

Assessing the Conduct of the 2006 Mid-Term Elections

**Testimony of Mark F. (Thor) Hearne, II
Before the U.S. Election Assistance Commission
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Washington D.C.**

Mr. Chairman, members of this Commission, I appreciate your invitation to address this Commission and I commend its decision to conduct these hearings into the conduct of the 2006 mid-term elections. The assessment of the 2006 election will provide opportunity to evaluate how the Help America Vote Act (“HAVA”) was implemented by the states and to recommend additional 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. This Commission has an important role in assisting the states in attaining this goal.

My name is Thor Hearne and I am an attorney in private practice in St. Louis, Missouri with the firm Lathrop & Gage.¹ In addition to other experience in election law and related civil rights and constitutional issues, I served as academic advisor to the bipartisan 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 served 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 those election reforms proposed by the Carter-Baker Commission. I have also, as noted in my biography, represented various political candidates and campaigns in election law matters.

¹ A full copy of my resume has been separately provided to this Committee.

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.”² 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 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.

The 2006 mid-term elections have provided opportunity to assess our election system and particularly to evaluate how well HAVA has been implemented and to consider additional measures to increase voter confidence and to protect the right of every eligible citizen to participate.

Three Essential Elements of Fair and Honest Elections

I believe that the conduct of the 2006 election can be determined by reference to three general criteria: current and accurate voter rolls, protecting the right of every eligible voter to cast a ballot, and, accurately counting every ballot.

(1) CURRENT AND ACCURATE VOTER ROLLS.

The Importance of an Accurate Voter Roll

The Carter-Baker Commission noted that, “Effective voter registration and voter identification are bedrocks of a modern election system.”³ A voter roll should include every eligible citizen that 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 that 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

² Carter-Baker Report, at p. 1.

³ Carter-Baker Report at p. 9.

disenfranchised from voting in most state and local races and issues.⁴ 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 a 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”.⁵ When the U.S. Senate was debating the Help America Vote Act of 2002 (“HAVA”),⁶ 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.⁷ 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%. The Columbia Missourian newspaper reported on November 2nd – a week before the election – that their analysis of Missouri voter rolls found more than 10,000 dead still on the voter rolls and that 235 of the “dead” had voted.⁸

Missouri is not, however, the only state with this problem. In 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.”⁹ (*emphasis supplied*).

⁴ Some states, such as Missouri, have adopted election reform to provide voters opportunity to cast a provisional ballot in all races and issues, not just state-wide and federal races. This reform increases the availability of provisional ballots beyond only federal races mandated by HAVA.

⁵ *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>

⁶ Pub. L. No. 107-252, 116 Stat. 1666 (2002) codified at 42 U.S.C. 15301 to 15545

⁷ *United States v. Carnahan* (W.D. MO). 05-4391-CV-C-WAK

⁸ *Missourian*, November 2, 2006, “Deceased still on state’s voting rolls: More than 10,000 deceased people are still registered to vote.”

⁹ Carter-Baker Report at p. 12.

The Help America Vote Act and the National Voter Registration Act of 1993 ("NVRA" or "Motor Voter")¹⁰ 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.¹¹ 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.¹²

I would encourage this Commission to provide guidance to the states for "best practices" required to establish and maintain current and accurate voter rolls. Again, I refer to a recommendation of the Carter-Baker Commission.

[A] complete, accurate, and current voter roll is essential to ensure that every eligible citizen who wants to vote can do so, that individuals who are ineligible cannot vote, and that citizens cannot vote more than once in the same election. A voter registration list must contain all eligible voters (including new registrants) and must contain correct information concerning the voter's identity and residence.

Incomplete or inaccurate registration lists lie at the root of most problems encountered in U.S. elections. When a voter list omits the names of citizens who believe they properly registered or contains incorrect or out-of-date information on registered voters, eligible citizens often are denied the right to vote. Invalid voter files, which contain ineligible, duplicate, fictional, or deceased voters, are an invitation to fraud.

¹⁰ 42 U.S.C. § 1973gg

¹¹ 42 U.S.C. § 1973gg-3(a)(2)(C)(i)

¹² 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 refilled. (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. The 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>

One reason for flawed lists is decentralized management. Local authorities often fail to delete the names of voters who move from one jurisdiction to another, and thus the lists are often inflated. For this reason, the Carter-Ford National Commission on Federal Election Reform recommended the creation of statewide voter registration systems, and this recommendation was codified into law in HAVA.

HAVA requires each state to create a "single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the state level." But states have not carried out this requirement in a consistent manner. Some are creating a "top-down" voter registration system, in which local election authorities supply information to a unified database maintained by the state. Others rely on a "bottom-up" system, whereby counties and municipalities retain their own registration lists and submit information to a state compilation of local databases at regular intervals. Top-down databases typically deliver information in real time — counties can see changes from other localities as these changes are made to the voter list. Bottom-up systems may continue the problems that gave rise to flawed registration lists — i.e., counties retain control of the lists. Counties might not delete the names of voters who move or might not add the names of voters who register at motor vehicle bureaus or other state agencies under the National Voter Registration Act (NVRA or "Motor Voter"). Thus, the statewide lists might be different from the controlling county lists. Having two inconsistent voter lists is like a person with two watches who never knows what time it is. It is essential to have a single, accurate, current voter list.

As of June 2005, 38 states were establishing topdown voter registration systems. The remaining states were either (a) building bottom-up systems; or (b) creating systems with both top-down and bottom-up elements. Three states had not finalized plans.⁷ The EAC, in its interpretation of the HAVA requirement on statewide voter databases, expressed a preference for top-down systems for voter registration but did not insist on it and did not rule out bottom-up systems.

In the judgment of our Commission, bottom-up systems are not capable of providing a complete, accurate, current, and valid voter registration list. They are ineffective in removing duplicate registrations of individuals who move from one county to another and in coordinating with databases of other state agencies. Even in the best of circumstances, with excellent cooperation and interaction between states and counties — an unlikely scenario with the bottom-up system — there will be a time lag in updating voter files in a bottom-up system. This time lag could be particularly harmful in the period approaching the deadline for voters to register.¹³

¹³ Carter-Baker Commission, Section 2.1

I would specifically recommend that this Commission conduct a study into how the HAVA requirement of a single state-wide voter roll was in fact achieved (or not achieved) during the 2006 elections. I know for a fact that in some states, this requirement of HAVA was not satisfied. Local election jurisdictions conducted the election by reference to a voter roll that was not part of a single state wide roll. In some cases there were significant differences between those whose names were on the local voter roll and those whose names were on the official state wide voter roll. In short, many states conducted the 2006 election with “two watches”, one the official voter roll and one the *de facto* roll that was used by local election jurisdictions.

I make this recommendation not to find fault with those officials involved in conducting the recent mid-term election but rather to look forward to future elections. And, I recommend that this Commission provide the technical guidance that may be useful to states seeking to comply with the HAVA single state-wide voter roll standard with the most accurate and current voter roll possible. I think the Carter-Baker recommendation that states create an accurate “top-down” voter roll is a sound recommendation.

The Carter-Baker Commission specifically recommended that, “States need to effectively maintain and update their voter registration lists. *The EAC should provide voluntary guidelines to the states for quality audits to test voter registration databases for accuracy (correct and up-to-date information on individuals), completeness (inclusion of all eligible voters), and security (protection of unauthorized access).* When an eligible voter moves from one state to another, the state to which the voter is moving should be required to notify the state which the voter is leaving to eliminate that voter from its registration list.”¹⁴ (emphasis supplied).

The Importance of Preventing Voter Registration Fraud Schemes

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.

I heartily endorse and encourage any efforts to increase voter participation and voter registration. Every eligible citizen should have opportunity to cast a ballot. Individuals and organizations that encourage and assist individual citizens registering to vote play an important role in increasing voter participation. Those efforts should be encouraged. However, it is an entirely different matter when voter registration efforts morph into an effort to “game” the election system through voter registration fraud. Voter registration fraud actually disenfranchises legitimate, eligible voters and makes the task of election officials even more difficult.

Democrat and Republican election officials in Ohio testified in the aftermath of the 2004 Presidential election that their state was “under assault” from various special

¹⁴ Carter-Baker Commission, 2.6.1

interest groups outside the state seeking to flood election officials with voter registration forms, many of which were fraudulent.¹⁵ Some organizations submitted voter registration forms in October on the eve of the election that had been filled out as early as April.¹⁶ 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 recent 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.¹⁷ 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.’”¹⁸

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 Secretary’s 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”.¹⁹ Several Kansas voters were prosecuted for voting multiple times in the 2000 and 2002 elections.²⁰

This voter registration fraud was also an unfortunate feature of the 2006 election. In Kansas City, Missouri a federal grand jury indicted a number of political operatives involved in a fraudulent voter registration scheme just days before the recent mid-term

¹⁵ 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/useftp.cgi?IPaddress=162.140.64.128&filename=20790.pdf&directory=/diskb/wais/data/109_house_hearings

¹⁶ See, above, note 15 especially the testimony of election officials Michael Vu and William Anthony.

¹⁷ “Allegations Trip Up Voting Rights Group”, Andrew Welsh-Huggins, Associated Press.

¹⁸ “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.”

¹⁹ See, *Memorandum of Understanding* at http://www.sos.mo.gov/elections/2005-12-11_MO-KS-IA-NE-MemorandumOfUnderstanding.pdf

²⁰ See, U.S. Department of Justice, Release, August 2, 2005. http://www.usdoj.gov/criminal/press_room/press_releases/2005_4163_AccessNVotingIntegritySymposium080205.pdf

elections.²¹ These voter registration fraud schemes included the illegal registration of “Miya Hinton, who is listed as a 20-year old residing at an address in the 4800 block of Sacramento Avenue. It turns out that Hinton is 16 and lives at a different address on that block.”²² The *Kansas City Star* found that, “Near the top of the fishy list would be a man named Mark who apparently registered [to vote] seven times over a three-day period using his mother’s home address and phone number. She told the *Star* that Mark hadn’t lived there in six years.”²³ These Missouri vote fraud schemes were the subject of several *Wall Street Journal* national editorials. Voter registration fraud was a national concern not limited to Missouri.²⁴

The Carter-Baker Commission recommended that, “[S]tates be required to establish unified, top-down voter registration systems”²⁵ 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 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.”²⁶ 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.”²⁷

²¹ *Wall Street Journal*, “The ACORN indictments”, November 3, 2006. *Wall Street Journal*, “The Don’t Show Me State: The Liberal Assault on Voter ID Laws”, October 24, 2006. *Kansas City Star*, November 2, 2006, “Four charged in voter registration fraud”. *St. Louis Post Dispatch*, “More Bogus Election Forms Found”, October 25, 2006. *Kansas City Star*, “Election Officials Seek Voter Registration Inquiry”, October 24, 2006. *Associated Press*, “Voter Registration Fraud Alleged in St. Louis”, October 11, 2006, *St. Louis Post Dispatch*, “Suspect Voter Registration Cards Found in St. Louis”, October 10, 2006. *Associated Press*, “Bogus Voter Registration Cards”, October 12, 2006. (“St. Louis officials say hundreds of potentially bogus voter registration cards were submitted ..”) *Associated Press*, “Here We Go Again, ACORN Caught Registering Dead People in Missouri”, October 11, 2006. See also, *Kansas City Star*, October 12, 2006. “Questions Abound In Voter Push: ACORN’s Registration Drive in the KC Area Generates 35,000 Applications, But Thousands of Them Appear to be Duplicates or Contain Dubious Data”. Subsequently, news reports suggest that ACORN national officials have acted to address this situation. “Overall, the St. Louis [ACORN] organizational problems are the worst that national ACORN officials have ever dealt with during the organization’s 36-year history.” *St. Louis Post Dispatch*, “St. Louis ACORN in disarray, under reconstruction.” November 30, 2006.

²² *St. Louis Post Dispatch*, “Suspect voter Registration Cards Found in St. Louis”, October 11, 2006.

²³ *Kansas City Star*, “Questions Abound About Voter Push”, October 12, 2006.

²⁴ *Associated Press*, “Milwaukee Woman Put on Probation for Voter Fraud”, October 24, 2006. *Columbus [Ohio] Dispatch*, “Paid Solicitors might Face Charges”, October 21, 2006. *New Jersey Sunbeam*, “Vote Courier is Arrested; Probe Grows” October 21, 2006. *Tennessean*, “Questionable Voter Registration Forms Surfaced In Nashville” October 12, 2006. *Associated Press*, “Voter Fraud charges Still Tripping Up Voting Rights Group”, October 1, 2006.

²⁵ Carter-Baker Report at 11

²⁶ Carter-Baker Report at 23.

²⁷ Carter-Baker Report at 15.

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 Democrat and Republican election officials was the burden that false and fraudulent registrations place upon the administration of the election. These election officials testified 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) Inflates the voter roll with false or fraudulent names. (3) Alters or invalidates an eligible voter’s existing registration with the potential effect of preventing that eligible voter from being able to vote; and, (4) Diverts significant resources of the election officials at the time when they are most busy preparing for an election.

Many states, Missouri, Ohio, Georgia and others have passed election reform by either statute or administrative rule to address the problem of fraudulent voter registration schemes and to require that legitimate voters registered in voter registration drives are properly and timely processed so that they will be added to the voter roll. This also reflects a recommendation of the Carter-Baker Commission. “Because there have been reports that some people allegedly 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. In addition, voter registration forms should be returned within 14 days after they are signed.”²⁸ When a voter registration form is completed by an eligible voter and then not submitted to election officials for months, or not submitted at all, that voter is denied their right to vote. Those organizations involved in voter registration drives owe every individual from whom they receive a voter registration form the obligation to diligently have the voter registration delivered to election officials for processing in a timely manner.

(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

²⁸ Carter-Baker Commission, 4.1.3

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 7 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 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.”²⁹ 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 name.

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 “Ritzy 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

²⁹ *Detroit News*, February 26, 2006.

“Ceiling” for a state’s identification requirements.³⁰ Many states have imposed more demanding voter identification requirements.

Requiring a person to identify themselves with photo identification before casting a ballot enjoys broad public support. The ACVR-LF poll found that eighty-nine percent of Missourians favor a photo ID provision.³¹ 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.³² Nationally, a Wall Street Journal/NBC poll conducted by Hart and McInturff on April 21-26, 2006 found that more than eighty percent of U.S. citizens support the requirement that a person show a photo ID before they are allowed to cast a ballot.³³ 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 bipartisan support for the measure. Albuquerque voters, with the support of Hispanic Democrat Mayor Chavez adopted a photo ID requirement for all Albuquerque elections.³⁴

³⁰ 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 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.”).

³¹ http://www.ac4vr.com/states/mo_polling_release_032206.pdf

³² 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. (cite 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.effwa.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.

³³ <http://online.wsj.com/public/resources/documents/poll20060426.pdf>

³⁴ 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 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

In Arizona, voters passed a popular state-wide initiative (Proposition 200) that required prospective voters to present proof of citizenship before registering to vote.³⁵ The Arizona proof of citizenship requirement was recently upheld in an initial decision in the federal court. The Ninth Circuit Court of Appeals stayed Proposition 200 but the U.S. Supreme Court overturned the Ninth Circuit and the voter ID and citizenship requirements were in force for the 2006 mid-term election.³⁶

(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 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.

³⁵ 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)

³⁶ 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 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 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) *GONZALES 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. This stay was overturned by the U.S. Supreme Court on October 20, 2006 in *Purcell v. Gonzales*, 549 U.S. ____ (2006). The Arizona mid-term elections were conducted with the requirements of Proposition 200 in force.

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."

Voter identification requirements – including photo identification requirements -- have emerged as a national consensus.³⁷ More than twenty-four states currently require every voter to provide identification before casting a ballot³⁸ and seven states – in addition to Missouri – currently require photo identification in order to vote.³⁹ Election reform legislation requiring photo identification before casting a ballot has been introduced this legislative session in at least four more states⁴⁰ and a national voter Photo ID requirement was 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.⁴¹

Some critics – notably the ACLU, Brennan Center and League of Women Voters⁴² – have mounted a national attack on voter identification or citizenship

³⁷ 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.)

³⁸ 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

³⁹ Florida, Georgia, Hawaii, Indiana, Louisiana, South Dakota and Ohio.

⁴⁰ 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 state's Governor. Similar voter identification legislation was introduced in Minnesota. Identification requirements are not unique to voting. 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."

⁴¹ 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, Calif., 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>

⁴² 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

requirements.⁴³ 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.⁴⁴ The Indiana Democrat Party, the ACLU and other allied parties 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 elderly, minorities and disabled.

The district court found that the Indiana legislature had reason to conclude that the reality of vote 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.⁴⁵ The evidence did not support these 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

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.

⁴³ 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. (See, discussion above), *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*. The Michigan Supreme Court heard argument in this case on November 13, 2006 and a decision is expected shortly. 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.

⁴⁴ 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 Democratic Party v. Rokita*, Slip Opinion, at 4.

⁴⁵ 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.

serious matter, we fear Plaintiffs are engaged in a similar exercise-throwing facts against the courthouse wall simply to see what sticks.”⁴⁶

The Democrat Party in Indiana has appealed the *Rokita* decision to the Seventh Circuit.⁴⁷ The Seventh Circuit heard argument in October 2006 and a decision is anticipated shortly. 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.⁴⁸

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

⁴⁶ Slip Opinion at p. 39.

⁴⁷ "Statement by DNC Chairman Howard Dean on Indiana" 5/2/2006 Democratic National Committee Press Release

⁴⁸ *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 midafternoon 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 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.

available, but only if for voters requested one at least six months before the election.”⁴⁹

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.⁵⁰ Georgia remedied these objections in early 2006 with new provisions to assure access to the required free photo ID.⁵¹

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 vote fraud and a measure to increase public confidence in the outcome of elections.⁵²

⁴⁹ 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.

⁵⁰ 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 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 a 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)

⁵¹ 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.

⁵² For a general discussion of the constitutionality of voter identification requirements, See also, Publius, *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

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.”⁵³

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 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 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.’”⁵⁴

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.⁵⁵ From boarding a commercial aircraft⁵⁶, 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.

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.

⁵³ 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.

⁵⁴ 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.

⁵⁵ "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."

⁵⁶ See, *GILMORE v. GONZALES*, 435 F.3d 1125 (C.A. 9, (Cal), 2006)

One of the reasons why government issued photo identification is an appropriate requirement is that the vast majority of most citizens already possess the identification. Depending upon the state, between 95% and 97% of citizens already possess government-issued photo identification. This means that there are only a limited number of individuals lacking such photo identification. However, for a government-issued photo voter identification requirement to be acceptable, states must: (a) make the required identification readily available without charge; and, (b) make reasonable efforts to provide the required identification to those who do not currently possess such identification.⁵⁷

Now, I realize that in recent days the recommendation that voters provide photo identification has been a concern to some who fear that a voter identification requirement will have the effect of making it more difficult for some to vote. This has led to legal challenges such as in Missouri where the Missouri Supreme Court found that under the Missouri state constitution the cost of underlying documents (such as a marriage certificate of birth certificate) which were required to obtain the free photo identification meant that the Missouri voter identification requirement was an impermissible burden on the right to vote.

For the reasons noted above, I (and many others) believe that a fair and uniform requirement that a person provide reliable identification before they cast a ballot will actually increase voter confidence and participation. I agree with federal judge Murphy who said in relation to the Georgia photo identification law that there is nothing wrong with a state requiring photo identification to vote and that a photo identification requirement is not a “poll tax”. Judge Murphy enjoined the Georgia law, however, because it became effective only two months before the first election in which the photo identification was required and it did not provide sufficient opportunity for voters to obtain the identification. I believe that the consideration of photo identification requirements is best framed not as a debate over whether or not there should be a voter identification requirement. Rather, I believe the most productive discussion should be how we adopt a reliable voter identification requirement that will not be an impermissible burden on any legitimate voter. For example, what exceptions should there be to a voter identification requirement (elderly, disabled, religious objectors), how much transition time should be provided before the identification is required, what must be done to assure that every eligible voter has access to the required identification with out cost.

⁵⁷ Making the identification available would be, for example, in Missouri providing the identification at almost 200 locations throughout the state, with at least two in each county and many more in major urban areas. In addition, Missouri provided the required identification by mobile vans or other teams that would go to specific locations within the communities (such as retirement homes) to provide the identification. Additionally, there should be a sufficient lead time provided during which voters may obtain this identification before the identification is required to vote. In Georgia, federal Judge Murphy noted that he had no objection to a state requiring photo identification to vote. However to require the photo identification for an election two months away did not provide ample opportunity for voters to obtain the identification.

Protecting Voter Access to Polls and Prosecuting Any Voter Intimidation or Suppression Efforts

Every voter (including especially the 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 bi-partisan legislation furthering this objective.⁵⁸ Historically, many polling places in Pennsylvania, especially in Philadelphia, have been located in private homes and other locations that are not readily accessible to handicapped. 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 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 twenty days before an election.

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

3. ACCURATELY COUNTING EVERY VOTE.

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.”⁵⁹

⁵⁸ 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.

⁵⁹ Carter-Baker Report at p. 49. The Commission calls for measures to increase professionalism of election officials and to reduce partisan conflicts of interest.

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.

In October Donna Brazile and I both testified before the U.S. Commission on Civil Rights. One important concern that Donna raised and which I share is the need to have adequate back-up paper ballots at polling locations using DRE and touch screen technology. This is important for two reasons. First, even when DRE and other voting technology operate correctly (as it usually does) some voters – especially those with less experience with technology – may not have the confidence that their vote will be counted. For these voters providing them the option of a “paper ballot” such as an opti-scan ballot will increase their confidence. Secondly, when there is a voting machine malfunction, it is important to have paper ballots available so that voters do not need to wait or return later to vote after the machine has been repaired.

However, we should also be mindful that paper ballots are not a panacea. As anyone who has participated in a manual recount of opti-scan ballots can attest, voters make errors when marking a paper ballot, their intention is not always clear and paper ballots are susceptible to easy manipulation and human error when being counted.

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 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.

As the U.S. Supreme Court noted in the cases I cited above, vote 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.”⁶⁰ 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 candidates’ supporters) recognize that, while they may have preferred a different result, the outcome is, nonetheless, an accurate expression 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 or candidate – the observer must have the meaningful opportunity to monitor the election process without interfering with any legitimate voters’ 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 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

⁶⁰ *Other People’s Money, and How the Bankers Use It* (1933)

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 to the transmission of the results."⁶¹

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 an observer.⁶² 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.⁶³ 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 the Ohio election "challenger" statute was upheld and at 2:00 am on Election Day, Republican observers were allowed to participate.⁶⁴

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.⁶⁵

⁶¹ Carter-Baker Report at p. 65.

⁶² <http://www.ac4vr.com/reports/072005/exhibitJ.pdf>

⁶³ 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>

⁶⁴ 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)

⁶⁵ "Secretary of State Rebecca Vigil-Giron asked the state Supreme Court to overturn 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.

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.”⁶⁶

In the days before the 2004 presidential election, 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.

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 bi-partisan 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. There is also important opportunity for this Commission to assist states in the conduct of elections in a manner that increases vote confidence.

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>

⁶⁶ Carter-Baker Report at p. 65.