

UNITED STATES HOUSE ADMINISTRATION

COMMITTEE

SUBCOMMITTEE ON ELECTIONS

**American Confidence in Elections:
Ensuring Every Eligible and Interested American
Has the Opportunity to Vote –
And for Their Ballot to Count According to Law**

Prepared Statement of Mark F. (Thor) Hearne, II

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INTRODUCTION

Chairwoman Lee and Ranking member Sewell and members of this Committee, I appreciate the opportunity to appear and address this important topic. How our nation conducts our elections is the bedrock of our constitutional republic. Without every eligible voter having the ability to cast a vote and all citizens having confidence in the conduct and outcome of our elections, We the People would cease to govern our nation. On Monday my third granddaughter was born. Her birth reminded me that those of us in this current generation have been blessed with the opportunity to live in the greatest, most free, and most prosperous nation in human history. This is a heritage that we must steward for future generations. Having fair and honest elections is how we preserve this legacy.

MY EXPERIENCE AND PERSPECTIVE

I have been involved in election litigation and legislation for decades. I was legal counsel for President Bush in *Bush-Cheney 2000 v. Evelyn Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000). I was President Bush's national election counsel in 2004. I served as legal advisor to Secretary of State James Baker and President Carter on the Commission on Federal Election Reform in 2005 (the Carter-Baker Commission). Virginia's Democrat Attorney General Mark Herring appointed me to defend Virginia's election reform legislation against a constitutional challenge. And the Commonwealth's election reforms including its voter identification requirement were upheld in both the trial court and in the Fourth Circuit Court of Appeals. See *Lee v. Virginia State Board of Elections*, 188 F. Supp.3d 577 (E.D. Va. 2016), *affirmed* 843 F.3d 592 (4th Cir. 2016). I represented the leadership of the United States House and Senate as their counsel in the amicus brief in *Crawford v. Marion County Election Board* and I was also

counsel for both Democrat and Republican election officials in another amicus brief in *Crawford*.

In its decision upholding Indiana’s voter identification law, the Supreme Court relied heavily on the work and recommendations of the Carter-Baker Commission. See *Crawford v. Marion County Election Board*, 553 U.S. 181, 193 (2008) (in the Help America Vote Act and the National Voter Registration Act, Congress indicated its belief “that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology[, which] conclusion is also supported by a report issued shortly after the enactment of [Indiana’s voter ID law] by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which is a part of the record in these cases.”).

I was also the lead counsel representing voters including minority voters in the federal redistricting litigation concerning St. Louis County, Missouri, in *Corbett v. Sullivan*, 202 F. Supp.2d 972 (E.D. Mo. 2002). In *Corbett* we were successful in having the St. Louis County Council reapportioned in a manner that allowed minorities opportunity to elect members of the minority community to the County Council. I worked closely with the local NAACP to achieve a just reapportionment of St. Louis County government. Counsel for the NAACP told the court, “[Mr. Hearne carried] the burden of a substantial amount of the NAACP’s case.... [Mr. Hearne] provided great help to counsel for the NAACP during this fast-paced redistricting litigation. [And Mr. Hearne took] the leading role in this action and in incorporating the NAACP’s objectives.”

I mention this background, and note especially the bipartisan nature of my experience, because I firmly believe that, while political campaigns and elections are

quintessentially a partisan endeavor, the manner in which elections are conducted and the laws governing the conduct of elections should rise above partisan interests. Our identity as Americans should transcend our partisan affiliations as a Democrat or Republican. As President Obama said in his speech to the Democratic National Convention in 2004, “there is not a liberal America and a conservative America — there is the United States of America. There is not a black America and a white America and Latino America and Asian America — there’s the United States of America.”

As American citizens, we share a common interest in assuring our elections are fair, honest, and accessible to every eligible voter. We also share a common interest in assuring that the outcome reflects the will of the voters and was not engineered by disenfranchising some voters or by partisan manipulation of the election process.

Confidence in the outcome of an election is especially important when the election is close such as it was in 2000 with the *Bush v. Gore* litigation. It is untenable that a significant portion of the electorate would believe an election was rigged or tainted by fraud or incompetence. It is also unacceptable for any citizen to be denied the right to vote based upon the color of their skin, gender or heritage.

Elections must be conducted according to clearly written laws that are faithfully followed and administered by election officials with transparency and without partisan bias. Every eligible citizen, irrespective of their race, color or heritage, must have equal opportunity to cast a ballot, and every American must be confident that every lawfully cast ballot is accurately counted. It is always easy to convince the winning candidate that he or she won. But the test of a fair and honest election is when the losing candidate and his or her supporters accept the outcome as the will of the voters. The legitimacy of

the Rule of Law depends upon the Nation as a whole being confident in the conduct and outcome of our elections.

MAKING IT EASY TO VOTE AND TOUGH TO CHEAT

There is a difference between a *ballot* and a *vote*. A *ballot* is a piece of paper with ovals. A *vote* is a ballot where the ovals have been filled in by a person lawfully entitled to vote. Every illegally-cast ballot disenfranchises a citizen who cast a lawful vote. In *Wesberry v. Sanders*, the Supreme Court wrote, “[n]ot only can this right to vote not be denied outright, it [can]...be destroyed by alteration of ballots or diluted by stuffing of the ballot box.”

Former President Jimmy Carter and Secretary of State James A. Baker, III co-chaired the Commission on Federal Election Reform (the Carter Baker Commission), recommending measures states should adopt to restore public confidence in the integrity and outcome of elections.

The Commission found absentee ballots and mail-in ballots (which include ballots deposited in drop-boxes) to be the most significant source of vote fraud. The Commission found ballot harvesting and “vote buying schemes are far more difficult to detect when citizens vote by mail.” The Carter-Baker Commission recommended, “States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting ‘third-party’ organizations, candidates, and political party activists from handling absentee ballots.”

The Commission also recommended that individuals seeking to cast ballots should first identify themselves to be an eligible voter. Indiana adopted an election reform law requiring an individual verify their identity with a government-issued photo identification before casting a ballot. The Supreme Court upheld Indiana’s strict photo-identification requirements in *Crawford v. Marion County*. Photo-identification is required to board a plane, cash a check or buy a beer. Shouldn’t a similar degree of security protect

our elections? A Gallup poll found 79% of Americans (including a majority of Democrats, Republicans and all races) support “requiring a photo ID as a condition of voting.”

Ballot harvesting is a scheme in which paid political operatives collect mail-in and absentee ballots in the names of “persons” copied from voter registration records or nursing homes residents. Political campaigns pay harvesters by-the-ballot to collect and submit these ballots. Ballot drop-boxes facilitate ballot harvesting schemes.

The Carter-Baker Commission recommended that no one other than the voter, the voter’s immediate family, election officials and postal workers (or private couriers like Federal Express) handle a mail-in ballot. Many other states (such as Arizona) adopted laws to prevent ballot harvesting. The Supreme Court upheld these laws holding, “[t]he [Carter-Baker] Commission warned that ‘[v]ote buying schemes are far more difficult to detect when citizens vote by mail,’ and it

recommended that ‘States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting “third-party” organizations, candidates, and political party activists from handling absentee ballots.’”

More recently in *Brnovich v. Democrat National Committee*, __ U.S. __, 141 S.Ct. 2321 (2021), the Supreme Court upheld Arizona’s election reform law that included provisions (based upon the Carter-Baker Commission recommendations) to prohibit ballot harvesting. The Democrat National Committee challenged these rules arguing that laws prohibiting ballot harvesting violated Section 2 of the Voting Rights Act. The Democrat National Committee lost.

The Supreme Court affirmed its prior holding in *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), that, “A state indisputably has a compelling interest in preserving the integrity of the election process.” The Court then noted, “that was the view

of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Security of State Jakes Baker. The Carter Baker Commission noted that “[a]bsentee balloting is vulnerable to abuse in several ways: ... Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.” *Brnovich* at 141 S.Ct. at 2347. (Quoting the Carter Baker Commission report of the Comm’on Fed. Election Reform, Building Confidence in U.S. Elections 46 (Sept. 2005)).

In our federal system the “Times, Places, and Manner” by which our elections are conducted is primarily the responsibility of the states. See U.S. Constitution Art. 1, Sec. 4 the Elections Clause. States are the primary authority to adopt facially neutral time, place, and manner regulations governing the conduct of elections. See, *Brnovich v. Democrat Natinoal Committee*, 141 S.Ct. at 2339. But, as the Elections Clause makes clear, there is a role for Congress to play in the

conduct of federal elections by adopting measures ensuring that federal elections are conducted in a fair and honest manner, for example requiring every eligible voter to have equal access to a ballot and requiring that voter registration rolls are current and accurate.

Our confidence in the integrity of elections is threatened if special interests and billionaires are able to pay state and local election officials and direct how state and local election officials conduct elections. *The Wall Street Journal* found that “[a] nonprofit called the Center for Technology and Civic Life, or CTCL, funded by Mark Zuckerberg, says it gave \$350 million to nearly 2,500 election departments in the course of the 2020 campaign.” *Editorial* (January 3, 2022).

Take Michigan as an example. In Michigan elections are conducted by more than 1,568 different jurisdictions from urban Detroit to rural townships in the Upper Peninsula. CTCL reported that it paid more than \$15.2 million to election

officials in more than 127 Michigan election jurisdictions. The vast majority of this money was paid to election officials in heavily-Democrat jurisdictions to increase mail-in voting. Detroit received more than \$7.4 million from CTCL.

These private funds were paid to election officials in favored urban (heavily-Democrat) jurisdictions to increase voter turn-out and increase the ballots cast in these favored precincts. The election officials who received these funds agreed to spend the funds in a manner (including buying remote ballot drop boxes) that CTCL directed. The election officials were required to report back to CTCL about how the election officials spent the funds CTCL paid the election officials. The funds were not allocated equally to all election jurisdictions. The money was significant. The money paid to some election jurisdictions was close to one-half of the cost of conducting the election.

Additionally, because this money was not equally distributed to all election jurisdictions, eligible voters in unfavored precincts did not have equally funded access to the ballot. This unequal funding of access to the ballot violates the Equal Protection Clause.

Election officials should not accept private “contributions” to fund and conduct elections. Recall the scene from the comedy *Caddyshack* where Chevy Chase (playing the character of Ty Webb) and Ted Knight (playing the Judge Elihu Smails) have a wager on which foursome will win a round of golf. The club pro is refereeing the match. The character played by Rodney Dangerfield (Al Czervik), who bet Chevy Chase would win, walks up to the club pro who is refereeing the golf match and covertly slips the club pro a handful of cash saying “Keep it fair. Keep it fair.”¹

¹ https://www.youtube.com/watch?v=vyJ3_10Wrcc

This is the same for election officials. Even if election officials “keep it fair,” accepting money from a private individual or organization to conduct the election is unseemly and suggests corruption. This is especially so when the person or entity paying the election officials requires the election officials to spend the money in a specific way to increase ballot access in favored precincts and requires the election officials to report back after the election about how the money was spent.

It doesn't matter whether the billionaire paying election officials is George Soros, Mark Zuckerberg, or Elon Musk, or the Koch Brothers, nor does it matter whether the billionaire favors Republicans or Democrats. Elections should not be for sale. Election officials should *never* be paid private funds and directed how to conduct the election. As the *Wall Street Journal* wrote, “[t]his isn't how elections should be run, especially in the current era of partisan mistrust. Some

states, including Georgia, Arizona and Florida, have already moved to prohibit donations to election officials.”

The Carter-Baker Commission was a highwater mark in bipartisan election reform and made a number of recommendations, including voter identification, elimination of ballot harvesting, and the maintenance of current and accurate voter rolls among other reforms. These recommendations will increase voter confidence in our elections and increase voter participation. Several of the Carter-Baker recommendations merit particular attention.

Voter Identification: The Carter Baker Commission recommended that,

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), and 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 an EAC-template ID with a photo to all non-drivers free of charge.

Requiring an individual to identify themselves with photo identification before casting a ballot is a commonsense measure to protect the integrity of elections. Of course, the state must provide the photo identification without cost. The constitutionality of requiring photo identification before an individual may cast a ballot has been reviewed by and approved as constitutional by the Supreme Court. See *Crawford*, 553 U.S. at 202. See also *Lee*, 843 F.3d at 607, in which Virginia's voter identification law was upheld against constitutional challenge. In *Lee*, the unanimous Fourth Circuit panel held, "just as Congress in HAVA found it

beneficial to the voting process and the public perception of the voting process to require photo IDs, and just as the Carter-Baker Commission found similarly, Virginia found it beneficial to require photo identification in all elections.” *Id.* Virginia’s and Indiana’s voter identification laws are a model for a constitutional voter identification law that protects the integrity of the election and does not impose an impermissible burden upon any voter. Indeed, in the *Lee v. Virginia* litigation, those challenging Virginia’s law could not identify a *single person* in the entire Commonwealth who was denied the right to cast a ballot due to Virginia’s voter identification law. As the Carter-Baker Commission noted, and as the voter identification laws that have been upheld provide, the required identification must be available to any person who does not possess the required identification without cost.

Voter identification laws are supported by more than eighty percent of Americans, more than seventy percent of Democrats, and more than seventy percent of African

Americans.² Prominent Democrats support reasonable voter identification laws, including former president Jimmy Carter, Civil Rights leader Andrew Young from Atlanta, former Congressman Lee Hamilton, who was a member of the Carter-Baker Commission, and others, including political journalist Juan Williams.

The requirement that individuals identify themselves before casting a ballot increases confidence in the integrity of the election and prevents lawful voters from being disenfranchised by having their ballot canceled by an illegally cast ballot.

Prohibitions against ballot harvesting: The Carter-Baker Commission found that,

Absentee ballot and voter registration fraud: Fraud occurs in several ways. Absentee ballots remain the largest source of potential voter fraud.

² Monmouth University Poll, “*Public Supports Both Early Voting and Requiring Photo ID to Vote* (June 21, 2021), available at: https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_062121.pdf.

.... Absentee balloting is vulnerable to abuse in several ways: Blank ballots may be mailed to the wrong address or to large residential buildings might get intercepted. Citizens who vote at home, at nursing homes, at the workplace or in church are more susceptible to pressure, overt and subtle, or to intimidation. Vote buying schemes are far more difficult to detect when citizens vote by mail. States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting “third-party” organizations, candidates, and political party activists from handling absentee ballots. States also should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted.

On the basis of this finding, the Carter-Baker Commission recommended that “State and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials. The practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated.” The Carter-Baker Commission continued, recommending that “All states should consider passing legislation that attempts to minimize the fraud that has

resulted from ‘payment by the piece’ to anyone in exchange for their efforts in voter registration, absentee ballot or signature collection.”

Current accurate voter registration lists: An accurate and current voter registration roll is essential to an honest election and making sure that every eligible voter may cast a ballot and that no voter’s ballot is cancelled by an unlawfully cast ballot. The Carter-Baker Commission recommended, “All states should have procedures for maintaining accurate lists such as electronic matching of death records, drivers’ licenses, local tax rolls and felon records.” The Commission continued, “States need to effectively maintain and update their voter registration lists. ... 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.”

Transparency in the conduct of elections: Justice Brandeis introduced the phrase “sunlight is said to be the best of disinfectant.” See Louis Brandeis, *Other Peoples’ Money*, 1933, p. 62. The Carter-Baker Commission similarly observed that sunlight in the conduct of elections was critical to assure confidence in the results of the election. “All legitimate domestic and international election observers should be granted unrestricted access to the election process.” Observers or challengers should be provided a meaningful opportunity to observe the conduct of elections and the processing of ballots.

Prohibitions on election officials accepting private payments: Election officials should be prohibited from accepting money from private interested groups and wealthy individuals. Zuckerberg’s (or anyone other billionaire’s) scheme to pay election officials and direct how they conduct elections undermines the integrity and public confidence in

our elections. Three reasons demonstrate why private payments to election officials are profoundly disturbing:

(1) *Disclosure*. There is no disclosure of the hundreds of millions Zuckerberg paid election officials. It is not until a year after the election when the 501(c)(3) organization through which Zuckerberg paid these funds to local election officials that the funds are disclosed in IRS filings. And, even then, the disclosure, is incomplete.

(2) *Disparity*: The payments of private money to election officials are not made equally on a pro rata basis to all voters in the state. Rather, the payments are disproportionately paid to selected precincts that are predominantly urban and Democrat. This is nothing more than a privately funded get-out-the-vote effort. And because this scheme favors voters in the selected precincts with greater ballot access than those voters in other parts of the state, it violates the Equal Protection clause of the constitution. See, *Bush v. Gore*. The

Constitution does not allow election officials to conduct an election in a manner that favors one group of voters over another group of voters.

(3) *Dystopian*: Recall the Apple commercial in Super Bowl XVIII. It was an Orwellian vignette recalling Orwell's 1984 novel. The advertisement featured a large screen with a Big Brother figure lecturing a crowd of grey-clad submissive subjects. A woman with a hammer ran through the crowd and hurled the hammer to smash the screen. <https://www.youtube.com/watch?v=VtvjbmoDx-I>. The United States is a constitutional republic governed by "We the People". The citizens of this nation are not sheep to be governed by Deep State overlords. Elections are the means by which we select those entrusted with the obligation to manage our nation's affairs. Elections are the means by which the voters express their decision of who is entrusted to administer the nation for a season. But allowing an elite, wealthy minority to influence and direct the conduct of our

elections (and thereby to influence the outcome) is anathema to the foundational principles upon which our nation was founded. No one should be able to pay election officials and direct how they conduct our elections.

CONCLUSION

Thank you for the opportunity to appear and to participate in this important discussion of how we conduct our elections. Because the right to vote is so important to every American citizen of every race, color or heritage legislation guaranteeing this fundamental right should rise above partisan interests, be a broadly bipartisan consensus of measures that protect all American's right to vote, respect the constitutional role of the states in conducting elections and accommodate meaningful and necessary election reforms such as those recommended by the Carter Baker Commission that will increase public confidence in our elections.