

Daniel P. Tokaji
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My name is Daniel Tokaji and I am an Associate Professor of Law at The Ohio State University, Moritz College of Law. This semester, I am a Visiting Professor of Law & Ralph E. Shikes Visiting Fellow at Harvard Law School. I am also counsel for plaintiffs in the *Project Vote v. Madison County Board of Elections* litigation, and have joined amicus briefs in several other cases in the recent election season. The testimony that follows is made solely on my own behalf, not in my institutional or representational capacities.

In my brief remarks today, there is really just one simple point that I wish to make: In considering election reform proposals, it is vital that legislative bodies take a careful, studied, and deliberative approach, one that collects and considers all the relevant evidence and data from this state and other states on how existing election administration works and what if anything is likely to improve it. That has not been done in this case. What we have learned over the past eight years is that the worst way to do election reform is to rush through a bill with a party-line vote, without taking the time to collect data on existing practices and proposed reforms. Yet that, unfortunately, is precisely the faulty process that is being followed here. For this reason, I urge that the bill be rejected in its entirety.

I should emphasize that the errant approach that I caution against is one that has been embraced by advocates on both the right and the left in recent years. On both sides, there has been an unfortunate tendency to make reform proposals based on seat of the pants judgments rather than on a dispassionate analysis of the evidence.

It is for this reason that I have called for a different approach, which I call the “Moneyball” approach to election reform, after the book of the same name. The book, as baseball fans know, is about how an underfunded team, the Oakland A's adopted a research-driven approach that relied heavily on empirical analysis of player performance. This allowed them to look behind the conventional wisdom and assess what practices were most likely to lead to success on the field. When Beane and the A's carefully scrutinized the numbers, it turned out that many of the intuitions upon which their hard-bitten, tobacco-spitting scouts had relied for years were just plain wrong. By adopting a research-driven approach to baseball, Beane was able to build a franchise that has competed for pennants year after year, while spending a fraction of what other teams spend.

We need the same “Moneyball” approach in election reform: a reliance on research, rather than intuition about what works and what doesn't. This requires us to collect data that has not been collected, much less analyzed, from this election season, on how various practices – such as absentee voting – really worked. To what extent did these practices include new voters in the process? To what extent did it enhance voter convenience? Did the practices employed allowed ineligible voters to participate, and if so, how many? What were the monetary costs,

and how can we reduce them? Similar questions should be investigated regarding proposed reforms. Will shortening the period for absentee voting depress participation? Will it result in more absentee ballots that won't be counted, because they were received or returned late? We need meticulous study of these sorts of questions in order to make intelligent recommendations on the topics addressed by this bill. We should also take seriously the idea of states as laboratories of democracy, by examining the experience of other states before proposing reform. But none of this has happened.

To be fair, it is not merely the current bill that represents such a flawed approach to election reform. Congress, when it passed the Help America Vote Act of 2002 ("HAVA") six years ago made similar mistakes, failing to gather sufficient data on its proposals and to think through the unintended consequences of its proposals regarding such matters as provisional voting and state registration databases. Critics of new voting technology have made a similar mistake, in recommending the abolition of existing technology without examining the empirical research showing that doing so would result in more lost votes. I have criticized our current Secretary of State for making such proposals, as was the case in the EVEREST report. I also urged the sort of methodical approach that I recommend here at her election summit last week, and have asked the Secretary of State's for information that will help us make an informed evaluation of our current practices. It is my hope that last week's summit will ultimately yield a more studied set of recommendations, based on evidence rather than hunches.

The concerns about proceeding in a more hasty fashion are brought home by recent survey evidence, showing that the American public does not have great confidence in the manner in which our elections are run. In a survey of citizens in 37 nations, more Americans rated their system as "very dishonest" than those of any other country, including Hugo Chavez's Venezuela. And fewer Americans rated their election system "very" or "somewhat honest" than any country save one: Vladimir Putin's Russia.

Ramming through a bill without careful study in the waning days of a lame-duck legislative session is not the way to enhance public confidence in the integrity of our election system. Doing so would instead fuel the perception that the rules are being made to advantage the party which happens to be in power at the moment. I am inclined to agree with some facets of this bill, and to disagree with others. But I would respectfully submit that none should be approved at this time, without careful study and empirical analysis on how the 2008 election really went and on the consequences – intended and unintended – of the various proposals in the current package. The bill should be rejected in its entirety, not rushed through without careful study in the manner that is currently taking place.

Thank you for listening.