

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.