Ten Years Since the Florida Election Meltdown—
Could It Happen Again?

At the 2010 NCSL Legislative Summit in Louisville, Ky., the Redistricting and Elections Committee heard an address by Doug Chapin with the Pew Center on the States focusing on the state of election reform nationally. It was almost 10 years ago when the race for president was so close in Florida that it took 35 days and a ruling by the U.S. Supreme Court before Americans knew who would be the 43rd president. That election revealed substantial flaws in how U.S. elections were conducted and prompted a massive effort to reform them. Have things improved?

As the founding director of electionline.org, which has been a nationally recognized voice in election administration policy since 2001 and a participant in the 2001 National Commission on Federal Election Reform, Chapin offered an insightful look at the state of election reform.

Could Florida happen again? Chapin noted that whenever there is a close election, with high stakes and a breakdown that directly affects the outcome, it is always possible that a replay of the 2000 scenario could occur. In fact, he pointed out that all three factors have been present in at least three notable election contests since: the 2004 Minnesota gubernatorial election; the 2006 Sarasota, Fla., congressional district election; and the 2008 Minnesota Senate race between Al Franken and Norm Coleman.

That said, there have been major improvements to the national election system. The Help America Vote Act marked the first time that the federal government authorized a direct infusion of funding ($3.9 billion) into election administration. Although actual appropriations were far smaller, state governments were able to use this funding to upgrade their voting equipment. Many bought electronic machines to replace punch card and lever systems. Now many are converting to optical scan systems. The creation of the Election Assistance Commission has also helped achieve greater uniformity in election standards. At the same time, the slow development of the federal voting equipment certification process under HAVA illustrates that regulation has not been able to keep up with technological advances. In addition, provisional ballots are now available if there are registration issues on Election Day.

What will be the focus of election reform in the next decade? Chapin noted first what has not worked well in election reform. To begin with, “drafting election policy to boost voter turnout is like using a hammer to pound in a screw,” he said. “It’s the wrong tool, it takes a long time, and you can cause serious damage.” Secondly, election reform should not be excessively “rights-focused.” The Voting Rights Act and other laws are already being actively enforced to prevent discrimination. Thirdly, election reform should not seek convenience for convenience sake. Rather, election policymakers should focus on citizens as not only voters, but first and foremost, as taxpayers. In that sense, factors such as cost, value and performance will become increasingly critical. “We may not necessarily need more new laws,” he said.

One way to reduce costs is to create strong partnerships with other governmental (nonelection) agencies and the private sector. In short, he said, legislatures should consider adopting an engineering approach to election problems and should strive to promote greater transparency in government through data-based solutions. Ultimately, election administrators need to ask, “Did voters have a good experience on Election Day?”

A complete Webcast of this session is available at NCSL.org.
On July 25, the NCSL Redistricting and Elections Committee held a session on voting by military and overseas citizens in light of the new federal Military and Overseas Voter Empowerment (MOVE) Act. This session explored state efforts to comply with the federal Military and Overseas Voter Empowerment (MOVE) Act. It also included a brief overview of the recently approved model state law for military and overseas citizens from the Uniform Law Commission and how that proposal compares with the MOVE Act.

Speakers included Doug Chapin, director, Elections Initiatives, Pew Center on the States, Washington, D.C.; Representative R. Mark Takai, Hawaii; Senator Peter C. Knudson, Utah; and Professor Stephen F. Huefner, law professor, Moritz College of Law, Ohio State University.

Some highlights included the following.

Chapin noted that MOVE Act compliance efforts in the states are advancing well with bills recently passed in Florida, Georgia, Louisiana, Missouri and Virginia. (More than 40 legislatures have introduced legislation in response to the MOVE Act, and at least 28 have passed such legislation to date.)

Representative Takai, an Iraq war veteran, presented details on Hawaii House Bill 2397 that changed the state’s primary date from the second Saturday of September (Sept. 18) to the second Saturday of August in every even numbered year, effective Jan. 1, 2011. He noted that historically there has been some opposition from incumbents who have in some instances opposed switching to a longer general election campaign. Notwithstanding, he credited the MOVE Act with spurring the Legislature to strongly support moving the date to August. In the interim, the state is seeking a hardship waiver from the Federal Voting Assistance Program exempting it from the requirement that it send out ballots 45 days before the general election.

Senator Knudson, a retired Colonel with the U.S. Army Reserve, presented background on Senate Bill 216, which allows an overseas voter to apply for an absentee ballot electronically and authorizes a county clerk to accept a ballot application for one general election instead of two general elections. Since military members move frequently, this change was necessary to maintain accurate lists of absentee voters. Senator Knudson added that the bill’s sponsor (Senator McAdams) consulted with the Adjutant General of the Utah National Guard to determine the most urgent priority in 2010 for military voters. The result was SB 216, which passed with strong support and he anticipates that the Utah Legislature will consider additional legislation to help military and overseas voters in the near future.

Steven F. Huefner provided an update on the Uniform Law Commission’s newly endorsed Uniform Military and Overseas Voters Act. He began by noting that the ULC’s primary goal for the model law is to bring greater uniformity to the military and overseas voting process for both state and federal elections. It is important to note that the ULC proposal goes far beyond the requirements of the 2009 federal Military and Overseas Voter Empowerment (MOVE) Act. For example, Section 2 of the ULC proposal expands upon the definition of a covered voter under the Uniformed Overseas Citizen Absentee Voting Act (UOCAVA) (and, by extension, the MOVE Act). The ULC proposal does this by adding members of the National Guard and U.S. citizens born abroad—who have not established a voting residency in the United States—to the class of covered voters. Moreover, the ULC proposal would cover all military personnel (stationed abroad or stateside) and their dependents, as well as U.S. citizens residing outside the United States who are unable to vote in person. This latter category includes a class of voters currently not covered by federal law: U.S. citizens born overseas who have reached voting age without having resided in the United States. The proposal would guarantee the covered class the opportunity to vote by absentee ballot in all state and local elections, in addition to all federal elections (primary, general, special and runoff).

The ULC proposal also redefines a uniformed-service voter to cover active duty uniformed service personnel, e.g., the Public Health Service corps, and states that these active duty workers do not have to be absent from the voting jurisdiction. Whereas UOCAVA covers elections only for federal office, the ULC proposal broadly extends voting eligibility to military and overseas citizens to include federal, state and local government measures. Once the act receives final approval by the Uniform Law Commission’s Style Committee, a copy will be available at nccusl.org or by calling (312) 450-6600. Ω

A complete Webcast of the session is available at NCSL.org.
Department of Justice Releases Guidelines for Implementing the “Motor Voter” Act

As reported at electionlineWeekly, 17 years after Congress approved the National Voter Registration Act of 1993 (NVRA), also known as “Motor Voter,” the U.S. Department of Justice (DOJ) recently released online a set of new NVRA “guidelines.” The Voter Registration Requirements of Sections 5, 6, 7 and 8 of the National Voter Registration Act (NVRA) Questions and Answers outlines in “FAQ” format what states and their subunits must do in order to offer the voter registration services required by the law. Updated on doj.gov on Aug. 4, 2010, the Q&A document ostensibly provides additional guidance as to how the Department intends to enforce “Motor Voter.” It should be noted that, DOJ did not issue a press release announcing the guidelines, nor does it appear that the guidelines constitute formal rules or regulations promulgated under federal Administrative Procedures Act. When contacted by phone, DOJ staff indicated to The Canvass that “there was no press release announcing the new Questions and Answers document.” According to the Q & A document, the new DOJ interpretation for Section 5 essentially requires voter registration to be part of any transaction at the department of motor vehicles:

Each state motor vehicle driver’s license application (including any renewal application) submitted to a state motor vehicle authority must serve as a simultaneous voter registration application unless the applicant fails to sign the voter registration application. This application for voter registration must be considered as updating any previous voter registration by the applicant.

Significant changes are also called for in Sections 6, 7 and 8. In Section 7 for example, the guidelines designate which state agencies that provide federal and state program assistance must offer voter registration forms, e.g., food stamps (SNAP), TANF, Medicaid and SCHIP. The section also stipulates that states must designate additional offices as voter registration agencies, such as public libraries, marriage license offices, and hunting and fishing license offices. Finally, in Section 8, DOJ attempts to codify the conditions for when a person may be removed from a voter roll.

States cannot remove registrants from the voter registration list solely because of the failure to vote. It also prohibits removing registrants due to a change of address to another location within the same registrar’s jurisdiction, even if the voter has failed to notify the registrar of the move within the jurisdiction. It also places restrictions of notice and timing on removals from the voter registration list when second-hand information is received, such as returned mail, which suggests a registrant may have moved outside of the registrar’s jurisdiction.

As reported in the July 15, 2010 electionlineWeekly, Project Vote, a nonprofit 501(c)3 organization, supports the new Q & A document: “This should prevent a lot of litigation,” said Estelle Rogers, director of advocacy for Project Vote. “If election officials are careful about their procedures and they read this (the guidelines) and get it memorized it’s going to prevent a lot of litigation because there should now be no

Russian Spies on Mass. Voter Rolls … According to a recent story in the Boston Globe, Donald Heathfield and Tracey Foley—the Cambridge, Mass., couple who allegedly lived double lives as Russian spies and “ordinary” Americans—took the audacious step last fall of registering to vote in their adopted homeland. The FBI has also said that while the couple claimed to have been born overseas, they also claimed to be naturalized citizens. Under state law, registering illegally involves a crime punishable by fines of not more than $10,000 or by imprisonment for not more than five years, or both. The Russian couple also could have been charged with federal crimes.1 According to the Cambridge Board of Elections, the two spies, who allegedly had resided in the United States since 1999, did not declare a political party affiliation and never actually voted. That aside, a hypothetical question arises: Had they not been apprehended this summer, would Mas-

1. Section 216 of The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 prohibits non-citizens from voting in federal elections and subjects a non-citizen to fines, imprisonment (up to one year), and possible deportation for a violation. 8 U.S.C. 1101,1182.

See also 18 U.S.C. 1001 for crimes involving material false statements.
Worth Noting

Uniform Law Commission Finalizes Model Act for Overseas Voting

At its annual meeting in July, the Uniform Law Commission announced passage of its Uniform Military and Overseas Voters Act, designed as a model for states to standardize election procedures for military and overseas voters. The document is essentially a recommendation for state legislatures. In a statement, Doug Chapin, director of Election Initiatives for the Pew Center on the States, said the model will “make it easier for those who defend and represent our nation's democratic ideals around the world to participate in our democracy here at home.”

The ULC, also known as the National Conference of Commissioners on Uniform State laws, now in its 119th year, comprises more than 350 lawyers, judges, law professors, and lawyer-legislators from every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. Commissioners are appointed by their states to draft and promote uniform laws as a way to solve problems common to all states.

Specifically, the proposed Uniform Military and Overseas Voters Act:

• Mandates that absentee ballots for all elections be transmitted at least 45 days before an election (unless the state has received a MOVE waiver).
• Requires that covered voters may request blank ballot transmission by fax, e-mail or Internet delivery (if offered by the jurisdiction).
• Eliminates notarization requirements and substitutes a declaration that must be signed under penalty of perjury and must be submitted with each voted ballot.
• Expressly mandates acceptance of the Federal Write-In Absentee Ballot (used as a back-up measure when official ballots aren't received) to include all covered elections.

The ULC is planning a major state lobbying effort in 2011 in time for the 2012 presidential election. See page 2 for further discussion of the ULC model act.

Cal Tech/MIT Releases New Studies on Voter Opinions about Election Reform


Using survey data, the researchers found that “a majority of U.S. voters do not support automatic voter and election day registration or moving Election Day to a weekend, except in a few states.” The survey also reported that Internet voting and vote-by-mail are not popular among voters.

According to the survey, “An overwhelming majority of Americans, however, do support requiring photo identification at the polls, and a small majority supports making Election Day a holiday. Americans, in general, are more interested in reforms to improve security, such as requiring photo identification, than reforms to make voting more convenient and accessible.”


Using survey data from the 2009 gubernatorial races in New Jersey and Virginia, the authors found that “Those who cast their ballot in person on Election Day expressed more confidence that their ballot would be counted as they intended than those who voted before Election Day, especially those who voted by mail.” They also discovered that, “Voters who used DRE voting machines wanted to continue using them, but voters in Virginia using optical-scan systems were divided on whether to continue using that technology.”

NCSL Reaffirms Policies on Federalism With Regard to Election Reform, Full HAVA Funding and Special Congressional Elections

At the 2010 NCSL Legislative Summit in Louisville, Ky., the Law and Criminal Justice Committee in consultation with the Redistricting and Elections Committee adopted and reaffirmed three current policies with regard to election law. The first involved election reform and the proper relationship between states and the federal government. NCSL policy says, “NCSL believes that it must be an equal partner with Congress or with any federal commission or task force designed for the purpose of implementing and drafting federal laws and policies … In this respect, federal legislation should not curtail state innovation, and NCSL believes that federal legislation should
Worth Noting

include reasonable time frames for implementing state and local programs.”

The policy statement also noted:

NCSL supports a federal grant formula that awards money to states for broad-based purposes dealing with election reform, and opposes any funding mechanism that makes specific requirements on the states.

NCSL supports federal formula grant funding to states for the following broad purposes:

- Improving election technology, systems and ballot design;
- Facilitating voter registration, verification and maintenance of voter rolls;
- Improving the accuracy and security of election procedures and vote counts;
- Educating citizens on representative democracy and election processes and systems;
- Providing greater access to voter registration and polling places especially for rural and disabled voters; and
- Providing training and education opportunities for elections personnel.

NCSL encourages Congress to consider whether states should be given greater latitude under the National Voter Registration Act (NVRA) to remove ineligible voters from the rolls. Another statement calls for preserving state flexibility with respect to the timing of and other rules governing special elections for Congress. Both statements will sunset if not renewed by August 2013. Finally, NCSL also approved a policy that urges the president and Congress to fund the “Help America Vote Act of 2002” sufficiently, which will enable states to fully implement the law according to its mandates. This statement will expire in August 2011, if not renewed.

The full policy statements are available online at ncsl.org.

Massachusetts poll workers have caught them trying to vote in November 2010? Unlike the majority of states (26), Massachusetts does not require any form of voter identification (photo or other). Consequently, if they had tried voting in person on Election Day, it seems unlikely that a poll worker would have intercepted them as noncitizens. Massachusetts has qualified absentee voting, which would have allowed them to vote by mail if they expected to be away from Cambridge on Election Day. If they registered by mail, under the Help America Vote Act, they would have been federally required to provide identification with their registration form or when they physically voted. A more intriguing question is: Had Heathfield and Foley lived in a state where proof of citizenship is required (Georgia and Arizona), could election officials have intercepted them when they sought to verify their U.S. citizenship? In Arizona, for example, they would have been required to provide at least one form of proof: a driver’s license or state ID dated after Oct. 1, 1996, (for which proof of citizenship is required); a legible photocopy of their birth certificate; a U.S. passport, naturalization documents; or a driver’s license from another state if the applicant provided satisfactory proof of citizenship.

While some may discount this as an isolated incident, registering to vote by noncitizens is a documented problem. In 2005, the U.S. Government Accountability Office found that, in Michigan and Virginia, significant numbers of people called for jury duty from voter registration rolls were not U.S. citizens. This month in Pennsylvania, Tennessee, and Washington, local election officials identified loopholes that allow noncitizens to register. In Tennessee, a county elections administrator notified state and federal authorities that an illegal alien confessed to having voted in November 2004. According to the Columbian of Vancouver, Wash., the Clark County auditor stated, “Since it’s easier for noncitizens to get a driver’s license in Washington than in most states, it’s also easier to register to vote,” since applicants need only a driver’s license or state ID. In Washington, New Mexico and Utah, a driver’s license or state ID applicant need not prove citizenship or legal residency. Proof of citizenship legislation is one method to ensure that only U.S. citizens cast a ballot. Last year in at least nine states, 21 bills were considered to establish this basic requirement, with Georgia enacting Senate Bill 86. This year, at least five states have considered such legislation, one of which remains pending in New York (Assembly Bill 2968).

Administrative verification of citizenship in voter roll maintenance is another remedy. Notwithstanding diverse opinions as to the correct approach for each state, there appears to be a growing consensus that significant work needs to be done to ensure that only U.S. citizens exercise the right to vote. When interviewed on this topic, Pennsylvania Representative Matt Smith may have articulated this notion best: “The right to vote is a very sensitive issue. People have died protecting that right and … one person doing it illegally is one too many.”

The full policy statements are available online at ncsl.org.
What They’re Saying

“The 2000 election shattered the notion that, on election night, the election was over. … Lawyering up is now part of the political lexicon of this country.”


“U.S. Senator Charles Schumer of New York, who serves as chair of the Senate Rules Committee (where election legislation is considered), is indicating that a major revision to how voter registration is handled is in the works. States will have responsibility for officially taking over voter registrations (meaning the state has to ensure that all citizens of eligible voting age are enumerated and added to the voting rolls). States will be responsible for devising methods to “automatically” put voters on the rolls within each state.”

R. Doug Lewis, Election Changes Mean Many Questions for States, but Few Sufficient Answers, in The Book of States 42 (2010). R. Doug Lewis is the executive director of the Election Center, a nonpartisan, nonprofit organization representing the nation’s election officials.

“M y job is to ensure a fair, secure and accessible elections process for every Georgia citizen who is eligible to vote. … Every ballot cast by a noncitizen erases a ballot cast by an eligible Georgia voter.”

Georgia Secretary of State Brian Kemp in response to a federal three-judge panel’s decision to permit Georgia’s voter verification system to continue during the pendency of the state’s legal claim in the U.S. District Court for the District of Columbia for Section 5 pre-clearance.

DOJ Guidelines

“confusion.” In an interview with The Canvass, Jason Torchinsky, an elections lawyer with Holtzman Vogel PLLC, and former counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice, disagreed: “Once again, this Justice Department is most concerned about adding people to the voter rolls as quickly as possible. The new DOJ guidance fails to explain to election officials how to comply with the list maintenance requirements of the NVRA and the anti-fraud provisions of the Help America Vote Act,” he said. Electionline.org’s electionlineWeekly added that, “The guidelines may frustrate some states that have interstate compacts and want to share and compare lists to more quickly remove duplicates.”

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