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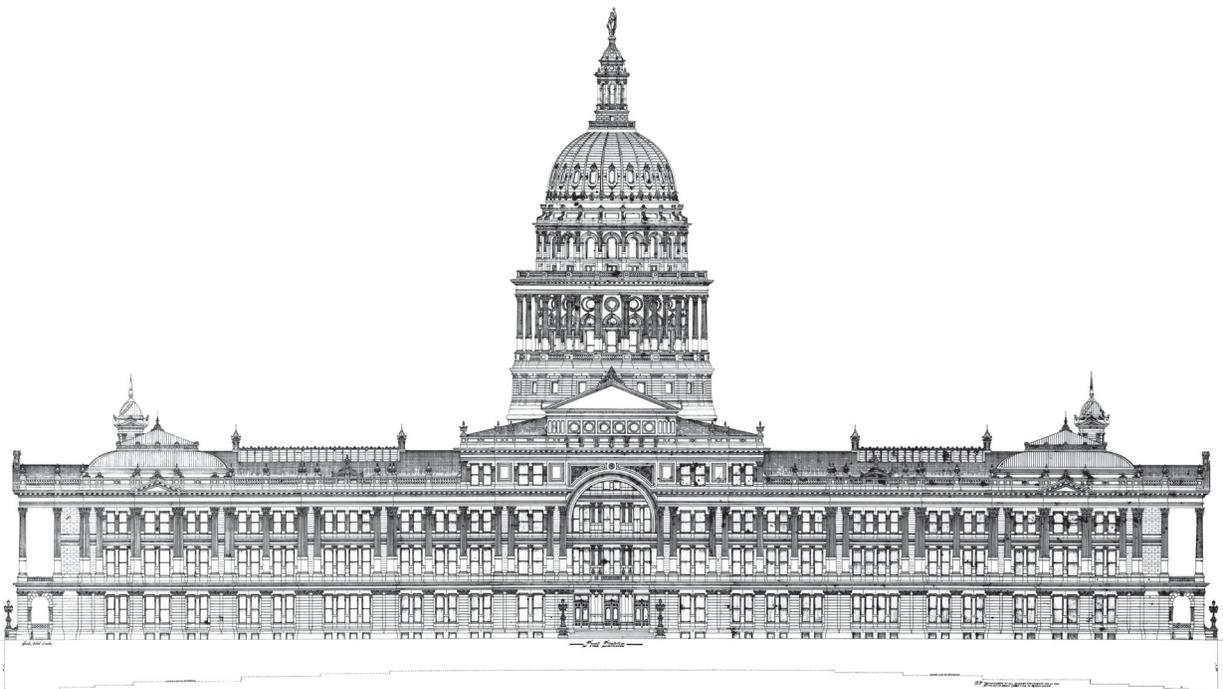
# INTERIM REPORT

TO THE

# 82ND TEXAS LEGISLATURE

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*House Committee on*  
ELECTIONS  
January 2011



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**HOUSE COMMITTEE ON ELECTIONS  
TEXAS HOUSE OF REPRESENTATIVES  
INTERIM REPORT 2010**

**A REPORT TO THE  
HOUSE OF REPRESENTATIVES  
82ND TEXAS LEGISLATURE**

**TODD SMITH  
CHAIRMAN**

**COMMITTEE CLERK  
STEVEN SCHAR**

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Committee On  
Elections

January 10, 2011

Todd Smith  
Chairman

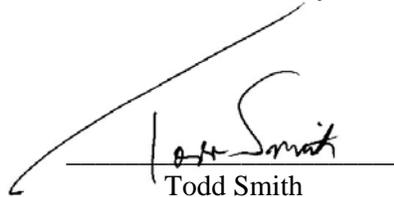
P.O. Box 2910  
Austin, Texas 78768-2910

The Honorable Joe Straus  
Speaker, Texas House of Representatives  
Members of the Texas House of Representatives  
Texas State Capitol, Rm. 2W.13  
Austin, Texas 78701

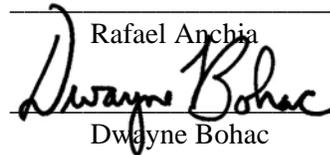
Dear Mr. Speaker and Fellow Members:

The Committee on Elections of the Eighty-first Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-second Legislature.

Respectfully submitted,

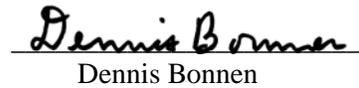
  
Todd Smith

  
Aaron Peña

Rafael Anchia  
  
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Vice-Chairman

Members: Dr. Alma Allen, Rafael Anchia, Dwayne Bohac, Dennis Bonnen,  
Betty Brown, Linda Harper-Brown, and Joe Heflin

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## INTRODUCTION

At the beginning of the 81st Legislature, the Honorable Joe Straus, Speaker of the Texas House of Representatives, appointed 9 members to the House Committee on Elections: Todd Smith, Chair; Aaron Peña, Vice-Chair; Dr. Alma Allen; Rafael Anchia; Dwayne Bohac; Dennis Bonnen; Betty Brown; Linda Harper-Brown; and Joe Heflin.

The House Rules adopted by the 81st Legislature as House Resolution 2 on January 28, 2009, give the House Committee on Elections its jurisdiction. Rule 4 Section 8 reads as followed:

ELECTIONS — The committee shall have nine members, with jurisdiction over all matters pertaining to:

- (1) the right of suffrage in Texas;
- (2) primary, special, and general elections;
- (3) revision, modification, amendment, or change of the Election Code;
- (4) the secretary of state in relation to elections;
- (5) campaign finance;
- (6) the duties and conduct of candidates for public office and of persons with an interest in influencing public policy; and
- (7) the following state agencies: the Office of the Secretary of State and the Texas Ethics Commission.

During the interim, the Speaker assigned charges to the committee. The House Committee on Elections has completed its hearings and investigations, and has adopted the following report.

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## HOUSE COMMITTEE ON ELECTIONS

### INTERIM STUDY CHARGES AND SUBCOMMITTEE ASSIGNMENTS

- CHARGE 1 Study ways the state can enhance military and overseas voters' ability to obtain and return balloting materials and reduce burdens on those voters' exercise of their right to vote. *Joint Interim Charge with House Committee on Defense and Veterans' Affairs*  
*Subcommittee Members: Peña, Chair; Brown, Betty and Bohac.*
- CHARGE 2 Examine the use of central polling places and compare voter turnout and the number of rejected provisional ballots in counties that use central polling places with similar counties that do not.
- CHARGE 3 Examine the prevalence of fraud in Texas elections. Study new laws in other states regarding voter identification and recommend statutory changes necessary to ensure that only eligible voters can vote in Texas elections.
- CHARGE 4 Review the Texas campaign finance law in judicial races in light of the recent United States Supreme Court decision *Caperton v. Massey*. *Joint Interim Charge with House Committee on Judiciary and Civil Jurisprudence*
- CHARGE 5 Monitor the agencies and programs under the committee's jurisdiction.

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**Interim Charge #1**

Study ways the state can enhance military and overseas voters' ability to obtain and return balloting materials and reduce burdens on those voters' exercise of their right to vote. *Joint Interim Charge with House Committee on Defense and Veterans' Affairs*

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## **BACKGROUND**

Texas is home to the nation's largest population of military service members serving overseas. Texans understand that soldiers and their families make great sacrifices to defend our democracy, and therefore, take very seriously a soldier's right and ability to participate in that democracy by casting ballots in all elections.

Soldiers from Texas, as well as from across the country have not been able to fully participate in the election process. Federal and state election laws and procedures have not protected the right of members of the military, their families and others living overseas to vote in local, state and federal elections.

A basic problem is that people living overseas cannot be certain that their absentee ballots will be tallied because of outmoded state laws, rules and deadlines. In 1952, President Harry Truman asked the United States Congress to reform the election and voting systems to ensure that the members of the military who were serving overseas in the post-World War II reconstruction efforts could fully participate in the electoral process and have their votes counted. Nearly six decades later, unfortunately, voters living overseas cannot be certain that their votes are counted.

The most comprehensive report on this issue was released in January 2009 by the Pew Center on the States in its *No Time to Vote: Challenges Facing America's Overseas Military Voters*.<sup>1</sup> This research showed that the laws and procedures in 25 states, including Texas and the District of Columbia, do not provide overseas military enough time to vote because the states mail absentee ballots too late for military voters to receive, mark and return the ballots in time to meet all of the required state deadlines.

The report from the Pew Center states that election data from 2006 shows that 86 percent of absentee ballots requested by the general population were cast, while only 27 percent of absentee ballots for overseas military voters were cast.<sup>2</sup> According to information provided to the Department of Defense (DoD) Federal Voting Assistance Program (FVAP), among members of the military who did not vote in 2004, 30 percent said they were unable to vote because their ballots arrived too late or never arrived at all. Additionally, 28 percent reported that they were unable to register, did not know how to go about requesting an absentee ballot or found the process too complicated.

A significant contribution to the problems faced by military and overseas voters is the complexity of the American electoral system. There is tremendous variation in how the 50 states and the District of Columbia administer the election process for overseas military personnel to vote. Each unique state has its own requirements, deadlines and methods of overseas military voting. One telling fact is that the DoD's instruction manual for overseas military voters is 460 pages long. The manual contains 5 to 10 pages of instructions detailing each individual state's requirements and procedures.<sup>3</sup> The Pew Center's report states:

. . . S(s)ome states send ballots out and allow voters to return them via e-mail or fax, while others rely entirely on postal mail to transmit blank and receive completed ballots. Some states require military and overseas voters to register first, before they can receive a ballot, while others do not—and some give voters an opportunity to register and ask for a ballot simultaneously. Some states require voters to get their ballots notarized or witnessed before returning them. Many states require absentee ballots from Uniformed and Overseas Citizen Absentee Voting Act voters to be returned by Election Day, while

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others count them even if they come in afterward.<sup>4</sup>

As a result, overseas military voters face the often overwhelming challenge of deciphering and navigating 51 separate voting systems. But as the Pew Center report states, it is the laws and practices of the 50 states and the District of Columbia that determine how and when these voters participate—and, most importantly, whether they can successfully cast a ballot.<sup>5</sup>

Although solving this problem will be a long and complicated effort, voting advocates have identified three major reasons why the laws of states like Texas do not currently give overseas military members enough time to vote:

1. *Reliance on Mail Delivery of Ballots* - When a state's absentee vote system relies on postal delivery, the lapse in the time between when the ballot leaves the mainland and when the ballot reaches the voter may leave the voter without a sufficient amount of time to comply with the state's deadline to cast that ballot;
2. *Waiting Too Long to Distribute Ballots* - States often wait too long to distribute ballots to overseas military personnel; and
3. *Early Deadlines for Ballot Return* - States set deadlines for return of ballots that are too early. The Pew Center's report found:

Of the 19 jurisdictions that allow the absentee ballot to come in after Election Day, Georgia, New York, Texas and four other states do not provide their military voters enough time to vote. These states would need to extend their receipt deadlines anywhere from three days (Texas) to 21 days (Massachusetts) to provide sufficient time.<sup>6</sup>

Advocates for less complicated overseas and military procedures conclude that states, like Texas, can dramatically increase the opportunity for military voters to participate in elections by: 1) distributing blank ballots to overseas military voters via fax and/or e-mail; 2) distributing blank ballots to overseas military voters as early as possible; and 3) providing more time for completed ballots from overseas military voters to return to local election offices. Supporters also recommend a minimum of 45 days for “ballot transit time” — this is, the amount of time between the date a state sends a blank ballot to a voter and the deadline by which the voter must return the completed ballot.<sup>7</sup> State law currently requires that ballots must be mailed 45 days before the November general election but does not provide the same courtesy in primaries, runoffs, special elections.<sup>8</sup>

Although these propositions appear relatively simple to implement, enacting them can be somewhat difficult. As legislators know, the election process is a complex one that consists of a series of several steps. Whether a state's election system allows enough time for military members to vote, therefore, depends on how well the series of steps work together. In states, like Texas, where election laws and practices have been developed and meshed together session after session, it is often necessary to step back and inspect the system as a whole. Such an inspection would help diagnose problems, and necessary reforms to ensure that the rights and unique circumstances of absentee military voters are addressed and legally protected.

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## **The 1986 Federal UOCAVA Act and the 2009 Federal MOVE Act**

A series of previous federal actions forced Texas to reform certain overseas voting procedures. In 1986, Congress enacted the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which gave an estimated six million uniformed service members, their spouses and dependents, and overseas civilians the right to vote in any federal election.<sup>9</sup> The law covered primary, runoff, special, presidential, and general elections. United States citizens covered by UOCAVA include members of the United States Uniformed Services and merchant marine and their family members, and United States citizens residing outside the United States.

Among its key provisions, UOCAVA provides for an application called the Federal Post Card Application (FPCA) that qualified service members and overseas citizens can use to register to vote and request an absentee ballot simultaneously. The law also allows for the use of a "back-up" ballot for federal offices, called the Federal Write-In Absentee Ballot (FWAB). This ballot may be cast by voters, covered by the Act, who have made timely application for, but have not received, their regular ballot from their state or territory, subject to certain conditions.

The UOCAVA could not, and did not, singlehandedly reform election systems across the nation. As discussed above, states' laws and practices determine how and when eligible voters cast absentee ballots, and how likely their ballots are to be counted. The U.S. Congress recognized that further reforms were necessary to ensure legitimate military and overseas votes were counted so, in 2009, Congress passed the *Military and Overseas Voter Empowerment Act* ("MOVE Act").

The MOVE Act amended the UOCAVA to establish new voter registration and absentee ballot procedures that states must follow in all federal elections. Most of these new procedures were to have been implemented by the November 2010 general elections, unless a state was granted a waiver by the federal government. As amended by the MOVE Act, UOCAVA now requires state officials to:

1. Provide these covered, eligible overseas voters with an option to request and receive voter registration and absentee ballot applications by electronic transmissions and establish electronic transmission options for delivery of blank absentee ballots to UOCAVA voters;
2. Transmit validly-requested absentee ballots to UOCAVA voters no later than 45 days before an election for a federal office, when the request has been received by that date, except where an undue hardship waiver is approved by the DoD for that election;
3. Take steps to ensure that electronic transmission procedures protect the security of the balloting process and the privacy of the identity and personal data of UOCAVA voters using the procedures;

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4. Expand the acceptance of the Federal Write-In Absentee Ballot to all elections for federal office beginning December 31, 2010;
  5. Accept otherwise valid voter registration applications, absentee ballot applications, voted ballots, or Federal Write-In Absentee Ballots without regard to state notarization requirements, or restrictions on paper type, or envelope type; and
  6. Allow UOCAVA voters to track the receipt of their absentee ballots through a free access system.

In layman's terms, overseas military voters are now entitled to receive their ballots for all federal elections earlier (45 days before the election) and faster (using technology such as e-mail). If the ballot still fails to arrive in time, there is also a back-up plan – the Federal Write-in Absentee Ballot (FWAB), which can be accessed online, printed as a blank form, filled in manually, and then sent to an election official. As discussed below, these federal measures to protect the votes of Americans abroad are significant, but further revisions are needed at the state level.

### **Importance of the FWAB**

The Federal Write-in Absentee Ballot (FWAB) serves as a back-up measure for military and overseas voters who do not receive their state ballots at least 30 days before the election or the state's deadline, whichever is later. In these cases, voters can download the FWAB, write in their preferences in general elections for federal offices such as president, vice president, U.S. senator and U.S. representative, and return this alternative ballot postmarked by their state's deadline. All states accept the FWAB. This is an important "fail-safe" option that provides military and overseas civilian voters the ability to cast a ballot if some aspect of their states' voting process goes awry.<sup>10</sup>

However, many overseas voters are unaware of the FWAB's availability. And, although the FWAB is accepted by all states, some states elect to accept it only when the ballot is cast for a federal office, or only from uniformed military service members. Military voting advocates suggest that states would better serve voters by increasing awareness of the FWAB, making it available to all UOCAVA voters and accepting it for federal, state, and local offices.<sup>11</sup>

### **Recent Action by Texas Secretary of State**

Because the MOVE Act required state-level compliance by 2010, and the Texas legislature does not convene until January 11, 2011, the Texas Secretary of State's office took steps to implement the MOVE Act through rulemaking authority so that Texas' conduct was compliant in the November 2010 elections. In July 2010, the Texas Secretary of State's office adopted new Rule §81.39, "concerning the e-mailing and tracking of balloting materials to military and overseas voters pursuant to the federal Military and Overseas Voter Empowerment Act (MOVE), 42 U.S.C. 1973ff." The new rule implements many of the MOVE Act's requirements, and early reports suggest that the November 2010 election system did improve the ability of overseas military voters to participate.

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## Need for State Legislation

Still, some observers see a need for legislative action in 2011 during the 82nd Texas Legislature. Though the Secretary of State's office has done an admirable job of implementing many reforms through the Office's rulemaking authority, explicit statutory authority is needed to guarantee that reforms are not challenged or diminished through challenges made by the federal government. Statutory changes would also provide the Secretary of State with legislative authority to implement further reforms to streamline voting for military and other overseas voters.

Military voting advocates propose that the Texas Legislature use the MOVE Act, new Secretary of State rules, and the new Uniform Act (discussed below) as a guide in crafting legislation to make it easier for overseas Texans to participate in all elections. Military voting advocates call for Texas legislation that explicitly:

1. Ensures that absentee ballots are sent out at least 45 days before all elections, not just the General Election each November;
2. Permits e-mailing blank ballots and information to overseas voters upon request; and
3. Allows overseas voters to use the Federal Write-in Absentee Ballot (used when official ballots are not received in time) for state and local races.

Some people have proposed further expediting the process by allowing overseas voters to also return their ballots by e-mail or fax. However, election officials, advocates and experts—including the federal General Accountability Office — have raised questions about the security and privacy of completed ballots transmitted electronically back to their states. Testimony about this concern presented to the interim committee suggests that e-mail or fax return of ballots are still controversial, and probably unnecessary, as long as ballots are distributed to voters early enough in the voting process. Testimony stated that sending blank ballots out via fax or e-mail should give military and other citizens living abroad enough time to complete the voting process.

## New Proposed Model Act from the Uniform Law Commission

As discussed above, states should strive for some measure of inter-state consistency as they enact MOVE Act-required reforms, so that overseas soldiers from various states will have an easier time voting. Fortunately, the Uniform Law Commission (ULC) has spent significant time and resources studying the feasibility of drafting and enacting legislation with consistent timelines, requirements, and standards for registration, absentee ballot distribution, and ballot voting for military and overseas voters covered under UOCAVA.

Recently, the ULC approved a proposal from the Pew Center of the States for a *Uniform Military and Overseas Voters Act* at its annual meeting.<sup>12</sup> Major provisions of the new Uniform Military and Overseas Voters Act includes: mandating that absentee ballots for all elections be sent at least 45 days before an election; requiring electronic transmission of voting materials, including blank absentee ballots for all elections, upon request; and expanding acceptance of the Federal Write In Absentee Ballot for all elections.

This new proposal could be a useful guide for Texas legislators as they draft legislation to amend the Texas Election Code.

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## **RECOMMENDATIONS**

The House Committee on Elections recommends that the 82nd Texas Legislature enact the following changes to the Election Code:

- (1) Require election offices to transmit ballots to military and overseas voters at least 45 days before every federal, state and local election - including primaries, runoffs, special, and general elections;
- (2) Provide for email delivery of blank ballots to all military and overseas voters upon request;
- (3) Allow the Federal Write-In Absentee Ballot, or FWAB, to be accepted for federal, state and local elections in Texas. While Texas has its own write-in absentee ballot, allowing voters to use the FWAB for all elections would simplify, standardize and streamline the voting process for Texans abroad; and
- (4) Follow the MOVE Act's lead and expand these protections to cover all military and overseas voters – and in particular, Texas military members stationed outside of their county of residence, who remain in the United States, and still often face challenges in obtaining, casting and returning a ballot in time to be counted.

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**Interim Charge #2**

Examine the use of countywide polling places and compare voter turnout and the number of rejected provisional ballots in counties that use countywide polling places with similar counties that do not.

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## **BACKGROUND**

The use of countywide voting locations in place of the traditional precinct polling place locations has been allowed to some extent since the legislature adopted a pilot program in 2005. The use of countywide polling places (also known as "super precincts" or "vote centers") allows voters to vote at any of the polling places in the county on election day. House Bill 758 was enacted by the 79th Legislature and required the Texas Secretary of State to establish a pilot program in one or more counties as a test of the countywide voting location concept. Lubbock County was the only county to participate and successfully ran a countywide precinct pilot for the November 2006 general election.<sup>13</sup>

In the 80th Regular Session, the Legislature enacted House Bill 3105, authorizing another pilot program for the 2008 election year. This pilot was limited to elections held countywide on the May uniform election date and the November General Election, excluded were the March and April 2008 primary elections. House Bill 3105 contained a number of changes from the previous legislation. Specifically, it added language requiring the county to adopt a methodology for determining its polling place locations. It also included a new requirement that participating counties could not reduce the total number of polling places to less than fifty percent of the number of regular precinct polling places that would normally be used in the county.<sup>14</sup>

In the 81st Regular Session, the Legislature enacted House Bill 719 that made the countywide voting locations pilot program permanent. It added language requiring a county to retain 65 percent of the number of precinct polling places that would normally have been used in its previous elections. House Bill 719 also limited the Secretary of State to choosing three counties with a population of 100,000 or more and two counties with a population of less than 100,000 for each election under the pilot program. Under the Program, counties were eligible to apply to use countywide voting locations for elections held on the November 2009 and 2010 uniform election dates and elections held countywide on the May uniform election date. Participation in the Program was limited to those counties that exclusively use direct recording electronic ("DRE") voting systems and provide a computerized and linked voter registration list at each countywide polling place. HB 719 required the SOS to file a report with the legislature on the status of program and to include any recommendations on the future use of countywide polling places.

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The following report was prepared by the Texas Secretary of State, as required by HB 719.<sup>15</sup>

## **Secretary of State report to the 82nd Legislature - Countywide vote centers**

### **Collin County**

According to the 2000 Census, Collin County's population is 671,909.

### **2009**

Collin County's initial election under the pilot program was in the November 3, 2009 Constitutional Amendment Election. In the previous constitutional amendment election held in November 2007, Collin County used 59 county election polling places and used 57 countywide election day polling places for the November 2009 election. While the county reduced its number of polls, most were placed at locations that had generally been used before as precinct polling places.

### **Turnout Trends**

Collin County had a 7.48% turnout for its November 3, 2009 Constitutional Amendment Election. This represented a .06% decrease from the November 2007 Constitutional Amendment Election. In comparison, statewide turnout for the two elections decreased by .06%.

### **Public Feedback**

After the election, the county received a positive report from the Collin County Republican Chair. Collin County included a study of its use of countywide election day polling places conducted by Robert Stein of Rice University. The study included an exit poll which asked voters to evaluate their experiences with the pilot program. The study determined that most voters were very satisfied with voting at the countywide locations. With that said, compared to Denton County, which was holding a precinct-based election on the same day, more Collin County voters reported having to wait in line to vote than Denton County voters. At the extreme end, 4.3% of the polled Collin voters waited more than 20 minutes against 0% of the Denton County voters. The study points to two issues that might have contributed to this difference. First, while 18% of the total vote in the Denton County election was cast at 10% of the county's election day polling locations, with the choice available to voters in Collin County, a third of the vote was cast in just 10% of the countywide election polling places. The study also notes that in comparison, Denton County had more voting systems per location than Collin County did and suggests that the fewer number of machines may have contributed to slightly longer voting times at the countywide election day polling places. The study concluded that increasing the number and size of countywide polling place locations and the number of voting systems at each location should be a goal for a larger turnout election.

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## **2010**

Collin County also took part in the pilot program for the November 2, 2010 election and used 72 countywide election day polling places in anticipation of higher turnout. In the morning, the county experienced a technical issue at the polls with its electronic poll books. The election department created a fix and submitted it to the polling places by 9:00 on election day, but until the patch was updated, the poll books were shutting down at 15 minute intervals, which caused delays for voters. At other locations, judges reported delays of up to 30-45 minutes for voters, especially towards the end of the day. One polling place, Christ United Methodist Church was open as late as 10:30 p.m. on election night after the polls closed.

### **Turnout Trends**

Collin County had a 37.18% turnout for the November 2, 2010 general election. This represented a 0.86% increase in turnout from the County's 2006 non-presidential general election. In the 2010 general election, 58% of the total vote was cast during early voting with 42% of the total vote cast on election day. In the 2006 general election, 45% of the total vote was cast early and 55% on election day. This increase in the early vote as a percentage of the total vote is in keeping with statewide trends.

### **Public Feedback**

The county included e-mails from election judges and clerks who served in the election with its report. These officials in large part approved of the countywide polling places as a concept but pointed to two challenges. First, they suggested the locations needed more computers, printers, and electronic poll books. They reported that many of the polling places had a single laptop and printer and when either one went offline, it served as a bottleneck that led to lines and delays. Correspondents state the same to have been true of the electronic poll books used to qualify voters. Apparently, had more of these devices been available at the polling places, officials could have processed voters more efficiently. A number of election officials also pointed to confusion by voters regarding the countywide polling place concept and suggested the county could have done more to educate voters. During election day, the county posted approximate wait times at the polling places to its website. Election officials believed voters found the information useful and the feature could be expanded to include more timely updates and postings to social media.

After the election, the Secretary of State received a number of direct e-mails for the most part from election judges and clerks who served in the election concerning the pilot program. These e-mails noted many of the same challenges, apparent bottlenecks created at some locations by a lack of equipment, suggested additional training for election judges and clerks, and suggested having more election officials at each vote center to most efficiently process voters.

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## **Erath County**

According to the 2000 Census, Erath County's population is 34,124.

### **2009**

The November 3, 2009 Constitutional Amendment Election was the second use of the Program by Erath County. Erath County regularly has twenty county election polling places. For the November 2009 election, this was reduced to four countywide election polling places for the relatively low turnout expected in an odd-numbered November Constitutional Amendment Election. Erath County placed a location in each county commissioners precinct.

### **Turnout Trends**

The county uses Votec's Vote Here election management system and reported no problems at its election day polling places. The total vote was 1,939 votes cast, which represented a 9.4% turnout. The Honorable Gwinda Jones, Erath County Clerk, noted in her report that the trend for the odd-numbered year constitutional amendment elections in Erath County is that more voters vote on election day than vote early. This trend is in contrast to the general state trends and the county trends for even-numbered year elections. The election day percentages of the vote increased from 57% in November 2005 to 59% in November 2007 to 65% in the 2009 November election.

### **Public Feedback**

The county circulated a questionnaire for election day voters. Voters who completed the questionnaire overwhelmingly approved of the countywide polling places and wished to see its use continued in future elections. According to the questionnaire, in November 2009, 55% of the voters voted outside their commissioner's precinct. In the previous election using countywide election polling places, 65% of the voters had voted at the polling place closest to their house. The Erath County Clerk believes that this represents a change as the voters become used to the convenience of voting at any election day location.

After the election, the county received positive reports from both the Democratic and Republican Party Chairs. A representative of the Erath County Hispanic Business Council also expressed support for use of countywide election polling places going forward. Erath County surveyed its election officials to determine whether there had been any problems in the election in terms of the voting system or the electronic poll books. Again, no problems were reported.

### **2010**

Erath County also took part in the Program for the November 2, 2010 General Election for state and county officers. Erath County used 11 countywide election polling places in lieu of its normal 20 county election precinct polling places. There were no polling place problems reported to the Secretary of State.

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## **Turnout Trends**

In the 2010 General Election, 52.3% of the total vote was cast on election day, with a 41.3% turnout. In comparison, in the 2006 general election for state and county officers, 53.1% of the total vote was cast on election day with a 37.7% overall turnout.

## **Public Feedback**

Erath County included a voter questionnaire in its report. 98% of the respondents indicated that they liked the countywide polling places, and 90% of the respondents said that it was convenient to choose a location rather than having to vote at the voter's home precinct polling place. 67% of the respondents said they had voted at a location closest to their home, while 20% were voting closest to their place of employment.

The county's report includes emails and statements from county stakeholders including the Republican and Democratic Party Chairs, the Stephenville ISD Superintendent, and local minority and community leaders indicating that the election was a success and recommended the county continue to use countywide election day polling places in future elections.

## **Galveston County**

According to the 2000 census, Galveston County's population is 286,814.

## **2009**

Galveston County's initial use of countywide election polling places was in the November 3, 2009 Constitutional Amendment Election. In its implementation plan, Galveston County increased the number of voting locations available on election day from 17 in the 2007 Constitutional Amendment Election to 40 for the November 3, 2009 Constitutional Amendment Election.

Due to 2008's Hurricane Ike, the Galveston County's Elections Department already had in place a program to inform voters of polling place election changes. Galveston County used this system, along with contacts in the community such as LULAC and the NAACP, to provide information to voters on Galveston County's shift to countywide polling places for the November 3, 2009 Constitutional Amendment Election.

On election day, Galveston County encountered connectivity problems with its linked voter registration system. According to the county's report, eight of the 40 locations were fully functional when the polls opened at 7:00 a.m. By 7:30 a.m., 20 locations were operational. 31 locations were up and running by 8:00 a.m. and by 11:30 a.m. that morning, 39 of the 40 countywide polling places were fully functional. The remaining location experienced technical difficulties all day. Election judges and clerks called the Galveston County Voter Registrar to verify the status of each voter at that location. Apart from connectivity challenges, different polling places reported different circumstances. At one polling place located in a school building, for example, the Galveston County's wireless card could not gain access through the school's

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firewall. At another location, the layout of the polling place originally had the antenna near a steel wall, which inhibited the connection. Galveston County had tested the wireless signals prior to election day and had provided two laptops for each location. Galveston County had also set aside personnel across the county to serve as roving troubleshooters on election day, which proved essential.

### **Turnout Trends**

Galveston County had a 7.23% turnout for the November 3, 2009 Constitutional Amendment Election, as compared to a 7.32% turnout in the November 2007 Constitutional Amendment Election.

### **Public Feedback**

After the election, Galveston County received a complaint from Advocacy, Inc. regarding the accessibility of two of its countywide polling place locations. Galveston County disagreed with the complaint, stating in its report that it had reviewed and believed the two locations did have ramps and side entrances that were accessible to voters. Galveston County's report did note that at the gymnasium, the location of the parking for disabled voters was not clearly marked.

In its report, the Galveston County Elections Department concluded that the county would need to purchase additional equipment, increase training, and increase locations to conduct future elections using countywide election polling places, especially in elections with a greater turnout than an odd-numbered year November election.

### **Lubbock County**

According to the 2000 census, Lubbock County's population is 270,550.

### **2009**

The county used countywide election day polling places (which it calls "vote centers" in its report) in the November 3, 2009 Constitutional Amendment Election. As it has in previous pilot elections, Lubbock County appointed a site selection committee to determine its countywide polling place locations. The committee consisted of members of the Lubbock County commissioners court, leaders from the minority community, and advocates for the disabled community. Lubbock County has 69 regular county election precincts and reduced the number to 40 countywide precincts for the November 3, 2009 Constitutional Amendment Election. In addition, the election was held jointly with the City of Lubbock.

Lubbock County provided information to voters on the polling place locations through radio, television and print media, along with an election day phone bank and text messaging to inform voters of their voting options. A list of the countywide polling places was also mailed to each non-suspense registered voter.

On election day, Lubbock County used Votec's Vote Here election management software and

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reported no problems at its election day polling places.

### **Turnout Trends**

Lubbock County reported 8,902 votes were cast on election day using the countywide polling places. Turnout was 14.15%, which was above the state average turnout of 8.11%.

### **Public Feedback**

No substantive election day problems were reported to the Secretary of State either by Lubbock County or through other sources.

### **2010**

The November 2, 2010 General Election for State and County Officers was Lubbock County's fifth election using countywide election day polling places. The county has 69 county election polling places and reduced that number to 38 countywide polling places for the November general election. As it has in the past, Lubbock County appointed an advisory board consisting of the political party chairs, representatives for Advocacy, Inc., local minority and community groups and staff from the county elections administrator's office. The advisory board assisted the elections administrator in determining the number of polling places and the best locations to encourage a high level turnout.

The Lubbock County Elections Administrator informed this office that educating voters about the pilot program and its effect on the election was a priority. The elections administrator's report noted that its primary focus is informing the public regarding polling locations. Lubbock County used radio, television, and local newspapers to publicize the upcoming elections, manned an election day phone bank to guide voters to the nearest polling place, and also used text messaging to contact voters with information on voting locations. Lubbock County also mailed a letter to non-suspense voters to inform them of the voting locations within the county.

Again, Lubbock County used its Vote Here election management system to maintain its real-time computerized list of registered voters. No one reported substantive election day problems (either by Lubbock County or through other sources).

### **Turnout Trends**

The turnout for Lubbock County's November 2, 2010 General Election for State and County Officers was 54,373. Comparing turnout for past gubernatorial general elections, the 2010 results represent a gain from the 2006 turnout, which was 53,609, but a decrease from 2002's 56,395 turnout. Also interesting is the decrease in election day voting as a percentage of the total vote. In 2010, election day represented 35% of the total vote down from 57% in 2002 and 46% in 2006. While the trend is towards an increase in early voting as a percentage of the vote, Lubbock County's trend, in which 65% voted early is certainly an outlier. By way of comparison in the November 2002 General Election for State and County Officers, statewide early voting was 13.00% of the total and in the November 2006 General Election for State and County Officers,

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early voting was 13.22% of the total vote statewide.

## **Public Feedback**

After the election, Lubbock County solicited comments from members of its advisory board and the other political subdivisions that took part in the process. An Advocacy, Inc. representative praised the countywide polling places because having fewer locations allowed an interpreter to be present at each location. Secretary of State received uniformly positive reviews on the countywide polling place process.

## **Madison County**

According to the 2000 Census, Madison County's population is 13,333.

Madison County's first use of countywide election polling places was in the November 2, 2010 General Election for State and County Officers. In its implementation plan, Madison County declined to reduce the number of election precincts for its first election under the Program. To concentrate on the administrative process of linking the polling places, the county retained its normal eight election day polling places, but each was a countywide polling place allowing voters to vote at any one of the eight polling places.

Mr. Earl C. Parker, the Madison County Elections Administrator, held four community forums for local groups, such as the Madison County Republican Party, a "Tea Party" group, the Retired Teachers Association, and downtown merchants to explain the new election procedures. Madison County also reached out to local media to disseminate information on the countywide polling places, posted information on the pilot at each post office serving the county, and at each of the polling places. Madison County used the Votec's Vote Safe election management system software, and the Madison County Elections Administrator held two three-hour sessions for election judges and clerks to train them on the new system.

On election day, the county equipped each polling place with a laptop and a wireless card for access to the computerized voter registration list. Madison County tested reception prior to election day and experienced a reception problem at the Elwood Baptist Church polling place which it resolved prior to the beginning of voting. No one reported problems with the laptops or wireless connections during election day. Madison County reports there were 18-20 voters not processed through Vote Safe because their names had not been included when the computerized list finalized prior to election day. These voters had to be qualified to vote by contacting the voter registrar directly.

## **Turnout Trends**

Reviewing the election results, in a comparison between the last gubernatorial General Election, Madison County had a total voter increase of 274 votes from the 2006 General Election in which 2,970 persons voted and the 2010 General Election for State and County Officers in which 3,244 votes were cast. With that said, the increase appears to have come from early voting rather than election day voting. Early voting increased by 467 votes compared to 2006 while election day

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voting decreased by 173 votes.

### **Public Feedback**

Post election, the Madison County Judge, the County Elections Administrator, Democratic and Republican Party County Chairs, and the representative from the retired teacher's association (who also served as an election day judge) expressed satisfaction with the county's implementation, and additionally, the County Judge and the County Elections Administrator expressed hope to continue with this Program in the future.

### **Recommendations**

After three cycles of the countywide polling place Program, there is still a relatively small sample size from which to make observations and recommendations.

#### **First Recommendation**

Expanding the number of counties in the pilot coincides with those who have already participated successfully taking allotted spaces. House Bill 719 provides for the Secretary of State to include three counties with a population of 100,000 or more and two counties with a population below 100,000 to take part in each election. Practically, these figures may overstate the expansion of the pilot because some or all of the previously participating counties are likely to keep wishing to participate for various reasons. This proved to be a challenge for the November 2010 General Election cycle when our office received valid applications from both Madison and Jack County, both with populations under 100,000. This office would have allowed both counties to use countywide polling places in the November 2, 2010 General Election had there been room in the program. Accordingly, the Legislature may wish to explore ways to allow previously participating counties to continue without taking a spot in the program or increase the number of counties in the program.

We also note that Erath County suggested that counties be allowed to use the countywide election polling places in primary elections. The Erath County Clerk believes some county voters may become confused when the county has to return to normal election day precinct procedures in a county that has taken part in multiple Programs and worked to educate its voters on the countywide election polling place concept.

#### **Second Recommendation**

The Secretary of State also suggests the Legislature examine whether to require the first election at which countywide polling places are used to be an election other than the November general election for state and county officers. This change would allow county election officials, local political subdivisions within the county, and the voters of the county to become familiar with the concept and in effect run a smaller scale election with countywide election day polling places before deciding whether the county should apply to use the countywide polling places in a November General Election. To facilitate an interested county's ability to take part in a pilot election on the May uniform election date, we would recommend allowing counties to participate

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in the pilot on the May uniform date even if the county itself is not having an election but has contracted with local political subdivisions to hold their elections. We note that no counties have yet applied for the Program on the May uniform date; generally, counties are not holding their own elections on that date and are not eligible as the statute is currently written (i.e., “countywide elections”).

### Overall Observations

For the moment, countywide polling places effects on voter turnout are difficult to gauge. However, anecdotal evidence from the participating counties, along with the turnout percentages, suggest countywide election polling places offer a way to ensure that voters who plan to vote in the election have an increased opportunity to do so much as with early voting.

The challenges that have arisen with countywide polling places appear to predominate in larger counties that can experience a high turnout. If the countywide polling place does not have sufficient equipment and personnel, delays can occur. The bottlenecks have seemed to occur not in the availability of the DRE voting systems, but at the voter qualification point, either due to the number of electronic poll books and laptops or backups for when those devices fail. As Galveston County noted in its report, this may point to the need for an increased investment in equipment. However, with the number of polling places reduced and the voting machines congregated at a countywide polling place, the counties have been able to provide an adequate number of voting systems. A larger county may need to invest in more electronic pollbooks, more backup laptops, and more election personnel at each polling place. Some of these observations may be reflective of the fact that most counties purchased DREs with their HAVA compliance funds while they acquire poll books on their own with non-federal funds.

### Statutory considerations:

Expand the number of counties eligible.

Expand the list of eligible counties by allowing counties, which have a mixed system of DREs and Optical Scans, to participate.

\* *(end of the SOS report)*

## PROVISIONAL BALLOTS

Below is a chart prepared by the Texas Secretary of State that compares voter turnout and the number of rejected provisional ballots in counties that use countywide polling places with similar counties that do not.<sup>16</sup>

<b>County</b>	<b>Population</b>	<b>Total Number of Provisional Ballots Cast 2010</b>	<b>Number of Provisional Ballots Counted 2010</b>	<b>Number of Rejected Provisional Ballots 2010</b>
Erath *	34,124	1	0	1
Kleberg	31,549	9	0	0
Jasper	35,338	32	19	13
Caldwell	35,383	33	5	28
Madison*	13,325	4	1	3
Archer	9,127	8	1	7
Reeves	11,508	6	3	3
San Augustine	8,888	6	1	5
Lubbock *	261,227	441	132	309
McLennan	223,567	5	2	3
Jefferson	245,793	194	1	193
Nueces	317,677	134	16	118
Collin *	671,909	764	155	609
Denton	614,650	432	109	323
Hidalgo	688,029	624	156	466
El Paso	731,534	244	96	148
Dallas	2,304,909	1,263	192	1,071

\* The Counties that are highlighted are the counties that participated in the super precinct pilot program.

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## **RECOMMENDATIONS**

The committee agrees with the findings of the Texas Secretary of State in their report to the 82nd legislature and agrees that there is a need for statutory changes to the election code to expand the number of counties eligible for the program and to expand the list of eligible counties by allowing counties, which have a mixed system of DREs and Optical Scans, to participate.

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**Interim Charge #3**

Examine the prevalence of fraud in Texas elections. Study new laws in other states regarding voter identification and recommend statutory changes necessary to ensure that only eligible voters can vote in Texas elections.

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## **BACKGROUND**

The issue was also studied last interim by The House Committee on Elections and their report addresses these findings and can be found at the following link

<http://www.house.state.tx.us/media/pdf/committees/reports/80interim/Elections80th.pdf>

The committee held a hearing on June 14, 2010, to gather more information about issues relating to voter identification to fulfill the interim charge.

## **TESTIMONY**

### **Attorney General's office**

Jay Dyer, Deputy Attorney General for Government and External Affairs, testified that the Attorney General's (AG's) office has two divisions primarily responsible for election code enforcement. The Criminal Investigation Division handles and investigates allegations of voter fraud or other election code violations that are referred to the AG's office by either the Secretary of State (SOS) or a local election official. The office's Criminal Prosecution Division prosecutes a case after it has been investigated by presenting the case to a local grand jury to secure a criminal indictment. If granted the indictment, the Division prosecutes the case.

Since 2002, Mr. Dyer testified that the AG's office received 267 referrals of incidences of alleged illegal voting as defined in Section 64.012 of the Texas Election Code. Thirty-five of those alleged violations have been resolved with guilty pleas, dismissals or plea agreements, while 12 cases remain active and the remainder of the cases are either still being investigated or the statute of limitations has expired.

Mr. Dyer testified that the AG's office has the authority, unlike other criminal violations, to investigate and prosecute allegations of voter fraud without being asked to by local prosecutors. He went on to explain, however, that the extent to which voter fraud cases are prosecuted locally compared to the amount of cases that are referred and handled by the AG's office could not be determined. The AG's office may only discuss cases that have been referred to them and because all voter fraud cases are not referred to the AG's office, it was difficult for their office to comment on the extent of voter fraud within the state. To get a complete picture of voter fraud in Texas further analysis is needed to gather additional information from local election and law enforcement officials.

The prosecution of election fraud cases at the local level are generally handled by the district attorney for felony offenses and the county attorney for misdemeanors violations. Additional research would need to be conducted to gather information from these officials about voter fraud cases that are referred to and prosecuted by their offices.<sup>17</sup>

### **Texas Secretary of State**

Ann McGeehan, Director of Elections Division for the Texas Secretary of State's office, testified that Texas and 26 other states require some form of voter ID in order to cast a ballot at the polls. She stated that her office has referred 24 election code violation cases over the past two years to

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the AG's office for possible prosecution and only two of these cases involved voter impersonation allegations. Ms. McGeehan also testified that it would be tough to detect if voter impersonation is occurring at the polls unless the poll worker knew everyone in their precinct.<sup>18</sup>

### **NEW LAW IN OTHER STATES**

#### **Idaho**

On July 1, 2010, new laws became effective in Idaho requiring that all voters show a photo ID in order to vote. These laws allow residents to register at the polls on Election Day by providing proof of residence, but also require the documents used in providing proof of residence be accompanied by a photo ID. The following documents may be presented as proof of a registrant's current address:

- A valid Idaho driver's license issued through the department of transportation;
- A valid Idaho identification card issued through the department of transportation;
- Any document that contains a valid address in the precinct together with a picture identification card; or
- A current, valid student identification card from a post-secondary educational institution in Idaho accompanied with a current student fee statement that includes the student's valid address in the precinct together with a picture identification card.

The new laws permit voters, without the proper identification, to sign an affidavit swearing to their identity. The affidavit, which is prescribed by the secretary of state, requires the voter to provide their name and address. A person who knowingly provides false, erroneous or inaccurate information on the affidavit will be guilty of a felony perjury offense.

#### **Utah**

Utah enacted new voter ID laws on May 12, 2009. The new laws require voters to show either one photo ID or two other forms of other identification designated by statute that suffice as proof that the voter lives in the precinct. Voters who do not present proper identification at the polls may vote using a provisional ballot; however, the provisional ballot will not count unless they provide valid voter identification to the election official within five days after the election.

#### **New Mexico**

In New Mexico, the voter ID laws that became effective in 2008 relaxed existing laws by allowing a voter to satisfy identification requirements by merely stating his or her name, registration address and year of birth. Under current law, New Mexico accepts the following forms of voter ID:

1. A physical form of identification that may be include:

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- a. An original or copy of a current valid photo identification with or without an address that is not required to match the voter's certificate of registration or a voter identification card; or
  - b. An original or copy of a utility bill, bank statement, government check, paycheck, student identification card or other government document including identification issued by an Indian nation, tribe or pueblo that shows the name and address of the person that is not required to match the voter's certificate of registration; or
2. A verbal or written statement by the voter of his or her voter's name, year of birth and registered address.

If a voter fails to provide the required voter ID, the voter is allowed to vote a provisional ballot.

## **Oklahoma**

The Oklahoma Legislature passed a voter identification bill in 2009 that required a voter to present a government-issued photo ID or their county voter ID card. This bill was vetoed by Democratic Gov. Brad Henry who said the proposal conflicted with the Oklahoma Constitution. In his veto message, the Governor warned lawmakers to be “especially careful when tinkering with this fundamental right.”

Instead of seeking to override Gov. Henry’s veto, legislators passed a plan to put the measure before the voters in the general election held in November 2010. The ballot measure called "State Question 746" passed with 74 percent of the vote, and the new law becomes effective in July 2011.<sup>19</sup> The new law requires that each voter prove his or her identity with a document that must have:

- The name and photograph of the voter;
- Been issued by the federal, state or tribal government; and
- An expiration date that is after the date of the election. No expiration date, however, would be required on certain identity cards issued to persons 65 years of age or older.

In lieu of such a document, voters can present voter identification cards issued by a County Election Board. A person who cannot or does not present the required identification may sign a sworn statement and cast a provisional ballot. Swearing to a false statement is a felony.<sup>20</sup>

## **LITIGATION**

### **Indiana**

The U.S. Supreme Court upheld Indiana's current voter ID law, 6-3, in April 2008 based on provisions in the U.S. Constitution. (*Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008)). The Court held that the state’s interests, identified as justifications for Indiana statute requiring government issued photo ID to vote, outweighed any limitation the law may have imposed on voters.

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The Indiana Court of Appeals struck down the law in 2009 and declared it void on the grounds that it violated the Indiana State Constitution. (*League of Women Voters v. Rokita*, 915 N.E.2d 151 (Ind. Ct. App. 2009)). The state's Court held that Indiana voter ID laws regulated voters in a manner that was not uniform and impartial by favoring Indiana voters who use mail-in absentee ballots. The reasoning behind the decision was those who mailed in absentee ballots did not have to show any identification to vote, while those voting in person did have to present a form of identification.

In June 2010, however the Indiana Supreme Court overturned the Court of Appeals decision in *League of Women Voters v. Rokita* upholding the state's voter identification law, saying the Legislature has the power to require voters to show a photo ID at the polls.<sup>21</sup>

### **Georgia**

The United States 11th Circuit Court of Appeals held that the burden imposed by the Georgia requirement of photo identification is outweighed by the state's interests in safeguarding the right to vote. (*Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009)). The Court of Appeals held that the district court did not err when it determined that the legitimate interest of Georgia in preventing voter fraud justified the insignificant burden of requiring voters to present photo identification before they vote in person.<sup>22</sup>

### **Arizona**

In October 2010, in *Gonzalez v. Arizona*, 08-17094, which is a court challenge to an Arizona law that requires individuals to produce proof of citizenship before they may register to vote was upheld, 2-1, by a three judge panel that included former Supreme Court Justice Sandra Day O'Connor. O'Connor was joined by Circuit Judge Sandra Ikuta, while Chief Judge Alex Kozinski dissented on the ruling.<sup>23</sup>

## **CONCLUSION**

The fact that states across the nation are passing voter ID laws is proof enough of the public's concern regarding the potential of voter fraud. While there is, and perhaps always will be, disagreement regarding the extent of voter fraud, the lack of public confidence in our voting system cannot be questioned. Voter ID laws have been upheld by courts across the country for one simple reason - the inability of those who are challenging the laws to demonstrate in court that those laws place an unreasonable burden on any legal voter.

Texas and other states appear to have had very infrequent prosecution of in-person voter fraud. Some may argue that is an indication that in-person voter fraud does not occur. Others will argue it is an indication that current law does not allow us to indentify in-person fraudulent voting as it occurs.

The close and controversial presidential election in 2000 led to the passage of the Help America Vote Act (HAVA) in 2002, to help restore the public's confidence in the American electoral system. Just two years after HAVA was passed, the 2004 presidential election raised even more

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suspicious and complaints from voters with further erosion in the public's confidence and faith in national, state and local elections. In 2005, then-President George W. Bush appointed the Commission on Election Reform, also known as the "Carter-Baker Commission."

The 21-member bi-partisan Commission was chaired by former President Jimmy Carter and former Secretary of State James A. Baker. After several months of study and hearings, the Commission released its report, *Building Confidence in U.S. Elections*, in September 2005. The House Committee on Elections concurs with the following statement by the Commission:

“While the Commission is divided on the magnitude of voter fraud – with some believing the problem is widespread and others believing that it is minor – there is no doubt that it occurs. The problem, however, is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference. And second, the perception of possible fraud contributes to low confidence in the system. A good ID system could deter, detect, or eliminate several potential avenues of fraud – such as multiple voting or voting by individuals using the identities of others or those who are deceased – and thus it can enhance confidence.” *Building Confidence in U.S. Elections*:<sup>24</sup>

### **RECOMMENDATIONS**

The Elections Committee recommends that the Legislature adopt legislation requiring voters to show photo identification in order to cast a ballot at the polls. We ask that free identification cards be issued by either the Department of Public Safety or the local voter registrar's office if the voter is registered in this state, does not already have a driver's license and is receiving the identification card with the express intent to vote. It is also important that such legislation provide for the education of voters on any changes enacted and that the Secretary of State and counties coordinate their efforts to inform the state's electorate. This law should take effect January 1, 2012.

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**Interim Charge #4**

Review the Texas campaign finance law in judicial races in light of the recent United States Supreme Court decision *Caperton v. Massey*. *Joint Interim Charge with House Committee on Judiciary and Civil Jurisprudence*

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## **BACKGROUND**

*Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) examines the point at which an elected judiciary may interfere with someone's right to a fair trial. Before *Caperton*, Texas Courts automatically rejected motions to recuse on the basis of campaign donations in judicial races. After *Caperton*, Texas judges must hear recusal motions based on elected judicial campaign donations. This has created the need to readdress and reevaluate existing laws regarding judicial elections and to identify the necessary changes to ensure that Texas judges are in compliance with federal law.

## **HISTORY OF THE CASE**

The case in *Caperton* evolved from the reversal by an appellate court - of a West Virginia trial court decision where a jury awarded Caperton \$50 million against A.T. Massey Coal Co. *Caperton*, 129 S. Ct. at 2256. At issue, in the U.S. Supreme Court case, was whether or not Caperton's right to due process was violated "when one of the [appellate court] justices in the majority denied a recusal motion." *Id.* The recusal motion called into question campaign contributions given to that court of appeals justice of "an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the [A.T Massey Coal] corporation" found liable for damages by the trial court. *Id.* at 2256-57.

The standard, established by *Caperton*, requires that a judge grant a motion to recuse where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 2257. Taking into consideration the size of the appellee's donations to the judge's election campaign: \$1,000 directly to the campaign; \$2.5 million to an organization opposing the election of the judge's opponent; and \$500,000 in independent expenditures for direct mailings and newspaper advertisements, the U.S Supreme Court ruled in favor of the appellant.

The U.S. Supreme Court concluded that, under the circumstances in *Caperton*, there was a serious risk of actual bias due to the campaign contribution's "relative size in comparison to the total amount of the money contributed to the campaign, the total amount spent in the election," and the effect of the contribution on the results of the election. *Id.* at 2264

## **WHAT THE CAPERTON DECISION MEANS FOR TEXAS**

In Texas, before *Caperton*, a litigant could not ask for a recusal based on judicial campaign contributions. Subsequent to the ruling by the U.S. Supreme Court, Texas courts must consider campaign contributions when deciding recusal motions. Because *Caperton* requires a recusal based on "objective and reasonable perceptions" and "the appearance of bias" Texas judges must decide whether or not to deny a recusal motion based on societies' opinion rather than proof of actual bias. *Id.* 129 S. Ct. at 2263. These vague standards provide little guidance for Texas' judges and put them in the precarious position of unintentionally being in compliance with federal law. Although the United States Supreme Court, made it clear that its decision was based on the

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extraordinary circumstances presented in *Caperton*, it still sets a precedent that any elected judge could be a candidate for recusal based on election campaign contributions.

### **CONCLUSION**

In 1995 the Texas legislature passed the "Campaign Fairness Act" in order to regulate the financing of judicial elections. Thus, Texas already has a structure in place governing contribution limits, expenditure limits, reporting requirements, and recusal procedures. The conflict, that arises in *Caperton*, as it pertains to Texas law, is that it provides no clear standard for when judicial recusal is required. Modifying Texas' existing judicial finance laws to provide judges with a clear standard of when and if campaign donations qualify a judge for recusal, would help protect our judiciary from unintentionally violating federal law. Changing existing laws requires rule changes by the Texas Supreme Court, new laws enacted by the Texas Legislature, or amendments to the Texas Constitution. The Texas Supreme Court has the authority to promulgate or amend the rules of criminal procedure and is currently reviewing revisions to Texas Rule of Civil Procedure 18a's recusal procedures and Rule 18b's recusal standards in light of this case.<sup>25</sup>

### **RECOMMENDATION**

If the Texas Supreme Court does not amend the rules as it pertains to recusal of Judges in certain cases in light of *Caperton v. Massey*, the Texas legislature should consider legislation giving judges a clearer standard for when judicial recusal is required.

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## ENDNOTES

- <sup>1</sup>Pew Center on the States: *No Time to Vote Challenges Facing America's Overseas Military Voters*, January 2009. [http://www.pewcenteronthestates.org/uploadedFiles/NTTV\\_Report\\_Web.pdf](http://www.pewcenteronthestates.org/uploadedFiles/NTTV_Report_Web.pdf)
- <sup>2</sup> Pew Center on the State: *No time to Voter Challenges Facing America's Overseas Military Voters*, January 2009.
- <sup>3</sup> Federal Voting Assistance Program [www.fvap.org](http://www.fvap.org)
- <sup>4</sup> Pew Center on the State: *No time to Voter Challenges Facing America's Overseas Military Voters*, January 2009.
- <sup>5</sup> Pew Center on the State: *No time to Voter Challenges Facing America's Overseas Military Voters*, January 2009.
- <sup>6</sup> Testimony, *House Committee on Elections public hearing 6-10-2010*
- <sup>7</sup> Testimony, *House Committee on Elections public hearing 6-10-2010*
- <sup>8</sup> Texas Secretary of State website devoted to Military and Overseas voters [http://www.votexas.org/military\\_overseas.html](http://www.votexas.org/military_overseas.html)
- <sup>9</sup> Title 42 - The Public Health and Welfare Chapter 20 - Elective Franchise [http://www.justice.gov/crt/military/uocava\\_statute.htm](http://www.justice.gov/crt/military/uocava_statute.htm)
- <sup>10</sup> Testimony, *House Committee on Elections public hearing 6-10-2010* and <http://www.fvap.gov/shortcuts/getfwab.html>
- <sup>11</sup> Testimony, *House Committee on Elections public hearing 6-10-2010*
- <sup>12</sup> <http://www.prnewswire.com/news-releases/pew-commends-uniform-law-commission-for-military-and-overseas-voters-act-98555564.html>
- <sup>13</sup> Texas Secretary of State, *Report to the 80th Legislature on House Bill 758- Relating to Countywide Polling Place Pilot Program*
- <sup>14</sup> Texas Secretary of State, *Report to the 81st Legislature on House Bill 3105, Relating to Countywide Polling Place Pilot Program*
- <sup>15</sup> Texas Secretary of State, *Report to the 82nd Legislature on House Bill 719. Relating to Countywide Polling Place Program*
- <sup>16</sup> Data Provided by the Texas Secretary of State, *Elections Division*
- <sup>17</sup> Testimony, *House Committee on Elections public hearing, 6-14-2010*
- <sup>18</sup> Testimony, *House Committee on Elections public hearing, 6-14-2010*
- <sup>19</sup> The Associated Press, Oklahoma: Henry vetoes voter identification bill
- <sup>20</sup> NCSL, State Voter Identification Requirements, <http://www.ncsl.org/default.aspx?tabid=16602>
- <sup>21</sup> Testimony provided by Texas Secretary of State Office, Elections Division, *House Committee on Elections public hearing, 6-14-2010*
- <sup>22</sup> Testimony provided by Texas Secretary of State Office, Elections Division, *House Committee on Elections public hearing, 6-14-2010*
- <sup>23</sup> <http://caselaw.findlaw.com/summary/opinion/us-9th-circuit/2010/10/26/252506.html>
- <sup>24</sup> Carter-Baker commission report: *Building Confidence in U.S. Elections*
- <sup>25</sup> Testimony, *House Committee on Elections joint public hearing with Judiciary and Civil Jurisprudence, 8-26-10*