

NATIONAL, STATE, AND LOCAL ELECTION REFORMS: WHICH OPTIONS WILL RESTORE CONFIDENCE IN THE PROCESS?

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"Where's My Vote? Lessons Learned from Washington State's Gubernatorial Election"

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What Happened in 2004

Americans know the 2000 election was a fiasco. Here in Washington you know it was also pretty problematic this year, but most Americans are not aware that the 2004 election, in many ways, might have been even worse than 2000. The purported margin of victory in November has led many to believe that the process went relatively smoothly. But the *appearance* of a smooth election concealed a range of troubling developments ranging from simple human errors to likely felony violations of federal law.

When Congress passed the Help America Vote Act (HAVA) in 2002, Americans rightly believed it represented a step forward in improving our broken voting process. We now realize that the combination of flaws and gaps in that law and a highly charged campaign season led in many ways to *more* obstacles to voting. In fact, had the popular vote been closer in just one state, 2004 could have been a legal battle that would have made 2000 look like a court hearing for a traffic ticket.

I am going to go through some of the major problems that occurred in the 2004 presidential election across the country, and then talk about some proposed reforms to address them.

Voter Registration

It was made an even bigger barrier to participation this time, with elections officials using various technicalities to keep people off the rolls.

For example, HAVA required that mail-in voter registration forms include a check-off box verifying that the voter is a U.S. citizen. Registration forms already include language above the signature line requiring the applicant to affirm his citizenship, making the new citizenship box redundant.

The Century Foundation conducts public policy research and analyses of economic, social, and foreign policy issues, including inequality, retirement security, election reform, media studies, homeland security, and international affairs. The foundation produces books, reports, and other publications, convenes task forces, and working groups and operates eight informational Web sites. With offices in New York City and Washington, D.C., The Century Foundation is nonprofit and nonpartisan and was founded in 1919 by Edward A. Filene.

Nonetheless, some election officials last year decided to reject the registrations of thousands of people who signed the affirmation but failed to check the citizenship box. As a result, in Florida for example, thousands of registrations were rejected and those voters were disenfranchised. This practice proved particularly detrimental to African Americans, who bore a disproportionate share of the rejections, according to a *Washington Post* analysis.

Other technicalities were invoked to disqualify voter registration forms. Most notorious was a directive from Ohio's Secretary of State that all voter registration forms be on eighty-pound paper stock, because lightweight cards could be shredded by postal equipment. This meant if someone downloaded a registration application from the Board of Elections website and submitted it, that registration had to be rejected.

Voter Identification

HAVA states that beginning in 2003, first-time voters who register by mail must present identification -- a current and valid photo ID, utility bill, bank statement, or government document with name and address -- either when registering or when voting.

Advocates of ID requirements argue they are necessary to prevent fraud. Civil rights advocates, meanwhile, argue such requirements chill the exercise of voting rights, and especially burden minorities, the disabled, young people, and the poor, who too often lack driver's licenses or other forms of identification.

Some state legislatures saw this new HAVA provision as an opportunity to go even further in requiring ID from voters. As a result, seventeen states now have laws that require *all* voters -- not just new ones -- to show identification at the polls. According to electionline.org, four of these states require voters to show *photo identification*. Indiana and Georgia are both poised to pass legislation now that would require every voter to present government issued photo identification at the polls, and several other states are contemplating similar measures, including Arkansas, California, Iowa, New Hampshire, and Wisconsin.

The other big trend is toward requiring people to prove their citizenship in order to register to vote. Last year, Arizona passed Prop 200 which requires voter registration applicants to provide proof of citizenship and requires all voters at the time of voting to present identification. Other states are now looking at this.

Provisional Ballots

The 2002 election reforms under HAVA included an important new protection: The right to cast a "provisional" or paper ballot that would be counted once elections officials could confirm its validity after the election. This was designed to avoid a repeat of the terrible scenes 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 -- some ongoing -- disputing when provisional ballots should

be used -- for example, should they be given if a voter was flagged for needing to present identification and the voter didn't bring it? And under what circumstances should they be counted – for example, what if the provisional ballot was cast in the wrong polling place or if the voter had requested an absentee ballot?

Specifically under HAVA, the right to cast a provisional ballot and to have it counted depends on being a registered voter in the *jurisdiction*. However, several state elections officers ordered counties to reject provisional ballots cast in the wrong polling place, and/or “precinct.” In some cases that meant if there was more than once “precinct” in a school gymnasium, as is the case in urban areas, going to the wrong desk in the gym meant your vote was thrown out.

According to electionline.org, 28 states threw out provisional votes cast in the wrong precinct—even with respect to selection of candidates for statewide offices such as governor or U.S. senator.

In the end, in 2004, over 1.6 million provisional ballots were cast and nearly 1.1 million, or 68 percent, were counted. However, the number of provisional ballots cast and counted varied wildly throughout the country. For example, the percentage of provisional ballots counted ranged from a national high of 97 percent in Alaska to a low of 6 percent in Delaware.

Whether the state counted ballots cast in the wrong precincts did make a difference. In the 18 states where ballots were counted if cast in the wrong precinct, 70 percent of them were counted. In the 25 states that did not count such ballots, 60 percent were included in the vote count.

Machines

Although worries about the security and accuracy of electronic voting machines were the focus of pre-election anxiety, the biggest machine problem on Election Day ended up being simply the *number* of machines employed. In many places, voters had to wait in line for up to 5, 6 or even to *10 hours*. Notably, the distribution of voting machines within states and even within counties varied widely.

In the months leading up to the election, a coalition of computer scientists, politicians and members of the public raised great alarm about the possibility that new computer voting machines were vulnerable to hacking, manipulation, or malfunctions. Many called for a voter-verifiable paper trail for these machines so voters could double-check their computer vote, and elections officials could do a manual audit. But only Nevada managed to implement this technology in time

The security and effectiveness of the computer machines remains a huge question mark, and remained a huge subject on the Internet in the election aftermath. Many activists argued that in fact it was quite possible that the election was stolen through manipulation of the voting machines. Many academics disputed this.

Unquestionably, there were a great number of problems with those machines on Election Day, including a number of allegations of voter's choices being switched by the computer. Most important perhaps was the nearly 4,000 votes computer machines mistakenly gave to Bush in suburban Columbus, Ohio. As of now, only two states will require a voter verifiable paper trail

by 2006, but many states are considering doing so, and there is federal legislation pending that would require all computerized voting systems in the country to have a voter verified paper trail.

Just as damaging as the growing mistrust of the computer systems was the backlash against them. States and localities that planned to get rid of punch card ballot machines – which we know are more prone to losing votes, especially African American votes – stopped in their tracks. Tens of millions of voters, including many in key battleground states, used punch-card ballots in this election. The Columbus Dispatch reported that 76,000 votes were lost by punch card machines in Ohio in the 2004 election.

Purges

In most states, felons are not allowed to vote and even after they have fully served their time, many states make it prohibitively difficult to regain voting rights -- hence the need for “felon purge lists.” Even after the state was charged with enormous malfeasance in this area in 2000, this year Florida was forced to withdraw its purge list after news media investigations revealed that the list included thousands of people who, as in 2000, were eligible to vote. Moreover, the felons list of ineligible voters provided by the state would have disqualified 22,000 African Americans (likely Democrats) and only 61 Hispanics (likely Republicans).

Challenges

For the first time this year, we saw the aggressive use of previously obscure rules allowing for “challenges” of a person’s right to vote. In Ohio, GOP officials preemptively challenged 35,000-plus new registrants before Election Day—in mainly Democratic and minority communities--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 hire people to go to the polls in a number of states on Election Day and challenge the rights of pre-selected registrants to vote.

Vote Suppression

Intentional efforts to block certain groups from voting have an ugly history in this country. Such activities reemerged in this election.

In Nevada, a private voter registration company funded by the Republican National Committee had its employees rip up and discard forms filled out by Democrats – a potential crime. And in Wisconsin, a flyer purportedly from the “Milwaukee Black Voters League” was distributed in Milwaukee’s African American neighborhoods. It read:

SOME WARNINGS FOR ELECTION TIME

IF YOU’VE ALREADY VOTED IN ANY ELECTION THIS YEAR YOU CAN’T VOTE IN
THE PRESIDENTIAL ELECTION.

IF YOU'VE EVER BEEN FOUND GUILTY OF ANYTHING, EVEN A TRAFFIC VIOLATION YOU CAN'T VOTE IN THE PRESIDENTIAL ELECTION.

IF ANYBODY IN YOUR FAMILY HAS EVER BEEN FOUND GUIULTY (SIC) OF ANYTHING YOU CAN'T VOTE IN THE PRESIDENTIAL ELECTION

...IF YOU VIOLATE ANY OF THESE LAWS YOU CAN GET TEN YEARS IN PRISON AND YOUR CHILDREN WILL BE TAKEN AWAY FROM YOU.

According to local media reports, Pennsylvania officials received calls regarding leaflets on "official" county letterhead in a Pittsburgh mall. They said that "due to immense voter turnout expected Tuesday," Republicans should vote on Tuesday, November 2, and Democrats should vote on Wednesday, November 3. And in Lake County, Ohio, some voters received an "Urgent Advisory" on fake Board of Elections letterhead that any voter registered through the Kerry campaign, America Coming Together, or the NAACP could not vote.

Remedies

What is happening in the process:

- Conyers bill, Clinton bill, Dodd bill, McConnell/Bond bill, Holt bill
- Much activity in the states, most predominantly on voter ID, early and absentee voting, and setting up statewide voter registration databases by the end of the year, as required by the 2002 HAVA. It is highly questionable whether some states will be able to meet HAVA's 1/1/06 deadline for voting machine replacement and databases. It is unclear what will happen to states that don't make it.
- Litigation is ongoing regarding the presidential election
 - There are two ongoing cases in Ohio regarding counting of provisional ballots
 - Numerous lawsuits regarding electronic voting machines are still pending
 - The litigation regarding the standards used for the recount in Ohio continue
 - Litigation regarding the rejection of registration applications for failure to check the citizenship box continues in Florida
- Our working group
- Carter-Baker

Substantive Recommendations

Databases

Along with machine replacement, setting up and running statewide voter registration databases is the immediate challenge states face, and it may be the most important reform required by the

Help America Vote Act. The hope has always been that centralizing lists at the state level and computerizing them would mean more accurate rolls – diminishing wrongful disenfranchisement and fraud at the same time. A great statewide database might even have averted a few of the problems Washington State had this year, and from what I understand, your elections officials are moving in the right direction by focusing on this.

Done right, statewide databases have a number of potential advantages:

- As is planned in Washington, 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 tend to be marginalized, 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 quickly changing registration information for voters who move within state.
- The potential for fraud is reduced by deleting dead voters from the rolls by expediting the flow of information from health and vital statistics departments, as will be likely the case with Washington's future database.

Verification

The concern with respect to the databases right now is whether the process of matching up voter registration applications and felon lists with the information in the databases will be done fairly and effectively. If there are mistakes made in shifting people on or off the database, many people could find themselves inadvertently disenfranchised.

- When computer verification find records that match some but not all voter information, these “near matches” should be audited for transposed characters, inverted names, or other frequent errors. And if the match is what we call “substantial” but not 100% it should still be deemed a successful verification. For example, if an Asian registrant has transposed the order of her surname and family name, which is common, it should still be a good match. If someone copies down one number wrong from their drivers license but everything else matches up, that should be a successful match

Voter Registration

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 must be clear and easy to comply with. It is therefore incumbent upon states and election administrators to make the voter registration form as simple as possible and keep errors that will disqualify a registration application to a minimum.

- When processing voter registration forms, registrants should be presumed to be an eligible voter and processed accordingly.

- At the same time, states need to provide clear rules for what missing or incorrect information will be a basis for disqualification and the need to correct or amend. Among the most important omissions that should not disqualify a registration form are:
 1. Social Security or Drivers License number. Under HAVA, registration forms now require these numbers, but if it is left blank, the state must assign the voter a unique identifier.
 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 will not be deemed a material omission.

- OPTIONAL: Registration forms collected by third parties should be considered in-person, not mail in registrations for the purposes of identification requirements. The rationale behind exempting people who register personally from identification requirements is that a face-to-face exchange provides a certain indicia of reliability that simply sending something in the mail does not. This increased trustworthiness is present regardless of where or with what particular individual the exchange takes place.

For states that already have established in law that such forms are to be considered mail-in registration forms, I suggest the following strategy: provide members and volunteers for third party organizations the opportunity to be trained and certified by the local board on the handling of registration forms such that they will qualify as and be deemed an official registrar. Any registration form collected by such temporary registrars should be considered in-person registration forms for the purposes of identification requirements.

Provisional Ballots

Counting

- The most important point with respect to provisional ballots is that it is necessary for state legislatures to clarify the standards for evaluating and counting provisional ballots and to do so in advance of the election, so that there is no uncertainty about when they count and when they do not, and thus little or no chance for variation in the treatment of provisional ballots county to county that might raise a new *Bush v. Gore* issue.
- If the voter casts the ballot in the correct jurisdiction (the county), even if it was the wrong polling place or precinct, the vote should count for those races in which the voter was eligible to vote (e.g. president, senator).

There are so many reasons a voter might show up at the wrong polling place through no fault of their own. Often, voters are never successfully notified by the board of elections where to go to vote or are never notified that their poll site has changed, which can sometimes happen even at the last minute. Just one of the many national voter hotlines set up during the weeks before election day, 1-866-myvote1, received 100,000 phone calls from people trying to find out where they were supposed to vote.

Moreover, under HAVA, the right to cast a provisional ballot and to have it counted depends on being an eligible, registered voter in the jurisdiction. As defined by the motor voter bill, jurisdiction means the geographic area responsible for voter registration (usually the county), and not the precinct or polling site. HAVA is to be read in conformance with NVRA. Therefore, the standard for counting provisional ballots should be in accordance with that law: if the voter casts the ballot in the correct jurisdiction (the county) the vote will count for those races in which the voter was eligible to vote (e.g. president, senator).

Voter Identification

- There is no clear justification for the expansion of voter ID at this time. The arguments put forth by both parties – the security argument by Republicans and the intimidation and disenfranchisement argument put forth by Democrats lack any evidence in either prosecuted cases of voter fraud or in a diminishing turnout among voters in those groups considered to be most likely to be impacted by voter ID. Much more study is required.
- The status quo established by HAVA should be kept in place until the required statewide voter registration databases are in place nationwide. The HAVA requirements for voter ID are sufficient. The addition of databases and the requirements for many new voters to provide identification upon registering should adequately guard against fraud.
- States that already require every voter to show identification should provide valid ID free of charge to all voters so as to reduce obstacles to voting.
- Here's what we do know about ID: We do know that one study by the The National Commission on Federal Election Reform found that 6 to 10 percent of the existing American electorate lacks any form of state ID. A 1994 Justice Department study found that blacks in Louisiana were four to five times less likely than whites to have photo IDs.
- I would like to also point out that 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 the *mail* provides the best opportunity for those seeking to undermine the election process and commit fraud on a much larger scale. By contrast, there is a good deal of anecdotal evidence suggesting polling-place voter fraud is exceedingly rare.

For the individual voter, voting fraud is a high risk/low reward strategy. A voter who pretends to be someone else risks prosecution for a felony if he or she is caught. On the other hand, the rewards for the individual who engages in fraud are meager. The secret ballot – which makes it impossible for outsiders to confirm who someone voted for at the polls – makes it very difficult to mount any successful scheme of widespread fraud, without enormous risk.

- As Professor Spencer Overton of George Washington School of Law has also pointed out, political leaders and voters must think about balancing values. He argues, “If only

0.01 percent of votes cast are fraudulent, for example, adopting an ID requirement that reduces legitimate voter turnout by 5 percent hurts democracy.

Voting Systems

- Huge disparities in the number of voting machines in different places are not only unfair; it might even present an Equal Protection problem under *Bush v. Gore*. Being asked to wait on line for 5 to 10 hours is tantamount to disenfranchisement for many working people. As a result, states and localities need to reassess their voting systems needs and base the number of machines deployed on election day to the number of registered voters in the jurisdiction as of the latest possible count, among other relevant factors regarding the makeup of the electorate in that jurisdiction.
- It is wrong that different voters, depending on where they live, use voting machines of widely varying accuracy and efficacy. This too is now a potential constitutional question, in light of *Bush v. Gore*. Therefore, all voting systems, no matter what the type, ought to be required to meet a federally mandated “residual vote benchmark”

Vote Suppression

- Criminal laws for disseminating false information about an election, obstructing an election, or destroying or altering voter registration applications should be enforced more vigorously and penalties heightened. The Department of Justice, which deploys hundreds of monitors on Election Day, needs to beef up its response to these types of activities.

Conclusion

I think in the long run the Help America Vote Act will have gone some way to improving the elections process. Clearly, further reforms need to be made. However, at the end of the day, elections are run by people. And whether they are secretaries of state, election officials, poll workers, advocacy organizations or voters, we all need to take responsibility for making our elections accessible and fair, and making our democracy work the way we know it can and should.