

Testimony of David J. Becker
Senior Counsel, People For the American Way Foundation
Senate Committee on Rules and Administration
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Madame Chairman, Ranking Member Bennett, Senators, good morning, and thank you for the opportunity to speak with you today regarding this important subject. I bring greetings from our President Ralph G. Neas, President of People For the American Way, a civil rights and civil liberties organization of over 1,000,000 members and activists. I am Senior Counsel at People For the American Way Foundation, responsible for our voting rights and election reform work. Prior to my current position, I served for seven years in both the current and previous administrations as a Senior Trial Attorney in the Voting Section of the Civil Rights Division of the Justice Department. In that capacity, I monitored dozens of elections in hundreds of polling places nationwide, and have observed thousands of voters casting ballots on all manner of equipment. Today, I am speaking on behalf of both People For the American Way and our Foundation and will submit more extensive written testimony for the record.

The right to vote is a bedrock of our American democracy and People For the American Way and our sister Foundation are committed to ensuring that this right guaranteed to all eligible voters and that that vote is secure. Since the debacle of the 2000 election, People for the American Way Foundation, along with key allies, have led the Election Protection coalition in response to the need to protect this right of all voters. This work supplemented by our litigation and legislative efforts has provided us with a depth of expertise on how we must continue to reform our election process in order to protect this most fundamental right to vote.

It is for this reason, Madame Chair, that we are particularly grateful for your leadership on the issue of election reform, and in particular voting technology. Unauditable electronic voting machines have likely left a trail of disenfranchised voters throughout the country, but nowhere have the dangers of these devices been felt more deeply by voters than in Sarasota County, Florida. People For the American Way Foundation currently serves as co-counsel for a group of Republican, Democratic, and unaffiliated voters in Sarasota County, and I serve as People For's lead counsel in this litigation. The facts as they occurred in Sarasota are illustrative of the problems resulting from the use of unauditable electronic voting machines – problems that must be corrected in time for the 2008 elections.

In the November election, Sarasota County used paperless, unauditable electronic voting machines. The race to succeed Katherine Harris in Florida's 13th Congressional district was on the ballot there, and it was arguably the most contested race on the entire ballot in Sarasota County. Nevertheless, Sarasota County's voting machines failed to register a vote for approximately 18,000 voters in that race – more than one out of every seven voters who attempted to vote on these machines. Even though almost 15 percent of the voters in Sarasota County saw their votes disappear in this election, the state certified

the winner by a margin of only 369 votes – less than 0.2 percent of the total vote. Meanwhile, dozens of voters have submitted sworn testimony that the machines changed, or flipped, their votes, or required multiple attempts to register their votes, or completely failed to register their votes at all.

Experts who testified in this litigation unanimously confirmed what we feared: that the failure to register 18,000 votes in a hotly contested congressional race could not be consistent with the will of the voters, and likely changed the outcome of the election. Even an expert retained by the voting machine vendor shares the view that if even a small fraction of these votes had not been lost, the outcome of the election would have been different.

All the experts agree that the rate of lost votes in Sarasota County in the 13th district race was “clearly extraordinary” and “anomalous,” if not unprecedented. Experts in the field agree we could normally expect to see 2.5 percent of the ballots fail to indicate a vote in this race, so the unusually high number of votes that disappeared cannot be attributed to voters choosing not to vote in that race. Indeed, only 2.5 percent of paper absentee ballots in Sarasota County failed to indicate a vote in this race, and rates in surrounding counties that include the 13th district were also around 2.5 percent. Sarasota County’s paperless electronic machines had a lost vote rate six times higher. As further demonstration of this point, Sarasota County’s machines registered more votes in the race for hospital board than in the race for Congress.

The county, and the election machine manufacturer, would have us believe that one out of seven voters who voted on the machines chose not to vote in this race, or that they were simply so confused that they could not register their votes properly, notwithstanding the fact that only one out of forty who voted on paper did not register a vote. This assertion is simply ludicrous. Even the most confusing elections in recent memory have not resulted in the number of lost votes we saw in this race. For instance, the notoriously confusing butterfly ballot in Palm Beach County, Florida in 2000 resulted in only around 5 percent of the ballots failing to be counted in the presidential race. Frankly, it is an insult to Sarasota County voters for anyone to try to assert that this congressional race was so confusing to them – and to only those voters who voted on the unauditible voting machines – that they were almost three times more confused than the voters in Palm Beach in 2000.

All experts in the Sarasota case agree that machine error cannot be ruled out as a cause of the excessive number of lost votes. Even the expert for the voting machine company admitted this while others testified that machine error is the likely cause of a substantial portion of the lost votes. To know for sure, of course, the machines must be examined by independent experts, which election officials and the voting machine company continue to oppose, even though an investigation would likely either confirm or refute the possibility that machine error led to the disenfranchisement of these thousands of Sarasota County voters.

Finally, the experts agree that had the voters' intent been properly recorded in Sarasota County, there is little doubt that the outcome would have been different. The expert for the voting machine company stated that there is essentially a 100 percent chance that the candidate whom the state of Florida certified as the winner would have been defeated if the rate of lost votes was consistent with what election experts would expect, and what it was in other counties. The company expert agreed with the other experts that even if only a small fraction of the lost votes was due to machine error – say, 2000 votes, or less than two percent of the votes cast in Sarasota County – the official outcome of the election would likely have been reversed.

Since the machines in use in Sarasota County were paperless, unauditible machines, there is no way to determine to what precise degree the voters' intent diverged from the tallies prepared in secret inside the machines. If there had been verifiable paper trails produced at the time of voting, we could compare those to the computer tallies, and determine not only the likely source of the problem, but also the true winner of the race. Sadly, because Sarasota County did not require verifiable audit trails, the only remedy that can possibly restore the constitutional rights of voters in Sarasota is a revote at this point.

Madame Chair, thank you again for your commitment to addressing this most pressing issue of voting technology. With the country facing an election in 2008 which will decide control of Congress and the presidency, as well as thousands of down-ballot races, the need for election reform in this country is urgent. As has been the case in the past 3 federal elections, we expect that many of these races will be close. Americans deserve to know that they will cast a vote that will be counted – and, if necessary, recounted, by fair and independent observers. This is not a partisan issue – regardless of the outcome in the 13th district race, or any other race where votes are cast on unauditible electronic machines, we must remember that it is the voters, and their votes, that are the foundation of our democracy. I can say without reservation that had a different winner been certified in the 13th district race, we would still be fighting for the rights of Sarasota County's voters to be represented by the Congressperson of their true choice. We look forward to working with you and the Committee in the future on comprehensive election reform that will ensure that every eligible voter can cast a ballot that is counted, and that no voter ever has to risk having their vote evaporate again.

David J. Becker
Senior Staff Attorney
People for the American Way Foundation
2000 M Street NW, Suite 400
Washington, DC 20036
(202) 467-4999
dbecker@pfaw.org

David J. Becker is Senior Staff Attorney at People for the American Way Foundation (“PFAWF”), responsible for issues regarding voting rights and election reform. In this capacity, he serves as co-counsel in the federal lawsuits challenging Arizona’s Proposition 200 and defending the constitutionality of the Voting Rights Act, as well as the state challenge to the disputed election in Florida’s 13th Congressional District. In addition, he has worked with Congress and the states regarding legislation affecting election technology, voting rights for minorities, deceptive practices, and redistricting.

David recently left the U.S. Department of Justice after serving for seven years as a senior Trial Attorney in the Voting Section of the department’s Civil Rights Division. As one of the department’s senior federal voting rights law enforcers, David was responsible for leading dozens of investigations into violations of federal voting laws, regarding issues including, among other things, minority language voter rights, redistrictings, alleged voter intimidation, and vote dilution.

David is an experienced voting rights litigator, having litigated several Voting Rights Act cases as lead counsel. Most notably, in one of the most pivotal voting rights cases in the last decade, David served as lead trial counsel in *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002), successfully contending that the Georgia State Senate redistricting plan violated the Voting Rights Act. He advised the Solicitor General on appeal to the Supreme Court, which resulted in a landmark 5-4 opinion in 2003. For his efforts on this case, the Assistant Attorney General for Civil Rights awarded him the department’s Special Commendation for Merit.

In addition to his redistricting expertise, David is one of the country’s foremost experts on compliance with federal voter access and minority language requirements, and has been on the forefront of the battle to expand the promise of the franchise to all eligible voters. David served as lead counsel responsible for minority language compliance in some of the largest and most diverse jurisdictions in the nation, fashioning permanent programs that built bridges between election officials and the minority language community while providing cutting-edge services that expand access to the polls for all voters, regardless of language needs. He has also supervised federal monitoring of thirty elections in hundreds of precincts in a dozen states, and helped direct Department policy regarding enforcement of the Help America Vote Act.

Since leaving the Justice Department, David’s opinions on voting issues have been published in the Washington Post (“Reviving Jim Crow?” 8/22/05), and he has authored an academic essay on *Georgia v. Ashcroft* (and its relation to the debate on reauthorization of the Voting Rights Act) for the Boalt Hall School of Law, scheduled to be published in Spring, 2007. He has appeared on the PBS newsmagazine NOW, and been quoted on voting issues by National Public Radio, the Boston Globe, the Dallas Morning News, the Cleveland Plain Dealer, and many other media outlets. In addition, David has been involved with international democracy building efforts, monitoring the 2005 Egyptian presidential and parliamentary elections, and the 2005 parliamentary elections in Azerbaijan.

David earned his B.A. from the University of California, Berkeley in 1991, and received his J.D. from the Boalt Hall School of Law, University of California, Berkeley, in 1994, where he served on the Executive Committee of the Moot Court Board, and taught Appellate Advocacy, Writing and Research, First Year Moot Court, and Street Law. He is a member of the State Bar of California and the District of Columbia Bar, and he is licensed to appear before many federal courts, including the U.S. Supreme Court.