

*Identifying the Disconnect***The Federal-State Divide**

by Barry H. Weinberg

**T**he 2000 Presidential Election has raised many questions about the way elections are administered at the state, county, and municipal levels in the United States. One of these questions is whether the U.S. Federal Government should take action to regulate election procedures.

There are federal laws already on the books that impact the management and administration of elections, but there are no federal standards for voting machines, for the performance of polling-place officials, or for the method of counting ballots. Could there be? Should there be? To answer these questions, we first need to look at existing federal law.

Nearly all voter registration and voting procedures are creatures of state law because the U.S. Constitution, in Article 1, Section 4, reserves those functions to the states. The U.S. Congress can alter the states' procedures only as to the time, place, and manner of choosing members of Congress (but not as to the place of choosing Senators). Where the federal government has used this authority to require procedures affecting elections for federal office, most states have adopted the same procedures for all other elections in order to avoid confusion and the administrative difficulties that would result from two different sets of election procedures – one for federal offices and another for state and local offices. This is true of the recent National Voter Registration Act of 1993 (NVRA), which became effective January 1, 1995.

*A nation waits.*

The NVRA, popularly called "the motor-voter law," is unusually detailed among federal voting-rights laws. Basically, it requires states to set up procedures for allowing voter registration when people renew or apply for their drivers' license and when people visit offices for public assistance, and offices that provide services to people with disabilities; the NVRA also requires states to allow voter registration by mail. The NVRA, for the first time in history, requires states to adopt a program for keeping the voter-registration rolls clean – to purge the rolls of the names of persons no longer eligible to vote – while prohibiting states from purging persons from the rolls simply because

they exercised their right not to vote in successive elections or because they moved within the same area of voter registration.

In the NVRA, Congress finds, among other things, that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." Typically, federal laws that require action by administrators of state and local elections impose such requirements because existing procedures are found to deprive particular groups of people of their voting rights.

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One such law is the Uniformed and Overseas Citizens Absentee Voting Act, which requires states to permit absent voters in the uniformed services or overseas to use absentee-voter registration procedures and to vote by absentee ballot in elections for federal office. Voters who do not receive a regular absentee ballot in time to return it to be counted may use a federal write-in ballot for general elections.

Another law is the Voting Accessibility for the Elderly and Handicapped Act, which requires that polling places be accessible to handicapped and elderly voters and also requires states to have voter registration and voting aids for them, such as large-type instructions and telecommunication devices for the deaf. However, this law allows states to set up an alternative way for handicapped or elderly voters to cast ballots if there is not an accessible polling place in the area involved. Other federal laws require that voters who need assistance to cast their ballot because of blindness, handicap, or inability to read or write, be allowed assistance from a person of their choice (with some narrow restrictions). Election officials are also required to retain for 22 months all records that relate to voting in federal elections.

Some federal laws are restrictions on administrators' actions. For example, one part of the Voting Rights Act of 1965 bans the use of literacy tests in the voter-application process, and other parts of the Voting Rights Act restrict actions that would disadvantage candidates or voters because of their race or because they speak a language other than English. Although federal voting-administration laws come under Article 1 of the Constitution and may not interfere with the right of states to govern their own elections, the Voting Rights Act applies to elec-

tions for state and local offices, as well as for federal offices, because it is based on the 14th and 15th Amendments to the U.S. Constitution which, respectively, guarantee due process and equal protection of the laws and protect all citizens against deprivation of voting rights "...on account of race, color, or previous condition of servitude."

The Voting Rights Act prohibits discriminatory actions by election administrators, such as:

- choosing polling-place locations far from minority populations, but convenient to white areas;
- choosing white or English-only polling-place workers to serve in areas of racial minority populations or areas where voters speak Spanish or Asian or American Indian languages and have limited proficiency in English;
- and publicizing voting procedures and rules primarily in English in areas where citizens speak Spanish or Asian or American Indian languages and have limited proficiency in English.

A more detailed discussion of the way federal legislation impacts the election process was recently published by the U.S. General Accounting Office. That report, "The Scope of Congressional Authority on Election Administration, GAO-01-470," was issued in March 2001. It can be found through the GAO website at <http://www.gao.gov>.

Can a federal legislative approach be used to address effectively the problems in vote casting and vote tallying that arose in the 2000 Presidential election? To follow the model of existing laws, we should define first the particular problem to be remedied, determine whose voting rights were deprived, and only then see if a federal remedy can be crafted within Constitutional bounds.

Laws currently on the books should be adequate to address situations where the names of people who registered were not found on the poll books. Whether these problems should be addressed by legal action under current state law or whether action is needed under current federal law, such as the NVRA or the Voting Rights Act, can be determined by the facts that are ascertained after investigation.

Some have suggested that the use of different types of voting machinery among a state's counties is a problem. However, the use of different machines does not suggest that anyone has been or will be denied his or her right to vote. There are reports that voters in some precincts had difficulty using some punch-card equipment, and as a result spoiled their ballot and lost their voting rights. The Federal Election Commission (FEC) has published recommended standards that can be used by states to evaluate voting equipment in determining whether it works to record votes accurately and is secure. The standards are tested by firms that have been certified by the National Association of State Election Directors (NASD). Nonetheless, the standards



do not relate to whether ballots are easily read by voters, or whether voters can mark the ballots accurately.

Over 30 states, including Florida, have adopted either the standards or the testing of systems using the standards. However, in Florida, existing equipment was "grandfathered" for continuing use. During the 2000 Presidential Election, some of the punch-card machines in Florida, which apparently caused the loss of people's votes for President, did not meet the NASD basic standards for accurately recording people's votes. This situation suggests that there could be a federal law which requires only voting equipment meeting these standards to be used in federal elections and directs federal funds to counties having substandard equipment. Those funds are to be used solely to upgrade the equipment to acceptable standards or to purchase acceptable equipment.

Standards are also needed to guide election administrators when they are required to determine whether questionable ballots have been marked or punched for a particular candidate. Of course, states currently may adopt such standards on their own and have done so. When a state has not set out such standards in legislation or regulation, it is left up to the courts to develop these standards in their decisions on a case-by-case basis.

This is a difficult area for federal legislation because the standards for recounting ballots need to be specific to the kind of election equipment that is used, as well as to newly introduced equipment. The needed flexibility could be attained through new, federal regulatory power that would set standards for recounting ballots in federal elections, along with the authority to investigate infractions and enforce compliance with the regulations. Such a federalization of the process would require a commitment to fund the additional federal workforce that will be needed on an ongoing basis. The Federal Government could help by earmarking funds to train poll workers, purchase voting machines on which people can practice before entering the voting booth, and hire additional poll workers.

If during the 2000 Presidential Election, voters in some precincts spoiled their ballots because they had difficulty using



punch-card equipment, whereas voters in other precincts in the same county did not have the same problems with similar equipment, there are steps that election administrators can take now. Poll workers could be required to advise voters that the difficulty exists; voting machines could be provided at the poll for people to practice before they enter the booth; voters could be encouraged to ask poll workers for instructions for turning in their spoiled ballots and getting new ballots to mark; and poll workers should be trained to be solicitous and helpful in responding to those voters.

While problems may appear severe in some states, there are many dedicated, informed state and county election administrators who have worked for years within their own jurisdictions and as members of national organizations to achieve fair, accurate, and honest voting.

If election administrators knew that voters in some precincts in a county spoil their ballots at a higher rate than voters in other precincts and if the county administrators did not take steps to provide whatever help is necessary for voters to use the voting equipment the county requires they use to cast their ballots, then it might be presumed the administrators intend that the problems recur at subsequent elections in those precincts. And if the precincts in question were populated predominately by members of traditionally disfranchised groups, such as racial or language minority-groups, then this situation could be addressed under the Voting Rights Act. Such redress under the Voting Rights Act would be possible, too, in situations in which the equipment used meets acceptable standards but is so worn or poorly maintained that it fails regularly.

This kind of situation is discussed in the U.S. Commission on Civil Rights' "Status Report on Probe of Election Practices in Florida During the 2000 Presidential Election." Among other things, the Commission said:

*We are deeply troubled by our preliminary review which points to differences in resource allocations, including voting*

*technology, and in voting procedures that may have operated so that protected groups may have had less of an opportunity to have their votes counted. We will conduct complete disparate impact and treatment analyses before the report is completed, and our final conclusions will take into account the results of these analyses. It appears at this phase of the investigation that the evidence may ultimately support findings of discrimination that is prohibited... We are attempting to document whether and, if so, how long state, county and local officials knew that certain differences in resources and procedures might impact more harshly African Americans and members of other protected groups.*

The FEC has published a series of studies on acquiring election systems and equipment, recruiting poll workers, electronic transmission of election materials, ballot security, and other aspects of election administration. These studies are meant as suggestions, and are followed by the states, or not, as their administrators desire, as their funds allow, and as their politics dictate. The content of these instructional pamphlets are focused on general administrative activity, and therefore do not set out the kind of standards that should be federally mandated.

Before we can decide how to provide voters with better voting technology and improved polling place procedures, we must make sensitive inquiries to determine exactly what went wrong, where, and why, and how different voting machines and procedures affect voting. These inquiries should include facts provided by the victims of the errors, those who administered the election where the errors occurred, and those with experience in attempting to resolve the kinds of errors that occurred.

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