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Where Perception Meets Reality: The Elusive Goal of Impartial Election Oversight

Christian M. Sande

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WHERE PERCEPTION MEETS REALITY: THE ELUSIVE GOAL OF IMPARTIAL ELECTION OVERSIGHT

Christian M. Sande[†]

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[†] Christian Sande is an attorney in private practice in Minneapolis, Minnesota, and is admitted to the bar in the states of Minnesota and Washington. He is a 1990 graduate of Hamline University (St. Paul, Minnesota) and a 1996 *cum laude* graduate of William Mitchell College of Law (St. Paul, Minnesota). He has represented political organizations, candidates, political action committees (PACs), and political parties in election matters for over ten years. He also served as special counsel to the St. Louis County Auditor in November 2006 during a recount for the County Attorney's race. He was a candidate for the DFL party's endorsement for Minnesota Secretary of State in June 2006. The author gratefully acknowledges Daniella Voysey (St. Olaf College, Minnesota, 2008) and Alexander Singh Bajwa (Hamline University College of Law, 2008) for their assistance in the preparation of this Article.

I. INTRODUCTION

Election operations in democracies have long been an area of debate and controversy. It is hard to find a time in recent history, however, when the issue has been so politically charged and rife with accusations, extensive documentation, up-to-the-minute reporting, and dashes to a courthouse. Few election statistics are as telling as the sudden rise in lawsuits in just eight years: from 1996 to 1999, the average number of election challenge lawsuits was ninety-six per year; by 2001 to 2004, this number had more than doubled to an average of 254 lawsuits per year.¹ What was once a bad joke on Election day, “vote early and often,”² now has a modern twist: *litigate* early and often.³

These problems stem largely from the structure in which elections are overseen in the various states of the union. By and large, the United States subscribes to partisan oversight of its elections.⁴ While this tradition is time-honored, the combination of closely-divided national elections, rapid information accessibility, and the influx of pre-election lawsuits has caused a palpable feeling that U.S. elections are increasingly skewed toward the party in power.⁵ The traditional solution of checks and balances—in the

1. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 958 (2005).

2. This quote is attributed to former Chicago Mayors William Hale Thompson (1915–23; 1931–35) and Richard J. Daley (1955–76), as well as mobster Al Capone. Speculation is that the phrase was invented by Thompson and copied by Daley and Capone. Source of “Vote Early and Often,” at <http://www.cs.hmc.edu/~geoff/classes/hmc.cs070.200401/votequote.html> (last visited Nov. 23, 2007).

3. See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1243 (2005). Professor Tokaji uses the phrase “sue early, sue often.” *Id.*

4. See Hasen, *supra* note 1, at 974 (“No state currently elects [its chief elections officer] through a nonpartisan election.”). The U.S. is now in the minority in this regard among democracies of the world:

More than half of the world’s democracies use independent officials or commissions to administer elections, including Australia, Brazil, Canada, India, Iraq, Mexico, Russia, South Africa and the United Kingdom. Another quarter of the world’s democracies allow the government to manage elections but have an oversight body composed primarily of judges, including France, Germany, Spain, Argentina, Japan, New Zealand and Israel.

SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 34 (2006).

5. David C. Kimball, Martha Kropf, & Lindsay Battles, *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5

form of a judicial order to the executive office overseeing the election—is becoming less effective as complex legal issues arise shortly before elections, making reasoned decision making almost impossible. Indeed, in the 2004 general election, U.S. Supreme Court Justice John Paul Stevens (in his role as Circuit Justice) refused to intervene in an Ohio election dispute simply because time had run out.⁶

With these problems and perceptions, Minnesota would do well to review its own system of election oversight. Minnesota has seen its fair share of election litigation since 2000.⁷ At the same time, no studies have assessed whether Minnesotans in particular feel a real concern about the fairness of their elections. Commentators and commissions in the United States have recommended that election officials adopt a code of conduct or conflict of interest rules to stop the growing perception of partisanship and partial election oversight.⁸ Additionally, other parties have proposed drastic changes, ranging from making the Secretary of State an appointed position to abolishing the position altogether in favor of an oversight board.⁹ Minnesota's neighbor, Wisconsin, has had an appointed election oversight board for over twenty years.¹⁰ Wisconsin is now replacing that election oversight board with a new board comprised of current and former state judges who will be selected by appellate judges, nominated by the Governor, and confirmed by two-thirds of the State Senate.¹¹

There is little question following the 2000 and 2004 presidential elections that problems of perception are real and measurable in the U.S. electoral process. The real question for Minnesota voters and lawmakers is whether such problems are temporary and should be “waited out,” or institutional and must be addressed.

ELECTION L.J. 447, 450 (2006) (“[T]he party affiliation of election officials can have noticeable effects on voting and elections.”)

6. See *Spencer v. Pugh*, 543 U.S. 1301 (2004) (mem.) (denying application to vacate a Sixth Circuit order without referral to the full Court).

7. See *infra* Part III.C.

8. See *infra* Part V.B.1.

9. See *infra* Part V.B.2-3.

10. See *infra* Part V.B.3.

11. *Id.*

II. ELECTION OVERSIGHT IN MINNESOTA

Minnesota's Secretary of State is elected through a partisan process and functions as the chief elections officer in the state, like those of the majority of other states.¹² The state constitution establishes the Secretary of State as an elected position within the executive department,¹³ charged with reporting returns in every election for statewide office.¹⁴ As the chief election official for the state, the Secretary of State has broad authority to provide information regarding state election laws and instructions, prepare and provide voting instruction posters and pamphlets to all county auditors, provide for voter education and a voter information telephone line, provide for election administration training of county auditors, and enter into a statewide contract to provide county auditors with election supplies.¹⁵ Every ten years, the Secretary of State coordinates information sharing among local officials regarding the redistricting of election districts and the establishment of election precincts.¹⁶

Perhaps by virtue of his or her position as the sole chief elections officer in Minnesota, the Secretary of State can easily become a lightning rod for controversy and political allegations, whether real or imagined.¹⁷

III. INCREASING ACRIMONY IN ELECTIONS

Recent elections have been decided by razor thin margins, increasing focus on the role of the nation's Secretaries of State and their decision making, thus leading to substantial controversy and litigation. Although the 2000 presidential election in Florida brought election oversight in that state to a quick head, election controversies in Ohio and Minnesota have been simmering for a number of years. Indeed, the chief election officials in these two

12. See Hasen, *supra* note 1, at 974 (noting that thirty-three states have a statewide election official (often called the Secretary of State) who is elected through a partisan election process).

13. MINN. CONST. art. V, § 1.

14. *Id.* art. VII, § 8.

15. MINN. STAT. § 204B.27 (2006).

16. *Id.* § 204B.146.

17. E.g., Mark Brunswick, *Ritchie Dispute Cloaks a Deeper Partisan Enmity*, STAR TRIB. (Minneapolis), Nov. 23, 2007; Mark Brunswick, *Secretary of State Should Resign, GOP Chair Says*, STAR TRIB. (Minneapolis), Nov. 22, 2007; Mike Mosedale, *Some Things About Mary: Her Critics Say She's a Party Hack. She Prefers to be Called Madam Secretary*, CITY PAGES (Minneapolis/St. Paul), Sept. 8, 2004.

states alone were involved in nearly twenty lawsuits or election process disputes between 2000 and 2006.¹⁸

A. *Florida (2000)*

Florida Secretary of State Katherine Harris, a Republican, gained national notoriety for her dual role as the chief election official as well as the co-chair of her state's Bush for President campaign.¹⁹ Leading up to Election day in 2000, Secretary Harris made several controversial decisions, including purging voter lists, deciding not to extend the time period allowed for filing recount protests, and not accepting late-filed returns from counties "after a court gave her discretion to do so."²⁰ Indeed, Secretary Harris's relationship with the Bush campaign during the 2000 election remains a source of controversy.²¹

Whether Secretary Harris's actions in 2000 were politically motivated is not really the issue; her party affiliation and her position in the Bush campaign raised perception issues that have never gone away:

Apply the very cliché, but accurate phrase "perception is reality" to Katherine Harris's behavior in her capacity as Secretary of State. Harris was accused of allowing her decisions to be orchestrated by Bush's national campaign strategists. According to partisans for Gore, she did not perform her responsibilities as a duly elected official representing the people of the State, but acted as a Republican party loyalist. Critics of Harris support this claim by pointing out that Harris was intimately involved in Bush's presidential campaign. Harris co-chaired the Florida Bush campaign, took time from her position as

18. See *infra* Part III.B–C.

19. ANDREW GUMBEL, *STEAL THIS VOTE* 211 (2005); Pamela M. Prah, *State Election Officials Steer Neutral in 2008*, STATELINE.ORG, Aug. 22, 2007, at <http://www.stateline.org/live/details/story?contentId=234017>.

20. Hasen, *supra* note 1, at 978 (citing ABNER GREENE, *UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY* 46–51, 56–60 (2001); see also GUMBEL, *supra* note 199, at 211–12; OVERTON, *supra* note 4, at 30–31).

21. See GUMBEL, *supra* note 199, at 211 (noting email correspondence between Harris and Governor Jeb Bush that has since been erased); JEFFREY TOOBIN, *TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION* 62, 70–82 (2002) (noting an election night telephone conversation between Secretary Harris and Governor Jeb Bush); see also OVERTON, *supra* note 4, at 30–32.

Secretary of State to campaign for Bush in New Hampshire and served as delegate to the Philadelphia Republican convention [in 2000].²²

B. *Ohio (2004)*

In 2004, Ohio Secretary of State Ken Blackwell was the subject of similar criticism for his dual role as chief elections official and chairman of the Ohio Bush for President campaign.²³ Indeed, Secretary Blackwell's decisions led to various controversies including no fewer than twelve lawsuits over Ohio elections pertaining to voting equipment, registration forms, provisional voting, photo identification requirements, challenges to voter eligibility, and long lines at polling locations.²⁴ In September 2004, Secretary Blackwell received criticism nationwide for his decision requiring that "Ohio registration forms be printed on 'white, uncoated paper of not less than 80 lb. text weight' (i.e., the heavy-stock paper used for cards)."²⁵ This decision appeared directly counter to the Voting Rights Act's prohibition against voting restrictions based on "paper relating to any . . . registration" that is not material in determining whether the individual is a qualified voter.²⁶

A notable last-minute run to the courthouse occurred during Secretary Blackwell's oversight of the 2004 election. Two lawsuits were brought to stop officials (including Secretary Blackwell) from allowing Republican Party challengers, as permitted by statute, to be present at the polls on Election day.²⁷ The plaintiffs contended that the use of challengers was geared almost exclusively at the African-American population. They presented the district court

22. Ann Shorstein, *Politicizing the Election Process: "The Katherine Harris Effect,"* 2 FLA. COASTAL L.J. 373, 377 (2001).

23. Prah, *supra* note 199; GUMBEL, *supra* note 199, at 281.

24. See Tokaji, *supra* note 3, at 1220.

25. *Id.* at 1227 (citing DIRECTIVE NO. 2004-31 FROM J. KENNETH BLACKWELL, OHIO SECRETARY OF STATE 1 (Sept. 7, 2004) (directed to all County Board of Election Members, Directors, and Deputy Directors), available at http://www.electiontruth.org/lib/downloads/bookdocs/1-041_80lb_paper_directive.doc); see also GUMBEL, *supra* note 199, at 281.

26. Tokaji, *supra* note 3, at 1227 (citing Voting Rights Act, 42 U.S.C. § 1971(a)(2)(B) (2000)).

27. *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004); *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547, 549 (6th Cir. 2004) (citing *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, No. 04-4311 (N.D. Ohio Oct. 31, 2004)).

with evidence that “14% of new voters in a majority white location will face a challenger . . . but 97% of new voters in a majority African-American voting location will see such a challenger.”²⁸ On the day before the election, the U.S. District Court for the Southern District of Ohio enjoined “all Defendants from allowing any challengers other than election judges and other electors into the polling places throughout the state of Ohio on Election Day.”²⁹ On petition to the U.S. Court of Appeals for the Sixth Circuit, however, the appellate court entered an emergency stay of the district court’s injunction, noting the competing interests of allowing registered voters to vote freely as well as “permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote.”³⁰

The plaintiffs then made a last-minute dash to U.S. Supreme Court Justice John Paul Stevens who declined to intervene:

With just several hours left before the first voters will make their way to the polls, the plaintiffs have applied to me in my capacity as Circuit Justice to enter an order reinstating the District Courts’ injunctions. While I have the power to grant the relief requested, I decline to do so for prudential reasons.

Although the hour is late and time is short, I have reviewed the District Court opinions and the opinions of the Circuit Judges. That reasonable judges can disagree about the issues is clear enough.

The allegations of abuse made by the plaintiffs are undoubtedly serious—the threat of voter intimidation is not new to our electoral system—but on the record before me it is impossible to determine with any certainty the ultimate validity of the plaintiffs’ claims.

Practical considerations, such as the difficulty of digesting all of the relevant filings and cases, and the challenge of properly reviewing all of the parties’ submissions as a full Court in the limited timeframe available, weigh heavily against granting the extraordinary relief requested here. Moreover, I have faith that the elected officials and numerous election volunteers on the

28. *Spencer*, 347 F. Supp. 2d at 530.

29. *Id.* at 538.

30. *Summit County*, 388 F.3d at 551.

ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots.

Because of the importance of providing the parties with a prompt decision, I am simply denying the applications to vacate stays without referring them to the full Court.³¹

Simply put, the parties had run out of time.

The sum total of all of this litigation alongside Secretary Blackwell's active political role in the presidential campaign is, again, a serious perception problem in the state's elections office:

Although at least some of [Blackwell's] . . . decisions might be defended on the merits, Blackwell's role as an elected Republican planning to run for higher office, with his close connection with the Bush campaign to boot, could only have fueled the perception that he was anything but a neutral arbiter.³²

C. *Minnesota (2000–2006)*

Minnesota's recent history has also seen several lawsuits challenging election decisions of the Secretary of State. Former Secretary of State Mary Kiffmeyer, a Republican, was sued four times from 2000 to 2006, each on the eve of an election. In *Erlandson v. Kiffmeyer*,³³ three individuals (including the Chair of the Minnesota DFL Party) filed suit to challenge several of Secretary Kiffmeyer's ballot-access decisions following the death of U.S. Senator Paul Wellstone in a plane crash, eleven days before the 2002 general election.³⁴ The Minnesota Supreme Court issued a decision on October 31, 2002, ordering Secretary Kiffmeyer to mail replacement ballots to absentee voters "who had been mailed ballots before Senator Wellstone's death and who requested a replacement absentee ballot and supplemental ballot."³⁵ The court reasoned that the statute on which Secretary Kiffmeyer based her refusal to provide replacement ballots to absentee voters violated equal protection.³⁶

31. *Spencer v. Pugh*, 543 U.S. 1301, 1302–03 (2004) (mem.) (citation omitted).

32. Tokaji, *supra* note 3, at 1250.

33. 659 N.W.2d 724 (Minn. 2003).

34. *Id.* at 726.

35. *Id.* at 727.

36. *Id.* at 734–35.

In re *Candidacy of Independence Party Candidates v. Kiffmeyer*³⁷ dealt with three Independence Party nominees who petitioned the court for an order compelling Secretary Kiffmeyer to place their names on the 2004 general election ballot.³⁸ Secretary Kiffmeyer had refused to do so because her interpretation of the applicable statute was that none of the candidates had received the requisite minimum number of votes in the primary election.³⁹ While sticking to her position throughout the litigation, the Secretary and her counsel, the Minnesota Attorney General, also acknowledged that no rational purpose was being served by Minnesota's primary threshold law—a circumstance noted by the court as “unusual.”⁴⁰ As such, the Minnesota Supreme Court struck down the statute as violating the Independence Party candidates’ “constitutional rights to vote and to associate for the advancement of political beliefs under the First and Fourteenth Amendments” and ordered Secretary Kiffmeyer to place the candidates on the 2004 general election ballot.⁴¹

Also in 2004, the American Civil Liberties Union, the National Congress of American Indians, and several individuals sued Secretary Kiffmeyer to compel her to accept photographic tribal identification cards as proof of identity and residency for the purpose of voter registration on election day.⁴² Secretary Kiffmeyer had argued that Minnesota law⁴³ prohibited the use of such cards to show identity and residence when the holder did not actually reside on their tribal reservation.⁴⁴ The plaintiffs, however, cited the Help America Vote Act,⁴⁵ which explicitly allows an individual to present a “government document that shows the name and address of the voter.”⁴⁶ Five days before the 2004 general election, Chief Judge James M. Rosenbaum of the U.S. District Court for Minnesota found that the statute on which Secretary Kiffmeyer relied violated equal protection.⁴⁷ Furthermore, he issued a temporary restraining

37. 688 N.W.2d 854 (Minn. 2004).

38. *Id.* at 855.

39. *Id.*

40. *Id.* at 861.

41. *Id.*

42. *ACLU v. Kiffmeyer*, No. 04-CV-4653 (MJR/FLN), 2004 WL 2428690 (D. Minn. Oct. 28, 2004).

43. MINN. STAT. § 201.061 (2002) (amended 2005).

44. *ACLU*, 2004 WL 2428690, at *1.

45. 42 U.S.C. § 15301 (Supp. IV 2004).

46. *ACLU*, 2004 WL 2428690, at *2 (citing 42 U.S.C. § 15301 (2000)).

47. *Id.* at *3–4.

order to compel Secretary Kiffmeyer to accept identification cards issued by federally-recognized American Indian tribes as sufficient proof of identity and residency (or with a current utility bill if no address or current address is shown on the card) for voter registration “without regard to whether the tribal members live on or off their tribal reservations.”⁴⁸

Although some might argue that the temporary restraining order issued against Secretary Kiffmeyer five days before the 2004 election was cutting it close, it is hard to imagine a much closer call than the 2006 general election. On election day in 2006, students living on campus at the University of Minnesota were turned away from the polls for not having sufficient proof of residence.⁴⁹ According to reports, Secretary Kiffmeyer upheld the decision regarding proof of the students’ residency, which caused the matter to be brought on an emergency petition that afternoon in Hennepin County District Court.⁵⁰ The court overruled Secretary Kiffmeyer’s decision and ordered that one of the polling places at the University of Minnesota remain open an extra hour.⁵¹ Nevertheless, reports indicated that approximately 100 people were turned away and only six people returned to vote following the judge’s order extending the polling time.⁵²

D. *Looking Ahead to 2008*

None of the three Secretaries of State identified above remain in office. From her position as Florida Secretary of State, Katherine Harris was elected to the U.S. House of Representatives in 2002⁵³ and was subsequently defeated in a 2006 bid for the U.S. Senate.⁵⁴ Ohio Secretary of State Ken Blackwell ran for Governor of Ohio in 2006 and was defeated by then-Congressman Ted Strickland.⁵⁵

48. *Id.*

49. Kathryn Nelson, *Melrose Residents Unable to Vote Tuesday*, MINN. DAILY, Nov. 9, 2006, available at <http://www.mndaily.com/articles/2006/11/09/69813>.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Harris, Boyd Victorious in Fla. Congressional Races*, USATODAY.COM, Nov. 3, 2004, at http://www.usatoday.com/news/politicselections/vote2004/2004-11-02-fl-house-harris_x.htm.

54. Kevin Begos, *Nelson Overwhelmingly Defeats Harris*, TAMPA TRIB., Nov. 8, 2006, at 17.

55. Lisa A. Abraham, *Strickland Wins; Not Even Close, Victory Ends 16-year Republican Hold on Governor’s Office*, AKRON BEACONJ. (Ohio), Nov. 8, 2006, at A1.

Minnesota Secretary of State Mary Kiffmeyer was defeated in her 2006 bid for re-election by Mark Ritchie, a Democrat.⁵⁶

Nevertheless, partisan activity by other Secretaries of State around the U.S. remains alive and well. The current president of the National Association of Secretaries of State, Indiana Secretary of State Todd Rokita, has signed on as co-chair of his state's finance committee for the Mitt Romney for President campaign.⁵⁷ Rokita also commented that "[i]t is Republicans under God that will save this country if it is to be saved."⁵⁸ The Secretaries of State of Rhode Island and Arkansas have endorsed Hillary Clinton for President.⁵⁹ The Secretaries of State of Arizona and South Carolina have endorsed John McCain for President.⁶⁰ Utah's Lieutenant Governor Gary Herbert also serves as that state's chief election official and has endorsed Mitt Romney.⁶¹ At the same time, the following Secretaries of State "have voluntarily refused to serve on political campaign committees or to publicly endorse candidates for office: Connecticut, Minnesota, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, South Dakota and Vermont."⁶²

In light of this patchwork of political involvement—some Secretaries of State openly endorsing partisan candidates in elections they will oversee, while others refusing to do so—one has to ask: why is such partisanship necessarily bad? Aside from the issues of perception raised by commentators about Secretaries Harris and Blackwell, one study found that in 2004, partisan election officials were more likely to accept provisional ballots in areas that were heavily partisan for their party (i.e., Democratic

56. Robert Franklin, *Turnover of State Offices is One for the History Books*, STAR TRIB. (Minneapolis), Nov. 9, 2006, at 4B.

57. Ian Urbina, *Voting Officials Face New Rules to Bar Conflicts*, N.Y. TIMES, Aug. 1, 2007, at A1.

58. Nate Smith, *Secretary of State addresses GOP*, WASH. TIMES-HERALD, Apr. 13, 2007.

59. See Prah, *supra* note 199 (reporting Rhode Island Secretary of State A. Ralph Mollis endorses Clinton); Press Release, Hillary Clinton 2008 Presidential Campaign, Arkansas Leaders Endorse Clinton (June 22, 2007), available at <http://www.hillaryclinton.com/news/release/view/?id=2141> (noting Arkansas Secretary of State Charlie Daniels endorses Hillary Clinton).

60. Prah, *supra* note 19.

61. *Id.*

62. *Id.* It should be noted that this information comes from a National Association of Secretaries of State survey of members in which twenty-five offices responded. *Id.* Further, four states (Colorado, Massachusetts, Ohio, and Virginia) limit their chief election officials' political activity, and Wisconsin requires that the chief elections official and all state board of elections staff be nonpartisan. *Id.*

election officials were more likely to accept provisional ballots in highly Democratic precincts).⁶³ The researchers concluded that “[t]he results are consistent with a theory that election officials may work at the margins to influence voter turnout in ways that benefit their political party.”⁶⁴

IV. NATIONAL CONFIDENCE IN ELECTIONS BY THE NUMBERS: SHAKEN BY PARTISANSHIP?

Statistics and polls bear out the concern that partisan activity and public perception has a direct effect on national confidence in elections. Following the 2000 presidential election crisis, a national Commission on Federal Election Reform was convened and co-chaired by former U.S. President Jimmy Carter and former U.S. Secretary of State James A. Baker, III.⁶⁵ The Commission’s report issued in September 2005 is commonly known as the “Carter-Baker Report” and cites to widespread concern over a loss of confidence in American elections. Indeed, the report notes:

On the eve of the November 2004 election, a *New York Times* poll reported that only one-third of the American people said that they had a lot of confidence that their votes would be counted properly, and 29 percent said they were very or somewhat concerned that they would encounter problems at the polls.⁶⁶

A Rasmussen Poll conducted just before the 2004 presidential election found that fifty-eight percent of Americans were concerned that the election would be another “Florida-style mess.”⁶⁷

Research conducted by American National Election Studies from 1996 to 2004 sought to gauge Americans’ sentiments about presidential elections:

In 1996, about 9.6% of the public (7.5% of Democrats and 12% of Republicans) thought the manner of conducting the most recent presidential election was

63. Kimball, et al., *supra* note 5, at 459.

64. *Id.*

65. See COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM III (2005) [hereinafter CARTER-BAKER REPORT], available at http://www.american.edu/ia/cfer/report/full_report.pdf (last visited Dec. 26, 2007).

66. *Id.* at 1.

67. 58% Worried About 2004 Voting Debacle, RASMUSSEN REPORTS, Oct. 19, 2004, at http://www.rasmussenreports.com/public_content/politics/58_worried_about_2004_voting_debacle.

“somewhat unfair” or “very unfair.” The number skyrocketed to 37% of the public (44% of Democrats and 25% of Republicans) in 2000 following the Florida debacle. By 2004, the number fell to a still worrisome 13.6% of the public holding strongly negative views of American election administration. The gap between the view of Democrats (21.5%) and Republicans (2.9%) remains quite large.⁶⁸

Professor Richard Hasen⁶⁹ has noted that the sentiment of the “losing” party in an election is particularly telling, and perhaps the reason why so many more Democrats compared to Republicans feel that presidential elections are unfair is simply because the Republicans have won.⁷⁰ Indeed, when the shoe was on the other foot in the 2004 Washington gubernatorial election where, after three recounts, Democrat Christine Gregoire won by 130 votes out of 2.9 million ballots cast,⁷¹ it was Republicans who found the process unfair: “In a January 2005 Elway Poll of Washington voters, 68% of Republicans thought the state election process was unfair, compared to 27% of Democrats and 46% of Independents.”⁷² The question, then, is how do we preserve confidence in our elections regardless of who wins?

V. WAYS TO PROTECT IMPARTIAL ELECTION OVERSIGHT

A. *Why Not Leave Well Enough Alone?*

In the absence of any reform, the current framework of filing a lawsuit to challenge an election official’s decision remains available. Yet the problems of running to court on the eve of an

68. Hasen, *supra* note 1, at 942–43.

69. Professor Hasen is William H. Hannon Distinguished Professor of Law at Loyola Law School, Los Angeles, CA, and one of the nation’s leading experts on election law. Professor Hasen also manages an election and political law blog, Election Law, at <http://electionlawblog.org> (last visited Dec. 21, 2007).

70. See Hasen, *supra* note 1, at 943–44.

71. Blaine Harden, *In Washington State, Democrat Wins Race*, WASH. POST, Dec. 24, 2004, at A4.

72. Hasen, *supra* note 1, at 943; see also GUMBEL, *supra* note 199, at 294 (“The Republican faithful amassed outside the statehouse in Olympia and made unflattering comparisons between their gubernatorial race and the blatant vote fraud under international scrutiny in the first round of Ukraine’s ultimately rerun presidential election.”).

election as well as the risk of a decision that “obfuscates” more than “clarifies” are very real.⁷³

Secretaries Blackwell and Kiffmeyer both received injunctions overruling their decisions literally hours before the polls opened.⁷⁴ The injunction against Secretary Blackwell regarding challengers was then stayed as the clock was ticking toward the polls opening; one of the reasons given by the Sixth Circuit for its stay was the “strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately preceding the election.”⁷⁵ Indeed, Justice John Paul Stevens’s sense of restraint is palpable in his refusal to intervene in Ohio’s election-eve battle, noting that the question was brought to him “[w]ith just several hours left before the first voters will make their way to the polls”⁷⁶ In Minnesota, one polling location was kept open an extra hour by court order in 2006, but the effectiveness of the order is dubious.⁷⁷

One of the best examples of a lawsuit leading to an unintended result occurred in Mississippi. The Mississippi Democratic Party filed suit in 2006 to close the state’s primary election to prevent people who were not registered members of their political party from voting in the primary election.⁷⁸ In a decision that threw many people for a loop, U.S. District Judge Allen Pepper granted the Party’s request but ordered that every voter must re-register as a Democrat, Republican, or Independent before the 2008 elections.⁷⁹ Judge Pepper has since amended his decision to extend the deadlines set forth in the original order—but not to change the re-registration requirement—and to allow additional parties to intervene as the litigation moves forward.⁸⁰

73. Tokaji, *supra* note 3, at 1243.

74. See Summit County Democratic Cent. & Executive Comm. v. Blackwell, 388 F.3d 547, 549 (6th Cir. 2004) (discussing injunctions granted in *Blackwell*); see also ACLU v. Kiffmeyer, No. 04-CV-4653, 2004 WL 2428690 (D. Minn. Oct. 28, 2004).

75. *Summit County*, 388 F.3d at 551.

76. *Spencer v. Pugh*, 543 U.S. 1301, 1302 (2004).

77. See Nelson, *supra* note 499 (reporting that approximately 100 people had been turned away from the polls and only six returned following issuance of the court order).

78. *Miss. State Democratic Party v. Barbour*, 491 F. Supp. 2d 641, 645 (N.D. Miss. 2007), *appeal docketed*, No. 07-60667 (5th Cir. Aug. 3, 2007).

79. *Id.* at 662.

80. *Miss. State Democratic Party v. Barbour*, No. 4:06CV29-P-B, 2007 WL 2071800, at *7–8 (N.D. Miss. July 17, 2007).

Nevertheless, the decision has been called “a real catastrophe” and “a big cloud over the state.”⁸¹ The Democratic Party’s hope to tidy up Mississippi’s primary election system led to a much broader decision requiring every voter in the state to be re-registered.

B. *Options for Reform*

With the uncertainty and risk of litigation, an increasing number of observers have proposed changes. Options for reform have generally taken the form of (1) ethics codes placed on election officials, (2) changing the election official’s position from an elected to an appointed position, and (3) governing elections via a commission rather than a single individual.

1. *Instituting Ethics Codes for State Election Officials*

Pointing to the pervasive appearance of partiality in elections, the Carter-Baker Commission recommends that election officials adopt a code of conduct “to avoid any activity, public or private, that might indicate support or even sympathy for a particular candidate, political party, or political tendency.”⁸² This recommendation has been echoed by Commissioner Ray Martinez of the U.S. Election Assistance Commission, who has proposed that states adopt “conflict-of-interest rules to govern the activities of state election officials.”⁸³

To that end, U.S. Senator Dianne Feinstein has introduced a bill in Congress that would amend the Help America Vote Act of 2002 to prohibit a state’s chief election official from taking “an active part in political management or in a political campaign with respect to any election for Federal office over which such official has supervisory authority.”⁸⁴ This prohibition would preclude the official from serving as a member of an authorized Federal candidate’s committee, making public comments in support of or opposed to any Federal candidate in an official capacity, fundraising for a Federal candidate, and providing Federal election

81. Mary Perez, *Voter Reform Is a Key Issue in Race for Secretary of State*, S. MISS. SUN HERALD, July 30, 2007, at A6.

82. CARTER-BAKER REPORT, *supra* note 65, at 52.

83. Steven F. Huefner & Daniel P. Tokaji, *Independent Election Administration: Who Counts the Votes? Who Draws the Lines?*, 5 ELECTION L.J. 410, 411 (2006).

84. Ballot Integrity Act, S. 1487, 110th Cong. § 325 (2007); *see also* Count Every Vote Act, H.R. 1381, 110th Cong. § 319A (2007).

information to any candidate that is not provided to every candidate.⁸⁵

Similarly, the Ohio Legislature recently passed a law to restrict that state's Secretary of State from serving as a campaign treasurer or any other official capacity for any federal, state, or local campaign committee other than the Secretary's own committee.⁸⁶

At present, the only statutory restriction on political activity by the Minnesota Secretary of State is the general prohibition on political activity by all state employees:

An employee or official of the state or of a political subdivision may not use official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity.⁸⁷

Although ethical restrictions on a Secretary of State or other election official have some initial attraction, such proposals remain subject to First Amendment challenges. Indiana Secretary of State and current president of the National Association of Secretaries of State Todd Rokita has stated that “[j]ust because you are elected to office doesn’t mean you check your constitutional right to free speech at the door.”⁸⁸ Indeed, the U.S. Supreme Court in 2002 struck down Minnesota’s canon of judicial conduct that prohibited candidates for judicial election from announcing their views on disputed legal or political issues, holding that such a restriction violated the First Amendment.⁸⁹

Further, even though an ethics code might survive First Amendment scrutiny, such a code cannot eliminate an individual’s partisanship. For example, in May 2007, Colorado Secretary of State Mike Coffman adopted rules that bar himself and certain employees from publicly endorsing or working for a political candidate, political party, or statewide ballot initiative.⁹⁰ But the day after announcing the new policy, Secretary Coffman was the

85. Ballot Integrity Act, S. 1487, 110th Cong. § 325 (2007).

86. OHIO REV. CODE ANN. § 3501.052 (West Supp. 2007).

87. MINN. STAT. § 211B.09 (2006).

88. Urbina, *supra* note 57.

89. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

90. Colorado Secretary of State Information Center News Release, Coffman Limits Outside, Partisan Political Activity of Employees (May 17, 2007), *available at* http://www.sos.state.co.us/pubs/pressrel/coffman_release_partisan_policy_5-17-07.html.

“featured speaker” at a Mesa County Republican Party event in Grand Junction, Colorado.⁹¹ The Secretary’s spokesman explained that Secretary Coffman “still continues to be an active Republican in the state.”⁹² Indeed, in November 2007, Secretary Coffman formally filed his candidacy with the Federal Elections Commission to run for retiring Congressman Tom Tancredo’s seat in the U.S. House of Representatives.⁹³

2. *Making the Chief Election Official an Appointed, rather than Elected Position*

Several individuals and organizations have proposed that states do away altogether with elected officials overseeing elections. The Carter-Baker Report recommended that states “consider transferring the authority for conducting elections from the secretary of state to a chief election officer, who would serve as a nonpartisan official.”⁹⁴ The report goes on to suggest that states could select this official by having a super-majority of two-thirds of one or both chambers of the state legislature and that the nominee “should receive clear bipartisan support.”⁹⁵

This idea is shared by Professor Hasen, who proposes that the states create a “cadre of individuals” whose allegiance is “to the integrity of the process itself and not to any particular electoral outcome.”⁹⁶ Like the Carter-Baker Report, Hasen underscores the need for broad support and nonpartisanship of the appointed election official, also suggesting that the individual be nominated by the governor and approved by a super-majority of the state legislature.⁹⁷ Hasen goes on to propose institutional protections such as a long-term appointment without the possibility of reappointment, removal only under the rules set out for impeaching a state executive, and a constitutionally guaranteed budget to guard against the legislature’s budgetary influence.⁹⁸

Yet this idea is opposed by Secretary Rokita, who believes that elected officials are more accountable when they know that they

91. Urbina, *supra* note 57.

92. *Id.*

93. Lynn Bartels, *Coffman Formally Files To Make Run for Congress*, ROCKY MTN. NEWS, Nov. 7, 2007, at N10.

94. CARTER-BAKER REPORT, *supra* note 65, at 50.

95. *Id.*

96. Hasen, *supra* note 1, at 983.

97. *Id.* at 984.

98. *Id.*

can be voted out of office if they fail to act impartially.⁹⁹ Rokita's comment would seem to have some credence given that the controversial Secretaries of State Harris, Blackwell, and Kiffmeyer have all left office either through a failed attempt to seek higher office or a loss at re-election.¹⁰⁰ Moreover, Maine's Secretary of State Matthew Dunlap, who was chosen by that state's legislature rather than being popularly elected, told the *New York Times* that "it's a pinpoint balancing act you have to play. . . . In order to get elected by the Legislature, you want your candidates to get elected."¹⁰¹

Several of the protections offered by the Carter-Baker Report and Professor Hasen would alleviate some of the concerns raised by Secretary Dunlap's comment. Yet the reality is that these proposals require such a substantial structural and legal change to current election administration (in Minnesota, the proposals would require significant constitutional amendment) that one must wonder whether these ideas are even realistic.

3. *Governing by Commission: The Wisconsin Government Accountability Board*

Wisconsin has had commission oversight of elections for quite some time, but the Wisconsin system is undergoing substantial reform. Having removed election and campaign oversight from the purview of the Wisconsin Secretary of State in 1974, Wisconsin was unique with an elections oversight board of members chosen by the Governor, the Chief Justice of the Wisconsin Supreme Court, legislative leaders, and chairs of major political parties.¹⁰² Although the Wisconsin Elections Board was bipartisan in make-up, the Board "produced decisions and formal opinions during often lively public meetings at which political considerations were never far from the surface."¹⁰³ As such, in January 2007 the Wisconsin

99. Urbina, *supra* note 57.

100. See Begos, *supra* note 54; Abraham, *supra* note 55; Franklin, *supra* note 56.

101. Urbina, *supra* note 577.

102. Press Release, Wisconsin State Elections Board, Elections Board Pledges to Work for Smooth Transition: Legislature Creates Government Accountability Board (Jan. 31, 2007), available at <http://elections.state.wi.us/docview.asp?docid=10581&locid=47>.

103. Peter C. Christianson, *Intended Advocate; Unintended Lobbyist; Regulating Elections and Lobbying in Wisconsin*, WIS. LAW., Oct. 2007, available at http://www.wisbar.org/AM/Template.cfm?Section=Search_Archive1&template=/cm/htmldisplay.cfm&contentid=67720.

Legislature enacted a sweeping reform that is merging state election administration with campaign finance, lobbying, and ethics into one oversight board, the members of which are all current or former judges.¹⁰⁴

The Wisconsin Government Accountability Board consists of six members,¹⁰⁵ each of whom must formerly have served as a judge elected to a court of record in Wisconsin.¹⁰⁶ The Board members will serve six-year staggered terms.¹⁰⁷ Board members are selected by a Government Accountability Candidate Committee, which consists of one judge chosen by lot by the Wisconsin Chief Justice (in the presence of the other Supreme Court Justices) from each of the four districts in the Wisconsin Court of Appeals.¹⁰⁸ No person may be nominated by the Government Accountability Candidate Committee unless the person receives its unanimous approval.¹⁰⁹ The Governor then nominates one candidate from the Candidate Committee's nominations,¹¹⁰ subject to a two-thirds vote of the Wisconsin Senate.¹¹¹

Wisconsin Government Accountability Board members' political activities are subject to several limitations:

- (1) Board members may not hold another state or local office except the office of circuit or court of appeals judge;¹¹²
- (2) Board members may not become a member of a political party, an officer or member of a committee in any partisan political club or organization or an officer or employee of a PAC;¹¹³
- (3) Board members may not become a candidate for state or local office;¹¹⁴
- (4) Board members may not make political contributions to state or local candidates;¹¹⁵ and

104. See Wis. STAT. § 5.05 (Supp. 2007).

105. Wis. STAT. § 15.60(1) (Supp. 2007).

106. *Id.* at subdiv. (3).

107. *Id.* at subdiv. (1).

108. *Id.* at subdiv. (2).

109. Wis. STAT. § 5.052(2) (Supp. 2007).

110. See *id.* at subdiv. (3).

111. Wis. STAT. § 15.07(1)(a)(2) (Supp. 2007).

112. Wis. STAT. § 15.60(4) (Supp. 2007).

113. See *id.* at subdiv. (5).

114. *Id.* at subdiv. (6).

115. *Id.* at subdiv. (7).

(5) Board members may not be a lobbyist or employee of a lobbyist.¹¹⁶

The restrictions on a Board member's political membership, contributions, and political activity apply for a period of one-year before the members' term.¹¹⁷ An Elections Division is created within the Government Accountability Board,¹¹⁸ and the Board is directed by statute to designate an employee of the Board to serve as the chief election officer in the state.¹¹⁹

Wisconsin's new venture into election oversight—a board of judges who are heavily restricted from political activity—is an intriguing way to address concerns of partisanship that apparently were not settled with the former elections oversight board.¹²⁰ This creative approach meets the goals of nonpartisanship and broad support (through two-thirds approval by the Senate) set forth in the Carter-Baker Report and by Professor Hasen.¹²¹ Yet the idea of commission or board-oversight of elections has been met with opposition by at least one election law professor who supports “one main person in an office that should encourage voter turnout and clean elections.”¹²² With the revised Wisconsin model just getting off the ground, it remains to be seen whether it is actually more advantageous to have six board members, (as well as a chief elections officer employed by the board), who individually and collectively can encourage voting and clean elections.

VI. CONCLUSION

The real issue in Minnesota is the magnitude of any change to our election oversight. A code of conduct or conflict of interest rules could be instituted by the legislature or even by the Secretary

116. *Id.* at subdiv. (8).

117. *See id.* at subdivs. (5)–(7).

118. WIS. STAT. § 15.603(2) (Supp. 2007).

119. WIS. STAT. § 5.05(3)(g) (Supp. 2007).

120. *See* Christianson, *supra* note 103.

121. *See* CARTER-BAKER REPORT, *supra* note 65, at 53; Hasen, *supra* note 1, at 983.

122. Mark Brunswick, *The Big Question Blog: An S.O.S. for the SoS?*, STARTRIBUNE.COM, Dec. 5, 2007, at <http://nc.startribune.com/blogs/bigquestion/?p=944#more-944>, (quoting Edward B. “Ned” Foley, Robert M. Duncan/Jones Day Professor of Law at Moritz School of Law, The Ohio State University). Professor Foley explains his position like this: “A good feature of a Secretary of State office is energy, and initiative can come out of that office. There is some advantage to political power and clout. We wish that it wasn't associated with that office being elected on a partisan basis. That's an unfortunate feature.” *Id.*

of State himself. But the example of Colorado shows that if partisanship—not formal endorsements—is the real concern, a code of conduct does little to alleviate that issue. Moreover, Minnesota’s current Secretary of State has already gone on record that he will not serve on any political campaign committees or publicly endorse candidates for office.¹²³

The real issues, then, are the increasing tendency toward litigation, the polling data that show a growing distrust of election results across the United States, and whether a structural change to election administration is in order. Any such structural change in Minnesota would require a constitutional amendment.¹²⁴ But if the concerns over partisan election officials may be attenuating with the departure from the political stage of Secretaries Harris, Blackwell, and Kiffmeyer, a structural change may be premature. In that case, Thomas Jefferson’s simple advice of “a little patience”¹²⁵ may be in order.

The risk of waiting is that the past problems can easily recur. As seen in Florida and Ohio, a single chief election officer can have extraordinary impact in an election. Without any change in the law, there is little assurance that these problems have been solved. Indeed, Minnesota’s new Secretary of State contends in a way eerily similar to his predecessor that attacks against him are politically motivated.¹²⁶

123. Prah, *supra* note 199.

124. Such an amendment is not unheard of in Minnesota. In the 1998 general election, Minnesota voters approved abolishing the elected constitutional office of State Treasurer effective January 6, 2003. Act of April 9, 1998, ch. 387, 1998 Minn. Laws 965. The administrative functions of the office were transferred by order of the Governor to the Minnesota Department of Administration. STATE OF MINNESOTA, DEP’T OF ADMIN. REORGANIZATION ORDER NO. 185 (Dec. 6, 2002).

125. Following enactment of the Alien and Sedition Acts in 1798, Thomas Jefferson wrote a telling letter to John Taylor:

A little patience, and we shall see the reign of witches pass over, their spells dissolve, and the people, recovering their true sight, restore their government to it’s [sic] true principles. It is true that in the mean time we are suffering deeply in spirit, and incurring the horrors of a war & long oppressions of enormous public debt. . . . If the game runs sometimes against us at home we must have patience till luck turns, & then we shall have an opportunity of winning back the principles we have lost, for this is a game where principles are the stake.

To John Taylor, 4 June [1798], in 30 THE PAPERS OF THOMAS JEFFERSON 387, 389 (Barbara B. Oberg ed., 2003).

126. In news coverage over an investigation by the Minnesota Legislative Auditor into his office, Minnesota Secretary of State Mark Ritchie told a local television station that the “experience has taught [me], among other things,

It is up to the Minnesota Legislature and the electorate to determine whether a structural change to Minnesota election oversight is necessary to protect the impartiality—and the perception of impartiality—in our elections. Wisconsin’s latest experiment in having an appointed board of former judges, all bound by a strict code of conduct, is intriguing in its Midwestern practicality. While the ink is barely dry on Wisconsin’s new law, the use of an independent commission or an independent official is already in use in at least sixteen other democracies in the world,¹²⁷ and it is a logical consideration for Minnesota.

partisan bloggers, political parties and opposition lawmakers at times work in concert for a coordinated attack. There is a concerted strategy to try to paint me as partisan. I’ve run this office for nearly a year on a very nonpartisan basis.” John Croman, *Secretary of State Battles Critics in Campaign Newsletter Flap*, KARE 11 NEWS, Nov. 22, 2007, at http://www.kare11.com/news/news_article.aspx?storyid=270172. Three years earlier, Mr. Ritchie’s predecessor, Mary Kiffmeyer, told the Washington Post that “her record speaks for itself: Under her watch, the state has had among the highest turnouts in the nation. ‘But I have the sense that if I walked on water, the Democrats would say I can’t swim.’” Jo Becker, *Behind the Scenes, Officials Wrestle Over Voting Rules*, WASH. POST, Oct. 10, 2004, at A1.

127. See Overton, *supra* note 4, at 34.