

Federal Election Reform: Advances Made, but Much More Work to Do



By Tova Andrea Wang

Tova Andrea Wang is Program Officer and Special Counsel at The Century Foundation and was on the professional staff of the National Commission on Federal Election Reform. The following remarks were made at The Election Law Summit on June 24, 2002 in Washington, D.C. In her comments, she praised efforts made so far to improve our voting system, but called for more steps to be taken to ensure equal, fair and accurate elections in the future.

The National Commission on Federal Election Reform, chaired by former presidents Carter and Ford, formed in early 2001 and met through the summer of that year. The Commission presented its final report and recommendations to President Bush in a Rose Garden ceremony in the summer of 2001.

Recently, both the House and the Senate passed significant election reform legislation. Many of the Commission's recommendations were incorporated in some fashion in both of those bills. For example, both bills require states to have a statewide voter registration system; require every state to have provisional voting; have measures for keeping the number of votes lost in elections to a minimum; and require that voting systems have the capacity to allow the voter to check his or her vote, verify it, and change it if desired, before it is cast.

There were some additional recommendations that the Commission made that were not incorporated into the bills but are worthy of our further consideration.

Making Election Day a federal holiday

While many contend, probably legitimately, that this would not increase turnout, it would be beneficial in other ways. First, it would be helpful to working people, especially busy working parents. Moreover, more public buildings, especially schools, would be available to use as polling places. Lack of poll sites is a prevalent problem for election administrators. More poll workers, from different walks of life, would be available, thus ameliorating the massive problems of recruiting sufficient numbers of poll workers and poll workers who do not show up. Finally, it would enable expansion of programs that allow high school and college students to work at polls.

Felon rights

Although federal legislation in this area has been introduced by Representative John Conyers, many argue that this is a matter constitutionally under state control. In either case, it is an important issue to raise.

3.9 million US citizens are unable to vote in federal or state elections because of felon disenfranchisement. This includes 1.4 million who have completed their sentences. Almost one-third are African Americans. Felony disenfranchisement laws currently disqualify 13% of African American males from voting. This has particularly become a problem with the expansion of the number of crimes considered felonies. This includes not only many drug convictions; in some states, a conviction for writing one bad check can result in disenfranchisement.

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There is little sense in these laws, particularly the ones that apply to people who have already served their time. Continuing the ban post-release sends the message that this person is permanently outside of and a pariah in our society. By contrast, allowing ex-felons the right to vote would be a means for them to be re-integrated into their communities and the law abiding, civic-minded American social fabric.

Five minutes per night of free TV air time for candidates and voter education

Most recommendations in this regard have focused on giving free airtime to candidates. I would stress the part of the recommendation that refers to free air time for voter education messages not on the issues, the candidates, or even the importance of voting, but rather how to vote on the voting system in the voter's local area. For anyone who believes in the premise that the airwaves belong to the public and television has been given huge financial subsidies based on it acting in the public interest, the rationale for this is more compelling than that for giving candidates time.



There are also a number of other proposals that should be thought about as we go forward with federal election reform. Here are a few examples.

- **Effectively addressing the residual error rate problem**

After the 2000 presidential election, the public was outraged that so many people's votes were "lost" and never counted in the election. At first this only focused on Florida, but subsequent reports made it clear that votes disappeared in the system all over the country.

For example, the MIT-CalTech study published shortly after the election reported that an estimated 1.5 million people—1.5 percent of voters—thought they voted for President when in fact their votes were not counted. Sometimes this was because the machines recording and/or counting the ballots did not work as they should. But for the most part, little of this vote loss was about a problem with the machines themselves.

Voters fail to properly complete their ballots and end up having their vote discarded in a variety of ways. The experience with the notorious punch cards is illustrative. Some voters pushed in the chad indicating a vote, but didn't push it far enough. Elsewhere, because of the way the ballot was designed (for example, the infamous "butterfly ballot"), voters mistakenly voted for two candidates for the same office. In other cases, multi-page ballots and confusing voting instructions caused voters to fail to register their votes as intended. Many voters across the country experience problems voting properly because they are visually impaired or disabled or do not speak English, and the methods by which they vote are not equipped to meet their needs. Poorly trained poll workers sometimes give voters the wrong instructions on how to properly vote, leading to vote loss. A small percentage of voters intentionally do not vote for an office at the top of a ballot – about three-quarters of 1% of voters. The combination of votes lost due to mechanical errors and the mistakes of voters are called "residual ballots."

Both the bill that passed the House of Representatives (HR 3295) and the bill that passed the Senate (S 565) acknowledge the problem of lost votes, but they deal with it in different ways. The House bill provides that states that receive funds from the federal government must establish a uniform statewide benchmark for voting system performance expressed as a percentage of residual votes in the contest at the top of the ballot, and requires local jurisdictions to report relevant data. In other words, the bill makes it a condition of funding that states establish a benchmark for what is an acceptable rate of lost votes.

As a result, the House bill does not require states to meet any standard for number of votes lost. It merely requires them to set a benchmark expressing what might be considered acceptable and that local jurisdictions report their error rates. It does not require the state to meet that benchmark, does not penalize states in any way for not achieving their own goals, and does not demand any particular

action by the state should local jurisdictions fall short. Moreover, the penalty for not even so much as setting such a state benchmark is loss of grant money.

The Senate bill makes it a requirement – not a condition for funding – that a state’s error rate not exceed standards established by the Federal Election Commission. However, the Senate bill states that the error rate should be “determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter.” The Senate bill explicitly only counts votes lost through mechanical means in establishing the appropriate federal standard. It does not include votes that are due to problems the voter experiences as detailed above.

The most effective way to address this grave problem is to utilize a standard that addresses both ways in which voters are potentially disenfranchised by the voting system: (1) votes discounted due to mechanical errors of the voting system, and (2) voting systems that cause ballot spoilage by the unintentional action of the voter. In other words, voter error rate standards must be set according to a maximum level of “residual” ballots—overvotes (votes for more than one candidate), spoiled or uncountable votes, and undervotes (no vote is recorded) for the first item appearing on the ballot. Using the “residual vote” as the basis for the error rate is the only way to effectively assess whether the voting process as a whole is giving citizens an equal opportunity to have their vote counted.

At the same time, because of their expertise and on-the-ground involvement, state and local elections officials should play a prominent role in determining what the federally mandated benchmark ought to be now and in the future.

It is also preferable to make the rate standard a federal mandate. State and local elections officials as well as some members of Congress oppose such a federal requirement because they believe state and local governments have primary responsibility for carrying out election administration, and have the practical knowledge necessary to make the appropriate improvements.

However, these arguments are not sufficiently persuasive when it comes to lost votes. First, it is constitutionally required that all votes be counted equally. Geographic disparities in the number of votes it is acceptable to lose are untenable. Moreover, it ought to be a matter of national concern, for all Americans, that no matter where one lives, one’s vote is counted.

Historically when it comes to voting rights, states have resisted any federal involvement. Too often in the past this meant massive disenfranchisement. This is one matter which is just too important to our democratic process to leave to the vagaries of local control.

Moreover, disparities in residual ballot rates are a civil rights issue. The U.S. Civil Rights Commission found in Florida rates of residual ballots as high as 20 percent or more in some heavily black precincts, compared with two percent and less in white precincts. Independent analyses by researchers and the media found the same results. The disproportionate loss of votes in poor and minority communities violates the principles of the Voting Rights Act and the Equal Protection Clause and thus requires the Congress to act.

▪ **Voter Education—Sample Ballot Requirement**

As I have pointed out, it isn’t necessarily the machines that failed during the 2000 election. It was primarily the inability of the voters to use those machines properly. As an analyst for the Florida Division of Elections put it, "Human error is the biggest threat to the integrity of any voting system. Even with your crudest systems, if the human does everything they're supposed to, that system will work."

Voter education on how to vote, such as by providing them with an actual sample ballot in advance of the election, with voting instructions, is therefore one of the most important and meaningful reforms we can institute to ensure every vote counts. This was in the original senate bill but is not in the one that passed.

The effectiveness of measures aimed at instructing the voter on how to vote properly on the mechanism at hand was demonstrated in Los Angeles last year. While the national residual vote rate for the type of punch card ballot machine L.A. uses is 3 percent, in Los Angeles in 2000 the rate was 2.4 percent. However, in the 2001 mayoral election, the city dramatically reduced the lost vote rate of the punch card ballot machines, especially among minority voters.

California already had in place a comprehensive voter education program that required administrators to mail voters sample ballots and detailed voting information. Los Angeles went beyond this in 2001 to specifically address voting on punch card ballot machines. Sample ballots contained an "All about chad" section. There were Internet pages and clever anagrams on sample ballots. The city launched an extensive public relations campaign, complete with a "Got chad?" slogan borrowed from the milk industry. Chad information was posted in seven languages inside booths. Poll workers warned voters to punch their ballots all the way through.

Here were the results:

- The overvote rate in the mayoral race was approximately half the rate of the 2000 presidential election
- The undervote rate was 43 percent lower than the presidential election
- 90 percent of predominantly Black and Latino voting precincts saw their residual ballot rate decline between the 2000 presidential election and the 2001 mayoral election

Similarly, in the Miami mayoral election of 2001, elections officials also took extra measures to avoid the embarrassment of the 2000. For example, in the first round of voting, in addition to regular poll workers, each polling site had a "tutor" to demonstrate how to use the punch card machine properly. Citywide only 2.7% of the mayoral vote was thrown out as spoiled, half of what the rate was in the presidential election. However, spoiled ballots remained pervasive in the same counties that had the biggest problems in 2000. In the five precincts where more than 9% of the votes for mayor went uncounted, all were predominantly low-income, black neighborhoods.

Due to the closeness of the election, a runoff was held. This time every poll worker was given a script to read to voters telling them they could not vote for more than one candidate and reminding them to check their ballots for hanging chads.

That one added measure – a measure that increased the amount of information provided to voters – made a huge difference. This time, *The Miami Herald* reported, only 1.28% of ballots were discarded because of overvoting or undervoting, citywide. Even more encouraging was that in the five precincts with the highest number of uncounted ballots in the first election round, where spoilage rates were between 9% and 15%, the rates plummeted to between .29% and 2.7%.

▪ **Election Day Registration**

The one mechanical (rather than political or sociological) fix we can implement to increase voter participation is to allow eligible citizens to register and vote simultaneously on Election Day. Six states that allow people to register and vote at the same time on election day, and the state that has no voter registration at all, North Dakota, consistently have among the highest turnout rates in the country. Four of the six states with voter turnouts at least 10% higher than the national average in the 2000 election had Election Day registration. States that have EDR have had a 3 to 6 percent increase in voter participation. Moreover, EDR would make participation easier for people who move to a new jurisdiction, especially those who do so after the cut-off date for registration.

Registration and Turnout in the 2000 General Election

| | <u>Registration</u> | <u>Turnout</u> |
|------------|---------------------|----------------|
| EDR States | 88.8% | 65.6% |

| | | |
|----------------|-------|-------|
| Non-EDR States | 77.3% | 50.5% |
|----------------|-------|-------|

Opponents of EDR argue that it will increase the opportunity for fraud. For example, they claim that voters can go from precinct to precinct registering to vote and voting. However, the six EDR states have not experienced much fraud and measures can be taken to prevent it. For example, such fraud should be made a felony with stiff penalties and be vigorously enforced. Moreover, administrators can check for duplicate registrations. EDR might actually reduce fraud by putting the registration process back into the hands of local administrators, as they have expressed the desire for. Finally, with the increased use of statewide computerized voter registration systems and reasonable in-person identification requirements, fraud can be avoided.

Election administrators also are concerned that EDR would be an administrative nightmare. Implementing EDR would clearly necessitate improvements in poll site operations and workers, meaning a greater investment of resources, but with that caveat, the administrative burdens are not unmanageable. Perhaps as important, EDR will greatly reduce the incidence of voters turning up at the polls to find that their registration applications have not been properly processed and they cannot vote. This was one of the most prevalent problems in the 2000 presidential election.

As a follow up to the National Commission on Federal Election Reform's report, The Century Foundation commissioned four authors to study and report on how the election administration system fared in 2001 in four major elections – the mayoral contests in LA and NYC and the gubernatorial elections in VA and NJ. Here is a preview of just two of the interesting findings that will emerge from those forthcoming reports.

In the elections that we analyzed, Los Angeles and Virginia fared considerably better than New Jersey and New York City with respect to spoiled ballots. Although Los Angeles widely used the notorious punch card ballots, as mentioned, the city initiated an intensive voter education program in the wake of the 2000 experience, and succeeded in reducing the number of residual ballots in the 2001 mayoral election to just around 1 percent, down from the national average of about 2 percent the previous year. Virginia, which already had an uncounted ballot rate below the national average in 2000, also cut that level in half in 2001, largely by instituting new technology that enabled voters to verify and correct their ballot choices if necessary, even if they used punch card systems.

New Jersey's residual ballot rate, which was around the national average in 2000, actually increased slightly in 2001, despite the elimination of the punch card ballot machines remaining in the state. In fact, the residual ballot rate actually went up in one of the two counties that got rid of their punch card ballot machines

Thus, the data collected on the 2001 elections reinforces my argument that the type of voting machinery employed is not necessarily the most significant factor affecting the rate of spoiled ballots. Even the alleged main culprit of the 2000 debacle, the punch card ballots, performed well when voter education efforts were undertaken in Los Angeles, and when they included technology that allows a voter to double check and correct his or her vote, as in Virginia. By contrast, only New Jersey replaced punch card machines -- to little apparent effect.

In 2001, there was again voter discrimination and intimidation. In the very jurisdiction monitored by the Department of Justice, Latino voters were mailed a threatening postcard warning them about election laws and claiming that there would be armed monitors at the polls. New York City has had problems in the past, particularly with respect to districts requiring Chinese translation. This occurred again in 2001. In some cases, poll workers prevented bilingual poll workers from assisting voters or failed to provide translated materials. The Asian American Legal Defense and Education Fund further reported that their monitors observed some 250 Asian voters being asked for identification in the primary election and 375 Asian voters being asked to show identification in the general election, even though identification is not required to vote in New York.

