Testimony of

William B. Canfield

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TESTIMONY OF WILLIAM B. CANFIELD
BEFORE THE SENATE JUDICIARY COMMITTEE
REGARDING S. 453 "PREVENTION OF DECEPTIVE PRACTICES AND VOTER INTIMIDATION IN FEDERAL ELECTIONS"
JUNE 7, 2007

Mr. Chairman and Members of the Committee:

My name is William B. Canfield and I am a partner in the Washington, D.C. law firm of Williams & Jensen, PLLC. with a practice specialty in the area of federal election law.

I have practiced in this area of the law since moving to Washington in 1975. During an eighteen-year career as a committee counsel to a number of House and Senate Committees, I had the opportunity to observe the conduct of federal elections from the perspective of both of the Congressional Committees that over-see federal election law. Since entering private practice in 1993, I have represented a number of clients before the Department of Justice and the Federal Election Commission, served as outside counsel to the Senate Committee on Rules during the contested 1996 Senate election in Louisiana and have been outside counsel to three Republican Presidential campaigns. Lastly, for more than a decade I have been a member of the American Bar Association's Standing Committee on Election Law and have twice been appointed by the President of the ABA to serve as Chair of the Standing Committee.

I appear before you today in opposition to the bill S. 453 "Prevention of Deceptive Practices and Voter Intimidation in Federal Elections." My opposition to the bill does not center on a belief that deceptive practices have any place in the conduct of elections or in a belief that voter intimidation should be an acceptable practice in our democracy. Rather my opposition to the bill centers on its overly wide scope and the "remedies" it would employ for statutory violations should this bill become law.

In reviewing this proposal, I would urge the Committee to seek specific evidence of institutionalized deceptive practices and voter intimidation in American elections. Anecdotal stories should not be sufficient. Actual evidence that deceptive election practices and voter intimidation have become systemic in our democracy should be required. It seems to me that the Civil Rights Division of the Justice Department, the Public Integrity Section of the Justice Department, the US Civil Rights Commission, and the Federal Election Commission should be able to provide insight on the extent of the problem for the Committee.

In my experience, federal elections are free and fair, but they are not perfect. In most instances, local volunteers are utilized to assist city and county election administrators on election day and those volunteers bring with them all of the frailties of the human condition. They make

unintended mistakes and sometimes prevent lawful voters from casting an actual as opposed to a challenged ballot. However, the scope of these mistakes and errors is so small in the magnitude of the numbers of votes cast as to be statistically unimportant with respect to the outcome of the election and our ability to deem it be a free and fair result. For all of the anecdotal stories that surface on election day of intimidation and deceptive campaign practices, the actual number of incidents that are prosecuted under current law is quite small. If voter intimidation and/or campaign deception is a systemic problem, the Department of Justice has all the authority it needs to root out such wrong-doing. In my view, S. 453 doesn't provide any greater authority in this area than already exists in statute.

My specific issues with this proposal are many but for the sake of brevity, I will highlight just a few:

(1) The bill would criminalize non-violent behavior where voter intimidation or campaign deception were proven in court. Assuming, as I do, that voter "intimidation" is, on it's face, repugnant, it isn't, by it's nature, a crime
that deprives a victim of life or liberty...why then should it be subject to a criminal rather than a civil penalty?

(2) The bill provides authority for agents of the federal government to make, in the days leading up to an election, instantaneous judgments as to who and what types of voter "intimidation" or campaign "deceptive practices" should be brought before a federal grand jury with the great risk that the news of such grand jury activity could taint the outcome of the very election that this bill is trying to uphold.

(3) The bill also provides a private right of action for individuals who believe that they were intimidated with respect to their right o vote or who were the subject of some loosely-defined election deceptive practice. Why the need for a private right of action in this area? The Justice Department's Civil Rights Division and Public Integrity Section, the local United States Attorney's office, and local law enforcement are but a phone call away from any citizen who believes that his or her voting rights have been infringed. I would argue that the last thing the dockets of the various Federal District Courts around the country need is additional layers of litigation filed by individuals, by-passing the federal agencies who are in place to prosecute these very problems.

(4) In my view, the definitional aspect of the bill's attempt to address "deceptive practices" in federal elections is a major problem for the Committee. Unfortunately, the definition of what constitutes a campaign "deceptive practice" is, by it's very nature, subject to subjective standards and tests. Not unlike the so-called "appearance" of a conflict of interest (as opposed to an actual conflict), the definition of the "appearance" of a "deceptive practice" is subjective rather than objective. A campaign "deceptive practice" may be thought to be improper in one region of the country but acquiesced to in another. To have any meaning at all and to give adequate notice to those who might be impacted by this proposal, the definitions utilized in S. 453 must be tightened though the use of objective not subjective tests. Campaign workers and officials who might be called upon to defend their actions under this proposal must know, with certainty, in advance, that the campaign activities they are performing may well be the subject of litigation

brought by the opposing campaign. The Committee must also address the bill's apparent effort to criminalize some types of campaign activity and chill protected 1st Amendment political speech.

Voter intimidation cannot be tolerated in a free society and evidence of such activity must be fully prosecuted by law enforcement. Similarly, voters should be free from deceptive practices that might cause them to be disenfranchised. But I am not at all sure that this legislation is needed.

Thank you and I would be happy to address any questions the Committee might have.