

**Testimony of Richard L. Hasen
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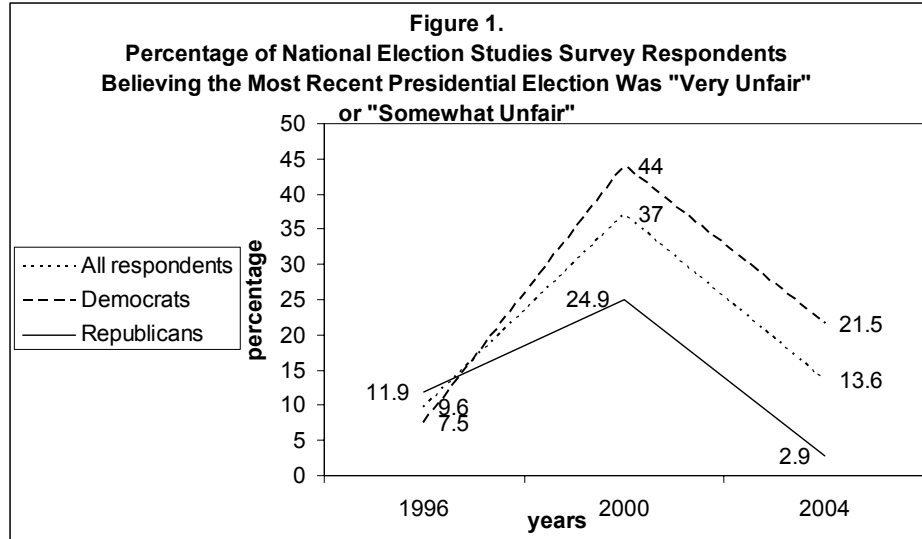
**Before the Commission on Federal Election Reform (Carter-Baker Commission),
April 18, 2005 Hearing, American University, Washington D.C.**

Note: These remarks and data are based upon my forthcoming article, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASHINGTON AND LEE LAW REVIEW (forthcoming 2005). A complete draft of the article is available at: <http://ssrn.com/abstract=698201>.

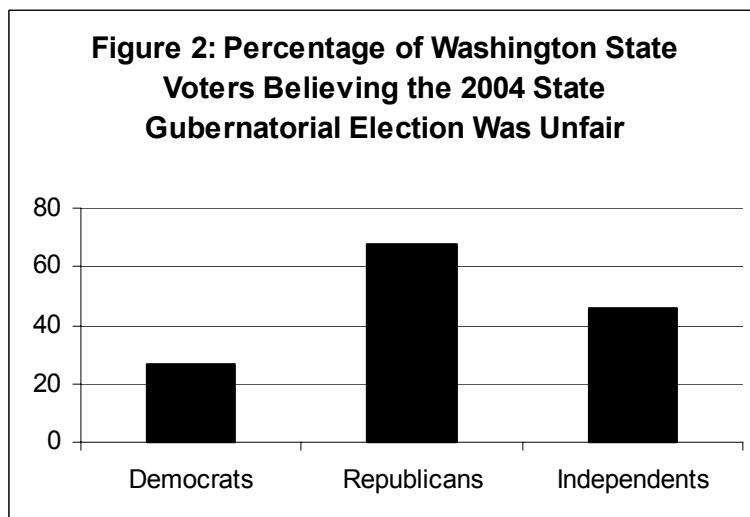
President Carter, Secretary Baker, distinguished members of the Commission on Federal Election Reform, and guests:

Thank you so much for the opportunity to address you today on vital election reform issues. In the 2004 presidential election, the United States came much closer to electoral meltdown, violence in the streets, and constitutional crisis than most people realize. Less than a 2% swing among Ohio voters (about 100,000 voters) toward Democratic candidate for President John Kerry and away from incumbent Republican President George W. Bush would have placed the Ohio—and national—election for president well within the “margin of litigation,” and it would have gotten ugly very quickly. Allegations of voter fraud and voter suppression were rampant on both sides, and even though Kerry conceded the election on the day after Election Day, public confidence in the U.S. system of American administration is now quite low.

It should go without saying that public faith in the integrity of the election system is a cornerstone of democratic government. Yet, the data are quite worrisome. According to a post-election NBC News/*Wall Street Journal* poll, more than a quarter of Americans worried the vote count for president in 2004 was unfair. Just before the election, a Rasmussen Reports poll showed 59% of American voters believing there was “a lot” or “some” fraud in American elections. And there is a partisan dimension to the issue. Consider the trends in Figure 1, which shows that in the most recent election, 13.6 percent of Americans believe the most recent presidential election was somewhat or very unfair, with Democrats much more likely than Republicans to believe there is a problem.

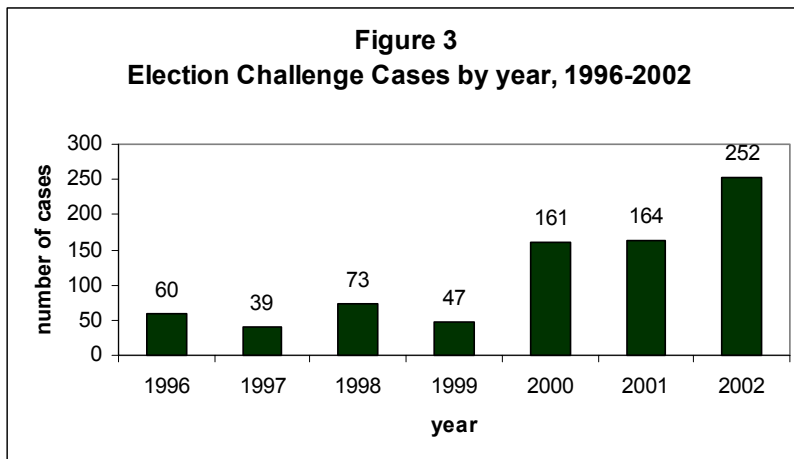


But this is not just a Democratic problem. Consider the views of Washington State Republicans, where a bitter election contest has left the Democratic candidate for governor, at least for now, in the governor's seat. A January 2005 poll of Washington state voters found that 68% of Republicans thought the state election process was unfair, compared to 27% of Democrats and 46% of Independents. See Figure 2. It is hard to escape the conclusion that views about the fairness of the process are driven, at least in part, by the outcome that recent elections have produced. If that's so, we should not be surprised to see large numbers of Republicans indicating a lack of faith in the national election process if the next close election features a Democrat squeaking by to gain the presidency.



The bad news from the story of Election 2004 is that things likely won't get better enough in 2008. Although voting technology has improved and continues to improve,

the extreme partisanship and close division of the American electorate, coupled with the Electoral College system, make the possibility of another razor-close presidential election in one or more battleground states fairly likely. Add to that mix election administration incompetence and a widely decentralized system of election administration with a patchwork of inconsistent rules—13,000 separate election jurisdictions, according to the Carter-Ford Commission. What’s worse, since *Bush v. Gore*, losing candidates have become more willing to resort to election law as part of a political strategy: the number of election-law related cases in the lower courts has risen dramatically compared to the period before Florida 2000. See Figure 3.



It all adds up to a recipe for electoral meltdown. To avoid litigation, a close election requires an election administration system close to perfection; yet we are far from perfection.

I argue for three reforms that could significantly lower the risk of electoral meltdown. First, I advocate registration reform, in particular universal voter registration conducted by the government coupled with a voter identification program. Registration issues appear to be the single largest subject for election-related litigation. For example, 32 of 52 cases on Electionline’s 2004 litigation survey involved registration issues.

There has been a wide partisan divide in the election administration debate between Democrats who have expressed concern about voter suppression and Republicans who have expressed concern about voter fraud. The registration reform I advocate can alleviate both of those concerns, minimize the potential for and political rhetoric regarding voter fraud, and eliminate a great majority of potential litigation surrounding presidential election administration

Under my proposal, the federal government would take on the task of voter registration, much like it does in conducting the census, in reaching out to register all eligible voters. It would then issue voter registration cards with biometric information such as fingerprints, as is done today in Mexico. The nationwide database will eliminate

double registrations, assist in quickly identifying voters for purposes of provisional ballots, and help restore faith in the election process. Because the cards would contain biometric information, voters could show up without i.d. at the polls and still have their votes counted. The cards certainly raise privacy concerns. But as I argue in my paper, the incremental privacy costs of the card are small compared to the potential gain in voter confidence they likely would achieve.

Second, I advocate a transition to nonpartisan election administration. The nonpartisan solution aims to create both the actuality and appearance of neutrality in election administration, thereby bolstering the public's faith in the process. Australia and Canada serve as good models for reform in this regard, though not necessarily their nationalization of election administration. States should adopt rules that are consistent with non-partisan administration, such as the Code of Conduct set forth by IDEA, the International Institute for Democracy and Electoral Assistance. The IDEA Code would prevent, for example, a Secretary of State or other chief elections officer from being co-chair of his or her party's presidential election committee, or from taking a position on a pending ballot measure in a state.

To assure a truly nonpartisan Chief Elections Officer, I advocate that such administrators be chosen statewide through a nomination of each state's governor, subject to a 75% approval of both houses of the state legislature. The broad supermajority requirement will insure that the person is one of great integrity, who could garner support from both Democrats and Republicans in the state. Trust in the system will increase public confidence as well as minimize litigation by giving courts a reason to defer to election administrators. Public faith in nonpartisan election administration will also lessen the heat over questions such as whether states should move to electronic voting systems.

Finally, courts have an important role to play in minimizing electoral meltdown. The key here is to encourage courts to be more willing to entertain *pre*-election litigation and much more chary of entertaining *post*-election litigation. To the extent election administration problems can be recognized in advance, pre-election judicial review prevents future harm from occurring, rather than putting courts in the position of trying to undo the bad effects of a past harm. Just think of someone going to court *before* anyone voted in Palm Beach County in 2000 claiming that the "butterfly ballot" was overly confusing. In addition, the costs of post-election review are large: the pressure put on courts to decide arcane election law questions when the outcome of an election—especially a presidential election—is huge, and the appearance of partisan decisionmaking is inevitable.

These three changes—registration reform, non-partisan election administration, and a shift in the timing of court challenges—will not eliminate close elections. But they will lessen the possibility of election meltdown to a great extent, and increase the public's confidence in free and fair elections.

Thank you for your time.