

# FLORIDA MOVES NORTH

ELECTORAL REFORM IN VIRGINIA POST-2000

JON B. GOULD

A CENTURY FOUNDATION REPORT

THE CENTURY FOUNDATION

HEADQUARTERS: 41 East 70<sup>th</sup> Street, New York, NY 10021 212-535-4441

D.C.: 1755 Massachusetts Ave., N.W., Suite 550, Washington, DC 20036 202-387-0400

Visit our websites at [www.tcf.org](http://www.tcf.org)

Copyright © 2002 by The Century Foundation, Inc., formerly the Twentieth Century Fund. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of The Century Foundation.

## PREFACE

**I**n the aftermath of the disputed presidential election of 2000, The Century Foundation and the Miller Center of Public Affairs at the University of Virginia organized a distinguished commission, the National Commission on Federal Election Reform, to analyze how the nation's voting systems could be improved. Cochaired by former presidents Jimmy Carter and Gerald R. Ford, the Commission released its report at a Rose Garden ceremony in July 2001. Many of the report's recommendations have been adopted in legislation that both the Senate and House of Representatives passed decisively.

The Commission's report was made public during an "off year" for national elections, when the only major campaigns under way across the United States were the governor's races in Virginia and New Jersey and the mayoral elections in Los Angeles and New York City. The Century Foundation thought it would be instructive to follow up on the Commission's work by looking at the voting process in those four elections to analyze the extent to which they experienced the kinds of problems evident in Florida a year earlier. Our hope was that the four reports on the major elections of 2001 would shed further light on the extent to which the voting systems around the country need repair and on lessons that may have been learned about how to do it right.

The Century Foundation would like to thank the William and Flora Hewlett Foundation, the David and Lucile Packard Foundation, and the John S. and James L. Knight Foundation for making

our work on the important issue of election reform possible. Without their generous support, our efforts never could have had the impact that they did.

For more information on our projects regarding election reform, please visit our website at [www.tcf.org](http://www.tcf.org) or the website of the National Commission on Federal Election Reform at [www.reform-elections.org](http://www.reform-elections.org).

# CONTENTS

Preface	iii
Overview of the 2001 Elections	ix
Florida Moves North: Electoral Reform in Virginia Post-2000, <i>Jon B. Gould</i>	1
Executive Summary	3
1. Introduction	9
2. The 2001 Election	13
3. The Prelude to 2001: Complaints from 2000	33
4. Before the Voting Begins: The Legislature Acts	41
5. Virginia Electoral Administration and Practice	53
6. Conclusion and Recommendations	61
Appendix 1. Election Protection Program	63
Appendix 2. Virginia's Political and Electoral History	66
Notes	69
About the Author	71



## **OVERVIEW OF THE 2001 ELECTIONS**



**T**he presidential election of 2000 laid bare egregious flaws in the U.S. electoral system, precipitating a constitutional and political crisis. In a country that has long served as a model for democracy to the rest of the world, the experience raised fundamental questions about the validity and fairness of its own voting process. The American public demanded that the government respond.

As a result, in the wake of the 2000 election, state legislatures considered more than 1,800 voting reform bills. Roughly 250 of these passed, but only Florida, Georgia, and Maryland enacted any sort of comprehensive approach to election reform.<sup>1</sup> Most of the reforms in other states were scattershot, focused on a particular voting rule here, a narrow process there. Many of those reforms will not take effect until the 2002 or 2004 elections.

At the federal level, too, initially there was a great flurry of activity. At least thirty-four bills were introduced in the House of Representatives and twenty-two in the Senate. A single measure was enacted: a change in voting procedures for military voters, included in the National Defense Authorization Act for Fiscal Year 2002.<sup>2</sup> One other bill passed the House, H.R. 3295, the Help America Vote Act, and one passed the Senate, S. 565, the Equal Protection Voting Rights Act of 2001.

In 2001, at the same time that election reform debates were percolating, many local elections and two statewide elections took place. For example, mayors were chosen in Los Angeles, New York City, Miami, Cleveland, Atlanta, Detroit, Seattle, and Houston, and governors were selected in New Jersey and Virginia.

To assess the extent to which the problems evident in Florida and elsewhere in 2000 persisted in the absence of fundamental reform throughout most of the country, The Century Foundation commissioned four reports examining the major elections that took place in 2001: the Virginia and New Jersey gubernatorial elections and the New York City and Los Angeles mayoral votes.

Overall, these reports show that election problems were much less pervasive in Virginia and Los Angeles than in New Jersey and New York City. Not coincidentally, Virginia and Los Angeles have long-standing voting laws and practices that parallel reforms that the U.S. Congress and many states have been considering in the wake of the 2000 election. Those jurisdictions also instituted additional reforms after 2000 that worked well in 2001. In contrast, the election systems in New York City and New Jersey have not been adequately improved.

While the stories of these four jurisdictions are very different from one another and demonstrate a wide variety of problems, the reports assess how they performed by looking, to varying degrees, at the following criteria:

- ◆ How many legitimate votes were lost or discarded?
- ◆ What problems at the polling sites might have contributed to disenfranchisement?
- ◆ Were adequate measures undertaken for language minority voters?
- ◆ What efforts were made to strengthen and increase voter education?

## VOTES LOST BY THE VOTING SYSTEM

Perhaps the most widely publicized problem in the 2000 election was the number of votes that were not counted because of voting system errors (often called “spoiled” or “residual” ballots). As researchers at the California Institute of Technology and the Massachusetts Institute of Technology (Caltech/MIT) found, “two million ballots, or two percent of the 100 million ballots cast for president in 2000, were not counted because they were unmarked, spoiled, or ambiguous. Of this two percent it is estimated that 0.5 percent did not intend to vote for president, so 1.5 percent (or 1.5 million people) thought they voted for president but their votes were not counted.”<sup>3</sup> As widely reported in numerous articles and reports, certain technologies seemed consistently to perform better than others, with punch card ballot machines singled out as the worst culprit when it came to lost votes. Studies also showed that more votes were lost in poor and minority jurisdictions, and some reports found that inferior voting systems were disproportionately located in poor and minority jurisdictions.<sup>4</sup>

In the elections analyzed in our reports, 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, 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 about 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 its 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 few punch card ballot machines remaining in the state. In fact, the residual ballot rate actually went up in one of the two counties that eliminated punch card ballot machines. New York City<sup>5</sup> had a significantly higher than average spoiled ballot rate in 2000, which improved marginally in 2001. But as in 2000, the rate of residual votes remained significantly worse in areas with high shares of minorities and low-income families. The only reform that might have contributed to this slight improvement was an effort to recruit and train poll workers to instruct voters better. Specifically, poll worker pay was increased, recruitment efforts extended beyond the political parties (the traditional source), and more resources were allocated to training.

Thus, the 2001 elections reinforce evidence 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, punch card ballots, performed well when voter education efforts were undertaken in Los Angeles and when they included technology that allowed a voter to double check and correct his or her vote, as in Virginia. By contrast, only New Jersey replaced punch card machines with little apparent effect. New York City was able to improve the performance of its thirty-eight-year-old lever machines to some extent by investing in poll workers.

The success of these efforts, however, does not mean that old machines should be left in place eternally. Evidence suggests that optical scan and Direct Recording Electronic systems (DREs) perform better than other methods when technologies are assessed overall.<sup>6</sup> More advanced technologies generally do produce better results. Moreover, electronic forms of voting have the potential to

make it easier for the disabled and citizens who have difficulty reading English to vote. For example, such technology can include ballots in unlimited numbers of languages and facilitate private polling place voting by the blind. The main lesson, though, is that replacement of machinery is not enough; it should be part of a menu of reforms.

### **POLLING SITE PROBLEMS**

Another major problem highlighted during the 2000 election was the large number of people who for one reason or another were unable to cast a vote when they arrived at polling stations. For some, it was because their names were not on the voter registration list. According to a study by the organization Demos, “In at least 25 states, inaccurate or purged lists prevented some eligible voters from casting ballots.”<sup>7</sup> For voters in jurisdictions that do not allow for provisional ballots in lieu of voting on the machines, this meant they had no opportunity to vote regardless of whether the error was theirs or that of the election administrators. According to the Caltech/MIT report, “We lost between one-and-a-half and three million votes because of the registration process in 2000. According to the U.S. Census, Current Population Survey, 7.4 percent of the forty million registered voters who did not vote stated that they did not vote because of registration problems.”<sup>8</sup>

Other voters were discouraged because their polling sites were moved, poll workers gave out faulty information, or lines were too long. Again, according to Caltech/MIT, “We lost between 500,000 and 1.2 million votes because of polling place operations. According to the U.S. Census, Current Population Survey, 2.8 percent of the forty million registered voters who did not vote in 2000 stated that

they did not vote because of problems with polling place operations such as lines, hours, or locations.”<sup>9</sup>

All four jurisdictions in this report had polling site problems in 2001, but the extent of those problems varied considerably. In Virginia, hearings following the 2000 election revealed many voters, especially African Americans, confronted polling site problems. Some voters who thought they had registered to vote were turned away at the polls. More disturbing were complaints voiced at the hearings about heavy police presence in high minority polling sites, possibly aimed at deterring voting. However, the problems in this respect seemed relatively minimal in 2001. The only noted difficulty was that redistricting led a small number of voters to show up at the wrong sites because they were mailed erroneous information. Similarly, in Los Angeles the poll site problems were scattered, with relocation of poll sites a particular problem.<sup>10</sup>

In New York City, there were still many problems at voting sites, but due to new funding, fewer than in previous years. Among the major problems were poll worker shortages, consolidated—and thus fewer—polling sites, a shortage of voting machines, and machine breakdowns, all leading to inadvertent but wrongful disenfranchisement. The worst problem may have been poorly informed poll workers.

Although New Jersey’s complex and decentralized system makes it difficult to assess poll site problems, there clearly were some. By far the most troubling were incidents of outright voter intimidation aimed at minority voters. In the very jurisdiction being monitored by the Department of Justice because of past problems, many Latino voters received a threatening postcard warning them about election laws and claiming that there would be armed monitors at the polls. In addition, county administrators reported problems with poll workers who withheld information about the availability of

provisional ballots. When provisional ballots were made available, poll workers failed to give voters instructions on how to cast those ballots. On the positive side, an increase in poll worker pay greatly increased the number of available poll workers.

The wide variety of problems experienced at poll sites makes it difficult to offer a simple solution. There is, however, an effective way to deal with voters who show up at the polls believing they are registered but are missing from the rolls. The solution is to establish statewide voter registration lists, particularly computerized ones. Through such systems, lists can be constantly updated, linked to other government records, and used to determine whether someone is eligible to vote in the state regardless of the poll site he or she appears at. However, Demos notes, “less than half of all states either have state-of-the-art voter registration lists or have plans to create them.”<sup>11</sup> Virginia, whose system runs relatively smoothly, has a statewide voter registration system; New Jersey does not. Fortunately, all four of the election sites studied have some sort of provisional balloting system, which helps to at least cover some of the pitfalls.

Cases of outright voter intimidation need to be addressed through federal law enforcement. The United States Department of Justice (DOJ) does an admirable job of trying to monitor elections and pursue violations of the voting rights laws. Yet, intimidation occurred in a federally monitored jurisdiction in New Jersey in 2001. It may well be, therefore, that the federal government needs to bolster its commitment to monitoring elections and pursuing enforcement actions. Other possibilities in this regard include:<sup>12</sup>

- ◆ allowing private individuals, not just the DOJ, to bring private actions for voting rights violations;

- ◆ eliminating restrictions on attorneys' fees that make it more difficult for aggrieved voters to find capable lawyers and experts;
- ◆ providing grants to state attorneys general to support new efforts to enforce antidiscrimination laws in registration and voting; and
- ◆ providing grants to community-based organizations to investigate and if necessary litigate possible violations.

The problems of too few poll sites and sites that move at the last minute, which all jurisdictions confront to some degree, are also difficult to remedy. The National Commission on Federal Election Reform suggested making Election Day a national holiday, which would allow more public spaces, such as schools, to be made available for polling.<sup>13</sup> Other scholars and organizations have advocated such an approach, notably the U.S. Commission on Civil Rights and Professor Burt Neuborne of NYU School of Law and the Brennan Center for Justice, but it remains controversial.

### **LANGUAGE MINORITY VOTERS**

One of the most serious though under-reported problems with the American election system is the lack of accessibility to the polls for language minority voters. It is difficult to quantify the number of minority language voters who are wrongfully and often illegally disenfranchised because required measures are not taken to assist them in voting.<sup>14</sup> However, there was plenty of anecdotal evidence of such disenfranchisement in the 2000 election. For example, the U.S. Commission on Civil Rights found that several thousand Spanish-

speaking voters were disenfranchised in Florida, as well as a large number of French-speaking Haitian voters. The commission reported, “Many poll workers were not properly trained to handle language assistance issues. Some voters found that even when volunteers were available to provide assistance, the volunteers or precinct workers were prevented from providing language assistance. In some instances, bilingual poll workers were directed to not provide language assistance to voters who were in need of that assistance.”<sup>15</sup>

As the two most diverse cities in the country, Los Angeles and New York City both face enormous challenges with respect to language minority voters: each has more minority voters than the states of New Jersey and Virginia combined.

Congressman Xavier Becerra testified before a Senate committee that fourteen poll sites in Los Angeles did not display or make available bilingual materials provided to them.<sup>16</sup> At the same time, Los Angeles does a great deal to prepare for the complexities involved in administering an election that requires it to provide voting materials in seven different languages. The city works directly with the communities and ensures there are sufficient bilingual poll workers and translators at voting sites. The ongoing challenges Los Angeles faces are cultural ones—helping new immigrants understand the system politically and administratively. As a result, this and other similarly situated jurisdictions must focus their voter education efforts particularly on new immigrant voters. In addition, Los Angeles was hindered by its use of punch card ballots, which cannot provide ballot choices in a large number of languages as easily as other technologies.<sup>17</sup>

New York City has had problems in the past, particularly with respect to districts requiring Chinese translation. For example, the Asian American Legal Defense and Education Fund reported that in

the 2000 election Chinese language ballots were incorrectly translated at six New York voting sites—“Democrat” was translated as “Republican” and “Republican” was translated as “Democrat.” Problems occurred again in 2001. Some 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.

Not only are many poll workers unprepared to provide adequate services to language minority voters, particularly Asian Americans, but New York City also continues to experience a dearth of bilingual workers at the polls, despite increased efforts at recruitment. In 2001, the city was short 122 Chinese interpreters out of a total of 483 positions, 256 Spanish interpreters out of a total of 779 positions, and 19 Korean interpreters out of a total of 32 positions. New Jersey encountered a similar problem in 2001. In one county that must provide materials in Spanish, instructions in Spanish on the absentee ballots were reversed, so that voters were told to place their mark below (*abajo*) their preferred candidate rather than the correct way, above (*sobre*). Many of those ballots were counted when the votes were tallied, thus potentially distorting the result.

## **VOTER EDUCATION**

After the 2000 election, there was broad consensus among administrators, voting rights advocates, elected officials, and elections scholars that the country needs more voter education. This includes not

only education about the candidates and the issues, but information on how to register, how to cast a ballot, provisional balloting, and how to use the voting system machinery. Voters need education, too, on their voting rights under the law (especially the disabled and minority language voters). As the National Commission on Federal Election Reform Report noted, “Some administrators believe, with cause, that they can get more improvements, dollar for dollar, from voter education and poll worker training than they can from investments in new equipment.”<sup>18</sup> The Democratic Caucus Special Committee on Election Reform report also urged increased voter education efforts, especially targeted to new voters.<sup>19</sup> The Caltech/MIT report supports increased voter education, including the publication of sample ballots and establishment of instructional areas at polling places to reduce the number of lost votes.<sup>20</sup> Other organizations that called for additional voter education included the League of Women Voters, the Constitution Project, and the NAACP.

There is much evidence to suggest that giving voters proper instructions, through education and well-trained poll workers, is one of the most effective ways to protect the integrity of the vote. As an analyst for the Florida Division of Elections said, “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.”<sup>21</sup>

This conclusion is demonstrated by the reports we commissioned. For example, Los Angeles still uses the punch card ballot system, just like Florida. Yet at the same time, Los Angeles invests a great deal in a comprehensive voter education process—it is one of the best in the country. Moreover, it stepped up its voter education activities even more for the 2001 election, undertaking a public

campaign called “Got Chad?” As a result, Los Angeles’ record of lost votes was much better than Florida’s and many other states that used punch card machines in 2000.

Miami also used punch card ballots again in its mayoral election in 2001. In the 2001 primary, however, in addition to regular poll workers, each polling site had a “tutor” to demonstrate how to use the punch card machine properly. The residual ballot rate was greatly improved over 2000. Then, in the runoff, every poll worker was also 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. Citywide, only 1.28 percent of ballots were discarded because of overvoting or undervoting. In the five precincts with the highest number of uncounted ballots in the primary election, where spoilage rates had been between 9 percent and 15 percent, in 2000, the rates plummeted to between 0.29 percent and 2.7 percent.<sup>22</sup>

New Jersey’s official efforts to educate voters with respect to registering to vote and voting is totally scattershot, but in 2001, grassroots organizations moved to fill the void. The NAACP not only had a voter registration drive but also sent three separate mailings to the new voters prior to election day about both the issues and the need to vote. The organization reported that a majority of the districts targeted for this activity showed an improvement in voter turnout.

In light of what transpired during the 2001 elections, it will certainly be interesting to observe how the country fares in the elections of 2002 and 2004. Except perhaps among activists involved in the issue, there seems to have been quite a lull in public interest or worry about the topic of election reform, especially with the advent of the nation’s war on terrorism. Perhaps that is the reason why the

jurisdictions that performed relatively well on Election Day 2001 were ones that already had progressive systems in place and had made some further improvements immediately after the 2000 election, such as Los Angeles and Virginia. Jurisdictions such as New York City and New Jersey, operating with somewhat retrograde systems to begin with and stymied by both politics and budget shortfalls—especially after September 11—continue to be at a distinct disadvantage. Numerous other states and cities throughout the country find themselves in a position similar to that of New York City and New Jersey: they had faulty systems prior to the election of 2000, and then after that election made it clear how severe the problems were, they lacked the political wherewithal and/or the funding to take any strong measures to fix the problems.

The prospect of further controversy regarding electoral reform in 2002 and 2004 is likely. Ongoing issues—the disturbingly low voter turnout in the country, the debate over registration rules and requirements, racial and ethnic discrimination, and disagreements about voter fraud—also will continue to be discussed, as they should be.

Perhaps the 2002 nationwide elections will rekindle interest in election reform. Perhaps, then, the states will again see it in their best interests to act to improve their systems.

We are left, however, with the question of whether the states and localities should be the ones ultimately to decide how to guarantee all citizens their fundamental right to vote and participate in our democracy. This report demonstrates the degree to which the ability to fully engage in the electoral system is a matter of geography. Should equal access to voting be dictated by the serendipity of where one happens to live in this country? After all, the right to vote is the foundation of our democratic system, the right upon which all other rights rely.

## **THE 2001 NEW YORK CITY ELECTIONS**

In 2001, New York City held municipal elections that included primaries, primary runoff elections, and general elections for mayor and several other citywide offices, as well as most of the seats on the City Council. Complicating an already complex scenario, the attacks on the World Trade Center occurred right in the midst of the election. Although the city had taken a few effective steps to improve the election system, they did not go far enough. New York City's largely antiquated and still flawed system resulted in many of the same types of problems that occurred in Florida in the much criticized 2000 presidential election.

### **VOTING MACHINES AND LOST VOTES**

In the 2001 primary runoff election for mayor, as always in New York City, a large number of votes were lost because of problems with the voting machines, and a disproportionate number of the losses were in low-income and minority districts. For example, the lost vote rate in the Bronx in the primary runoff was 2.8 percent. A variety of problems caused difficulties for voters.

- ◆ New York State uses old-fashioned lever machines, which are no longer manufactured. Unlike other parts of the state, the sensor latches of New York City machines, which prevent a voter from knowingly failing to cast a vote, are disabled. Largely as a result of this, other parts of the state have a lower lost vote rate than the city does.
- ◆ Although the city bought more machines in 2001 from other jurisdictions that are phasing out the use of the lever machines,

it still had a shortage of voting machines. In 2001, Manhattan was 113 machines short of the number needed to comply with state law, Queens was 111 machines short, and Brooklyn was 143 machines short.

- ◆ Although the city was able to recruit more voting machine technicians in 2001, there was still a shortage.
- ◆ As in every New York City election, there were a large number of voting machine breakdowns. For example, in Manhattan there were voting machine problems in 22.2 percent of the election districts.

#### **POLL WORKER AND POLL SITE PROBLEMS**

Efficient and informed poll workers are key to a smooth election day operation. Organizing poll worker and poll site activities is a major undertaking in a city as large and complex as New York City, and there were many problems in this area of election administration in 2001.

- ◆ There was a tremendous shortage in election workers. The city needed another 3,371 poll inspectors to fully staff polling sites, and there were major shortages in poll site coordinators, information clerks, poll clerks, and language interpreters as well.
- ◆ Many poll workers were found to be inadequately trained and informed.

- ◆ Language minority voters experienced many problems. In one survey of Asian-American voters, more than 300 of 1,500 voters complained of voting problems in the 2001 primaries. In the general election, 700 of 2,300 Asian-American voters surveyed had a problem in voting, including 375 who said they were illegally asked for identification.
- ◆ There was a wide variation in the quality of polling sites throughout the city, in terms of such indicators as convenience of location and length of the lines to vote.
- ◆ Poll worker recruitment and training in New York City is deficient. For example, the Board of Elections routinely hired workers who failed the training test, many recruited were not assigned to a training session, and some workers were never assigned to a position on election day.

### **ADMINISTRATIVE PROBLEMS**

Elections in New York City include the use of many types of paper ballots, including affidavit ballots, emergency ballots, and absentee ballots. All of these paper ballots must be judged to be valid or invalid and then counted. This process can lead to a number of question marks during and after an election, which was the case in 2001.

- ◆ At the end of the primary election, the Board of Elections invalidated over 40,000 paper ballots for various reasons. When the number of invalidated votes were disproportionate to one candidate, that candidate raised questions about the process by which the casting and counting of such votes took place.

- ◆ Given the number of paper ballots that had to be counted, many days passed before the final outcome of the race was determined, leading to uncertainty among the candidates, administrators, and the public.
- ◆ The rate of use of paper ballots varied among the boroughs, raising questions about why such differences existed and suggesting possible disparate impacts and outcomes.

### **IMPROVEMENTS MADE BY NEW YORK CITY**

In the aftermath of the 2000 election crisis, New York City did take a few meaningful steps to improve its election process.

- ◆ The Board of Elections established standards for what constitutes a valid vote on paper ballots and the process by which they are counted.
- ◆ Civic organizations in the city mobilized to recruit poll workers and monitor elections.
- ◆ The city increased funding for the election by between \$8 million and \$9 million. New funding went to increasing poll worker pay from \$125 to \$200, improving poll worker training and training materials, hiring more technicians, buying more machines and ballot scanners, expanding the board's phone information services, and hiring four language translators.

**RECOMMENDATIONS**

Clearly, although New York City has taken some steps to improve the system, many more reforms are required. Recommendations include the following:

- ◆ Funding to the Board of Elections should be increased so it can continue improving its procedures.
- ◆ Recruitment of Board of Elections' staff should expand beyond the political parties.
- ◆ Election worker training methods and materials need to be improved.
- ◆ The voting machine sensor device should be activated to prevent lost votes.
- ◆ There should be an outside monitor of election administration.
- ◆ The state should adopt a statewide voter registration system.
- ◆ The state should establish a process for purchasing new voting technology that includes input from voting rights and civic organizations, and new machines should be accessible for the disabled and language minority voters.
- ◆ Voter registration deadlines should be moved closer to election day.
- ◆ The city should improve and expand voter education and outreach activities.

## THE 2001 LOS ANGELES ELECTION

Los Angeles is the most ethnically diverse city in the nation. As such, in the 2001 mayoral election, the city had to provide ballots and voting information in seven different languages. Moreover, Los Angeles is the largest election jurisdiction in the nation to use punch card ballot machines—the scourge of the 2000 presidential election, blamed as the primary reason for the large number of lost votes in Florida. Los Angeles was also in the national spotlight because the election was seen as the first major opportunity for a Latino candidate in a city whose demographics have changed dramatically over the past several years. Yet the 2001 election proceeded with few problems or complaints.

Given its success, Los Angeles provides a model for many American cities that are likely to become increasingly diverse in the future. Los Angeles took three important steps to avoid the potential problems created by language barriers and less than modern voting technology.

- ◆ It had previously adopted many of the election system reforms that have been advocated since the 2000 election, such as provisional voting and establishing state definitions of what constitutes a vote on various types of voting machines. It had also adopted procedures for election certification and candidate challenges.
- ◆ It invested heavily in voter education.
- ◆ It worked with minority communities to ensure that language minority voters' needs were met.

### **SUCCEEDING WITH PUNCH CARD BALLOTS**

While the residual vote rate (the combined overvote and undervote) for the type of punch card ballot machine Los Angeles uses was 3 percent nationally in 2000, in Los Angeles the rate was only 2.4 percent. Moreover, in the 2001 mayoral election, the city dramatically reduced the lost vote rate of the punch card ballot machines, especially among minority voters.

- ◆ The overvote rate in the mayoral race was approximately half the rate of the 2000 presidential election.
- ◆ The undervote rate in the mayoral race was 43 percent lower than the rate in the 2000 presidential election.

Ninety percent of predominantly Black and Latino voting precincts saw their residual ballot rate decline between the 2000 presidential election and the 2001 mayoral election.

### **ACHIEVING SUCCESS WITH VOTER EDUCATION**

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 specifically to address how to vote on punch card ballot machines.

- ◆ The voting guide provided a new section explaining how to vote on the machines properly.
- ◆ New signs about punch card ballots were put up in polling places.
- ◆ The city undertook a “Got Chad?” public education campaign.

### **MEETING THE CHALLENGE OF LANGUAGE DIVERSITY**

In addition to Los Angeles being the most ethnically diverse city in the nation, 25 percent of the city's voters do not speak English well. Due to its diversity, the city must provide election materials in English, Chinese, Japanese, Korean, Spanish, Tagalog, and Vietnamese. In 22 percent of precincts, most voters need language assistance.

Los Angeles has been able to address the needs of these language minority voters largely by working in partnership with the affected populations through the Community Voter Outreach Committee. The committee helped administrators identify needs among language minority voters. The committee pinpointed which voting sites were most likely to have voters in need of assistance.

### **REMAINING PROBLEMS**

Of course, problems did occur in the 2001 mayoral election.

- ◆ Some poll workers illegally asked for voter identification.
- ◆ Some poll workers did not allow provisional voting.
- ◆ Some polling sites were moved shortly before the election, leaving little opportunity to alert voters to the change and causing some voters to arrive at the wrong polling site. Some voters never received information as to where their new polling site was located.

### **LESSONS FROM LOS ANGELES**

In terms of the language diversity that complicated its administration, the Los Angeles election is a portent of things to come for many American cities in the near future. As such, its successes and failures should be examined to see what lessons they provide.

Moreover, although Los Angeles was able to achieve success with the punch card ballot machines, they have been de-certified by the state and will no longer be in use within the next few years. This will be an especially welcome change for language minority voters. Voting systems with touch screen technology, which are expected to replace the punch card ballot machines, can be programmed to ensure voters receive ballots in their native languages.

Finally, the experience in Los Angeles demonstrates that an effective election system can be developed through voter education efforts, along with provisional balloting, having clearly set standards and procedures, and addressing the needs of language minority voters by soliciting their active involvement.

## **THE 2001 VIRGINIA GUBERNATORIAL ELECTION**

Virginia was one of just two states to hold a gubernatorial election in 2001. Although the election did not proceed flawlessly, the system performed extremely well, in part because the state already had in place such things as a statewide voter registration system and provisional voting, which were among the reforms advocated in the aftermath of the 2000 election.

The state took a number of additional steps between the 2000 and 2001 elections that proved effective. As a result, although there is still room for improvement, Virginia in 2001 provided a valuable lesson for the rest of the country.

### **REDUCING LOST VOTES THROUGH VOTER NOTIFICATION AND VERIFICATION TECHNOLOGY**

After the 2000 election, the Virginia General Assembly amended the election law to permit all types of voting machines, which at

the moment includes the optical scan system, paper ballots, Direct Recording Electronic systems (DREs), and punch card ballots, to initially refuse a ballot on which the voter marked more than one selection for the same office—an “overvote.” The voter would then be given the option to correct the ballot before submitting it. Some jurisdictions, primarily those using optical scan and punch card ballot systems, changed the software on their voting machines to do this with dramatic results.

- ◆ Whereas 1.59 percent of ballots for governor went uncounted in 1997, and 1.8 percent of presidential ballots went uncounted in 2000, only 0.97 percent of ballots for governor went uncounted in 2001.
  
- ◆ In one jurisdiction that employed the new software, the drop in uncounted votes was even more striking. While in 2000, this jurisdiction invalidated between 600 and 700 ballots as overvotes, in 2001 the jurisdiction invalidated only one ballot.

### **PUNCH CARD MACHINE PERFORMANCE**

Punch card ballot machines have come to be seen as the symbol of the Florida 2000 election fiasco. Most studies conducted after that election reported that punch card machines have the highest number of votes lost of any voting system. Yet in 2001, Virginia was able to achieve great success in the seven jurisdictions using punch card ballots by incorporating the new software described above.

In 2000, jurisdictions using punch card ballot machines had a 2.07 percent uncounted ballot rate. In 2001, punch card jurisdictions

had a 0.73 percent uncounted ballot rate. Punch card ballot machines performed slightly better than DRE machines (machines with a user interface), which some advocate as the ideal replacement for the punch card ballots. In 2001, jurisdictions using DRE machines had a 0.74 percent lost vote rate.

While other factors may well have contributed to these remarkable results, such as greater voter awareness of voting processes after 2000 and voter education efforts, this small improvement in the voting machines clearly had a tremendous positive impact on the performance of the system.

In addition, Virginia tested several other potential reforms in 2001. For example, four jurisdictions used touch screen technology—ATM-like machines—for the first time. Voters responded extremely positively to these systems. As a result, the machines are expected to be the first new voting machines to be certified in Virginia in seven years.

### **ELECTION SYSTEM PROBLEMS**

As indicated, the 2001 Virginia election was not completely error-free.

- ◆ The optical scanner for absentee ballots in Arlington County could not read 51 of 690 ballots, representing 7.39 percent of such ballots.
- ◆ Due to redistricting, voters had to be notified of new districts and, in some cases, changed polling sites. In Fairfax County, 18,000 residents were mailed voter registration cards instructing them to go to the wrong location.

Moreover, voters voiced a good number of complaints after the 2000 election. At hearings convened by Congressman Bobby Scott, voters cited many problems they had encountered, including:

- ◆ difficulties faced in registering to vote through the Department of Motor Vehicles and citizen voter registration drives;
- ◆ poor poll worker performance; and
- ◆ election administration problems that were more serious in African-American areas and included late receipt of registration cards, too few or poorly operating voting machines, and long lines. One witness complained that there were heavy police presences in African-American precincts.

### **STATE ACTIONS BETWEEN THE 2000 AND 2001 ELECTIONS**

Although the state already had a largely efficient election system, since voters did encounter problems in 2000, the government did not stand pat. The legislature created a Joint Subcommittee to Study Election Process and Voting Technologies, which split into two task forces—one on technology and voting equipment, and another on voter registration and election day processes. Both task forces made proposals for the General Assembly to consider.

The General Assembly already had passed a law in 2001 establishing standards for hand-counting punch card ballots when a recount is necessary. However, it did not establish standards for initial hand counts of paper ballots. It required the State Board of Elections to promulgate standards for resolutions of recounts. The State Board also created standards for manually recounting ballots for systems other than punch card ballot machines.

### **THE FUTURE**

Virginia's election system works well, and the progress it has made should be continued. The state should focus on three areas with respect to upcoming elections:

- ◆ establishing standards for hand counts of paper ballots;
- ◆ providing adequate funding for upgrading and replacing voting machines; and
- ◆ requiring all machines to have software that notifies the voter of an overvote and provides the opportunity for correction of the ballot, and providing funding for such software.

## **THE 2001 NEW JERSEY ELECTIONS**

The 2001 election in New Jersey, which included a contentious gubernatorial race, was especially challenging because of both the psychological and practical effects of the World Trade Center attack and the anthrax scare, both of which took place just prior to the election. This may have played a role in New Jersey having its lowest voter turnout since the state's new constitution was adopted in 1947. However, the problems that occurred in the 2001 election were more the result of long-standing flaws, including structural flaws in the state's system, than about the unique circumstances of this particular election year.

### **STRUCTURAL FLAWS**

The structural flaws in the system reduce responsibility for carrying out elections effectively and leave local and county administrators unaccountable. These flaws make it almost impossible for the public, the press, and even government officials to know how the administration of elections is progressing or to respond to problems that may occur.

For example, New Jersey has an extremely decentralized system whereby local and county officials are responsible for most election tasks, and there is very limited state authority or responsibility for carrying out elections. This means that each locality is carrying out its election duties in different ways and with varying degrees of success. The state does not have many specific standards that the counties must achieve, leaving the level of performance geographically disparate.

The localities and counties are not even asked to reveal the outcomes of their various performances. Counties are not required to report on most aspects of their election performance, and thus they are not held accountable by the state or the public.

### **GENERAL OUTCOMES**

These structural flaws make it difficult to make an over-arching assessment of the election system during the 2001 election. However, we can make some general statements about how the election system performed in 2001.

- ◆ The rate at which votes go uncounted in New Jersey hovers around the national average. However, the number of uncounted votes in the 2001 elections actually rose slightly, despite the fact that one of the few actions the state took after the 2000 election was to replace punch card ballot machines.
- ◆ The counties in New Jersey use a wide variety of voting machines, with a corresponding variety in the number of problems that occur.
- ◆ Despite official reports that indicate otherwise, election observers and voting advocates in New Jersey report that many polling sites and systems remain inaccessible for the disabled.

### **COUNTY-SPECIFIC OUTCOMES**

A closer look at four particular counties through interviews and media reports indicate that there were a broad assortment of problems that occurred in these counties that should be troubling to both voters and elected officials in New Jersey.

- ◆ In Passaic County, a county already subject to a federal monitor for past voting rights violations, Hispanic voters received postcards that not only were designed to intimidate but contained fraudulent information on voting.
- ◆ In this same county, voters received phone calls on election day telling them to bring identification to the polls. Since there is no such requirement in New Jersey, this can be seen as a clear voter suppression tactic.
- ◆ In Cumberland County, Spanish absentee ballots had a major translation error.
- ◆ In Atlantic City in Atlantic County, there were disputes over voter registration of the homeless.
- ◆ In Lawrence Township, Mercer County, there were major battles over absentee ballot counts and recounts.

### **OUTCOMES REPORTED BY ELECTION ADMINISTRATORS**

Interviews with local election administrators also aided in filling out the picture of what occurred in New Jersey's 2001 election. Many of the responses indicated favorable attitudes toward reforms that have been undertaken. Findings included the following:

- ◆ Voters responded positively to a change in the law requiring poll sites to open at 6:00 A.M. instead of 7:00 A.M.
- ◆ Administrators strongly endorsed the legislature's act of doubling of the pay rate of poll workers to \$200.
- ◆ Administrators favor use of provisional ballots, which have been employed in New Jersey since 1999, but some have difficulty with poll workers who fail to offer them.

Yet the changes put in place, which amount to tinkering with individual components of the system, are not enough. The system must undergo comprehensive reform; the issues most in need of redress include increasing the standards counties are held to, improving bilingual services, establishing statewide standards for voting equipment, and promoting elections to increase voter participation.

## NOTES

1. Anya Sostek, "The Immortal Chad," *Governing Magazine*, January 2002, p. 26.

2. The Constitution Project, "Pending Legislation," [www.constitution-project.org/eri/legislation.htm](http://www.constitution-project.org/eri/legislation.htm).

3. MIT/CalTech Voting Technology Project, "Voting, What Is, What Could Be," July 2001, p. 10.

4. See The National Commission on Federal Election Reform, "To Assure Pride and Confidence in the Electoral Process," August 2001; General Accounting Office, "Statistical Analysis of Factors that Affected Uncounted Votes in the 2000 Presidential Election," GAO-02-122, October 2001; Democratic Investigative Staff, House Committee on the Judiciary, U.S. House of Representatives, "How to Make Over One Million Votes Disappear," report prepared for Rep. John Conyers, Jr., August 2001; Minority Staff, Special Investigations Division, Committee on Government Reform, U.S. House of Representatives, "Income and Racial Disparities in the Undercount in the 2000 Presidential Election," July 9, 2001; Ford Fessenden, "Ballots Cast by Blacks and Older Voters Were Tossed in Far Greater Numbers," *New York Times*, November 12, 2001, p. A17; John Mintz and Dan Keating, "A Racial Gap in Voided Votes Precinct Analysis Finds Stark Inequity in Polling Problems," *Washington Post*, December 27, 2000, p. A1.

5. In New York City, due to the use of lever machines, lost votes only include "undervotes" or ballot entries in which no vote is marked.

6. When using the optical scan system the voter must indicate his or her choice by filling in a circle or completing an arrow. Optical scanners then read the marks made on the ballots. DREs have an interface that is either a set of physical buttons or a touch screen upon which the voter casts his or her vote. These machines simultaneously record the voter's choices.

7. Demos, "An Overdue Reform: The Need for Statewide Computerized Registration Systems," January 2002, p. 3.

8. Caltech/MIT Voting Technology Project, "Voting, What Is, What Could Be," July 2001, p. 10.

9. Ibid.

10. It should be noted, however, that, as the postscript to the Los Angeles report details, there were some serious poll site problems in the 2002 primary election in Los Angeles.

11. Demos, "An Overdue Reform: The Need for Statewide Computerized Voter Registration Systems," January 2002, p. 3.

12. Suggested by Professor Christopher Edley, Harvard University School of Law, in his additional statement in the report of the National Commission on Federal Election Reform, "To Assure Pride and Confidence in the Electoral Process," August 2001.

13. National Commission on Federal Election Reform, "To Assure Pride and Confidence in the Electoral Process."

14. The bilingual voting materials requirements of the amendments to the Voting Rights Act mandate that bilingual voting materials must be provided by states or localities that have more than 10,000 voting age citizens or more than 5 percent of voting age citizens who are members of a single language minority. See 42 U.S.C. 1973b(f)(4), 1973aa-1a.

15. U.S. Commission on Civil Rights, "Voting Irregularities in Florida during the 2000 Presidential Election," 2001, Chapter 6.

16. *Election Reform Issues: Hearing before the Senate Committee on Rules and Administration*, 107th Congress (2001)(statement of Honorable Xavier Becerra, Representative in Congress from the State of California, Congressional Asian Pacific American Caucus), June 28, 2001.

17. A few months after the 2001 primary, the secretary of state of California decertified punch card voting technology and ordered that such machines be replaced by 2005. Thereafter, a judge in U.S. District Court ordered the state to replace all punch card ballot machines by the 2004 election. The state is considering an appeal, claiming that does not give it enough time to make the necessary changes.

18. The National Commission on Federal Election Reform, "To Assure Pride and Confidence in the Electoral Process," August 2001, p. 49.

19. Democratic Caucus Special Committee on Election Reform, "Revitalizing our Nation's Election System," 2001, pp. 11-23.

20. Caltech/MIT Voting Technology Project, "Voting, What Is, What Could Be," July 2001, p. 33.

21. Jim Drinkard and Peter Eisler, "Weakest Part of Any Voting Machine: People," *USA Today*, March 1, 2001, p. 13A.

22. See on-line report at [www.tcf.org](http://www.tcf.org)

**FLORIDA MOVES NORTH:  
ELECTORAL REFORM IN VIRGINIA POST-2000**

**JON B. GOULD**



## EXECUTIVE SUMMARY

Fifty years ago few would have expected Virginia to be a national leader in election administration, but today the commonwealth has already adopted or made substantial progress on several of the recommendations from the National Commission on Federal Election Reform. Virginia is also one of four major jurisdictions that held general elections in 2001. Election day went largely without incident in the commonwealth, as voting systems and elections officials improved their operations, especially of punch card machines. But while the Virginia General Assembly has recently addressed the reliability and feasibility of new voting machines, neither it nor most localities have sufficient funds to upgrade voting systems in the commonwealth. The legislature finally changed state law to permit existing machines to notify voters of overvotes, but this change is merely an allowance not a requirement. Results from the most recent election show that uncounted votes dropped substantially, and anecdotal evidence suggests that, where instituted, new software alerting voters to overvotes greatly improved tabulation. Thus, even if Virginia cannot—or will not—prioritize new voting equipment, the legislature must ensure that, as much as possible, local election boards implement technology to alert voters to problems in their ballots so that they can be corrected.

This report describes the state of electoral administration in Virginia circa 2001, illuminating where the commonwealth has made progress and outlining a few areas where it has more to accomplish. It also provides a detailed description of election day 2001, including the many accomplishments and few problems in

voting and tabulation. The report is comprised of six chapters. The bulk of the report is in Chapter 2, explaining developments from election day and analyzing the effects of these results on further electoral reform. The report then turns to the effect of the 2000 presidential election, the problems it exposed for Virginians and their leadership, and the efforts taken to ensure there was not a Floridian experience in Virginia in the 2001 election. This includes a description of hearings within the commonwealth and the development of a nonprofit election monitoring program, which is discussed in detail in Appendix 1. Chapter 4 analyzes more official responses from the Virginia General Assembly, its Joint Subcommittee to Study Election Process and Voting Technologies, and the Virginia State Board of Elections. Chapter 5 describes Virginia's electoral laws and practice, introduces the various actors in electoral administration, and explains key provisions in the law. The report then closes with a short section arguing that Virginia must prioritize additional funds for election administration if it wants to maintain its pace of progress. There is also a second appendix that provides a short political history of Virginia, for it is difficult to appreciate how far Virginia has come in improving its electoral process without understanding where it started from.

Among its several conclusions, the report finds that:

- ◆ Voter turnout in 2001 was roughly comparable to turnout from the last gubernatorial election but only two-thirds as large as turnout in a presidential election.
- ◆ Uncounted ballots dropped substantially from the 2000 election, particularly among votes cast in punch card machines. The improvement appears to be a combination of newly approved

software that notifies voters of an overvote, better cleaning and servicing of machines, and increased voter education and awareness of the frailties of voting machines.

- ◆ In at least one jurisdiction, optical scan machines could not read 7 percent of absentee ballots because a fold required for mailing smudged voters' marks.
- ◆ New touch-screen voting machines successfully passed the voters' test in four jurisdictions. Provided the machines complete additional durability and viability testing, they would be the first new voting system certified for use in Virginia in the past seven years. However, with a price tag of nearly \$3,000 per machine, few localities will be able to afford new systems. Neither the Virginia General Assembly nor the State Board of Elections has the funds, nor apparently the inclination, to provide support for localities to improve their voting systems, save for those that increase access for the disabled. Although the legislature would support calls for increased federal support, there will be no new state funding in the foreseeable future.
- ◆ The Military Overseas Absentee Voting Project, a pilot program in which active duty military personnel may apply for an absentee ballot by e-mail and also download the ballot itself to be filled out and submitted by mail, is a novel idea but one that was implemented too late to have an appreciable effect on the 2001 election.
- ◆ Virginia's maintenance of both a voter roster and a poll book is a historical anachronism that slows voting on election day. The

State Board of Elections is experimenting with a project to combine the two, a move widely applauded by those involved in election administration.

- ◆ Events following September 11—including delayed mail service—did not affect turnout or absentee voting. However, a computer error following redistricting sent incorrect polling information to eighteen thousand voters in Fairfax County. When some voters arrived at the wrong precinct near closing time, election workers allowed them to vote by provisional ballot. The Fairfax Electoral Board counted eighteen of these ballots the next day, which drew the ire of the State Board of Elections. The State Board has petitioned the courts to remove the local board members.

The run-up to the 2001 election in Virginia included several legislative and administrative changes, many of them motivated by the 2000 presidential vote in Florida. One of Virginia's congressmen held a hearing in December 2000 to hear testimony on perceived registration impediments and possible voting irregularities in the commonwealth, and the general assembly appointed a Joint Subcommittee to Study Election Process and Voting Technologies. Of the several recommendations for change, three made their way into legislation prior to the 2001 election. This past election, candidates' party identification was finally included on the ballot for state offices, and voters had to either present identification or sign an affidavit attesting to their identity at the polls. In addition, both the legislature and general assembly adopted new standards for recounting ballots. Although the new criteria are commendable, Virginia statute still provides little guidance for divining voters' intent when ballots *initially* must be counted by hand.

If there is a message to take away from Virginia's experience, it is that the commonwealth deserves kudos for the way it has modernized its system of electoral administration. But now that Virginia has made progress, it is all the more important to ensure that new proposals and recommendations are carried out and that continued attention is paid to lingering shortcomings in the electoral process. Of these, there are three issues deserving of particular consideration. First, the new standards for recounts must be extended to those paper ballots that are initially counted by hand. Second, additional funds must be sought to assist local electoral boards in upgrading their voting machines. Finally, whether or not new voting machines are purchased, the legislature and/or the State Board of Elections ought to both require and assist local electoral boards in upgrading the software on their machines so that vote tabulators will notify voters if they cast an overvote. It would be a shame if such progress were not pursued wherever possible.



## 1. INTRODUCTION

Following the disastrous 2000 recount in Florida, The Century Foundation helped to create the National Commission on Federal Election Reform—chaired by former presidents Ford and Carter—to investigate weaknesses in electoral processes across the nation and to propose changes to alleviate these problems. Of its many recommendations, seven applied directly to the states, encouraging them to:

- ◆ institute statewide voter registration;
- ◆ permit provisional voting;
- ◆ simplify and facilitate absentee voting by uniformed and overseas citizens;
- ◆ allow for the restoration of voting rights to otherwise eligible citizens once they have fully served their sentences for the conviction of a felony;
- ◆ fund and administer elections (including such measures as investments in equipment through voter education and procedures at the polling places) to ensure that each individual's vote is equally effective;

- ◆ set a benchmark for voting system performance, expressed as a percentage of the residual vote (including overvotes, spoiled votes, and undervotes) for the race at the top of the ticket; and
- ◆ adopt uniform statewide standards to define what will constitute a vote on each category of voting equipment.

Virginia has already adopted or made substantial progress on five of these recommendations. It has statewide voter registration and provisional voting, and ex-felons can petition the governor to restore their voting rights (albeit through a complicated process). In 2001 the Virginia General Assembly and State Board of Elections together established new standards for recounting ballots by hand, and this past fall the State Board experimented with a method to permit voters to download applications for absentee ballots—and in some cases the ballots themselves—as well as to use the Web to check the status of their applications to vote.

Virginia, of course, is one of four major jurisdictions that held general elections in 2001. Election day went largely without incident in the commonwealth, as voting systems and election officials improved their operations, especially of punch card machines. But while the Virginia General Assembly has recently addressed the reliability and feasibility of new voting machines, neither it nor most localities have sufficient funds to upgrade voting systems in the commonwealth. The legislature finally changed state law to permit existing machines to notify voters of overvotes, but this change is merely an allowance not a requirement. Results from the most recent election show that uncounted votes dropped substantially, and anecdotal evidence suggests that, where instituted, new software alerting voters to overvotes greatly improved tabulation. Thus, even if Virginia

cannot—or will not—prioritize new voting equipment, the legislature must ensure that, as much as possible, local election boards implement technology to alert voters to problems in their ballots so that they can be corrected.

This report describes the state of electoral administration in Virginia circa 2001, illuminating where the commonwealth has made progress and outlining a few areas where it still has more to accomplish. It also provides a detailed description of election day 2001, including the many accomplishments and few problems in voting and tabulation. The report itself is laid out in six chapters. The bulk of the report is found in Chapter 2, explaining developments from election day and analyzing the effects of these results on further electoral reform. The report then turns to the effect of the 2000 presidential election, the problems it exposed for Virginians and their leadership, and the efforts taken to ensure there was not a Floridian experience in Virginia in the 2001 election. This includes a description of hearings within the commonwealth and the development of a nonprofit election monitoring program, which is discussed in detail in Appendix 1. Chapter 4 analyzes more official responses from the Virginia General Assembly, its Joint Subcommittee to Study Election Process and Voting Technologies, and the Virginia State Board of Elections. Chapter 5 describes Virginia's electoral laws and practice, introduces the various actors in electoral administration, and explains key provisions in the law. The report then closes with a short section arguing that Virginia must prioritize additional funds for election administration if it wants to maintain its pace of progress. There is also a second appendix that provides a short political history of Virginia, for it is difficult to appreciate how far Virginia has come in improving its electoral process without understanding its various starting points.



## **2. THE 2001 ELECTION**

### **THE POLITICAL BACKDROP**

**N**ovember 6, 2001, dawned with largely fair weather across the commonwealth, a welcome end to an election campaign that should have drawn more attention than it did. Democrats and Republicans each had much at stake when the campaign began in earnest earlier in the year. Democrats were feeling positive for the first time in eight years, as their candidate for governor, Mark Warner, ran unopposed for the nomination. For their part, Republicans were in the midst of a fight to choose the successor to Jim Gilmore, who had ridden an anti-tax message to the governor's mansion four years earlier. But Gilmore had overplayed his hand in cutting the commonwealth's car tax earlier in the year, setting up a bitter confrontation with fellow Republicans, who thought that the governor was threatening the future solvency of Virginia to make good on a campaign promise he could not keep. Mark Earley, the attorney general, had Gilmore's backing and eventually beat the lieutenant governor, John Hager, for the Republican nomination.

Meanwhile, Republicans were anticipating a successful campaign for the State Senate and the House of Delegates, having received full control of the General Assembly only two years earlier. Several factors seemed poised in their favor. The commonwealth had recently been redistricted—completely under Republican hands—

and district boundaries were thus advantageous to Republican candidates. Party labels had been added to the ballots, so voters could finally identify the political affiliation of candidates; and the commonwealth had been drifting closer to the national Republican Party over the last decade. As one political scientist says, “the Democrats had been snoozing, unable to articulate a credible message to voters and slow to develop good candidates. It’s hardly surprising that the Democrats had lost their lock on statewide offices.”

The campaign was just picking up steam when the September 11 tragedy hit, effectively freezing the campaign in place for the duration. Although the gubernatorial candidates eventually held a series of debates, and one of them—the Republican, Mark Earley—tried to capitalize on the attacks by having Rudolph Giuliani tape a television ad for him, polling showed most races stuck at their Labor Day levels. What had changed were the new responsibilities, and costs, of government, but voter interest seemed unaffected. With voter turnout relatively unchanged from past years, both parties still had cause to celebrate on election night. Mark Warner and Tim Kaine had taken the governor’s and lieutenant governor’s offices for the Democrats, while Republicans netted attorney general as well as sizable majorities in the State Senate and General Assembly. In fact, Republicans gained twelve seats in the House of Delegates, moving from fifty-three seats to sixty-five.

### **TURNOUT WAS AVERAGE**

In a review of the 2001 vote, Cameron Quinn, secretary of the Virginia State Board of Elections, said, “there was nothing out of the ordinary at all.” In one sense, Ms. Quinn is correct. Although voter registration had risen slightly over the previous year, voter turnout was

comparable to past gubernatorial elections. As Table 2.1 indicates, 46.3 percent of registered voters participated in the 2001 election, which, while certainly nothing to crow about, is in line with turnout for the 1997 governor's race.

**TABLE 2.1**  
**VOTER TURNOUT IN VIRGINIA, 1996–2001**

Election	Total Registered	Total Voting	Voter Turnout (%)
2001 governor	4,109,127	1,905,241	46.3
2000 president	4,073,644	2,789,808	68.5
1997 governor	3,565,697	1,764,476	49.5
1996 president	3,322,740	2,468,229	74.3

*Source:* Virginia State Board of Elections.

## PERFORMANCE OF THE VOTING SYSTEM

### NEW TECHNOLOGY AND THE DROP IN UNCOUNTED BALLOTS

In other respects, however, Ms. Quinn could not be more mistaken. In the wake of the Florida recount, the Virginia General Assembly had amended the commonwealth's election laws in 2001 to

permit voting machines to note and initially refuse an overvoted ballot. This was a striking measure, as under past policy voting systems were *prohibited* from noting overvotes. According to local election administrators, the State Board of Elections saw this change not as a suggestion but as a mandate, telling the local election boards as one member said, “to deploy the software if [you] have it.” It is important to note that this change primarily affected jurisdictions that use punch card or optical-scan machines, and then only those precincts where the voter places a ballot paper into a voter tabulator. With the law now changed, these machines could be programmed to notify a voter when he had overmarked his ballot, at which point poll workers could offer him the opportunity to discard his old ballot and mark a new one.

The difference in the uncounted ballot rate was phenomenal. As Table 2.2 indicates, 1.59 percent of ballots for governor went uncounted in 1997, either because voters intentionally chose to sit out that race or because voting machines failed to record their vote. In 2000, 1.8 percent of ballots for president went uncounted.<sup>1</sup> But in 2001 a remarkably small 0.97 percent of ballots for governor went uncounted. To be sure, there are many potential explanations for the drop. Being an “off year” race, the 2001 gubernatorial contest attracted about 30 percent fewer voters than in a presidential year, individuals who arguably were more familiar with the balloting process and thus were less likely to use the voting machines improperly than would “novice” voters. Perhaps voters were feeling patriotic following September 11 and chose to cast votes in all of the races at stake. Among other things, this might explain why uncounted ballots hit historic lows in the lieutenant governor and attorney general races.

**TABLE 2.2**  
**PERCENTAGE OF BALLOTS NOT COUNTED STATEWIDE IN**  
**VIRGINIA, 1997–2001**

ELECTION YEAR	PRESIDENT	U.S.		LT.	ATTORNEY
		SENATE	GOVERNOR	GOVERNOR	GENERAL
2001	—	—	0.97	3.45	3.17
2000	1.80	2.56	—	—	—
1997	—	—	1.59	5.09	6.01

*Source:* Virginia State Board of Elections.

These explanations notwithstanding, the experience from one optical-scan jurisdiction suggests that the new software was a substantial force in reducing the number of uncounted ballots there. Speaking on the condition of anonymity, an election official estimated that this jurisdiction invalidated 600–700 ballots for president in 2000 as overvotes. However, one year later, after the law had been changed, the jurisdiction lost only one ballot in the 2001 gubernatorial election as an overvote. The official is quick to note other potential bases for the large decline in overvotes, including the fact that this jurisdiction invested substantially in voter education throughout 2001. Nevertheless, as the official acknowledges, the drop from 600–700 overvotes to only 1 is too great an improvement to be explained primarily by experienced or newly educated voters. The more likely explanation is that computer technology permitted

poll workers to notify voters when they had cast an erroneous ballot and to offer them an opportunity to discard the faulty ballot and mark a new one. Although the election official could not estimate how many voters were notified of an overmarked ballot in 2001 (the reports being largely word of mouth from poll workers in this jurisdiction), he said that only one ballot in over 30,000 cast had been rejected by the tabulating machines as overvoted.

### **IMPROVEMENT IN PUNCH CARD ERROR RESULTS**

Even more remarkable than this single jurisdiction, the rate of uncounted ballots hit a historic low in punch card jurisdictions. Of the 135 electoral jurisdictions in Virginia, seven cities or counties used punch card machines in the 2001 election,<sup>2</sup> including two of the commonwealth's largest cities, Norfolk and Virginia Beach. Having watched the Florida recount on television, most observers are aware that punch card machines have been criticized as less reliable or fair than other voting systems. The first objection has been that the machines fail to count ballots at an unacceptably high rate. At the University of California–Berkeley, researchers concluded that electronic and optical scan voting systems did the best job of recording and tabulating votes cast in the 2000 presidential election, while punch card ballots performed the worst. Rating the various systems, investigators called punch card machines “worrying,” as the machines produced overvotes or undervotes 2 or 3 percent of the time. This rate was over three times higher than that for optical scan and electronic systems, which produced an overcount or undercount less than one percent of the time.

The Berkeley results have been replicated in other national studies, including one performed by the General Accounting Office, as well as in a study analyzing the 2000 presidential vote in Virginia.

Testifying before the Joint Subcommittee to Study Virginia's Election Process and Voting Technologies, Professor Stephen K. Medvic of Old Dominion University concluded that punch card systems "should be avoided" because of their potentially high error rates.

Given their historic error rates, policymakers are concerned that punch card machines may be used disproportionately in areas with minority or low-income populations. Here the results have been mixed. Although both the General Accounting Office and a team of independent researchers have found that, nationally, "African Americans and the poor were no more likely than whites or more affluent voters to reside in counties that use the much-maligned punch-card machines," the same does not appear to be true in Virginia. As Table 2.3 shows, punch card jurisdictions have both higher percentages of African-American residents and lower personal incomes than does the commonwealth as a whole. Put another way, punch card machines are more likely to be found in localities that are poorer and in jurisdictions that have more African Americans than the state average.

**TABLE 2.3**  
**INCOME AND RACIAL DIFFERENTIALS BETWEEN**  
**PUNCH CARD JURISDICTIONS AND OTHER LOCALITIES**

	PER CAPITA PERSONAL INCOME	PERCENT OF POPULATION AFRICAN AMERICAN
Punch card jurisdictions	\$28,650	24.5
State average for localities	\$29,794	19.6

*Sources:* U.S. Department of Commerce, Bureau of Economic Analysis, Local Area Personal Income, 2000; U.S. Bureau of the Census, 2000 Census.

The concern, then, is that African-American and lower income voters may be more likely than others to be disenfranchised by punch card machines in Virginia. To be sure, there is some past evidence to suggest this inference. In 2000, slightly more than 2 percent of ballots in punch card jurisdictions within Virginia went uncounted, over three times the rate of uncounted ballots in jurisdictions that used electronic machines. However, as Table 2.4 shows, punch card machines performed *better* than the state average—and on an equal footing with electronic machines—in the 2001 election. This is an impressive improvement and one that has not generally been seen either within Virginia or across the nation as a whole. Nor are observers exactly sure why the machines performed so well this past election. Certainly, the new software helped, but not all of the punch card precincts allow voters to enter a ballot into the tabulator. Some jurisdictions cleaned and serviced their machines more carefully after 2000, which might have reduced mis-strikes. But still others believe that voter education improved voters' familiarity with and knowledge of punch card machines. Having been exposed to the frailties of punch card machines in the 2000 vote, Virginians may have responded with more care in 2001 to ensure that their ballots were correctly marked and that no "chads" were left hanging.

If new software has reduced the number of uncounted ballots in Virginia—and there is good evidence to suggest that some of the improvement lies here—it is troubling that the Virginia General Assembly has failed to require the programming of tabulating machines to identify overvotes. The State Board of Elections gets credit for encouraging localities to employ the software, but not all of them have the technology, and some jurisdictions have resisted this move. The website for the Chesterfield County registrar contains a colloquy in which the registrar maintains the rejection of an

**TABLE 2.4**  
**COMPARISON OF UNCOUNTED BALLOTS BETWEEN**  
**VIRGINIA JURISDICTIONS, 2000–2001**  
**(PERCENTAGE OF TOTAL VOTE)**

ELECTION	STATEWIDE	PUNCH CARD JURISDICTIONS	DRE JURISDICTIONS
2001 governor	0.97	0.73	0.74
2001 lt. governor	3.45	2.39	1.89
2001 attorney general	3.17	1.65	1.98
2000 president	1.80	2.07	0.66
2000 U.S. Senate	2.56	1.63	1.61

*Source:* Virginia State Board of Elections.

overvote would violate Article II, Section 3 of the Virginia constitution guaranteeing a secret ballot. Yet it is difficult to understand how one uncovers a voter's selections by notifying her that there is an error in her ballot. The Chesterfield registrar goes on to claim that "there are voters who deliberately vote for every candidate," but this position is countered by results of the National Election Study, which show that less than 1 percent of voters nationwide intentionally fail to cast a valid vote for president. The same was true in the anonymous jurisdiction mentioned above. Again, when notified that they had overvoted, every voter but one in this locale chose to correct his/her ballot.

The more likely reason behind the old law comes from a political observer in Virginia, who says the legislature may have

“worried about embarrassing voters at their precincts by notifying them that they had voted incorrectly.” Surely, no one wants to embarrass voters (certainly not elected officials), but reports from the unnamed jurisdiction suggest that voters were grateful to be offered the opportunity to correct their ballots. It seems only reasonable that any hint of embarrassment would be overcome by the threat of disenfranchisement, a danger that appears all too real. Given Florida’s experience in 2000, not to mention Virginia’s improvement in 2001, the legislature should mandate new software to identify and prevent overvotes.

### **NEW VOTING MACHINES PASSED THE TEST WITH VOTERS**

Arlington County was one of four Virginia jurisdictions in 2001 to test entirely new voting machines. Manufactured by Shoup Voting Systems, Election Systems Hardware, and Global Equipment, the voting systems all use touch screen technology, much like an automatic teller machine. Arlington, Henrico, and Prince William counties, along with the city of Norfolk, sought and received permission from the State Board of Elections (and the U.S. Department of Justice under Section 5 of the Voting Rights Act) to test these voting systems in the most recent gubernatorial election. Each of the four jurisdictions deployed the voting machines in selected precincts, with voters offered the chance to use the new systems. Votes cast on the machines counted in the election.

Reports from the test were largely favorable, with most voters reporting that machines were “easy to use and . . . an improvement . . . even though most of the voters had not expected to find an unfamiliar machine in their polling place.” Where voters had complaints about the machines they were largely limited to three areas: first, the machines were deployed in relatively open booths, offering less

privacy than machines that had a curtain; second, some machines were calibrated too sensitively to touch, so that they skipped over the first ballot page containing the race for governor; third, the buttons on some machines were too small. In many cases, however, “these complaints were offset by the fact that the machine provided an explicit opportunity to review the entire ballot before the ballot was cast” so that votes would not be missed. One county that compared the residual vote (that is, the undervote) between its old direct recording electronic machines (DRE) and the new ones found no appreciable difference in the results.<sup>3</sup>

If the touch screen machines are no more accurate than DRE systems, their real advantage is greater convenience for the voter. The machines are similar to ATMs, with which most voters are familiar, and the equipment can be calibrated both to present one race at a time while also summarizing the voters’ choices on a final screen. The positive response to the touch screen systems this past November helped to convince the State Board of Elections to provisionally approve the machines for use in Virginia elections. If the machines pass the remaining requirements—including tests for durability and the manufacturers’ financial viability—they will become the first new voting machines to be certified in Virginia in seven years. At that point local electoral boards could choose to utilize the machines, which cost over \$3,000 each.

But therein lies the rub, as it does in many respects for electoral administration throughout Virginia. The State Board has opened the door to new machinery, yet no one seems prepared to pay for these systems. Spouting slogans like “local autonomy” and “limited government”—and, understandably, pointing to a budget shortfall in Virginia—state leaders have effectively endorsed new election machinery for Virginia’s localities without providing the funding to

allow jurisdictions to upgrade their voting systems. To be sure, some localities are purchasing new machines, convinced of the need to make voting easier. But the vast majority of Virginia's local electoral boards cannot afford to upgrade their electoral systems without outside funding, whether from the state or federal government or from outside foundations.

### **STATE BOARD OF ELECTIONS PURSUES TWO PILOT PROJECTS**

The point is not that the State Board (or even the legislature) lacks goodwill, but rather that election administration is not a high priority for state funding. That said, the State Board has begun pilot projects to facilitate absentee voting and streamline election day processes. In the 2001 election the State Board of Elections inaugurated the Military Overseas Absentee Voting Project, whereby active duty military personnel could apply for an absentee ballot by e-mail and also download the ballot itself to be filled out and submitted by mail. The program was late in starting, being publicized in the late summer, and in the end was tested by only two jurisdictions. According to election officials, only one voter used the new system, which in itself would suggest that the pilot program failed. However, state officials report that they are committed to the program and believe that a better publicity campaign will attract future absentee voters.

Along with the Military Voting Project, the State Board of Elections has also been conducting a pilot program to consolidate the poll book and voter roster in several jurisdictions. Currently, when a voter shows up at the polls in Virginia he is greeted by a curious practice, whereby his name is listed on both a voter roster and a poll book. The voter roster is the official record of registered voters

in the precinct. The poll book is similar to the precinct roster, except that it lists only the name and address of each registered voter in the precinct, with a separate poll book for every legislative district in the precinct. The dual registration lists are not only a historical anachronism but also a bottleneck in processing voters on election day.

Consolidating the two lists has proven more successful than the absentee project, and officials at several local electoral boards are enthusiastic about developing a single, computer-generated roster of registered voters in each precinct. In fact, one general registrar says that the two lists are “the greatest barrier” to speedy voting. More than the type of voting machine used, the check-in procedure associated with two voter lists slows the process of balloting. Understandably, many registrars look forward to the successful completion of the trial consolidation and expect that Virginia will eventually move to a single list of registered voters in each precinct. Since the commonwealth’s voter registry is now kept electronically by the State Board of Elections, officials hope—and expect—that the list will eventually be available on-line.

## **ABSENTEE BALLOT PROBLEM**

### **OPTICAL SCAN MACHINE WOULD NOT READ FOLDED ABSENTEE BALLOTS**

If Virginia saw improvements in the counting of ballots this past election, there was a new problem that initially raised its head in Arlington County. Arlington is one of the most progressive and professional localities in Virginia, and election officials are continually reviewing their procedures for improvements. Indeed, the local registrar says that the events of the 2000 presidential election spurred them to scrutinize their operations even more carefully than in the past.

Over the past two years Arlington switched from a punch card system to an optical scanner for absentee ballots that are marked by the voter and mailed in to the electoral board.<sup>4</sup> In the November 2001 election, however, Arlington found that 51 of the 690 ballots so marked (7.39 percent) could not be read by the vote tabulator. If this were to have occurred at the polls—in jurisdictions with vote readers that reject unreadable ballots—the voters would have been notified and offered another chance to mark a clean ballot. But because the unreadable ballots were absentee, Arlington could not count them. The secretary of the Arlington Electoral Board speculates that the ballots became unreadable because they were smudged from folding and mailing, a problem unique to the absentee process and not likely the fault of the voters. He also says that, smudges aside, the voters' intentions on these ballots were clear. However, because the markings had become slightly smudged, the ballots could not be read and the voters were unfortunately disenfranchised.

Arlington has forwarded a report to the State Board of Elections detailing this problem and urging a response, but the difficulty is that current law does not offer an easy solution. At present there is no mechanism for reviewing these ballots and counting them. They are simply put aside as improperly cast, even if the fault lies in the election procedure. Moreover, even if the ballots were treated as contested votes and submitted to the local electoral board for review after election day, Virginia law gives the board members no standards for interpreting the ballots. Virginia Code §24.2-655 states that "Any ballot marked so the intent of the voter is clear shall be counted," but the statute provides no bases for determining a voter's intent. As described later, the legislature and State Board of Elections adopted new rules in 2001 for divining

recounted ballots, but these standards do not govern the initial, manual evaluation of ballots. Arlington is only one locality among 135 electoral jurisdictions in Virginia, and only a small number use a similar type of absentee ballot. But Arlington is the first jurisdiction to study this problem and raise it with the State Board of Elections. If one county has found that 7 percent of its absentee voters were disenfranchised, the total number across the commonwealth may be extensive.

## **ADMINISTRATIVE CONCERNS**

### **LOCAL ELECTORAL BOARD TAKES HEAT FOR ERRONEOUS REGISTRATION CARDS**

It is important to note that 2001 was the first statewide election this decade using new districts. With changes from the 2000 Census, the State Board of Elections had an additional challenge of notifying voters of their new legislative districts and in some cases informing them of changed polling sites. For the most part this process went well, although in a few counties, most notably Fairfax, the local electoral boards either mailed voter cards late or disseminated incorrect information. In Fairfax more than 18,000 residents were mailed voter registration cards that instructed them to go to the wrong polling places. The problem apparently originated in a computer glitch during the processing of 347,000 new voter cards. According to the *Washington Post*:

The county mailed new cards [in October 2001] to anyone whose voting district was changed over the summer by redistricting based on the 2000 Census. The updated information was sent electronically to the State Elections Board mainframe computer,

where it was processed and sent back to the county. Somewhere on that round trip, [the General Registrar] said, the records for the 18,000-plus Fairfax residents were “de-linked” and reverted to the old information. “We had nothing to do with any of this,” [said Diane McIntyre, the local Registrar.] “The antiquated main-frame has served the citizens of Virginia well, but for way too long.”

In response, the Fairfax general registrar’s office mailed new registration cards with the correct polling places to anyone suspected of having received the inaccurate information. But the registrar’s response was not enough for some officials, notably the county’s Board of Supervisors, who accused election officials of being “terribly inept.” County Supervisor Dana Kauffman proposed that voters be allowed to vote in their old precincts if they showed up by accident, but since ballots often vary by precinct the general registrar said she would instead provide workers with maps and directions to the correct polling places. As McIntyre replied, “We are putting tools in each precinct to help anyone who may be in the wrong place.”

The mix-up in voter cards led to even greater problems in Fairfax County. Given the confusion in precinct information, several voters showed up at the wrong precincts near closing without enough time to make it to their new polling places. Since the voters’ names did not appear on the registration list for their old precincts—and without time to call the Fairfax general registrar—poll workers issued the voters conditional ballots, which were reviewed the next day by the county’s Electoral Board. According to state guidelines, the Electoral Board should have rejected these ballots because they were cast at the wrong precinct, a rule, the State Board of Elections

notes, it reiterated to local electoral boards in a memorandum of June 8, 2001. However, at its meeting the day after election day, the Fairfax County Electoral Board voted to include eighteen conditional ballots for voters who inadvertently showed up at the wrong location.

The Electoral Board's decision quickly drew the ire of the State Board of Elections, which initially called the three members of the county board to appear on December 4, 2001, and explain their actions. Said William Atkinson, deputy secretary of the State Board of Elections, "It's a question of ensuring that the election board in Fairfax knows the proper procedures and laws and that those laws and procedures are followed . . . ." Fairfax election officials, however, defended their actions to count the conditional ballots because the "voters showed up close to the time polls closed and would not have had time to go to the proper precinct." Because those voters did not know their polling place had changed, "the County [Electoral] Board did not want [voters] who had cast the conditional ballot to be disenfranchised because of a mistake by a public official or by a disruption in the postal service," said Fairfax board secretary, Carol Ann Coryell.

The State Board again met with the Fairfax board members on January 4, 2002, and voted to petition the Fairfax County Circuit Court to remove two of the county board members and rebuke the third. Interestingly, all of the parties in the hearing defended their actions based on lessons from the 2000 presidential race. Said State Board of Elections secretary Cameron Quinn, "In light of Florida last year and the Supreme Court cases, there was even more concern this year that things should be treated uniformly." Responded county board member Barbara Varon, "To me, the right to vote is sacred. It's not a privilege, it's a right. Do I feel that I did something wrong

by the spirit of the law? No.” In another strange twist, the Fairfax County Electoral Board found support for its actions from both Republican and Democratic camps. Joseph Underwood, chairman of the Fairfax Republican Party, has already informed the Virginia attorney general’s office that he intends to contest the State Board’s ruling as “a gross misuse of power.” Added Gerald Connolly, a Democratic county supervisor, “This is a travesty. The real losers . . . are the voters of Fairfax County. I would call upon the judges to look long and hard upon this action.”

### **VOTER IDENTIFICATION**

Voters in Virginia must also provide some form of identification at the polls or sign an affidavit attesting to their identity. Up through the 2000 election Virginians were simply asked to sign the poll book, a practice that left open the possibility that interlopers might vote in place of (or in addition to) registered voters. Although election officials say Virginia rarely faced such fraud, it was one of a small handful of states that did not include an identity check. As a result, the General Assembly passed a statute in 2000 requiring voters to present identification (which need not be photo id) or attest in writing to their identity. This measure was initially opposed by some in the civil rights community as a possible revival of literacy tests, although there is not yet evidence that the measure has affected turnout. The general registrar for an urban jurisdiction reported that less than 1 percent of voters on election day chose to sign the affidavit, some of them, she said, as a protest against the government requiring identification in order to vote. There were no reports in this jurisdiction of individuals who refused both to present identification and sign the affidavit, although information is not available on other localities.

## THE IMPACT OF SEPTEMBER 11

The 2001 general election came, of course, after the tragedies of September 11, and, at least in and around Washington, D.C., mail service was interrupted following the anthrax scares at the U.S. Capitol. Given these events, there were concerns that absentee balloting might be disrupted by infrequent or erratic deliveries in northern Virginia. Reporting a week before the election, the *Washington Post* declared that “voters who have mailed their ballots should be fine. . . . But several general registrars [say] that absentee ballots that haven’t been mailed out could miss the deadline.”

At the time, the U.S. Postal Service confidently predicted that most local mail would arrive on time with no disruption to the electoral process. Interviews with local registrars after the election suggest that postal representatives were largely correct and that absentee balloting was not affected by postal difficulties, at least not for voters who used the U.S. mail. An official in Fairfax County, a large jurisdiction just west of Washington, D.C., said she noticed little to no change in late or uncompleted absentee ballots this past November. If anything, the electoral boards report that more voters than usual came to vote at the central absentee precincts, a factor they attribute both to news coverage of the mail difficulties and an information campaign by the electoral boards to encourage in-person absentee voting.

That said, one registrar reported a slightly higher number of late ballots from voters who used the U.S. State Department’s diplomatic pouches to deliver their absentee votes. The number of affected voters in this county was small, totaling around ten or less, but as the official said, “we consider it a problem when anyone is denied his vote.” Given the heightened security level at U.S. missions

abroad, diplomatic pouches were either subjected to additional checks or simply reserved for diplomatic business. As a result, the absentee ballots were relegated to a lower priority.

### **3. THE PRELUDE TO 2001: COMPLAINTS FROM 2000**

**R**eactions to the 2000 presidential election were strong and swift in Virginia, with many of those initial responses leading the way to later changes in Virginia's electoral process. Within a month of the presidential vote, Representative Robert C. "Bobby" Scott of Virginia's third congressional district held a public hearing in Richmond to hear testimony on "Perceived Registration Impediments and Possible Voting Irregularities in the Third District." Representative Scott convened the session in light of problems found in the Florida vote, both to spur interest in federal legislation to improve the administration of elections and also to draw attention to conditions within Virginia. Scott chaired the hearing, which included several well-known panelists from within the commonwealth, including two state senators, the chair of a county board of supervisors, current and former election registrars, an election law attorney, the head of the Virginia NAACP, and two representatives of the State Board of Elections.

With one slight exception, each witness spoke of problems in Virginia's administration of elections, although witnesses seemed as concerned if not more so with the climate of electoral fairness nationally in light of Florida's recent experience. To a person, the witnesses seemed to be either Democrats or representatives of constituencies often aligned with the Democratic Party. When coupled

with the witnesses' larger concern about the Florida recount, it is difficult, then, to assess the seriousness of the problems they identified in Virginia. On the one hand, some observers—particularly those of a Republican perspective—might see the hearing as a “gripe session,” an opportunity to vent about the outcome of the 2000 presidential election and to lump Virginia into the same category as Florida, whether deserved or not. To be sure, coming shortly after the Supreme Court's decision in *Bush v. Gore*, many participants in the hearing were incensed, if not despondent, about the 2000 presidential election. But several other witnesses were able to point to specific concerns in the commonwealth's administration of elections. Thus, even if partisan in their evaluation of the 2000 results, much of the testimony should give Virginians pause, suggesting that some election procedures, whether intentionally or not, have disenfranchised some Virginia voters, especially African Americans.

Representative Scott began the hearing by acknowledging that not all reports of voting irregularities in Virginia were the fault of the commonwealth. He noted a case from 2000 in which the Democratic Party's sample ballot in Newport News and Hampton instructed voters to mark an “X” on the ballot while the official ballot required shading in. This example aside, the vast majority of witnesses spoke of voting irregularities by the commonwealth. Taking the witnesses as a whole, their concerns fell generally into four areas: first, that the transition to a “Motor Voter” process (in which residents are registered to vote after completing paperwork at their state's Division of Motor Vehicles [DMV]) left out some individuals who believed they had registered but who arrived at the polls to find that their names were not listed; second, that the State Board of Elections failed to distribute voter registration cards in a timely manner, especially in African-American areas; third, that some

precinct workers were ill-trained and either gave erroneous advice or failed to follow election-day procedures, thereby disenfranchising some voters; and fourth, that police presence was unusually high in African-American areas on election day, which, one witness said, served to intimidate some voters from participating.

### **VOTER REGISTRATION COMPLAINTS**

One of the most compelling witnesses was Gerald Hebert, an attorney from Alexandria and former acting chief of the Voting Rights Section of the U.S. Department of Justice. Hebert argued that the transition to Motor Voter in 2000 left out some voters who believed they had registered. Said Hebert,

One of the things that voter registrars tell me is that a lot of people who go to the polls to vote and think that they registered at the DMV office or the Social Services office suddenly go to the polls to vote and find out they're not registered. In fact, some of the registrars tell me that upwards of 30 to 40 percent of all people that try to register to vote at DMV get applications rejected when they go to the registration office because they haven't filled out the form correctly.

Another witness reported similar problems with registering at the DMV, noting that the process does not contemporaneously notify an applicant when he has made an error in applying to vote. Theoretically, the local election registrars are supposed to inform an applicant when his application cannot be accepted, but if the individual seeks to register shortly before an election, there may not be time to notify the applicant, let alone correct the error before election

day. Witnesses also testified to testiness or ignorance by officials at the DMV, who seemed unable—or unwilling—to assist potential voters in navigating their way through the new Motor Voter provisions. As the State Board of Elections' vice chair concluded, the attitude of DMV “needs to be changed . . . [so they come to see] that this is part of their mission, to register people to vote and to assist them.”

This problem is hardly limited to registering at the DMV. As another witness noted, similar problems arise in voter registration drives, where applicants attempt to register and believe themselves thus able to vote but go to the polls only to find that they are not registered. The witness suggested these failings were the fault of the State Board of Elections, which should notify applicants more quickly when there are problems with a voter's application; but, as local registrars have reported, petitioners sometimes fail to submit the applications they solicited. Nonetheless, in 2000 there were no measures in place to notify a voter contemporaneously whether his application had been accepted or not.<sup>5</sup>

Besides its failure to notify voters imminently about their registration applications, witnesses also said that the State Board of Elections had been tardy in mailing registration cards to voters. One witness identified the affected localities as Amelia, Newport News, Hampton, Richmond, Chesterfield, Henrico, Norfolk, and Brunswick, most of which have high concentrations of African-American voters. Other witnesses pointed to problems in Richmond, where, they claimed, the local election board had run out of voter registration cards in September and thus was unable to inform voters properly of their eligibility to vote and the location for doing so.

## **POLL WORKER PROBLEMS**

The 2000 election was the first to require Virginians to present identification at the polls. Witnesses at Representative Scott's hearing complained that precinct workers were unfamiliar with the new legislation, particularly the provision that allowed voters to sign an affidavit in lieu of presenting identification; according to the witnesses, the poll workers' ignorance cost certain voters their right to participate. Witnesses also spoke more generally about the need to train poll workers better. The vice chair of the State Board of Elections agreed with such assessments, saying that "better training of officers of elections is another area that needs to be addressed." But even he did not go so far as one local election official, who claimed that many of the precinct workers are "old," "cranky," and "abusive."

Such pejoratives aside, witnesses were able to identify several cases in which the ignorance of poll workers cost qualified individuals the opportunity to cast an informed ballot. In King and Queen County, for example, officials required voters to throw out sample ballots before entering the voting booth. This problem was eventually corrected, but in the interim voters were missing an important guide, particularly since two of the candidates opposing each other had similar last names, Davis and Davies.

## **POLICE PRESENCE**

If there was a common thread flowing through the testimony at Representative Scott's hearing, it was that the problems of election administration were prevalent in African-American areas throughout the commonwealth. Whether witnesses claimed that voter

registration cards were sent late, that voting machines were too few or in poor condition, or that voting lines were too long, their primary point was that adequate resources and accurate information were most often lacking in minority areas. This theme has also been identified in Florida, most particularly in the hearings of the U.S. Civil Rights Commission following the 2000 presidential election. But one point in Virginia deserves special attention. At least one witness at Representative Scott's hearing complained about heavy police presence in African-American precincts on election day. This is an unusual and delicate point to make, for rather than applauding the police for keeping order on election day, the witness claimed that the police were acting to intimidate some African Americans from voting. It is a very controversial point, based on one of two premises—either that African Americans generally have reason to fear the police and would avoid them at the risk of not voting, or that particular African Americans, because they are engaged in criminal behavior, would bypass the polls if police were present. That the charge was offered by an African American does not lessen its controversy, for the claim resembles those from other states in which political operatives posed as INS agents to drive down the Hispanic vote. Some of those claims have been proven in court, but the present allegations lack similar support. Although they are undoubtedly consistent with Virginia's political history (and may, in fact, be true today), the witness was unable to provide proof outside of his own statement.

### **ENSUING VOTER EDUCATION EFFORTS**

Representative Scott's hearing was more than simply a fact-finding session; it also seems to have mobilized some activists who created an election monitoring program in the 2001 election. Initiated by

People for the American Way Foundation, the NAACP Legal Defense and Education Fund, the Lawyers' Committee for Civil Rights Under Law, the NAACP National Voter Fund, and the National Coalition on Black Civic Participation, this "Election Protection Program" was a multifaceted project to educate voters about their rights, provide legal advice and assistance to voters who needed help in order to vote, and monitor the polls to ensure that voting rights were enforced. The program is described in Appendix 1 to this report, in which its mission and activities are analyzed. Designed to address voting irregularities, there are also those who see it as a political operation to elect African-American candidates.



## **4. BEFORE THE VOTING BEGINS: THE LEGISLATURE ACTS**

### **JOINT SUBCOMMITTEE TO STUDY ELECTION PROCESS AND VOTING TECHNOLOGIES**

**M**any of the problems identified in Florida or at Representative Scott's hearing were not lost on the Virginia General Assembly, which in the first half of 2001 created a Joint Subcommittee to Study Virginia's Election Process and Voting Technologies. Numbering sixteen members, the subcommittee included ten legislators, three state election officials, the commonwealth's secretary of technology, an outside lawyer, and an academician. The subcommittee, in turn, split into two task forces, one that examined issues of technology and voting equipment, and another that appraised voting registration and election day processes. Together the task forces submitted their recommendations to the General Assembly on October 19, 2001, intending that the House of Delegates and State Senate address these proposals in the next legislative session.

#### **TASK FORCE ON TECHNOLOGY AND VOTING EQUIPMENT**

The Task Force on Technology and Voting Equipment focused primarily on three issues in its report: the use of new and updated voting equipment, the training and professionalization of election staff, and the merging of the poll book and voting list into a single

index of registered voters. On the question of voting equipment, the task force took a politicked approach, professing itself satisfied with the variety of voting systems used by each locality but also recommending that the federal and state governments provide additional funding to upgrade voting equipment. Acknowledging that there is “still much to learn about the reliability of various types of equipment,” the task force nonetheless concluded that “no one voting system has proven more reliable and accurate than any other system.” As a result, the task force recommended that Virginia continue its practice of local choice over voting systems (subject to certification by the State Board of Elections).

A closer reading of the task force’s report, and particularly its tone, suggests that members would favor the replacement of punch card equipment with “high-tech” voting systems, and in fact, the report noted with approval that three jurisdictions, including Norfolk, are in the process of replacing punch card machines. But as the task force correctly noted, the cost of doing so is high, an expense that must compete with other priorities in the state budget. Although the task force failed to say so explicitly, it seems clear that subcommittee members felt the narrow differences in reliability and efficiency between existing voting systems did not justify the wholesale replacement of older voting machines. Whether the task force would support such a recommendation with unlimited resources is unclear, or whether opinions would change if Virginia had been the state to decide the 2000 presidential race on a hand recount. At present, it seems that the task force has reached a decision by weighing the relative costs and benefits of upgraded machines: on the one hand, new voting systems would minimize and equalize “error rates” in balloting across the commonwealth, as well as making the process of voting easier and quicker for Virginians; on the other hand, new

machines are expensive and theoretically may threaten the sovereignty of localities to choose their own voting systems. Moreover, and perhaps more to the point, it is highly unlikely that a single election would turn on the differences in error rates between various voting systems. Call it Russian roulette, but the task force's recommendation must be premised on the notion that either Florida was an anomaly or the various studies comparing voting machines are wrong.

In the task force's defense, its members recommended that the General Assembly promote federal legislation to provide states and localities with money to upgrade voting equipment and support election process reforms, but the task force was unwilling to commit state funds to improve or upgrade voting equipment. Rather, it supported state funding to "assure accessibility to the polls for all voters." Put simply, the task force would appropriate state funds to make voting accessible to disabled voters, but it would upgrade voting equipment for others only if the federal government provided funding. Such conflicting approaches would surely alarm Michael Brenner, vice chair of the State Board of Elections. Testifying before Representative Scott's hearing in December 2000, Brenner said, "The locality is the one that purchases [voting] equipment. To [recommend that they] change it and not give them the money to do it, I think is unfair." This is particularly true when, as Brenner says, his "predecessor, as well as the late Deputy of the State Board [of Elections] used to always say, if they could ever decertify the use of punch card voting equipment in the state then they wish they could have done that."

The task force was more forthcoming in its proposals to improve staffing and training for election officials. Subcommittee members recommended that the State Board of Elections hire a new full-time employee with broad responsibilities to conduct oversight

of the process of certifying voting equipment, monitoring developments in voting technologies, and administering grants to localities to accommodate disabled voters. The task force also suggested that the State Board of Elections increase training time for poll workers and other local officers of elections other than the chief or assistant chief officer. Like the witnesses who testified at Representative Scott's hearing, task force members apparently agreed that there were improvements to be made in the training, knowledge, attitude, and professionalization of some local election workers.

Finally, the task force noted with some concern that localities must work with two computer-generated lists of registered voters in each precinct, the voter roster and the poll book. The State Board of Elections has been conducting pilot tests of a single combined list, with the pilot program due to finish in July of 2003. The task force approved of such endeavors and recommended that the move to a single voting list for each precinct begin in 2002. It also proposed that the State Board of Elections evaluate the feasibility of an electronic list of voters.

#### **TASK FORCE ON VOTER REGISTRATION AND ELECTION DAY PROCESSES**

The second task force, which focused on voter registration and election day processes, rightly took pride in the Virginia voter registration system and supported its goal of maintaining clean, up-to-date voting records to prevent fraud. Among its proposals, the task force recommended that the Department of Motor Vehicles institute print-on-demand voter applications. Similarly, the task force proposed that any overseas person who is otherwise qualified to vote in Virginia and who temporarily lives outside of the United States, should be allowed to register to vote by mail.

Task force members considered problems arising from third-party registration drives. According to the task force's report, in the first half of 2001 the State Board of Elections distributed 50 or more voter registration applications to approximately 127 public bodies and 276 other individuals and groups. However, as at Representative Scott's hearing, the task force heard reports of parties who conducted a registration drive but failed to submit completed applications on time; as a result, individuals who believed they had registered with a third party arrived at the polls to find that they were not registered and could not vote. To address this problem the task force recommended that the State Board of Elections "continue its efforts to provide guidelines for third-party registration drives through the Internet and by providing the guidelines to the registrars for distribution at the local level." Rather than focusing its attention on educating prospective voters, the task force believed that the State Board of Elections should concentrate on alerting "third-parties to their responsibilities for conducting the drives." However, because registration drives are often conducted on college campuses, the task force also recommended that the State Board of Elections coordinate with colleges and universities in Virginia to include information on voter registration in student handbooks.

In a measure that is sure to generate opposition, the task force proposed that the State Board of Elections and/or the local electoral boards post voters' rights and responsibilities at polling places to educate officers of elections and voters and assure that all voters have access to the same information. The task force noted that the American Civil Liberties Union and others have sued in the past to enjoin the posting of voter responsibilities as a burden on the voting process and a possible literacy device. However, task force members thought there was more to be gained by educating election officers

and reassuring voters about their rights through postings. They did caution that any postings should avoid suggestions that the information imposes new qualifications on the right to vote.

With the joint subcommittee meeting after September 11, task force members urged the General Assembly to review legislation to allow for the postponement of primaries and local elections in the event of emergencies. For general elections, though, a constitutional amendment would be required to postpone the vote, a proposal that task force members believed the General Assembly should consider and eventually adopt. To handle absentee ballots in emergencies, the task force proposed that the State Board of Elections be granted additional authority to designate alternative methods and procedures for absentee balloting in such events. For example, the task force pointed to a past forest fire in the Shenandoah Valley where firefighters were unable to cast their votes. According to the task force, many other states have given authority to the secretary of the State Board of Elections to determine what constitutes a public emergency and to permit alternative methods for casting absentee ballots. Although the task force recommended such accommodations, it emphasized that all absentee ballots must be received prior to the closing of the polls on election day.

Finally, in response to Florida's experience in 2000, the task force recommended revisions to Virginia's timetable for a recount following a presidential election. Under Virginia law, a recount may not begin until the election results are certified by the State Board of Elections, which happens in late November. But, as Florida clearly showed, this schedule does not permit sufficient time to recount the ballots and also entertain any court challenges so that a state's electoral votes will count. Accordingly, the task force proposed legislation that would allow a challenger to file an early petition for a

recount and require prompt action by the recount court. These measures, and the other recommendations from the Joint Subcommittee, are waiting for the Virginia General Assembly.

### **RECOUNTS AND THE STATE BOARD'S RESPONSE**

The joint subcommittee was hardly acting in a vacuum when proposing measures for a recount, for the Virginia General Assembly had taken up the issue of recount standards following the 2000 election. At the time, Virginia's election laws reflected many of the same weaknesses observed in the Florida recount. Under Virginia law the loser of an election is permitted a recount when the difference between two candidates is less than 1 percent. The candidate must file a petition in circuit court no later than ten days following final vote certification by the State Board of Elections or a local electoral board. The petition is heard by the chief judge of the circuit court, who presides along with two other judges appointed by the chief justice of the Virginia Supreme Court. Under law the court may order a recount, "or, in the case of mechanical or direct electronic voting devices, [dictate that] the vote [be] redetermined."

Virginia has had several experiences with a recount, one of the most recent being the 1989 gubernatorial election contest between Douglas Wilder and Marshall Coleman. Yet, like many other states, Virginia had not previously addressed the standards for hand-counting challenged ballots. Part of the reason may be that only seven localities in the commonwealth use punch card ballots, which, as Florida's experience shows, are most susceptible to a hand recount, but few if any statewide elections in Virginia have ever turned on the margin of undercounted ballots. Nonetheless, to protect itself from a reprise of the Florida recount, the Virginia General Assembly

passed a law in 2001 setting the standards for hand-counting punch card ballots in the event of a challenge. According to the legislature, the “machine count shall be the official count and shall be attempted first.” When the machine “will not accept an individual ballot,” the ballot may nonetheless be counted by hand if at least two corners of a “chad” are separated. Voting for more than the number of candidates permitted is considered an overvote and will not be counted. The legislature did not set standards for recounting electronic ballots. Perhaps more important, the legislature did not clarify standards for initial counts of ballots. This could be important in some cases, such as in jurisdictions that use paper ballots.

If the legislature did not enact additional standards for the counting (or, in some cases, recounting) of ballots, it did assign new responsibilities to the State Board of Elections. Under legislation passed during the most recent session, the General Assembly required that by September 1, 2001, the State Board of Elections promulgate standards for the resolution of a recount. The State Board of Elections responded on August 20, addressing two issues as well as the standards for a recount. Should a circuit court order a recount, the State Board of Elections directed local electoral boards to provide recommendations to the court about what types of locations and teams would be required to complete the recount. The State Board of Elections also concluded that the eligibility of a voter to vote should not be raised as an issue in the recount if that voter’s ballot was counted in the election and included in the certified results. Voter eligibility issues, thus, are reserved for contest actions should the original winner be overturned on a recount.<sup>6</sup> Nonetheless, the State Board of Elections decreed that a recount court may consider the qualifications and eligibility of absentee or conditional ballots that were not opened and counted in the original vote.

Going beyond the legislature's new standards for recounting punch card ballots, the State Board of Elections also established standards for manually recounting ballots from other voting machines. Each of these criteria rest on the term "target area," encompassing "the square next to the candidate's name on the paper ballot, the oval next to the candidate's name on the Accu-Vote ballot, or the incomplete arrow next to the candidate's name on the Optech ballot." The marks that may be counted in the target area include:

- ◆ If the names of all candidates but one are stricken through, the nonmarked candidate will count as a vote.
- ◆ Any mark in the target area for only one candidate (including circling, making a mark, etc.) shall be counted as a vote "unless the mark is a clearly negative or extraneous comment or a substantial part of the candidate's name is crossed through or stricken out."
- ◆ A mark for one candidate that strays into another candidate's target area will count as a vote for the original candidate so long as 3/4 of the mark is in the candidate's target area. Other marks, including "X" or " ", will count if the lines of the X or bottom point of the checkmark are in the candidate's target area.
- ◆ A mark for one candidate, when marks for other candidates have been erased or scratched out, will count for the candidate where no erasure is present.
- ◆ A mark next to, opposite, or across a candidate's name shall count as a vote.

- ◆ Any other writing or remark that indicates a voter's support for one and only one candidate for the office that is subject to recount shall be considered a vote. Ranking candidates will not count unless only one candidate is marked.
  
- ◆ Marks that indicate opposition to candidates will not count as votes.

The Task Force on Voter Registration and Election Day Processes has praised these standards, saying the measures “serve as a step forward in assuring uniformity of process in recounts,” but neither the State Board of Elections nor the task force addressed whether these new standards for manually counting ballots apply to the original vote or only in recounts. On their face, the regulations pertain only to recounts where manual counting is required. But ten jurisdictions in Virginia employ paper ballots in some or all of their precincts—a method of voting that, by definition, is counted manually. For years these localities have been subject only to Virginia Code §24.2-655, which states that, “Any ballot marked so the intent of the voter is clear shall be counted.” But if this standard was too vague for recounting ballots—such that both the legislature and the State Board of Elections implemented new standards for manually divining votes—then why have these standards not been applied to those ballots that must be initially counted by hand? In essence, the General Assembly and Board of Elections have fixed one problem—recounts—while leaving the more pressing problem of paper ballots untouched.

### **PARTY IDENTIFICATION ON THE BALLOT**

If many of the legislature's changes in 2001 were in reaction to the 2000 presidential vote, at least one of them had been brewing for

several years. Since nearly the time of the Byrd Machine in Virginia, ballots in the commonwealth did not identify any candidate's party identification. Although voters were free to bring partisan guides with them into a voting booth, voters who did not already know the party of a candidate were "voting blind" if they sought this information from the ballot. Nor could they ask poll workers for help. As one local election board member said anonymously, "this rule was unwieldy. Political parties could set up shop outside the polling stations to notify voters about the candidates' affiliations, but if a voter asked me any question about a candidate's party I would get in serious trouble if I answered."

For years Democrats had resisted calls to include a candidate's party affiliation on the ballot, largely, it seems, because they feared an increasingly conservative electorate would vote against them if they realized that some of their favorite sons were actually members of the more liberal national party. Throughout the mid-1990s Democrats controlled either the governor's mansion or one of the legislative houses, allowing them an implicit veto should legislation have been raised to reverse the ballot policy. But in 1999 Republicans took control of the General Assembly and the governorship. In turn, they pushed through legislation to put partisan labels on the ballot, a change that first took effect in the 2001 statewide elections. Under the new legislation, candidates for state offices—including governor, lieutenant governor, attorney general, state senator, and delegate—are listed alongside their political party. Candidates for local offices appear without the designation. As the discussion in Chapter 2 indicated, Republicans took even bigger majorities in the General Assembly following the 2001 election, but it is difficult to say whether this development was the result of ballot labels, local issues, or 2000 redistricting. At a minimum, the addition of labels did not contradict the Republicans' position on the issue.



## 5. VIRGINIA ELECTORAL ADMINISTRATION AND PRACTICE

As the preceding discussion suggests, election administration in Virginia is the ultimate responsibility of the State Board of Elections, which supervises and coordinates the work of local election officials. The State Board of Elections has five primary functions: establishing and implementing policies and procedures to register and maintain voter registration records; promoting and ensuring uniformity in the procedures of county and city electoral boards and registrars; aiding local electoral boards by reimbursing local governments for the compensation of local registrars and providing data circuitry; training electoral board members and general registrars with an annual two-day seminar; and administering the campaign finance disclosure laws.

The actual administration of elections and voter registration is carried out by the local electoral boards, the general registrars in each jurisdiction, their staffs, and election-day poll workers. Virginia is divided into 135 electoral jurisdictions, three-quarters of which encompass counties, with the remaining 25 percent covering independent cities. The local electoral boards are responsible for carrying out elections in each jurisdiction, from the purchase of voting equipment and the hiring of staff to the registration of voters and maintenance of voter lists. Although staffing decisions vary by jurisdiction, most localities have an appointed electoral board, a

general registrar for voter registration, and several office staff. Temporary staffs swell on election day, when most precincts have at least two poll workers, one or more to record voters and others to assist in the operation of the voting machines.

## **REGISTRATION**

Virginia is one of a small number of states that maintain a computerized, statewide list of registered voters. Citizens may register in person, by mail, or, under Motor Voter, at any number of governmental offices. They may also download applications from the Internet. In Virginia an application to vote must be received twenty-nine days before an election to qualify a voter. Virginia was grandfathered under the National Voter Registration Act, permitting the commonwealth to list voters by their Social Security numbers in the registration database. As a result, the general registrars are able to check easily for individuals who attempt to register in more than one jurisdiction. The commonwealth regularly updates its voter list by comparing the names to death certificates and felony convictions issued in Virginia, and once a year much of the voter roll is checked against the registration lists of neighboring Maryland and the District of Columbia. The local jurisdictions also regularly mail address checks to voters who have not voted in previous elections. Under the Motor Voter law such "inactive voters" may be purged from the registration lists if they do not vote in two successive federal elections.

## **FELONY DISENFRANCHISEMENT**

As in several other states, individuals convicted of a felony may not vote in Virginia, a prohibition, however, that lasts for life unless an individual successfully appeals to the governor to reinstate his voting

rights. The process in Virginia for reinstatement is long and complicated, requiring a felon who has successfully completed probation and/or parole to wait five years and file a petition with the circuit court providing several certified documents, letters of reference, and a detailed description of the offender's renewed civic responsibility. If the court approves the petition it is forwarded to the governor for his review.

### **“ODD YEAR” VOTING**

Virginia is one of only a few jurisdictions nationwide to hold “odd year elections.” Although federal elections are held in years divisible by two, Virginia state races do not occur at the same time. State legislative races are scheduled for 2003, with the next statewide elections to occur in 2005. The practice of odd year elections is, like several aspects of Virginia's electoral process, a historical anachronism, one that has been criticized by political scientists as designed to limit voter interest and turn out. On average, voter turn out is 30 percent higher in Virginia for a presidential election than for the gubernatorial race, meaning that far fewer Virginians elect the governor than participate in the presidential, senatorial, and congressional elections.

### **VOTING SYSTEMS**

Virginia electoral jurisdictions use a variety of voting systems. The State Board of Elections is responsible for certifying voting machines, but localities are given latitude to decide which systems to employ. Since the localities are also responsible for purchasing the voting systems, their choices reflect a variety of approaches. Up through the 2001 elections, Virginia's counties and cities employed eleven different types of voting systems that had been certified by the State Board of Elections (see Table 5.1, page 56).

**TABLE 5.1**  
**VOTING SYSTEMS CERTIFIED BY THE VIRGINIA**  
**STATE BOARD OF ELECTIONS**

TYPE	MANUFACTURER	DESCRIPTION
ACCU-VOTE	Global Election Systems	Marksense Tabulator
AVC	Sequoia Pacific AVC Advantage	Direct Recording Electronic
AVM-RS	Automatic Voting Machine	Automatic voting machine with a mechanical printer and removable selectors
AVM-NS	Automatic Voting Machine	Automatic voting machine with mechanical printer and non-removable selectors
AVM-NP	Automatic Voting Machine	Mechanical, non-printer, non-removable selectors
OPTECH IIIPE	BRC Election Services Division	Marksense Tabulator
PBC-3	BRC Election Services Division	Punch card tabulator with ballot bag
PBC-IIID	BRC Election Services Division	Punch card tabulator without ballot bag
IES	International Elections Systems Shoup	Mechanical
RFS	R.F. Shoup	Mechanical
1242	R. F. Soup Shouptronic 1242	Direct recording mechanical

*Source:* Virginia State Board of Elections.

Besides these machines, six jurisdictions were authorized in 2001 to use paper ballots in a few selected precincts along with one small county that relied exclusively on hand tabulation.

Virginia law mandates voting systems at every precinct with 750 or more registered voters, setting a ratio between the number of registered voters in a precinct and the number of voting devices that must be present. The premise behind this requirement is that voters will be unfairly delayed if there are not sufficient machines present at each precinct to accommodate their desire to vote. But statute does not establish a maximum number of voters for each precinct. This question is delegated to the localities, leaving open the possibility that voters will be held up not by the absence of machines but instead by a lack of staff to accommodate their numbers.

This prospect is real in Virginia, where precincts in punch card jurisdictions have 21 percent more voters than do precincts in other localities throughout the commonwealth. It is not known whether the punch card localities assign more poll workers to their precincts than do other jurisdictions to meet these numbers, but it is reassuring at least to find that punch card jurisdictions surpass the required ratio of voting booths to registered voters. Under Virginia law, any city or county that uses voting machines in which voters insert ballots into an electronic counter must “provide for each precinct at least one voting booth with a marking device for each 425 registered voters.” As Table 5.2 demonstrates (see page 58) localities with punch cards provide on average of one voting booth for every 342 voters, while jurisdictions that use “marksense” (or optical scan) balloting offer one voting booth for every 406 voters. Thus, even if voters in punch card localities are being held up by insufficient staff to process their ballots, they benefit from more numerous voting machines.

**TABLE 5.2**  
**COMPARISON OF PUNCH CARD PRECINCTS**  
**TO OTHER JURISDICTIONS IN VIRGINIA**

	VOTERS/PRECINCT	VOTERS/BOOTH
State average	1,811	471
Punch card localities	2,205	342
Marksense localities	2,005	406

*Source:* Virginia State Board of Elections.

### CONDITIONAL VOTING

Should a voter appear at a polling station and his name is not on the voter roster, election officials are supposed to call their general registrar's office to verify the voter's identity. If the registrar or his/her staff cannot be reached, poll workers are instructed to offer the voter a conditional ballot. Sometimes called a provisional ballot, conditional voting permits the individual to cast a ballot, which is sealed in an envelope and put aside until the next day when the local electoral board determines the individual's eligibility. If upon additional review the electoral board determines the individual was eligible to vote in the precinct where he presented himself, his ballot is unsealed and included in the final tabulation. If, however, the voter was not qualified to vote, or at least not in the precinct where he appeared, the ballot is destroyed and the individual is sent either a voter registration application or additional information about his correct precinct.

Conditional voting has been controversial in Virginia. In the summer of 2001 the secretary of the State Board of Elections sent a

memorandum to the general registrars reminding them that conditional ballots are permitted only after poll workers first attempt to verify a voter's eligibility with the general registrars, and then are offered only to voters who claim to be voting in their correct precincts. As discussed earlier, a dispute over this latter requirement has set up a potential court fight between the State Board of Elections and two members of the Fairfax County Electoral Board.

### **ABSENTEE VOTING**

Finally, Virginia provides absentee voting for individuals who are unable to vote on election day. Virginia has broad allowances for absentee voting, permitting individuals to vote up to 45 days ahead of a general election in November and 30 days before other elections. Of Virginia's 135 electoral jurisdictions, 65 have established central absentee precincts where voters may vote early if they will be indisposed on election day; all jurisdictions permit absentee voters to request ballots and submit them by mail.

Virginia does not have early voting, the kind seen in Oregon, but the commonwealth is experimenting with alternative methods to make absentee ballots available to voters. As an earlier section mentioned, Virginians may now check the status of their absentee ballot applications on-line, and in some jurisdictions military personnel may both request and receive absentee ballots by e-mail. There are, however, no allowances for late ballots. To be counted, all absentee ballots must be received by election day so that they may be included in the certified counts of the local electoral boards. At 5 P.M. the day after voting each jurisdiction is required to forward its official vote total to the State Board of Elections, which, following general elections, meets the fourth Monday of November to certify the state vote.



## 6. CONCLUSION AND RECOMMENDATIONS

Virginia deserves kudos for the many ways in which it has modernized the commonwealth's system of electoral administration. Statewide registration, provisional balloting, absentee ballots by e-mail, all of these measures are ones that would surely meet the standards set forth by the National Commission on Election Reform. Whether each of the improvements would have occurred without the events of Florida is questionable, but now that the commonwealth has made progress it is all the more important to ensure that the new proposals and recommendations are carried out and that continued attention is paid to lingering shortcomings in the electoral process.

In Virginia, three issues deserve particular consideration. First, the new standards for recounts must be extended to those paper ballots that are initially counted by hand. This may have been a technical oversight by the General Assembly, but again, if the legislature and State Board of Elections believe formal standards are necessary for election recounts, at least the same is required for initial counts. Second, additional funds must be sought to assist local electoral boards in upgrading their voting machines. The General Assembly seems open to new machines, especially for improving access for the disabled, but legislators have neither the money nor the apparent commitment to funding additional, improved voting machines. If funds are to be forthcoming, then, they will have to be appropriated

at the federal level or from private sources. Finally, whether or not new voting machines are purchased, the legislature and/or the State Board of Elections ought to both require and assist local electoral boards in upgrading the software on their machines so that vote tabulators will notify voters if they cast an overvote. This change will assist only those jurisdictions that use punch card or optical scan ballots—and then only in those precincts that count ballots as voters cast them—but the experience from the 2001 election suggests that advanced software can greatly improve vote tabulation. It would be a shame if such progress were not pursued wherever possible.

These recommendations aside, there is more to an electoral process than voting machines, including such basic issues as voter eligibility, registration processes, voter education, and electoral staff training. Although the events of the 2000 presidential election focused national attention on the weaknesses and deficiencies of voting equipment and recount standards, Virginia and its sister states must ensure that they pay as much care to matters leading up to election day as they do to the actual voting. Over the past year and a half Virginia has made tremendous strides in amending and improving its electoral process. If the 2000 presidential election taught us anything, it is that these issues are best handled before problems arise than under the glare of klieg lights and lawsuits.

## **APPENDIX 1. ELECTION PROTECTION PROGRAM**

**T**he 2001 elections saw a new “Election Protection Program” from a combination of five nonprofit organizations. Initiated by People for the American Way Foundation, the NAACP Legal Defense and Education Fund, the Lawyers’ Committee for Civil Rights Under Law, the NAACP National Voter Fund, and the National Coalition on Black Civic Participation, the Election Protection Program is a multifaceted project to educate voters about their rights, provide legal advice and assistance to voters who need help in order to vote, and monitor the polls to ensure that voting rights were enforced. According to People for the American Way, “the inspiration for the project grew directly out of the aftermath of the November 7 [2000] national elections, when countless stories of voting irregularities surfaced all over the country, including Virginia.” Said Ralph Neas, president of the People for the American Way Foundation, “After November 7 it was clear that something had gone very wrong not just in Florida but around the country.”<sup>7</sup>

Given the broad purpose of the Election Protection Program, it is surprising that the five organizations focused their attention exclusively on the Fourth Congressional District in Virginia. The program began in June 2001, shortly before a special election to replace the representative for this district. At the time, the two

candidates were a conservative, white, male Republican, and a more liberal, African-American, female Democrat. People for the American Way says the Election Protection Program “focused primarily on Petersburg and other areas in the district with the highest percentage of African American voters,” which coincidentally are the same spots in which the Democratic candidate had the greatest support.<sup>8</sup> Indeed, the more one considers the activities of the program, the more it resembles a traditional Get-Out-The-Vote (GOTV) political campaign. According to People for the American Way, volunteers hung reminders about the election and the Voters’ Bill of Rights on 25,000 doorknobs in Democratic strongholds, broadcast \$65,000 worth of radio ads on “district-wide stations serv[ing] the African American community,” placed over 20,000 phone calls reminding voters to go to the polls, and distributed fliers in African-American churches urging voters to “get your souls to the polls.”<sup>9</sup> The only activity that separated the Election Protection Program from a traditional political enterprise was the stationing of monitors at polling sites on election day, who were backed up by a team of twenty-five volunteer lawyers via telephone.

Of course, there is nothing wrong with political mobilization, and any organization should be lauded for encouraging voters to participate in an election, particularly those who historically have been left out in Virginia. The concern here, then, is not that the five organizations combined resources to bring voters to the polls. It is that they used the specter of voter intimidation to cloak what was essentially a GOTV effort. Others have certainly done worse, and one need go no further than most direct mail advertising to find excited claims intended to bring voters to the polls. But given the history and connotation of voter intimidation, its overtone should be handled gently. If the five organizations had provided *recent* evidence of

fraud or coercion to justify the Election Protection Program in the Fourth Congressional District, or if they had extended their project across the entire state in 2001, then this evaluation might be different. As it is, a local political reporter seems to have it mostly right when he calls the Election Protection Program a well-orchestrated, highly publicized program to elect an African-American candidate.

## **APPENDIX 2.**

### **VIRGINIA'S POLITICAL AND ELECTORAL HISTORY<sup>10</sup>**

**I**f, on the whole, the 2001 election went well in Virginia, the same has not always been true for political or electoral development in the commonwealth. In fact, many of the changes that Virginia has made to its electoral process arose in only the last few years, revising over two centuries of a political past that has been less than transparent and accommodating. To fully appreciate Virginia's progress, one must understand from where it came.

Many American schoolchildren are familiar with colonial Virginia, a commonwealth of gentlemen-farmers who helped to create self-government and establish democratic voting. But even in those idyllic times, the vast majority of Virginians were unrepresented in colonial government, including women, people of color, and those who did not hold land. It would take almost a century before property qualifications were removed for officeholding and voting. Other restrictions would wait another century before their reform.

Virginia is also associated with the Civil War, with Richmond serving as the capital of the Confederacy. Yet Reconstruction too disenfranchised many African Americans. Beginning in the late 1800s and continuing through the first half of the twentieth

century, Virginia was in essence a “well-disciplined and ably managed oligarchy.”<sup>11</sup> Under the autocratic rule of Harry Byrd and his political machine, Virginians were subject to residency requirements, literacy tests, and poll taxes designed largely to eliminate poor, uneducated, and minority voters. Now relegated to the scrap heap of history, these restrictions nonetheless color the perspective some voters have of Virginia’s electoral process. In several cases, in fact, the commonwealth has only recently removed provisions that were, at best, historical anachronisms.

As the civil rights movement began, 395,000 Virginians voted for governor in 1961. By the end of the decade, more than 905,000 voters participated in Virginia’s gubernatorial election. The difference is not simply the result of population growth. Led by organizations such as the National Association for the Advancement of Colored People (NAACP), Virginians joined with others across the nation to end racial segregation and with it poll taxes and other restrictions on voting. The passage of the federal Voting Rights Act in 1965 was particularly important to Virginia, for under Section 5 Virginia is required to obtain pre-clearance from the U.S. Department of Justice or a federal court whenever the commonwealth or any of its counties or municipalities wish to make a change that would affect voters or the voting process. This requirement extends to the most recent election, when Virginia counties were required to obtain pre-clearance before testing new voting machines to ensure that there were no adverse effects based on race.

In some respects Virginia has changed remarkably over the last thirty years. The number of voters who now participate in the political process is several times larger than the relatively few who were permitted suffrage earlier. The growth of northern Virginia and its suburbs has also begun to shift the center of political life away from

the commonwealth's rural areas and an agricultural and mining economy to its new cities and suburbs and more hi-tech enterprises. In 1989 Virginia became the first state post-Reconstruction to elect an African American as governor, and four years before that the first woman won statewide office in Virginia when she was elected attorney general. In addition, the Republican Party, which had been moribund during the years of Harry Byrd, became a keen competitor in the commonwealth, to the point where Republicans now control sizable majorities in the Virginia House of Delegates and Senate.

Nevertheless, if Virginia has been a leader in reforming and opening its political process, there still have been bumps in the road. When the National Voter Registration Act (NVRA), or the Motor Voter law, was adopted in 1993, Virginia's then-governor and current senator, George Allen, fought its implementation, calling the act an unfunded federal mandate. Virginia had to be sued to force the commonwealth to comply with the law, making Virginia one of the last states to implement the NVRA. In fact, the 2000 elections were the first ones for Virginia under the Motor Voter provisions.

Over the last year Virginia has been active in evaluating its electoral process, and as the preceding discussion explains, several legislative and administrative changes have taken place. The effects of these innovations should be largely positive, but as the experience of Florida showed in 2000, it is not enough simply to scrutinize statutes and directives. Election officials must also be encouraged to apply these measures evenly and ensure that every voter has a relatively equal opportunity to participate in the political process and have his vote count.

## NOTES

1. Comparisons are made for races at the “top of the ticket,” because historically voters are least likely to sit out contests for the most important offices.

2. A few counties used punch card ballots for absentee voters, with another small number employing paper ballots at a central absentee precinct.

3. Since both the DRE and touch screen machines prevent overvotes, the county focused only on the undervote.

4. Absentee votes cast at the central precinct utilize a direct recording electronic system.

5. In response, the State Board of Elections has created a new system in which citizens may check the status of their registration on-line. This process does not provide immediate feedback when voters attempt to register, but it is a novel measure to address some of the problems raised.

6. Should a candidate originally be declared the winner but then lose on a recount, he may file a contest action to challenge either the eligibility of the winner or other electoral wrongdoing that would have affected the outcome of the race. In all but presidential elections, a contest action is filed in and decided on by the General Assembly. Contest actions for president are heard in the Circuit Court of Richmond.

7. “‘Election Protection’ Volunteers, Hotline, Legal Team to Safeguard Voters in Virginia’s June 19 4th. CD Election,” Press Release from People for the American Way, June 18, 2001.

8. Ibid.

9. Ibid.

10. Thanks to the Virginia State Library for information on the commonwealth’s history.

11. V. O. Key, *Southern Politics in State and Nation* (New York: A. A. Knopf, 1949).



## **ABOUT THE AUTHOR**

**JON B. GOULD** is an assistant professor of public and international affairs and visiting assistant professor of law at George Mason University in Fairfax, Virginia, where he is also assistant director of the Administration of Justice Program. He studies law and politics and has written on electoral reform, campaign finance, and free speech. Before entering academe, he worked on the staffs of two presidential campaigns, served as counsel for a national party committee, and chaired the election law committee of the American Bar Association.