

BALANCING ACCESS AND INTEGRITY

The 2004 presidential election was the first big test of the Help America Vote Act of 2002 (HAVA). Enacted in the wake of the deeply flawed 2000 election, the law was passed in an effort both to improve the voting process and to increase voter access. While there were improvements in the voting process in a number of jurisdictions, the ways in which many states carried out the law's mandates produced a number of unintended consequences, resulting in allegations of fraud and voter disenfranchisement. The Century Foundation assembled the Post-2004 Election Working Group to find ways for states to implement future elections in a way that balances ballot integrity with voting rights and accessibility.

The Century Foundation has been at the forefront of efforts to reform the voting system since the issue achieved national prominence following the 2000 presidential contest. In 2001, the foundation cosponsored the National Commission on Federal Election Reform, cochaired by former presidents Gerald Ford and Jimmy Carter. The final report of that commission served as the model for important measures in the Help America Vote Act. Since that time The Century Foundation has published numerous reports and sponsored several events on issues related to the U.S. election system. Information on election reform topics is available at www.tcf.org.

The Working Group would like to express its great appreciation for the work of a few individuals who contributed enormously to the deliberations of the group and the production of this report: Thomas Wilkey, executive director, United States Election Assistance Commission, and former executive director, New York State Board of Elections; Alex Baker of The Century Foundation; and Doug Chapin, Dan Seligson, and Sean Greene of Electionline.org.

BALANCING ACCESS AND INTEGRITY

THE REPORT OF
THE CENTURY FOUNDATION WORKING GROUP
ON STATE IMPLEMENTATION OF ELECTION REFORM

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INTRODUCTION

Since the 2000 election, many states have struggled to reform their voting systems in an effort to improve the election process and comply with the federal Help America Vote Act of 2002 (HAVA). This has led to upgraded voting machines, greatly expanded use of provisional ballots, new procedures for registering to vote as well as for counting and recounting ballots, and, in some places, increased voting accessibility for the disabled.

Those efforts, however, did not completely address the concerns raised in 2000, nor did they help avoid entirely a repetition of familiar polling place problems four years later. In some states, reforms or the implementation of those reforms even created new voting problems. In part this is because some of HAVA's deadlines for meeting federal mandates are not until January 1, 2006, but it is also because HAVA left some areas of implementation vague and, in an effort not to overly federalize the election system, left many decisions to the discretion of the states.

This report is intended to identify potential improvements within the HAVA framework. Some of these improvements might be adopted by Congress as clarifying amendments to HAVA. More likely, they would be adopted by state legislatures (or state administrators) as part of the implementation of HAVA. But this report does not endeavor to revisit basic choices made by Congress in enacting HAVA itself.

HAVA was very much a compromise between contending forces in Congress, a compromise that was barely achieved before the 2002 elections because of the difficulty of obtaining bipartisan agreement on various aspects of election administration. Broadly speaking, one

side of the pre-HAVA debate tended to emphasize the importance of promoting access to the electoral process through measures that facilitate voter registration and the like. By contrast, the other side tended to emphasize the need for protective measures to prevent voting fraud.

Were we starting afresh without HAVA, many close observers of American elections—including some members of this Working Group—might be inclined to align themselves closer to one side or the other in this familiar “access versus integrity” debate. But HAVA is in place, and the immediate task confronting the nation in preparation for the elections of 2006 and 2008 is, within the contours of the existing HAVA framework and its underlying compromise, to redress serious deficiencies that were exposed during the 2004 election.

These serious deficiencies concern two fundamental attributes of an electoral system that all participants in the pre-HAVA debate would agree are necessary for the results of an election to be, and perceived by the public to be, fair and valid. First, an electoral system must be able to collect, record, and tally the votes of the electorate with sufficient accuracy to declare a winning candidate whose victory is procedurally legitimate in the eyes of supporters and opponents alike. Second, no well-functioning electoral system would fail to provide or count a ballot cast by a properly registered voter who correctly completed all steps required to receive one.

Because all parties to the political process would embrace these two basic standards, it should be possible to adopt bipartisan legislation that repairs our nation’s present inability to meet them. Consequently, The Century Foundation convened this Working Group on Election Reform in order to identify the specific ways in which, as revealed by the 2004 election, our nation’s electoral processes remain deficient in these two respects. Likewise, the Working Group’s charge was to identify specific solutions to these deficiencies that it would be feasible to adopt, within the existing HAVA framework, in advance of the 2006 or 2008 elections.

The nonpartisan group included prominent election law and voting system experts from across the country. As part of its mandate, the group considered gaps and ambiguities in the key provisions of HAVA and other post-2000 election reforms that emerged in 2004. The implementation of HAVA and these other measures proved more challenging than many anticipated, and the Working Group focused on ways implementation might be improved by the states moving forward.

The group paid particular attention to those HAVA requirements for which implementation deadlines have already passed or are slated for the beginning of next year. We analyzed how states are complying or preparing to comply with those additional requirements and endeavored to provide the best policy options for states currently working to meet the mandates. With the view that the federal landscape with respect to election reform is unlikely to change in any dramatic fashion at least until the provisions of HAVA have been seen through, we strove to take a very practical approach to solving the problems that HAVA may have inadvertently created and to provide realistic approaches the states can take in order to fulfill the original promise and intent of the act.

The group analyzed the issues of voter registration, provisional voting, voter identification, voting systems, registration databases, and early voting and arrived at a number of recommendations for the states. The goal throughout has been, without revisiting the basic compromises and value judgments underlying HAVA, to identify implementing measures that will enable states to improve their electoral systems with respect to the two key dimensions of democratic legitimacy discussed above: the accuracy of the voting process, and the inclusion of all registered voters who complete all steps required of them.

OVERVIEW

With a margin of re-election victory for President Bush of more than three million votes, it has been said that the 2004 presidential election cleared “the margin of litigation.” But the appearance of a smooth election concealed troubling developments ranging from simple human errors to allegations of voter fraud, destruction of registration forms by individuals and private entities, voter intimidation, and other likely felony violations of federal law.

When Congress passed the Help America Vote Act of 2002, which mandated, among other things, statewide registration databases, voting machines accessible to people with disabilities, and provisional ballots, many Americans justifiably believed it represented a step forward in improving our broken voting process. It is now acknowledged that the combination of ambiguities and gaps

in that law and its implementation, and a highly charged campaign season, led to continued, systemic weaknesses that make it difficult, if not impossible, to declare an indisputable winner in a close election. (Had the morning of November 3 shown a 12,000-vote difference between the two presidential candidates in Ohio, as there was in Wisconsin, the cloud of doubt raised by the ensuing litigation would have rivaled or even exceeded what occurred in Florida in 2000.) Moreover, concerns over the arbitrary application of voter identification rules, lost votes in some electronic machines, long lines in voting precincts, including minority-majority precincts, questions about the neutrality of partisan election officials, access problems for those with disabilities, and a host of other pre- and post-election day issues have undoubtedly affected voters' confidence in the electoral process.

Even though HAVA's mandates have not yet been met in many states, disputes over its implementation have continued to pose difficulties. In Washington, a gubernatorial race that yielded a historically close result has led to a judicial contest over the treatment of some provisional ballots and the inclusion of votes that some contend should not have been allowed. Legislatures in Georgia and Indiana have enacted strict voter identification statutes that require voters to present a government-issued photo identification before casting a ballot at polling places. Other states appear poised to follow suit.

At the same time, many observers continue to make the point that the voting process in 2004 was plagued with numerous problems in many states, including Ohio, Pennsylvania, and Florida. These problems contributed to a perception that the process of election administration is biased in favor of partisan interests and reduced the faith that voters have in the process. In order to maximize the faith that the electorate has in the integrity of the political process, it is important that states do not repeat the problems that some thought plagued the 2004 presidential elections: these include reports of machine failures, provisional ballot problems, allegations of inappropriate use of voter identification requirements, egregious acts of voter intimidation and suppression by various groups and individuals, polling place inaccessibility for voters with disabilities, and other problems that could have resulted in disenfranchisement in the 2004 election.

Many other states are seeking to avoid these polling place problems altogether by increasing the availability of early voting, absentee voting, and vote by mail. In the meantime, a majority of states continue

to struggle to put together a statewide voter registration database that HAVA requires by the end of this year.

The report is divided into six major sections, with subcategories in some sections. These six are (1) voter registration; (2) provisional ballots; (3) statewide voter registration databases; (4) voter identification; (5) voting machine testing and certification; and (6) early voting. With respect to every part of the report, we attempted to identify improvements within the framework of HAVA that will enable electoral systems to achieve greater accuracy and inclusion and, when possible, to reduce the probability of postelection litigation.

We have sought to identify states that appear to be doing an especially effective job in each of the areas that might be useful as models. This is particularly the case with respect to databases and machine testing and certification. For other areas, although there may be model states, we were not able to identify one that exemplified what we would consider an ideal system.

Although we do not explore the issue in depth in this report, the Working Group strongly urges the federal government and state governments to provide additional funding for election reform activities at the state and local level. While HAVA for the first time in history provided federal funding for elections and implementing its mandates, many states and localities have found that even the \$3 billion Congress appropriated is not nearly sufficient to meet the demands of the law. Moreover, there are no plans to provide funding to election administrators for the ongoing maintenance of the machines and databases that is now required, nor is there any contingency in place for ongoing poll worker training and voter education activities. Adequate funding for elections is critical to ensure election officials and administrators can do their jobs and provide fair and accurate elections.

Another area of great importance the group was not able to address in detail was that of recounts and election contests. However, we do recommend that all states make sure the rules governing such actions are clearly established prior to the next federal election, especially with respect to timing issues, given federal law's mandate that election controversies be determined within thirty-five days of the date of the presidential election (the "safe harbor"); otherwise, in counting the electoral votes, Congress is not bound to recognize the state's designated electors. Even after the problems that beset Florida and Ohio, there are still states that do not have a plan should these events occur.

It also should be noted that the group deliberately did not explore the question of voting machines and vote verification, that is, the debate over voter-verified paper trails and the like. The sense of the group from the outset was that this is an area that others with far more expertise in the technological and administrative issues are already examining and that our thoughts would not add sufficient value to the debate.

Obviously, there are other important issues concerning the electoral process that are beyond the scope of this report. Nonetheless, if before the next congressional and presidential elections states are able to adopt measures repairing the structural weaknesses identified in the report, then our nation will be much more likely to avoid either the calamity that actually occurred in 2000 or the “near miss” of 2004.

SUMMARY OF MAJOR RECOMMENDATIONS

VOTER REGISTRATION

While HAVA attempts in some respects to provide uniformity with respect to voting administration, it may be the case that states, consistent with the legislation, will promulgate different rules that reflect their values, particularly concerning voter registration procedures. Notwithstanding the benefits of this diversity, there are some features of the voting registration process that ought to be represented in all of the states.

As became apparent during 2004, a state’s rules or procedures regarding registration may prevent it from being able to identify a winner in a close election. Moreover, problems with the processing of new registration forms can cause individuals to be excluded from the rolls even though they are eligible and have done all that state law has asked of them.

Consequently, it is of paramount importance to the future success of HAVA implementation that, whatever specific rules and procedures states choose to adopt regarding registration, these rules be clear and straightforward and thus not susceptible to postelection disputes about their meaning. Similarly, while recognizing the burdens that election administrators face in years with high numbers of

new registrations, it is nonetheless essential that states have systems in place that enable them to handle such volume and that allow the registrants themselves to make sure that their successful submission of the form results in their ability to cast a valid vote.

Major Recommendations

- ◆ When processing voter registration forms, registrants should have the presumption of eligibility. (See Recommendation 1.1.)
- ◆ States need to provide clear rules for what missing or incorrect information will be a basis for disqualification and/or the need to correct or amend. We suggest material omissions that must be corrected by the voter by a date certain, but not more than one week before election day. Among the most important omissions that should NOT be material are the following:
 1. Social Security or driver's license number. In this instance, the state should assign the voter a unique identifier. If states choose to require identification at the time of registration, they should ensure that would-be registrants are not prohibited from registering if they lack a Social Security number or a driver's license.
 2. If there is one place to sign an affirmation of citizenship and age (and/or mental capacity), and that is signed, the failure to check any box that refers to the aforementioned should not be deemed a material omission. (See Recommendations 1.1 and 1.2.)
- ◆ States should consider testing a modified system of voter registration by which a voter who registers to vote earlier in the registration process would be guaranteed that administrators will take all steps possible to ensure he or she is properly registered, such as providing the voter timely notice and opportunity to correct, and the voter will be able to vote by regular ballot. With respect to those who register at the last minute, administrators would still be expected to take all steps necessary in the time allowed to ensure the orderly processing of the registration, but

such voters will not be guaranteed that if there is a problem with their application that they will be able to vote by a regular ballot. A potential advantage of such a two-tiered registration system would be a likely reduction in postelection disputes. (See Recommendation 1.4.)

- ◆ As an integral component of this modified process, states should implement a system by which all voters receive a receipt with a “tracking number,” allowing the voter and other interested parties to check on registration status through the use of that number and a publicly available registration list. (See Recommendation 1.6.)
- ◆ States should have clear rules with respect to whether registration forms collected by third parties are processed as mail-in or in-person registrations. (See Recommendation 1.7.)

PROVISIONAL BALLOTS

The 2002 election reforms under HAVA included an important new protection: the right to cast a “provisional” ballot that would be counted once elections officials could confirm its validity. This “fail-safe” measure was designed to avoid a repeat of 2000 in which many registered voters were turned out of polling sites because their names had been improperly purged from the rolls or because there were problems that prevented the accurate entering or updating of names on the voter rolls.

However, because the federal law was vague on certain aspects of provisional balloting, the implementation of this reform in 2004 proved problematic. Among other difficulties, such provisional ballots were treated differently not only from state to state but from county to county. This lack of clarity led to numerous lawsuits disputing when provisional ballots should be used—for example, if a voter was flagged for needing to present identification—and under what circumstances they should be counted, such as if cast in the wrong polling place or if the voter had requested an absentee ballot.

Because of the importance of provisional voting for future federal, state, and local elections, it is especially urgent that forward-looking election law reforms clarify the ambiguities that emerged

with respect to provisional voting in 2004. Close elections increasingly will hinge on the evaluating and counting of provisional ballots, unless the problems that cause citizens to vote provisionally (rather than conventionally) can be solved before election day. Therefore, to avoid postelection disputes over potentially outcome-determinative provisional ballots—disputes that inevitably will diminish public confidence in the accuracy and legitimacy of the result—it is imperative that, well in advance of the election, states establish, announce, and publicize clear statewide standards for every aspect of the provisional ballot process, from who is entitled to receive a provisional ballot to which ones are counted.

Major Recommendations

- ◆ HAVA requires that voters who registered by mail and did not provide identification when doing so bring identification with them to the polls. HAVA also requires that voters receive provisional ballots if they fail to bring identification to the polls. We recommend that election administrators make every effort to verify that voter's eligibility through available databases. If such verification is made, the provisional ballot should be counted. (See Recommendation 2.1.)
- ◆ In addition, we recommend that states give voters in this situation up to three days to provide either the HAVA-specified forms of identification or other documentation that will facilitate the state's ability to verify that the person casting the provisional ballot is the same one who registered by mail. Whatever procedures the states choose for making this determination, however, the paramount consideration—as with all others concerning provisional voting—is that they be clear and thus not susceptible to postelection manipulation and litigation. (See Recommendation 2.2.)
- ◆ We recommend that as long as a voter appears at any precinct within the county in which the voter resides, the provisional ballot cast by the voter be counted for all countywide, statewide, and presidential races. But if a state chooses to require voters to appear at their assigned precinct, then it is the strong position of

this report that, where the same polling site serves more than one precinct (a single school gym containing three precincts, for example), a voter's provisional ballot should count as long as the voter appears at the correct polling site. (See Recommendations 2.3 and 2.4.)

- ◆ As a general matter, if some kind of administrative error on the state's part is the reason why a timely new registration form did not result in the entry of this voter on the state's official list of registered voters, the provisional voting process should hold this voter harmless from this administrative error and count the provisional ballot as a valid vote—although it would be preferable if the state could adopt preelection procedures to rectify this administrative error so that the voter could cast a conventional rather than provisional ballot. (See Recommendation 2.6.)
- ◆ Conversely, if some kind of material error or omission on the voter's part is the reason why the state is unable to process the new registration form successfully, then (again, as a general principle) states are entitled to exclude a provisional ballot cast by this voter as invalid on the ground that the voter never successfully completed the registration process and thus is not a properly registered voter. Here, too, states should adopt a preelection procedure whereby citizens submitting registration forms with material errors or omissions would receive notice of the problem, with the opportunity to rectify the situation in time to vote a conventional rather than provisional ballot. Moreover, if a state puts in place the kind of tracking number system mentioned above, this would serve as another way for voters to correct material errors or omissions with new registrations in time to avoid the need to cast a provisional rather than regular ballot. (See Recommendation 2.7.)
- ◆ With respect to voter registration forms handed in person to agents of a state's Department of Motor Vehicles (or other state agency), an error in the transmission of those forms from the agency to the appropriate election officials should be considered administrative error for the purpose of provisional voting, with the consequence that a provisional ballot cast by a voter in

this situation should count as if that voter had been properly registered. (See Recommendation 2.9.)

STATEWIDE VOTER REGISTRATION DATABASES

By January 1, 2006, all states must have databases in place as required by the Help America Vote Act of 2002. While the act requires the databases to perform certain functions, for the most part how they are to be built and implemented has been left to the states.

Statewide databases have a number of potential advantages. They can link to correctional databases and courts and smooth the process of both taking felons off the list of eligible voters and restoring the franchise of ex-felons. Links to social service agencies' databases can enfranchise people that historically have had low participation rates, get their information into the registration system accurately, and keep it updated. Duplicate registrations can be prevented by more accurately purging voters who have moved out of the state or by quickly changing registration information for voters who move within state. The potential for fraud is lessened by deleting dead voters from the rolls by expediting the flow of information from health and vital statistics departments. Finally, an up-to-date, clean voter roll could reduce the number of eligible voters whose names are not in the poll book, diminishing the need for what should be the very last option, that of the provisional ballot.

Major Recommendations

- ◆ States should take all appropriate measures to protect the privacy rights of voters when constructing and utilizing the statewide voter registration database. This includes establishing an exclusive list of who has access to voter information and what voter information can be made public and/or be exchanged among state agencies. (See Recommendation 3.1.)
- ◆ Databases should be, at a minimum, connected interactively with the Department of Motor Vehicles (DMV), courts, Department of Corrections, and the state's Department of Vital Statistics. Optimally, the database should be connected interactively with as

many state agencies as possible to ensure the timely and accurate updating of voter information and the most accurate matching and verification of voter registration information. (See Recommendation 3.2.)

- ◆ All voters, including first-time voters registering by mail, who provide a DMV identification number or the last four digits of their Social Security number on their voter registration form are exempt from HAVA's identification requirements if the state can verify their information with an existing state database. (See Recommendation 3.3.)
- ◆ When computer verification finds records that match some but not all voter information, these “near matches” should be audited for transposed characters, inverted names, or other frequent errors. (See Recommendation 3.4.)
- ◆ As we explain more fully below, states should adopt a substantial match standard that verifies those applicants who have a significant part of their records verified within state databases. (See Recommendation 3.5.)
- ◆ States should explore opportunities for interstate compatibility in their database software and communications systems. (See Recommendation 3.5.)

FELON PURGES

For those states that choose to maintain felon disenfranchisement laws, it is critical that determinations about whom to purge be accurate and that those subject to purges be accorded due process. Many states still have not taken appropriate measures to ensure their felon purge and re-enfranchisement process works accurately and effectively.

Major Recommendations

- ◆ Though HAVA does not mandate specific rules concerning the re-enfranchisement of felons who have completed their incarceration,

parole, or probation, best practices require that states make re-enfranchisement automatic or no more burdensome than the process required for any new registrant. At the very least, the re-enfranchisement process should be clear and straightforward. As long as the ex-felon completes all necessary steps specified by law, re-enfranchisement should be ministerial (that is, mandatory), not discretionary. Otherwise, there is the potential for litigation over abuse of discretion or unlawful discrimination in deciding which ex-felons are permitted to vote and which are not. (See Recommendations 3.12 and 3.13.)

- ◆ In states where re-enfranchisement is automatic upon completion of a felon's sentence (such that the ex-felon is under no obligation to reregister), it is necessary for states—in order to avoid potential errors in their voter rolls—to establish procedures whereby the requisite information is transmitted expeditiously and accurately to the relevant election officials for inclusion in the state's centralized voter registration database. (See Recommendation 3.14.)
- ◆ States should adopt statutes that specify and standardize matching criteria for purging purposes. These statutes should prescribe the use of numerous matching criteria, require exact matches of felony conviction and voter registration data, and require that matches be double-checked at state and county levels. Matching criteria should include first name, middle name, last name, gender, maiden name, date of birth, place of birth, and driver's license number, if any. (See Recommendation 3.15.)
- ◆ Purges should be done year-round but should end ninety days before the election so that anyone purged is given due notice and opportunity to contest the state's determination. Any individual to be purged should first be mailed a certified, forwardable notification letter to the last known address. The notification should notify the individual that he or she has a specified time period within which to respond if he or she wishes to contest the state's determination. (See Recommendation 3.16.)
- ◆ With respect to felons currently incarcerated, we recommend that the state send the notification to the prison where the individual is incarcerated. (See Recommendation 3.17.)

VOTER IDENTIFICATION

Title III, section 303 of the Help America Vote Act mandates that only those voters who register for the first time in a jurisdiction through the mail and who fail to include a copy of their license, copy of a utility bill, bank statement, government check, or other government document that shows a voter's name and address, or to provide the last four digits of their Social Security number or their driver's license number, present identification at a polling place the first time they vote. If they fail to do so, they are entitled to a provisional ballot, which should be counted if the voter is later determined eligible under state law.

From all indicators, it appears that the number of states requiring identification from *all voters* is on the rise. As in previous years, the debate in state legislatures regarding this issue has been partisan and racially divisive.

In fact, while much of the emphasis on ballot security and fraud reduction has centered on proposals to introduce or change requirements for polling place identification from voters, election officials in many states have said that the mail (that is, absentee ballots and early voting by mail) provides the easiest opportunity for those seeking to undermine the election process and commit fraud on a scale sufficient to affect the result of a close election.

Major Recommendations

- ◆ We recommend that states not expand voter identification rules at this time—for example, by requiring all voters to show identification documentation at the polls—as there has been insufficient time for a thorough evaluation of all relevant information and options relating to such rules. Instead, this report encourages policymakers and policy analysts to explore new approaches that might minimize the scope and extent of policy disagreement on the topic of voter identification and, optimistically, to defuse some of the intense controversy surrounding this topic. (See Recommendation 4.1.)
- ◆ States that currently require voters to present photo identification when they vote should, with respect to indigent voters,

make sure that such documentation is widely available at the state's expense, so that the identification requirement does not have the practical effect of serving as a kind of poll tax. (See Recommendation 4.3.)

- ◆ Most important, whatever particular rules a state adopts regarding required identification at the time of registration and voting, states should devote special attention to making sure they are straightforward and unambiguous, so that both voters and poll workers easily understand exactly what rules apply. (See Recommendation 4.6.)
- ◆ In addition, given the special sensitivity of identification requirements, states should pay close attention to whether their rules, both as written and as implemented, are consistent with the basic principle of treating all voters equally. This point is important not just for the intrinsic democratic reason that all voters are entitled to equal treatment in the electoral process but because of the practical need to avoid potentially disruptive litigation under the Equal Protection Clause of the Fourteenth Amendment, as interpreted in *Bush v. Gore* and related precedents. In this regard, states should be wary of adopting identification requirements applicable to voting at polling places that do not apply as well to absentee or other forms of at-home or mail-in voting. States that require more stringent forms of identification when people vote at polling places than when they vote at home may be expected to have to justify this distinction in equal protection litigation under the strict scrutiny standard and may be hard-pressed to do so. (See Recommendation 4.7.)

TESTING AND CERTIFICATION OF VOTING SYSTEMS

Some states do not adhere to the voluntary federal voting system standards. A great many states do not have sufficiently rigorous state testing and certification programs to complement the federal process, and some states have no independent system for reviewing voting machines at all.

One potential model for state testing and certification is the system used in Georgia. After the state replaced all of its voting machines with the same direct recording electronic (DRE)–style voting system statewide in 2002, Kennesaw State University established the Center for Election Systems to oversee and conduct Georgia’s state certification program as well as to assist in its county-level acceptance tests. For states that opt to conduct testing and certification programs “in-house,” we recommend looking at the rigorous procedures and standards put in place by the states of New York, Florida, and California.

Major Recommendations

- ◆ All states should adopt the new federal standards that will now be devised by the United States Election Assistance Commission and the National Institute of Standards and Technology. (See Recommendation 5.1.)
- ◆ States should engage in both federal and state testing and certification procedures. (See Recommendation 5.2.)
- ◆ All states should require voting systems to meet federal voting system standards and to comply with the state’s own testing and certification process and standards. The purpose of the state certification system should be not only to ensure that the systems comply with any additional requirements the state might impose but to fill in any gaps in the vendor and Independent Testing Authority testing. (See Recommendation 5.2.)
- ◆ Changes or upgrades to software in electronic systems should be subject to a de novo review and certification, and penalties for installation of uncertified software or software upgrades should be stiff. (See Recommendation 5.2.)
- ◆ States should heed the recommendations of the Leadership Conference on Civil Rights and the Brennan Center for Justice at the New York University School of Law regarding the components that ought to go into a system of state testing. (See Recommendation 5.3.)

EARLY/LIBERALIZED ABSENTEE VOTING

Many elections administrators, voting advocates, and voters have embraced the movement toward both in-person early voting and “no excuse” absentee voting rules. The legislatures in the states that do not have early voting are closely examining it, and states that do have some version of early voting are looking at expanding it. However, it should be noted that there are powerful arguments both for and against the expanded use of early voting and competing data on its usefulness for both administrators and voters not to mention campaigns. Before rushing to join the trend, we advise states, administrators, advocates, parties, and voters to take all of the competing arguments and research into account.

1. VOTER REGISTRATION

THE VOTER REGISTRATION FORM

BACKGROUND

While HAVA attempts in some respects to provide uniformity with respect to voting administration, it may be the case that states, consistent with the legislation, will promulgate different rules that reflect their values, particularly concerning voter registration procedures. Notwithstanding the benefits of this diversity, there are some features of the voting registration process that ought to be represented in all of the states.

As became apparent during 2004, a state's rules or procedures regarding registration may potentially disenfranchise eligible voters and/or prevent the state from being able to identify a winner in a close election. This is particularly true when there are ambiguities in these rules or procedures and disputes about these ambiguities surface during a postelection evaluation of provisional ballots (a problem that is compounded by further ambiguities in the rules and procedures regarding the evaluation of provisional ballots). If, for example, there are 50,000 new registration forms about which there is a serious dispute over whether their submission has resulted in a valid registration under state law—a kind of dispute that occurred in several states in 2004—then the outcome of the election is seriously in doubt if the margin of victory is dependent upon the inclusion or exclusion of provisional votes from these disputed registrants.

As a general principle, any eligible voter who makes the effort to fill out and submit a registration form should not, without good reason, be denied the right to vote. Moreover, in order to encourage more Americans to participate in the election process, the rules for doing so should be clear and easy to comply with. The voter registration form should be as simple as possible and ought to be designed to keep the potential for errors that will disqualify a registration application to a minimum.

RECOMMENDATIONS

- 1.1 When processing voter registration forms, elections administrators should provide registrants with the presumption of eligibility. At the same time, states need to provide clear rules for what missing or incorrect information will be a basis for disqualification and/or the need to correct or amend.

We suggest material omissions that must be corrected by the voter by a date certain but not more than one week before election day, include the following:

1. Name (see below)
 2. Street Address (see below)
 3. City/Town (see below)
 4. Attestation of age and citizenship (see below)
- 1.2 Nonmaterial omissions, that is, blanks or mistakes that should NOT cause disqualification or the need to amend or correct, include the following:

1. Social Security or driver's license number. In this instance, the state must assign the voter a unique identifier.

If there is a slight error in data entry of the number, such as a transposition of numbers, and all of the other voter verification information matches with one of the state databases, the administrator should correct the voter record.

Pursuant to HAVA, first-time voters registering by mail who provide a DMV identification number or last

four digits of their Social Security number on their voter registration form are exempt from identification checks at the polls if the state can verify their information with an existing state database. When computer verification finds records that match some but not all voter information, these “near matches” should be audited for transposed characters, inverted names, or other frequent errors.

If it is absolutely impossible, given the information received from the registrant, to make a match, the elections office should immediately issue notification to the registrant with a precise description of the problem.

2. If there is one place to sign an affirmation of citizenship and age (and/or mental capacity), and that is signed, the failure to check any box that refers to the aforementioned should not be deemed a material omission.
 3. Apartment number
 4. Middle names
 5. Name title (for example, Jr., Sr., III)
 6. Zip code
 7. If under “city/town” the voter identifies his or her county
 8. Failure to enter the word “NONE” in the box requiring driver’s license number or last four digits of Social Security number
- 1.3 More study needs to be undertaken regarding best practices in design and wording selection for a form that is easy to understand, explains the rules, and gathers all of the necessary information. For now, the elements of a registration form should include the following at minimum:
1. The form should include a question about whether the prospective voter was previously registered somewhere else, and, if so, what that last address was.

2. The identification requirements should be boldly and clearly stated.
3. The form should state that if the registrant has not received a notification from the elections office within a certain number of days from the time the form was submitted, that person should contact the elections office. The form should provide a toll-free phone number and Web site for the elections office.

PROCESSING

BACKGROUND

Problems with the processing of new registration forms can cause individuals to be excluded from the rolls even though they are eligible and have done all that state law has asked of them. For example, suppose an individual submits a properly completed registration form by the deadline set by state law, but the state fails to process the form properly, leaving the voter off the rolls but without any way to rectify this administrative error. In addition to the individual injustice of preventing this eligible citizen from voting (unless corrected by means of a provisional ballot), this type of error, if frequent enough in a year with a large volume of new registrations—as 2004 was—could undermine the legitimacy of a close election.

Consequently, it is of paramount importance to the future success of HAVA implementation that, whatever specific rules and procedures states choose to adopt regarding registration, these rules be clear and straightforward and thus not susceptible to postelection disputes about their meaning. Similarly, while we must recognize the burdens that election administrators face in years with high numbers of new registrations, it is nonetheless essential that states have systems in place that enable them to handle such volume and that enable the registrants themselves to make sure that their successful submission of the form results in their ability to cast a valid vote.

RECOMMENDATIONS

1.4 We suggest states consider having two voter registration deadlines:

Early deadline: If a state adopts this system and a voter registers before this date, the elections office must give him or her opportunity to correct the voter registration form if it has been found faulty in any way or if he or she has not, for whatever reason, been put on the registration list. In such an instance, it is the voter's right to be notified of and permitted to make necessary amendments in person or by mail up until election day. In other words, if the elections office has found a material omission for this registrant, the elections office must follow notification and opportunity to correct procedures. Similarly, if the early registrant discovers through the public list (see Recommendation 1.5 below) that he or she has not been registered, he or she has the right to use the correction process up until election day.

In addition, if a registrant has registered by the early date, the deadline for a challenge to that voter's registration must be earlier. In such a case, the voter must be notified by at least one piece of forwardable mail if the elections office concludes the challenge has merit by a clear and convincing evidence standard (see Challenges section, page 28). That voter then has the opportunity to rebut the challenge before election day. Moreover, the challenger may be subject to penalties in the event of an unreasonable and unsuccessful challenge. If, however, after personal notification the voter who has been challenged does not respond, that voter is subject to the same rules as a late registrant, as described below.

Third parties conducting voter registration drives should make all bulk deliveries (as defined by the United States Postal Service) of registration forms by this date to ensure the effective processing of the forms they have collected.

Late Registration Deadline: Under this revised system, if a voter registers by this later date, the elections office should make every effort to notify the voter of any problems and provide the opportunity to make corrections. Again, we point out that this is in the interests of election administrators, candidates, and voters

because it helps to forestall the prospect of a large influx of provisional ballots that must be dealt with after election day. However, in this instance the voter does not have an absolute right to make corrections before election day. If the elections office has taken every reasonable step it can to follow notification and opportunity to correct procedures, and the voter still does not appear on the registration list on election day, he or she would have to cast a provisional ballot, which might or might not be counted (see Chapter 2).

Moreover, if the registrant registered at the late date and is challenged, and the elections office finds clear and convincing evidence the registration is not valid, the voter may vote by regular ballot on election day, but must present documentation of legitimacy, for example, identification as specified by HAVA, within three days. Again, when circumstances warrant, the challenger in such an instance could be subject to serious penalties.

We do not recommend a specific time plan with specific deadlines but instead defer to the states to make the determination as to what is feasible given local conditions. However, none of the recommendations made here should discourage states from making voter registration deadlines closer to election day or adopting election day registration, nor do these proposals necessarily conflict with current election day registration practices.¹

While taking this approach may require more work for elections administrators before the election, we believe it will lighten the burden of processing provisional ballots after the election and will likely lead to a reduction in postelection disputes. It also will help prevent the prospect of an onrush of registration forms at the last minute and the consequent likelihood of administrative error. At the same time, it gives the voter, third-party organizations, and political parties ample opportunity to ensure that registration applications are in proper order—that everybody who should be on the list is there, and anybody mistakenly on the purged list is put back on the eligible registration list.

- 1.5 As an integral component of this modified process, the state should provide, on a continuous basis if possible but certainly by a date certain before the election, a publicly available list of everyone on the registration rolls. This list should be constantly updated on the Web in real time and available in person

and by phone. There should be a separate list of names that have been removed from the registration rolls since the most recent federal election so that voters are given notice, well in advance, that their registration has been purged and are given the opportunity to contest or correct this. All necessary legal precautions should be taken to protect privacy rights with respect to these lists—a voter may notify the elections office of his or her desire not to be publicly listed, and there should be automatic protections for certain categories of voters, such as those involved in law enforcement or victims of spousal abuse.

In the alternative, states should make available to all voters, through the Internet, by phone, and in person, the information necessary for a voter to determine whether he or she has successfully registered to vote. In this regard, New Jersey's proposed legislation is instructive:

The Statewide voter registration system shall include . . . the ability to permit an individual to verify via the Internet whether that individual, and only that individual, is included in the system as a legally registered voter, whether the information pertaining to that individual required by subsection c. of this section is correct, and if not, a means to notify the pertinent county commissioner of registration of the corrections that must be made and to so verify in a way that does not give one individual access to the information required by subsection c. of this section for any other individual.²

Providing these lists will give voters, as well as campaigns, parties, and third-party organizations that engage in voter registration drives, the opportunity to ensure that the registration applications are processed properly and, if there is a question, to take whatever action is necessary to rectify problems or omissions. However, only the voter should be able make changes to his or her registration, and this must be done through filling out a form that the registrant signs under oath.

- 1.6 A unique number should be printed on the registration form and also on a detachable receipt³ that the voter can keep to check

the status of the form. Together with this tracking number should be printed the telephone number and Web site address for the elections office, either of which will work to see if that office received the form. The unique number also can be used by elections officials to track the distribution and return of voter registration forms submitted by third-party organizations. That way, if a voter complains that he or she registered through a third party but is not on the registration list, the elections official can make the appropriate inquiries.

- 1.7 States should have clear rules with respect to whether registration forms collected by third parties are processed as mail-in or in-person registrations.
- 1.8 Third-party voter registration groups should consider providing voters a receipt that serves as proof of attempted registration and as a record of the entity that conducted the registration. The groups also should save a receipt. The Advancement Project recommended the following form in 2004:⁴

MODEL RECEIPT FOR VOTER REGISTRATION APPLICATION SUBMISSION

[INSERT NAME OF VOTER REGISTRATION GROUP]

DATE: _____ TIME: _____

LOCATION: _____

TOTAL REGISTRATION APPLICATIONS SUBMITTED: _____

SIGNATURE OF PERSON RECEIVING FORMS: _____

PRINT NAME: _____

RECEIPT STAMP:

(stamp is not required but suggested where possible)

- 1.9 All states should work toward using electronic poll books (EPBs) at all voting precincts. The EPB is a handheld device that can be employed at the polling site. It functions as a registration database with the ability to identify and verify voter information.

In pilot tests of EPBs in North Carolina and Iowa last year, voter and poll worker reaction was positive. According to a county commissioner in North Carolina,

One promising innovation, piloted through a HAVA grant, in Guilford County, North Carolina, during the 2004 general election, was providing each Election Day precinct with an “electronic poll book.” This enabled precinct officials to confirm the registration of any registered voter who appeared at their polling place and to process “unreported moves” as transfer voters, providing them with a regular ballot rather than a provisional ballot. Of Guilford County’s 201,500 voters, fewer than 2,000 cast provisional ballots with 1,291 ultimately being counted. These numbers were substantially lower than the other larger counties in North Carolina where electronic poll books were not available.⁵

A study of the pilot in Iowa reported,

In many cases, persons with the EPBs were able to navigate through the screens and pull up a voter’s information faster than a poll worker could obtain the information in the hard copy of the election register. Poll workers commented positively on the ability of the handheld machine to generate a receipt with correct precinct information for voters who came to the wrong precinct. The EPB could obtain and print the information in seconds, while it took a poll worker five minutes or more to obtain the information from the County Auditor’s office. In many cases, the poll worker had to call the Auditor’s office 5–10 times before they [sic] were able to reach County Auditor staff. In almost all cases, the information generated by the EPB matched the information obtained from the Auditor’s office.⁶

CHALLENGES

BACKGROUND

State statutes that allow some individuals to file challenges to a person's right to register or vote have long been on the books but were rarely used in practice. This threatened to change in 2004. For example, in Ohio, GOP officials preemptively challenged more than thirty-five thousand new registrants on the grounds that the party sent the registrant a postcard and it was returned as undeliverable. Challenged registrants were required just days before the election to attend a hearing and prove their eligibility. This went on in some areas until the courts put a stop to it. The GOP also announced it would send people to the polls in Ohio on election day and challenge the rights of preselected registrants to vote. Republicans filed similar challenges and/or planned to deploy challengers in many "battle-ground" states, including Nevada, Florida, Wisconsin, Minnesota, Michigan, and Colorado. The Democrats then planned to deploy their own challengers to challenge the Republican challengers.

While small-scale challenges to individual registrants by others with specific knowledge of a problem may, in rare instances, be proper, the large-scale challenge that was put into play in 2004 is decidedly inappropriate in a system in which the elections office has a process for screening registrants. It should accordingly, as a policy and legal matter, be discouraged.

RECOMMENDATIONS

Considering the potential for this tactic to continue to be used by both political parties and others, states need to establish clear standards for challenging names on the registration list. We recommend those standards encompass the following:

- 1.10 There should be a rebuttable presumption that the registrant, having been screened by the elections office, is a legitimate voter.
- 1.11 A challenger should be required to provide clear and convincing evidence, as that term is used legally, to the elections office to

make a challenge.⁷ This means either providing documentary evidence or swearing by affirmation, under penalty of perjury, that the challenger has personal knowledge that the registrant is not legitimate.

1.12 Penalties for false claims should be stiff.⁸

2. PROVISIONAL BALLOTS

BACKGROUND

The 2002 election reforms under HAVA included an important new protection: the right to cast a “provisional” ballot that would be counted once elections officials could confirm its validity. This fail-safe measure was designed to avoid a repeat of 2000 in which many eligible voters were turned out of polling sites because their names did not appear on the rolls.

However, because the federal law was vague on certain aspects of provisional balloting, such ballots were treated differently not only from state to state but from county to county. This lack of clarity led to numerous lawsuits disputing when provisional ballots should be used—for example, if a voter was flagged for needing to present identification—and under what circumstances they should be counted, such as if cast in the wrong polling place or if the voter had requested an absentee ballot.

This level of uncertainty around a key election procedure must be remedied. States should create clearly defined, uniform rules for the casting and counting of provisional ballots, or else litigation over these matters is bound to confront us again and again. In the ongoing pursuit of balancing the right to cast a ballot and have it be counted and maintaining the integrity of the process by avoiding postelection clashes—for which provisional ballots inherently create the potential—clarification on how this process ought to work should be at the forefront of the states’ agendas.

In 2004, more than 1.6 million provisional ballots were cast, and nearly 1.1 million, or 68 percent, were counted. In twenty-eight

states, a provisional ballot cast in the wrong precinct was not counted. In seventeen states, a ballot cast in the wrong precinct but correct registrar's jurisdiction (usually the county) was counted.⁹

Moreover, despite predictions that statewide registration databases would greatly ameliorate the problems associated with provisional ballots, when comparing all seventeen states that had statewide voter registration databases during the November election with those that did not, there is little difference in the percentage of ballots counted. In states with databases, 65 percent of provisional ballots were counted. In states without databases, 68 percent of these ballots were counted. In states with databases, provisional ballots constituted 0.85 percent of the total ballots cast, whereas in states without databases, provisional ballots made up 1.76 percent of the total ballots cast.¹⁰

Elected officials, election administrators, campaigns, parties, and organizations should make every effort to minimize the use of provisional ballots. Voters cannot be confident they will be counted; further, they add to the postelection burden of vote counting and introduce uncertainty into the election process. New measures such as the implementation of statewide voter registration databases, if they do more to verify and properly process voters ahead of time, ought to go a long way to achieving this goal.

The earlier suggestion that states consider two separate deadlines for submitting new registration forms may help to avoid the need to rely on the provisional voting process to rectify problems arising in the registration process. If registrations received by the early deadline could be handled in a way that all problems associated with them would be cleared up by election day, so that these voters could vote on regular ballots, then provisional ballots would be needed only for problems associated with registration forms submitted by the later deadline.

However, the most important lesson learned in 2004 was that, no matter what rule is chosen, in fairness to the voters and elections administrators, states need to make the rule early and make it clear. In no area was this more evident than that of provisional ballots. Ohio provided the perfect example, where the secretary of state promulgated last-minute directives regarding such matters as which voters should receive a provisional ballot and what ballots ought to be counted, causing much confusion. Voting rights advocates filed litigation concerning the terms by which provisional ballots would be offered and counted in Missouri, Colorado, Michigan, Arizona, and Florida as well.

States need to establish, announce, and publicize statewide standards for every aspect of the provisional ballot process, from who is entitled to receive one to which ones are counted, well in advance of the election. We suggest some of those standards below. However, we wish to emphasize that no matter what the standards, they should be statutorily mandated to be implemented uniformly throughout the state.

RECOMMENDATIONS

- 2.1 HAVA requires that voters who registered by mail and did not provide identification when doing so bring identification with them to the polls. HAVA also requires that voters receive provisional ballots if they fail to bring identification to the polls. HAVA provides that states must count these provisional ballots as valid votes if “the appropriate State or local election official” subsequently determines that the individuals casting these provisional ballots are “eligible” voters under state law. The only question left open here by HAVA is the procedure that the state should use for determining that the voter who showed up at the polls without the necessary identification is really the same voter who registered by mail without identification. We recommend that election administrators make every effort to verify that voter’s eligibility through available databases. Since HAVA requires identification at the polls only from voters who registered by mail and did not provide identification when doing so, presumably all those who cast a provisional ballot solely because HAVA requires it are not missing from the state’s voter rolls. Thus, the poll workers should have no problem finding the voter’s name in their poll books. If such verification is made, the provisional ballot should be counted. This is because, were it not for HAVA’s identification requirement, the poll worker would otherwise let the voter cast a conventional ballot.
- 2.2 Additionally, since this situation would arise only in a state that would not have required an identification without the mandate of HAVA, it is reasonable to assume that it is consistent with the state’s policy to permit the voter in this situation to provide the requisite identification subsequent to casting the provisional

ballot. Consequently, we recommend that states give voters in this situation up to three days to provide either the HAVA-specified forms of identification or other documentation that will facilitate the state's ability to verify that the person casting the provisional ballot is the same one who registered by mail. Whatever procedures the states choose for making this determination, however, the paramount consideration—as with all others concerning provisional voting—is that they be clear and thus not susceptible to postelection manipulation and litigation.

- 2.3 One of the most heavily litigated issues in the 2004 election was whether a provisional ballot would count if cast in the wrong precinct, at least for statewide races. Although the litigation indicated that HAVA itself may not require the counting of these so-called wrong precinct ballots in presidential or other federal elections, it is the recommendation of this report that, as long as a voter appears at any precinct within the county in which he or she resides, the provisional ballot cast be counted for all county-wide, statewide, and presidential races.¹¹ Otherwise, a state is likely to face litigation over whether its election officials provided adequate notice to voters regarding their particular precincts.

There also is already some evidence that narrower definitions of jurisdiction for the purposes of provisional ballots resulted in disenfranchisement in 2004. In the eighteen states where ballots were counted or partially counted if they were cast in the wrong precinct but correct jurisdiction, 70 percent of provisional ballots cast were counted. Eleven of these states counted more than 50 percent of these ballots. In the twenty-five states that did not count provisional ballots cast in the wrong precinct (two other such states did not provide data), 60 percent of the ballots were counted. Sixteen of those states counted fewer than 50 percent of these ballots.¹² Moreover, provisional ballots are not sorted and counted at the precinct; that happens at the board of elections or elections office.

There are many legitimate reasons why a voter might appear in the wrong polling location, especially in an election like that of 2004 with its millions of first-time voters: voters who have moved recently may show up at their old site; polling locations change, and voters are not notified; or a voter's registration is filed in the wrong place through administrative error.

Just one of the many national voter hotlines set up during the weeks before election day, 1-866-myvote1, received one hundred thousand phone calls from people trying to find out where they were supposed to vote.¹³ Sometimes poll workers will misdirect voters to the wrong location.

- 2.4 If a state nonetheless chooses to require voters to appear at their assigned precinct, then it is the strong position of this report that, where the same polling site serves more than one precinct (a single school gym containing three precincts, for example), a voter's provisional ballot should count as long as the voter appears at the correct polling site. States should mirror the recent ruling of the New York State Court of Appeals when it made the following finding:

When a ballot is contested in a judicial proceeding, the court must, after determining that the person who cast the ballot was entitled to vote, order the ballot to be counted "if the court finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face." . . . We can reasonably infer that casting an affidavit ballot at the correct polling site but at the wrong election district is the result of ministerial error on the part of a poll worker in failing to direct the voter to the correct table, and instead providing the voter with an affidavit without first properly verifying such voter's right to vote in the election district.¹⁴

Elections officials have expressed concern that polling places are selected, staffed, and provided with supplies and machines based on the registered voters for that location. As a result, if voters were not required to vote at their correct precinct, officials would not have any idea how many voters might show up at a certain polling place. Long lines and running out of ballots could, as a consequence, become problems. Moreover, for such voters, votes for offices below the county level on the ballot might not count.

These are legitimate concerns. However, we are optimistic that the continued efforts of elections administrators and organizations involved to ensure voters know where to vote, along

with the advent of new technology—especially new voter registration databases—will reduce the number of misdirected voters and thus alleviate problems associated with voters appearing to vote at the wrong polling place.

- 2.5 As indicated in the registration section above, one of the important areas for reform concerns the relationship between a state's registration system and its rules for provisional voting. Under HAVA, all properly registered voters must receive a provisional ballot that eventually gets counted as a valid vote if, for some reason, the poll workers are unable to locate the name of a registered voter on the election day rolls. To comply with this mandate, states need to adopt publicly transparent procedures that enable them to verify the official registration records even though poll workers were unable to identify the voter as registered.
- 2.6 In addition, states need to adopt clear rules and procedures regarding provisional ballots cast by citizens who submitted new registration forms prior to the state's deadline for doing so but whom the state has never recognized as properly registered—thus, they do not appear on the state's official master list of registered voters. As a general matter, if some kind of administrative error on the state's part is the reason why a timely new registration form did not result in the entry of this voter on the state's official list of registered voters, the provisional voting process should hold this voter harmless from this administrative error and count the provisional ballot as a valid vote. An administrative error should be determined by examining the original voter registration form, not just the ultimate voter list. Michigan, which is held as the national model in the area of statewide voter registration databases, follows the practice of going back to the original voter registration records if a voter claims to have registered and is not on the list. However, it would be preferable if the state could adopt preelection procedures to rectify this administrative error so that the voter could cast a conventional rather than provisional ballot.
- 2.7 Conversely, if some kind of material error or omission on the voter's part is the reason why the state was unable to process the new registration form successfully, then (again, as a general

principle) states are entitled to declare a provisional ballot cast by this voter invalid on the ground that the voter never successfully completed the registration process and thus is not properly registered. If it is a case in which the voter failed to receive notice of the need to correct or amend a registration application, the presumption should be that failure was attributable to administrative error.

Here, too, states should adopt a preelection procedure whereby citizens submitting registration forms with material errors or omissions would receive notice of the problem, with the opportunity to rectify the situation in time to vote with a conventional rather than provisional ballot. Moreover, if a state puts in place the kind of tracking number system mentioned above, this would serve as another way for voters to correct material errors or omissions with new registrations in time to avoid the need to cast a provisional rather than regular ballot.

- 2.8 It is possible to imagine circumstances whereby the failure of a submitted registration form to be recorded on the state's official list of registered voters is the result of neither administrative nor voter error. A registration form lost in the mail would be one example. With respect to these and other cases in which it might be debatable who is responsible for the problem, it is most important that a state—in advance of the election—make clear whether or not the voter bears the risk that the problem will prevent a provisional ballot from being counted. It would be desirable as well that states adopt a mechanism, like the suggested tracking number system, that enables voters to minimize this risk.
- 2.9 With respect to voter registration forms handed in person to agents of a state's Department of Motor Vehicles or other state agency, an error in the transmission of those forms from the agency to the appropriate election officials should be considered administrative error for the purpose of provisional voting, with the consequence that a provisional ballot cast by a voter in this situation should count as if that voter had been properly registered. Related to the tracking number suggestion, states should consider providing new registrants with receipts when they submit their registration forms to a DMV agent or other

government official, the receipt serving as proof of the voter's timely submission of a registration form in the event the voter needs to cast a provisional ballot. A provisional ballot cast by any voter able to produce such a receipt should count as a valid vote (assuming such a voter is substantively qualified to be a registered voter), as the receipt would demonstrate that the failure of the voter to appear on the state's official registration list was the result of administrative error.

There is ample evidence of administrative error in the steps between receiving a voter registration form and appearing on the registration list. Such errors, made by government employees, should not mean the voter is disenfranchised. This is not to suggest that elections workers are anything less than honest, hard-working, and competent individuals but simply that human error is inevitable.

Indeed, election administrators across the country have conceded that some voters were left off the registration rolls owing to administrative error in the processing of forms and the compiling of voter lists. A coalition of good-government groups testified before the New York City Council that, in September 2004, the New York City Board of Elections reported that it sent approximately fifteen thousand records of voters who would be subject to identification checks to the State Board of Elections in an attempt to verify their DMV numbers (and thereby exempt them from the law's identification provisions). The state board "flagged" 2,959 of those records, about 20 percent, as not having DMV numbers that matched those in the DMV's database. The city's Board of Elections then went back and took a look at the scanned originals of the voter registration applications of those 2,959 voters. Incredibly, 2,951 of them—99.7 percent—appeared to be due to City Board clerks entering incorrect information from the forms into the system, often transposing or wrongly entering a single digit or two.¹⁵

A recent report by Demos found that "twenty percent of the cases [of provisional ballot problems] derived from a botched voter list created before Election Day—in other words, from a previous error in elections administration." In further discussion of a survey of calls received during the 2004 election by the Election Protection Coalition, the report states,

Some callers discovered that their names had been left off the rolls because they had been classified as "inactive" voters, or had

mistakenly been purged as ineligible felons. In many other instances, the nature of the mistake was unclear. Voters may have been omitted because of erroneous list purges, flawed or delayed data-entry of registration forms, or the failure of state voter registration agencies to submit voter registration applications to elections boards in a timely manner. . . . Counties lose valid registrations or delay the processing of registration applications such that eligible voters are deprived of their right to cast ballots.¹⁶

News reports provide numerous further examples of the problem.¹⁷

- 2.10 If a poll worker challenges a voter signature, and the voter must therefore vote by provisional ballot, the voter should be given the opportunity to present HAVA-defined identification within at least three days of the election to rebut the poll-worker challenge. If the voter does not do so, the elections office should be required to find cause to believe the voter is not who he or she claimed to be in order to disqualify the vote. Poll workers should be trained to challenge signatures only in the rare case where they have specific and compelling reason to believe that a discrepancy is the result of fraud.
- 2.11 When a voter goes to the polls on election day, and the record shows that voter previously requested an absentee ballot, that voter should be entitled to vote by provisional ballot. That ballot should be counted unless it is clear that the voter did in fact already vote by absentee ballot.
- 2.12 In the case where a voter is not registered, a provisional ballot should serve as a voter registration form even if it is not ultimately counted, as is the case, for example, in Colorado.¹⁸

3. STATEWIDE VOTER REGISTRATION DATABASES

BACKGROUND

As of the November 2004 elections, at least seventeen states had some form of statewide voter registration list in use. By January 1, 2006, all states must have databases in place as required by the Help America Vote Act of 2002.¹⁹ While the act requires the databases to perform certain functions, for the most part how they are to be built and implemented has been left to the states.

Statewide databases have a number of potential advantages. They can link to correctional databases and courts and smooth the process of both taking felons off the list of eligible voters and restoring the franchise of ex-felons. Links to social service agencies' databases can enfranchise people that have historically had low participation rates, get their information into the registration system accurately, and keep it updated. Duplicate registrations can be prevented by more accurately purging voters who have moved out of the state or by quickly changing registration information for voters who move within state. The potential for fraud is lessened by deleting dead voters from the rolls by expediting the flow of information from health and vital statistics departments. Finally, an up-to-date, clean voter roll could reduce the number of eligible voters whose names are not in the poll book, diminishing the need for what should be the very last option, that of the provisional ballot.

Kentucky and Michigan are two states that have what are considered to be model statewide registration systems.²⁰ The state of

Kentucky created one of the first such systems in 1973. Legislation had been passed the previous year providing for a statewide database and requiring that every voter reregister to start with a clean database. In 1986, the system was upgraded to have a real-time, online database that allowed each county to take over its own data-entry duties. It was updated once again in 1995 after the enactment of the National Voter Registration Act (NVRA).²¹

Kentucky county election officials have access to the database, which is on a mainframe system, from local terminals. The state uses the full Social Security number as the unique identifier. It does not allow for more than one record per Social Security number. Voters who move within Kentucky and reregister have their old record automatically purged from their former county. The state provides daily reports to every county clerk with updates to registrants' records. To ensure privacy, the numbers are not printed on any public documents.

The database has a direct, real-time link to the state's driver's license database and a "nightly batch" link with social services agencies' databases: these include food stamps, Medicaid, and the Kentucky Transitional Assistance Program (K-TAP, formerly known as Aid for Families with Dependent Children). Other information received by but not directly connected to the database comes from the Special Supplemental Nutritional Program for Women, Infants, and Children (WIC) and disability offices.

Information also comes via electronic files from the Department of Vital Statistics twice a month. The names of the deceased are matched with the registration database and then purged. Also, twice a month files of convicted felons are received from U.S. attorneys, and once a month, from the Administrative Office of the Courts. That information is matched with the database for purging purposes.

State law allows a voter to file a protest over being purged. The county board then hears the protest of the voter at the next regular monthly board meeting. If the board finds in favor of the voter, the voter's registration record is restored.

In the 2004 presidential election, Kentucky had a very small number of provisional ballots issued—1,494 out of 1.8 million ballots cast—of which 221 were counted. This could be attributed in part to the accuracy and timeliness of the state's voter registration database.

Like Kentucky, Michigan's election officials saw an opportunity to revamp their registration system completely after NVRA was passed. State law in 1994 required the creation of a statewide voter

registration database. In addition to the passage of NVRA, an additional incentive for action was that Michigan's registration system was more decentralized than most states—it was managed by approximately two thousand local officials at the county, city, and township level.

In 1998, the state implemented the Michigan Qualified Voter File (QVF). As with the Kentucky database, it was built in-house. It was put together using a compilation of voter files maintained at the local level and every registered voter whose name appeared on the Department of State's driver's license/personal identification file.²² While costly to set up—the state bought all the hardware and software for about \$7.6 million—state officials believed the initial costs would be recouped quickly in reduced paperwork and the streamlining of registration maintenance.

In Michigan's database, each registrant is identified by a driver's license number or personal identification card number—this is the state's unique identifier. If a registrant has neither, one can be generated and assigned. The QVF is linked to the state's driver's license database.

The linkage of the voter registration file and the driver's license database file allows for adjustments to be made to registration information when a voter either makes a driver's license change or registration change. Every "motor-voter" transaction is forwarded to the appropriate local election official, and the local official determines the acceptability of the registration. In the case of Michigan, the state has the advantage of the secretary of state's office being in charge of both the voter registration database and the driver's license database. This means if a voter who is already registered moves to a new county and makes the appropriate change to his or her driver's license, the voter registration is automatically updated without the voter needing to reregister. Eighty-five percent of the state's registrations are via driver's license transactions. Recent state law requires all drivers to use their voter registration address for their driver's license, which helps keep the two records synchronized.

Michigan's system is a "distributed database." The state has a central file located in Lansing that is on a UNIX-based computer. Local clerks have computers and printers with the QVF installed by the state. Local installations are connected to the state file through an Internet account that also was provided by the state, but the databases can stand alone in each jurisdiction when not connected to the

Internet. Replication updates go both ways via the Internet connection: the local file updates Lansing, and Lansing updates the local file.

The Department of Community Health gives information to the Department of State on a regular basis about drivers who have died. If the voter was registered, the record is marked deceased, and the local election official is notified.²³

The Michigan system, like Kentucky's, allows for uniformity: all voters are registered using the same standards. It also allows for a more accurate database. The state claims it correctly purged 800,000 duplicate registrations in building the database.²⁴

RECOMMENDATIONS

- 3.1 States should take all appropriate measures to protect the privacy rights of voters when constructing and utilizing the statewide voter registration database. This includes establishing an exclusive list of who has access to voter information and what voter information can be made public and/or be exchanged among state agencies. States also should make clear that information from the database may be used only for voter registration and elections purposes.
- 3.2 Databases should be, at a minimum, connected interactively with the state's Department of Motor Vehicles, courts, Department of Corrections, and Department of Vital Statistics. Optimally, the database should be connected interactively with as many state agencies as possible to ensure the timely and accurate updating of voter information and the most accurate matching and verification of voter registration information (as is the case in Kentucky).
- 3.3 Under HAVA, all voters, including first-time voters registering by mail, who provide a DMV identification number or the last four digits of their Social Security number on their voter registration forms are exempt from HAVA's identification requirements if the state can verify their information with an existing state database.

- 3.4 When computer verification finds records that match some but not all voter information, these “near matches” should be audited for transposed characters, inverted names, or other frequent errors.
- 3.5 When adding voters, states should adopt a substantial match standard that verifies those applicants who have a significant part of their records verified within state databases. If, for example, an applicant’s name and date of birth match a record in a state database but that person has made a minor error such as transposing a pair of the digits on his or her driver’s license, the record should count as being verified. In another example, since some Asian voters customarily reverse the order of their surname and family names, if their date of birth and driver’s license number match, then their record should be verified. Enactment of a substantial match standard also would alleviate the problem of a minor incorrect entry of voter information by an elections office. States should endeavor, through legislation or regulations promulgated well in advance of the election, to specify criteria for implementation of this “substantial match” standard so as to avoid the potential for postelection disputes over whether particular cases count as a “substantial match.”
- 3.6 If it is impossible for the board or elections office to make a match using these standards, unless there is some additional evidence of fraud, the registration should not be automatically rejected. Rather, the voter should be notified in an effective and timely manner and given the opportunity to amend or correct. If there is evidence of fraud, the elections office should make further inquiries and, when appropriate, refer the case to the proper authorities.
- 3.7 Counties should maintain control over adding new registrants to the voter registration rolls. While counties should keep control as well over identifying voters for removal from the registration lists when required by law to do so, rather than automatic removal, the name to be purged should be double-checked by a state or second county elections administrator from another party before final removal. Local administrators should maintain

primary control, as they are in the best position to know their constituents and the particulars of their own jurisdictions.

- 3.8 Before removing any name from the computerized list, a state should notify the voter and provide that person an opportunity to correct any errors or omissions in the record, including errors caused by election officials. Notification should be made by a certified, forwardable letter to the last known address, along with a postage-prepaid response card.²⁵
- 3.9 Statewide databases should preserve electronic records of all their transactions, including those to remove names from the list. These electronic records should indicate the date and time of each transaction, the identities of the persons who removed or modified records, the identities of the persons who authorized the transaction, and the reason any record was removed from the list. The databases should be capable of generating reports of all such transactions to facilitate state oversight and public monitoring of list maintenance activities.²⁶
- 3.10 Ideally, statewide databases should be updated in real time. In any case, states should establish uniform and binding timing standards for processing and entry of voter registration information to ensure such data is immediately reflected in the database.
- 3.11 We encourage states to explore opportunities for interstate compatibility in their database software and communications systems.

FELON PURGES

BACKGROUND

The problems that occurred with respect to felon purges in Florida in 2000 have become election lore. Just before that election, the state removed thousands of actually eligible voters, primarily African Americans, from the rolls. Unfortunately, in 2004, Florida and other states again encountered all sorts of trouble when it came

to adding and subtracting voters accurately from the registration rolls according to their criminal status. In Florida, the state was forced to withdraw its purge list after news media investigations revealed that the list contained thousands of people who, again, were eligible to vote. Moreover, the list clearly included a disproportionate number of African-American voters relative to Hispanic voters. Indeed, the felon list provided by the state would have disqualified 22,000 African Americans (more likely to be Democrats) and only 61 Hispanics (more likely to be Republicans).²⁷

For those states that choose to maintain felon disenfranchisement laws, it is critical that determinations about whom to purge be accurate and that those subject to purges be accorded due process. Many states still have not taken appropriate measures to ensure their felon purge and re-enfranchisement process works accurately and effectively.

According to a recent survey of the purge processes of fifteen states with a wide variety of disenfranchisement laws by the ACLU,

- ◆ One-quarter of the states surveyed compile their purge lists without reference to any legislative standards whatever, while half the states surveyed do so using only an individual's name and address
- ◆ No state surveyed has codified any specific or minimum set of criteria for its officials to use in ensuring that an individual with a felony conviction is in fact the same individual who is being purged from the voter rolls.
- ◆ Two-thirds of the states surveyed do not require elections officials to notify voters when they purge them from the voter rolls, denying these voters an opportunity to contest erroneous removals.²⁸

RECOMMENDATIONS

3.12 Though HAVA does not mandate specific rules concerning the re-enfranchisement of felons who have completed their incarceration, parole, or probation, best practices require that states

make re-enfranchisement automatic or no more burdensome than the process required for any new registrant. At the very least, the re-enfranchisement process should be clear and straightforward. If ex-felons must reregister in the same way as would an individual returning to the state after living in a different state for several years, the law and relevant procedures should be clear that an ex-felon need do no more than any other new or renewing registrant. If an ex-felon must do more than simply reregister, the law should specify exactly what additional information and/or procedures are necessary for re-enfranchisement.

Elimination of barriers to ex-felons' ability to register or reregister to vote can have dramatic impacts. After Texas removed its two-year waiting period for felon re-enfranchisement, an estimated 316,981 former felons regained the right to vote.²⁹

- 3.13 As long as the ex-felon completes all necessary steps specified by law, re-enfranchisement should be ministerial (that is, mandatory), not discretionary. Otherwise, there is the potential for litigation over abuse of discretion or unlawful discrimination in deciding which ex-felons are permitted to vote and which are not.
- 3.14 In states where re-enfranchisement is automatic upon completion of a felon's sentence (such that the ex-felon is under no obligation to reregister), it is necessary for states—in order to avoid potential errors in their voter rolls—to establish procedures whereby the requisite information is transmitted expeditiously and accurately to the relevant election officials for inclusion in the state's centralized voter registration database. If states neglect to update their rolls in this way, then ex-felons will need to vote using provisional ballots, which will qualify for counting (since, by definition, in a state with automatic re-enfranchisement these ex-felons are registered voters, even though the rolls do not accurately reflect this fact).
- 3.15 States should adopt statutes that specify and standardize matching criteria. These statutes should prescribe the use of numerous matching criteria, require exact matches of felony conviction and voter registration data, and require that matches be double-checked at

state and county levels. Matching criteria should include first name, middle name, last name, gender, maiden name, date of birth, place of birth, and driver's license number, if any.³⁰

- 3.16 Purges should be done year-round but should end ninety days before the election so that anyone purged is given due notice and opportunity to contest the state's determination. As is the practice in New York, any individual to be purged should first be mailed a certified, forwardable notification letter to the last known address. The individual in question ought to have a certain number of days to respond (in the case of New York it is fourteen days, but states should consider making it twenty-one). The letter that New York administrators send includes a postage-prepaid card that asks the person to list any reasons why he or she should not be removed. If the individual does not respond, the state sends out a second letter with information about re-enfranchisement.³¹
- 3.17 With respect to felons currently incarcerated, we recommend that the state send the notification to the prison where the individual is being held.

4. VOTER IDENTIFICATION

BACKGROUND

Perhaps the most divisive and partisan issue in election administration, voter identification predates the Help America Vote Act and the 2000 election fiasco as a significant issue of concern in a number of states. The issue is a classic question of balance: many view requirements for polling place identification as necessary to ensure ballot security. Only those who are qualified to vote can cast ballots, and those who would commit fraud would be thwarted by requirements to prove their identity beyond stating their names or signing a poll book.

Others, conversely, often refer to voter identification rules as a “solution in search of a problem.” They argue it is an unnecessary burden that does not prevent fraud, in that most fraud does not occur at the polling place; it potentially intimidates certain segments of the population from going to the polls; and it may disenfranchise those groups less likely to have required verification: the elderly, the poor, and language or ethnic minorities.³²

In 2002, Congress tried to craft a compromise: Title III, section 303 of the Help America Vote Act mandates that only those voters who register for the first time in a jurisdiction through the mail—and who fail to include a copy of their license, copy of a utility bill, bank statement, government check, or other government document that shows a voter’s name and address, or to provide their driver’s license number or the last four digits of their Social Security number—present identification at a polling place the first time they vote. If they fail to do so, they are entitled to a provisional ballot, which should be counted if the voter is later determined eligible under state law.

In 2000, eleven states required voters to show some verification of their identity before voting. Four states allowed poll workers the option of demanding voter identification or allowed localities to establish their own rules. Nine states required a signature match, while eighteen required a voter's signature in a poll book. In nine states, voters were asked to state their names.³³

In thirty-three states and the District of Columbia, HAVA's rules represented the first time any voters were required to show identification. The passage of HAVA, however, as well as the post-2000-election flurry of legislation around the country, led to a marked increase in the number of states requiring all voters to show identification. Lawmakers in six states—Alabama, Colorado, Montana, North Dakota, South Dakota, and Tennessee—confronted with the necessity to update voter identification laws to make them HAVA compliant went further and enacted universal voter identification. (North Dakota, which enacted voter identification in 2003, does not require voter registration.) In 2004, lawmakers in thirteen more states debated similar voter identification bills.

At the time of this report, a total of twenty states have laws requiring all voters to show identification when voting. There are indications that the number of states requiring identification will continue to rise.

As in previous years, the debate in state legislatures regarding this issue has been partisan and sometimes racially divisive. For example, according to a recent report in the *Atlanta Journal-Constitution*,

Lingering anger over a vote to require picture IDs at the polls spilled over into a special Saturday session of the Georgia General Assembly centered on the symbolic repeal of the state's Jim Crow laws. African-American lawmakers, and some white ones, staged walkouts in the House and Senate on Friday night to protest proposed photo ID requirements that they likened to the poll taxes, literacy tests and other obstacles used to suppress black votes during segregation.³⁴

Senators Mitch McConnell (R.-Ky.) and Christopher “Kit” Bond (R.-Mo.) recently introduced federal legislation (S. 414) that would require all voters to show identification around the country. It would place the burden on states to provide identification to all voters free of charge, with money provided by federal grants.

In fact, while much of the emphasis on ballot security and fraud reduction has centered on proposals to introduce or change

requirements for polling place identification from voters, election officials in many states have said that the mail (that is, absentee ballots and early voting by mail) provides the best opportunity for those seeking to undermine the election process and commit fraud on a much larger scale. That is because the anonymity and privacy of the ballot—critical ingredients of the election system’s integrity—are most easily compromised when voters cast absentee ballots. For example, if absentee ballots are sent to a married couple, it would be possible for one spouse to vote the other spouse’s ballot and then have him or her sign the outside envelope. The potential for coercion—of spouses, children, or even parents—lurks in a way that it does not in the privacy of the voting booth. No-fault absentee voting also raises the possibility of vote-buying schemes. If someone tries to pay a voter to vote for a particular candidate, the offerer of the bribe cannot verify whether the voter has actually done so if the voting took place at a precinct, given the secrecy of the ballot. The same cannot be said for mail-in ballots.

By contrast, there is a good deal of anecdotal evidence suggesting polling place voter fraud is exceedingly rare.³⁵ As Georgia secretary of state Cathy Cox wrote in a letter to Governor Sonny Perdue opposing the state’s new identification bill,

One of the primary justifications given by the Legislature for the passage of the photo identification provisions of House Bill 244—the elimination of voter ID fraud at the polls—is an unfounded justification. I cannot recall one documented case of voter fraud during my tenure as Secretary of State or Assistant Secretary of State that specifically related to the impersonation of a registered voter at voting polls. Our state currently has several practices and procedures in existence to ensure that such cases of voter fraud would have been detected if they in fact occurred, and at the very least, we would have complaints of voters who were unable to vote because someone had previously represented himself or herself as such person on that respective Election Day.³⁶

RECOMMENDATIONS

- 4.1 We recommend that states not expand voter identification rules at this time—for example, by requiring all voters to show identification documentation at the polls—as there has been insufficient time for a thorough evaluation of all relevant information

and options relating to such rules. Instead, this report encourages policymakers and policy analysts to explore new approaches that might minimize the scope and extent of policy disagreement on the topic of voter identification and, optimistically, to defuse some of the intense controversy surrounding this topic.

- 4.2 Considerable empirical research is necessary to inform the ongoing policy discussion over voter identification. Fruitful avenues for such empirical research include the extent to which identification requirements impose burdens on voters and whether those burdens fall differentially on various subsets of the voting population, including the elderly and language, racial, or ethnic minorities. Likewise, empirical research would help illuminate the extent to which identification requirements contribute to the avoidance of fraud and/or other forms of voting irregularities. Furthermore, empirical research is necessary to address the question of whether identification requirements help or hinder the objective of reducing election-related litigation that tends to undermine the public's confidence in the validity of the election's results.
- 4.3 Careful consideration should be given to whether the obligation to provide documentation, particularly at the time of casting a ballot, has the effect of creating a barrier to the exercise of the franchise and, if so, the steps a state may adopt to avoid this barrier. For example, states that currently require voters to present photo identification when they vote should, with respect to indigent voters, make sure that such documentation is widely available at the state's expense, so that the identification requirement does not have the practical effect of serving as a kind of poll tax. (See Recommendation 4.8.)
- 4.4 In particular, given that HAVA's requirements regarding provisional voting and the creation of statewide computerized databases are novel developments in the field of election law and administration, it is necessary to explore the ways in which these two new developments will interact with the subject of voter identification. In what way does the availability of provisional voting, as an "insurance policy" for properly registered voters, protect the right to vote for those who go to their polling places

without particular identification documents that are required either by HAVA or state law? Conversely, in what way do more stringent polling place identification requirements exacerbate the need to rely on the safety net of provisional voting, thereby potentially leading to more postelection disputes and litigation over the qualification and counting of provisional ballots?

- 4.5 Similarly, what forms of identifying information and/or documentation are necessary to ensure the reasonable accuracy of statewide voter registration databases, both at the time new registrations are entered into the database and with respect to the ongoing maintenance of the names in the database? If and when appropriate standards and procedures are in place with respect to computerized statewide registration databases, is it possible—particularly with the use of technology in the form of electronic poll books or otherwise—for voters to “sign in” at their polling place on election day simply by verifying the information contained in the computerized statewide registration database?
- 4.6 Most important, whatever particular rules a state adopts regarding required identification at the time of registration and voting, states should devote special attention to making sure they are straightforward and unambiguous, so that both voters and poll workers easily understand exactly what rules apply.
- 4.7 In addition, given the special sensitivity of identification requirements, states should pay close attention to whether their rules, both as written and as implemented, are consistent with the basic principle of treating all voters equally. This point is important not just for the intrinsic democratic reason that all voters are entitled to equal treatment in the electoral process but because of the practical need to avoid potentially disruptive litigation under the Equal Protection Clause of the Fourteenth Amendment, as interpreted in *Bush v. Gore* and related precedents. In this regard, states should be wary of adopting identification requirements applicable to voting at polling places that do not apply as well to absentee or other forms of at-home or mail-in voting. States that require more stringent forms of identification when people vote at polling places than when they vote at home may be expected to have to justify this distinction in equal protection

litigation under the strict scrutiny standard and may be hard-pressed to do so.

- 4.8 States that now require every voter to show identification should provide valid identification free of charge to all voters. Moreover, making a free identification document available through the Department of Motor Vehicles is inadequate; such identification should be very easily obtained and available at many different times and locations, including evenings and weekends. Alternatively, states might mail voters an application that allows the voter to provide some piece of information that would verify his or her identity along with a picture, and to return it postage prepaid.

Many voters cannot meet the financial burden of obtaining a valid identification, particularly if they do not drive and therefore do not need to have the kind of verification required in some states. In addition, many cannot take time off during a workday to stand in line at the DMV to obtain a document necessary to exercise the right to vote.

- 4.9 In their antifraud efforts, states also should focus on absentee ballot fraud, which many states consider a far greater threat to election integrity than polling place fraud. Some states are already beginning to move in this direction.³⁷ Oregon employs a multilayered system in an effort to curtail fraud. First, the ballots cannot be forwarded. Second, the voter is required to sign an outer envelope, which is verified using a computer signature on record. Questioned ballots are put aside for investigation.³⁸ The state has recently added even greater security measures. First, beginning in 2002, the state required all counties to file a “ballot security plan.” Second, the state now requires that ballot drop boxes, which voters can use to save a stamp, must be marked as “official” (when set up by elections officials) or “unofficial” (when set up by others).

5. TESTING AND CERTIFICATION OF VOTING SYSTEMS

BACKGROUND

The current system for testing and certification is essentially a four-step process in many states:

1. Vendor testing
2. Qualification testing: For the past several years, qualification testing has been conducted by the National Association of State Election Directors and contracted Independent Testing Authorities. This task will now be the responsibility of the United States Election Assistance Commission (EAC). The National Institute of Science and Technology will staff the Technical Guidelines Development Committee of the EAC and will accredit laboratories under the National Voluntary Laboratory Accreditation Program. Hardware, software, and documentation of the voting system are to be defined, reviewed, and tested for conformity with the federal voting system standards. To be qualified, a system must contain a method to create elections, provide a ballot, record votes, report tallies, produce an audit trail, and ensure voting is secret, accurate, and reliable. An Independent Testing Authority reviews code and documentation to ensure it will provide an accurate election. Qualification testing does not mean the system complies with state standards.

3. State certification: State personnel or contractors perform testing under the direction of the state to ensure the voting system complies with all of the state's requirements.
4. Local acceptance testing: Individual jurisdictions perform testing before each election.

When it comes to voting machines, among the biggest but least focused on problems by reformers is that some states do not adhere to the voluntary federal voting system standards. A great many states do not have sufficiently rigorous state testing and certification programs to complement the federal process, and some states have no independent system for reviewing voting machines at all. Both federal and state procedures are important.

As the Leadership Conference on Civil Rights has pointed out,

Certification standards serve a number of vital functions. Federal standards protect voters through such requirements as the new "second chance voting" provision. They deal with such issues as reliability, audit techniques, and security standards that are basic to ensuring that the voter's vote will be effective. Certification also protects state and local governments from voting machine manufacturers by providing technical specifications, testing and reliability measures, and operational standards. The national standards exist to ensure that a vote in California is as likely to be counted as a vote in Virginia, and they cover an extremely wide range of physical and administrative issues pertaining to the machines. It is through the national certification standards that policy goals and technical specifications are brought together. Bypassing the certification process undermines the important protections that ensure that voting systems meet basic accuracy, security and access goals.³⁹

And in congressional testimony, Michael Shamos, a professor of computer science at Carnegie Mellon University, explained,

Many states that formerly had statutory certification procedures have abdicated them in favor of requiring no more from a vendor than an ITA qualification letter, in some cases, even less. Alabama, for example, requires no certification at all, but relies

on a written guarantee by the vendor that its system satisfies that State's statutory requirements. Mind you, these are requirements over which experts may differ as to their meaning. My own State, Pennsylvania, I am embarrassed to say, abandoned certification in the year 2002, because it believed the ITA process was sufficient. We are, therefore, less safe in 2004 than we were 20 years ago, and possibly less safe than we even were in the year 2000.

Even certified machines may not operate properly when delivered to a jurisdiction, and must undergo acceptance testing, but I am not aware of any State that makes such testing a statutory requirement. It may be recommended in the standards, and the ITAs may recommend it, but there is no body that actually forces the states to go through acceptance testing.⁴⁰

According to a 2004 report by Electionline.org, thirty-five states required voting systems to meet state and federal standards; nine relied entirely on federal standards; five used state standards; and Mississippi and Oklahoma had no voting system standards. The nine states that did not have their own standards were Alaska, Delaware, the District of Columbia, Georgia, Hawaii, Oregon, Rhode Island, Utah, and West Virginia.⁴¹

One potential model for state testing and certification is the system used in Georgia. After the state replaced all of its voting machines with the same DRE-style voting system statewide in 2002, Kennesaw State University established the Center for Election Systems to oversee and conduct Georgia's state certification program as well as to assist in its county-level acceptance tests. While there may be disagreement with some of the conclusions Kennesaw has come to with respect to the electronic machines Georgia uses, the idea of using an unaffiliated, nonpartisan, nonprofit institution composed of experts in the field to assist the state at every stage of the process of setting up, testing, and running voting systems is promising and should be explored further.

For states that opt to conduct testing and certification programs "in-house," we recommend looking at the rigorous procedures and standards put in place by the states of New York, Florida, and California. For example, New York imposes a number of requirements and obligations upon vendors on top of the federal standards. These include:

- ◆ Retesting of modifications;
- ◆ State board supervision of all local acceptance testing;
- ◆ Quarterly testing and annual testing for all new equipment;
- ◆ Escrowing of all source codes, software and design drawings.

The state also works with its own independent testing authority to examine and test all voting systems in the state. When a vendor applies to the state board, staff provides it with ballot format and test requirements, and the Independent Testing Authority establishes a test script for the examination and oversees testing and evaluation. The testing authority then provides a comprehensive report to the board.⁴²

California has a Voting Systems and Procedures Panel working with the secretary of state to review systems submitted for certification. The panel works with an advisory committee and technical consultants, and its meetings are open to the public. The system is tested by conducting two mock elections, one a presidential primary, the other a gubernatorial election. The secretary of state schedules a public hearing regarding any item the panel considers. State procedures require local jurisdictions to conduct acceptance testing.⁴³

In addition, last year California began a Parallel Monitoring Program, which “provided for the random selection of DRE voting equipment to be set aside for use by experts to test on Election Day, simulating actual voting conditions, to determine the accuracy of the machines to record, tabulate and report votes.”⁴⁴ On election day in 2004, test teams comprised of employees of the secretary of state, consultants, and video operators did such testing in eleven counties.⁴⁵

RECOMMENDATIONS

- 5.1 All states should adopt the new federal standards that will now be devised by the EAC and NIST.
- 5.2 All states should require voting systems to meet federal voting system standards *and* comply with the state’s own testing and certification process and standards. As Douglas W. Jones, professor of computer science at the University of Iowa, has pointed out, the

purpose of the state certification system should be not only to ensure that the systems comply with any additional requirements the state might impose but to fill in any gaps in the vendor and Independent Testing Authority testing.⁴⁶ Changes or upgrades to software in electronic systems should be subject to a de novo review and certification, and penalties for installation of uncertified software or software upgrades should be stiff.

5.3 As suggested by the Leadership Conference on Civil Rights and the Brennan Center for Justice at New York University School of Law:

- a. State elections officials should hire an independent security team to examine the potential for operational failures of and malicious attacks on the system.
- b. The assessment performed by the independent experts should cover at least the following areas of concern:
 - i. Hardware design;
 - ii. Hardware/firmware configuration;
 - iii. Software design;
 - iv. Software configuration;
 - v. Election procedures;
 - vi. Physical security.
- c. Elections officials should implement the critical recommendations of the independent expert security team and should demonstrate to experts and voters alike that these recommendations have been implemented.
- d. Elections officials should provide a thorough training program for all elections officials and workers to ensure that security procedures, including those recommended by the independent expert security team, are followed even in the face of election day exigencies.

- e. Elections officials should develop procedures for random parallel testing of the voting systems in use to detect malicious code or bugs in the software. Parallel testing involves selecting a random sample of the DREs to be used in the election and setting them up in mock precincts. Then, using all of the same procedures and during the same hours as the real election, mock elections are conducted in the mock precincts. Two separate mock elections should be conducted, one with real volunteer voters and one with trained personnel following a voting script that represents as accurately as possible the statistical voting profile of a precinct in the county. The entire process, and in particular what happens on the DREs' screens, should be videotaped. At the end of the day, after the mock precincts have been closed down, the mock election results must be reconciled with what the videotape shows that the results should have been.
 - f. Elections officials should have in place a permanent independent technology panel, including both experts in voting systems and computer security and citizens representing the diverse constituencies involved in election oversight, to serve as a public monitor over the entire process outlined above and to perform a postelection security and performance assessment.
 - g. Elections officials should establish standard procedures for regular reviews of audit facilities and operating logs for voting terminals and canvassing systems to verify correct operation and uncover any evidence of potential security breaches.
 - h. All jurisdictions should prepare and follow standardized procedures for the response to alleged or actual security incidents that include standardized reporting and publication.⁴⁷
- 5.4 In states where more than one system is employed and/or machines are procured by localities, the state should encourage localities to have their own on-site demonstrations and testing. The focus of these tests should be usability by the voter, including disabled voters, and ease of use by poll workers.⁴⁸

- 5.5 Machines should be tested again just prior to the election to make sure they are still working as they did when undergoing original testing and to verify that the machines are correctly configured for the specifics of the particular election.⁴⁹
- 5.6 No state should contract with a manufacturer that has not been certified by the EAC; that will not make software open to the public, including source code and object code; or will not document the chain of custody.
- 5.7 No state should certify a system that exceeds the residual ballot standard established by the EAC. The residual ballot standard is the maximum error rate based on overvotes, spoiled or uncountable votes, and undervotes, less what the best research says is the estimated intentional undervotes.



On a different machine issue, it is of great importance to note the problem of insufficient numbers of operating voting machines at a number of jurisdictions throughout the country in 2004, leading to long lines and wait times of several hours. For many working people, this could be tantamount to disenfranchisement. As Daniel Tokaji testified before the Committee on House Administration,

Many Ohio voters waited for hours on or before November 2, 2004 in order to exercise their right to vote. The problems appear to have been particularly acute in some urban precincts here in Franklin County, where voters reported waiting for up to four or five hours. And at one polling place near Kenyon College in Knox County, Ohio, voters waited as long as ten hours. These lines posed a special difficulty for working people who could not be away from their jobs for that long, and for parents of younger children. It will probably never be known how many people were discouraged from voting, either because they arrived at the polling place to find lines stretching around the block or because they heard about how bad the lines were and thus never went to the polls in the first place.⁵⁰

States and localities should reassess their voting system needs and base the number of machines deployed on election day on the number of registered voters in the jurisdiction as of the latest possible count. Jurisdictions ought also to take into account the following: voting-age population; voter turnout in recent elections; the number of voters who have registered since the most recent election; the educational levels and socioeconomic features of the jurisdiction; length of the ballot; and the needs and numbers of disabled voters and voters with limited English proficiency.

6. EARLY VOTING

BACKGROUND

Over the past several years, the use of liberalized absentee voting rules and in-person early voting has grown enormously throughout the country, and in 2004 the trend accelerated. In that year, thirty-two states allowed for some form of early voting.⁵¹ Twenty percent of voters voted early in 2004, up from 14 percent in 2000.⁵²

In states throughout the country, the number of people voting early clearly spiked, including in many of the “battleground states.” For example, the numbers of people voting early in Florida, Iowa, and New Mexico all more than doubled between the 2000 and 2004 presidential elections. In Florida alone, the number increased from 720,453 in 2000 to over 2 million early voters in the presidential election of 2004.⁵³

For purposes of this report, the term “early voting” is used to encompass two distinct practices: in-person early voting, in which voters may choose to appear at a central polling location set up before election day and cast their ballots in the privacy of a voting booth; and voting by mail, in which ballots are mailed to all voters who request them, regardless of whether they have an excuse for not voting in person, so that they may be marked and delivered back to the registrar before election day. While there are some important differences between these two practices, particularly when it comes to fraud, there are similarities as well that warrant their being discussed together.

Many elections administrators, voting advocates, and voters have embraced the movement toward early voting. The legislatures in states that do not have early voting—in-person early voting, voting by mail, or both—are closely examining it, and states that do have some version of early voting are looking at expanding it. However, it should be noted that there are powerful arguments both for and against the expanded use of early voting and competing data on its usefulness for both administrators and voters, not to mention campaigns. Before rushing to join the trend, we advise states, administrators, advocates, parties, and voters to take all of the competing arguments and studies into account.⁵⁴ Some of those arguments and supporting research are outlined here.⁵⁵

BENEFITS OF EARLY VOTING

- ◆ The primary argument is that pre-election day voting increases turnout. There is some limited evidence to support this view. For example, Curtis Gans has done research on “convenience voting” and turnout in 2004, finding that:

—The 24 states with no excuse absentee voting (where an individual need give no reason for requesting an absentee ballot) had a turnout performance at virtually the same level as the states which did not have that provision in their election laws. Turnout increased in no excuse absentee states in the aggregate by 6.7 percentage points as opposed to 6.2 for the other states.⁵⁶ Still this performance is better than every previous election—both Presidential and mid-term—when the states with no absentee voting in each year recorded worse performances—greater declines in years of decline and lesser increases in years of increase.

—For the second consecutive election (2002 being the previous one), the 11 early voting states (where the state creates convenience satellite locations for people to vote early—but not necessarily often) showed a small but positive impact on turnout. Turnout increased by an aggregate average of 7.2 percentage points in early voting states as opposed to 6.2 in the states without early voting.⁵⁷

- ◆ In a Canadian study (2003) of 151 elections in 63 countries, researchers found that turnout in countries with the option of mail-in or early voting was 10 percent higher than in those countries that did not have that option.⁵⁸
- ◆ Some voter advocates argue that making voting as convenient for the voter as possible easily trumps other considerations. Miles Rapoport of the advocacy organization Demos has written:

We have a quaint myth that it is a wonderful “civic exercise” to have one day (and a working Tuesday at that) where everyone goes to the polls. But the reality is democratic in form but undemocratic in content. Who remembers with any nostalgia racing to the bank on Friday afternoon and waiting in line for two hours to get cash for the weekend? And what if your employer won’t give you several hours off during the day? The real civic exercise is exercising the right to vote, and we ought to make that act as accessible as possible.⁵⁹

- ◆ From some press reports, it seems that at least some administrators favor early voting because they feel it is easier to service voters and process voting over a longer stretch of time, reduces the number of poll workers needed, and cuts long lines at the polls on election day. They also believe it may be the solution to declining voter turnout.
- ◆ Given the steady growth in the number of voters opting to vote early, it is reasonable to assume that some voters like this alternative, either out of convenience or because it helps reassure them that if there is a problem at the polls, there is time to rectify it.

PROBLEMS WITH EARLY VOTING

- ◆ Mail-in absentee ballots in particular are susceptible to fraud. As noted by the National Commission on Federal Election Reform, “Growing use of absentee voting has turned this area of voting into the most likely opportunity for election fraud

now encountered by law enforcement officials. These cases are especially difficult to prosecute, since the misuse of a voter's ballot or the pressure on voters occurs away from the polling place or any other outside scrutiny. These opportunities for abuse should be contained, not enlarged."⁶⁰

Concern about voter fraud through absentee ballots is bipartisan. Kansas secretary of state Ron Thornburgh, a Republican, said that people getting absentee ballots that do not belong to them represents a threat to elections. "The greatest potential for abuse in the state of Kansas in our election system right now is advance voting. We've got a situation where any person may return another individual's ballot," he commented in March.⁶¹

Georgia secretary of state Cathy Cox, a Democrat, told the *New York Times* in April that she had not heard of any cases of voters accused of fraud at polling places. Cox, however, said in the same article that stringent voter identification rules at polling places "opens the floodgates" to "already rampant fraud in absentee voting."⁶² According to Gary Bartlett, director of elections in North Carolina, "It seems like whenever there is hanky-panky in elections, it's usually through absentee voting."⁶³

If not amounting to outright fraud in all cases, recent newspaper reports detail numerous incidents of, at the very least, questionable handling of absentee ballots. The South Dakota Republican Party hired eight people to register voters and fill out absentee ballot applications. The state GOP has previously been accused of improperly notarizing absentee ballot applications.⁶⁴ Illinois officials began investigating allegations of voter fraud in January. The investigation centers on thirteen ballots cast from a boarding house in East St. Louis.⁶⁵ Questionable absentee ballots resulted in a New Jersey judge overturning two elections in Atlantic County. In the city of Passaic, New Jersey, three dozen voters claimed they had been victims of absentee ballot fraud in 2003.⁶⁶ One hundred twenty-two Colorado residents are under investigation for allegedly voting twice, once with an absentee ballot and again at a polling place. The incidents occurred despite the state's requirement that all voters present identification before casting ballots.⁶⁷ From 2000 to 2004, prosecutors brought criminal cases in at least fifteen states for absentee ballot fraud.⁶⁸

An unscientific but thorough Nexis search of incidents of voter fraud involving absentee ballots pulls up more than 120 stories just from the past six months. According to a Demos study of voter fraud, “Overall, the absentee mail-in ballot process is the feature most vulnerable to voter fraud within the decentralized, patchwork U.S. electoral system, at least in theory. This is not to say that there is a lot of evidence of absentee ballot fraud but rather that the potential for fraud is greatest in this area because of a lack of uniformly strong security measures in place in all states to prevent fraud.”⁶⁹

- ◆ It is not clear that early voting increases turnout. Indeed, an earlier Gans report published in September 2004 found that in 1992 and 2000—years when turnout increased nationally—states with early voting saw smaller increases in votes cast. In 1988 and 1996, the declines were larger where early and no-excuse absentee voting was available. A variety of research seems to support the idea that early voting does not really mobilize voters who would not otherwise vote, with the possible exception of states where there is heavy partisan mobilization.⁷⁰ Recent research by Martha Kropf and her colleagues in two battleground states finds that “early voters would be the individuals who would vote whether there was an option to vote early or not.”⁷¹
- ◆ It means voters are casting ballots on the basis of potentially radically different information: all sorts of information about the candidates might emerge, or critical events might occur, in the weeks and days just prior to the election. Indeed, it is conceivable that events might be manipulated by candidates or outside groups or individuals so as to influence different groups of voters at different times. In the worst-case scenario, a voter might be completely disenfranchised in a particular race because of early voting. In 2002, Senator Paul Wellstone of Minnesota died in a plane crash well after many absentee ballots had been submitted. Those voters were not permitted to change their votes or vote again. It also is not infrequent for candidates to drop out of the race close to election day, raising similar problems.

- ◆ It distorts the campaign process and adds some burdens and complexities to the work of parties and campaigns. Rather than focus “Get-out-the-vote” efforts toward one day, campaigns must engage in such efforts for weeks before election day. The 2004 race witnessed campaigns holding rallies and then busing supporters to early voting sites and delivering absentee ballots. Get-out-the-vote operations are time-consuming and expensive for any organization that engages in them, and prolonging that process only increases the costs. Finally, this constant and drawn-out concentration on voter turnout detracts from the discussion of issues and the merits of the candidates.
- ◆ In-person early voting may be more expensive for election officials to implement owing to the staffing and voting equipment changes necessary to administer elections on additional days. States considering these changes should closely investigate possible changes in cost.
- ◆ It detracts from the idea of having one day of collective, deliberative democracy. As Norman Ornstein has written,

Voting is one of the most precious privileges of a free society (as is the freedom not to vote). In America, individuals join their neighbors at a local polling place, underscoring their role as a part of a collective society, then go into a curtained booth to make their choices as free individuals. Every conceivable step should be taken to make the votes cast on Election Day easy to do—longer hours, ample poll workers and voting machines, easier registration, and so on. But we should not make voting the equivalent of sending in a Publishers Clearing House contest form.⁷²

It is not at all clear that the benefits of early voting outweigh the costs. We urge elections officials, elected leaders, and voters to consider carefully both the positive and negative implications of this voting option before further expanding its use.

NOTES

1. There is some evidence that election day registration (EDR) increases turnout. For example, Curtis Gans in his 2005 report writes, “The six states with election day registration had, as they have had for every close election since this reform was adopted, a better performance than the other states in the aggregate and this reform benefited the Democrats in 2004. The overall increase in turnout in election day registration states was an aggregate average 7.5 percentage points as opposed to 6.4 percentage points for states without it.” Curtis Gans, “Turnout Exceeds Optimistic Predictions,” press release, Committee for the Study of the American Electorate, Washington, D.C., January 14, 2005, available online at http://election04.ssrc.org/research/csae_2004_final_report.pdf.

According to Demos, 73.8 percent of all eligible voters in EDR states voted, compared with 60.2 percent of eligible voters in states without EDR—a difference of 13.6 percentage points; turnout in four of the six states with EDR led the nation: Minnesota (78 percent), Wisconsin (74.9 percent), Maine (72.6 percent), and New Hampshire (70.5 percent); Oregon, which employs a vote-by-mail system, had a turnout of 70.9 percent, making it the only non-EDR state to place in the top five. Turnout in “safe” states with EDR averaged 66.9 percent, compared with 58.5 percent in other “safe” states—a difference of 8.4 percentage points; “battleground” states with EDR averaged a 75.7 percent turnout, compared with 65.2 percent in other “battleground” states—a difference of 10.5 percentage points. The 13.6 percentage point turnout advantage for EDR states was significantly larger than the 8.2 point difference in turnout between “battleground” and “safe” states. See “High 2004 Turnout for States with Election Day Registration,” Demos, New York, January 10, 2005, available online at <http://www.demos-usa.org/pubs/EDR%20-%202004%20Election%20info%20sheet%20011005.doc>.

According to the U.S. Census Bureau, the six states with EDR had an average turnout of 68 percent in the 2000 election, nearly 10 points higher than the national average. See “Election Day Registration Helps America Vote,” Tools for Advocates, Demos, New York, Winter 2004, available online at http://www.demos-usa.org/pubs/EDR_-_Toolkit.lr.pdf.

2. See General Assembly of the State of New Jersey, no. 45, 211th Legislature, introduced March 7, 2005, Section 1 b. (5), available online at http://www.njleg.state.nj.us/2004/Bills/A0500/45_I1.PDF.

3. Recently enacted election reform legislation in New Mexico, originally Senate of the State of New Mexico, Bill no. 678, 47th Legislature, effective July 1, 2005, available online at <http://legis.state.nm.us/Sessions/05%20Regular/final/SB0678.pdf>, provides: “1-4-5. METHOD OF REGISTRATION—UNLAWFUL USE OF INFORMATION—PENALTY.—

A. A qualified elector may apply to a registration officer or agent for registration.

B. The registration officer or agent or qualified elector shall fill out each of the blanks on [the original and the voter’s copy of] the certificate of registration by typing or printing in ink. [Carbon paper may be used between the original and the voter’s copy.] The voter shall be given a receipt, which may be a carbon copy, for the original, and the registration agent shall receive a copy that omits the voter’s social security number and date of birth and which shall contain a number traceable to the registration agent or officer.” Pending legislation in Nevada, Assembly of the State of Nevada, Bill no. 455, 73rd Session, enrolled June 3, 2005, available online at http://www.leg.state.nv.us/73rd/bills/AB/AB455_EN.pdf, has a similar provision: “Sec. 33. NRS 293.507 is hereby amended to read as follows: 7 293.507.. 3. [A] Each form for an application to register to vote must include a [duplicate copy or receipt to]:

(a) Unique control number assigned by the Secretary of State; and

(b) Receipt which:

(1) Includes a space for a person assisting a voter in completing the form to enter his name; and

(2) May be retained by the applicant upon completion of the form.

4. “Urgent Alert: Elections Officials Reportedly Destroying Voter Registration Forms—Tips for Voter Registration Groups on Maintaining

Proof that Applications Were Turned in to Election Officials,” Advancement Project, Washington, D.C., n.d., available online at <http://www.advancementproject.org/votertips.pdf>.

5. Written testimony of Cherie Poucher, director of elections, Wake County, North Carolina, “Implementation and Use of Provisional Voting,” presented at a public hearing of the United States Election Assistance Commission, Columbus, Ohio, February 23, 2005, available online at <http://www.eac.gov/docs/columbus/Testimony%20-%20Ms.%20Cherie%20Poucher.pdf>.

6. “Electronic Poll Book Pilot Project Evaluation,” State Public Policy Group, Des Moines, December 2004, p. 9.

7. The trier of fact must be persuaded by the evidence that it is highly probable that the claim is true. The clear and convincing evidence standard is a heavier burden than the preponderance of the evidence standard but less than beyond a reasonable doubt.

8. Under Title 18 of the U.S. Criminal Code, chapter 9, section 1621, “Whoever—

- (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or
- (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.”

9. “Solution or Problem? Provisional Ballots in 2004,” Election Reform Briefing no. 10, Electionline.org, Washington, D.C., April 2005, available online at <http://electionline.org/site/docs/pdf/ERIP10Apr05.pdf>.

10. Ibid.

11. Many argue, nonetheless, that HAVA should be read in conformance with the National Voter Registration Act. Since the NVRA says jurisdiction

means the geographic area responsible for voter registration (usually the county), not the precinct or polling site, if the voter casts the ballot in the correct jurisdiction (the county) the vote should count for those races in which the voter was eligible to vote (e.g., president, senator). This was the view advocated by the National Commission on Federal Election Reform (the Carter/Ford Commission) before HAVA was passed.

12. "Solution or Problem? Provisional Ballots in 2004."

13. "Report from the Voters: A First Look at 2004 Election Data/Common Cause Agenda for Reform," Common Cause, Washington, D.C., December 2004, p. 3, available online at http://www.common-cause.org/atf/cf/{FB3C17E2-CDD1-4DF6-92BE-BD4429893665}/Report_to_Nation2.pdf

14. *Panio v. Sunderland*, 4 N.Y. 3rd 123, 791 N.Y.S. 2nd 57, 824 N.E. 2nd 488 (2005).

15. Testimony of the New York State Citizens' Coalition on HAVA Implementation on implementation of the Help America Vote Act before the Governmental Operations Committee, New York City Council, October 18, 2004.

16. "Continuing Failures in 'Fail-Safe' Voting: A Preliminary Analysis of Provisional Voting Problems in the 2004 Election," Demos, New York, December 7, 2004, pp. 2, 5, available online at <http://www.demos-usa.org/pubs/December%20PB%20Report%20Draft%2015.pdf>.

17. See, for example, Gabrielle Crist, "Unregistered Voters Tallied: Of Provisional Ballots Rejected, 55% Didn't Show Up on Records," *Rocky Mountain News*, November 19, 2004: "Pete Maysmith, executive director of Colorado Common Cause, expressed concern that some voters didn't show up on the registration rolls because of errors by election officials. 'Were those people really unregistered?' Maysmith asked. Jefferson County Clerk and Recorder Faye Griffin acknowledged that there might have been a small percentage of errors when the applications were input. 'There very well could have been some typographical errors,' Griffin said. However, she said, it was more likely election officials couldn't read the applicant's writing or that the applicant used a nickname instead of a legal name when filling out the form."; Diane Solov, "System to Blame for Ballot Debacle: Focus Shifts to Finding Solutions," *Cleveland Plain Dealer*, December 24, 2004, reporting that, in discussing the number of provisional ballots cast because voters did not appear on the registration list, the Cuyahoga County elections director said, "We know there is going to be clerical error in there that we can't account for. The question is, what is the acceptable level?"; Jeff Testerman, "Nearly 500 Provisional Ballots Don't Make Cut," *St. Petersburg*

Times, November 5, 2004, describing the case of a woman erroneously listed by the Board of Elections as deceased; William C. Hidlay, "A Precious Vote Denied (Almost) by a Typo," *Asbury Park Press*, November 3, 2004; John Strauss, Tom Spalding, and Jason Thomas, "'Dead' Voters Mistakenly Removed from Poll Lists," *Indianapolis Star*, November 3, 2004: "Marion County election workers mistakenly deleted more than 3,300 names from the list of registered voters this summer, thinking those people were deceased. Some were, but not all. And when 'dead' voters like 76-year-old Robert Glenn Johnson showed up at the polls Tuesday, they weren't happy. . . . The county Election Board heard from about 40 people in the same position Tuesday, Marion County Clerk Doris Anne Sadler said. They were allowed to vote after election workers realized they had been wrongly listed as deceased. . . . Besides the dead-voter mix-up, hundreds of other Marion County residents were left off the voter list because the registration forms used to sign them up were outdated. The Voter Registration Board later decided to accept the registrations, but not in time to include the names in the poll books sent to the precincts. Voters who were left off the list could finally vote after election workers consulted a separate list to make sure they were registered. 'We regret the error. It was an honest mistake,'" said LaDonna M. Freeman, the Voter Registration Board chief deputy.

18. See Colorado Statutes, Title 1, Article 9, part 3, 1-9-301, available online at <http://198.187.128.12/colorado/lpext.dll?f=templates&fn=fs-main.htm&2.0>.

19. The actual deadline was January 1, 2004, with an option for a waiver, of which most states availed themselves, until 2006.

20. *Voting: What Is, What Could Be*, report of the Caltech/MIT Voting Technology Project, California Institute of Technology and Massachusetts Institute of Technology, July 2001, p. 32, available online at http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf, cited Michigan's QVF as a best practice. *To Assure Pride and Confidence in the Electoral Process: Task Force Reports to Accompany the Report of the National Commission on Election Reform*, Miller Center of Public Affairs, University of Virginia, and The Century Foundation, New York, August 2001, p. 38, available online at http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/complete.pdf; Lori Minnite and David Callahan, "Securing the Vote: An Analysis of Election Fraud," Demos, New York, 2003, p. 33, available online at http://www.demos-usa.org/pubs/EDR_-_Securing_the_Vote.pdf, cites both Kentucky and Michigan as model states.

21. John Y. Brown III, “Commonwealth of Kentucky State Plan,” May 2003, pp. 8–11, available online at <http://sos.ky.gov/NR/rdonlyres/86ACE421-4864-46DC-9260-F149011ED78E/0/HAVAsateplanpdf.pdf>. All Kentucky information is taken from the state’s HAVA plan and e-mail correspondence with Sarah Ball Johnson, Kentucky elections director.

22. Terry Lynn Land, “Help America Vote Act: Michigan’s State Plan,” December 19, 2003, p. 4, available online at http://michigan.gov/documents/121903_Final_State_Plan_HAVA_for_Web_80959_7.pdf. Unless otherwise noted, all Michigan information is from the state’s HAVA plan or from “The Michigan Qualified Voter File: A Brief Introduction,” Department of State, State of Michigan, n.d., available online at http://www.michigan.gov/sos/0,1607,7-127-1633_11976_12001-27157--,00.html.

23. “Michigan Qualified Voter File (QVF) Presentation,” Florida Task Force on Election Reform, December 9, 2002, available online at <http://www.aamva.org/Documents/legMichiganQualifiedVoterFilePresentation122002.pdf>.

24. Phone interview with Timothy Hanson, director, Election Liaison Division, State of Michigan, April 2005.

25. Testimony of Wendy R. Weiser, associate counsel, Brennan Center for Justice at New York University School of Law, before the United States Election Assistance Commission, Boston, April 26, 2005, available online at <http://www.eac.gov/docs/boston/Weiser%20EAC%20testimony%2004-26-05%20v.2.pdf>.

26. Ibid.

27. Ford Fessenden, “Florida List for Purge of Voters Proves Flawed,” *New York Times*, July 10, 2004.

28. “Purged! How a Patchwork of Flawed and Inconsistent Voting Systems Could Deprive Millions of Americans of the Right to Vote,” American Civil Liberties Union, Right to Vote, and Demos, New York, October 2004, available online at <http://www.aclu.org/Files/OpenFile.cfm?id=16844>.

29. “Legislative Changes on Felony Disenfranchisement, 1996–2003,” Sentencing Project, Washington, D.C., September 2003, p. 9, available online at <http://www.sentencingproject.org/pdfs/legchanges-report.pdf>.

30. “Purged!”

31. Ibid. See also New York State Election Law, sec. 5-402 (2) (3).

32. In the early 1990s, the U.S. Department of Transportation estimated that 87 percent of the voting-age population had a driver’s license, and another 4 percent had a nondriver ID from their state department of motor vehicles. A Gallup poll in October 2000 found that 93 percent of Americans

have a driver's license. Therefore, between 6 and 10 percent of the voting age population do not have state-issued identification. "We have not been able to locate information about the characteristics of adults who lack driver's licenses but they probably parallel the characteristics of people who do not own automobiles: they are poorer . . . or urban" (*To Assure Pride and Confidence in the Electoral Process*). A 1994 Department of Justice study found that blacks in Louisiana were four to five times less likely than whites to have photo IDs. Spencer Overton, "Voter ID Supporters Lack Hard Evidence," *Atlanta Journal-Constitution*, April 8, 2005.

33. "Voter Identification," Election Reform Briefing no. 3, Electionline.org, Washington, D.C., April 2002, available online at <http://www.electionline.org/Portals/1/Publications/Voter%20Identification.pdf>.

34. Nancy Badertscher and Carlos Campos, "Picture ID Debate Gets Heated," *Atlanta Journal-Constitution*, March 13, 2005. Georgia has since passed this bill, and the governor has signed it.

35. Professor Lorraine Minnite of Barnard College, who has studied voter fraud extensively, says, "There are no reliable, officially compiled national or even statewide statistics available on voter fraud. Researchers working on voter fraud must construct their own datasets by culling information about allegations, investigations, evidence, charges, trials, convictions, acquittals and pleas from local election boards and local D.A.'s, county by county and sometimes town by town across the U.S. The task is painstaking which explains in part why nobody has done it yet. Such a dataset is desirable because hard data are persuasive, at least with reasonable people. On the other hand, I do not think the lack of such data means we can't observe patterns from the available non-statistical data and draw reasonable conclusions about the low incidence of voter fraud in U.S. elections today. Moreover, if fraud is such a persistent concern of those who run elections and a widespread cause for concern among a large number of voters who believe there is a great deal of fraud in elections, why don't government agencies responsible for election administration collect statistics on voter fraud? Some ID proponents argue law enforcement officials don't bother with voter fraud, they don't have the resources to do the investigations, they are under much more pressure to find the murderers, rapists and thieves who commit more serious crimes. I've interviewed elections officials and law enforcement people for my work on voter fraud who adamantly do not agree with this argument." E-mail correspondence with Lorraine Minnite, April 23, 2005.

36. Letter from Georgia secretary of state Cathy Cox to Governor Sonny Perdue, Atlanta, April 8, 2005, cited in a statement by Laughlin McDonald,

“Georgia House Bill 244: Why It Is Objectionable,” ACLU Voting Rights Project, Atlanta, April 26, 2005.

37. Some proposals in the states include the following: Alaska lawmakers are considering a bill that would specify mail ballots could not be forwarded (House of Representatives of the State of Alaska, Bill no. 94, 24th Legislature, enrolled May 15, 2005, available online at <http://www.legis.state.ak.us/PDF/24/Bills/HB0094Z.PDF>); Connecticut lawmakers are considering “greater accountability of campaigns to prevent violations of absentee voting laws” (General Assembly of the State of Connecticut, Bill no. 6669, 2005 Session, introduced February 9, 2005, available online at <http://www.cga.ct.gov/2005/fc/2005HB-06669-R000841-FC.htm>) and requiring anyone who assists a person in completing an absentee ballot application to sign the application as well (Senate of the State of Connecticut, Bill no. 1131, 2005 Session, introduced February 17, 2005, available online at <http://www.cga.ct.gov/2005/TOB/s/pdf/2005SB-01131-R00-SB.pdf>); in Illinois, a bill (General Assembly of the State of Illinois, Bill no. 2474, 94th General Assembly, introduced February 17, 2005, available online at <http://www.ilga.gov/legislation/94/HB/PDF/09400HB2474lv.pdf>) would require an election authority’s list of people who have received and returned absentee ballots to include the voter’s address; in Indiana, a bill (General Assembly of the State of Indiana, Senate Bill no. 15, 114th General Assembly, effective July 1, 2005, available online at <http://www.in.gov/legislative/bills/2005/PDF/SE/SE0015.1.pdf>) includes a number of absentee ballot security provisions, including affidavits for those who file absentee ballot applications for another individual, allows for challenges of applications, and requires those who deliver absentee ballots to voters to affirm “certain facts under penalty of perjury” along with new criminal penalties; Mississippi lawmakers rejected a bill (Legislature of the State of Mississippi, House Bill no. 390, 2005 session, introduced January 13, 2005, available online at <http://index.ls.state.ms.us/isysnative/UzpcRG9jdW1lbnRzXDIwMDVccGRmXGhiXDAzMDAtMDM5OVxoYjAzOTBpbj5wZGY=/hb0390in.pdf#xml=http://10.240.72.35/isysquery/irl3817/71/hilite>) that would have increased the penalties for some absentee ballot violations; New York lawmakers will decide on a bill that regulates the use of absentee ballots in nursing homes (Assembly of the State of New York, Bill no. 5847, 2005 Session, introduced March 1, 2005, available online at <http://assembly.state.ny.us/leg/?bn=A05847&sh=t>); Virginia lawmakers rejected a similar bill (General Assembly of the State of Virginia, House Bill no. 1351, 2004 Session, introduced January 22, 2004, available online at <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HB1351>); a bill in Washington’s legislature details what aspects of handwriting represent a signature match, including details

such as “letters tail off alike; letter spacing is the same; the space between the signature and the line is the same; the beginning and ending of the signature and the slant are consistent,” etc. (Legislature of the State of Washington, House Bill no. 1752/Senate Bill no. 5740, 59th Legislature, introduced February 3, 2005, available online at <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/House%20Bills/1752-S2.pdf> and <http://www.leg.wa.gov/pub/billinfo/2005-06/Htm/Bills/Senate%20Bills/5740.htm>).

38. “Vote by Mail Voter’s Guide,” Office of the Secretary of State, State of Oregon, 2000.

39. “Statement of Principles on Electronic Voting,” Leadership Conference on Civil Rights, Washington, D.C., February 17, 2004, available online at http://www.civilrights.org/issues/voting/electronic_voting_principles.pdf.

40. Testimony of Michael I. Shamos, Distinguished Career Professor, School of Computer Science, Carnegie Mellon University, at a hearing before the Subcommittee on Environment, Technology, and Standards, “Testing and Certification for Voting Equipment: How Can These Processes Be Improved?” U.S. Congress, House, Committee on Science, 108th Cong., 2nd sess., June 24, 2004, available online at <http://www.house.gov/science/hearings/ets04/jun24/shamos.pdf>.

41. “Securing the Vote,” Election Reform Briefing no. 7, Electionline.org, Washington, D.C., April 2004, available online at <http://www.electionline.org/Portals/1/Publications/Securing%20the%20Vote.pdf>.

42. Information provided by Thomas Wilkey, former executive director, New York State Board of Elections.

43. “Voting System Certification,” Web site of the Office of the Secretary of State, State of California, available online at http://www.ss.ca.gov/elections/elections_w.htm.

44. “Parallel Monitoring Program, California General Election, Tuesday, November 2, 2004: Report of Findings,” report prepared by R&G Associates LLC, Carmichael, Calif., for the Office of the Secretary of State, State of California, November 30, 2004, p. 1, available online at http://www.ss.ca.gov/elections/november2004_pmp_report.pdf.

45. *Ibid.*, p. 6.

46. Douglas W. Jones, “Testing Voting Systems,” Web-based tutorial, Department of Computer Science, University of Iowa, available online at <http://www.cs.uiowa.edu/~jones/voting/testing.shtml>.

47. “Recommendations of the Brennan Center for Justice and the Leadership Conference on Civil Rights for Improving Reliability of Direct Recording Electronic Voting Systems,” Leadership Conference on Civil Rights, Washington, D.C., and the Brennan Center for Justice, New York

University School of Law, June 29, 2004, available online at http://www.civilrights.org/issues/voting/lccr_brennan_report.pdf.

48. Jones, "Testing Voting Systems."

49. Ibid.

50. Testimony of Daniel P. Tokaji, assistant professor, Moritz College of Law, The Ohio State University, before the Committee on House Administration, U.S. Congress, House, 109th Cong., 1st sess., March 21, 2005, available online at <http://moritzlaw.osu.edu/electionlaw/analysis/050321a.htm>.

51. Nancy Benac, "Voters Quickly Cast Slew of Early Ballots," Associated Press, October 27, 2004.

52. "Early Voting Reaches Record Levels in 2004, National Annenberg Election Survey Shows," press release, Annenberg Public Policy Center of the University of Pennsylvania, March 24, 2005, available online at http://www.annenbergpublicpolicycenter.org/naes/2204_03_early%20voting%2023_23_05_pr.pdf.

53. Jim Drinkard, "Long Lines on Election Day Enhance Appeal of Early Voting," *USA Today*, November 18, 2004.

54. Note, however, that those states that intend to employ in-person early voting sites should establish standards for distribution of the polling places and voting machines, taking into account the types of considerations detailed in the voting systems section; as well, they should ensure equitable geographic placement of sites. The need for this precaution became abundantly clear in Florida in 2004, where originally there were disproportionately fewer early voting sites in heavily African-American counties. See, for example, Manuel Roig-Franzia, "In Florida, It Begins Anew: Early Voting Starts amid Shadow Left by 2000 Chaos," *Washington Post*, October 19, 2004.

55. Although the academic literature frequently treats in-person early voting and liberalized absentee ballot rules distinctly, many of the arguments for and against early voting apply to both.

56. However, this does not control for the battleground nature of the states, where more activity to mobilize pre-election day voters occurred.

57. Gans, "Turnout Exceeds Optimistic Predictions."

58. André Blais, Louis Massicotte, and Agnieszka Dobrzynska, "Why Is Turnout Higher in Some Countries than in Others?" Elections Canada, March 2003, p. 14, available online at <http://www.elections.ca/loi/tur/tuh/TurnoutHigher.pdf>.

59. Miles S. Rapoport, "The Democracy We Deserve," *American Prospect*, January 2005, available online at <http://www.prospect.org/web/page.wv?section=root&name=ViewPrint&articleId=8963>.

60. *To Assure Pride and Confidence in the Electoral Process.*
61. Tim Hrenchir and Liz Montano, "Mail Ballot Mix-Up Illustrates Potential Flaws," *Topeka Capital-Journal*, March 31, 2005.
62. Ariel Hart, "Georgia Lawmakers Pass Demand for Voter Photo ID," *New York Times*, April 1, 2005.
63. Michael Moss, "Absentee Votes Worry Officials as Nov. 2 Nears," *New York Times*, September 13, 2004.
64. David Melmer, "Voting Problems Resurface in S.D." *Indian Country Today*, October 25, 2004.
65. "St. Clair Prosecutors Join Feds in Investigating Voter Fraud," Associated Press, January 6, 2005.
66. Bob Ivry, "Absentee Ballot Abuse Is Difficult to Forestall," *Bergen County Record*, October 4, 2004.
67. Susan Greene and Karen E. Crummy, "Voter Fraud Probed in State: Double Dippers, Felons Targeted," *Denver Post*, March 24, 2005.
68. Moss, "Absentee Votes Worry Officials."
69. Minnite and Callahan, "Securing the Vote: An Analysis of Election Fraud," p. 26.
70. See Robert Stein, Chris Owens, and Jan Leighley, "The Role of Candidates and Parties in Linking Electoral Reforms with Voter Participation," paper presented at the 61st Annual National Conference of the Midwest Political Science Association, Chicago, April 3–6, 2003.
71. Martha Kropf et al., "Pursuing the Early Voter: Does the Early Bird Get the Worm?" paper presented at the 2003 Northeastern Political Science Conference, Philadelphia, November 6–8, 2003. In fact, the evidence suggests it is likely that early voters are those who would vote anyway. That is, early voting has a convenience effect rather than a mobilization effect. Research finds those who are more highly educated and older actually vote early at higher rates (John Mark Hansen, "Early Voting, Unrestricted Absentee Voting, and Voting by Mail," in *To Assure Pride and Confidence in the Electoral Process*), as do strong partisans (Grant W. Neeley and Lilliard E. Richardson, Jr., "Who Is Early Voting? An Individual Level Examination," *Social Science Journal* 38, no. 3 [Autumn 2001]: 381–92; Robert M. Stein, "Early Voting," *Public Opinion Quarterly* 62, no. 1 [Spring 1998]: 57–69). However, some studies find very few other demographic differences between the groups (Neeley and Richardson, "Who Is Early Voting?").
72. Norman Ornstein, "Early Voting Necessary, but Toxic in Large Doses," *Roll Call*, September 22, 2004.

