

## **Toward a New Procedural Paradigm**

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This paper will, in its winding way, end as an argument for a biometrically based National ID for voting and other purposes. It does not start there. It starts as an examination of how we came to have personal registration in the United States; how it, in some ways, has changed; how the motivation for its continuance and further elaboration rests on myths closely held by each major political party even though they are largely without foundation; how these myths have led to present-day increasingly cumbersome registration and voting laws, including but not limited to much more intrusive voter identification requirements and an ever increased need for administrative resources; how these changes are inadequate either to make possible the highest levels of citizen voting participation or to protect the integrity of the voting process; all of which leads, in turn, to the one available technology that will enhance these goals.

The United States is one of only two advanced democracies (the other: France) that require personal individual registration in order to vote and re-registration should one move to a different residence. In all others, the state is responsible for registration and accurate lists of eligible potential voters – either by means of a voting identification card (made as feasibly as possible non-forgable) or, as in Canada, by enumeration. All the citizen has to do in the political process in these countries is vote. One of the major reasons why the United States had a lower voter turnout rate than almost all advanced democracies (Switzerland being the exception) even at the apex of its post-women's enfranchisement in 1960 (and still has now) is that voting in this nation is a two-step rather than a one-step act.

The establishment of a system of personal registration in the United States was driven, in part, by the size of the nation, its residential diversity and the federalist tradition. But it also came about because of two other factors which are startlingly similar to issues in current debate. The two driving forces behind the creation of highly restrictive personal registration were the essential corruption of the political process in the last part of the 19th century – vote buying, multiple voting, ineligible voters and the large influx of non-Anglo-Saxon immigrants – Italians, Irish, Poles, Russians, Jews, Catholics – in the early part of the 20th. The drive for restrictive registration was propelled by the twin forces of reform and xenophobia, plus the renaissance of racism in the post-Reconstruction segregationist south.

Personal registration was accompanied by stringent residency requirements; a very large gap between the close of registration and elections; the virtual non-existence of permanent registration in most states, which thus required citizens to re-register before each election; poll taxes, literacy and citizenship tests; and other measures to discourage participation, particularly from those at the bottom of the socio-economic scale,

immigrants and blacks. And for some, it had its desired results in a way that is similar to modern times. Elections were less corrupt. But voter turnout plunged from levels near 80 percent in the late 1800s to less than 50 percent in 1924. The cost and complexity of election administration increased geometrically as did maladministration and corruption by election officials. And, then, as now, the party that attracted the objects of prejudice and xenophobia suffered – the post-Reconstruction Republicans who lost their black supporters in the South and northern Democrats toward which most European immigrants had gravitated.

The ensuing 85 years, from 1920 when women were given the right to vote, to the present may be seen as a continuing attempt to roll back the excesses of the registration and segregation laws, created in the late 1800s and early 1900s, without addressing the central problem – personal registration as the basis of American election law.

These efforts – particularly after World War II, President Truman's desegregation of the military, Democratic integrationist leadership advocacy beginning at the 1948 national convention and the gradual shift of black America from the party of Lincoln to the Democratic Party – tended to have a partisan cast based on what was and is largely political mythology on the part of each major party (in some cases to the detriment of each party's real interests) and, more recently, on a form of political xenophobia with regard to illegal Latino immigrants.

The myths: Democrats tend to believe that the larger the turnout the more likely they are to win. Many Republicans believe that the best thing that could happen to their electoral fortunes is rain on election day, that the lower the turnout the better their electoral chances. Both premises are false. The Democrats won two of three lowest turnout Presidential elections in the past half-century (1948, 1996). The Republicans won the two highest turnout Presidential elections in the last four decades (1968, 2004). The GOP won the highest turnout recent mid-term (1994). But, as with Alfred E. Neuman ("My mind is made up. Don't confuse me with the facts."), the myths continue to govern conduct.

Republicans tend to believe that elections are stolen from them by fraud and chicanery – double voting, bought ballots, non-citizens casting votes, lost and tampered with ballot boxes and false registrations, among other ills. Democrats tend to minimize the incidence of fraud and maximize the potential and reality of disenfranchisement and intimidation – registrations blocked on technicalities; purges that disenfranchise legal voters; discarded registrations and absentee ballots; telephoned, mailed or in-person threats of criminal prosecution of citizens (usually people of color) who might try to cast ballots without proper credentials or at improper voting places.

There are, of course, both fraud and intimidation.

Fraud: Last week, twelve government workers in Gary, Indiana were indicted for vote fraud. In the 2004 election, Dick Tracy and other cartoon characters were registered in Ohio. In 2000, a dog was registered in Missouri. In 2004, a New Jersey newspaper found

that more than a few citizens of that state were also citizens of Florida and voted in both places. The state of Washington conducted a review of the closely contested 2004 gubernatorial race and found a number of ineligible people registered who cast votes, not, however, sufficient to reverse the outcome of the election, according to a state judge. In 1998, the U.S. House Administration Committee, upon complaint, reviewed the results of the race between present Rep. Loretta Sanchez and former Rep. Robert Dornan and found a substantial number of non-citizens had cast ballots, not, again, sufficient to overturn the results of the election. As recently as three years ago, ballot boxes were missing in San Francisco, only to be found days later without any idea of what they went through in the interim. An election in the suburbs of Chicago had to be redone because a number of no excuse absentee votes were found to have been purchased. In 1989, the Committee I headed for 30 years was commissioned by the chairs of the two major parties to ascertain how many instances of fraud appeared in the largest newspaper of each state over a ten-year period. That study found, there were 91 such incidents reported, probably understating how many times fraud of one form or another took place.

Suppression and Intimidation: In 2004 alone: election officials in Florida rejected registration applications because applicants who had fully filled out a citizenship affidavit failed to put a check mark about citizenship in another part of the application; registration list purging activities were handed to private companies that, in turn, removed legitimate registrants from voting lists; in at least two states, partisan private company registrars hired by the GOP failed to deliver Democratic registrations to election boards; voters in at least one state received phone calls, saying Republicans vote on Tuesday, Democrats vote on Wednesday; provisional ballots were, in some cases, not given out to people who qualified and some provisional ballots were not counted, when they should have been; in one Florida County, citizens who filed for absentee ballots found out that the applications were not ready until past the deadline for applying; lack of adequate numbers of polling stations created long lines at the polls and up to eight hour waits to cast ballots, largely in minority areas.

While it would be both appropriate and principled for the leadership of both parties to want every eligible person to have the opportunity to vote, to want with equal fervor the integrity of the election system to be protected from any form of fraud or abuse and to cooperate on achieving both, it has never worked out that way. While there have been a few efforts at cooperation, almost always the respective parties fall back on their myths about turnout and their fears about the others' intentions. That – coupled with the events in Florida and elsewhere in 2000 and the intense polarization of the nation around the actions of the Bush Administration – created “armed” camps in 2004 manned by legions of lawyers, battalions of spotters, fueled by intense paranoia and ready to do partisan battle at the drop of a hat.

Progress toward mitigating the most Draconian of the pre-1920 electoral reforms was always mired in partisan power struggles. Getting rid of Jim Crow laws and black disenfranchisement in the South ultimately became possible because external action (the civil and voting rights movement and the violent white power structure response to it) and the size of the post-1964 Democratic majority in both Houses of Congress made it

possible to overcome the s Congressional governing coalition of Southern bourbons and conservative Republicans whose power was at stake. Individual states rid themselves of egregiously long residence requirements and early registration deadlines, only when the Democrats had firm control of both houses of state legislatures and the governorship in individual states. But progress was glacial.

The first real voting law breakthrough, the National Voting Rights Act of 1995 (the so-called motor voter law), provided for mail and deputy registration in every state; mandated that registration in all states would close no earlier than 30 days before a Federal election; made registration available at motor vehicle license bureaus and other government agencies; among other advances. This law was made possible only after a bi-partisan agreement was reached to deal with cleaning of registration lists to prevent potential fraud. The Help American Vote Act passed, with all of its salutary provisions aimed at avoiding the most egregiously negative features of the 2000 election, only after acquiescing to the legitimate demands of Sen. Christopher Bond for an identification requirement for first-time mail registrations.

In the present, fully implementing HAVA within a reasonable approximation of its statutory deadlines and going beyond to address the additionally revealed problems that the original legislation did not contemplate is again running up against the partisan divide. That divide is exacerbated by a politically inspired xenophobia about illegal immigration that has roots not only in concepts of law and order, worries about citizen job loss and reduced pay, and hostility to illegal foreigners, but also to the fact that the character of politics in the Southwest and California could irrevocably shift away from Republican competitiveness or dominance were these immigrants granted a path to citizenship.

Democrats, liberals and particularly minorities want to do something about partisan and private purges; having verified paper trails for voting machines to protect against any election official chicanery; ensuring that provisional ballots are available and counted within a liberal definition of who is entitled; and providing polling place accessibility both with respect to the needs of the disabled and as well as having sufficient polling stations or multiple precinct kiosks to eliminate long lines at the polls. They also want to ensure that all registrations and ballots gathered by others are delivered to election offices; that voting lists accurately and fully reflect those who are qualified to vote; and that these lists are computerized and interoperable with all registration entities and locations. Many also want non-partisan administration of elections to prevent the putative abuse that occurred in 2000 in Florida and in 2004 in Ohio.

Republicans and conservatives also want computerized lists to expedite removal of those who have moved; interoperability with state health records to eliminate those who have died or who are psychologically incapable of casting a knowledgeable vote; and interoperability with the lists in other states to insure against multiple registrations and voting. And they want stringent identification requirements either enacted by state for strictly voting purposes or under the provisions of the Real ID legislation aimed at ferreting out non-citizens both legal and illegal.

The movement toward identity requirements for voting is inexorable. In the year 2000, there were 39 states that did not require any identification. Today, every state has some form of identification requirement. Twenty-six states have imposed the minimum identification requirements in order to comply with HAVA – in person, at the polls, identification for all persons who registered for the first time by mail. Twenty-three states impose an identification requirement at the polls for all voters. Two states require identification for all first-time voters whether they registered by mail or not.

In 2006, largely because identification requirements are now an article of Republican faith, some 31 pieces of voting identification legislation were introduced in 21 states. And while many of these measures did not pass and/or are languishing in committee, the trend is unmistakable. No one has yet moved to accept the recommendation of the Carter/Baker Commission to use the identification mandated by the Real ID bill to provide a uniform identity card nationally. But it would seem that if the Real ID could be implemented – now a major question mark because of litigation and the fact that it is a major unfunded mandate – its use for voting is not likely to be far behind.

In theory, there should be no objection to having citizens present proper identification at the polls, provided there is some recourse (such as provisional ballots) for citizens who are entitled to vote and should be on the registration lists but aren't and/or failed for some reason to bring the mandated identification. Such identification which would include information on citizenship, age, and residence -- under penalty of prosecution for false information – could reduce but not eliminate the problem of identity fraud, produce more confidence in the system and reduce the tendency to demagogue about fraud.

But there are two major problems and one potential problem with any of the identification systems in use or contemplated: 1. Some are burdensome and perhaps, in effect if not intent, discriminatory; 2. While they will reduce the chances of certain types of potential fraud, they won't fully close the door on the types of fraud they were supposed to protect against nor will they prevent what is possibly the largest opportunity for fraud; and 3. They may, especially the most burdensome ones, have a deleterious effect on turnout (which for some of their sponsors is an intent).

The most burdensome identification requirements are those that require a photograph (Florida, Georgia, Hawaii, Indiana, South Carolina and South Dakota) and/or a specimen of handwriting (Tennessee) and/or two forms of identification if one does not have a photograph (Arizona). It is too early to ascertain the turnout effects of any of these requirements (or, for that matter, the lesser requirements of the other states that do not require a photograph and offer several options for identification). There have been too few elections to make any valid comparisons. But the legal challenges to the new laws in Arizona, Georgia and Indiana make it clear that there are serious issues involved. The Georgia legislation mandates photo identification – either a drivers' license or a state produced (but not paid for) non-driver identification card for those who do not either drive or have a drivers' license. It limits the availability of such a card to one locality in each county. And it requires a person seeking an identity card to provide information as

to the person's citizenship and residence. It pays for none of this. It is being challenged because it will work a hardship on all citizens without a drivers' license who are certain to be disproportionately minorities of color; those who cannot pay for the documents attesting to citizenship and residence who are almost certainly the poor and people of color; and those for whom traveling to one place in a county, when they don't drive works a substantial hardship, who are also likely to be the poor and people of color. It is virtually inconceivable that this law will survive court challenge. Arizona's and Indiana's laws are also under legal attack, not so much for their photo identity requirement, since the state will pay for identity cards for those who don't have licenses and offer many sites where they could be provided, but for their limitations on voting by provisional ballot should a person show up at the polls without proper ID, limitations that directly contradict HAVA.

In general, whether we continue to have a hodge-podge of state regulations or move to the recommendation of the Carter/Baker Commission and use the Real ID as a method of gathering both photos and signatures, there need to be principles established that are not presently in place – that the cost of the ID and the cost of putting together and reproducing the papers necessary to come close to insuring the ID is accurate needs to be borne by government (federal or state) and that access to the ID should to be easy and universal. Nothing so far has been written into law to make these conditions a reality.

Perhaps of equal import is that while an ID may reduce the chances for some forms of abuse of the voting system, it will not address in any way the largest potential source of fraud and will only mitigate the possibility of older versions of potential fraud. The largest potential source of fraud lies in mail voting and no-excuse absentee voting, which, in effect, eliminate the secret ballot and make possible varying forms of abuse – from ballots that are taken (with their protective envelopes) and cast by persons other than the voter; from the pressured vote in ballot- signing gatherings of one's peers, pressures one can resist behind a voting curtain but not in a friend's living room; and from ballots that are collected for delivery and then discarded when the vote is not cast the way the deliverer would want. Nor would an ID protect against the purchase of these early votes. Of perhaps equal import is the fact that except for election-day registration states (self-selected for their absence of any form of fraud in their history – save perhaps some recent history in Wisconsin), there is a NVRA mandated gap of at least 60 days between the completion of a registration list cleaning process and the election. (This gap was established for three purposes – to afford those who are left off the list time to appeal their removal, to guard against any last minute capricious purging and to provide election officials the opportunity to check the accuracy of their lists.) During that period a portion of the electorate will die or change residence and their names will remain on the registration list. And this, in turn, offers the opportunity for those names to be used by others or for those persons (at least those who are alive) to vote in two places. Neither the best ID regime nor the best computerization of registration lists can address this potential problem or, for that matter, the potential problem of forged identification.

Which is the essential problem with much of what we are discussing today. Many things, which were mandated by HAVA and have been proposed since will improve the system. Interoperable computerized registration lists will help with both registration intake and

protecting against certain types of potential abuse. Uniform standards for where and how people vote and for provisional ballots would be an improvement on the hodge-podge of current law and regulation. Voting machines with paper voting and audit trails will be helpful not only to voters but also to the accuracy and integrity of the vote count. Non-partisan administration can help prevent the egregious excesses of partisanship. Taking purging out of the hands of private and often partisan organizations will surely improve both the purging process and people's faith in the accuracy of the voting lists. Numbered registration forms that must be returned could help prevent the partisan discarding of some legitimate registrations. More polling stations can eliminate long lines and voter discouragement. Clearly written voter information pamphlets and equally clear ballots can reduce confusion.

But, at root, we are adding, at great cost and additional administrative burden, improvements to the fundamentally flawed system of personal registration. We will not have eliminated and, in certain respects, we will have made more complex, the cumbersome system of registration and re-registration when one moves. We still will be faced with a very complex, several-stage system of removing people from the registration lists in a manner that both makes the lists more accurate and while protecting the interests of the wrongly removed voter. We will still have a gap between the end of purging and elections that will make even the most thorough and timely purging regime inaccurate. We still will have all the complexities that are by-products of the necessary provisional ballots. We will have reduced but not eliminated the potential for fraud. And we will continue to have partisan divisions on enhancing the opportunity to vote and protection of the integrity of the system, of stimulating high turnout or depressing turnout.

There is a better way.

As stated at the outset of this paper, almost every advanced democracy has, instead of a system of personal registration, a system by which the state is responsible for preparing a list of those qualified and, in most cases, issuing a voting card that is unduplicable so all the citizen need do is vote. We now have the technology to base the American system on such a card. If we moved from a system of personal registration to a mandatory national identity card based on an unduplicable biometric – three-finger fingerprints, retinal scans, DNA – we could eliminate the barrier called registration; eliminate all potential forms of fraud, save vote buying; and render unnecessary the partisan debate over access and fraud. We could substantially reduce the level of administration, accurately know how many voters there are in any given place and thus accurately predict what staff and polling places would be needed. We could greatly simplify the public's understanding of what is entailed in the voting process by making voting in the United States a one-step, as it is in most democracies. And with another piece of modern technology – one that is currently in operation – we could end any confusion about where people are supposed to vote. If you can plug an address into a computer and emerge with a zip code, you can also plug an address into a computer and emerge with a polling place.

There would be collateral benefits to such a mandatory National ID card based on biometrics. Identity theft would be a thing of the past. An accurate Census could be had

without costly enumeration. Public services would be available to those who qualify without complex searches for identity and qualifications. The benefit list is large and the cost savings after the initial expenditure is substantial.

But the initial expenditure – of buying the necessary equipment, arranging for intake that is accessible to all citizens at no personal cost, setting up and protecting databases, making sure that the appropriate equipment is deployed in all the necessary places after intake period – is large, an estimated \$14 billion. It is a figure that probably cannot be justified on the basis of the voting process alone – although its benefits there would be enormous.

We are, however, moving towards a biometrically-based identity system for national security. Federal workers, initially those in sensitive positions but moving towards all such workers, will be subject to such identification. Almost every nation is moving toward a card based on biometrics for travel and immigration. It is only a matter of time before, in the interests of security, our government, for citizen and national protection, will want to know who is in this country and who is coming to it. If we are so moving, then the important questions are how can we ensure that it is done right, how can we ensure that it has useful applicability to other important process such as the electoral system and how can we ensure this new system is not abused.

Even if the United States decides a biometrically based identification card is in our future, there will, of course, be a time lag between idea and implementation. And that, in turn, makes the discussions in this conference highly relevant. But it is at least my hope that in pursuing the presently necessary, we will be open to the possibility of something better in the future and we will attempt to expedite the transition.

(The author would like to express his gratitude to Paul Kleppner, whose concise book, *Who Voted*, provides in a minimal amount of pages an outline of the changes made to the election process in the period between the late 1800s and 1920; and to Doug Chapin and his staff for making intelligible the many changes that have recently been and are continuing to take place in the election administration system).

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