



**Lawyers' Committee for
Civil Rights Under Law**

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**STATEMENT OF BARBARA R. ARNWINE, EXECUTIVE
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Thank you Chairman Carter and Chairman Baker,

Good morning. I am Barbara Arnwine, the Executive Director of the Lawyers' Committee for Civil Rights Under Law. I want to thank President Carter and Secretary Baker and the Commission on Federal Election Reform for their dedication to ensuring that all Americans can safeguard our fundamental freedoms by effectively exercising the right to vote.

I commend the Commission for continuing the necessary spotlight on the shortcomings in the American system for choosing our political leaders. The perception that the administration of the past two presidential elections was flawed and unresponsive coupled with the unprecedented mobilization of advocates on issues of representation has created a unique moment when our electoral failures coincide with unprecedented activism and awareness about our voting process. I ask activists, citizens and policy makers not to let this moment recede without action.

The Lawyers' Committee is a forty year old nonpartisan, nonprofit civil rights legal organization, formed in 1963 at the request of President John F. Kennedy to provide legal services to address racial discrimination. Since its inception, the Lawyers' Committee and its nationwide network of pro bono law firms and attorney volunteers has worked to secure and protect minority voting rights. After the 2000 election debacle, the Lawyers' Committee combined with over 100 national, state and local non-profit organizations to form the non-partisan, Election Protection Program. Last year's Election Protection program was the largest volunteer mobilization to protect voters in the nation's history. The coalition called on the talents of over 25,000 volunteers, including more than 8,000 legal volunteers to answer the 866-OUR-VOTE voter protection hotline, engage in direct poll monitoring, and provide legal services for voters who faced obstacles to the ballot box. Over 130 civil rights and civic participation organizations devoted their resources to making the 2004 Election Protection Program a success.

The Lawyers' Committee is deeply frustrated and disappointed with media reports suggesting all was well at the polls in 2004. The reality is that Election Protection received over 110,000 calls from voters on Election Day alone to the twenty-one 866-OUR-VOTE call centers and 65 local legal command centers across the country which told a different story. Long lines, the singular issue that the media focused on following the election, were a manifestation of the many voting irregularities that confronted voters as they attempted to cast a vote and not solely a consequence of near record turnout. Despite what we saw on the news, the margin of victory in an election should not be used as an automatic indicator that the election ran smoothly and was not plagued by errors.

Overall, the Election Protection hotline provided assistance to over 205,000 callers from the Early Voting period to the close of polls on Election Day. To date, we have entered nearly 43,000 reports in the Electronic Incident Reporting System, the coalition's database. Prior to the election and on Election Day, voters calling the hotline reported incidents of registration problems, late mailing of absentee ballots by election offices, failure to provide assistance to the disabled, failure to provide bilingual assistance, failure to provide provisional ballots, improper and racially discriminatory voter ID requests, breakdowns of electronic voting machines, polls opening late and closing early, poorly trained and inadequate numbers of poll workers, and voter intimidation and suppression tactics in predominantly minority neighborhoods.

In addition to voters, Election Protection also received calls from county election officials, election judges, and poll workers seeking guidance on federal and state election laws.

The Election Protection Program helped voters across the country navigate a messy and confusing voting process. Systemic failures included the breakdown of electronic voting machines in Ohio, Georgia, Florida, New York, New Jersey, North Carolina and Texas. Reports ranged from mis-calibrated machines which selected a different candidate than the voter intended to choose; to machines counting backwards; to computers eliminating votes; and of course, the well publicized Ohio precinct that gave President Bush 4,258 votes when only 638 ballots were cast.

In many cases, the problems of 2004 can be traced to a lack of election resources resulting in voter registrars who were unable to process the often record numbers of voter registration applications. More than two weeks before the registration deadline, the Supervisor of Elections in Duval County Florida declared that his office would be unable to process any more applications and could not ensure that all Floridians who registered before the deadline would be listed in the voter registration rolls on Election Day. In Cleveland, Ohio, and San Bernardino, California, voter registration organizations called attention to significant registration backlogs that threatened to disrupt the functioning of the election. Even where counties could keep up with entering new registrants onto the voter rolls, many voters never received confirmation that their registrations had been processed, where they should go to vote, and other critical information necessary to cast an effective vote.

Election Protection recorded acts of voter intimidation and suppression aimed at minority communities throughout the election period. "Dirty Tricks" flyers were distributed in predominantly minority neighborhoods across the country. These malicious flyers misidentified polling places, publicized Election Day as November 3rd, and threatened voters with legal repercussions for casting a ballot. One flyer distributed in Milwaukee, claiming to be from the fictional *Milwaukee Black Voters League* warned voters that if they've ever been found guilty of anything, even a traffic violation they can get 10 years in prison and their children will be taken away if they cast a ballot. Equally troubling were the new suppression tactics including spreading misinformation through automated "robo" calls and paid operatives who went door to door in predominantly minority neighborhoods.

Election Protection received thousands of complaints regarding the provisional voting process, many of which can be traced to ineffective state legislative provisional balloting structures. Many states interpret “jurisdiction” for provisional balloting purposes to mean precinct. In practice, voters in these states went to a polling place with multiple precincts, stood in line at the wrong precinct table where they were not on the registration list and cast a provisional ballot that was not counted for any office (including president, senator and other state wide offices) even though that voter was merely ten feet away from the table at which he was supposed to vote. Undercutting the promise of the provisional balloting system further in 2004 was the ubiquitous unfamiliarity with the system by poll workers. Across the country, poll workers made no attempt to determine where voters were registered and made no effort to explain to voters the consequences of casting a provisional ballot in the wrong precinct. Also, because of the widespread problems notifying voters of their registration information, many never received any communications from their registrars about where they were supposed to vote. Together, these factors led to many validly registered voters who, through no fault of their own, were forced to cast provisional ballots which were never counted. When Ohio Secretary of State, J. Kenneth Blackwell inexplicably demanded that election officials refuse to provide provisional ballots to voters who requested, but never received, an absentee ballot, Election Protection immediately filed litigation allowing these Ohioans to cast provisional ballots on Election Day.

We received complaints, backed up by testimony at post-election hearings sponsored by Election Protection, suggesting that voters in urban, predominantly minority communities suffered from a lack of Election Day resources, including voting machines and well trained poll workers, compared to voters in more affluent suburbs. When voters in minority communities were harassed and interrogated by vote challengers, Election Protection responded by defeating widespread racially targeted voter challenges in Ohio, Georgia and Florida.

The Election Protection Coalition has, for the first time in history, documented the systemic failures of the United States electoral process and the pervasive threats to disenfranchise voters. The Snap Shot Summary, “Shattering the Myth” that we released in December provides preliminary information on the tens of thousands of reported incidents of voting barriers.

The Lawyers’ Committee, working with our many allies, will use the documented evidence to make a strong case for electoral reform at the federal and state level.

Because of the holistic need to address the problems Americans face in casting a ballot, it is important that those responsible for reform do not rely on any currently existing mechanism to frame the debate. Specifically, Congress and the states must look beyond the Help America Vote Act in order to effectively address the shortcomings in the system. Although we continue to support vigorous enforcement of existing legislative voting rights protections, we now know that successfully reforming the process will take additional prospective legislative action at all levels.

This election cycle provided Election Protection an opportunity to observe and monitor the impact that HAVA had on election administration at the national, state and local level. Unfortunately, what we saw confirmed fears that HAVA is an inadequate mechanism to effectively remedy voting irregularities. In addition to independent legislation, meaningful election reform will also improve on HAVA's mandates.

We must reexamine the provisional balloting system created by HAVA. While we applaud Congress for recognizing the problem facing validly registered voters who fail to show up on precinct registers or who otherwise would be turned away at the polls, the provisional ballot system created by HAVA is inadequate. States across the country have enacted overly restrictive and burdensome requirements to the counting of provisional ballots.

Congress must better equip the Election Assistance Commission with the resources it needs to effectively monitor the implementation of HAVA and should provide it the authority to issue binding, rather than recommended, directives.

We must reevaluate HAVA's identification provisions; assess their impact on traditionally disenfranchised communities and their effectiveness in preventing fraud. Election Protection heard from thousands of voters across the nation complaining of poll workers asking for identification when they shouldn't have, demanding more identification than required or discriminating in their application of ID procedures.

While further study is necessary to determine the effect ID provisions have on the electorate, experts estimate that 10% of eligible voters do not have government issued photo identification. It is likely that most of those who do not have ID are poor or fall into traditionally disenfranchised classes, such as students and young voters. Across the country, college students either have no identification proving their residency in college towns or rely on their student IDs to prove their identity to poll workers. Further restricting which voters need to provide identification or what IDs are acceptable frustrates one of the central purposes of higher education: to produce productive civic participants. Making it harder for students to register and vote disengages young people at a critical time in their political development. Although HAVA encourages states to allow voters to prove their identity through an expansive list of acceptable ID (including utility bills, bank statements and government checks), efforts in Congress and in the states are underway to limit acceptable ID to government issued photo ID. In addition to having a disenfranchising effect on young voters, these provisions are often selectively implemented against minority voters.

There are, of course, many election reform issues not addressed by HAVA. We must seriously consider the impact of allowing partisan officials to remain responsible for the conduct and fairness of federal elections. What seemed like a misguided idiosyncrasy of American elections turned into an embarrassing reality during the 2004 election cycle. We saw state and local partisan election officials privileging their party's political success – or, sometimes, personal political ambition – over the rights of their constituency. This is disgraceful and unacceptable.

To be effective, we must reconsider the way we register voters and process absentee ballots. We must explore the virtues of early voting and the limitations of the precinct system. In short, in order to effectively respond to the problems that American voters have, to protect each citizen's constitutional right to cast a meaningful ballot, we must look at the system with a fresh set of eyes.

Since the election, members of Congress from both sides of the Capitol and both sides of the aisle have introduced legislation that attempts to address the problems they see as the root of the public's increasing criticism of the system. Most of the proposals focus on strengthening representation through provisions that expand the franchise, such as Election Day Registration, Early Voting, no-excuse absentee voting and criminalizing unfair and deceptive practices. These efforts, while noble, are unlikely to muster the political resources necessary to pass this Congress. Other efforts concentrate on nebulous accusations of ineligible voters casting ballots and will almost certainly result in making it more difficult for Americans to exercise the right to vote. The truth is that, while we need to know more about how ineligible voters affect the electoral system, it does not have as significant a role in preventing the will of voters to determine electoral successes that antiquated and unresponsive electoral structures do. Advocates of restricting access to the polling place because of a supposed fear of ineligible voters point to isolated incidents of abuse in the registration system that are viscerally shocking. They hold up registration cards for Mary Poppins or Mickey Mouse as sufficient evidence that the system is corrupt and needs dramatic remedies. But the reality is that, although there seem to be isolated incidents of ineligible people registering to vote and voters casting multiple ballots, the problem is probably not widespread and the possibility that this type of fraud regularly influences the outcomes of elections is exceedingly remote. Moreover, much of the evidence that initially seems to suggest fraudulent activity— like poll books showing more votes than voters — are often explained by a poorly administered system executed by under-trained, under-resourced poll workers and election officials, not by malevolent conspirators.

Even where fraud exists, many of the proposed solutions are draconian responses, reacting to the wrong situations, leading to understandable skepticism and allegations that they merely cater to partisan predilections and not to substantive problem solving. First, proposals such as requiring universal government photo identification at the polls could disenfranchise 10% of the electorate, mostly in minority and traditionally disenfranchised communities. While it is important to ferret out ineligible voters from the system, such a proposal will inevitably disenfranchise a significantly larger number of eligible, legitimate voters than it will fraudulent voters. Second, the evidence of fraud that we have seen — fraudulent voter purges, “stuffing” ballot boxes, and manufacturing votes — tends to be the result of deliberate action on the part of election officials and poll workers, not voters. Identification requirements and restrictions on voter registration organizations will not address this type of fraud at all. Those claiming concern with “voter fraud” are often restricting the definition of fraud only to ineligible ballots showing up at the polling place. Of course, this fails capture such fraudulent practices as the thousands of voter registration applications that were destroyed by partisan registration organizations in Nevada this past election cycle because the registrants registered for the opposing political party. In order to effectively respond to misconduct in the election system, election fraud should have a much broader definition. It should include

conduct of poll workers and election officials and should include deceptive practices and intimidation. Election fraud consists of any conduct that has the effect of restricting access to the ballot. A definition of fraud that is confined to ineligible voters is not only unhelpful, but it has been used as a discriminatory tactic to confine voter fraud to the poor and minority community through suggestions that, because of the precarious financial position of traditionally disenfranchised voters, minorities are more susceptible to temptations to cheat the system for financial or personal gain. This is both unhelpful and offensive.

One of the most insidious proposals rationalized by undisciplined accusations of fraud is the recent proliferation of “proof of citizenship” requirements. These proposals would seriously undermine the purpose and effectiveness of major federal electoral protections, especially the National Voter Registration Act. Legislatures and voters across the country are considering demanding that voters show proof of citizenship either when registering or at the polling place. Practically, this is a terrible idea. There are very few documents that prove one’s citizenship. Generally only, passports, birth certificates, and naturalization certificates pass this test. Only an estimated 20% of Americans have passports. Logically, most of us who have passports are also those who can afford to travel internationally. In many states, many older voters were never issued a birth certificate. Even those voters who have a birth certificate often cannot produce it and the process for replacing a birth certificate is often cumbersome, especially for voters who were born in other states. Other voters, including married women who have taken their husband’s name, will have a different name on their birth certificate than on their registration card.

While the practical obstacles make “proof of citizenship” requirements unworkable, the risk that these provisions will be implemented in a discriminatory way is enormous. As with ID provisions, “proof of citizenship” requirements will likely be enforced sporadically against people who are unfamiliar to poll workers, or people who “look foreign.” We know that this happens in places that require ID at the polls (and in some places that don’t have this requirement), a more restrictive system will only lend itself to further discriminatory abuse.

As a lawyer, I must allow the evidence before me to guide my decisions. What I know is this; Election Protection has compiled over 40,000 incidents from over 200,000 reports across the country of voters facing obstacles to the polling place. News reports from across the country – although muted by the fallacy of a flawless election – reported massive registration backlogs, ten-hour long lines at the polls, countless eligible voters left off of voter registration lists, embarrassing deceptive practices and other disenfranchising defects in our electoral system. The Lawyers' Committee, in its 42 years, along with our partners in the civil rights community, has successfully litigated hundreds of cases to protect the rights of minority voters across the country. If there’s a crisis of democracy in this country, it is a crisis of access.

I have not seen convincing evidence that the veracity of democratic results is similarly threatened by a wave of ineligible voters colluding to disrupt the results of election contests. Instead, I have heard illogical justifications for further restricting access to the polls for our most vulnerable citizens. While we all agree that ineligible voters should be kept from the polling place, the solutions that have been offered are, in the language of lawyers, both

overinclusive and underinclusive. They are over inclusive because the convincing likelihood is that many more eligible voters will be disenfranchised through enforcement of restrictive ID provisions or “proof of citizenship” provisions than fraudulent voters. The proposals are underinclusive because they fail to address the parts of the systems most susceptible to fraud. Take, for example, the recent photo identification bill that passed the Georgia Legislature. That law requires voter to provide photo identification although there is no evidence of ineligible voters swarming to Georgia polling places. Moreover, the bill allows voters who take advantage of the absentee system to avoid the ID requirement.

We must ensure that the counting and administration process, the period after a voter casts her ballot, is secure. We should have better systems for what to do after ballots are cast. There should be no more so-called central tabulators where ballots have to go from the polls to a central location to be counted; instead they should be counted at the polls. We do need to make sure that ineligible voters are not casting ballots, so we should be sure that the statewide, centralized voter registration databases mandated by HAVA are dynamic, effective and interactive. This reform alone will go far in solving the concerns of both the voting rights community and those concerned with ineligible voting. An effective statewide database will allow for important reform that will expand access, such as Election Day Registration, while safeguarding the system from those who should not be participating. HAVA requires that states implement these systems by 2006.

We have to make sure that the companies who are supplying our jurisdictions with voting machines understand that the public is depending on the security of these machines for its most important decisions. We have to demand that machines have open source codes and that the counting and processing of ballots is transparent. While proprietary interests are obviously important, they cannot trump the sanctity of our democratic system.

Mr. Chairman, all Americans are proud of our brave men and women for delivering democracy to voters in the Middle East. The pride of the Iraqi people as they went to the polls is a familiar emotion to most of our fellow citizens. We know the importance of participation. But, our greatness as a nation rests in our ability to shape the national debate through our voice at the ballot box. Our constitutional democratic promise is only fulfilled when we have confidence in the veracity of our electoral process. While the national political focus is on developing a responsive system of elections half a world away American voters are forced to rely on an outdated and unresponsive infrastructure that supports our electoral system. Citizens across *this* country must be provided the necessary tools to cast an effective and meaningful vote. Substantive, effective election reform can be accomplished and guard against election fraud. A better system can be developed that is more open to eligible voters while keeping those who would like to manipulate the system out. The gravitas of this Commission must be used to secure the rights of all Americans to participate in our national experience on equal footing by casting a meaningful vote.

Thank you.