"Prudent Steps Toward Improving Voter Confidence"

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"[T]he protection of the voting process is as important for the well-being of the body politic as is protection of public health and safety for the bodies of our individual citizens."

INTRODUCTION

Let me start this afternoon by thanking our gracious hosts from the The Policy Research Institute for the Region here at Princeton University and in particular, its director, Tony Shorris. My thanks also to Andy Rachlin for his assistance in bringing us all together and assembling a fine mix of academics, advocates and practitioners. I am honored to be here. This happens to be my first visit to this wonderful university and already, I am in awe of both its beauty and its rich history and tradition. Your outstanding commitment to research excellence and undergraduate education has ensured that your motto of "…being in the Nation's service" is not only well-earned, but well-deserved. Let me also say that how pleased I am to travel yesterday from our Nation's current capitol to this campus which of course, briefly hosted the Continental Congress back in 1783 and in doing so, served for a brief period as the capitol of the United States. (Is there any chance we can move it back to Nassau Hall so that I can just stay here?)

Let me also thank Myriam Gillies for your very kind introduction, the Fels Institute of Government at the University of Pennsylvania, and the Brennan Center for Justice at New York University School of Law for sponsoring this important conference. (Michael Waldman, executive director, Brennan Center is my former colleague on the White House staff during the Clinton Administration.)

I want to also publicly acknowledge my good friend and former colleague, the Reverend DeForest "Buster" Soaries, who was your keynote speaker yesterday. Although I was unable to make it here in time for his remarks, I understand that he was as dynamic and insightful as always. Reverend Soaries is an outstanding national

leader who worked diligently during his tenure as chairman of the EAC to bring appropriate attention and resources to the efforts of our agency to make a difference in improving the process of election administration – I'm honored to follow him at this podium. Likewise, I would be remiss if I did not take this opportunity to publicly thank several individuals in attendance at this conference who, throughout my time on the EAC, have been gracious in providing me advice and counsel on a variety of important policy matters – in particularly, Professor Ned Foley, the director of the electionlaw@Moritz program at the Moritz College of Law at The Ohio State University; Doug Chapin, executive director of electionline.org; and Christina Galindo-Walsh, senior attorney, National Disability Rights Network.

INTRODUCTION

With your indulgence, I'd like to take a few minutes this afternoon to share with you some personal thoughts I have on the current state of election reform and to humbly offer some ideas to improve the underlying confidence in the integrity of election administration.

Yesterday's focus on campaign finance and the Voting Rights Act allowed us to consider the important policy decisions that will be need to be made in the near future regarding further implementation of BCRA and the re-authorization of the Voting Rights Act.

And yet, as significant as these two topics are – and I can think of nothing more important that re-authorization of the Voting Rights Act – there is, as you know, a third aspect to election law that has become increasingly central to ensuring fundamental fairness on Election Day. And, of course, that third aspect is election administration and the Help America Vote Act. In order to ensure that we are improving how we conduct our elections – which is, after all, the promise of HAVA – we must not be afraid to have candid discussions about our progress and to shine a constant spotlight to our actions. Which is why I am so delighted to be here today.

ERODING VOTER CONFIDENCE

Perhaps one of the most alarming trends in our country, at least from my perspective, is the continual erosion in voter confidence in the process of election administration. Various independent polls taken over the last several years indicate a precipitous decline in the level of confidence that an average voter has in the accuracy of tabulated results. As Professor Rick Hasen and others have noted, the problems in election administration since the 2000 presidential election – including allegations of fraud, claims of voting system manipulation, and the perception of partisanship by election administrators – have adversely affected the opinions of many Americans regarding the fundamental fairness of our electoral process. A *Wall Street Journal – NBC News* poll, for example, taken shortly after the 2004 presidential election, showed that more than 25 percent of those surveyed worried that the vote count in the 2004 presidential race was unfair. More recently, the American Bar Association, at its 2005 summer meeting in Chicago, released a nationally commissioned poll showing that some 20 percent of Americans surveyed had lingering doubts that their vote was accurately counted in the 2004 presidential election. Clearly, what I refer to as the "voter confidence meter" is trending in the wrong direction.

I must also say that these days, it seems like nearly everyone – from the mainstream media to the fringes of the 'blogosphere' – is talking almost exclusively about real or perceived deficiencies in voting system technology. Are electronic voting machines safe? Can they be manipulated, thereby affecting their reliability and accuracy? Should DRE's be used only with a voter verifiable paper audit trail, if used at all? Despite warnings by election administrators and public interest advocates alike regarding the lack of attention to the "people" aspect of election administration, our collective national attention has not strayed too far since November 2000 from the "technology" we use in casting and counting ballots.

To be sure, I am not suggesting that this important national debate on the integrity of electronic voting machines be in any way curtailed or even discouraged, especially in light of the financial incentives given to state and local governments under HAVA to purchase new voting equipment. Because of HAVA, election

administrators throughout the country have been put in the unenviable situation of having to make difficult policy decisions regarding the purchase and use of electronic voting systems during a climate of relative uncertainty and looming federal deadlines.

Clearly, the American public ought to be informed – and vocal – in their opinions about these key technology decisions regarding the means by which we capture and count our ballot choices. And yet, focusing almost exclusively on "technology" will only get us so far in accomplishing meaningful election reform. Moreover, regardless of how one feels about the reliability and integrity of electronic voting machines, one result of this contentious and at times, highly partisan national debate has been to further erode the confidence of the American public in our election outcomes. Given that this national debate on electronic voting machines is unlikely to fade any time soon, it is all the more imperative that we concurrently examine other means by which to afford the American public with a renewed sense of optimism in the fundamental fairness of our electoral process.

RECOMMENDATIONS FOR GREATER IMPARTIALITY

When it comes to considering ways to improve the perception of fundamental fairness in election administration, I am guided primarily by my professional experiences as a life-long student of both politics and public policy, as well as by the perspective I have been privileged to gain while serving as an EAC commissioner. The continued partisan wrangling and controversy associated with our nation's last two presidential elections have placed a tremendous obligation upon election officials at all levels of government to improve upon each aspect of election administration – including, but especially, the technology we use, the policies and procedures which govern our elections, and of course, the people who administer the entire process.

I believe we are making significant progress in all three areas. For those of you not familiar with the work of the EAC, it is worth noting that in our short two-year history, we have fully distributed all HAVA funds to every jurisdiction in the country; we have developed and adopted – after a much deliberation and extensive public comment – the first set of revised voluntary voting system guidelines

governing the accessibility and security of electronic voting systems; we have issued voluntary guidance regarding statewide voter registration lists; we are poised, in the coming months, to transfer the national voting system certification program from the National Association of State Election Directors (NASED) to the EAC; we have developed significant research and data collection regarding various aspects of election administration; and perhaps most important, we have worked diligently to achieve genuine collaboration and partnership with all HAVA stakeholders which in turn, has allowed the EAC to become a legitimate and credible voice in the arena of election administration and election reform.

Progress is also due in no small part to the efforts of state and local election administrators throughout the country. In my many years of working in the public sector, I have never met a group of individuals as universally committed to fairness and integrity in the process as are state and local election officials. There are certainly differences of opinion in this group as to numerous policy issues and how best to achieve meaningful election reform, but there is never any wavering in their universal commitment to continual improvement in the conduct of free and fair elections.

And yet, while we are making progress in enhancing all phases of election administration, the pace of this steady improvement, in my opinion, does not appear to be keeping stride with the persistent erosion in voter confidence. That is, while election reform legislation at the state and federal levels – such as HAVA – will take years to fully implement, the growing contentiousness and litigious nature of our election process is creating additional doubts with each passing election cycle. It is true that there is little we can do to diminish the controversy associated with close elections, nor the courtroom battles that sometimes ensue – moreover, our great democracy is clearly capable of withstanding such difficulties. And yet, the continued attrition in voter trust ought to concern not only the election administration community, but all Americans.

There are four restrained and reasonable steps that can be taken today, which will, in my view, begin to stem the flow of voter trust.

First, as Professor Rick Hasen has already suggested, I believe it is imperative for states to perform an "election law audit" on a routine or periodic basis to determine whether there exists any lingering ambiguities or outright inconsistencies in the current policies and procedures governing the administration of elections for that particular jurisdiction.

For example, language in HAVA required that each state adopt a "uniform and nondiscriminatory" definition of what constitutes, and what will count as, a vote for each type of voting system used in that state. This requirement, a clear attempt by Congress to address the difficulties encountered by Florida in the 2000 presidential election, caused state legislatures to examine their respective election codes with a collective discerning eye towards "voter intent."

Likewise, in my view, state legislatures should periodically turn such collective scrutiny toward *all* aspects of their statutory and administrative election policies and procedures, not just voter intent. And, this election law audit should be done in a fully transparent and collaborative manner, much like the development of the respective "state plans" under HAVA. In fact, the very same planning committees that were statutorily mandated to develop a state's HAVA plan – many of whom are now either dormant or disbanded – should be reconstituted for the very purpose of conducting a periodic election law audit on a state-by-state basis.

In addition to assessing ambiguities and confusion in state policies and procedures, a periodic election law audit will also allow state policymakers to better understand how the various election procedures operate, who has discretion or responsibility to implement such policies, and perhaps equally important, what election-related policies and procedures *are not* currently, but should be, written into state law.

For example, one of the most controversial aspects of the 2004 presidential contest was the casting and counting of provisional ballots, an issue that was extensively litigated right up to Election Day. In conducting such an election law

audit, a state may determine that the policies and procedures governing provisional voting should be largely codified by the state legislature rather than administratively promulgated by a state chief election official who was likely elected or appointed to that office on a partisan basis. At a minimum, if state legislatures were to institute a periodic, transparent and collaborative review of statutory and administrative election laws and procedures, such an assessment will at least deter the perception by some that the "rules of the game" are being made up in the middle of an election contest.

Second, while many respected academics and commentators have articulated a compelling rationale for state chief election officials to be appointed on a nonpartisan basis and confirmed by a super-majority vote, I believe that calls for such an approach are premature. Like a majority of members of the National Association of Secretaries of State, I happen to believe that chief election officials who are elected to their positions – as most are – will make decisions knowing that the ultimate accountability for their actions will be decided by voters on election day. Thus, before we take steps that could decrease such accountability, we should consider whether voter confidence can be strengthened through a less drastic step.

Accordingly, I believe the time has come for adoption, on a state-by-state basis, of a limited, yet strong, conflict-of-interest requirement for all state chief election officials – whether elected or appointed. In the current environment of close public and media scrutiny over election administration, clearly, the momentum is building for such a development. Recently, two statewide chief election officials – Secretaries Bruce McPherson of California, a Republican, and Bill Bradbury of Oregon, a Democrat, issued a joint pledge to carry out their duties in an "independent and non-partisan manner that is beyond question" and to not "serve in any ongoing official capacity on a campaign supporting any candidate. Others have expressed similar support for political impartiality by a state's chief election official, including former NASS president Mary Kiffmeyer, who currently serves as the elected Secretary of State in Minnesota.

Let me be clear in stating that I do not believe that when a state's chief election official chooses to engage in a partisan contest, such political involvement

necessarily leads to any partisan advantage. Every statewide chief election official – such as a secretary of state – takes an oath of office pledging to implement the laws of that jurisdiction in a fair and impartial manner. And yet, I am in agreement with those – such as Secretaries McPherson and Bradbury – who have concluded that the issue of public *perception* when such a conflict-of-interest is present is simply too compelling to ignore.

In short, removing the perception of partisanship by requiring a state's chief election official to refrain from serving, whether actual or honorary, on a campaign or committee supporting any candidates and to remain neutral on any referendums, measures, propositions, recalls, or initiatives unless they relate directly to the official duties and responsibilities of the chief election official seems to me a restrained and yet, significant step toward restoring the public's faith in the underlying fairness of our election system.

Although voluntarily adopting such a restriction is certainly prudent – as many current secretaries of state have done – in my view, such conflict–of-interest provisions should be legislatively debated and enacted into state law. One state in the country has done so, by the way, which is Colorado. There are several benefits to codifying such a provision. First, the public input and discussion that would be generated by having a state legislature debate this important topic would, in my view, serve to increase public confidence in the electoral process, regardless of what language, if any, is finally adopted. Second, while a voluntary pledge of neutrality accomplishes the same result as one that is statutorily enacted, the voluntarily pledge is only as good as the official who makes it. In other words, any successor is not bound by the incumbent's pledge. Finally, and perhaps most important, adopting a conflict-of-interest provision into state law would help remove the political pressure to participate in party politics that may be felt by a state's chief election official who is appointed or elected on a partisan basis. That is, having the ability to point to a provision in state law that restricts such activity is an enormously useful tool for a statewide chief election official who may be under great pressure to engage in partisan activity, particularly if that individual happens to be the highest ranking statewide elected official for a particular political party.

Let me also say that I strongly believe that the genesis of such efforts for legislatively-enacted conflict-of-interest provisions ought to come directly and solely on a state-by-state basis. Other than utilizing the "bully pulpit," as I am doing today, the EAC should play no role in effectuating this particular outcome. In my view, the best way to develop a meaningful conflict-of-interest provision applicable to a state's chief election official is through discussion and deliberation in each respective state which will need to take into account various factors, such as state-specific constitutional, statutory and regulatory provisions.

My third recommendation for improving the public's confidence in our election outcomes involves an increasingly essential player in the process of election administration – the vendors of election equipment. Given the important – and significantly direct – role that voting machine vendors play in our political process, I believe they too, have an obligation to take necessary steps toward greater neutrality. While I suspect the days of voting system company CEO's publicly pledging to deliver votes for a particular political candidate have long since passed, nevertheless, election equipment vendors must also consider adopting strong conflict-of-interest provisions to help restore confidence in the integrity of our electoral process.

As with the election community, many of the major election equipment vendors have voluntarily adopted company-specific ethical standards. This is a positive development. And yet, while each company having a specific policy is important, I believe an industry-wide conflict-of-interest provision is necessary, which, at a minimum, should include a prohibition on all company officers and executives from endorsing, assisting, or contributing to, candidates, political parties, or political organizations.

While I am concerned about the First Amendment implications of such a strict ethical standard, the special trust that is placed in an election equipment vendor by a jurisdiction that purchases its equipment – and then, in most cases, must rely on the vendor's technical expertise to set-up and operate the voting systems – is quite compelling. In many ways, that particular vendor has just as much obligation – if not

more so – to act with integrity, impartiality and fundamental fairness as does a public officer, such as a state's chief election official or local election administrator. Therefore, in this particular circumstance, I am persuaded that the benefits of producing greater public confidence in the fairness of our election process in adopting such a strict political neutrality restriction outweighs the loss of individual rights for those election equipment company officers and executives which would be impacted by this provision.

At least one major election equipment vendor agrees. Diebold, Incorporated has adopted a policy prohibiting its chief executive officer, president, and chief financial officer, as well as company executives with oversight of election system companies *and employees* of those companies from making contributions to any political candidate, party, election issue or cause, or participate in any political activities, except for voting. Accordingly, I think the time has come for the election equipment industry to immediately implement a strict, industry-wide conflict-of-interest provision regarding political neutrality for, at a minimum, all senior company executives and officers.

Finally, as a means to further protect the public interest in such a key governmental function as is the fair and impartial administration of elections, I propose that, as a condition of state voting system certification, states require disclosure to appropriate state officials of certain key information from the vendor, such as: (1) details concerning past or present criminal or corruption investigations or prosecutions involving a vendor's employees or officers; (2) disclosure of financial information of the vendor pertaining to bankruptcy, insolvency or reorganization; and (3) disclosure of all litigation in which the vendor is, or has been, a party within the past five years.

There is precedent for such a requirement. For example, many states currently require voting system vendors – as a condition of state certification – to deliver to state officials copies of the software and source code for electronic voting systems that are being certified for use in that particular jurisdiction. We ought to do the same in requiring key information from voting system vendors.

Let me also say that as the responsibility over federal voting system certification transfers from the National Association of State Election Directors (NASED) to the EAC, I believe it would be prudent for the EAC to adopt a similar disclosure requirement upon voting system vendors. In fact, having this criminal, financial and litigation information disclosed at the federal level – to be shared with relevant state officials when necessary – may be a more efficient way to implement this disclosure proposal, rather than having the vendor do so each time it applies for state voting system certification.

While it is true that past conduct – whether meritorious or lamentable – is no definitive predictor of future behavior, nevertheless, the public, through its state election officials, has a right to know such details, particular at a time of heightened public scrutiny and anxiety regarding the use of certain election technology. In my opinion, such transparency will ensure that state officials have adequate information to assess the integrity, reputation and reliability of voting system vendors that wish to do business in that particular state. More importantly, this should serve as another small, yet significant step, toward improving the confidence of the American public in the process of election administration.

CONCLUSION

Let me conclude by saying that the four steps that I have proposed today – periodic election law audits, implementation of state-specific conflict-of-interest requirements for state chief election officials, adoption of an industry-wide political neutrality requirement for senior executives and officers of voting system vendors, and disclosure of certain criminal, financial and litigation information by election equipment vendors to relevant state officials as a condition of voting system certification – serve as measured, yet, in my view, sound and prudent steps toward

achieving a greater sense of voter confidence in our election procedures and outcomes. Moreover, none of these proposals require any additional authority or responsibility to be given to the EAC. I truly hope that all HAVA stakeholders will take these proposals in the spirit in which they are offered – not to upset the delicate federal/state balance that has been achieved with the passage of HAVA and the creation of the EAC, but as observations from an EAC commissioner who has been privileged to sit at a unique vantage point from which to view – and comment upon – the progress of election reform.

I will end my remarks today simply by stating that, as we move forward with HAVA implementation in the months and years to come, the EAC must diligently stick to the task it was assigned in HAVA – to distribute appropriated federal HAVA funds in a timely manner, as we have done; to provide timely voluntary guidance on matters related to the election technology and administrative requirements in HAVA; to act as a national clearinghouse on information and research pertaining to election administration; to assist in implementing important federal voting laws, such as NVRA and UOCAVA; and to develop a program of certification of voting systems in this country – together with strong and transparent voting system standards – that we can all have faith in. And, we must do all of the above in a transparent and collaborative manner while taking into account the great history in our country of election administration being a responsibility largely reserved – appropriately, in my view – to state and local governments.

I am honored to be here will you all today. Thank you.