

**Testimony of Colleen C. McAndrews, Esq.
Bell, McAndrews & Hiltachk
1441 Fourth Street, Santa Monica, CA 90401
(310)458-1405; colleen@bmhlaw.com**

**Before the Carter/Baker 2005 Commission on Federal Election
Reform**

April 18, 2005

American University, Washington, D.C.

President Carter, Secretary Baker, distinguished members of the Commission, staff, and guests, I am honored to have this opportunity to address you.

It was my privilege to serve with President Carter and Minority Leader Michel on the 2001 Carter/Ford National Commission on Federal Election Reform, and I am pleased you are continuing with the task of analyzing and recommending improvements for our national and state elections systems.

This panel addresses the issues of Access and Integrity. During my oral testimony, I plan to address in detail the idea of requiring voter identification at the polls. However, I also want to take this opportunity to briefly review those recommendations from the Carter/Ford Commission that should be revisited to enhance ballot access and integrity, and commend them to you for further recommendations and consideration.

Before that discussion, however, I wish to preface my remarks with an admonition. I strongly urge that you acknowledge in all areas of election reform, not just access and integrity, but also equipment, registration, absentee and provisional voting, and election administration areas, the explicit finding of the Carter/Ford Commission that “one size does not fit all” in election administration in this country. What works in my home county of Los Angeles, the largest election jurisdiction in the nation, may not work in Iowa, or even in tiny Amador County, in the same state of California.

That is the reason the Carter/Ford Commission resisted the natural impulse to federalize elections and achieve uniformity. Our nation’s longtime, historical commitment to the federal/state doctrine is never as critical as in the administration of elections. States must be left to experiment and incubate reforms that fit for their size, geography, and voters’ expectations.

Former Senator Howard Baker reminded us in 2001 that his wife, former Senator Nancy Kassebaum, still voted in her precinct in Kansas using paper and golf pencils. The voting officials in Cambridge, Massachusetts may have entirely different considerations than an official

in a retirement area in Florida. Each jurisdiction must retain control over its operations without rigid dictates from the federal government inside the beltway.

I urge you to evaluate each proposed reform or change with the adage used by doctors. *Will the treatment do no harm?* Will the reform proposal do no harm? The elections systems in place are sometimes fragile.

Because funding varies from locality to locality, a reform that sounds good (for example uniform voting system machines nationwide, or even statewide in a large state such as California) could lead to a train wreck in a future election. In this example, in considering a suggestion to impose one type of voting machines on the whole county, it is imperative to balance the benefits of that uniformity with the resultant loss of creative invention and competition among machine vendors that could arise if one system dominated a few large states. Likewise, what works in urban New York may not be applicable in rural Montana.

With mandates regarding machinery, I suggest you should evaluate risks and drawbacks, always looking to lower them, while at the same time measuring unintended consequences such as availability of resources for ongoing training and support, etc. These decisions should be made on the local level by the election administration officials and not imposed top down from Washington. I feel very strongly about this and believe you will come to see the wisdom of this position after your extensive hearings.

Carter Ford Commission Issues to Revisit

The following issues impact access and integrity and were not addressed by HAVA or in its implementation.

1. Money. Federal funding needs to be guaranteed for administration of federal elections. The funds have recently begun to flow and that must be maintained and even increased in order to solve key problems. Inadequate equipment, poll worker training, enough polling places, number of poll workers, and voter education, all are impacted by the fact that election administration is funded at the county level. This is the poorest unit of government which is tasked with conducting elections while funding health care, public safety, and social services. Access and integrity mean little if the system is so financially starved that competent processes are lacking.
2. National Holiday. If the celebration of Veterans Day were moved to the first Tuesday after the first Monday in November (federal election day), it would be a fitting way to honor those who serve our country by exercising the right to vote that they protected. In addition, it provides a significant percent of the population easier access to the polls on a day without work. More poll workers would be available to serve. More ADA qualified public buildings such as schools would be available as polling places. Some veterans groups have been resistant in the past to sharing the holiday but I think they should be cajoled into seeing the merit of this idea.
3. Uniform Poll Closing. I commend to you the policy recommendation of the Carter/Ford Commission regarding media projections on election night and the Commission's carefully nuanced suggestions of a remedy. Former Congressman Leon Panetta, former Senator Slade

Gorton, and I submitted an additional statement from our Western States perspective about the pernicious effect of early calls of the election on our state and local elections. Those sections are appended for your reading and commended to you. I believe that nothing undermines the integrity and reliability of an election as much as suppression of the vote. It is naive to think that once the press has named a winner for President, voters will still troop to the polls to vote for their legislator or congressperson. Surely, a bit of mandated restraint upon the hyperactive media might be upheld by the courts in the interest of democracy.

Voter Identification Issue

Convenience Voting

Many commentators including Norman Ornstein of the American Enterprise Institute, or columnist George Will lament that with “convenience voting” ([1] “no reason needed” absentee voting as early as 30 days before election day; [2] early voting in the week prior to election day at civic locations; or [3] vote by mail laws), something is lost in the democracy.

The act of the polity all coming together on one day, with their neighbors, with the same set of facts and issues flushed out until the last minute, proudly casting ballots that determine their representatives is a singular binding achievement of a democracy. Recall South Africa in 1994 or Iraq in 2005. The pictures and emotions of those election days were felt around the world.

We have lost that in the United States with the decade long march for convenience in our elections and voting.

The Genie is Out of the Bottle

However, the genie is out of the bottle. Huge numbers of voters welcome not standing in lines (short ones or ridiculously long ones as in 2004). Americans’ frequent and easy travel dictates absentee voting. New technologies such as the direct record electronic (DRE) machines can be placed in libraries or city halls and beckon voters to get that voting chore out of the way as they pass by days and weeks before election day.

In the 2004 election, 20% of voters nationwide voted by absentee ballot. This number is higher in states like California where there is “no excuse needed” absentee voting. These voters are not likely to agree to return to same day election day rituals.

Future Technologies and Election Integrity

Experts in election technology told the 2001 Commission that the day would come when voting could be done in the supermarket parking lot; that votemobiles could travel a county in the weeks before an election providing access to all voters; that even voting from one’s home computer might someday be secure and safe.

Election laws and administrators must prepare for these future developments. Election integrity will be a key component for these future systems. How will votes be limited to one per person when the process is so fluid? How will the voter's right be preserved for that one individual (can you imagine the howls if you went to vote on election day and were told that you had already voted at the Safeway the week before)? How will the citizenry feel confident that there are free and fair elections without safeguards as to identity?

Skepticism and Doubt are not Healthy for the Democracy

The American people experienced the closest election in any participant's lifetime in November, 2000. The media, fueled by the 24 hour news cycle, brought the drama into everyone's living room. Scrutiny grew of every election at every level, and inevitable flaws and warts in many local and state elections were soon observed and communicated to the electorate.

It is a process administered by humans and used by humans and it will never be perfect.

The billable hours of law firms all over American undoubtedly plummeted on November 1 and 2, 2004 due to the thousands of attorneys deployed by both the Kerry and Bush campaigns into the battleground states. Attorneys were stationed in one battleground state with PR specialists and private planes ready to jump them into neighboring battleground states, depending on where the fraud or errors or close vote were discovered on election night. The entire nation was poised expecting a repeat of Florida. I even felt a whiff of disappointment in the political community that the margin of Bush's victory deprived legions of operatives of the adrenaline rush of Florida four years later.

As a frequent, partisan election monitor in California, my job is frequently just working with the other party's lawyer counterpart so that both of us can contain the wild rumors, jostling, and heated behavior of each side's election monitoring troops. I have personally tracked down specific claims of fraud or vote stealing on numerous occasions. Often a great deal of effort is expended to obtain actual facts, legal affidavits, or eyewitness accounts rather than rumor or hearsay, all for naught. Almost without exception, over 16 years, in post-election monitoring situations, such charges evaporate and no merit can be found that will prove anything or change an election. And yet the mistrust remains.

These close elections in recent years have bred mistrust in all sectors of the political arena. Partisans all experience severe paranoia that the other side will steal the election. Few trust election administrators fearing they are either partisan or just not competent. No one trusts the media. Several close congressional races in California in recent years gave rise to lots of charges of illegal voting. Whether it was all smoke or real fraud was hard to deduce.

Nevertheless, as one who approaches all claims of fraud with a healthy dose of doubt due to this history, I believe the time has come to address the rampant fears of fraud. As someone on the ground, I believe these fears have accelerated to nonmanageable proportions. It is imperative to assure all sides in the political community that elections are free and fair; to guarantee the integrity of the system; to provide mechanisms that make sense to common people so that

rumors and fear and mistrust can be addressed. Voter identification is a key element in dispelling this mistrust.

Voter Identification Needs to Be De-Polarized

For some reason, recent months have created an intense, partisan approach to voter identification. The echo chamber has liberals believing that voter identification at the polls is a direct assault on civil liberties and that voter suppression is the goal. Meanwhile, conservatives believe that the desire to maintain the current lack of voter identification rules in most states is in order to perpetuate illegal and fraudulent voting practices in certain areas of the country. The claims and counterclaims need to be ignored so that common sense can prevail.

This intense partisanship defies understanding. In 2001, the Democratic Caucus Special Committee on Election Reform, chaired by Congresswoman Maxine Waters, supported a jurisdiction's right to require voter identification at the polls. There were certain reasonable caveats as to availability (so there were no barriers; and there was equal application of standards, practices or procedures to all eligible voters). However, the fact remains, Water's position is important and should not be lost in the current polarization.

Recently, Democratic Governor Bill Richardson (another member of the Carter/Ford Commission) signed election reform legislation in New Mexico, requiring voter identification, although it has been called "registration lite" since it permits numerous types of identification. Perhaps these examples of rational positions by Congresswoman Waters and Governor Richardson can be cited to help lower the fear and paranoia among partisans.

The trend is towards acceptance of voter identification at the polls. In 2001, 11 states required it. By 2004, 17 states required it. Now in 2005, with the addition of New Mexico and Indiana in recent weeks, 19 states require some type of voter identification at the polls.

The legislative trend is possible because voters are used to providing identification (usually with a picture) to board planes, to use credit cards, to buy cigarettes in some states, to cash checks, to obtain prescription drugs, to enter government buildings, and so on. Such are viewed as quick and non intrusive requests. It seems commonsensical to the public.

A poll cited by John Fund in his book, Stealing Elections, (2004) cited a Rasmussen Research poll that 82% of Americans believed voters should show photo ID. The supporters included 89% of Bush voters and 75% of both Kerry voters and those also self described as liberals.

Therefore, I believe for all the above reasons, it is time for your commission to recommend to the states that voter identification rules be put in place.

What Should a Voter Identification Process Contain?

I recommend consideration of the following options, which I have listed in descending order of effectiveness (but not necessarily practicability). I have listed possible problems with practicability or arguments against each in parentheses:

1. Government issued voter identification cards with photo, issued only to registered voters (biggest cost and a burden in that all voters must go someplace to obtain them).
2. Drivers licenses with a free government issued photo alternative for non drivers or those unable to afford drivers licenses (a cost to state government and a burden for those without drivers licenses since they must go someplace to obtain one).
3. Employer issued photo identification (not available to the self employed or unemployed).
4. Student photo identification cards (correct addresses may be an issue since students register in hometowns or the college town, either of which may not appear correctly listed in order to vote in the location).
5. Passports (not available to lower income levels who may not afford or need one).
6. Military ID cards with photo (limited cohort).
7. Indian reservation photo identification cards (limited cohort).
8. Non photo identification in conjunction with an identifier number such as last four digits of a social security number (better than the current honor system but not full proof).
9. Utility bills in the name of the voter (better than nothing but does require some verification).
10. Library cards or political party issued identification cards (neither guarantee identity and would be ludicrous to impose the burden on the voters with little benefit for the system).

These are among the suggestions being made around the country in proposed legislation. There are many combinations and variables. Indiana has recently adopted very tight requirements and New Mexico very flexible ones. Most proposals contain procedures for easily changing names and obtaining new cards as well as new addresses. One commentator said with any system there must be supreme educational efforts on the part of the government to notify all voters prior to the first election imposing identification requirements. For any voters who appear to vote without the required document, provisional voting must be available with an affirmation that the voter is who he or she says they are. Then there could be a system whereby the provisional ballot can be "cured" either election day or shortly afterward with the submission of the required identification document or a photo copy of it to attach to the provisional ballot.

Surely the first few cycles until voters acclimate to the new rule, there will be administrative burdens on elections officials and poll workers.

Legal Issues

A comprehensive statement was presented to the Carter/Ford National Commission on Federal Election Reform in 2001 by its Task Force on Constitutional and Federal Election Law regarding legal issues for identification requirements. The Task Force pointed out that it is dangerous to generalize about what kinds of identification requirements might be permissible under the Voting Rights Act. I attach that statement as a background piece for the constitutional and statutory challenges that might be brought against a jurisdiction adopting such reforms.

Prior to HAVA, the U.S. Department of Justice would preclear voter identification rules only when affirmations or affidavits or vouching under penalty of perjury were included as an alternative. However, in the last four years, the Justice Department has approved a number of voter identification statutes (including Alabama's and Arizona's), and the Department specifically approved HAVA's identification requirements for first-time voter registrants in a letter to Senator Kit Bond. Therefore, the legal sands are shifting with regard to prior concerns about incursions on civil liberties.

Whenever legal analysts are discussing constitutional muster for such reforms, it is in the context of whether burdening the right to vote is substantial or not. While any proposal must be narrowly tailored to accomplish its goals and will be strictly scrutinized, some legal scholars believe that the governmental interest in the integrity of elections is such that some burden is appropriate as long as it is not undue. That will depend in large part on the kinds and combination of identification required.

Last, never discussed in any hearings I have attended or any of the recent literature reviewed is any system such as the one we witnessed in Iraq. The purple stained finger indicating an individual had proudly voted once was compelling television. Of course, the inked finger impedes multiple voting but does not address the fraud of impersonating another. However, it is a simple step that could address some of the paranoia about fraud in the United States, and certainly does little damage to civil liberties. Perhaps that would be a first step for the US to emulate the new democracy in the middle east.

Thank you very much for the privilege of sharing my thoughts with your distinguished panel.