

## WHAT'S CHANGED, WHAT HASN'T AND WHY ELECTION REFORM IN 2006

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In February of this year, *electionline.org* released its latest edition of our annual report entitled *Election Reform: What's Changed, What Hasn't and Why 2000-2006*. The “what’s changed”, etc. rubric has always guided our annual reports, but it seems especially apt this year given passage of two key milestones in the area of election reform:

- First, the five-year anniversary of the November 2000 presidential election. If the current wave of election reform can be said to have a birthday, it is November 7, 2000, when voters in Florida and elsewhere woke up to discover that something was rotten in Florida, that there were problems with the way that we conduct our elections around the country. Our report, among other things, aimed to look back at what had and hadn't changed in those five years; and
- Second, the January 1, 2006 deadline for key portions of the Help America Vote Act (HAVA) enacted by Congress and signed by the President in October 2002. The year 2006 thus marks what amounts to a finish line for the federal portion of the reform efforts that began on November 7, 2000. We wanted to see where states stood on implementing HAVA and what it meant for the future of the federal role in election reform.

What we found was both interesting and instructive regarding the once and future state of elections. *What's changed, what hasn't and why* is incredibly meaningful - not only for election reform, but for the election system itself in 2006 and beyond.

### **What's changed?**

In truth, a lot has changed. In the current environment, we tend to focus on states that didn't make deadlines or things that aren't going well. And yet, when you look back, a tremendous amount has changed in the last five years in the way that we conduct elections around the country.

For example, in 2000 only 11 states had something called a provisional ballot. Provisional balloting, or something like it, only existed in some form in about two-thirds of the states. It's now the law of the land.

Voting technology has also changed tremendously. Thanks to Kim Brace and his colleagues at Election Data Services, we now know that in the period between 2000 and 2006, jurisdictions containing over 80 million registered voters saw or will see new voting technology by the 2006 election. Just to put that into context, that's roughly two-thirds of the total number of people who went to vote in the presidential election of 2004. So we've seen a tremendous amount of change.

The issues themselves have changed as well. Immediately post-2000, we saw a wave of revulsion for paper-based voting technology. The dominant national visual image of that

Florida judge peering almost cross-eyed through a punch card led to a push across the country to de-emphasize, if not eliminate, paper from the voting process. HAVA represented a move toward – indeed, I'd say an enshrining – of the new direct recording electronic, or touch-screen, voting technology. People believe that DREs represented the next big thing in voting and HAVA reflected that belief.

Over time, however, people began to re-think the wisdom of “paperlessness” – resulting in increasing calls for reintroducing paper into the voting process. Thus was born what I call the verifiability lobby – that loosely organized but ultimately influential combination of academics and advocates that favors state and/or federal laws requiring a voter verifiable paper audit trail, or VVPATs. By 2006, that movement resulted in laws in approximately half the states requiring either a paper ballot requirement or a VVPAT.

That's a huge change - and yet, the change continues. Recently, the discussion has moved from whether or not to have VVPATs to what exactly to do with them after an election. California, for example, recently enacted a law that would require that VVPATs be used as the ballot of record in a recount – and other states have or are preparing to follow suit.

So whereas in 2000 we had many visual images of an election judge looking up at a punch card to decide a disputed election, in 2006 and beyond we may have the same picture - except they'll be looking at a voter verified paper trail. So the issue has changed, and yet, to a certain extent, it really hasn't.

## **What hasn't changed?**

What hasn't changed is the diversity of election practice among the states. Following the disputed 2000 election and with the passage of HAVA, there was a general sense – implicit and explicit -- that reform would even out the differences between states and localities on the way they conducted elections. And while, as I noted, there have been lots of changes in how states conduct elections, the diversity between states hasn't changed.

For example, we saw fights before the 2004 election about the different ways states interpret HAVA's provisional voting requirement. More recently, we have seen a renewal of vehement fights in state legislatures - and maybe on Capitol Hill - about the issue of voter identification. In 2000 there were very few states that had a universal ID requirement. Now we're seeing more and more states requiring all voters to show ID. And once again, we're starting to see states – Georgia, Indiana, and some others' - that are requiring photo identification. And so what hasn't changed is the diversity between states.

Something else that hasn't changed with passage of HAVA is money worries at the state and local level. When HAVA passed in 2002, it was a watershed event in that it represented the first-ever infusion of federal funds into supporting election administration in the United States. Many people nationwide thought HAVA was now the down payment on an ongoing federal involvement in improving state and local election administration across the country. As it happens, that hasn't come true. We now know that because of various delays, HAVA money came late to the states, if at all. The fiscal year 2007 federal budget that was released in February 2006 contains no new money for state grants under HAVA – and neither did the

FY2006 budget. So this question of money, which very often is the major reason why states can or cannot meet their HAVA obligations, continues.

### **What does this mean going forward?**

I think the most important thing going forward is that the tumult that we've seen in changing the way Americans cast their votes means that the specter of disputed elections is probably not likely to fade for the foreseeable future. Everyone is familiar with the phrase "a loose cannon on a rolling deck" - I would suggest that the metaphor is incredibly apt for our current state of affairs.

The loose cannon is the evenly divided and fiercely partisan nature of our politics. In 2004, a gubernatorial race in Washington State was decided by hundreds of votes out of millions cast. In 2005, an attorney general's race in Virginia was decided by 300 or so votes out of 2 million cast. That environment, where a tiny number of votes can make a big difference, makes people very interested in every single detail of the process – and much more willing to challenge the process when the results are not to their liking.

The rolling deck is the amount of change we have, or haven't had, in various states' electoral systems. As Election Data Services, Inc. points out, roughly two-thirds of voters are seeing new voting equipment for the first time. States have new voter ID laws, new statewide voter databases, new pollworkers, and other new requirements unrelated to HAVA.

And while change - depending on your point of view - can be good, change almost always breeds uncertainty and uncertainty almost always is fertile ground for error. And error, in the electoral context, almost always means controversy, if for no other reason than there is no shortage of losing candidates, parties, lawyers, and other groups who are willing to pick apart the electoral process.

So given the amount of change we've had in some states, or the lack of change we've had in others, the specter of electoral controversy is something that we are likely to see in 2006 in a fiercely divided fight for Congress and in several key states, and maybe even more likely in 2008 for what's likely to be a wide-open presidential race.

The other major issue going forward is the need to take a very good look at the federal role in election reform and election administration. In 2002, immediately following passage of the HAVA, there was some surprise that the federal government hadn't gotten involved sooner in election administration reform. The experience of three years following the passage of HAVA, however, begins to suggest why Washington may have been reluctant to get involved.

Specifically, I think the federal response to the electoral problems we saw on November 7, 2000, has been uncertain and, to a certain extent, incomplete. I don't think you can lay that at the feet of the Election Assistance Commission; however; I think the problem with the federal response is that it's been halting, at best.

Congress enacted a new law and partially funded its requirements, but beyond that has paid very little attention to the issue. As a result, states and localities have really become the center of gravity of election reform. And in many cases, the EAC is catching up to developments in the states—again, not through their lack of effort but because they don't have the resources to take the kind of steps that they need to make.

As the election reform process begun in 2000 enters 2006, then, I think the federal government needs to heed the words of Tom Paine, who once said you need to “lead, follow, or get out of the way.” One of the things that will need to be resolved the next several years is whether or not the federal involvement in elections, which many thought was going to be a down payment on a long-term involvement, is rather a so-called “one-shot deal”, merely an echo of the boom that went off on November 7, 2000. Until we get that worked out, no one at any level of government – federal, state or local – can work out the very difficult matters of how to improve election administration in an increasingly difficult fiscal, political, and partisan world.