise of any fair and honest election. First, every eligible citizen should be able to participate and cast a ballot free from the threat of intimidation or harassment. Second, the public should enjoy confidence that the outcome of the election – especially a close election – accurately reflects the will of the voters with

¹⁰¹ A full copy of my resume has been separately provided to this Committee.

¹⁰² Carter-Baker Report at p. 1.

every eligible ballot having been accurately counted. Unfortunately, the Carter-Baker Commission found that, “Americans are losing confidence in the fairness of our elections”. This lack of confidence in our national elections is confirmed by a number of national polls.

Three Essential Elements of Fair and Honest Elections

To restore confidence in our national elections we should adopt election reforms that address three essential points.

1. CURRENT AND ACCURATE VOTER ROLLS.

The Carter-Baker Commission noted that, “Effective voter registration and voter identification are bedrocks of a modern election system.”¹⁰³ A voter roll should include every eligible citizen who is registered to vote and assure that the voter is accurately registered in the precinct of the voter’s current residence. This is the only means to assure that every voter is provided opportunity to cast a ballot for all national, state and local elections. An inaccurate voter roll is the most likely reason that an eligible voter is denied access to the ballot. Provisional ballots are only an imperfect solution for the eligible voter who is wrongly omitted from a voter roll. A provisional ballot is a “fail-safe” means of voting but in most states only provides opportunity for the provisional voter to cast a partial ballot in state-wide and federal elections, and the provisional voter is disenfranchised from voting in most state and local races and issues. The best solution is an accurate state-wide voter roll with opportunity for each voter to cast a full ballot in their proper election precinct.

Inaccurate voter rolls can also provide significant opportunity for vote fraud. Having dogs, the dead, duplications and fictional “voters” on the voter rolls not only undermines public confidence in the outcome of election, it provides opportunity for vote fraud. Inaccurate voter rolls are a real and significant national issue.

During the 2004 Presidential election in Defiance County, Ohio, Chad Staton was paid crack cocaine to fraudulently register Mary Poppins, Dick Tracy, Jive Turkey and almost one hundred other fraudulent and fictional “voters.”¹⁰⁴ When the Senate was debating the Help America Vote Act of 2002 (“HAVA”),¹⁰⁵ Missouri Senator Kit Bond told of Ritzy Meckler – a cocker spaniel – being registered to vote in St. Louis, Missouri. My home state of Missouri is currently being sued by the U.S. Justice Department for having some of the most polluted voter rolls in the nation.¹⁰⁶ In some Missouri counties, there are more registered voters than there are people and in others the number of registered voters exceeds the voting age population (as determined by the U.S. Census Bureau) by more than 150 percent. Missouri is not, however, the only state with this problem. In

¹⁰³ Carter-Baker Report at p. 9.

¹⁰⁴ *State v. Staton*, Defiance County Ohio 04-CR-09070. A copy of the criminal pleadings is available at <http://www.ac4vr.com/reports/072005/exhibitT.pdf>

¹⁰⁵ Pub. L. No. 107-252, 116 Stat. 1666 (2002) codified at 42 U.S.C. 15301 to 15545.

¹⁰⁶ *United States v. Carnahan* (W.D. MO). 05-4391-CV-C-WAK.

other states there is significant concern about inaccurate voter rolls including the problem of non-citizens, felons and other ineligible voters who are registered to vote and who are illegally casting ballots as well as duplicate voter registrations.

The Carter-Baker Commission noted, “A substantial number of Americans are registered to vote in two different states. According to news reports, Florida has more than 140,000 voters who apparently are registered in four other states (in Georgia, Ohio, New York and North Carolina). This includes almost 64,000 voters from New York City alone who are registered to vote in Florida as well. Voting records of the 2000 elections suggest that more than 2,000 people *voted* in more than one state. Duplicated registrations are also seen elsewhere. As many as 60,000 voters are reportedly registered in both North Carolina and South Carolina.”¹⁰⁷

The Help America Vote Act and the National Voter Registration Act of 1993 (“NVRA” or “Motor Voter”)¹⁰⁸ have addressed several aspects of this problem. HAVA requires that (as of January 2006) each state have a single state-wide voter roll. NVRA requires that a person registering to vote affirm that they are a U.S. citizen.¹⁰⁹ Unfortunately, a number of states are not yet in compliance with this HAVA requirement of a single, state-wide voter roll and special-interest groups are pursuing litigation to undermine the ability of election officials to assure that only U.S. citizens are included on voter rolls.¹¹⁰

In addition to making sure that every state is in compliance with HAVA and has a current and accurate state-wide voter roll, we need to hold accountable those who seek to “game our election system” by voter registration fraud. Regrettably, voter registration fraud is a significant problem that has the effect of disenfranchising legitimate voters. Democratic and Republican election officials in Ohio testified in the aftermath of the 2004 Presidential election that their state was “under assault” from various special-interest groups outside the state seeking to flood election officials with voter registration forms,

¹⁰⁷ Carter-Baker Report at p. 12 (emphasis supplied).

¹⁰⁸ 42 U.S.C. § 1973gg.

¹⁰⁹ 42 U.S.C. § 1973gg-3(a)(2)(C)(i).

¹¹⁰ See *Washington Association of Churches v. Reed*, U.S. Dist. Ct. WD Wash. CV06-0726 (Suit to compel voter registrations to be added to voter roll even when information on registration form is incomplete or not verified and to enjoin election officials from reviewing and validating voter registration forms. Plaintiffs include participation by Washington Association of Churches, Washington Association of Community Organizations for Reform Now (“ACORN”), Service Employees International Union, 775 (“SEIU”), Washington Citizens Action, Filipino American Political Action Group of Washington and the Brennan Center); *Gonzales v. Arizona*, CV 06-1268 PHX ROS (D.C. Ariz., June 19, 2006) (ACLU lead Plaintiff with participation of other organizations seeks to overturn popularly passed initiative (Proposition 200) adopted by Arizona voters. Proposition 200 requires proof of citizenship before a person is allowed to register to vote.); *Diaz v. Hood*, a case originally filed in advance of the 2004 presidential election in Southern District of Florida, (04-22572-CIV-KING) stayed by the 11th Circuit Court of Appeals (04-15539) and now refiled (The Plaintiffs are seeking to compel election officials to add to the voter roll names from voter registration forms lacking an affirmation of U.S. citizenship. Plaintiffs include American Federation of State, County And Municipal Employees, AFL-CIO; Florida Public Employees, Council 79, AFSCME, AFL-CIO; And Service Employees International Union.). The importance of efforts to assure that only U.S. citizens are added to voter rolls is detailed by Pat Rogers, director of ACVR-LF, in his testimony before the U.S. House Administration Committee on June 22, 2006, “*Hearing on non-citizen voting*,” <http://cha.house.gov/hearings/Testimony.aspx?TID=936>

many of which were fraudulent.¹¹¹ Some organizations submitted voter registration forms in October on the eve of the election that had been filled out as early as April.¹¹² This had the effect of overwhelming the ability of local election officials processing the registration forms and prevented legitimate voters from being timely registered while at the same time making it difficult for the election officials to review and prevent fraudulent registrations – such as Dick Tracy – from being wrongly included on the voter roll.

Recent press reports suggest that voter registration fraud remains a significant issue in the current mid-term elections. A recent Associated Press report noted that “Ohio prosecutors are looking at almost 400 cards that the Franklin County elections board says included already registered voters or listed the wrong address.” The report went on to note “hundreds of other” registration cards with inaccuracies.¹¹³ This is not limited to Ohio. In Pennsylvania, “Director of Elections V. Kurt Bellman told the Board of Elections Thursday that there have been flagrant attempts at voter registration fraud. ‘It’s absolutely out of hand,’ Bellman said, ‘Not only do we have unintentional duplication of voter registrations but we have blatant duplicate voter registrations.’”¹¹⁴

Kentucky Secretary of State Trey Grayson found that more than 8,000 people on the Kentucky voter roll were also registered to vote in Tennessee and South Carolina. In Missouri, Secretary of State Robin Carnahan joined with the Nebraska, Iowa and Kansas Secretaries of State to reach a Memorandum of Understanding to “develop a system to cross-check voter registration information to provide for cleaner and more accurate voter lists”.¹¹⁵ Several Kansas voters were prosecuted for voting multiple times in the 2000 and 2002 elections.¹¹⁶

The Carter-Baker Commission recommended that, “[S]tates be required to establish unified, top-down voter registration systems”¹¹⁷ and that “States need to effectively maintain and update their voter registration lists. All states should have procedures for maintaining accurate [voter] lists such as electronic matching of death records, drivers’ licenses, local tax rolls, and felon records. Federal and state courts should provide state

¹¹¹ U.S. House of Representatives, Committee on House Administration, March 21, 2005, “2004 ELECTION AND THE IMPLEMENTATION OF THE HELP AMERICA VOTE ACT (HAVA)” http://frwebgate.access.gpo.gov/cgi-bin/useftpl.cgi?IPaddress=162.140.64.128&filename=20790.pdf&directory=/diskb/wais/data/109_house_hearings

¹¹² See note 111, above, especially the testimony of election officials Michael Vu and William Anthony.

¹¹³ “Allegations Trip Up Voting Rights Group”, Andrew Welsh-Huggins, Associated Press.

¹¹⁴ “Voter fraud Suspected in Registration Deluge”, Oct 8, 2006, *The Mercury News*, Reading PA. See also, “Partisan groups May Have Eyed Berks For Registration Drives”, October 13, 2006, *The Mercury News*, Reporting that, “Berks County officials continue to pour through voter registrations attempting to weed out the fraudulent duplicate registration forms... ‘In 20 years of politics, I’ve never in my life seen anything like this,’ said Berks County deputy Director of Elections, Christopher Winters.”

¹¹⁵ See *Memorandum of Understanding* at http://www.sos.mo.gov/elections/2005-12-11_MO-KS-IA-NE-MemorandumOfUnderstanding.pdf

¹¹⁶ See U.S. Department of Justice, Release, August 2, 2005.

http://www.usdoj.gov/criminal/press_room/press_releases/2005_4163_AccessNVotingIntegritySymposium080205.pdf

¹¹⁷ Carter-Baker Report at 11.

election officials with the lists of individuals who declare they are non-citizens when they are summoned for jury duty. In a manner consistent with the National Voter Registration Act, states should make their best efforts to remove inactive voters from the voter registration lists and adopt strong safeguards against incorrect removal of eligible voters.”¹¹⁸ The Carter-Baker Commission further recommends that the state voter rolls be interoperable to assure that voter rolls “take account of citizens moving from one state to another.”¹¹⁹

I believe that it is important to make sure that every eligible citizen is registered to vote and that they have opportunity to cast a ballot that will be fairly and accurately counted. During the U.S. House Administration Committee hearings into the conduct of the 2004 general election, one of the significant concerns voiced by both Democratic and Republican election officials was the burden that false and fraudulent registrations places upon the administration of the election. They reported that large volumes of registrations (many of them collected months earlier) were held and “dumped” on election officials at the last minute. They also reported that significant numbers of these registration forms were fraudulent.

The situation of large numbers of false or fraudulent voter registration forms dumped on election officials at the last minute creates a situation that (1) prevents legitimate voter registrations from being timely processed and may lead to eligible voters not being added to the voter roll in a timely manner potentially disenfranchising legitimate voters. (2) Inflating the voter roll with false or fraudulent names. (3) Altering or invalidating an eligible voter’s existing registration with the potential effect of preventing that eligible voter from being able to vote.

2. PROTECTING EVERY ELIGIBLE VOTER’S RIGHT TO CAST A BALLOT

In Albuquerque, New Mexico, Dwight Adkins tried to vote on Election Day in November 2004 but was not allowed to do so because someone had already voted in his place. He voted on a provisional ballot, which he later learned was not counted. Similarly, in Albuquerque, Rosemary McGee attempted to vote on Election Day, finding instead that someone else had signed the voter roster in her place; she voted on a provisional ballot, and her vote was not counted. Another Albuquerque citizen, Glen Stout, found that his 13-year-old son was illegally registered to vote by a 527 voter registration organization prior to the 2004 general election. In Philadelphia, Donna Hope, a non-citizen immigrant from Barbados who resides in Philadelphia, was told by a representative of the voter registration group “Voting is Power,” the voter mobilization arm of the Muslim American Society, that she could register to vote if she has been in the United States at least seven years. Ms. Hope completed the registration form and was added to the voting rolls. In November of 2004, Ms. Hope did not vote because she was not a citizen, but later found out that, according to Philadelphia election officials’ records, someone illegally cast a ballot in her name. This organization, Voting is Power, remains a focus of

¹¹⁸ Carter-Baker Report at 23.

¹¹⁹ Carter-Baker Report at 15.

reports involving fraudulent voter registration forms. See “Partisan Groups May Have Eyed Berks For Registration Drives”, *The Mercury News*, Reading, PA Oct 13, 2006.

In Michigan, the *Detroit News* in a front page article reported that, “In Michigan, even dead vote: From Holland to Detroit, votes were cast by 132 dead people; Detroit's voting records are riddled with inaccuracies, casting doubt on elections' integrity.”¹²⁰ The *Detroit News* found that, in Michigan, dead voters were not just on the voter rolls, but actual ballots were being illegally cast in their names.

Even when a fraudulent vote does not directly disenfranchise a voter by preventing them from casting a ballot – as in Dwight Adkins and Rosemay McGee’s case – it nonetheless disenfranchises a legitimate and lawful voter. The United States Supreme Court made this point when it wrote: “It must be remembered that ‘the right of suffrage can be denied by debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’” *Bush v. Gore*, 531 U.S. 98 (2000) citing, *Reynolds v. Sims*, 377 U.S. 533 (1964) “In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger . . . Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.” *Ex parte Yarbrough (The Ku-Klux Cases)*, 110 U.S. 651, 666 (1884) “Free and honest elections are the very foundation of our republican form of government. Hence any attempt to defile the sanctity of the ballot cannot be viewed with equanimity.” *United States v. Classic*, 313 U.S. 299 at 329 (1941).

HAVA imposed limited voter identification requirements to address mail-in vote fraud by requiring that newly-registered voters who have not physically appeared before election officials must identify themselves to election officials using one of the HAVA forms of identification before they may vote by absentee or mail-in ballot. This was a limited (but significant) voter identification requirement intended to address the situation of “Ritzzy the Dog” where a “mail-in” voter registration form placed the name of a fictional voter on the ballot and provided an opportunity for someone to cast a ballot in the name of this fictional voter by casting a ballot by mail, such as an absentee ballot. The limited HAVA ID provisions are expressly stated to be the “Floor” and not the “Ceiling” for a state’s identification requirements.¹²¹ Many states have imposed more demanding voter identification requirements.

¹²⁰ *Detroit News*, February 26, 2006.

¹²¹ Section 303(b) was specifically included in HAVA to address vote fraud and provides minimum requirements for identification of voters who register by mail, including presentation of photographic identification. (See *Hearing on H.R. 3295 Before the H. Comm. on the Judiciary, 107th Cong. (2001)*, available at 2001 WL 1552086 (F.D.C.H.) (statement of Rep. F. James Sensenbrenner, Jr.) (identifying that vote fraud was a significant motive for the anti-fraud provisions of HAVA); Remarks by President Bush at Signing of H.R. 3295, Help America Vote Act of 2002 (Oct. 29, 2002), 2002 WL 31415995 (White House), at *2. Section 303(b) of HAVA provides for a non-photo identification alternative of “a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” The HAVA voter identification standards were expressly stated to be a “floor” and

Requiring a person to identify themselves with photo identification before casting a ballot enjoys broad public support. The ACVR-LF poll found that 89 percent of Missourians favor a photo ID provision.¹²² This included the support of an overwhelming majority of Democrats, Republicans and members of minority communities. Similar support for photo ID is found in other states.¹²³ Nationally, a Wall Street Journal/NBC poll conducted by Hart and McInturff on April 21-26, 2006 found that more than 80 percent of U.S. citizens support the requirement that a person show a photo ID before they are allowed to cast a ballot.¹²⁴ More recent polls by Rasmussen have found similar or even stronger public support for requiring photo identification to vote.

When the issue of voter photo ID is placed on the ballot, there is strong bi partisan support for the measure. Albuquerque voters, with the support of Hispanic Democrat Mayor Chavez adopted a photo ID requirement for all Albuquerque elections.¹²⁵ In

not a “ceiling”. HAVA explicitly provides that it shall not “be construed to prevent a State from establishing election technology and administration requirements that are more strict than” provided in HAVA. The HAVA voter identification standards are exceptionally easy to satisfy. The HAVA voter identification standards are notably weak and provide far less than the standard of identification required in others areas of civic life. See Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 *Tex. Rev. L. & Pol.* 277, 288-89 (2005) (“Anyone who has ever moved into a new house or apartment and received bank statements and other government documents (all of which would satisfy the HAVA requirement) in the mail intended for the former occupants knows how easy it is to obtain such documents. When combined with the huge rise in identity theft, it is obvious that allowing documents without photographs is not an acceptable security measure for our voter registration and voting process.”).

¹²² http://www.ac4vr.com/states/mo_polling_release_032206.pdf

¹²³ In Pennsylvania, the American Center for Voting Rights poll conducted by the Winston Group found more than 80% of Pennsylvania voters favored or strongly favored the requirement that a voter present photo ID before casting a ballot. (ACVR web page). In Washington state a poll conducted in January 2006 by the Evergreen Foundation found that more than 86% of the public supported a photo ID requirement. <http://www.ewfa.org/files/pdf/Poll%20results-public.pdf> and Wisconsin public opinion polls found similarly strong support <http://www.wpri.org/Reports/Volume18/Vol18no6.pdf> for a constitutional amendment requiring voters to produce photo ID before casting a ballot.

¹²⁴ <http://online.wsj.com/public/resources/documents/poll20060426.pdf>

¹²⁵ Albuquerque voters supported photo ID by 77-17 percent margin in pre-election poll, as 92 percent of Republicans and 66 percent of Democrats supported the measure. (Dan McKay, “Voter Picture ID Has Wide Support,” *Albuquerque Journal*, 8/24/05) Polling showed photo ID with overwhelming support “among Republicans and Democrats, Anglos and Hispanics and across income levels” in Albuquerque. (Dan McKay, “Voter picture ID has wide support,” *Albuquerque Journal*, 8/24/05) Albuquerque Mayor Martin Chavez (D): “Integrity of the voting process is essential. I worked closely with Councilors Mayer and Cadigan to put photo ID onto the ballot.” (Jim Ludwick, “Critics: Mail-in voters should show ID, too,” *Albuquerque Journal*, 9/12/05) Democrat City Councilor Michael Cadigan supported photo ID requirement. (Jim Ludwick, “Voter ID plan OK’d by Council,” *Albuquerque Journal*, 6/21/05) Albuquerque “City Clerk Judy Chavez and other election officials said the rule change didn’t cause any problems.” (“New ID rule passes test,” *Albuquerque Journal*, 11/16/05) “[S]hirley Bartel, an Election Clerk at Chelwood Elementary School, said many voters had their IDs out already when approaching the polls. “They said, “It should’ve been done a long time ago. It makes for a more honest election,” Bartel Said.” (“New ID rule passes test,” *Albuquerque Journal*, 11/16/05) “Hubert Gutierrez, a retiree who voted Tuesday, said producing an ID was no problem. ‘I wish they would make it mandatory for everything,’ he said.” (“New ID rule passes test,” *Albuquerque Journal*, 11/16/05) “Incumbent City Councilor Sally Mayer, victorious in District 7, said she was thrilled the photo ID measure she got on the ballot won with

Arizona, voters passed a popular state-wide initiative (Proposition 200) that required prospective voters to present proof of citizenship before registering to vote.¹²⁶ The Arizona proof of citizenship requirement was recently upheld in an initial decision in the federal court.¹²⁷

Voter identification requirements – including photo identification requirements – have emerged as a national consensus.¹²⁸ More than 24 states currently require every voter to provide identification before casting a ballot¹²⁹ and seven states – in addition to Missouri – currently require photo identification in order to vote.¹³⁰ Election reform legislation requiring photo identification before casting a ballot has been introduced this legislative session in at least four more states¹³¹ and a national voter photo ID requirement was

73 percent of the vote. ‘This shows it is not a partisan issue,’ she said. ‘It’s going to set a real good precedent.’ Mayer said voters seemed to agree that the photo ID requirement was not necessary for mail-in absentee ballots. City Councilor Martin Heinrich said he supported the idea of voter ID and expected it would pass, but he and other critics said it should have had stronger provisions concerning absentee ballots. Only voters at a polling place will be required to show a photo ID.” Gran, Susie, *Albuquerque Tribune*, Oct. 5, 2005.

¹²⁶ See *Arizona Daily Star* "Lawsuit off base in challenging voter ID rules" (5/15/06). See also: KOLD News 13 "ID required for voters headed to the polls Tuesday" by Jim Becker (5/15/06).

¹²⁷ Proposition 200 was passed overwhelmingly by Arizona voters in 2004. This popular initiative requires those seeking to register to vote in Arizona to provide proof of U.S. citizenship when registering. On May 9th the ACLU, People for the American Way and other liberal activist organizations filed a federal lawsuit seeking to eliminate the citizenship requirement because, they claimed, it was contrary to the federal National Voter Registration Act (“Motor Voter”). Arizona Secretary of State Jan Brewer vigorously defended the right of Arizona voters to pass Proposition 200.

On June 19th, Federal District Judge Roslyn O. Silver denied the plaintiff’s request for a Temporary Restraining Order finding that the plaintiff’s had “no[t] shown that there is a likelihood they will succeed on the merits.” Judge Silver wrote: “Determining whether an individual is a United States citizen is of paramount importance when determining his or her eligibility to vote. In fact, the NVRA repeatedly mentions that its purpose is to increase registration of “eligible citizens.” Providing proof of citizenship undoubtedly assists Arizona in assessing the eligibility of applicants. Arizona’s proof of citizenship requirement does not conflict with the plain language of the NVRA.” (internal citation omitted) *Gonzalez v. Arizona*, CV 06-1268 PHX ROS (D.C. Ariz., June 19, 2006). Subsequently Judge Silver denied the request for a permanent injunction and the Arizona law was appealed. Application of the law was stayed by a two-judge motion panel of the 9th Cir pending final appeal by the 9th Circuit.

In so doing, Judge Silver agreed with the people of Arizona and found that Arizona can continue to require that individuals provide proof of citizenship in order to vote. Ensuring that only legitimate U.S. citizens can register to vote is a commonsense practice. Judge Silver’s ruling helps Arizonans to maintain confidence in their state’s election process. Voters should have the confidence that legal citizens are the voters deciding the outcome of our elections. Those not legally in the United States should not be casting a ballot and the citizens of Arizona passed a commonsense measure to protect that principle. We are pleased that Judge Silver upheld this basic protection of the election process.”

¹²⁸ See also *Harvard Law Review*, “Developments in the Law”, Vol. 119:1127 February, 2006. and Barone, Michael, "Message to the Secretaries of State: 1679 and 2006", *U.S. News and World Report*, web blog, February 6, 2006. (From remarks of Michael Barone to meeting of the National Association of Secretaries of State).

¹²⁹ Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Missouri, Montana, New Mexico, North Dakota, Ohio, South Carolina, South Dakota, Ohio, Tennessee, Texas, Virginia, Washington.

¹³⁰ Florida, Georgia, Hawaii, Indiana, Louisiana, South Dakota and Ohio.

¹³¹ Wisconsin, Pennsylvania, New Hampshire and Minnesota. The voter identification requirement was passed by the legislature in Wisconsin, Pennsylvania and New Hampshire but vetoed by the respective

proposed in the U.S. Senate, the McConnell Amendment to the Immigration bill. That amendment is supported by a majority of the Senate. A similar amendment, the Hyde Amendment, was passed by the U.S. House of Representatives.¹³² Some critics – notably the ACLU, Brennan Center and League of Women Voters¹³³ – have mounted a national attack on voter identification or citizenship requirements.¹³⁴ The Indiana law provided that a person voting at a poll must first present a form of valid photo identification issued by the state of Indiana or the United States and did not contain some of the exceptions allowed in Missouri.¹³⁵ The Indiana Democrat Party, the ACLU and other allied parties

state's Governor and is currently pending in Minnesota. Identification requirements are not unique to election activity. The Federal REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (to be codified in scattered sections of 8 and 49 U.S.C. 30301) established requirements that states must meet by 2008 for the issuance of photo identification that will be necessary to enter a federal building, board a plane or open a bank account. § 202, 119 Stat. at 312. Indeed, photo identification is such a common feature of our civic life that the author recently was required to provide two forms of identification including one photo ID to rent a "Rug Doctor."

¹³² On May 22nd a national voter photo ID requirement was introduced by Senate Majority Whip Mitch McConnell, as an amendment to the federal comprehensive immigration reform bill. The amendment would make it mandatory for all voters to present photo identification before casting ballots in any federal election after Jan. 1, 2008., amendment to The Comprehensive Immigration Reform Act of 2006 (S.B. 2611). This amendment also provides "all necessary funds" to the states as a federal grant to pay for the cost of free photo identification. "The photo ID issue is being joined with the immigration debate because there is growing anecdotal evidence that voter registration by noncitizens is a problem. All that it takes to register is for someone to fill out a postcard, and I have interviewed people who were still allowed to register without checking the box that indicated they were a citizen. Several California counties report that an increasing number of registered voters called up for jury duty write back saying they are ineligible because they aren't citizens. The man who in 1994 assassinated Mexican presidential candidate Luis Donaldo Colosio in Tijuana had registered to vote at least twice in the U.S. although he was not a citizen. An investigation by the Immigration and Naturalization Service into alleged fraud in a 1996 Orange County, California, congressional race revealed that "4,023 illegal voters possibly cast ballots in the disputed election between Republican Robert Dornan and Democrat Loretta Sanchez." Fund, John, *Wall Street Journal – Opinion Journal* May 21, 2006. <http://www.opinionjournal.com/diary/?id=110008411>

¹³³ The ACLU and League of Women Voters oppose other (non-ID related) election reforms as well. The Pennsylvania Legislature passed the Pennsylvania Voter Accessibility Act (SB 999) with broad bi-partisan support in both the House and Senate. The legislation was signed by Democrat Governor Rendell, former chair of the Democrat National Committee. The Pennsylvania Voter Accessibility Act contained protections to assure that military overseas ballots would be counted and, *inter alia*, prohibited polls from being located in private homes, political campaign offices and locations where elderly and handicapped would not have access to a poll or where voters would experience harassment or intimidation. The ACLU and League of Women Voters called on Governor Rendell to veto these election reforms. *See* "Pennsylvania passes bill limiting use of homes for polls." *Philadelphia Inquirer*, May 4, 2006.

¹³⁴ Voter identification requirements are currently at issue in the following cases. *Gonzalez, et. al v. Arizona* U.S. District Court, District of Arizona, *ACLU v. Albuquerque*, CV 05-1136 U. S. District Court for the District of New Mexico (Filed April, 2006), *League of Women Voters of Georgia, et al. v. Billups*, (405 F. Supp. 2d 1326). The Michigan Supreme Court is considering the constitutionality of the Michigan voter identification requirement in, *IN RE REQUEST FOR ADVISORY OPINION REGARDING SUPREME COURT NO: 130589 CONSTITUTIONALITY OF 2005 PA 71*. During the 2004 election some of the same groups now challenging voter identification requirements also filed unsuccessful legal challenges to voter identification requirements. *See; Colorado Common Cause, et al. v. Donna Davidson*, 2004 WL 2360485 (Colo. Dist. Ct.). *See also League of Women Voters v. J. Kenneth Blackwell*, 340 F.Supp.2d 823; *Bay County Democratic Party and Michigan Democratic Partt v. Terri Lynn Land, Michigan Secretary of State, et al.*, 347 F.Supp.2d 404.

¹³⁵ *See, Ind. Code § 3-11-8-25.1., Ind. Code § 3-5-2-40.5., Ind. Code § 3-11-8-25.1(c), and Indiana*

challenged the voter identification requirement in federal court. *Ind. Dem Party v. Rokita*, 2006 WL 1005037 (S.D. Ind., April, 2006). The opponents of voter identification charged that the measure disenfranchised the elderly, minorities and the disabled.

The district court found that the Indiana legislature had reason to conclude that the reality of voter fraud at polling locations actually occurred and that a photo identification requirement would reduce opportunity for this fraud and also, as a separate basis for the requirement, increase public confidence in the election process.¹³⁶ The evidence did not support the allegations of disenfranchisement. The court found that not a single Indiana voter would be disenfranchised by the identification requirement. The court held that the opponent's arguments against photo ID "resembles the college student 'wet Kleenex' prank of yore in which as entertainment, a soggy wet tissue mass is thrown against the dorm room wall to see if it will stick. In the context of this much more serious matter, we fear Plaintiffs are engaged in a similar exercise-throwing facts against the courthouse wall simply to see what sticks."¹³⁷

The Democrat Party in Indiana has appealed the *Rokita* decision to the Seventh Circuit.¹³⁸ After the district court affirmed the constitutionality of the Indiana voter identification law, a state-wide election was held. This election was notable for the absence of any voter experiencing difficulty with Indiana's new voter identification requirement.¹³⁹

Democratic Party v. Rokita, Slip Opinion, at 4.

¹³⁶ The district court referred to evidence of vote fraud in states other than Indiana as a legitimate basis for the Indiana to adopt photo identification requirements in Indiana. There is significant evidence of vote fraud in Indiana, current and historic. The court did not premise its ruling upon this evidence of Indiana vote fraud. In 1914 federal authorities prosecuted 114 people for election fraud in Indiana. The mayor of Terra Haute went to federal prison for six years after engineering a scheme where fraudulent voter registrations allowed some individuals to vote as many as 22 times. And, examples of vote fraud in Indiana continue to the present day. In 2004, the Indiana Supreme Court invalidated the 2003 mayoral primary election in East Chicago because of an absentee ballot fraud scheme. In 2005, Secretary of State Rokita testified before the U.S. Congress that he saw evidence indicating a dead person had "voted", or more accurately, that someone had voted in the name of the dead. See Tracey Campbell, *Deliver the Vote*. p. 147 – 149.

¹³⁷ Slip Opinion at p. 39.

¹³⁸ "Statement by DNC Chairman Howard Dean on Indiana" 5/2/2006 Democratic National Committee Press Release.

¹³⁹ *The Journal Gazette* in Fort Wayne wrote: "Election Day calm as voters comply with photo ID rule...Despite months of debate culminating in a federal lawsuit, Indiana's new requirement that voters show photo identification at the polls caused barely a ripple in Tuesday's primary election. Across Indiana, there were no reports of problems caused by the new requirement, with most areas reporting they did not have to turn away a single voter; those that did turn voters away for lack of identification found it to be a rare exception ... Voters casting ballots at the Fort Wayne Urban League in the Hanna Creighton neighborhood – with the highest concentration of poor and minorities in the city – did not have to turn away a single voter, workers said ... In Noble County, precinct officials at three voting locations said that as of mid-afternoon Tuesday no one who wanted to vote was turned away because they didn't have proper identification." Dan Stockman, May 3, 2006.

The Star Press in Muncie wrote, "Only one provisional ballot was cast in most of the 10 precincts polled by *The Star Press*, indicating the photo ID requirement was not a problem. Provisional ballots are cast for voters who cannot show a photo ID." *The Indy Star* reported, "Tuesday's primary election came and went

With the close decision in the Mexican presidential election this month, it is worth noting measures that Mexico takes to assure voter confidence in a fair and honest election.

“Mexico spends much more than the U.S. on measures to prevent vote fraud. All voters in Mexico must present voter IDs at the polls, which include not only a photo but also a thumbprint. The IDs themselves are essentially counterfeit-proof, with special holographic images, imbedded security codes, and a magnetic strip with still more security information. As an extra precaution, voters' fingers are dipped in indelible ink to prevent them from voting multiple times.

Voters cannot register by mail - they have to go in person to their registration office to fill out forms for their voter ID. When a voter card is ready three months later, it is not mailed to the voter as it is in the U.S. Rather, the voter has to make a second trip to a registration office to pick it up. Sunday's election was the first in which absentee ballots were available, but only if for voters requested one at least six months before the election.”¹⁴⁰

A similar conclusion was reached in studies of United States voter identification requirements. Far from reducing voter participation, these confidence-building measures have been shown to actually increase voter participation. *See* John Lott, “Voter Fraud and The Impact That Regulations to Reduce Fraud Have on Participation Rates”, August 24, 2006. (I have attached a copy of this study to this testimony.)

The U.S. Department of Justice has (in those jurisdictions requiring pre-clearance under Section 5 of Voting Rights Act 42 U.S.C. § 1973 *et. seq.*) approved voter identification requirements in Virginia, Georgia, Arizona and New Mexico. Georgia was approved twice. The initial Georgia voter identification law was initially enjoined because the district court found that Georgia did not provide sufficient opportunity for voters to obtain the voter ID.¹⁴¹ Georgia remedied these objections in early 2006 with new provisions to assure access to the required free photo ID.¹⁴²

with few hitches despite a new state law requiring all voters to show a photo ID. The low-key election dispelled fears that the new ID law, ballot typos and printing errors in Marion County and elsewhere, as well as glitches with some voting machines and the state's voter-registration database, would result in widespread problems at the polls. ‘All the sky-is-falling-Chicken-Little arguments never came to fruition,’ Indiana Secretary of State Todd Rokita said.” Rick Yencer, May 3, 2006.

¹⁴⁰ John R. Lott Jr. & Maxim C. Lott, “*LOOK SOUTH: AMERICANS COULD LEARN FROM MEXICAN ELECTIONS*”, *National Review On-Line*, July 6, 2006, <http://article.nationalreview.com/> Mexico is not alone. Even the impoverished nation of Haiti requires photo voter identification. See, *Washington Post*, February 6, 2006. “John Lott, a scholar at the American Enterprise Institute, notes that in the three presidential elections Mexico has conducted since the National Election Commission reformed the election laws “68% of eligible citizens have voted, compared to only 59% in the three elections prior to the rule changes.” People are more likely to vote if they believe their ballot will be fairly counted.” *Wall Street Journal*, John Fund, “How to Run a Clean Election, What Mexico can teach the United States” July 10, 2006.

¹⁴¹ Georgia Legislature passed HB 244 in 2005. HB 244 required voters to show any of six government-issued photo IDs at the polls: a driver's license, passport, military ID, government employee ID, tribal ID or

The requirement that a person provide photo identification before voting (when the required form of identification is available for free and is accessible) is a reasonable constitutionally valid regulation of the constitutionally protected fundamental right to vote and is justified as both a protection against voter fraud and a measure to increase public confidence in the outcome of elections.¹⁴³

The Carter-Baker Commission recommended, “To ensure that persons presenting themselves at the polling place are the ones on the registration list, the Commission recommends that states require voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005. The card includes a person’s full legal name, date of birth, a signature (captured as a digital image), a photograph, and the person’s Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back whether the individual is a U.S. citizen. States should provide [such photo ID] to non-drivers free of charge. All states should use their best efforts to obtain proof of citizenship before registering voters.”¹⁴⁴

Civil rights leader Andrew Young supported the Carter-Baker Commission recommendation that states require photo identification to vote. One of the reasons that Ambassador Young identified for supporting the request of photo identification was the desire that photo identification be provided free to everyone in society. Requiring photo identification for voting would increase its availability to those that may not have photo identification necessary for other daily activities. Requiring photo identification would increase voter confidence. One of the reasons identified by some minority and low-income voters as to why they do not vote is the perception that they will not be permitted to cast a ballot or the ballot they cast will not be counted. Providing a voter free photo identification will increase that voter’s confidence that they will be allowed to vote. In a conversation between the author and one of the Democrat members of the Carter-Baker

a valid ID card issued by the state or federal government. Residents who did not have any of the six required IDs had to get a state-issued photo ID (a five-year card cost \$20; 10-year cards, \$35) in order to vote. For those who could not afford them, the fees could be waived with a signed indigency affidavit. Indigent was not defined and the affirmation was under oath so the district court concluded that this ambiguity would present a burden to some truly indigent voters who, in the face of an undefined standard of indigency, would not affirm their indigency. Secondly, the district court held that Georgia did not afford opportunity for access to free voter ID. Fulton County, where Atlanta is located, did not have single location where free photo identification could be obtained. The District court faulted the Georgia law on essentially these two points. *Common Cause v. Billups*, 406 F.Supp.2d 1326 (N.D. GA., 2005).

¹⁴² Georgia Senate Bill 84 was passed in January 2006 and provided a free voter photo ID card to anyone who requested without the requirement of an affidavit of indigency Senate bill 84 also required that all 159 counties in Georgia maintain a location where the free photo IDs can be obtained. There is currently pending a Georgia state court challenge to the statute arguing that it violates provisions of the Georgia state constitution.

¹⁴³ For a general discussion of the constitutionality of voter identification requirements, *See also* Pobilus, *Texas Review of Law and Politics*, Vol. 9, No. 2, Spring 2005. *Harvard Law Review*, “Development in the law”, volume 119:1127, February 2006. For a discussion of the Missouri Voter Protection Act which included a photo identification requirement, *see* Thor Hearne, Missouri Voter Protection Act, Real Reform for All Missouri Voters, *St. Louis Lawyer*, June 2006, Bar Association of Metropolitan St. Louis.

¹⁴⁴ Carter-Baker Report at 21. The Commission recommended transition rules until 2010 to allow the Voter photo ID card to be phased in and assure that all registered voters have access to a free photo identification.

Commission it was said that, “For our base, who may not believe their vote will count, a photo ID will give them greater confidence they will be allowed to cast a ballot when they go to the poll and greater confidence will increase participation. We can say, ‘go to the poll, show the election officials this card with your picture on it and it will guarantee you can vote and your vote will count.’”¹⁴⁵

Availability of free photo identification in today’s society is also good policy for reasons totally apart from election reform. Photo identification is required to engage in essentially every activity in modern life.¹⁴⁶ From boarding a commercial aircraft¹⁴⁷, applying for a job, entering a federal building, to checking out a book at the neighborhood library, photo identification is required. Making this identification free and accessible to all members of society – especially the low-income, disabled and minority communities – is good public policy.

A related point is that an eligible voter (including disabled and elderly voters) should have the opportunity to cast their ballot in an accessible polling location free of intimidation or harassment. Pennsylvania recently enacted bipartisan legislation furthering this objective.¹⁴⁸ Historically, many polling places in Pennsylvania, especially in Philadelphia, have been located in private homes and other locations that are not readily accessible to the disabled. These locations have also been the focus of complaints of voter harassment and intimidation. The Republican legislature passed and Democrat Governor Rendell signed the Pennsylvania Voter Accessibility Act. This legislation moves polling places from private homes, political campaign offices and other locations inaccessible to the disabled and elderly, into public buildings. The Pennsylvania Voter Accessibility Act adopts a number of recommendations of the Carter-Baker Commission including the recommendations concerning polling place accessibility and protection against voter intimidation or harassment. The legislation also requires establishing and posting poll locations 20 days before an election.

The Carter-Baker Commission recommends that states adopt strengthened felony protections against intimidation or harassment of voters. This language has been adopted by recent voting-rights legislation in Missouri and Pennsylvania.

3. ACCURATELY COUNTING EVERY VOTE.

¹⁴⁵ Conversation between author and Democrat member of Carter-Baker Commission in White House Reception before presentation of Commission report to President Bush. The quoted language is not a direct quote but is a paraphrase of the member's comments.

¹⁴⁶ "Dust-up over Hanaway's voter ID may cause fallout down the road" *St. Louis Post Dispatch* by Jo Mannies (4/12/04). "Carnahan said Friday that she was stunned that Blunt views expired drivers' licenses as acceptable IDs. 'On its face, it doesn't make a lot of sense to me,' she said. 'Any valid form of ID needs to be current.' 'You can't cash a check with an expired license, so you shouldn't be able to vote with one,' [Democrat St. Louis County Director of Elections Judy] Taylor said."

¹⁴⁷ See *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006).

¹⁴⁸ Pennsylvania Voter Accessibility Act – Senate Bill 999, signed by Governor Rendell on May 12, 2006. ACVR-LF worked to support passage of the Pennsylvania Voter Accessibility Act.

James Madison observed in Federalist 51 that, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” Our Constitution and laws are premised upon this fundamental understanding of human nature and our elections should be likewise.

The candidates and campaigns in any election have a specific partisan objective – winning the election. Election officials also have specific policy and partisan interests. To have a fair and honest election in which the participants – including those conducting the election – may have a partisan interest in the outcome requires that there be clear, specific and objective standards governing the conduct of the election and accountability to assure the election is conducted in a manner consistent with these standards.

The Carter-Baker Commission notes, “To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner. Elections are contests for power and, as such, it is natural that politics will influence every part of the contest, including the administration of elections.”¹⁴⁹

One of the most fundamental steps to avoid this possibility of partisan interest (or the appearance of partisan interest) influencing election officials is to develop clear, definite and unambiguous statutes and rules governing the conduct of elections, and to provide a mechanism to hold election officials responsible to follow these standards. This means that rules for conduct of the election and any recount avoid opportunity for the exercise of discretion by an election official. Clear written uniform standards for what constitutes a “vote” should be established well before any election contest. Uniform standards for locating polling places and allocating election equipment should also be established to avoid opportunity for officials to act in their (real or imagined) partisan interest when managing the conduct of an election.

The voting technology – opti-scan, DRE machine or other equipment for recording votes – should be chosen and tested for accuracy, and election officials should be adequately trained in the use of this equipment. Standards for conducting the election in the event of any malfunction should be established before the election. Ballots and voting equipment should be kept in a secure and controlled location, and no one other than election officials acting pursuant to their authority should have access to the voting equipment or ballots. Tabulating the ballots should be done in accordance with established procedures and under the supervision of observers.

The Important Role Of Observers and Examiners

These three principles, accurate and accessible voter rolls, reliable voter identification and voter accessibility to the ballot, and the objective impartial administration of

¹⁴⁹ Carter-Baker Report at p. 49. The Commission calls for measures to increase professionalism of election officials and to reduce partisan conflicts of interest.

elections mean nothing, however, unless election officials diligently, uniformly and fairly enforce these and related election laws and there is a means to assure that these principles are, in fact, followed when elections are conducted. This brings us to the critical subject of this hearing - the continuing need for federal examiners or observers to monitor elections.

As the U.S. Supreme Court noted in the quotes cited above, voter fraud and voter suppression (or intimidation or harassment) are but two sides of the same repugnant coin. Both are an effort to illegally influence the outcome of an election by either preventing an eligible voter from casting a ballot or by preventing the ballot cast by an eligible voter from counting by cancelling it out with one illegally cast.

Supreme Court Justice Louis Brandeis said, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹⁵⁰ Justice Brandeis’ statement in support of the benefits of openness and transparency underlies the Carter-Baker Commission recommendation in favor of permitting independent observers to be present to monitor the conduct of an election.

It has been noted that it is never difficult to persuade the winner of an election that they won; the challenge is to convince the loser that they lost. This is true of not just the losing candidate but also the supporters of the losing candidate. In any election – but especially a close national or state-wide election - it is important for the legitimacy of the winning candidate that the losing candidate (and the losing candidate’s supporters) recognize that, while they may have preferred a different result, the outcome is, nonetheless, an accurate reflection of the voters’ choice expressed in a fair and honest election.

Even when an election is administered in a fair and honest manner and is free of fraud or voter intimidation, there is a temptation for the losing candidate to suggest that such occurred. This suggestion of fraud or illegality in the conduct of an election undermines the public’s confidence in the outcome and the authority of the winning candidate. The best response is to prevent fraud and intimidation from occurring, or, if they do occur, to document them and quickly prosecute any wrongdoing.

An election observer serves two important roles. First, by their presence, an observer deters actual fraud or voter intimidation as well as deterring or refuting false charges of voter fraud or intimidation. Secondly, if election fraud or voter intimidation does occur, the presence of an observer provides the means to assist in documenting and prosecuting these serious election crimes.

However, for an observer to be effective – whether a federal official, an independent observer or a “challenger” from a political party – the observer must have the meaningful opportunity to monitor the election process without interfering with any legitimate voter’s right to cast a ballot. The following features define an effective and appropriate election observer program: (1) Observers should be trained in the requirements of federal election law and the relevant state’s election law and procedure, (2) Observers should be

¹⁵⁰ *Other People’s Money, and How the Bankers Use It* (1933).

permitted meaningful access to observe and monitor the conduct of the election, including pre-election and post-election certification and tabulating procedures and handling of ballots and voting equipment, (3) Observers should be free to communicate with the press and others outside of the election facility, (4) Observers should not interfere with voters lawfully seeking to cast a ballot or with election officials performing their duties, (5) Observers should have the means to provide a timely objection to election misconduct by communication with senior election officials or law enforcement authorities, including the U.S. Department of Justice and the relevant state's Secretary of State or Attorney General, (6) Observers should have the ability to observe those polling locations with the greatest likelihood of fraud or of voter intimidation, (7) Observers should be protected from intimidation or threats seeking to prohibit them from participating as an observer, and (8) Observers should be designated as such so that voters do not confuse them with election officials.

While the presence of observers is critical to a fair and honest election and to public confidence in the election process, each state has different standards for election observers (often called "challengers") and each state has established different qualifications necessary for an individual to participate as an observer. In most (but not all) states an observer must be a registered voter in the state or in the specific county or even precinct. Observers must be credentialed before the election and, depending upon the state, the credentials may only allow them to observe at specific polling places. Typically, an observer must be designated by one of the political parties or a candidate. Many of these regulations governing election observers do not meaningfully relate to the legitimate objective of protecting against inappropriate activity by an observer. The Carter-Baker Commission notes, "In too many states, election laws and practices do not allow independent observers to be present during crucial parts of the process, such as the testing of voting equipment or the transmission of the results."¹⁵¹

Indeed, during the 2004 presidential election both election officials and political campaigns sought to exclude observers from polls. In Florida, Republican observers were called on the eve of the election and threatened with a personal lawsuit if they participated as observers.¹⁵² In Philadelphia, two attorneys observing the election were pursued in a high-speed car chase by thugs who then physically attacked the car and intimidated the observers.¹⁵³ In Ohio, a federal court challenge was filed seeking to prevent any Republican election observers. The trial court issued the requested injunction, but the injunction was overturned by the Sixth Circuit Court of Appeals (affirmed on an emergency writ by the U.S. Supreme Court) and, at 2:00 am on Election Day, the Ohio election "challenger" statute was upheld and Republican observers were allowed to participate.¹⁵⁴

¹⁵¹ Carter-Baker Report at p. 65.

¹⁵² <http://www.ac4vr.com/reports/072005/exhibitJ.pdf>

¹⁵³ See "Reality of Intimidation" Eric Wang, Reported in ACVR-LF report on Vote Fraud and Voter intimidation during the 2004 Presidential election. <http://www.ac4vr.com/reports/072005/exhibitM.pdf>

¹⁵⁴ See *Summit County Democrat Central Committee v. Blackwell*, 388 F. 3d 547 (6th Cir. 2004) cert denied. *Spencer v. Blackwell*, 347 F.Supp.2d 528 (SD OH, 2004).

In New Mexico, the local election officials in Dona Ana County and Secretary of State Rebecca Vigil-Giron each sought to count ballots in secret, free from any observation. Both were challenged and observers were, ultimately, allowed to witness the process.¹⁵⁵

The Carter-Baker Commission recommended that, “All legitimate domestic and international election observers should be granted unrestricted access to the election process, provided that they accept election rules, do not interfere with the electoral process, and respect the secrecy of the ballot.”¹⁵⁶

Republican National Committee Chairman, Ed Gillispie, wrote Democrat Party Chairman Terry McAuliffe proposing that each party designate poll watching teams with a representative from each party that would monitor those polling places mutually selected by each party. Chairman McAuliffe did not accept Chairman Gillispie’s offer. The DNC did, however, independently place lawyers and election observers in a number of polling places to monitor the election. This suggests a strong appreciation by both major political parties in the importance of having observers able to monitor the election process.

¹⁵⁵ “Secretary of State Rebecca Vigil-Giron asked the state Supreme Court to overturn a lower court ruling that had allowed Republican observers into the polls in Sandoval and Dona Ana counties. She also seeks to overturn a decision by the Bernalillo County Clerk to allow observers there. In her court filing, she contends state law doesn’t provide for challengers to be part of the review process.

But cynics point out that she filed her petition shortly after the Bernalillo County Clerk told media outlets that observers had discovered instances of voter fraud during the qualification of provisional ballots. Provisional votes are cast by people whose names did not appear on registration rolls but nonetheless were allowed to vote pending verification of their eligibility. In counting the first 5,000 provisional ballots in Bernalillo County, observers turned up 53 instances of individuals voting more than once. They also found four voters who were dead and dozens of felons attempting to vote. In two cases, the same individual tried to vote three times: early, absentee and on Election Day.

Double voting appears to fall into two categories: voters who themselves may have voted multiple times, and those whose votes were essentially stolen. Dwight Atkins of Albuquerque attempted to vote on Election Day, only to discover that someone had already voted early in his name. Rosemary McGee showed up to vote at 3 pm on Election Day. But someone had voted in her place at 7:00am (the imposter actually misspelled her name on the signature roster). Both were shocked to learn that if an imposter votes first, the fraudulent ballot will stand, and the provisional ballot, cast later by the legitimate voter, will be disqualified.” *Wall Street Journal* – On-Line - Political Diary, November 9, 2004.

See also Las Cruces Sun-News November 6, 2004 account of attempts to secretly count provisional ballots. “When Doña Ana County begins next week to sort provisional ballots, the reason a ballot is rejected should be made public, District Judge Robert E. Robles ruled Friday. The decision came after Republican and Democrat attorneys sought a reversal of an order from the secretary of state to keep such information private. The ruling contradicts and trumps the secretary of state’s procedure, which Doña Ana County Clerk Rita Torres was set to follow.” There was strong public support for open and transparent election procedures. The *Albuquerque Journal* editorialized that, “Vigil-Giron said there is nothing in state law requiring the [election] process be open. But, neither is there anything in state law prohibiting a practice that is consistent with the principles of transparency in government and elections. The secretary of state should open up her part of the process.” <http://www.abqjournal.com/opinion/2OP10-29.HTM>

¹⁵⁶ Carter-Baker Report at p. 65.

Conclusion

Even though an election is a quintessentially partisan activity, the rules governing the conduct of an election should *not* be partisan. The Carter-Baker Commission demonstrated that there is a broad area of bipartisan agreement on substantial and specific issues including the need for voter identification, election observers, current and accurate state-wide voter rolls and many other election reforms.

I am grateful that this Commission is hearing testimony on this very important issue.

Donna L. Brazile
Chair
Democratic National Committee's Voting Rights Institute
Testimony to the U.S. Commission on Civil Rights
October 13, 2006

Mr. Chairman and members of the U.S. Commission on Civil Rights, my name is Donna Brazile. I am Chair of the Democratic National Committee's Voting Rights Institute ("VRI") and an Adjunct Professor at Georgetown University here in Washington, D.C.

In 2000, I served as Campaign Manager for the Gore-Lieberman Presidential Campaign and, over the years, I have participated in campaigns at all levels ranging from local city council races to campaigns for state and federal offices. I became active in politics at the age of nine and my first assignment was going door to door encouraging my neighbors and friends not only to register, but also to vote in an election where one candidate had promised to build a playground in our neighborhood. From that moment on, I knew what I wanted to do with my life: to encourage others to vote and to participate in governing their communities and our nation.

The Democratic National Committee's Voting Rights Institute (VRI) was created in the aftermath of the chaotic 2000 Presidential election to educate citizens on their rights to vote and to help restore voters' confidence in our electoral system. As Democrats, we believe that every eligible voter should be encouraged to participate in the political process and that their right to vote should be protected. We do not condone any acts of voter intimidation, voter harassment or voter fraud that not only threaten our democracy but also undermine the integrity of our electoral process.

On July 27, 2006, I was honored to witness the signing by President George W. Bush of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 which reauthorized and strengthened key provisions of the Voting Rights Act of 1965 that were to expire next year. While this legislation was not perfect, it once again reaffirmed our nation's commitment to the democratic ideal that all Americans should be allowed to cast their votes and cast them without fear of intimidation and harassment, which were rampant in our nation just a generation ago.

When President Bush signed the landmark legislation, surrounded by a bipartisan group of lawmakers who worked collegially, he pledged that his administration will "vigorously enforce the provisions of this law, and...will defend it in court." We intend to hold not only this President and Congress but also future Presidents accountable to ensure that our basic rights are protected and enforced.

Mr. Chairman, members of this committee, throughout my political career spanning many campaigns and numerous elections, I have advocated the need for meaningful and effective election reform, specifically, the essential need to restore citizens' confidence in

the electoral process and the integrity of our voting systems through the adoption of enforceable regulations that will not only reduce fraud, but will also protect the right of all Americans to vote free of harassment and intimidation and to ensure that all votes cast are properly counted.

I would also like to submit for the public record the following studies that have been conducted which highlight the growing problem of voter intimidation and suppression at the polls and evidence of its reoccurrence in recent elections. They are as follows: Democratic National Committee, June 2005 “Democracy at Risk: The 2004 Election in Ohio” http://www.democrats.org/a/2005/06/democracy_at_ri.php; Lawyers’ Committee for Civil Rights Under Law, Report by The National Commission on the Voting Rights Act, February 2006 “Highlights of Hearings of the National Commission on the Voting Rights Act 2005”; <http://www.votingrightsact.org/report/finalreport.pdf>; Demos 2003, “Securing the Vote, An Analysis of Election Fraud http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf”; People for the American Way Foundation, August 2006, “The New Face of Jim Crow: Voter Suppression in America” Crow, <http://www.pfaw.org/pfaw/general/default.aspx?oid=22223#>; A Report to the Center for Voting Rights & Protection, September 2004 by Chandler Davidson, Tanya Dunlap, Gale Kenny, and Benjamin Wise “Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression” and the Cuyahoga Election Review Panel Interim Report issued June 14, 2006.

Indeed, there are other studies and reports, as well as court cases, verifying numerous scurrilous attempts to impede citizens’ voting rights.

ALL CITIZENS SHOULD BE ENCOURAGED TO VOTE

In the weeks leading up to the 2004 presidential election, the VRI heard numerous reports from citizens claiming that they no longer were on the voter rolls and had to cast provisional ballots or their voting precinct had changed and they were worried that they could not get to the right polling station. Upon hearing some of these reports, I traveled to numerous states including Michigan, Pennsylvania, Missouri, Florida and Ohio to learn firsthand what was happening and to ensure our voter education and protection program was being implemented. Following the election, the VRI decided, with the help of the Kerry-Edwards Campaign and the Ohio Democratic Party, to look into some of the more serious allegations of voter suppression and intimidation at the polls.

We conducted a comprehensive investigative study to determine the accuracy, validity and prevalence of problems surrounding the 2004 Presidential Election in the state of Ohio. Very simply, we wanted to know: what was going on and what did voters experience when they went to cast their ballots? While Ohio may have experienced the most extreme and widespread problems, it can be viewed as a microcosm for several battleground states. The types of problems reported in Ohio were reported in other states across the country, but intensified with the degree of competitiveness between President Bush and his Democratic challenger Senator John F. Kerry.

Thus, many of the battleground or swing states (Ohio, Pennsylvania, Florida, Michigan, Missouri, Minnesota, Wisconsin, Nevada and New Mexico, to name a few) experienced significantly more problems (controlling for population) than other so-called safe (Republican or Democratic) states.

The Democratic National Committee retained professional, academic experts from various fields including survey research, voting machine technology, and data analysis to answer the questions: how the allocation of voting resources (machines, poll workers, provisional ballots) affected voters' experiences at the polls and the likelihood that their votes would be counted as cast; whether touch screen Direct Recording machines functioned properly and reliably; whether provisional ballots were distributed and uniformly counted across counties and in accordance with election law; and whether registered voters encountered other obstacles that kept them from voting or prevented votes cast from being counted.

It is my opinion that the United States of America, which encourages every other nation to adopt broad democratic principles and reform, needs to make a basic policy decision that it is in the best interest of our democratic form of government to encourage all eligible citizens to register and vote. We know that election laws, particularly in some states, emphasize voting prevention, rather than encouraging the participation of all citizens who have that right. That is one reason why voter participation in the United States is lower than that in many other leading democracies. By contrast, election participation in six states that provide same-day voter registration--Idaho, Maine, Minnesota, New Hampshire, Wisconsin, Wyoming – have reported higher levels of participation with little or no reported election fraud.

Before we try to address voter fraud, which we all condemn, let us commit to a policy of voting as a civil right for all citizens of the United States and design and implement policies that further that right. Some jurisdictions have adopted voting regulations and procedures which do encourage voter participation--such as extended voting periods, absentee voting, vote by mail, putting polling places near public transportation stops, weekend elections, etc.-thereby facilitating convenient places and times to vote. These laws should be uniformly adopted. The penalties for voter fraud as well as any forms of voter suppression should be serious and enforced.

VOTER SUPPRESSION AND INTIMIDATION SHOULD BE ILLEGAL

The United States has never committed itself to policies of full voter participation. The failure of that commitment has made it easier for discriminatory practices that selectively disenfranchise certain citizens, in order to give a greater voice to remaining citizens. Until participation by all eligible voters is our goal, we will leave ourselves open to manipulation, election scandal and suppression of selected groups because we are not judging those policies against a principle that favors participation. If our government favored participation, women's suffrage would have been unnecessary. The Voting Rights Act would have happened without blood being spilled. Young adults (18-to-20-

year-olds) would not have been sent to war without the right to participate in electing the public officials who sent them.

In VRI's Ohio report, we found that African-Americans were more than twice as likely to experience problems at the polls as white voters. Over half of all African-American voters in Ohio reported that they encountered some obstacles to voting at the polls. Statewide, African-American voters reported waiting an average of 52 minutes to cast a ballot. White voters waited an average of just 18 minutes. African Americans were 20 percent more likely than white voters to be required to vote by provisional ballot, accounting for 35 percent of all provisional ballots in the state. Three-quarters of provisional ballots were counted overall in the state, but only two-thirds of provisional ballots cast in Cuyahoga County (the city of Cleveland), a county with one of the highest concentrations of African Americans in the state, were counted.

Identification requirements were illegally administered and the effects varied significantly by race. Only voters who registered by mail and voters who did not provide identification on the registration form are legally required to produce ID, which accounts for less than 7 percent of the 2004 Ohio electorate. Fully 61 percent of male African-American voters were asked for ID and, overall, African-American voters were 47 percent more likely to be required to show identification than white voters. These racial differences hold even when controlling for residential mobility.

African Americans were four times more likely than white voters to have their registration status changed at the polls, arriving to find that their names had either been purged or never added. African Americans were three times more likely to experience voter intimidation than white voters, including misinformation campaigns that threatened arrest and up to 10 years in jail if a person who had ever been arrested, had a family member arrested, or had an unpaid parking ticket, tried to vote.

Many argue that, if even one innocent man dies, it is reason enough to abolish the death penalty. Yet, our government takes the exact opposite stand when it comes to election reform. ID laws, restrictive registration legislation, voter roll purges... all serve to catch and punish the statistically negligible occurrence of voter fraud. In 2004, there were six proven cases of voter fraud (Brennan Center on Justice NYU Law School), yet thousands upon thousands of honest, tax-paying American citizens were disenfranchised because of this illegal voter witch-hunt. Something is wrong with the foregoing analogy. This is not to say that we should abandon all attempts to safeguard the franchise to only legally registered voters, but we need to be smart about it and stop casting nets that entrap scores of American voters. The innocent Americans caught in this net were disproportionately low-income and minority individuals. Perhaps this is nothing more than an unfortunate consequence of good intentions but, with our history of disenfranchisement, whether explicit or veiled by Jim Crow proxies, we cannot allow intent to trump effect. The effect here is indisputable: intimidation, machine problems, lack of sufficient resources, bigoted and poorly-trained poll workers all operate to suppress turnout among low-income and minority communities. Jim Crow is alive and well, just called by the name of voter fraud protectionism.

The failure to commit to full participation continues to allow states and localities to abrogate the constitutional guarantees of democracy and selectively decide who has an easier and who has a harder time voting. No one should wait for an hour to vote -- but those precincts where voters have been forced to wait in line for hours in order to vote have historically been located in neighborhoods occupied by large numbers of poor people, people of color and young people (as occurred in Ohio, for example, in 2004). While many of these decisions – ranging from where to place polling sites, training election day workers and accessibility to public transportation – are left to local and state officials, it's imperative that we find ways to outlaw all forms of discrimination in the process of making these important decisions.

While the right to vote is our most precious right and the cornerstone of our democracy, our government policies often fail to encourage voting, and by failing to adopt the principle that voter participation is encouraged and facilitated, the election process has been left open to discrimination, fraud and abuse. There's no better example of how this is played out than the decision by some state and local election officials to require some form of ID on Election Day.

A NEW POLL TAX UPON OUR CITIZENS

In 2000, my sister who resided in Florida called me early on Election Day and asked, "How many forms of ID do I need to vote?" My simple answer was to tell her only one. Unfortunately on that day, Demetria had to produce not one, nor two, but three forms of ID in order to vote.

In signing the original Voting Rights Act, President Lyndon Johnson remarked that "voting is the lifeblood of our democracy." The core of our democracy is premised upon our duty to do everything in our power to make voting secure, open, transparent and easier for citizens to participate. No one should have to pay a fee or incur hardship in order to exercise the right to vote. No one should have to go through the humiliation like my sister did in having to show her driver's license, voter registration card and even produce a utility bill in order to vote.

Some of the laws that serve to restrict participation profess the legislative intent to reduce voter fraud -- like requiring a government-issued ID. No one favors voter fraud, but the reality is that over 79 million eligible voters did not vote in the last election, more than four times the highest estimates of undocumented adults in this country, and tens of thousands times higher than any estimate of voter fraud. We have too many laws designed to eliminate a small problem that are instead creating an enormous problem -- a citizenry that is fundamentally disenfranchised and whose participation is discouraged by its government.

The most comprehensive recent academic study of voter fraud was published in 2003 by Demos, a nonpartisan public policy research and advocacy organization that focuses on issues affecting voting rights and election reform. The report, entitled "Securing the

Vote: An Analysis of Election Fraud,” encompasses reported cases from 1991 through 2000 and reports that “the incidence of election fraud is minimal across the 50 United States and rarely affects election outcomes. A survey conducted by the nonpartisan League of Women Voters and other groups of Ohio’s 88 counties in 2005, identified only *four* instances of ineligible or fraudulent voting in the state’s 2002 and 2004 general elections, out of 9 million votes cast.”

<http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf>.

Aggressive proponents of ballot security programs have played a significant role in American politics over the past half century. Under the false guise of a desire to guard against election fraud, and relying upon voters to buy into the inaccurate stereotype of minority precincts as rife with fraud and chicanery, ballot security proponents have routinely sent teams into these precincts to “observe,” but more to challenge, misinform and intimidate racial and ethnic minority voters, who still live in the shadow of massive historical disfranchisement.

An example of partisan chicanery that is cited in “Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression—or both?” is New Jersey’s 1993 gubernatorial election, where Republican candidate Christine Todd Whitman narrowly defeated the incumbent governor, Democrat James Florio. Despite Whitman’s denial that her campaign had engaged in vote suppression, post-election investigations by the news media discovered that some members of the Black Ministers Council of New Jersey reported receiving offers of cash from people identifying themselves as Republicans if the ministers would not endorse Florio to their congregations. Whitman’s campaign manager, Ed Rollins, admitted to reporters that he had used \$500,000 of Whitman’s campaign funds to suppress the black vote. He did this by promising black ministers that he would donate to their favorite charities if they would not rally their congregations behind Florio. Whitman’s campaign spokesman was quoted as saying, “We cut the (Democratic) margin in Essex and Hudson (two urban counties with large black and Latino constituencies). Sometimes vote suppression is as important in this business as vote-getting.” As a result of a federal lawsuit brought against him, Rollins later testified under oath that his claim was false (*Race and Ethnic Ancestry Law Digest 2* (Spring 1996), Rachel E. Berry, “Democratic National Committee v. Edward J. Rollins: “Politics as usual or Unusual Politics?” pp 42 – 46.).

In the summer of 2004, Michigan state representative John Pappageorge, while discussing election strategy, blatantly advised a meeting of the suburban Oakland County Republican Party, “If we do not suppress the Detroit vote, we’re going to have a tough time in this election.” Blacks make up over 80 percent of Detroit’s population. When his remarks appeared in the newspapers, Pappageorge denied intending to give offense to his “colleagues in Detroit or anywhere.” However, he did not deny making the comments attributed to him (*See* Associated Press, “Democrats blast GOP lawmaker’s ‘suppress the Detroit vote’ remark,” *Detroit Free Press*, 21 July 2004).

These are but two examples of historically well-organized, publicized efforts to field poll watchers (poll challengers) in predominantly Democratic precincts with large

concentrations of minority voters, where “official looking” personnel (some of whom are off-duty police officers) are posted at polling places that have been targeted with misinformation. In addition to trying to discourage voters from participating, many of these so-called ballot security officials have used aggressive face-to-face challenges, designed to intimidate and humiliate registered voters. Vote challengers have been known to use inaccurate, unofficial lists that have been obtained from “do-not-forward” letters sent to Democratic neighborhoods that are predominantly inhabited by low-income and minority voters. These intimidating and disfranchising tactics have been employed by a wide range of Republicans, many of whom are prominent professionals with high official standing within the Republican Party.

Proposed and existing voter ID laws make voting more difficult for no compelling reason. The fact is that all voters, in all states, have to show identification in order to *register* to vote. Under the federal Help America Vote Act (“HAVA”), all states require first time voters who do not present ID when they register to vote to show it when they come to the polls to vote. Thus, it is a given that voters who register by mail and those who are registered in door-to-door voter drives must show ID when they arrive at the polls to vote. The reality is that voter ID laws that go beyond the requirements of HAVA disenfranchise many lawfully registered voters. And, they do so in a discriminatory fashion, disproportionately undermining the voting rights of seniors, low-income citizens, minorities, young people and people who live in urban and rural areas. Voting laws are unevenly and often improperly enforced by election officials.

According to the Cuyahoga Election Review Panel Interim Report issued on June 14, 2006, there was a disparity in Ohio between those who were asked for identification: 35 percent of residents in Cleveland said they were asked for ID as opposed to 16 percent of suburban residents, and 31 percent of African-American voters were required to present ID in contrast to 18 percent of white voters. This report mirrors the Democratic National Committee’s studies of similar problems faced by voters living in inner cities versus those living in the suburbs. This entire report can be found at http://www.cuyahogavoting.org/CERP_Final_Report_20060720.pdf.

Finally, let me conclude with one other concern we have today in conducting elections and managing campaigns.

NEW VOTING MACHINES WORRY ELECTION OFFICIALS AND VOTERS ALIKE

People will also be more likely to participate when they believe their vote is counted accurately. We need added accountability in the system to help restore that trust. Where electronic voting machines are used, voters should be provided with a paper ballot option, as well as accessible voting options. Election officials and public officials must effectively communicate to voters that their vote is encouraged and that it will be fairly counted.

The results of the VRI's analysis of the 2004 Ohio election are shocking and profoundly disturbing. In 2004, the project experts concluded that touchscreen (DRE) machines should not be used until a reliable voter-verified paper audit feature can be uniformly incorporated into these systems. While 26 states have now implemented requirements for voter-verified paper records and 13 more and the District of Columbia have such a requirement pending, the independent auditability of the vote count must be equally assured and protected in all states in order to assure equal protection under the law. We are alarmed at the number of states that continue to have problems with their new voting technology. At the end of my testimony, I provide a summary of news articles that have covered this topic.

During our meeting held last summer, the DNC adopted a resolution that expressed deep concerns that the privatization of the vote count through the use of privately controlled electronic devices running on trade-secret-protected and undisclosed software is fundamentally at odds with transparent, verifiable election procedures.

We highly recommend that all lawmakers, including those at the state and local levels, adopt regulations that mandate transparent election administration, require voting equipment vendors to disclose their source codes so that the software that counts the votes can be examined by third parties, and ensure that all voting machines used in local, state and federal elections (including, but not limited to, DRE touch-screen machines) are certified as accurate and tamper-proof.

Also, we encourage lawmakers to adopt regulations that prohibit voting machines from having wireless or internet connections and require that all voting equipment be used exclusively for voting purposes. Citizens expect our election process to be fair and transparent.

Thus, in order to detect potential voting machine error, lawmakers should adopt audit protocols in addition to Voter-Verified Paper Audit Trail (VVPAT) systems, whereby a statistically significant (at least 5%) random selection of precincts is required to manually count 100% of their voter-verified paper ballots on election night; and in those cases where the manual count doesn't match the electronic count, the manual count of the ballots would be the official tally.

Finally, as we learned in Florida in 2000 and most recently in Ohio, lawmakers must adopt election procedures that require a manual countywide recount before the vote is certified in those circumstances where manual vote tabulation detects a strong possibility of election equipment tampering or other irregularity.

Ohio is not alone. For example, in Maryland, tens of thousands of voters were disenfranchised in the September 2006 primary by a combination of unreliable new technologies, incompetence and lack of preparation. In Montgomery County, failure to distribute voter access cards needed to operate the Diebold Accuvote TS machines in use across the state prevented all the voting machines from operating countywide. In some cases voters waited for hours, leading to long lines, voters being turned away and use of

limited supplies of provisional ballots as emergency paper ballots. Court action by the Democratic Party forced Maryland election officials to keep the polls open for an extra hour. In Baltimore City, thousands of voters were turned away when polls failed to open on time because precinct election officials failed to show up and because precinct officials were unable to operate the Diebold Accuvote systems, and when the Diebold electronic poll books and units used to program the voter access cards repeatedly crashed and malfunctioned.

The Maryland Democratic Party Voter Protection hotline received more than 207 documented reports of problems in the City. Again, the Party, along with civil rights groups, successfully sued to keep the polls open an extra hour. Many of these problems could have been prevented through such simple steps as making an adequate supply of emergency paper ballots available and advising chief election judges at the precincts that they could open the polls even without a full complement of officials. Of course, the DNC, which had full voter protection operations in place, has been strongly pushing these and many other steps to make sure all Marylanders can vote and have their vote counted this November.

CLOSING RECOMMENDATIONS ON THE NEED FOR ELECTION REFORM

Let me conclude with my concern about the upcoming election and some recommendations that I hope the next Congress will adopt to ensure a fair, transparent and error-free election.

Laws must be enacted and regulations implemented that mandate transparent election administration and

- require voting machine vendors to disclose their source codes so that software that counts the votes can be examined by third parties, and ensure that all voting machines used in elections are certified as tamper-proof;
- prohibit voting machines from having wireless or internet connections and require that all voting equipment be used exclusively for voting purposes;
- develop audit protocols in addition to Voter-Verified Paper Audit Trail systems, whereby a statistically significant number of precincts are required to manually count 100% of their voter-verified paper ballots on election night, and in those cases where the manual count doesn't match the electronic count, the manual count of the ballots would be the official tally; and, further, that a county-wide manual vote be mandated in those cases where manual vote tabulation detects a strong possibility of election equipment tampering or other irregularity;
- protect voters from unlawful purges;
- reinforce a voter's right to cast a provisional ballot in federal elections and adopt regulations that clarify the proper places and procedures for casting provisional ballots and establish a presumption in favor of validity;
- require equitable distribution of voting equipment and supplies to all polling places, and mandate brief and reasonably equivalent wait times for all voters,

in sheltered areas, no matter where they live, nor what may be their race or socio-economic status;

- make voter suppression and intimidation, including the use of deceptive practices, explicitly a criminal offense;
- establish procedures to ensure that ballots timely cast by eligible U.S. voters living overseas will be counted;
- allow college students greater access to the polls;
- ensure that the polls are accessible to all persons with disabilities;
- prohibit Secretaries of State and other election officials from engaging in partisan conduct during federal elections;
- fully fund the Help America Vote Act to assist states in the recruitment and training of poll workers on new voting systems, and for retrofitting DRE machines so that they can produce paper records and Verified Voting Paper Audit Trail systems.

There are several bills pending in the United States House of Representatives and the U.S. Senate which, if adopted, will make great headway into much needed election reform.

- HR 6187 the “Confidence in Voting Act” would reimburse states at the rate of 75 cents per printed ballot for offering voters, upon their request, the right to cast their vote by means of a contingency paper ballot, regardless of the equipment otherwise in use at the precinct, and would mandate that the contingency ballots be counted as regular (not provisional) ballots.
- S.1975 “Deceptive Practices and Voter Intimidation Prevention Act of 2005” would make it a crime punishable by up to one year in prison or a fine of up to \$100,000, or both, for knowingly deceiving a person regarding the time, place, or manner of election in any federal election, or the qualifications for or restrictions on voter eligibility for any federal election with the intent to prevent such person from exercising the right to vote in such election. The bill contains mandatory provisions requiring the Assistant Attorney General to investigate such claims within 48 hours (or immediately, if the deceptive practices occur within 72 hours of the subject election) and to undertake effective measures necessary to correct information to voters affected by the deception, and refer the matter to appropriate Federal and State authorities for criminal prosecution.
- The Senate “Count Every Vote Act” is a sweeping federal election bill which not only discourages partisan manipulation and deceptive practices in elections, but also requires voter-verified paper trail for all voting systems and a mandatory recount of voter-verified paper records in at least 2% of all polling places in each state. The bill sets minimum standards for the number of voting systems and poll workers at each precinct and requires that each precinct has at least one machine that can provide audio and pictorial verification and that is accessible to language minority voters. This legislation would impose new security standards for voting equipment.

Mr. Chairman, members of this Committee, I remain hopeful and optimistic that one day we will put aside our partisan concerns and do what is necessary to clean up our electoral process and transform and strengthen our democracy here at home.

Thank you for allowing me to participate and share my observations.

EXAMPLES OF VOTER CONFUSION AND PROBLEMS VOTING

MARYLAND: SEPTEMBER 2006 PRIMARY ELECTION

Voter Registration Machines Had Software Flaws. In Maryland's Prince George's and Montgomery County, during the Sept. 12th 2006 primary, the voter-registration machines experienced three types of problems. [[Washington Post](#), 10/4/06]

- **The Machines Rebooted Without Warning In Every Maryland Precinct.** This occurred because of a software flaw that caused each machine to freeze up after an election judge had checked in 43 voters. At Sligo Middle School, the voter registration check-in machine crashed at least 12 times, said elections judge June Jeffries, a federal prosecutor. [[Washington Post](#), 10/4/06; [Washington Post](#), 10/14/06]
- **Access Cards Created Problems.** Some machines could not encode the access cards that voters must use to operate a voting machine. The polling books, which were used for the first time this year to verify voter registration, crashed when the voter access cards were inserted into them. Alan Fox, the chief judge at a Kensington polling place, said it happened a few times before the elections judges figured out how to reprogram the equipment, which took a little technical ingenuity. Janet Millenson, a chief elections judge at a Potomac precinct, said the same thing happened at her polling place on a few occasions. [[Washington Post](#), 10/4/06; [Washington Post](#), 10/14/06]
- **Some Machines Failed To Communicate Properly With Other Units.** [[Washington Post](#), 10/4/06]
- **Diebold Made the Software.** The software, e-poll books, is made by Diebold Election Systems. [[Washington Post](#), 10/4/06]

Polls Opened Late. Some polls opened late for primary voting on September 12th, 2006 in Prince George's County, Maryland, because technicians did not show up for work. [[Washington Post](#), 9/14/06]

Access Cards Arrived Late. Problems in the Maryland Election included the late arrival of the voting machine access cards. [[Washington Post](#), 9/14/06]

Waits Were Long. The computer flaws led to long waits at precincts. [[Baltimore Sun](#), 9/26/06]

Provisional Ballots Ran Out. When a Circuit Court judge ordered that polls stay open an extra hour in Montgomery County, until 9 p.m., election officials were faced with even more problems. Under state law, votes cast during an extended voting period must be on paper provisional ballots. But many polling places had used up those ballots during the morning delays. When one commissioner obtained a spare set of ballots, he realized

they were marked for the wrong precinct. The commissioner used them anyway. [[Washington Post](#), 9/14/06]

Delivering Results Was Problematic. Many election workers also had trouble electronically transmitting results to the central voting office at the end of the day. And the county spent more than a week after the election collecting data cards from 47 voting machines that should have been delivered to headquarters by poll workers on election night. [[Washington Post](#), 10/4/06]

MASSACHUSETTS: SEPTEMBER 2006 ELECTION

Some Scanners Did Not Work. Voting in Boston on September 19, 2006 saw minor problems with less than a dozen scanners, which tabulate votes. [[Boston Herald](#), 9/20/06]

Asian Group Complained About Language Barriers. New York-based Asian American Legal Defense and Education Fund complained that candidates' names did not appear on the ballot in Asian languages. [[Boston Herald](#), 9/20/06]

OHIO MAY 2006 PRIMARY

Electronic Scanners Were Useless, Delaying Results. In Ohio, results from the May primary election were delayed for nearly a week in Cuyahoga County (Cleveland) when thousands of absentee ballots were incorrectly formatted for electronic scanners and had to be counted manually. [[Washington Post](#), 9/17/06]

ILLINOIS: MARCH 2006 PRIMARY

Problems With New Technology Caused Results To Be Delayed 4 Weeks. During Illinois's March primary, poll workers in Cook County, where Chicago is located, experienced problems at hundreds of sites with new voting technology, delaying results in a crucial vote for the county's board. Malfunctions in Sequoia Voting Systems' machines contributed to a four-week delay in getting full results. This prompted a Cook County official to threaten to withhold payment of some of the \$50 million the county owes Sequoia. [[Washington Post](#), 9/17/06; [Rocky Mountain News](#) (Denver, CO), 5/8/06]

EL PASO, TEXAS NOVEMBER 2005 ELECTION

Ballot Shortage Created Long Lines and Frustrated Voters. El Paso County polling places ran out of ballots creating long lines for voters and delays in counting votes. Some people waited up to four hours to vote, and others, frustrated by the wait, left without voting, according to some reports. [[Denver Post](#), 11/2/05]

COLORADO NOVEMBER 2005 ELECTIONS

All-Mail Balloting Vexed Some Voters in Colorado. There were problems in some of the 35 counties conducting the election by mail. Some voters said they never got ballots,

and others didn't realize it was a mail election and went to the polls. [[Denver Post](#), 11/2/05]

PENNSYLVANIA NOVEMBER 2005 COUNTY COUNCIL RACE

Counter Allegedly Broken. Mr. Purcell, candidate for a County Council seat in the North Hills, Allegheny County, Pennsylvania and a former Ross commissioner, filed a complaint in Common Pleas Court last week, arguing that a polling site in Aleppo had a voting machine with a broken counter. The complaint also raised concerns about disparities between the number of votes and the number of voters recorded by poll workers at sites in Aleppo, Ross and Sewickley. [[Pittsburgh Post-Gazette \(Pennsylvania\)](#), 11/30/05]

WISCONSIN: JUNE 2005 ELECTION

Some Voters Were ID'ed. A few people in Mount Pleasant, Wisconsin got a bit miffed at the polls Tuesday morning when they were asked to show their driver's licenses when trying to vote on a school spending referendum. It wasn't a locally imposed voter identification rule but an attempt to get ahead of a statewide voter registration system that will require registered voters to list their driver's license numbers or the last four digits of their Social Security numbers. The statewide system goes into effect Jan. 1. [[Milwaukee Journal Sentinel](#)] (Wisconsin), 6/26/05]

PENNSYLVANIA: MAY 2005 PRIMARY/REFERENDUM ELECTION

Eligible Voters Turned Away. At a Hempfield precinct in Pennsylvania, three independent voters briefly were turned away from the polls. Elections Director Paula Pedicone said election workers incorrectly turned away voters registered as independents because they didn't think they were eligible to vote in the party primaries. However, independent voters can vote on referendum questions and the three voters were contacted as soon as the error was realized and they went back and voted. All voters in the state were eligible to cast ballots in a referendum on whether the state should borrow \$650 million to fund environmental programs. [[Pittsburgh Post-Gazette \(Pennsylvania\)](#), 5/18/05]

LOS ANGELES, CALIFORNIA: MARCH 2005 MAYORAL ELECTION

Some Voters Turned Away and Told To Go To Different Location. In Echo Park, at least 20 people expecting to vote at Allesandro Elementary School were turned away, even though the official ballots mailed to their homes listed the site as their polling place. Instead, they were told to go about a mile away. Barbara Heller, a precinct inspector, said some people said "this has inconvenienced them to the point that they're not going to be able to vote at all." [[Los Angeles Times](#), 3/9/05]

Precinct Opened Late. In West Los Angeles, one precinct station in a private home failed to open on time because the homeowner apparently was not aware that his house was supposed to be a polling place. [Los Angeles Times, 3/9/05]

PALM BEACH COUNTY, FLORIDA MARCH 2005 ELECTION

Man Could Have Voted Twice. Daryl Wilmoth of Boca Raton said that a poll worker at the Wayne Barton Study Center let him reactivate a voting machine after it froze, making him worry he might have voted twice. He said he wished workers had done more to document the problem in case the machine was defective. [Sun-Sentinel (Fort Lauderdale, FL), 3/9/05]

Voters Were Unaware of Precinct Location Change. Some Boca Raton voters said they didn't realize that Precinct 4156 was moved to Fire Station No. 2 from the Science of the Mind Center. [Sun-Sentinel (Fort Lauderdale, FL), 3/9/05]

John H. Fund

Columnist, The Wall Street Journal and Author of "Stealing Elections: How Voter Fraud Threatens Our Democracy" (Encounter Books, 2004)

Our nation may be on the brink of repeating the 2000 Florida election debacle, although this time not in one, but in several states, with allegations of voter fraud, intimidation and manipulation of voting machines added to the generalized chaos that sent that presidential election into overtime. It's time to acknowledge that the U.S. has a haphazard, fraud-prone election system that is still more befitting an emerging nation than the world's leading democracy.

With its hanging chads, butterfly ballots and Supreme Court intervention, the Florida fiasco compelled this country to confront an ugly reality: that we have been making do with what noted political scientist Walter Dean Burnham has called "the modern world's sloppiest electoral system." How sloppy? Just ask the residents of Maryland, who saw their primary election last month thrown into chaos after electronic voting machines couldn't be activated. Thousands of voters gave up and went home, surrendering their right to vote.

The 2000 recount was more than merely a national embarrassment, it left a lasting scar on the American political psyche. A Zogby poll found that 38 percent of Americans still regard the 2000 election as questionable. Many Republicans believe that Democratic-appointed judges on the Florida Supreme Court tried to hand their state to Al Gore based on selective partisan recounts. Many Democrats feel that the justices of the U.S. Supreme Court tilted toward Bush, and they refuse to accept the outcome as valid. But this issue transcends "red state" vs. "blue state" partisan grievances. Many Americans are convinced that politicians can't be trusted to play by the rules and will either commit fraud or intimidate voters at the slightest opportunity.

Indeed, the level of suspicion has grown so dramatically that it threatens to undermine our political system if not addressed. Nearly 10 percent of Americans believe their votes are not counted accurately, and almost as many voters worry that this is the case, according to a 2004 poll by John Zogby. A Rasmussen Research poll that year found that 44 percent of Americans were either very or somewhat worried that a Florida-style mess could happen again in 2004. This growing cynicism diminishes respect for the nation's institutions and lowers voter participation. Only 13 percent of the 18-to 19-year-olds eligible to vote for the first time now bother to go to the polls. The United States ranks 139th out of 163 democracies in the rate of voter participation. That means that, as voting is left to the zealous or self-interested few, the more we are likely to see harshly personal campaigns that dispense with any positive vision of our national future.

The 2000 election resulted in some modest reforms at the federal level such as the Help America Vote Act of 2002, but the implementation has been slow.

America's election problems go beyond the strapped budgets of many local election offices. More insidious are flawed voter rolls, voter ignorance, lackadaisical law enforcement and a shortage of trained volunteers at the polls. All this adds up to an open invitation for errors, miscounts or fraud.

Reform is easy to talk about, but difficult to bring about. Many of the suggested improvements, such as requiring voters to show ID at the polls, are bitterly opposed. Others, such as improving the security of absentee ballots, are largely ignored. The biggest growth sector of our election industry has been the turning of Election Day into Election Month through a new legal quagmire: election by litigation. Every close race now carries with it the prospect of demands for recounts, lawsuits and seating challenges in Congress. "We're waiting for the day the pols can just cut out the middleman and settle all elections in court," jokes Chuck Todd, editor of the political tip sheet *The Hotline*.

Such gallows humor may be entirely appropriate given the predicament we face. The 2000 election may have marked a permanent change in how elections can be decided, much as the battle over the Supreme Court nomination of Robert Bork changed, apparently forever, the politics of judicial appointments.

"If you think of election problems as akin to forest fires, the woods are no drier than they were in 2000, but many more people have matches," says Doug Chapin of *ElectionLine.org*, a nationwide clearinghouse of election news. If the trend towards litigation continues, winners in the future may have to hope not only that they win but that their margins are beyond "the margin of litigation."

Some of the sloppiness that makes fraud and foul-ups in election counts possible seems to be built into the system. The National Voter Registration Act ("Motor Voter"), passed in 1993, imposed requirements on the states that driver's license bureaus register anyone applying for licenses, to offer mail-in registration with no identification required, and to forbid government workers to challenge new registrants, while making it difficult to purge "deadwood" voters (those who have died or moved away). In 2004, the voter rolls in many American cities included more names than the U.S. Census listed as the total number of residents over the age of 18. Philadelphia's voter rolls, for instance, have jumped 24 percent since 1995 at the same time the city's population has declined by 13 percent.

Ironically, Mexico and many other countries have election systems that are far more secure than ours. To obtain voter credentials, the citizen must present a photo, write a signature and give a thumbprint. The voter card includes a picture with a hologram covering it, a magnetic strip and a serial number to guard against tampering. To cast a ballot, voters must present the card and be certified by a thumbprint scanner.

But in the U.S., at a time of heightened security and mundane rules that require one to show ID to travel and enter federal buildings, only about 20 states require some form of documentation in order to vote. A recent *Wall Street Journal/NBC News* poll found that

over 81% of those surveyed supported the requirement to show photo ID at the polls, including two-thirds majorities of Hispanics, African-Americans and Democrats.

The reason for such support is that citizens instinctively realize that some people will be tempted to cut corners in the cutthroat world of politics. "Some of the world's most clever people are attracted to politics, because that's where the power is," says University of Virginia professor Larry Sabato. "So they're always going to be one step ahead of the law."

Election fraud, whether it's phony voter registrations, illegal absentee ballots, shady recounts or old-fashioned ballot-box stuffing, can be found in every part of the U.S, although it is probably spreading because of the ever-so-tight divisions that have polarized the country and created so many close elections lately. Fraud can be found in major cities such as St. Louis and Detroit, where recent Democratic primaries have been marred by allegations of official malfeasance, as well as rural areas such as South Dakota and Texas.

Investigations of voter fraud are inherently political; and, because they often involve race, they are often not zealously pursued or prosecuted. Many federal and state prosecutors remain leery of tackling fraud or intimidation - the U.S. Justice Department has some 200 lawyers handling civil rights complaints but only one attorney whose chief job is pursuing voter fraud violations.

The U.S. Attorney for the Northern District of Louisiana, Donald Washington, admits that "most of the time, we can't do much of anything about ballot-box improprieties until the election is over. And the closer we get to the election, the less willing we are to get involved because of just the appearance of impropriety, just the appearance of the federal government somehow shading how this election ought to occur." Several prosecutors told me they fear charges of racism or of a return to Jim Crow voter suppression tactics if they pursue such fraud cases. Wade Henderson of the Leadership Conference on Civil Rights calls efforts to fight election fraud "a solution in search of a problem" and "a warmed-over plan for voter intimidation."

But when voters are disenfranchised by the counting of improperly cast ballots or outright fraud, their civil rights are violated just as surely as if they were prevented from voting. The integrity of the ballot box is just as important to the credibility of elections as access to it. Voting irregularities have a long pedigree in America, stretching back to the founding of the nation - though most people thought the "bad old days" had ended. But every time we fall into that complacency there is a rude awakening.

In 1948, pistol-packing Texas sheriffs helped stuff Ballot Box 13, stealing a U.S. Senate seat and setting Lyndon Johnson on his road to the White House. Amazingly, 56 years later came the 2004 primary election, when Rep. Ciro Rodriguez, a Democrat and chairman of the Hispanic Caucus in the U.S. House, charged that, during a recount, a missing ballot box appeared in south Texas with enough votes to make his opponent the Democratic nominee by 58 votes.

Political bosses such as Richard J. Daley or George Wallace may have died, but they have successors. A one-party machine in Hawaii intimidates critics and journalists who question its vote harvesting among noncitizens. In Republican counties in Kentucky and Tennessee, age-old habits of buying votes in exchange for pints of bourbon continue. In 1998, a former Democratic congressman named Austin Murphy was convicted in Pennsylvania of absentee ballot fraud in nursing homes.

Even after Florida 2000, the media tend to downplay or ignore stories of election incompetence, manipulation or theft. Allowing such abuses to vanish into an informational black hole in effect legitimizes them. The refusal to insist on simple procedural changes such as requiring a photo ID at the polls, combined with secure technology and more vigorous oversight of absentee ballots, accelerates our drift towards more chaotic and contested elections.

In 2002, Miami officials hired the Center for Democracy, which normally oversees voting in places such as Guatemala or Albania, to send 20 election monitors to south Florida. Scrutinizing our elections the way we have traditionally scrutinized voting in developing countries is, unfortunately, a step in the right direction. But before we can get the clearer laws and better protections we need to deal with fraud and voter mishaps, we have to get a sense of the magnitude of the problem we have. I hope and trust you, as commissioners of this body, can help in that process.

Speaker Biographies

Robert A. Pastor

Robert Pastor is Vice President of International Affairs, Professor of International Relations, and Director of the Center for Democracy and Election Management at American University. From 1985 to September 2002, Dr. Pastor was a Professor at Emory University and a Fellow and Founding Director of the Carter Center's Latin American and Caribbean Program and the Democracy Project. He organized the Center's election-monitoring missions to more than 30 countries around the world. He was National Security Advisor for Latin America from 1977-81, a Fulbright Professor in Mexico, the Ralph Strauss Visiting Professor at Harvard, and was nominated by President Clinton to be Ambassador to Panama.

Dr. Pastor served on the National Governing Board of Common Cause, was former President Jimmy Carter's representative to the Carter-Ford Commission on Federal Election Reform, and was the Executive Director and a member of the Carter-Baker Commission on Federal Election Reform. Dr. Pastor received his M.P.A. from the Kennedy School of Government and his Ph.D. in Political Science from Harvard University. He is the author or editor of 16 books, including *Democracy In the Americas: Stopping the Pendulum* (1988) and *Democracy and Elections in North America: What Can We Learn From Our Neighbors?* Election Law Journal (2004).

Mark F. "Thor" Hearne II

Thor Hearne is one of the nation's most experienced election attorneys. Hearne served as National Election Counsel to President Bush's reelection campaign and in 2000 was Missouri counsel to the Bush-Cheney campaign. Hearne was on the Bush campaign recount team in Broward County, Florida in 2000. Hearne has also served as legal counsel to many other political candidates and campaigns on the federal and state level. Hearne was appointed by the Missouri Secretary of State as an advisor to the Missouri Help America Vote Act (HAVA) implementation task force. Hearne testified before the U.S. House Administration Committee hearings in March 2005 regarding the conduct of the 2004 presidential election and implementation of HAVA. Hearne also testified before the Missouri commission to investigate the 2000 Missouri general election and voter fraud in the City of St. Louis.

Hearne served as an academic-advisor to the bipartisan Commission on Federal Election Reform (the "Carter-Baker Commission"). Hearne has testified before the U.S. Senate Judiciary Committee on issues of election reform and participated as a member of the federal Election Assistance Commission working group on voter fraud and intimidation. Hearne was lead counsel in the federal civil rights redistricting litigation of St. Louis County, Missouri in which he represented individuals including minority plaintiffs and worked closely with the local NAACP in achieving a successful reapportionment of St. Louis County government. Hearne also serves as election counsel to the American Center for Voting Rights.

Hearne is a longtime advocate of voter rights and an attorney experienced in election law civil rights and constitutional litigation. Hearne has spoken to numerous groups and organizations about issues of election reform and served as chair of the Republican National Lawyers Association ("RNLA") National Election Law School in 2003 and 2004. The RNLA Election Law School is a continuing education program for attorney's involved in election law and is accredited by the bar associations of various states. Hearne was named one of Missouri's ten best attorneys by the Missouri Lawyers Weekly in 2004. Hearne was also named one of the "Up and Coming Young Attorneys" by the St Louis Business Journal.

Hearne also served as an attorney and law clerk in the U.S. Department of Education Office for Civil Rights during the Reagan Administration. He has been admitted to the Michigan and Missouri bars and has been admitted to and practiced in a number of courts including the United States Supreme Court, the United States Court of International Trade, the Supreme Courts of Missouri and Michigan, the Eighth, Second and Federal Circuit Courts of Appeals.

Hearne received his law degree from Washington University Law School and his B.A. from Washington University in St. Louis. He is a licensed pilot who has provided commentary for National Public Radio, FOX News and MSNBC and has authored a number of law review articles on various legal issues.

Donna L. Brazile

Donna L. Brazile is Chair of the Democratic National Committee's Voting Rights Institute (VRI) and an Adjunct Professor at Georgetown University in Washington, D.C. The VRI was established in 2001 to help protect and promote the rights of all Americans to participate in the political process.

Brazile, a veteran Democratic political strategist, is the former campaign manager for Gore-Lieberman 2000 – the first African American to lead a major presidential campaign.

Prior to joining the Gore campaign, Brazile was Chief of Staff and Press Secretary to Congresswoman Eleanor Holmes Norton of the District of Columbia, where she helped guide the District's budget and local legislation on Capitol Hill.

Brazile is a weekly contributor and political commentator on CNN's inside Politics and American Morning. In addition, she is a columnist for Roll Call Newspaper and appears regularly on MSNBC's Hardball and Fox's Hannity and Colmes.

During the 2002 mid-term election, Brazile traveled to over 29 states and 53 congressional districts to help train Democratic activists. At the conclusion of the 2002 mid-term elections, Brazile served as a media consultant and grassroots organizer for Senator Mary Landrieu (D-LA).

A veteran of numerous national and statewide campaigns, Brazile worked on several presidential campaigns for Democratic candidates, including Carter-Mondale in 1976 and 1980, Rev. Jesse Jackson's historic first bid for the presidency in 1984, Mondale-Ferraro in 1984, U.S. Representative Dick Gephardt in 1988, Dukakis-Bentsen in 1988, and Clinton-Gore in 1992 and 1996.

In addition to working on political campaigns, Brazile has served as a senior lecturer and adjunct professor at the University of Maryland and a fellow at Harvard's Institute of Politics.

Brazile is the recipient of numerous awards and honors, including *Washingtonian Magazine's* 100 Most Powerful Women in Washington, D.C., *Essence Magazine's* 50 Most Powerful Women in America and the Congressional Black Caucus Foundation's Award for Political Achievement.

Brazile, a native of New Orleans, Louisiana, earned her undergraduate degree from Louisiana State University in Baton Rouge. She is currently the Founder and Managing Director of Brazile and Associates, a political consulting and grassroots advocacy firm based in the District of Columbia.

John Fund

John Fund is a columnist for the *Wall Street Journal*, where he previously served as an editorial writer and deputy features editor. He is also a contributor to the 24-hour cable news channels MSNBC and CNBC.

Mr. Fund has testified extensively on voting rights and ballot security issues before several prestigious groups, including the National Association of Secretaries of State and the bipartisan Commission on voting rights issues co-chaired by former President Jimmy Carter and former Secretary of State James Baker.

Fund authored a book, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (Encounter Books, 2004, ISBN 1-59403-061-8), about the U.S. system, which he describes as "a haphazard, fraud-prone election system befitting an emerging Third World country rather than the world's leading democracy."

Mr. Fund worked as a research analyst for the California State Legislature in Sacramento before beginning his journalism career in 1982 as a reporter for the syndicated columnists Rowland Evans and Robert Novak. In 1993, he received the Warren Brookes Award for journalistic excellence from the American Legislative Exchange Council.