

**Voting Irregularities in
Florida During the 2000
Presidential Election**



June 2001

United States Commission on Civil Rights

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

Members of the Commission

Mary Frances Berry, *Chairperson*

Cruz Reynoso, *Vice Chairperson*

Christopher Edley, Jr.

Yvonne Y. Lee

Elsie M. Meeke

Russell G. Redenbaugh

Abigail Thernstrom

Victoria Wilson

Les Jin, *Staff Director*

U.S. Commission on Civil Rights
624 Ninth Street, NW
Washington, DC 20425

(202) 376-8128 voice
(202) 376-8116 TTY
www.usccr.gov

This report is available on disk in ASCII and WordPerfect 5.1 for persons with visual impairments. Please call (202) 376-8110.

Voting Irregularities in Florida During the 2000 Presidential Election

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: (202) 512-1800 Fax: (202) 512-2250
Mail: Stop SSOP, Washington, DC 20402-0001

ISBN 0-16-050927-0

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The U.S. Commission on Civil Rights held public hearings in Tallahassee on January 11–12, 2001, and in Miami on February 16, 2001. The purpose of the hearings was to investigate allegations that Florida voters were prevented from casting ballots or that their ballots were not counted in the November 2000 presidential election. The Commission initiated this investigation after it received allegations of widespread voter disenfranchisement in Florida. The Commission is authorized—and obligated—to investigate claims of deprivations that are “a result of any pattern or practice of fraud,” or that infringe on the right of citizens “to vote and have votes counted.”

The Commission’s investigation sought to determine whether isolated or systematic practices and/or policies by governmental entities denied eligible Florida citizens their right to vote. The investigation focused on who was responsible for making the critical decisions regarding resource allocations for Election Day activities, the reasons these decisions were made, and the effect these judgments had on specific communities.

During the hearings, the Commission received testimony from more than 100 witnesses, including the governor, the secretary of state, the attorney general, a representative of DBT Online (the company involved in state-sponsored removal of felons from Florida’s voter registration lists), the director of the Florida Division of Elections, the general counsel of the Florida Elections Commission, and the co-chairperson and executive director of the Select Task Force on Election Procedures, Standards and Technology established by the governor. Additional testimony was also heard from current and former Florida state and county officials, including county supervisors of elections, county commission officials, and law enforcement personnel as well as experts on election reform issues, election laws and procedures, and voting rights. Registered Florida voters also testified on the obstacles they encountered when attempting to participate in the November election. Both hearings included an open session in which the public was invited to testify about election procedures or personal voting experiences in the November election.

The report generated by the hearings, *Voting Irregularities in Florida During the 2000 Presidential Election*, concludes that many eligible Florida voters were, in fact, denied their right to vote, with the disenfranchisement disproportionately affecting African Americans. The report also contains recommendations, stressing that any electoral reform must include clear guidance, responsibility and accountability measures that include effective monitoring, and adequate resources to ensure meaningful implementation of these recommendations.

The report analyzes the Voting Rights Act of 1965, its subsequent amendments, and other applicable statutes. It evaluates the evidence of voter disenfranchisement, along with summaries of the testimony of people of color, individuals with disabilities, individuals with language needs, and election employees who witnessed first hand what occurred at Florida’s polling places.

The report contains an assessment of state election accountability and responsibility issues, including an examination of the state’s and counties’ allocation of financial resources, Election Day preparations and resources, and identifies who had the ultimate authority for ensuring full participation in the Florida election process.

The report also looks at Florida election law procedures for voting in two broad categories: the use of affidavits to resolve problems arising at the polling place and the use of absentee ballots. It also discusses the implementation of Florida's list maintenance obligations and its subsequent effect on voters. The report addresses the recent Florida electoral reform legislation signed by the governor after the Commission began its investigation. The Commission commends the legislation, including the elimination of punch cards, paper ballots, mechanical lever machines, and central-count voting systems as well as the addition of provisional balloting, but notes the legislation was deficient in several areas of concern and would only be effective if the implementation matches the legislature's intent to eliminate the problems.

To promote and protect the voting rights of Florida residents—as well as voters in all states—the Commission recommends that sufficient funding and expert assistance be made available to ensure adequate voter education and proper training for election officials, especially in those jurisdictions with new technology. Jurisdictions should be provided with the necessary funding to replace outdated voting technology and standards for new technology should be adopted. Election officials should also train precinct managers and poll workers on providing assistance to voters, especially individuals with disabilities and non-English-speaking voters. True provisional balloting must be enacted or expanded so that those denied the opportunity to vote on Election Day would have a right to appeal this determination prior to the canvassing of the election or the counting of ballots—eliminating, among other things, eligible voters being erroneously purged or absent from registration rolls. There must be meaningful measures to protect the integrity of the ballot box from fraud. The Commission, while making these and other recommendations to remedy the obstacles encountered by Florida voters, asks the Justice Department and the Civil Rights Division in the office of the Florida attorney general to investigate any official improprieties in the election and hold accountable those state election officials whose actions or failure to act violated relevant federal and/or state laws.

Voting is the language of our democracy. As the Supreme Court observed, “no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” It is clear that many people in Florida were denied this precious right. The Commission's investigation and report also demonstrate that although this denial in Florida fell most heavily on African Americans, it also affected many others, including, but not limited to, individuals with disabilities, people requiring language assistance, and former felons.

Some Americans, who wanted to vote, were eligible to vote, and who tried to vote, were nevertheless denied this precious right to vote. The error-plagued election in Florida must never be repeated. It is the duty of the federal government to promote the exercise of the right to vote when states fail to do so—thus making federal election reform measures essential. The Commission implores you to support appropriate legislation to ensure that the voices of all eligible voters are heard on Election Day.

Respectfully,
For the Commissioners,



Mary Frances Berry
Chairperson

Acknowledgments

The hearings were organized and the report was written under the supervision of General Counsel Edward A. Hailes, Jr. The report was written by project team leaders Michael Foreman, Deborah Reid, Peter Reilly, and Audrey Wiggins, and attorney-advisors Barbara de La Viez, Jenny Kim Park, Bernard Quarterman, and Joyce Smith who also conducted the prehearing research, investigation, and planning and participated in the hearings. Legal secretary Pam Moyer performed and coordinated an array of clerical tasks. Student intern Sheldon Fuller* of the Office of Civil Rights Evaluation and Deric Newton** of the Human Resources Division also provided assistance during the prehearing phase of the investigation. Staff Director Les Jin and Kimberley Alton, special assistant to the staff director, gave input and assistance throughout the project. Rebecca Kraus* and the Office of Civil Rights Evaluation compiled statistical data, under the supervision of Assistant Staff Director for Civil Rights Evaluation Terri Dickerson. Terri Dickerson, Betty Edmiston, and Dawn Sweet performed the editorial policy review. Dawn Sweet prepared the report for publication with additional legal editorial assistance by attorney-advisor Barbara de La Viez.

Additionally, the Commission acknowledges with gratitude the contributions of the Office of Staff Director, the Administrative Services and Clearinghouse Division, and the Southern Regional Office. The Commission also thanks Allan J. Lichtman, Ph.D., for the services he rendered in support of this project.

* No longer with the Commission

** Deceased

Contents

Executive Summary	xi
Introduction	1
1 Voting System Controls and Failures	6
The Voting Rights Act of 1965	7
Section 2 of the Voting Rights Act	8
Trends of Widespread Vote Dilution	12
Spoiled Ballots	12
Refined Statistical Analysis of Vote Dilution	14
Methodology and Data	14
Summary of Detailed Statistical Analysis	16
Impact of the Purge List	22
Conclusion	24
2 First-Hand Accounts of Voter Disenfranchisement	25
Voters Not on the Rolls and Unable to Appeal	25
Citizens Who Were Not Permitted to Vote	25
Poll Workers Confirm Widespread Voter Disenfranchisement	27
Polling Places Closed Early or Moved Without Notice	28
Polling Places Closed Early	28
Polling Places Moved Without Notice	29
National Voter Registration Act: The Motor Voter Law	29
Absentee Ballots	32
Police Presence at or near Polling Sites	33
Conclusion	35
3 Responsibility Without Accountability?	37
Who's in Charge?	37
Governor John Ellis Bush	37
Secretary of State Katherine Harris	38
Division of Elections	40
County Supervisors of Elections	40
Maintaining the Voter Lists	42
The State's Obligations	42
The Supervisors of Elections' Obligations	42
The Voter's Burden to Prove Innocence	43
Conclusion	44
4 Resource Allocation	45
Who Pays?	45
The State Budget Process	45
Appropriations to the Division of Elections	46
The State's Contribution to Florida's Election Resources	47
County Contributions to Florida's Election Resources	49
State Support and Election Day Preparations	52
Election Day Resources	54
Difficulties on Election Day	54

Computer Access	55
Conclusion.....	55
5 The Reality of List Maintenance	56
How Florida Contracted for List Maintenance.....	57
DBT Online, A ChoicePoint Company	58
Contractual Provisions.....	59
Contract Scope and Databases.....	59
Simplified Verification of Accuracy.....	60
Accuracy of the Felon Exclusion List.....	61
Division of Elections' Payment and Contract Status.....	63
Convicted Felons and Clemency Status.....	64
Automatic Restoration of Civil Rights.....	64
Executive Clemency in Florida.....	65
Number of Felons and Out-of-State Clemency Verification.....	67
Data Verification	67
Supervisors of Elections' Exclusion List Verification Methods.....	69
Division of Elections' Responsibilities	74
Responses to Implementation of the List Maintenance Contract.....	75
Human Consequences of Felon Exclusion List	75
Conclusion.....	77
6 Accessibility Issues.....	78
Special Needs Assistance	78
Access to Polling Places for People with Disabilities	78
Florida's Inaccessible Polling Places for People with Disabilities	79
Access to Polling Places for People Needing Language Assistance	81
Florida's Inaccessible Ballots for Non-English or Limited-English-Proficient Voters	81
Conclusion.....	83
7 Casting a Ballot.....	84
Proving One Should be Permitted to Vote	84
Affidavits.....	84
Provisional Ballots	86
Absentee Ballots.....	87
Requests for Absentee Ballots.....	87
Conclusion.....	89
8 The Machinery of Elections	90
The Machines.....	90
Punch Cards	90
Optical Scan Central Tabulation	91
Optical Scan Precinct Tabulation	91
Paper Ballot.....	91
Machine Lever	91
Votes in Communities of People of Color Less Likely to be Counted	91
Precinct-Based Counting Systems	93
Ballot Confusion	95
Palm Beach County.....	95
Witnesses Confirm Confusion in Palm Beach.....	96
Duval County.....	97
Conclusion.....	97

9 Findings and Recommendations	99
Epilogue	118
Statements	
Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners Christopher Edley, Jr., Yvonne Y. Lee, Elsie Meeks, and Victoria Wilson	125
Commissioner Victoria Wilson	126
Dissenting Statement.....	130
Charts	
1-1 Ballot Rejection Rates by Race, State of Florida	17
1-2 Ballot Rejection Rates by Race, Duval County: Ecological Regression Estimates	19
1-3 Ballot Rejection Rates by Race, Miami-Dade County: Ecological Regression Estimates	19
1-4 Ballot Rejection Rates by Race, Palm Beach County: Ecological Regression Estimates	19
1-5 Ballot Rejection Rates by Race, Duval County: 90%+ Black and 90%+ Nonblack Precincts.....	20
1-6 Ballot Rejection Rates by Race, Miami-Dade County: 90%+ Black and 90%+ Nonblack Precincts.....	20
1-7 Ballot Rejection Rates by Race, Palm Beach County: 90%+ Black and 90%+ Nonblack Precincts.....	20
8-1 Percentage of Spoiled Ballots by Voting Technology	95
Tables	
1-1 Top 10 Counties with Various Population Characteristics and Ballot Rejection Rates	13
1-2 Ecological Regression Estimates of Statewide Ballot Rejection Rates by Race	17
1-3 Ecological Regression and Extreme Case Analysis of Duval, Miami-Dade, and Palm Beach Counties' Ballot Rejection Rates by Race	21
1-4 Convicted Felons List, Miami-Dade County, 1999 and 2000	24
4-1 Division of Elections Appropriations for Fiscal Years 1999–2000 and 2000–2001	47
4-2 Division of Elections Appropriations for Fiscal Year 1998–1999	47
4-3 Division of Elections Appropriations for Fiscal Year 1997–1998	47

* The Appendix is published as a second volume to this report.

Executive Summary

Addressing voting rights issues has been a core responsibility for the U.S. Commission on Civil Rights since the Commission was founded in 1957. The Commission has broad authority over voting rights. It has general jurisdiction to examine allegations regarding the right of U.S. citizens to vote and to have their votes counted. These allegations may include, but are not limited to, allegations of discrimination based on race, color, religion, sex, age, disability, or national origin.

Pursuant to its authority, and fulfilling its obligations, members of the Commission staff conducted a preliminary investigation and discovered widespread allegations of voter disenfranchisement in Florida in the 2000 presidential election. The Commissioners voted unanimously to conduct an extensive public investigation into these allegations of voting irregularities. Toward that end, the Commission held three days of hearings in Miami and Tallahassee and, using its subpoena powers, collected more than 30 hours of testimony from more than 100 witnesses—all taken under oath—and reviewed more than 118,000 pages of pertinent documents.

The Commission carefully selected its subpoenaed witnesses to ensure that it heard testimony on the wide range of issues that had come to light during its preliminary investigation. The Commission also acted to ensure that it heard a broad spectrum of views. It subpoenaed a cross section of witnesses, including Florida Governor Jeb Bush, Florida Secretary of State Katherine Harris, members of Governor Bush's Select Task Force on Election Procedures, Standards and Technology, and Florida's attorney general. The Commission staff's research also led it to subpoena the state official responsible for oversight of motor voter registration, the general counsel for Florida's Elections Commission, the director of the Division of Elections (part of the secretary of state's office), the director of Florida's Highway Patrol, and numerous local elections officials, county supervisors, poll workers, and local sheriffs. Additionally, the Commission subpoenaed a number of witnesses who had problems or who had first-hand knowledge of problems during the election, especially those on Election Day.

The Commission attempted to ensure that it heard all points of view in a second way. At each of the hearings, it invited the general public to testify once the formal sessions had concluded. There were no time limits on how long these sessions lasted, and they ended only after all witnesses had made their statements and each of the Commissioners present had ample opportunity to ask any and all questions of the witnesses. The witnesses' statements and answers to Commissioners' questions were under oath.

During the three days of hearings, numerous witnesses delivered heartrending accounts of the frustrations they experienced at the polls. Potential voters confronted inexperienced poll workers, antiquated machinery, inaccessible polling locations, and other barriers to being able to exercise their right to vote. The Commission's findings make one thing clear: widespread voter disenfranchisement—not the dead-heat contest—was the extraordinary feature in the Florida election.

After carefully and fully examining all the evidence, the Commission found a strong basis for concluding that violations of Section 2 of the Voting Rights Act (VRA) occurred in Florida. The VRA was enacted in 1965 to enforce the 15th Amendment's proscription against voting discrimination. It is aimed at both subtle and overt state action that has the effect of denying a citizen the right to vote because of his or her race. Although the VRA originally focused on enfranchising African Americans, the law has been amended several times to also include American Indians, Asian Americans, Alaskan Natives, and people of Spanish heritage. Additionally, the VRA includes a provision that recognizes the need for multilingual assistance for non-English speakers.

The VRA does not require intent to discriminate. Neither does it require proof of a conspiracy. Violations of the VRA can be established by evidence that the action or inaction of responsible officials and other evidence constitute a “totality of the circumstances” that denied citizens their right to vote. For example, if there are differences in voting procedures and voting technologies and the result of those differences is to advantage white voters and disadvantage minority voters, then the laws, the procedures, and the decisions that produced those results, viewed in the context of social and historical factors, can be discriminatory, and a violation of the VRA.

The report does not find that the highest officials of the state conspired to disenfranchise voters. Moreover, even if it was foreseeable that certain actions by officials led to voter disenfranchisement, this alone does not mean that intentional discrimination occurred. Instead, the report concludes that officials ignored the mounting evidence of rising voter registration rates in communities. The state’s highest officials responsible for ensuring efficiency, uniformity, and fairness in the election failed to fulfill their responsibilities and were subsequently unwilling to take responsibility.

Disenfranchised Voters

Disenfranchised voters are individuals who are entitled to vote, want to vote, or attempt to vote, but who are deprived from either voting or having their votes counted. The most dramatic undercount in the Florida election was the uncast ballots of countless eligible voters who were wrongfully turned away from the polls. Statistical data, reinforced by credible anecdotal evidence, point to the widespread denial of voting rights. It is impossible to determine the extent of the disenfranchisement or to provide an adequate remedy to the persons whose voices were silenced by injustice, ineptitude, and inefficiency. However, careful analysis and some reasonable projections illustrate what happened in Florida.

The disenfranchisement of Florida’s voters fell most harshly on the shoulders of black voters. The magnitude of the impact can be seen from any of several perspectives:

- Statewide, based upon county-level statistical estimates, black voters were nearly 10 times more likely than nonblack voters to have their ballots rejected.
- Estimates indicate that approximately 14.4 percent of Florida’s black voters cast ballots that were rejected. This compares with approximately 1.6 percent of nonblack Florida voters who did not have their presidential votes counted.
- Statistical analysis shows that the disparity in ballot spoilage rates—i.e., ballots cast but not counted—between black and nonblack voters is not the result of education or literacy differences. This conclusion is supported by Governor Jeb Bush’s Select Task Force on Election Procedures, Standards and Technology, which found that error rates stemming from uneducated, uninformed, or disinterested voters account for less than 1 percent of the problems.
- Approximately 11 percent of Florida voters were African American; however, African Americans cast about 54 percent of the 180,000 spoiled ballots in Florida during the November 2000 election based on estimates derived from county-level data. These statewide estimates were corroborated by the results in several counties based on actual precinct data.

Poor counties, particularly those with large minority populations, were more likely to possess voting systems with higher spoilage rates than the more affluent counties with significant white populations. There is a high correlation between counties and precincts with a high percentage of African American voters and the percentage of spoiled ballots. For example:

- Nine of the 10 counties with the highest percentage of African American voters had spoilage rates above the Florida average.
- Of the 10 counties with the highest percentage of white voters, only two counties had spoilage rates above the state average.
- Gadsden County, with the highest rate of spoiled ballots, also had the highest percentage of African American voters.
- Where precinct data were available, the data show that 83 of the 100 precincts with the highest numbers of spoiled ballots are black-majority precincts.

The magnitude of the disenfranchisement, including the disparity between black and nonblack voters, is supported by the testimony of witnesses at the Commission's hearings. These witnesses include local election officials, poll workers, ordinary voters, and activists. Among the sworn testimony:

- One potential voter waited hours at the polls because of a registration mix-up as poll workers attempted to call the office of the supervisor of elections. The call never got through and the individual was not allowed to vote. A former poll worker herself, she testified that she never saw anything like it during her 18 years as a poll worker.
- A poll worker in Miami-Dade County with 15 years of experience testified, "By far this was the worst election I have ever experienced. After that election, I decided I didn't want to work as a clerk anymore."
- A poll worker in Palm Beach County testified that she had to use her personal cell phone to attempt to contact the election supervisor's office. Despite trying all day, she only got through two or three times over the course of 12 hours.
- A Broward County poll worker testified that in past elections it took about 10 minutes to get through to the elections supervisor. During the course of the November 2000 election, she turned away approximately 40–50 potential voters because she could not access the supervisor of elections.
- A Boynton Beach poll worker explained how his precinct workers turned away about 30–50 potential voters because they could not get through to the supervisor of elections. He was successful only once during an eight-hour period.
- Other persons testified about waiting in long lines only to be ultimately denied their right to vote.

The Commission calls upon the attorney general of the United States to immediately begin the litigation process to determine liability under the VRA and appropriate remedies. The Commission is a fact-finding body, authorized to investigate allegations of voting discrimination, fraud, and other irregularities. However, it does not adjudicate violations of the law, hold trials, or determine civil or criminal liability. It is within the jurisdiction of the U.S. Department of Justice and Florida law enforcement officials to seek appropriate sanctions and remedies. In addition to calling on the attorney general to initiate the litigation process on this issue, the Commission requests this action on a number of other issues as well, such as Florida's handling of its voter roll purge and its failure to accommodate voters with disabilities and limited English proficiency.

The Commission recommends that Florida retain knowledgeable experts to undertake a formal study to ascertain the reason for the racial disparities in vote rejection rates between white voters and persons of color. Once this is completed, the state should adopt and publi-

cize procedures to eliminate this disparity. As a start, the state could identify and promote the “best practices” of counties in Florida or around the nation that performed well during the 2000 presidential election.

Missing Leadership

Florida’s governor insisted that he had no specific role in election operations and pointed to his secretary of state as the responsible official. After the election, however, the governor exercised leadership and responsibility in electoral matters in the commendable action of appointing a task force to make recommendations to fix the problems that occurred. The secretary of state, the state’s chief elections officer, denied any responsibility for the problems in the election, claiming only a “ministerial” role, her clear statutory obligations notwithstanding. Rather, she asserted that county election officials are responsible for the conduct of the election, describing her role in the policies and decisions affecting the actual voting operations as limited. However, her claims of no responsibility sharply contrast to her actions in the immediate aftermath of Election Day, when she asserted ultimate authority in determining the outcome of the vote count. On the local level, supervisors of elections in the counties that experienced the worst problems failed to prepare adequately and demand necessary resources.

This overall lack of leadership in protecting voting rights was largely responsible for the broad array of problems in Florida during the 2000 election. Furthermore, state officials ignored the pleas of some supervisors of elections for guidance and help. Especially at the highest levels, officials must take responsibility for leading on matters for which they have authority and, to the extent they do not have sole authority, to take the initiative for working with other key officials. Specific examples of the areas in which Florida officials need to improve are discussed in other parts of the Executive Summary and throughout the report. However, the need for key officials to exercise leadership in protecting the right to vote is imperative. This was not a responsibility that officials were willing to accept during the 2000 election.

Purging Former Felons from the Voter Rolls

Individuals not legally entitled to vote should not be allowed to vote. Appropriate efforts to eliminate fraudulent voting strengthen the rights of legitimate voters. In fact, there are already laws in place in Florida that make it a crime to vote unlawfully. However, poorly designed efforts to eliminate fraud, as well as sloppy and irresponsible implementation of those efforts, disenfranchise legitimate voters and can be a violation of the VRA. Florida’s overzealous efforts to purge voters from the rolls, conducted under the guise of an anti-fraud campaign, resulted in the inexcusable and patently unjust removal of disproportionate numbers of African American voters from Florida’s voter registration rolls for the November 2000 election.

The purge system in Florida proceeded on the premise of guilty until proven innocent. In 1998, the Florida legislature enacted a statute that required the Division of Elections to contract with a private entity to purge its voter file of deceased persons, duplicate registrants, individuals declared mentally incompetent, and convicted felons without civil rights restoration, i.e., remove ineligible voter registrants from voter registration rolls. This purge process became known as list maintenance. Once on the list, the process places the burden on the eligible voter to justify remaining on the voter rolls. The ubiquitous errors and dearth of effective controls in the state’s list maintenance system resulted in the exclusion of voters lawfully entitled and properly registered to vote.

African American voters were placed on purge lists more often and more erroneously than Hispanic or white voters. For instance, in the state’s largest county, Miami-Dade, more than 65 percent of the names on the purge list were African Americans, who represented only 20.4 percent of the population. Hispanics were 57.4 percent of the population, but only 16.6 per-

cent of the purge list; whites were 77.6 percent of the population but 17.6 percent of those purged.

Florida easily could have, and should have, done much more to protect the voting rights of African Americans and other Floridians. What should have been done include the following:

- The governor, the secretary of state, or the director of the Division of Elections should have provided clear instructions to their subordinates on list maintenance strategies that would protect eligible voters from being erroneously purged from the voter registration rolls. Two key failings accounted for a large portion of the purge-related disenfranchisement:
 - The Division of Elections failed to recommend the same cautionary steps before the November 2000 presidential election that were taken before the 1998 election. At that time, supervisors of elections were asked to verify the exclusion lists with the greatest of care. They were asked to provide opportunities for persons to vote by affidavit ballot in those instances in which the voter made a credible challenge to his or her removal from the voter registration rolls.
 - Inadequate supervision of Division of Elections staff allowed irresponsible decisions to be made, including an official of the Division of Elections encouraging an error-laden strategy that resulted in the removal of a disproportionate number of eligible African American voters from the rolls.
- State officials should have provided adequate training to supervisors of elections in purge verification procedures.

The purposeful use of erroneous listings to promote the state's purging priorities and the permanent disenfranchisement of discharged felons raise important questions of fundamental fairness. The state's aggressive purging laws, policies, and practices disproportionately affect African Americans, who are disproportionately charged, convicted, and sentenced in the criminal justice system. The Commission questions Florida's onerous and infrequently rendered clemency process. Former offenders who have paid their debt to society should have citizenship rights restored, which is already done in 36 states. Further, the report expresses disappointment that the recently enacted legislation failed to address the issue of automatic restoration of voting rights for former felons and asks that the governor recommend reform in this area of state law.

Accessibility

Florida failed to provide adequate access to individuals with disabilities and to people who have limited English proficiency. Specific concerns pertaining to those with physical disabilities include:

- Persons who rely on wheelchairs were forced to negotiate steps and unreachable polling booths or undergo humiliation by relying on others to lift them into the polling places to exercise their right to vote.
- Some voters with visual impairments found that the precincts did not have proper equipment to assist them in reading their ballots and, therefore, they had to rely on others—often strangers—to cast their ballots, denying them their right to a secret ballot.
- Others precincts were not equipped, or otherwise failed altogether, to accommodate potential voters with disabilities. As a result, individuals with disabilities were simply turned away, and therefore disenfranchised.

Individuals who were not proficient in English faced comparable barriers, despite federal requirements that language assistance be provided for non-English-proficient voters. Thus, a large number of limited-English-speaking voters were denied assistance at polling places, greatly increasing the likelihood of disenfranchisement. In some parts of Florida, Spanish-speaking voters did not receive bilingual assistance or bilingual ballots. Some of these counties are required to provide language assistance under the VRA. The failure to provide language assistance resulted in widespread voter disenfranchisement of an estimated several thousand Spanish-speaking voters in Florida.

Voter Education, Voter Registration, Training Poll Workers, and Election Day Problems

Many of the obstacles that caused voter disenfranchisement in the November 2000 election were the result of inadequate voter education and insufficient poll worker training. Moreover, counties were grossly unprepared for the large voter turnout and scrambled, often unsuccessfully, to meet the needs of voters on Election Day. Despite the early signs of a large influx of new voters, Florida state election officials did not respond with the appropriate array of measures to avoid the chaos that occurred. The lack of sufficient and comparable resources and the absence of guidance from top state officials on matters such as voter education and effective poll worker training contributed to the incidence of spoiled and uncast ballots. Florida must take steps to remedy this, including:

- The secretary of state's office and local election officials must ensure that they have sufficient resources to engage in effective voter education.
- Local election officials who do not have sufficient resources for conducting a well-run election must have an adequate process to ensure they can obtain those resources.
- There must be better coordination between the secretary of state's office and local election officials. The Commission recommends that any future reforms include effective monitoring systems and adequate resources to ensure the meaningful implementation of the proposals.
- Florida officials need to do a better job of consulting people with disabilities, individuals with limited English proficiency, and groups representing these individuals to ensure that voters with access problems have a full and fair opportunity to cast their ballots and to have them accurately counted.

As a result of these shortcomings, some potential voters never got to cast ballots. For example:

- Some voters were barred from voting despite arriving at their polling places before closing time because poll workers did not understand the rule that if voters arrive before 7 p.m., they must be allowed to vote.
- Adequate notice was not always given to voters when polling places were moved.
- The failure to process in a timely manner motor voter registrants contributed to disenfranchising voters.
- Aside from the lack of consistency and uniformity in election operations, many election officials failed to use affidavits under appropriate circumstances and instituted few procedures to confirm voter lists.
- Poll workers were unable to reach central offices to certify voters.

Conclusion

The Commission found that the problems Florida had during the 2000 presidential election were serious and not isolated. In many cases, they were foreseeable and should have been prevented. The failure to do so resulted in an extraordinarily high and inexcusable level of disenfranchisement, with a significantly disproportionate impact on African American voters. The causes include the following: (1) a general failure of leadership from those with responsibility for ensuring elections are properly planned and executed; (2) inadequate resources for voter education, training of poll workers, and for Election Day trouble-shooting and problem solving; (3) inferior voting equipment and/or ballot design; (4) failure to anticipate and account for the expected high volumes of voters, including inexperienced voters; (5) a poorly designed and even more poorly executed purge system; and (6) a resource allocation system that often left poorer counties, which often were counties with the highest percentage of black voters, adversely affected.

Since the Commission began its hearings, Florida has enacted legislation to address many of the problems of the last election. The Commission publicly applauded this development as soon as it occurred, and even before the details of the legislative package were finalized. The Commission reiterates that Florida and its leaders deserve credit for the new election law.

However, the same leadership that effectively ensured passage of the recent legislation was missing in the years and months leading up to the November 2000 election. If the same level of leadership had been present, the Commission's investigation reveals that most of the problems during the past election would have been prevented, and the dire consequences documented in this report could have been avoided.

Unfortunately, the recent legislation fails to address several other important issues, including accessibility for persons with disabilities, language assistance, and other barriers to voter participation. Additionally, the new law permits provisional balloting only under limited circumstances. While provisional voting is a positive step, the legislation is too restrictive to adequately address possible situations that might require its use. The provision should be amended to ensure additional voters are not disenfranchised.

Moving forward, the Commission urges that the same leaders who worked to enact the recent election reforms work even more diligently to ensure they are implemented effectively. Moreover, the Commission encourages Florida's leaders to expeditiously take up the issues they did not address in the last legislative package, such as making rules on purging of former felons less punitive and more in line with the mainstream of other states.

Introduction

*No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this [Voting Rights] Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.*¹

BACKGROUND

The 2000 presidential election and its aftermath became the focus of international attention on the application of America's election laws and policies. The state of Florida's electoral process took center stage as the world paused to observe the unfolding drama of identifying the next President of the United States.² During this time, many allegations of voting irregularities arose as to whether eligible voters were hindered and in some cases prevented from voting for the presidential candidate of their choice, and if votes that were cast were properly tabulated.

When the U.S. Commission on Civil Rights receives allegations of voting irregularities it is obligated to investigate.³ Accordingly, the Commission initiated an investigation into these issues. In the area of voting rights, the Commission is specifically authorized to investigate allegations of deprivations "as a result of any pat-

tern or practice of fraud; of the right of citizens of the United States to vote and have votes counted."⁴ The Commission's authority to conduct hearings emanates from 1957 legislation that established it as an independent bipartisan federal agency of the U.S. government. The Commission is charged by federal law:

- to appraise the laws and policies of the federal government;
- to serve as a national clearinghouse for information—all in connection with discrimination or the denial of equal protection of the laws of this nation, because of race, color, religion, sex, age, disability, national origin, or in the administration of justice.

The Commission's investigation in Florida was intended to determine if there were unequal allocations of election resources throughout Florida's counties, and whether there were isolated or systemic practices and/or policies that prevented Florida residents from voting. Moreover, the investigation focused on who was responsible for making the critical decisions regarding resource allocations for Election Day activities, the reason these decisions were made, and the effect these judgments had on specific communities. The investigation included public fact-finding hearings in Tallahassee on January 11–12, 2001, and in Miami on February 16, 2001. In total, hundreds of witnesses were interviewed by Commission staff, and more than 100 witnesses testified under oath before the Commission, including approximately 65 witnesses who were selected for the two hearings due to their knowl-

¹ 42 U.S.C. § 1973i(a) (2000).

² In Florida, the ballot for the 2000 presidential election included 12 candidates for President. The top vote-getters in Florida were George Bush and Albert Gore. Both candidates received 48.8 percent of the vote in Florida. On December 13, 2000, 36 days after the election—following a mandatory recount and amid a flurry of lawsuits, appeals, and two cases that reached the Supreme Court—Florida announced that its 25 electoral votes would be cast for George Bush. The final vote tally in Florida was 2,912,790 for Bush and 2,912,253 for Gore. In the end, Bush became the president-elect, winning the electoral college by a margin of 271–267; Gore won the popular vote with 50,158,094 over Bush's 49,820,518.

³ 42 U.S.C. § 1975a(a)(1) ("The Commission *shall* investigate. . .") (emphasis added).

⁴ 42 U.S.C. § 1975a(a)(1)(B) (2000). "The Commission shall investigate allegations in writing under oath or affirmation relating to deprivations—because of color, race, religion, sex, disability, or national origin." 42 U.S.C. § 1975a(a)(1).

edge of and/or experience with the issues under investigation. The Commission heard testimony from top elected and appointed state officials, including the governor, the secretary of state, the attorney general, the director of the Florida Division of Elections, the general counsel of the Florida Elections Commission, other current (and former) Florida state and county officials, and a representative of DBT Online (a Choice-Point company that was involved in the state-sponsored removal of felons from Florida's voter registration lists).

During the hearings, Florida citizens, registered voters, and experts on election reform issues, election laws, and procedures, and voting rights provided sworn testimony. The co-chairperson and executive director of the Select Task Force on Election Procedures, Standards and Technology, established by Florida Governor John Ellis (Jeb) Bush, testified before the Commission. Various county supervisors of elections, county commission officials, law enforcement personnel, and a state's attorney also presented their sworn statements. In addition to the scheduled witnesses, the Commission extended an opportunity for concerned persons, including members of the U.S. Congress and the Florida legislature, to submit relevant testimony under oath. Furthermore, the Commission subpoenaed documents from witnesses containing pertinent information that could assist with this investigation and augment submitted testimony. These witnesses produced more than 118,000 pages of relevant documents, computer discs, CD-ROMs, and tapes of data.

After the hearing phase of this investigation, the staff reviewed testimony, posed various interrogatories to a number of witnesses and examined their responses to these interrogatories, conducted a deposition of a hearing witness at the request of Commissioners, conducted supplemental research on areas of law and fact, and performed an extensive review of the subpoenaed documents.

During the course of this investigation, Chairperson Mary Frances Berry sent a letter to Governor Bush expressing her deep disappointment with his failure to "address the most serious problems that occurred in Florida during the 2000 elections."⁵ Chairperson Berry was refer-

ring to a statement of priorities that Governor Bush presented during the opening of the Florida legislative session. She indicated that his support for voting technology reforms in Florida was necessary and a step in the right direction. She emphasized, however, that "[t]hese measures standing alone are insufficient to address the significant and distressing issues and barriers that prevented qualified voters from participating in the recent presidential election."⁶

At the Commission's March 9, 2001, meeting, Commissioners approved and released a statement on the status of this investigation. The Commissioners reported that "voter disenfranchisement appears to be at the heart of the issue."⁷ The status report offered a preliminary assessment of the evidence by the Commissioners. It identified an array of problems including, but not limited to, differences in resource allocations "that may have operated so that protected groups may have had less of an opportunity to have their votes counted."⁸ The statement expressed the hope of Commissioners that "Florida officials, as well as officials in other jurisdictions—where barriers existed, will promptly resolve these major problems that occurred on their watch, instead of hoping with the passage of time the public will forget."⁹

The Commissioners also agreed at this meeting to hold a future hearing in Florida to hear testimony from state and local officials to assess what legislative changes have been proposed or enacted at the state and local levels and to report to the public on what progress has been made.

The day before the Commission's May 4, 2001, meeting, the Florida legislature announced it agreed upon a legislative package that would overhaul the state's voting system. The Commission issued a statement commending the approval of Florida electoral reform legislation that "addresses many of the issues presented to the Commission during its investiga-

⁶ Ibid.

⁷ See U.S. Commission on Civil Rights, "Status Report on Probe of Election Practices in Florida During the 2000 Presidential Election," Mar. 9, 2001.

⁸ Ibid.

⁹ Ibid.

⁵ See Mary Frances Berry, chairperson, U.S. Commission on Civil Rights, letter to Governor Jeb Bush, Mar. 8, 2001.

tion.”¹⁰ Striking a cautionary note, Chairperson Berry, however, observed, “We are all cognizant of the fact that not all areas of concern are covered, such as the need for language and special needs assistance. We know also that this legislation can only be effective if the implementation matches the legislature’s intent to eliminate the problems.”¹¹ The Commission also renewed its commitment to “travel to Florida to assess the impact of the legislation and to encourage appropriate distribution of resources to eliminate the well-publicized difficulties that were experienced in the last election.”¹² On May 9, 2001, the Florida Election Reform Act was signed into law by Governor Jeb Bush.

In the final stages of this investigation, the Commission followed its procedures by conducting legal sufficiency, defame and degrade, and editorial policy board reviews. Affected agencies were afforded an opportunity to review and respond to applicable portions of this report. These comments were then considered and where appropriate are reflected in this final report.

OBJECTIVE

The Commission’s report analyzed the Voting Rights Act of 1965 (VRA), its subsequent amendments, and other applicable statutes. The objective of this investigation was not to determine if violations of these laws occurred, since the Commission does not have enforcement powers, but to provide a backdrop for an analysis of the civil rights implications of the Commission’s factual findings. Obviously, some analysis of the rights afforded to U.S. citizens pursuant to the VRA was an important component of the investigation. Among other provisions, the VRA provides that:

- All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation

of any State or Territory, or by or under its authority, to the contrary notwithstanding.¹³

- No person acting under color of law shall in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.¹⁴

Based on a complete review of the record, and employing the appropriate statistical analysis, the Commission examined whether Florida’s eligible voters experienced disenfranchisement during the 2000 presidential election as a result of disparate treatment or based on apparently neutral factors that resulted in denying the right to vote. Initially, under the VRA, a plaintiff could prove a violation by showing that government practices resulted in the denial of the right of any citizen to vote on the basis of race or color.¹⁵ The Supreme Court subsequently ruled that establishing a violation of the VRA required proof of intentional discrimination, which diminished a voter’s ability to challenge practices that disenfranchised African Americans.¹⁶ Because of the unfortunate legacy and the lingering effects of race-based discrimination, Congress reacted immediately to reverse the Supreme Court and prevent the continuation of discriminatory practices in voting that served to disenfranchise African Americans and other persons of color.

In 1982, Congress passed an amendment to the VRA, providing provisions to further guarantee the sacred right to vote for all eligible citizens of the United States. Congress understood that the nearly impossible burden of proving discriminatory intent would preclude the elimination of policies that although neutral on their face had the effect of disenfranchising persons of

¹³ 42 U.S.C. § 1971(a)(1) (2000).

¹⁴ 42 U.S.C. § 1971(a)(2)(A).

¹⁵ See *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973).

¹⁶ In *Mobile v. Bolden*, 446 U.S. 55 (1980), the U.S. Supreme Court determined that proof of discriminatory intent was required pursuant to the 14th and 15th Amendments and section 2 of the Voting Rights Act. As discussed, Congress subsequently rejected the *Mobile* decision. See chap. 1.

¹⁰ See U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights Commends Florida Leaders’ Proposed Overhaul of Voting System,” May 4, 2001.

¹¹ *Ibid.*

¹² *Ibid.*

color. Thus, the VRA amendments of 1982 reversed the Supreme Court and clarified that discrimination could be established by either showing intentional discrimination or that the totality of the circumstances results in a violation of the VRA.

The essence of this change in the law was to make it clear that a "specific intent to discriminate" is not required to establish a violation of the VRA. Rather, the proper test is whether the "result" of the election practice is one that is not equally open to minority voters or whether the election practice gives minority voters less opportunity to participate in the electoral process.¹⁷

Additionally, the Commission recognizes that other factors could have contributed to voter disenfranchisement in Florida during the 2000 presidential election. For example:

- **The Western Florida Time Zone Controversy.** On the evening of November 7, 2000, various television networks and cable stations announced the closure of Florida's polls, exit poll outcomes, and/or the predicted results of the presidential and Florida senate races at 6 p.m. Central Standard Time (7 p.m. Eastern Standard Time), when polls in the western Florida panhandle did not officially close until 7 p.m. Central time.¹⁸
- **Absentee Military Ballots.** Florida absentee ballots from overseas members of the nation's military were delivered to the state via the U.S. mail service, but questions arose as to their validity because of their late arrival, improper certification, incomplete applications, illegible ballots, improper certification

by election officials, or the lack of required postmarks.¹⁹

- **Complaints of Voter Fraud.** There were allegations that some Florida residents voting in the November 2000 election were not eligible to vote.²⁰

While recognizing that the above factors do raise concerns of voting irregularities, the Commission did not receive a significant number of complaints or sufficient evidence during its Tallahassee and Miami hearings pertaining to how these issues created possible voter disenfranchisement in Florida.²¹

Traditionally, the Commission has focused its attention on the expansion of voting rights issues and related litigation.²² The Commission

¹⁹ See, e.g., Tara Copp, "Congress to Eye Changes in Military Voting," Scripps Howard News Service, Apr. 3, 2001; Thomas B. Pfankuch, "Bill Revises Overseas Balloting Proposal; Would Ensure Absentee Votes Counted," *The Florida Times-Union* (Jacksonville), Apr. 3, 2001, p. B1.

²⁰ See Florida Department of State, Division of Elections, "Voter Fraud Notice" <<http://election.dos.state.fl.us/fraud/index.shtml>> (accessed May 15, 2001). The Division of Elections defines voter fraud as "intentional misrepresentation, trickery, deceit, or deception, arising out of or in connection with voter registration or voting, and the prescribed offenses set forth in chapter 104, Florida Statutes." *Ibid*.

²¹ See generally Linda Ward, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 12, 2001, Verified Transcript, p. 351 (testifying about alleged voter fraud activity in Seminole and Miami-Dade counties); Enos Schern, president, Citizens of Dade United, Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 529 (testifying about alleged voter fraud activity in Seminole and Miami-Dade counties); Raymond Jackson, president, North Florida branch of the NAACP, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 359 (expressing concerns that election officials did not count overseas military ballots delivered in Okaloosa and Walton counties); Senator Daryl Jones, Senate District 40, Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 429 (suggesting permitting voting through use of the Internet for overseas military personnel to remedy overseas absentee ballot problems); June Littler, chairperson, Florida Advisory Committee to the U.S. Commission on Civil Rights, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 22 (testifying that Florida citizens have informed her they do not support Florida's polls closing at different times based on the state's two time zones); Katherine Harris, Florida secretary of state, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 249 (describing state's procedures for investigating voter fraud complaints).

²² See generally U.S. Commission on Civil Rights, *Statutory Report for 1961, Volume 1: Voting* (1961); U.S. Commission on Civil Rights, *Voting in Mississippi* (1965) (analyzing findings of field investigations and a hearing in Mississippi); U.S. Commission on Civil Rights, *The Voting Rights Act of*

¹⁷ See chap. 1.

¹⁸ See U.S. Congress, Senate, Committee on Governmental Affairs, *Federal Elections*, Testimony of Daniel B. Perrin, executive director, Committee for Honest Politics, Federal Document Clearing House, Inc., May 3, 2001; Jim Abrams, "No Intentional Bias in Early Calls," AP Online, Feb. 8, 2001. Florida's panhandle is located in the Central time zone, while the remaining portions of the state are in the Eastern time zone. Nevertheless, the CBS, ABC, NBC, FOX, and CNN networks made announcements that erroneously stated or implied that Florida's election was concluded at 6 p.m. Central time. As a result, there have been several accounts indicating that a number of western Florida voters in the panhandle did not vote during the evening of November 7, because they assumed their polling locations would not be open until the scheduled closing time of 7 p.m. Central time.

has historically played an important role in investigating these types of allegations and has made recommendations that contributed to the expansion of protections of the right to vote. Accordingly, in this report, the Commission continues in its traditional role by investigating voting irregularities in Florida during the 2000 presidential election.

Chapter 1 of this report, "Voting System Controls and Failures," provides a brief discussion of the Voting Rights Act. It also discusses evidence of voter disenfranchisement and how this disenfranchisement affected the rights of people of color to vote in the 2000 presidential election. Chapter 2, "First-Hand Accounts of Voter Disenfranchisement," provides summaries of the testimony of people who witnessed what occurred at polling places on November 7. This chapter includes details of such issues as poll workers' inability to contact county supervisors of elections, polling places being moved without notice, and police presence at or near polling places.

Chapter 3, "Responsibility Without Accountability?" focuses on state election accountability and responsibility issues and discusses who has the ultimate authority for ensuring full participation in the Florida election process. This chapter discusses the requirements of voting eligibility list maintenance. Chapter 4, "Resource Allocation," examines the following election topics: financial election resources for the state of Florida, the state's allocation of financial resources, counties' allocation of financial resources, the state's efforts to establish election uniformity throughout Florida, Election Day preparations, and Election Day resources.

Chapter 5, "The Reality of List Maintenance," discusses the implementation of Florida's voter list maintenance obligations and how it affected voters. Chapter 6, "Accessibility Issues," examines special needs assistance concerns and how individuals with disabilities and those with language needs were affected during the November 2000 election.

Chapter 7, "Casting a Ballot," focuses on Florida election law procedures for voting in two broad categories: the use of affidavits to resolve problems arising at the polling place and the use of absentee ballots. Chapter 8, "The Machinery of Elections," provides information on the types of equipment used on Election Day, the effectiveness of this voting machinery, a contextual framework for election technology improvements, and voting machinery experts' perspectives. Findings and recommendations of the Commission are presented in chapter 9. The Epilogue provides a brief overview of the pertinent legislative and other governmental actions that have occurred since the Commission began its investigation.

This report is the final step in the Commission's examination of the testimonial and documentary evidence, laws, processes, procedures, and methods of resource allocation in Florida that may have resulted in a significant number of voters who were either denied the right to vote or did not have their vote counted in the 2000 presidential election. Additionally, this report includes an analysis of relevant evidence that contributes to the Commission's findings and policy recommendations.

1965: *The First Months* (1965); U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (1975); U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* (1981) (examining the status of minority voting rights in jurisdictions covered by the original provisions of the 1965 act); U.S. Commission on Civil Rights, *A Citizen's Guide to Understanding the Voting Rights Act* (1984); Louisiana Advisory Committee to the U.S. Commission on Civil Rights, *Voter Registration in Louisiana Parishes* (1989); South Carolina Advisory Committee to the U.S. Commission on Civil Rights, *Reversing Political Powerlessness for Black Voters in South Carolina: Will Single-Member Election Districts Lead to Political Segregation?* (1991).

Voting System Controls and Failures

*No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.*¹

To ensure that every eligible citizen in Florida has an opportunity to exercise his or her right to vote, the state established a system of checks and balances that extends from the governor to the local poll worker. This system of control is codified in many of the provisions of the election laws of the state of Florida and, in part, is intended to help guarantee the rights granted to voters by the Voting Rights Act of 1965 will be protected. During the November 2000 election, a wide range of errors, including the insufficient provision of adequate resources, caused a significant breakdown in the state's plan, which resulted in a variety of problems that permeated the election process in Florida. Large numbers of Florida voters experienced frustration and anger on Election Day as they endured excessive delays, misinformation, and confusion, which resulted in the denial of their right to vote or to have their vote counted. While some maintain that what occurred in Florida was nothing out of the ordinary, but rather was simply amplified by the closeness of the election, the overwhelming evidence provided to the Commission proves otherwise.

It is impossible to determine the total number of voters turned away from the polls or deprived of their right to vote. It is clear that the 2000 presidential election generated a large number of complaints about voting irregularities in Florida. The Florida attorney general's office alone received more than 3,600 allegations—

2,600 complaints and 1,000 letters.² In addition, both the Democratic and Republican parties received many complaints from Floridians who either could not vote or experienced difficulty when attempting to vote.³ These widespread complaints prompted Florida's governor to sign an executive order creating the Select Task Force on Election Procedures, Standards and Technology.⁴ The task force was formed to examine the concerns that had been raised about Florida's election process and to recommend reforms where necessary.⁵

Several advocacy group representatives testified about the disproportionate number of complaints they received from their constituents in Florida. Jackson Chin, associate counsel at the Puerto Rican Legal Defense and Education Fund in New York City, explained that his group's preliminary investigation revealed that certain election practices in central Florida might have

² Robert A. Butterworth, Florida attorney general, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 12, 2001, Verified Transcript, pp. 193–94. See also "Complaints of Voting Irregularities in the 2000 Election," Bates Nos. 8204–8257.

³ Copies of these complaints were provided to the Commission pursuant to subpoenas *duces tecum* served on the headquarters of the Democratic and Republican parties in Florida. See "Complaints of Voting Irregularities in the 2000 Election," Bates Nos. 1–612.

⁴ John Ellis Bush, governor of Florida, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 11, 2001, Verified Transcript, pp. 98–99, 105–09. See also the Governor's Select Task Force on Election Procedures, Standards and Technology, *Revitalizing Democracy in Florida*, Mar. 1, 2001 (hereafter cited as Governor's Task Force, *Revitalizing Democracy*).

⁵ John Ellis Bush, governor of Florida, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 105–09. On March 1, 2001, the Governor's task force released its findings and recommendations, which focused largely on reforming and updating Florida's election technology. See Governor's Task Force, *Revitalizing Democracy*.

¹ *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

led to the widespread voter disenfranchisement of up to several thousand Latino voters.⁶ D.P. Misra, former president of the Association of Indians in America, and Venghan Winnie Tang, president of the South Florida chapter of the Organization of Chinese Americans, both testified that immigration and language assistance problems prevented many East Indians and Asians from being able to vote in Florida.⁷

Other advocacy groups formed coalitions to investigate or to take action against the election problems that surfaced in Florida. For example, the NAACP filed a federal class-action lawsuit on behalf of voters in Florida who allege their right to vote in the election was unlawfully denied or abridged.⁸ The Florida Justice Institute joined with the ACLU of Florida and Florida Legal Services to develop statewide electoral reform that focuses on the concerns of Florida's racial and language minorities and those who live in poverty, "considerations that are probably long overdue in this state."⁹ According to JoNel Newman of the Florida Justice Institute, "[w]hen new or vulnerable voters from traditionally disenfranchised groups are wrongly prevented from going to the polls and from voting, they feel often a humiliation and a stigma or a disaffection that has the effect in many cases of causing them never to return to the voting booth."¹⁰

The complaints from those denied the right to vote during the 2000 Florida presidential election were anything but isolated or episodic. Credible evidence shows many Floridians were denied the right to vote. Analysis of the testimony and evidence gathered by the Commission show that these denials fell most squarely on persons of color. To place this discussion in a

legal context it is important to briefly discuss some of the nondiscrimination provisions of the Voting Rights Act of 1965.

THE VOTING RIGHTS ACT OF 1965

The United States has an ugly history of voter exclusion and disenfranchisement. The original attempt to enfranchise African Americans occurred after the Civil War. Prior to the Civil War, voting was usually limited to white male property owners over the age of 21. After the war, the First Reconstruction Act of 1867 mandated that to re-enter the Union, Confederate states had to adopt new constitutions guaranteeing male suffrage without regard to race. Subsequently, Congress adopted the 15th Amendment in 1870, which guaranteed, in theory, the equal right to vote regardless of "race, color, or previous condition of servitude."

Despite what appeared to be a clear prohibition on race discrimination in voting, most states had adopted barriers, including poll taxes and literacy tests, which while appearing neutral on their face prevented many African Americans from voting. Notwithstanding the 15th Amendment, countless barriers kept voting a white male privilege and left people of color without a meaningful franchise consonant with the intent of the amendment.¹¹

The passage of the Voting Rights Act of 1965¹² (VRA) was Congress' reaction to the abhorrent racial discrimination in voting rights in the United States and an attempt to finally enfranchise the majority of African American citizens. The VRA was a response to the growing civil rights movement that occurred almost 100 years after the passage of the 15th Amendment. Congress enacted the VRA to bar discriminatory voting laws in any form on the basis of race or color. The original VRA was aimed at eliminating persistent discrimination in voting, and the intent was to abolish the use of voter exclusionary procedures or processes, such as literacy tests, poll taxes, grandfather clauses,¹³ dur-

⁶ Jackson Chin Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 198.

⁷ D.P. Misra Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 443; Venghan Winnie Tang Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 446-51.

⁸ See National Ass'n for the Advancement of Colored People v. Harris, No. 01-CIV-120-GOLD (Fla. Dist. Ct., filed Jan. 10, 2001). See also Bradford Brown, first vice president, Miami-Dade branch of the NAACP, Testimony before the U.S. Commission on Civil Rights, Miami, FL, Feb. 16, 2001, Verified Transcript, p. 437.

⁹ JoNel Newman, attorney, Florida Justice Institute, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 128-29.

¹⁰ *Ibid.*, pp. 129-30.

¹¹ Women were also excluded from the franchise until the 19th Amendment was ratified on August 18, 1920.

¹² 42 U.S.C. §§ 1973 *et seq.*

¹³ "Grandfather" and "old soldier" clauses made it easier to disenfranchise blacks without similarly disenfranchising whites by exempting from the application of literacy tests and other voting restrictions anyone who had served in the United States or Confederate army or navy, their descendants, and anyone who had himself voted, or whose father

ational residency requirements, registration harassment, and other intimidation tactics.¹⁴ The VRA also intended to prevent the introduction of new devices or processes that might dilute the voting rights of African American citizens.¹⁵

The VRA was enacted under Congress' authority to enforce the 15th Amendment's proscription against voting discrimination. Although voting rights legislation was first enacted in 1870 to enhance the effectiveness of the 15th Amendment, voting rights continued to be a legal fiction for people of color—particularly African Americans—until the passage of the VRA, which was signed into law on August 6, 1965.¹⁶

had voted, or whose grandfather had voted before January 1, 1867.

¹⁴ Many of the voter qualifications/regulations found unconstitutional in the past were indeed facially discriminatory along such lines as wealth, race, occupation, property ownership, and geography. *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding poll tax prerequisite to voting violates equal protection); *Smith v. Allwright*, 321 U.S. 649 (1944) (banning white primary laws); *Guinn v. United States*, 238 U.S. 347 (1915) (striking down grandfather clause that exempted descendants of people who voted prior to 1865 from literacy test voting prerequisite); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (holding that excluding non-property owners from school district election violates equal protection); *Reynolds v. Sims*, 377 U.S. 533 (1964) (discussing legislative reapportionment).

¹⁵ The previous efforts to enfranchise African American citizens were unsuccessful. The first attempt was the Civil Rights Act of 1870, ch. 114, 16 Stat. 140, amended by Act of February 28, 1871, ch. 22, 17 Stat. 13 (codified as amended at 18 U.S.C. §§ 241–242 and 42 U.S.C. §§ 1971, 1983 (1988)) (establishing penalties for racially motivated interference with voting).

It was not until the 1950s that Congress tried again. *See, e.g., Civil Rights Act of 1957*, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 42 U.S.C. § 1975 (1988)) (establishing the U.S. Commission on Civil Rights with responsibility for investigating and reporting on voting procedures and devices used by jurisdictions to discriminate against racial minorities); *Civil Rights Act of 1960*, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended at 42 U.S.C. § 1974 (1988)) (requiring state and local officials to retain federal election records and authorizing the attorney general to inspect such records at his discretion); *Civil Rights Act of 1964*, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 1971(c) (1988)) (prohibiting local election officials from applying registration tests or standards different from those administered to already registered voters and establishing a presumption of literacy for registrants who had completed a sixth-grade education).

¹⁶ One of the legal issues the enactment of the Voting Rights Act of 1965 addressed was the restrictive reading of constitutionally protected voting rights in a 1959 U.S. Supreme

The VRA prohibited, among other things, the use of literacy tests and other discriminatory “tests and devices” in states where less than 50 percent of the voting-age population was registered to vote or had voted in the November 1964 elections. These tests and devices had, for generations, effectively disenfranchised African Americans in the South. In 1965, people of color still met many obvious barriers that prevented them from exercising their right to the franchise, such as poll taxes, literacy tests, and intimidation tactics.

Congress passed the VRA in hopes of effectively combating the discriminatory voting practices that were used against nonwhites.¹⁷ Initially, the VRA focused on voter registration.¹⁸ The act was aimed at subtle, as well as obvious, state action that had the effect of denying citizens their right to vote because of their race.

Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act is a codification of the intent of the 15th Amendment and forbids racial discrimination with respect to voting rights. It provides:

No voting qualifications or prerequisites to voting, or standard, practice, or procedure, shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of

Court decision. *See Lassiter v. Northampton County Bd. of Election*, 360 U.S. 45 (1959). In *Lassiter*, the Supreme Court upheld the use of English literacy tests in North Carolina as a means of qualifying voters, despite that literacy tests effectively disenfranchised a sizeable portion of African American voters. In haunting language, the Court held that absent invidious discrimination the states could limit the franchise to literate persons “to promote intelligent use of the ballot.” *Id.* at 51.

¹⁷ Although the Voting Rights Act of 1965 was intended to enfranchise African Americans, the statute has been amended several times since its enactment. In 1975, Congress amended section 2 to specifically include within the scope of the statute other ethnic minorities. The statute is now also applicable to American Indians, Asian Americans, Alaskan Natives, and people of Spanish heritage. 42 U.S.C. § 1973(b)(f)(2).

¹⁸ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (1982)). The 1965 Voting Rights Act also included a provision that recognized the need for multilingual assistance for non-English speakers. It barred language discrimination at the polls for literate Spanish-speaking Puerto Rican voters who emigrate to the mainland. 42 U.S.C. § 1973b(e) (1982).

the United States to vote on account of race or color.¹⁹

Since its enactment in 1965, the VRA has been instrumental in providing people of color with access to the political process and in overcoming more than a century of racially discriminatory election laws and policies. Specifically, section 2 outlaws practices that deny people of color electoral participation by diluting the effectiveness of their votes.²⁰

Until 1980, a party alleging a section 2 violation could establish a claim by demonstrating, based on the totality of the circumstances, that the challenged electoral procedure had the result of denying a minority group equal opportunity to participate in the political process and to elect their preferred candidates.²¹ There was no requirement that disenfranchised voters prove a specific intent to deny them the right to vote because of their race.

In 1980, the Supreme Court held in *Mobile v. Bolden*²² that a plaintiff must show discriminatory intent to prove a section 2 violation of vote dilution based on constitutional claims.²³ Congress immediately responded to this decision by amending section 2 in 1982.²⁴ The amendment provides in pertinent part:

A violation . . . of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the elec-

torate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.²⁵

Congress intended the amendment to “clarify the standard of proof in establishing violations of the Voting Rights Act.”²⁶ While debating the amendment, Congressman Don Edwards of California argued that in *Bolden* the Supreme Court—

was interpreting an act of Congress and interpreted [it] in a way that [Congress] did not intend in 1965. It said that there must be direct proof of a discriminatory intention to establish a violation of section 2. . . . Now, the problem with this ruling, contrary to what Congress intended, is that it is an impossible burden to prove intent to discriminate, even where the system clearly discriminates.²⁷

Congressman John Conyers of Michigan said if the intent requirement was not eliminated, “the most important sentence in the Voting Rights Act would be made a nullity.”²⁸ Said Congressman Conyers:

Here is the one sentence that requires that we look at the effect, the result, or the purpose, and not the intent. . . . We do not need specific criminal intent on the part of any local or State officials to determine that a violation has occurred.²⁹

The 1982 amendments do not preclude plaintiffs from introducing evidence of discriminatory intent, but rather properly afford plaintiffs the option of demonstrating that the challenged

¹⁹ Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1994)).

²⁰ Although the focus of this chapter is section 2 of the Voting Rights Act (VRA), section 5 is important to mention. Once there is a determination that a state or political subdivision has violated the VRA, the state or political subdivision is required, under section 5 of the VRA, to obtain preclearance (approval) from the United States District Court for the District of Columbia or the United States attorney general whenever it enacts or seeks to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting. 42 U.S.C. § 1973c (1994).

²¹ See *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971); *White v. Regester*, 412 U.S. 755, 765-66 (1973).

²² 446 U.S. 55 (1980).

²³ *Id.* at 66-67.

²⁴ 42 U.S.C. § 1973(a) (1984).

²⁵ 42 U.S.C. § 1973(b).

²⁶ 127 CONG. REC. 23,175 (1981) (statement of Rep. Sensenbrenner).

²⁷ 127 CONG. REC. 23,176-77 (1981) (statement of Rep. Edwards).

²⁸ 127 CONG. REC. 23,177 (1981) (statement of Rep. Conyers). Representative Conyers referred to § 1973(a), which reads: “No voting qualifications or prerequisite to voting or standard or standard practice or procedure shall be imposed or applied . . . to deny or abridge the right of any citizen to vote on account of race, color. . . .”

²⁹ 127 CONG. REC. 23,177 (1981) (statement of Rep. Conyers).

electoral procedure has the effect of denying a protected class equal access to the political process and electing representatives of their choice.

In its amendment of section 2, Congress reaffirmed that discrimination could be established using a results test and that under this test there was no requirement to prove discriminatory intent. Congress described factors to be considered in determining whether, under the results test, discrimination has occurred.³⁰ The results test, also known as the "totality of the circumstances" test, only requires the plaintiff to prove that a challenged election process results in a denial or an abridgment of the right to vote.³¹ This amendment restored previous Supreme Court precedent, allowing violations of

³⁰ The Senate report delineated seven factors for courts to use to determine whether there is *dilution* in voting rights discrimination claims. The report, however, did not define how courts should, in fact, weigh these factors. The factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of members of the minority group to register, vote, or otherwise participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals; and,
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. REP. No. 97-417, at 206-07 (1982), *reprinted in* 1982 U.S.C.C.A.N. 375-76.

The report added that "[a]dditional factors that courts may consider include 'whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group' and 'whether the policy underlying the state or political subdivision's use of such voting qualifications, prerequisite to voting, standard, practice or procedure is tenuous.'" *Id.* at 207.

³¹ A plaintiff alleging a violation under the act need only prove that a practice or procedure has a discriminatory effect and is no longer required to prove that the practice was motivated by discrimination.

section 2 to be established by demonstrating abridgement of voting rights by totality of the circumstances or intentional discrimination.

Under the VRA, as amended, a violation of section 2 may be established by either showing intentional discrimination or that the totality of the circumstances "results" in a section 2 violation. Evidence of discriminatory intent is not limited to direct evidence; intent may be demonstrated by the impact of the challenged action on minorities, the ability to foresee that impact, the historical background of the challenged action, the sequence of events leading up to the challenged action, and the legislative history.³² "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by African American and white voters to elect their preferred representatives."³³ A person attempting to prove a violation of the VRA "must either prove [discriminatory] intent or alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process."³⁴

Under the totality of the circumstances standard, success does not depend on an algorithm; rather, a violation may be established by the court's weighing of the factors outlined by Congress. "There is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."³⁵

³² S. REP. No. 97-417, at 206-07 (1982), *reprinted in* 1982 U.S.C.C.A.N. 375-76. It is important to note that an election official's ability to foresee the impact of an election practice or procedure, alone, is not sufficient to establish intentional discrimination. The 1982 amendment specifically states that foreseeability can be used to determine intentional discrimination: "The plaintiff may establish discriminatory intent for purposes of this section through direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions which 'is one type of quite relevant evidence of racially discriminatory purpose.'" *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 536, n.9 (1979).

See also Testimony of Irving Younger, Senate Hearings, at 5. *Village of Arlington Heights v. Metro. Hous. Develop. Corp.*, 429 U.S. 252, 264-68 (1977). S. REP. No. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 205.

³³ *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

³⁴ S. REP. No. 97-417, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 204.

³⁵ S. REP. No. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 206.

Accordingly, as the evidence presented to the Commission is discussed, the proper analysis is not to look at individual facts or witnesses and attempt to draw conclusions from these isolated facts but rather, as the law requires, these facts must be analyzed to determine whether there was intentional discrimination or whether under the totality of the circumstances the state's actions resulted in racial minorities being denied the right to vote.

The Commission heard from several experts regarding potential violations of the VRA during the Florida presidential election, including Professors Allan Lichtman and Darryl Paulson.

Professor Lichtman, applying the results test, said, "The key is whether a system, regardless of why it was adopted or why it was held in place, has the effect of diminishing minority voting opportunities."³⁶ Professor Lichtman explained:

We do not have to demonstrate an intent to discriminate. We do not have to demonstrate that there was some kind of conspiracy against minorities or that anyone involved in the administration of elections today or yesterday had any intent whatever to discriminate against minorities, because indeed under the Voting Rights Act, practices can be illegal so long as they have the effect of diminishing minority opportunities to participate fully in the political process and elect candidates of their choice.³⁷

Professor Lichtman testified that a violation occurs if the following two criteria are satisfied:

- if there are "differences in voting procedures and voting technologies between white areas and minority areas"; and

³⁶ Allan Lichtman, professor of history, American University, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 190. In *Alexander v. Sandoval*, No. 99-1908, 121 S. Ct. 1151 (2001), the Supreme Court held that a private citizen has no right to enforce the disparate impact regulations promulgated by the U.S. Department of Justice under Title VI of the Civil Rights Act of 1964. While the news media have correctly reported this as a decision limiting individuals' ability to sue "over policies that allegedly have a discriminatory effect on members of a minority group," this decision in no manner affects a person's ability to use an effects test under the VRA. Charles Lane, "Justices Limit Bias Suits under Civil Rights Act," *The Washington Post*, Apr. 25, 2001, p. A1. The VRA in unequivocal language authorizes the use of the effects test.

³⁷ Allan Lichtman Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 189-90.

- if voting procedures and voting technologies used in minority areas "give minorities less of an opportunity to have their votes counted."³⁸

Referring to a *New York Times* study showing that voting systems in Florida's poorer, predominantly minority areas are less likely to allow a voter to cast a properly tallied ballot, Professor Lichtman testified:

In other words, minorities perhaps can go to the polls unimpeded, but their votes are less likely to count because of the disparate technology than are the votes of whites. . . . That is the very thing the Voting Rights Act was trying to avoid—that for whatever reason and whatever the intent, the Voting Rights Act is trying to avoid different treatment of whites and minorities when it comes to having one's vote counted. . . . If your vote isn't being tallied, that in effect is like having your franchise denied fundamentally.³⁹

Professor Lichtman testified that one remedy in such a case would be to equalize the technology across all voting places in the state of Florida—"to have technologies equalized such that there are no systematic correlations between technologies and whites and minorities, and a minority vote is as likely to be tallied as a white vote."⁴⁰ The professor acknowledged this would require spending additional funds in certain parts of the state.

Darryl Paulson testified he did not believe *intentional* discrimination occurred in Florida against people of color during the 2000 vote—meaning "some sort of collusion among public officials, some sort of agreement in principle, some sort of mechanism to impose" discrimination.⁴¹ However, Professor Paulson agreed with

³⁸ *Ibid.*, p. 192.

³⁹ *Ibid.*, p. 193. Professor Lichtman added that a finding of a violation of the Voting Rights Act would not be vitiated merely by a substantial participation of African Americans in a given election "if there is a higher hurdle for minority ballots to be counted than for white ballots to be counted that operates independently of levels of turnout and the violation of the Voting Rights Act would still be present." *Ibid.*, p. 196.

⁴⁰ *Ibid.*, pp. 193-94.

⁴¹ Darryl Paulson, professor of government, University of South Florida, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 185. See also testimony of Ion Sancho, who discussed discriminatory intent versus effect: "I don't think there was any conscious targeting or racial discrimination on

Professor Lichtman on the voter spoilage issue, testifying that the “real scandal” in Florida was “the inequities that existed from county to county. Disparities between wealthy and poor counties were reflected in the types of voting machinery used. Poor counties, whether in Florida or elsewhere, have always had a disproportionate number of votes not counted.”⁴²

TRENDS OF WIDESPREAD VOTE DILUTION

Not every denial of the right to vote or the abridgement of this right requires an analysis under the “results” test. For example, if the only evidence of the denial of the right to vote is a person being told by an election official that he or she could not vote because of the color of his or her skin, such evidence would not require a results analysis, but obviously would be compelling evidence of intentional discrimination.

Quantitative evidence reflecting the actual number of voters and the race of all the voters who were denied the right to vote does not exist. The only evidence that exists is the testimony of those who have stated publicly that they were denied the right to vote and the credibility of their testimony. This is precisely the type of testimonial evidence that courts usually hear in discrimination claims.

In other instances there is quantitative evidence that shows a disturbing trend of disenfranchisement related to race. Two clear examples of this evidence are the number of spoiled ballots in counties with substantial minority populations and the state’s use of purge lists.⁴³

the part of supervisors. I think some of the effects of not having the kinds of monies necessary to do ongoing voter education programs has the effect of in fact impacting on minorities and young people and senior citizens because this was an election that brought out voters that voted maybe only one time in the last 10 years.” Ion Sancho, supervisor of elections, Leon County, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 52.

⁴² Darryl Paulson Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 187. After hearing the testimony of Professors Lichtman and Paulson, the Commission was heartened to read the statement in the report issued by Governor Bush’s Select Task Force on Election Procedures, Standards and Technology that “the substantial difference in error or reliability rates for different kinds of voting systems argues strongly for installing a uniform, standardized voting system for use by all voters in the [Florida] statewide 2002 election cycle.” See Governor’s Task Force, *Revitalizing Democracy*, p. 37.

⁴³ The term “purge lists” refers to the lists of names of people to be removed from voter rolls, as provided by the Division of

Spoiled Ballots

An analysis of the incidence of spoiled ballots (votes cast but not counted) shows a correlation between the number of registered African American voters and the rate at which ballots were spoiled. The higher the percentage of African American residents and of African American voters, the higher the chance of the vote being spoiled.

To make comparisons across counties and to determine the relationship between spoiled ballots, race, and ethnicity, the Commission calculated correlations.⁴⁴ Data on spoiled ballots—which include both overvotes and undervotes for president⁴⁵—were collected by the *Orlando Sentinel* and updated by the Collins Center for Public Policy.⁴⁶ Information on registered voters and voters by race (white, African American, other, and unknown) was provided for each county by its elections supervisor and the secretary of state of Florida.⁴⁷ For ease of comparison, race and ethnicity were analyzed as percentages of the total population.

Correlations are used to determine relationships among variables. The stronger the correlation, the more likely the association between two variables does not occur by chance. However, correlations cannot indicate cause and effect. To further explore the relationship between race and voter disenfranchisement, and to control for spuriousness and effects of other variables, additional analyses, such as regression analyses, can more fully explain how the variables interact.

Elections. While some object to the use of the term “purge,” that is in fact what occurs. A person’s name is removed from the active list and placed on the inactive list. He or she is purged from the list of active voters. See chap. 5.

⁴⁴ These correlations were calculated using SPSS for Windows, version 10.0. Population data (for total population, median income, percentage living in poverty, and percentage white, African American, Hispanic, and minority) are Census Bureau estimates for 1999. Data from the 2000 census were not available on the county level for the state of Florida at the time of this analysis. Estimates are expected to be published. The data used for this analysis are set forth in appendix I to this report.

⁴⁵ An overvote occurs when the voter selects more than one candidate. Undervotes include those votes in which the voter purposely did not select a candidate as well as votes that were not registered by the machine.

⁴⁶ See Governor’s Task Force, *Revitalizing Democracy*.

⁴⁷ The Division of Elections, pursuant to a subpoena, provided this information. Florida Department of State, Division of Elections, “Registered Electors by Party: County Totals” Oct. 10, 2000, Bates Nos. 16764–16872.

TABLE 1-1

Top 10 Counties with Various Population Characteristics and Ballot Rejection Rates
(counties in bold/italics have spoilage rates higher than the statewide average)

Highest % of white residents	Highest % of black residents	Highest % of minority residents	Highest % of black voters	Highest % of minority voters	Highest % of white voters	Highest % living in poverty
Pasco	<i>Gadsden</i>	<i>Miami-Dade</i>	<i>Gadsden</i>	<i>Gadsden</i>	Holmes	<i>Hardee</i>
Citrus	<i>Jefferson</i>	<i>Gadsden</i>	<i>Jefferson</i>	<i>Miami-Dade</i>	<i>Dixie</i>	<i>Hamilton</i>
Hernando	<i>Madison</i>	<i>Jefferson</i>	<i>Madison</i>	<i>Jefferson</i>	<i>Gilchrist</i>	<i>Gadsden</i>
<i>Charlotte</i>	<i>Hamilton</i>	<i>Hendry</i>	<i>Hamilton</i>	<i>Madison</i>	Martin	Holmes
Sarasota	<i>Jackson</i>	<i>Madison</i>	<i>Duval</i>	Leon	Sarasota	<i>Lafayette</i>
<i>Collier</i>	<i>Duval</i>	<i>Hamilton</i>	Leon	Osceola	Citrus	<i>Dixie</i>
Santa Rosa	Leon	<i>Hardee</i>	<i>Jackson</i>	<i>Hamilton</i>	Pasco	<i>De Soto</i>
Monroe	<i>Union</i>	<i>Duval</i>	<i>Miami-Dade</i>	<i>Duval</i>	Santa Rosa	<i>Madison</i>
Holmes	<i>Gulf</i>	Hillsborough	<i>Escambia</i>	<i>Hendry</i>	Lafayette	<i>Union</i>
Martin	<i>Bradford</i>	<i>Jackson</i>	<i>Taylor</i>	Orange	Hernando	Calhoun

NOTE: For the category "Highest % of minority residents," for the purposes of this analysis, the population of persons who are members of minority groups is defined as the total population minus the white, non-Hispanic population. For the category "Highest % of black voters," the percentage of African American voters is based on the number of registered voters in a county who are African American.

SOURCE: (1) population data based on Census Bureau estimates for 1999—U.S. Bureau of the Census, "Quick Facts," accessed at <<http://www.quickfacts.census.gov>> and (2) data on registered voters by race as provided by the secretary of state for Florida. See app. 1.

Nonetheless, correlation coefficients provide a useful estimate of the interdependence among the data presented in this report.

The relationship between race and voter disenfranchisement is particularly evident when looking at the issue of spoiled ballots. The Commission's statistical analysis shows that the percentage of spoiled ballots⁴⁸ is positively correlated with both the percentage of the population that is African American and the percentage of the population that is a member of a minority group. Thirty-four percent of the variation in the percentage of spoiled ballots across counties can be explained by the size of the African American population in the counties.⁴⁹ Twenty-eight per-

cent of the variation in the percentage of spoiled ballots is explained when considering the percentage of the population that is a member of a minority group.⁵⁰ Further, the percentage of the population that is white is negatively correlated with the percentage of spoiled ballots.⁵¹ In other words, race may be one factor in explaining why ballots were spoiled in Florida counties.⁵²

These relationships can best be seen when comparing the counties with the highest percentage of spoiled ballots to counties with the highest minority populations (see table 1-1). For

⁴⁸ Spoiled ballots include both overvotes and undervotes for president.

⁴⁹ The correlation coefficient is .587 and is significant at the .01 level. The closer the correlation coefficient is to 1 or -1, the stronger the relationship between the two variables; the higher the coefficient, the more likely it is that the relationship between the two variables does not occur by chance. Correlation coefficients between 0.4 and 0.7 suggest a medium to strong relationship between the variables. Correlations above 0.7 are considered highly correlated. Conventionally, social scientists accept as statistically significant results of either a 0.5 level of confidence, which means there is a 5 in 100 probability of the results being observed occurring by chance, or the more stringent 0.1 level of confidence, which means there is a 1 in 100 probability of the results

being observed occurring by chance. Stated alternatively, a significance level of .01 can be interpreted as meaning that there is a 99 percent confidence level that the relationship observed did not occur by chance. See, e.g., Richard A. Zeller and Edward G. Carmines, *Statistical Analysis of Social Data* (Chicago: Rand McNally, 1978), p. 202.

⁵⁰ The correlation coefficient is .526 and is significant at the .01 level.

⁵¹ The correlation coefficient is -.574 and is significant at the .01 level.

⁵² Correlations are used to determine interdependence among variables but cannot indicate causality. For a discussion of the use of statistics as evidence in discrimination cases, see Ramona Paetzold and Steven L. Willborn, *The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases* (Colorado Springs: Shephard's/McGraw-Hill, 1994). Regression analysis may be used to further explore the relationship between variables.

example, Gadsden County, which had the highest spoilage rate of 12.4 percent, also has the largest African American population, at 63 percent. Indeed, considering the top 10 counties with the highest percentage of African American residents, or the top 10 counties with the highest percentage of African American voters, nine out of 10 of the counties have spoilage rates higher than the Florida average of 2.93 percent.⁵³ The only county with a substantial minority population that did not have a spoilage rate above the Florida average is Leon County.⁵⁴ Conversely, with respect to the 10 counties with the highest percentage of white residents and those with the highest percentage of white voters, only two counties have spoilage rates higher than the Florida average.

On a practical level this means that persons living in a Florida county with a substantial African American or people of color population are more likely to have their vote spoiled or discounted than the average Florida resident. Conversely, persons living in a county with a substantial white population have less chance of having their vote discounted than the average Florida resident. These data alone do not prove unlawful discrimination. They provide one piece of evidence, considering the "totality of the circumstances," which supports the finding that the Florida election was not equally open to participation by all.

Refined Statistical Analysis of Vote Dilution

Based on the Commission's initial statistical analysis showing a correlation between race and the rate at which ballots were rejected, it was determined that a more refined statistical analysis was warranted. The Commission requested that Allan Lichtman, a voting rights expert who testified at the Commission's Miami hearing,⁵⁵ examine this issue and perform ap-

⁵³ See app. I.

⁵⁴ Leon County, home to the state capital, has a state-of-the-art election system. See Ion Sancho, supervisor of elections, Leon County, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 48.

⁵⁵ Allan Lichtman is a professor of history at American University in Washington, D.C. At the time of the hearing, he was chair of the Department of History at American University. His areas of expertise include political history, voting analysis, and historical and quantitative methodology. He is the author of numerous works on quantitative methodology in social science. He has coauthored with Dr. Laura Lang-

appropriate statistical analyses. Professor Lichtman was to determine whether the rejection of ballots during the 2000 Florida presidential election had a disparate impact on the votes cast by African Americans. In doing this examination, Professor Lichtman was asked to consider all unrecorded ballots—both undervotes (ballots not recorded for the lack of a recognized vote) and overvotes (ballots not recorded for including more than one recognized vote).⁵⁶ The focus of his analysis was whether African Americans were more likely than other voters to have their ballots invalidated during the 2000 presidential election.⁵⁷

Methodology and Data

The database for this study included county-level election returns for the presidential election of 2000 in Florida, including the number of ballots cast, undervotes, overvotes, and unrecorded votes. Fifty-four of Florida's 67 counties, encompassing 94 percent of ballots cast in 2000, separately recorded undervotes and overvotes. The database included identification of voting system by county and county-level statistics for a variety of social, economic, and political variables, including race and education. The racial data included the percentage of African Ameri-

bein, *Ecological Inference*, a standard text on the subject of inferring the behavior of population groups from data collected for political units. His scholarship also includes the use of quantitative and qualitative techniques to perform political and historical studies of voting. He has published articles on the application of social science analysis to the Voting Rights Act.

Dr. Lichtman has worked as a consultant or expert witness for both plaintiffs and defendants in more than 60 federal voting rights cases. This experience includes several cases in the state of Florida. He has been recognized as an expert witness in voting rights, political history, political systems, statistical methodology, quantitative analysis of voting, and socioeconomic analysis, among other matters, in more than 50 federal court cases in which he has presented oral or written testimony. A copy of his complete curriculum vitae is included in the report prepared by Dr. Allan Lichtman titled "Report on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida" (hereafter cited as Lichtman Report). The Lichtman Report is attached as appendix VII.

⁵⁶ For counties that separately record undervotes and overvotes, the total number of unrecorded votes is slightly higher than the sum of undervotes and overvotes.

⁵⁷ This discussion of refined statistical analysis of voter dilution is a summary of the detailed statistical analyses performed by Dr. Lichtman and is in large part taken from the Lichtman Report. See app. VII.

can registered voters, based on 2000 voter registration data. The database also included precinct-level data for three of Florida's largest counties: Miami-Dade, Duval, and Palm Beach. This precinct-level data included unrecorded votes, undervotes, overvotes, and voter registration by race, based on 1998 voter registration data.⁵⁸

Florida election returns, voting registration data, and county-by-county lists of voting technology were obtained from the Web site of the Florida Division of Elections, Department of State. Information on unrecorded votes was obtained from the governor of Florida's task force report on the Florida 2000 presidential election, *Revitalizing Democracy in Florida*.⁵⁹

Professor Lichtman used simple descriptive statistics as well as the standard statistical method of regression analysis⁶⁰ to compare the racial composition of counties and precincts with rates of overall unrecorded votes, overvotes, and undervotes. He also used ecological regression⁶¹

⁵⁸ The county-level correlation between the percentage of African American registrants for 1998 and 2000 is a near-perfect .996.

⁵⁹ Additional data on undervotes and overvotes were obtained from the data tables in Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000) and from CNN and the Associated Press, <<http://www.cnn.com/election/2000/resources/ballot1.htm>>. Precinct-level data for Duval, Miami-Dade, and Palm Beach counties were obtained from the Web site of Bruce E. Hansen, Stockwell professor of economics, University of Wisconsin-Madison: <<http://www.ssc.wisc.edu/~bhansen/vote/data.html>>. Socioeconomic data were obtained from the 1990 census (such data are not yet available for 2000. Estimates of literacy rates were obtained from CASAS, "Synthetic Estimates of Literacy, Percent Level 1, National Adult Literacy Survey."

⁶⁰ Regression analysis measures the influence of one or more variables, known as independent variables, on another variables known as the dependent variable. When used for political units such as the counties of Florida or the precinct within a county, regression analysis measures the extent to which the value of the dependent variable changes from one unit to another in response to changes in the value of the dependent variable. For a brief description of regression analysis, see Hubert M. Blalock, *Social Statistics* (New York: McGraw-Hill, 1979), pp. 382-86.

⁶¹ Ecological regression is a standard method for inferring the behavior of population groups from data collected for aggregate units such as counties or precincts. It produces such estimates by comparing the racial composition of the various voting precincts with the division of the vote among competing candidates in each precinct. The ecological regression procedure for analyzing the behavior of population groups is set forth in Dr. Lichtman's book, *Ecological Inference* (Sage Series on Quantitative Applications in Social Science, 1978, with Laura Irwin Langbein). Other references on

that provides county-level and precinct-level estimates of the percentage of African Americans and non-African Americans casting unrecorded votes as well as either overvotes or undervotes.⁶² Ecological regression procedures were recognized as appropriate for voter analysis by the Supreme Court in *Thornburg v. Gingles*.⁶³

For the precinct-level data of Duval, Miami-Dade, and Palm Beach counties, rates of ballot rejection for African Americans and non-African Americans can also be examined through a technique termed "extreme case" analysis,⁶⁴ which examines the rejection rates of ballots including both undervotes and overvotes in precincts that are heavily composed of registrants who are either African American or non-African American. The extreme case results will not correspond exactly to the results of ecological regression analysis, because it applies only to some of the precincts within a jurisdiction and those precincts examined include at least some members of other ethnic groups. While not nec-

the use of ecological regression for voting analysis include Richard Engstrom, "Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting," *Urban Lawyer*, 1985; Bernard Grofman and Chandler Davidson, eds., *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Cambridge: Cambridge University Press, 1992); Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (Cambridge: Cambridge University Press, 1992); Allan J. Lichtman, "Passing the Test: Ecological Regression in the Garza Case and Beyond," *Evaluation Review*, 1991.

⁶² Nonblacks include non-Hispanic whites as well as Hispanics and members of other races. Because of limitations in the data available, no attempt was made to distinguish the components of the non-African American group; although, racial disparities might be even greater if African Americans and non-Hispanic whites were isolated for analysis.

⁶³ 478 U.S. 30 (1986).

⁶⁴ Extreme case analysis is designed to isolate nearly homogeneous groups of African Americans and non-African Americans by examining precincts within each county studied that are either 90 percent or more African American or 90 percent or more non-African American in their voter registration. The analysis simply reports the actual ballot rejection rates in these precincts that are composed overwhelmingly of African American or non-African American registrants. Extreme case analysis provides a very useful check on the results of ecological regression analysis. It provides a comparison of actual rejection rates in nearly homogeneous African American and non-African American precincts with estimated rejection rates for African Americans and non-African Americans in all precincts derived from ecological regression analysis. For descriptions of extreme case analysis and its relation to ecological regression analysis, see Lichtman, "Passing the Test," and Grofman, et al., *Minority Representation*, pp. 85-90.

essarily identical, extreme case results should closely mirror the pattern of results found in ecological regression. Extreme case analysis involves no inferential procedures. It simply tallies the actual rejection rates, as well as rates of overvoting and undervoting, in the precincts chosen for the analysis. The technique of extreme case analysis is applied to precinct-level data in Duval, Miami-Dade, and Palm Beach counties with a cutoff rate of precincts that are either 90 percent or more African American in their voter registration or 90 percent or more non-African American in their voter registration.

Summary of Detailed Statistical Analysis

In Florida's 2000 election, about 2.9 percent of all ballots cast (about 180,000 ballots out of slightly more than six million ballots cast) did not contain a vote that could be counted as a vote for president. Most of these invalid ballots were recorded as either overvotes or undervotes, with overvotes outnumbering undervotes by nearly two to one.⁶⁵ Counties that separately recorded overvotes and undervotes rejected about 107,000 ballots as overvotes and about 63,000 ballots as undervotes.

Looking at the entire state using county-level data and at Duval, Miami-Dade, and Palm Beach counties using precinct-level data, both sets of data demonstrated that African Americans were far more likely than non-African Americans to have their ballots rejected in the 2000 Florida presidential election.⁶⁶ As illustrated by appendix II-A, statewide there is a strong positive correlation between the percentage of African American registrants in a county and the percentage of rejected ballots. The linear correlation (termed *R*) between the percentage of ballots rejected in the presidential election and the percentage of African Americans among voters is .50, with a squared correlation of (R^2) of .25. This means that when one looks at the variation in the ballot rejection rates for each county in Florida, about one-quarter of that variation can be explained solely by knowing the

percentage of African Americans who were registered to vote in that county. This relationship is statistically significant at levels far beyond the conventional standards used in social science.⁶⁷

One obvious question is presented by this data: Is there some other factor that better explains this disparity in ballot rejection rates? In short, the answer is no. This statistically significant county-level correlation between race and ballot rejection rates cannot be attributed to the educational level of African Americans in Florida. A multiple regression analysis that controlled for the percentage of high school graduates and the percentage of adults in the lowest literacy category failed to diminish the relationship between race and ballot rejection or to reduce the statistical significance of the relationship.

In a very small part, the county-level relationship between race and rates of ballot rejection can be attributed to the fact that a greater percentage of African American registered voters live in counties with technologies that produce the greatest rates of rejected ballots.⁶⁸ About 70 percent of African American registrants resided in counties using technology with the highest ballot rejection rates—punch cards and optical scan systems recorded centrally—compared with 64 percent of non-African American registrants. Counties using punch card or optical scan methods recorded centrally rejected about 4 percent of all ballots cast, compared with about 0.8 percent for counties using optical scan methods recorded by precinct. The vast majority of rejected votes were recorded in counties using punch cards or optical scan methods recorded centrally. Such counties included about 162,000 out of 180,000 unrecorded votes in Florida's 2000 presidential election. These counties that used punch cards or optical scan technology recorded centrally included 65 percent of all ballots cast in Florida's 2000 presidential election, but 90 percent of rejected ballots.

⁶⁵ As noted above, not every rejected ballot in Florida was separately classified as either an undervote or an overvote.

⁶⁶ The analysis first used ecological regression to estimate the turnout rates of African Americans and non-African Americans (which were approximately equal) and then applied those rates to estimate the percentage of African Americans among voters.

⁶⁷ These correlations are consistent with those found by the Commission in its own preliminary analysis of rejected ballots as discussed in this chapter.

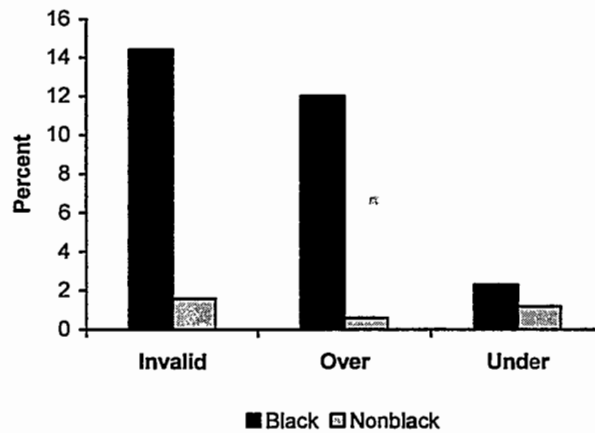
⁶⁸ An analysis of the voting systems used in the 2000 Florida presidential election showed that counties using punch card systems and optical scan systems with central tabulation had much higher rates of ballot spoilage than those using optical scan precinct count systems. See chap. 8.

TABLE 1-2**Ecological Regression Estimates of Statewide Ballot Rejection Rates by Race**

	Invalid votes*		Overvotes		Undervotes	
	Black voters	Nonblack voters	Black voters	Nonblack voters	Black voters	Nonblack voters
Punch card & central-record counties	19.4%	2.2%	17.1%	0.8%	2.4%	1.3%
Precinct-record counties	5.2%	0.4%	2.5%	0.2%	2.1%	0.1%
All counties combined	14.4%	1.6%	12.0%	0.6%	2.3%	1.2%

* The rates for rejected votes are not exactly equal to the sum of rates for overvotes and undervotes. Some invalid votes were not subdivided into either of these two categories. Also, 13 counties do not separate recorded overvotes and undervotes. Estimates for all counties are weighted means of estimates for punch card and central-record counties and for precinct-record counties.

SOURCE: Data provided by Allan J. Lichtman, professor, Department of History, American University, June 2001.

CHART 1-1**Ballot Rejection Rates by Race, State of Florida**

SOURCE: Data provided by Allan J. Lichtman, professor, Department of History, American University, June 2001.

As illustrated in appendix II-B, within the group of counties using punch card or optical scan technology recorded centrally there is a strong, statistically significant relationship between race and rejected ballots. This correlation between race and ballot rejection is even stronger than the correlation between race and ballot rejection for all counties. The linear correlation between the percentage of ballots rejected in the presidential election and the percentage of African Americans among voters within the counties using punch cards or optical scan machinery recorded centrally is .56, with a squared correlation of (R^2) of .31, a stronger relationship between race and rejected ballots than for the state overall. This means that nearly one-third of the county-by-county variation in the rates of rejected ballots within this group of counties can be predicted solely by knowing the racial composition of the counties. This relationship is statistically significant at levels far beyond the conventional standards used in social science.⁶⁹

When the counties using the technology with the lowest ballot rejection rates are examined, the correlation between race and ballot spoilage is substantially reduced but not eliminated. There remains a statistically significant relationship between race and the rate at which ballots are spoiled even when the best technology is used. The linear correlation between the percentage of ballots rejected in the presidential election and the percentage of African Americans among registrants within the counties using optical scan machinery recorded by precinct is .28, with a squared correlation of (R^2) of .08, a weaker relationship between race and rejected ballots than for the state overall. This means that slightly less than one-tenth of the county-by-county variation in the rates of rejected ballots within this group of counties can be predicted solely by knowing the racial composition of the counties. The relationship is not statistically significant at conventional standards used in social science. In summary, while the type of

technology used accounts for some of the relationship between race and the rate at which ballots are rejected, there remains a statistically significant relationship even after education is considered and the type of voting system is taken into account.

These correlations, although suggestive of a strong relationship between race and ballot rejection, pertain only to county-level relationships. They do not by themselves provide estimates of the ballot rejection rates for African American and non-African American voters included for the entire state. The ecological regression technique does provide these estimates for the state overall. As reported in chart 1-1 and table 1-2, the results are striking. For the entire state, the rate of rejection for votes cast by African Americans was an estimated 14.4 percent, compared with a rate of 1.6 percent for votes cast by non-African Americans. The greatest discrepancy is for overvotes with an estimated rejection rate of 12 percent for votes cast by African Americans, compared with an estimated rate of 0.6 percent for votes cast by non-African Americans.

To further refine this analysis, precinct data for Duval, Miami-Dade, and Palm Beach counties were examined. These counties have substantial numbers of African Americans. Duval County, with a 9.2 ballot rejection rate, had a much higher rate than the 4.0 average for punch card counties. Miami-Dade County had a rejection rate of 4.4 percent—close to the punch card average. Palm Beach County had an intermediate rejection rate of 6.4 percent. Taken together, the three counties included about 85,000 rejected ballots, about 47 percent of the statewide total. Precinct-by-precinct rejection rates and African American percentages for each county are reported in appendices II-C, II-D, and II-E. For these counties, with large numbers of precincts, the graphs also include the linear regression line to portray with clarity the relationship between race and ballot rejection.

⁶⁹ As for the state overall, within this group of counties that account for most rejected ballots, a multiple regression analysis that controlled for the percentage of high school graduates and the percentage of adults in the lowest literacy category failed to diminish the relationship between race and ballot rejection or to reduce the statistical significance of the relationship.

CHART 1-2

Ballot Rejection Rates by Race, Duval County: Ecological Regression Estimates

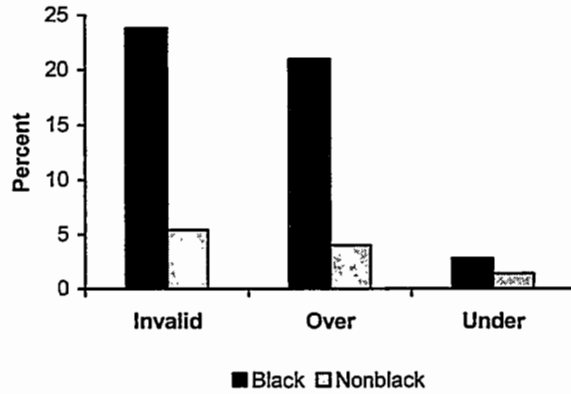


CHART 1-3

Ballot Rejection Rates by Race, Miami-Dade County: Ecological Regression Estimates

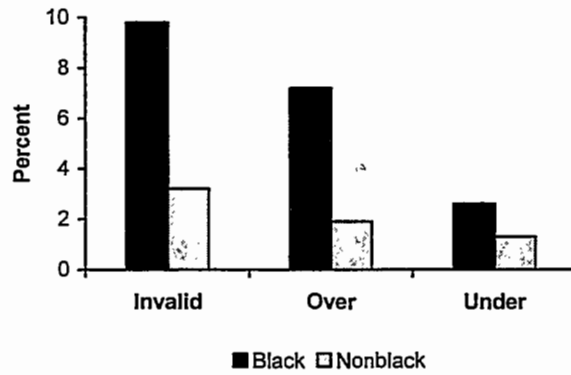
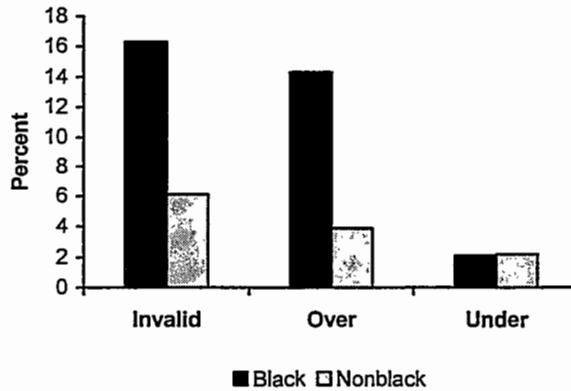


CHART 1-4

Ballot Rejection Rates by Race, Palm Beach County: Ecological Regression Estimates



SOURCE: Data provided by Allan J. Lichtman, professor, Department of History, American University, June 2001.

CHART 1-5

Ballot Rejection Rates by Race, Duval County: 90%+ Black and 90%+ Nonblack Precincts

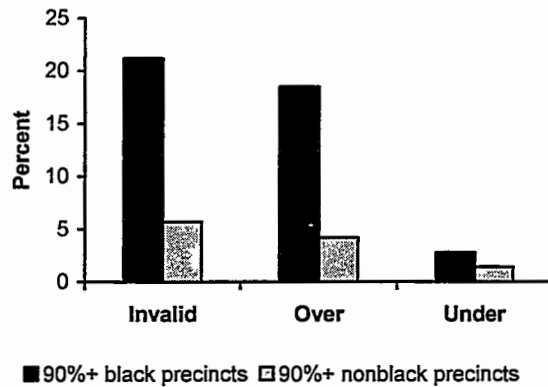


CHART 1-6

Ballot Rejection Rates by Race, Miami-Dade County: 90%+ Black and 90%+ Nonblack Precincts

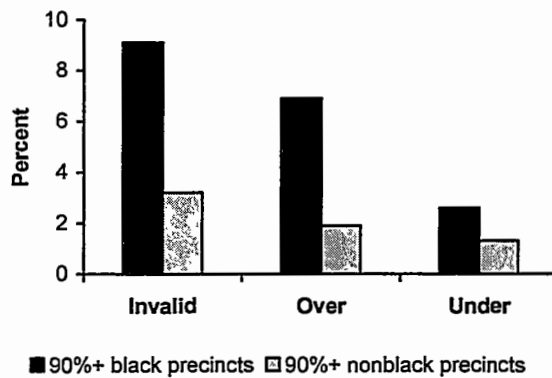
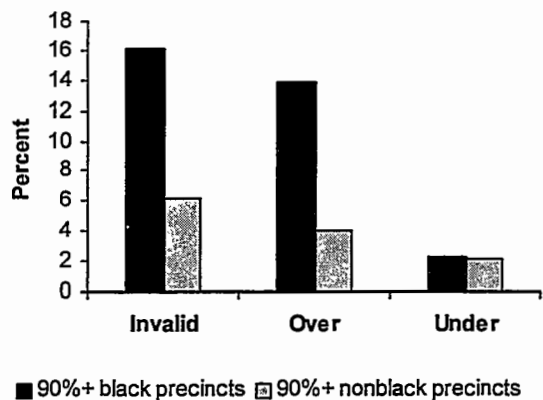


CHART 1-7

Ballot Rejection Rates by Race, Palm Beach County: 90%+ Black and 90%+ Nonblack Precincts



SOURCE: Data provided by Allan J. Lichtman, professor, Department of History, American University, June 2001.

TABLE 1-3**Ecological Regression and Extreme Case Analysis of Duval, Miami-Dade, and Palm Beach Counties' Ballot Rejection Rates by Race**

	<u>Ecological regression results</u>					
	Invalid votes		Overvotes		Undervotes	
	Black voters	Nonblack voters	Black voters	Nonblack voters	Black voters	Nonblack voters
Duval	23.6%	5.5%	20.8%	4.1%	2.8%	1.4%
Miami-Dade	9.8%	3.2%	7.2%	1.9%	2.6%	1.3%
Palm Beach	16.3%	6.1%	14.3%	3.9%	2.2%	2.1%

	<u>Extreme case results</u>					
	Invalid votes		Overvotes		Undervotes	
	90%+ black precincts	90%+ nonblack precincts	90%+ black precincts	90%+ nonblack precincts	90%+ black precincts	90%+ nonblack precincts
Duval	22.1%	5.8%	19.2%	4.3%	2.9%	1.4%
Miami-Dade	9.1%	3.2%	6.6%	1.9%	2.5%	1.3%
Palm Beach	16.1%	6.2%	13.8%	4.0%	2.3%	2.2%

SOURCE: Data provided by Allan J. Lichtman, professor, Department of History, American University, June 2001.

As indicated by the results of ecological regression analysis reported in charts 1-2, 1-3, and 1-4 and table 1-3, the estimated rejected rates derived from precinct-level data in these three counties confirm the findings derived from county-level data for the entire state. In Duval, Miami-Dade, and Palm Beach counties, as in the state overall, African Americans were far more likely than non-African Americans to have their ballots rejected.

For Duval County, as demonstrated in chart 1-2, the overall rate of rejection for votes cast by African Americans was an estimated 23.6 percent, compared with a rate of 5.5 percent for votes cast by non-African Americans. The greatest discrepancy is for overvotes, with an estimated rejection rate of 20.8 percent for votes cast by African Americans, compared with an estimated rate of 4.1 percent for votes cast by non-African Americans. For Miami-Dade County, as demonstrated by chart 1-3, the overall rate of rejection for votes cast by African Americans was an estimated 9.8 percent, compared with a rate of 3.2 percent for votes cast by non-African Americans. The greatest discrepancy is again for overvotes, with an estimated rejection rate of 7.2 percent for votes cast by African Americans, compared with an estimated rate of 1.9 percent for votes cast by non-African Americans. For

Palm Beach County, as demonstrated in chart 1-4, the overall rate of rejection for votes cast by African Americans was an estimated 16.3 percent, compared with a rate of 6.1 percent for votes cast by non-African Americans. The greatest discrepancy is for overvotes, with an estimated rejection rate of 14.3 percent for votes cast by African Americans, compared with an estimated rate of 3.9 percent for votes cast by non-African Americans.⁷⁰

As demonstrated by charts 1-5, 1-6, and 1-7 and table 1-3, the results of extreme case analysis for 90 percent plus African American and non-African American precincts confirm the findings of ecological regression analysis. For Duval County, as demonstrated by chart 1-5, in precincts that were 90 percent or more African American in their voter registration the overall rate of rejection was 22.1 percent, compared with a rate of 5.8 percent for precincts that were 90 percent or more non-African American in their voter registration. For Miami-Dade County, as demonstrated by chart 1-6, the overall rate of rejection for votes cast by African

⁷⁰ Duval County is 24 percent African American, Miami-Dade County is 20 percent African American, and Palm Beach County is 9 percent African American based on 1998 voter registration information. All three used punch card technology.

Americans was an estimated 9.1 percent, compared with a rate of 3.2 percent for votes cast by non-African Americans. As reflected in chart 1-7, in Palm Beach County the overall rejection rate for votes cast by African Americans was an estimated 16.1 percent, compared with 6.2 percent in the non-African American precincts.

In the 2000 presidential election, for Duval, Miami-Dade, and Palm Beach counties, as well as for the state overall, the percentage of African Americans among voters with rejected ballots was far greater than the African American percentage of all voters. Although the statewide results are estimates derived from county-level data that should be interpreted with caution, the wide disparity they reveal between rejection rates for African Americans and non-African Americans are confirmed by the precinct-level analysis for Duval, Miami-Dade, and Palm Beach counties.⁷¹ The greatest disparities were found not for the undervotes that have been the focus of media attention, but for overvotes—voting for more than one candidate. Overall, about twice as many Florida ballots were rejected in the 2000 presidential election as overvotes than as undervotes.

These discrepancies in small part reflect the greater concentration of African Americans compared with non-African Americans in counties using the technologies that produce the greatest percentage of rejected ballots. The evidence from Duval, Miami-Dade, and Palm Beach counties indicates that major racial disparities in ballot rejection rates remain with counties using punch card technologies. Based on precinct-level information, in Duval County statistical estimates show that African American voters were over four times more likely than white voters to have their ballots rejected in the 2000 election; in Miami-Dade County, African American voters were over three times more likely than white voters to have their ballots rejected; and in Palm Beach County, they were nearly three times more likely than white voters to have their ballots rejected. In the three counties, the rate of rejected ballots by African Americans ranged from about 10 percent to about 24 percent. For all three counties combined, the rate of rejected ballots averaged about 15 percent—

⁷¹ Databases for the three individual counties and for the county-level analysis are attached to the Lichtman Report. See app. VII.

meaning that one out of every seven African Americans who entered the polling booth in these counties had his or her ballot rejected as invalid. These results closely mirror the county-level findings for the state overall.

Part of the problem of ballot rejection for African Americans in Florida can be solved by requiring the adoption of precinct-based optical scan systems for all counties in the state. Based on the 2000 experience, a uniform system of technology, like precinct-based optical scan systems, would reduce the number of invalid ballots for both African Americans and non-African Americans.⁷² However, the use of this technology would not eliminate the disparity between the rates at which ballots cast by African Americans and whites are rejected. County-level estimates indicate that even in counties using optical scan methods recorded by precinct, the rejection rate for ballots cast by African Americans was still about 5 percent, compared with well under 1 percent for non-African Americans as shown in table 1-2.

Impact of the Purge List

A similar effect upon African Americans is presented based on an analysis of the state-mandated purge list.⁷³ In 1998, the Florida legislature enacted a statute that required the Division of Elections to contract with a private entity to purge its voter file of any deceased persons, duplicate registrants, individuals declared mentally incompetent, and convicted felons without civil rights restoration, i.e., remove ineligible voter registrants from voter registration rolls. What occurred in Miami-Dade County provides

⁷² Optical scan precinct tabulation voting systems work best to prevent ballot rejections when all features, including the “kick out” feature, are used in each polling place. In the November 2000 election, some precincts reportedly disabled the kick out feature, which prevented correction of voting errors. See chap. 8, “Optical Scan Precinct Tabulation.”

⁷³ It is important to note that this investigation did not include an examination of the rates of ineligible voters who did vote on Election Day as compared with eligible voters in Florida who were prevented from voting in this election. The scope of the investigation focused on allegations that eligible persons were denied the right to vote by errant policies and practices. The Commission heard sworn testimony and received subpoenaed documents that provided detailed information about these policies and practices. The Commission did not receive adequate information about allegations that felons ineligible to vote voted in the election to present any conclusions, findings, or recommendations about the issue into this report.

a vivid example of the use of these purge lists. According to the supervisor of elections for Miami-Dade County, David Leahy, the state provides his office with a list of convicted felons who have not had their rights restored.⁷⁴ It is the responsibility of Mr. Leahy's office to verify such information and remove those individuals from the voter rolls "[i]f the supervisor *does not* determine that the information provided by the division is *incorrect*. . . ."⁷⁵ In practice, this places the burden on voters to prove that they are incorrectly placed on the purge list. Mr. Leahy's office sends a notice to the individuals requiring them to inform the office if they were improperly placed on the list.⁷⁶

Many people appear on the list incorrectly.⁷⁷ For example, in the 2000 election, the supervisor of elections office for Miami-Dade received two lists—one in June 1999 and another in January 2000—from which his office identified persons to be removed from the voter rolls. Of the 5,762 persons on the June 1999 list, 327 successfully appealed and, therefore, remained on the voter rolls (see table 1-4). Another 485 names were later identified as persons who either had their rights restored or who should not have been on the list.⁷⁸ Thus at least 14.1 percent of the per-

sons whose names appeared on the Miami-Dade County list appeared on the list in error.⁷⁹ Similarly, 13.3 percent of the names on the January 2000 list were eligible to vote. In other words, almost one out of every seven people on this list were there in error and risked being disenfranchised.

In addition to the possibility of persons being placed on the list in error, the use of such lists has a disparate impact on African Americans. African Americans in Florida were more likely to find their names on the list than persons of other races. African Americans represented the majority of persons—over 65 percent—on both the June 1999 and the January 2000 lists (see table 1-4). This percentage far exceeds the African American population of Miami-Dade County, which is only 20.4 percent. Comparatively, 77.6 percent of the persons residing in Miami-Dade County are white; yet whites accounted for only 17.6 percent of the persons on the June 1999 convicted felons list. Hispanics⁸⁰ account for only 16.6 percent of the persons on that list, yet comprise 57.4 percent of the population. The proportions of African Americans, whites, and Hispanics on the January 2000 list were similar to the June 1999 list.⁸¹

This discrepancy between the population and the percentage of persons of color affected by the list indicates that the use of such lists—and the fact that the individuals bear the burden of having their names removed from the list—has a disproportionate impact on African Americans.

Indeed, the persons who successfully appealed to have their names removed from the list provided to Miami-Dade County by the Florida Division of Elections are also disproportionately African American. One hundred fifty-five African Americans (47.4 percent of the total) successfully appealed in response to the June 1999 list, and 84 African Americans (59.2 percent of the total) successfully appealed in response to the January 2000 list. Hispanics ac-

⁷⁴ David Leahy Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 315–16.

⁷⁵ FLA. STAT. ch. 98.0975(4) (1999) (emphasis added).

⁷⁶ David Leahy Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 315–16.

⁷⁷ See chaps. 2 and 5.

⁷⁸ David Leahy Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 316–17. The Division of Elections forwarded a list to Mr. Leahy that identified 485 people as incorrectly included in the previous felon exclusion list. An excerpt from the Miami hearing transcript follows:

"MR. QUARTERMAN: Of the individuals who challenged the determination by DBT or by the Florida Law Department that they were convicted felons, how many were found not to be convicted felons?"

MR. LEAHY: We had two different lists applied. One was in June of 1999 and one was in January 2000. On the June 1999 list, let me start, there was a total of 5,762 names provided to us. Of that, there were 327 who responded with appeal forms who eventually we were told by either Florida Department of Law Enforcement or the Office of Executive Clemency that they were not convicted felons. That's 327 out of 5,762.

We were also sent a subsequent list to that June 1999 list, which informed us that 485 people that were on the original list in fact had their rights restored and should not have been on the list to begin with. So you've got to add up the 485

plus the 327 that were not convicted felons or had their rights restored out of the 5,762." Ibid.

⁷⁹ It is important to emphasize the "at least." These data only capture those who actually appealed. They do not capture those who never received notice until they were denied the right to vote on Election Day or for whatever reason did not appeal.

⁸⁰ Hispanics may be of any race.

⁸¹ See app. I.

TABLE 1-4**Convicted Felons List, Miami-Dade County, 1999 and 2000**

	<u>June 1999</u>		<u>January 2000</u>		<u>Combined totals</u>	
	Number	Percent	Number	Percent	Number	Percent
Names on list	5,762	100%	1,388	100%	7,150	100%
Appealed & removed	327	5.7%	142	10.2%	469	6.6%
Names on list in error	485	8.4%	N/A	N/A	485	6.8%
Total names removed	812	14.1%	N/A	N/A	954	13.3%
White	1,013	17.6%	251	18.1%	1,264	17.7%
Black	3,794	65.8%	884	63.7%	4,678	65.4%
Hispanic	955	16.6%	253	18.2%	1,208	16.9%
Total	5,762	100%	1,388	100%	7,150	100%
<i>Successful appeals</i>						
White	98	30.0%	27	19.0%	125	26.7%
Black	155	47.4%	84	59.2%	239	51.0%
Hispanic	74	22.6%	31	21.8%	105	22.4%
Total	327	100%	142	100%	469	100%

SOURCE: Data collected by Rebecca Kraus, senior social scientist, U.S. Commission on Civil Rights, June 2001.

counted for approximately 22 percent of those who appealed in response to both lists. White Americans accounted for 30 percent of those who appealed in 1999 and 26.7 percent of those who appealed in 2000 (see table 1-4). Based on the experience in Miami-Dade County, the most populous county in the state, it appears as if African Americans were more likely than whites and Hispanics to be incorrectly placed on the convicted felons list.

CONCLUSION

The Voting Rights Act prohibits both intentional discrimination and "results" discrimination. It is within the jurisdictional province of the Justice Department to pursue and a court of competent jurisdiction to decide whether the facts prove or disprove illegal discrimination under either standard. The U.S. Commission on Civil Rights does not adjudicate violations of the law. It does not hold trials or determine civil or criminal liability. It is clearly within the mandate

of the Commission, however, to find facts that may be used subsequently as a basis for legislative or executive action designed to protect the voting rights of all eligible persons.

Accordingly, the Commission is duty bound to report, without equivocation, that the analysis presented here supports a disturbing impression that Florida's reliance on a flawed voter exclusion list, combined with the state law placing the burden of removal from the list on the voter, had the result of denying African Americans the right to vote. This analysis also shows that the chance of being placed on this list in error is greater for African Americans. Similarly, the analysis shows a direct correlation between race and having one's vote discounted as a spoiled ballot. In other words, an African American's chance of having his or her vote rejected as a spoiled ballot was significantly greater than a white voter's. Based on the evidence presented to the Commission, there is a strong basis for concluding that section 2 of the VRA was violated.

First-Hand Accounts of Voter Disenfranchisement

*Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.*¹

Although statistics on spoiled ballots and voter purge lists point to problems in Florida's election, perhaps the most compelling evidence of election irregularities the Commission heard was the first-hand accounts by citizens who encountered obstacles to voting. The following chapter presents individual accounts of voting system failures.

VOTERS NOT ON THE ROLLS AND UNABLE TO APPEAL

On November 7, 2000, millions of Florida voters arrived at their designated polling places to cast their votes. Unfortunately, countless voters were denied the opportunity to vote because their names did not appear on the lists of registered voters.² When poll workers attempted to call the supervisors of elections offices to verify voter registration status, they were often met with continuous busy signals or no answer.³ In

accordance with their training, most poll workers refused to permit persons to vote whose names did not appear on the rolls at their precinct. Thus, numerous Floridians were turned away from the polls on Election Day without being allowed to vote and with no opportunity to appeal the poll workers' refusal. The following are a few examples of experiences that Floridians had who were turned away from their polling places.

Citizens Who Were Not Permitted to Vote

Cathy Jackson, an African American woman, has been a registered voter in Broward County since 1996. Upon registering in Broward County, Ms. Jackson was told that if she ever experienced a problem with her voter registration card, she would be allowed to vote if she could produce a valid driver's license. Ms. Jackson voted in Broward without any incident using her driver's license since 1996. However, when she went to her polling place, Precinct 52Z, on November 7, 2000, she was told that her name was not on the list. The poll workers suggested that she travel back to her old precinct in Miami-Dade County to vote. Ms. Jackson did as she was advised even though she had voted in Broward County since she moved from Miami-Dade County in 1996. After waiting 45 minutes at her old precinct, the poll workers in Miami-Dade told Ms. Jackson that her name was not on the rolls and referred her back to Broward to vote.

When Ms. Jackson returned to the Broward precinct, the poll workers advised her to wait while they checked her registration status. While she waited, Ms. Jackson observed a poll worker from another precinct within the same polling place allow an elderly white voter, whose

¹ THE FEDERALIST NO. 57 (James Madison).

² Numerous complaints received by the attorney general's office and the Florida Democratic Party confirm that voters were turned away from their precincts. See "Complaints Received by Attorney General's Office," Bates Nos. 0008948, 0009170, 0009173, 0009279.

³ Ava Zamites of Tampa waited for one and a half hours but could not get through to the supervisor of elections office. "Complaint Received by Attorney General's Office," Bates No. 0009277. In another instance, when Lynette Johnson was told that her name was not on the voter list, poll workers attempted to call the supervisor of elections office. When they could not get through for an hour, she had to return to work. She continued to call on her own with no success.

"Complaint Received by Attorney General's Office," Bates No. 0009882.

name did not appear on the rolls, to fill out an affidavit and vote. When Ms. Jackson asked if she could do the same, the poll workers explained that she could fill out an affidavit, but that she could not vote until they had verified her registration. The phone lines to the supervisor of elections office, however, remained busy for several hours. Ms. Jackson became upset and eventually left to go to work. Undeterred by these delays, Ms. Jackson returned to her precinct after work to try to vote again, but the poll workers were never able to verify her registration status and refused to allow her to vote.⁴

Donnise DeSouza, an African American, has been registered to vote since 1982 in Miami-Dade County. When she entered the Richmond Fire Station in Miami-Dade County at 6:50 p.m. and showed her identification to the poll worker, Ms. DeSouza was told that her name was not on the rolls. The poll worker directed her to the "problem line," so that her registration status could be verified with the supervisor of elections office. Ms. DeSouza recalled that the line of about 15 people did not move, but at 7 p.m. when the poll began to close, a poll worker announced to the group "if our name was not on the roll that she could not let us vote and that there was nothing she could do." The poll workers stopped their attempts to verify the registration status of the voters who had been standing in line. When Ms. DeSouza asked if there was an absentee ballot that would allow her to cast her vote, the poll worker explained that there was nothing he could do.

Ms. DeSouza testified to the Commission that she was "very agitated" and the next day began to register complaints with various sources about her experience. Upon further investigation with the office of the supervisor of elections, she discovered that the poll workers should have continued their efforts to resolve the problems of those voters who were in the precinct prior to the 7 p.m. closing time. Furthermore, Ms. DeSouza learned that her name was actually on the rolls of registered voters, because subsequently a worker at the elections office showed

⁴ Cathy Jackson, Testimony before the U.S. Commission on Civil Rights, Miami, FL, Feb. 16, 2001, Verified Transcript, pp. 80-87. Ms. Jackson explained that her polling place's building was being used by two different "districts," which apparently refer to precincts. Ms. Jackson belonged to the first, while the elderly white voter belonged to the second. *Ibid.*

her the sheet that contained her name where she should have been allowed to sign. But Ms. DeSouza explained, "at that point [the election was over so] there was nothing they could do and I was deprived of my right to vote."⁵

Angenora Ramsey, an African American former poll worker with 18 years' experience, had changed her address prior to November 7. Based on her familiarity with election procedures, when Ms. Ramsey went to vote at Precinct 62 in Palm Beach County, she completed a change of address affidavit. But when the poll worker tried to call the office of the supervisor of elections to verify Ms. Ramsey's registration status, she was unable to get through. According to Ms. Ramsey, the phone lines remained busy for three and a half hours—a delay she had never experienced during her time as a poll worker. Ultimately, the poll workers refused to allow her to vote because they could not verify her voter status.⁶

Margarita Green, a 75-year-old Cuban American woman, went to vote at the same precinct in Miami-Dade County where she had always voted since becoming a citizen in 1966. When Mrs. Green showed her registration card to the poll worker, she was told that her name was not on the rolls and that she must speak with another poll worker who would look into the problem. Mrs. Green recalled that it took a long time for the poll worker to reach the supervisor of elections because the phone line was busy. When she finally got through, the worker explained that according to their records Mrs. Green had called in 1998 and "erased" herself from the voter list. Although Mrs. Green insisted that she had not called and showed the poll worker her registration card, the poll worker refused to allow her to vote.⁷

R. Jai Howard, vice president of the Florida Agricultural and Mechanical University Student

⁵ Donnise DeSouza Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 54-58.

⁶ Angenora Ramsey Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 87-96.

⁷ Margarita Green Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 65-68. The supervisor of elections for Miami-Dade, however, provided a form signed by a Margarita C. Green purporting to indicate that she no longer lived in Miami-Dade County. Mrs. Green does not recall signing any such form. David Leahy, supervisor of elections, Miami-Dade County, letter to Edward A. Hailes, Jr., general counsel, U.S. Commission on Civil Rights, June 1, 2001, pp. 2-3.

Government Association, testified on behalf of more than 12,000 predominantly African American students. She described the massive voter registration efforts that took place at the school in the months preceding the November 2000 election. The association's efforts continued until October 10, 2000 (the last day to register before the election) and included a rally in which Reverend Jesse Jackson and Ion Sancho, the Leon County supervisor of elections, participated. Despite its efforts, the Student Government Association learned in the days following the election that large numbers of students had problems voting, "including one student who had two voter registration cards with two different precincts, some students who received no voter registration cards, switching of precincts without prior notification, misinformation at precincts, and students who had attempted to register numerous times and never received registration [cards] and were never entered into the system." As a result of these combined problems, many students who believed they had been properly registered were not allowed to vote.⁸

Poll Workers Confirm Widespread Voter Disenfranchisement

The experiences of these Floridians who were denied their opportunity to vote were corroborated by poll workers who testified at the Commission hearing in Miami. Many poll workers attempted to follow the procedures they had been taught in their training, such as verifying voter registration with the supervisor of elections, but their efforts were largely futile because of the inadequacies and obstacles they faced throughout the voting system.

Marilyn Nelson, a poll worker with 15 years of experience in Miami-Dade County, testified, "By far this was the worst election I have ever experienced. After that election I decided I didn't want to work as a clerk anymore." At North Dade Elementary School, Precinct 232, she observed several voters who had presented their voter registration cards showing they were properly registered, but the poll workers did not allow them to vote because their names did not appear on the rolls. Ms. Nelson also saw voters

with their "orange cards," which meant that the voter had registered on time and should be allowed to vote, provided that the poll worker could verify the voter's registration status with the supervisor of elections office. Many of these voters, however, were not permitted to vote because the poll workers could not get through on the phone line to the supervisor's office.⁹

Maria DeSoto, a poll worker in Palm Beach County, testified that she used her personal cellular phone to call the supervisor of elections office all day, but was only able to get through two or three times over the course of 12 hours. Ms. DeSoto added that if voters' names did not appear on the rolls, they were not allowed to vote, even if they presented valid identification.¹⁰

Barbara Phoele, a poll worker in Broward County at Precinct 6C, observed mostly African American and Hispanic voters being turned away because their names did not appear on the rolls. The precinct clerk at her site was unable to get through to the central election office to give affidavits to those voters whose names did not appear. According to Ms. Phoele, the clerk did not communicate with the voters and did nothing to encourage them to vote. In fact, Ms. Phoele noticed later that afternoon that the sign informing voters where they should call if they experienced problems had never been posted. She brought this to the attention of the precinct clerk who explained, "I didn't have time to put it up." Ms. Phoele recalled that in past elections it took only about 10 minutes to reach the elections supervisor, but on November 7, 2000, she turned away approximately 40 or 50 people because she could not access the supervisor of elections.¹¹

Marvin Rickles, Jr., a deputy at Precinct 74B in Palm Beach County, observed an African American school principal turned away, after waiting for two hours, because her name did not appear on the rolls and poll workers could not reach the supervisor of elections office. She returned to the precinct later that afternoon and was allowed to vote only after she discovered

⁸ R. Jai Howard, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 11, 2001, Verified Transcript, p. 84. Florida A&M University houses a voting precinct on its campus.

⁹ Marilyn Nelson Testimony, poll worker, Precinct 232 in Miami-Dade County, Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 129-38.

¹⁰ Maria Desoto Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 142.

¹¹ Barbara Phoele Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 126-27, 136, 156. Ms. Phoele eventually posted the sign herself. *Ibid.*, pp. 126-27.

that her name had been misspelled on the rolls.¹²

Millard Suid, a poll worker at the Water Works Department in Boynton Beach, testified he was not able to get through to the office of the supervisor of elections. He recalled helping only one voter over the course of about eight hours. Mr. Suid stated that the precinct deputy estimated that poll workers “[m]ust have turned away maybe 30 or 50 people that could not vote.”¹³

Randall Benston worked as an area chair overseeing three precincts in Broward County. Mr. Benston observed poll workers who were unaware that voters not on the rolls were allowed to fill out affidavits and vote. He eventually persuaded the poll workers to allow voters to fill out affidavits in accordance with Florida election law.¹⁴

POLLING PLACES CLOSED EARLY OR MOVED WITHOUT NOTICE

Many Floridians experienced extreme frustration on November 7 when they reported to the precincts where they had been voting regularly, in some cases for many years, and discovered that their precincts were no longer being used or had moved to another location without notice from the county supervisor of elections.¹⁵ In other instances, some voters who had been standing in line to vote at their precincts prior to 7 p.m. were told that they could not vote because the poll was closed.¹⁶ Under these circum-

stances, the patience of many Floridians was exhausted.

Polling Places Closed Early

When Lavonna Lewis, an African American first-time voter, went to her polling place to vote, she was told by a white poll worker standing outside that the poll was closed. As she turned to leave, the poll worker allowed a white gentleman to walk in and get in line to vote.¹⁷

Donnise DeSouza arrived at her assigned precinct at 6:30 p.m., but she could not enter until 6:50 p.m., due to the long line of cars parked on the street waiting to gain access to the polling place. Once Ms. DeSouza was finally able to enter the polling place, she waited for another 10 minutes while poll workers verified her registration status. At 7 p.m., however, the poll workers announced to Ms. DeSouza and about 15 other voters who were waiting to be helped that they could not vote because the poll was closed.¹⁸

Susan and Joel Newman arrived at the Water Works Department in Palm Beach to vote at approximately 6:15 p.m. Upon their arrival, they noticed:

[T]he iron gates at the entrance were closed, preventing entrance . . . Several cars pulled into the entrance lane and tried to attract attention by honking horns and ringing an intercom. We waited 5–10 minutes but no one showed up and the gates remained locked. We drove off thinking we were wrong about the closing time—that the polls must have closed at 6:00. A few blocks away we spotted a police car and pulled up to check. He verified that the polls were open until 7:00. We complained about the situation we had just experienced and he told us to go to the Board of Elections (some 20 minutes away). We drove there and met a policeman as we entered the building. He listened to our complaint and politely told us there was nothing he could do. We would have to register our complaint with the [supervisor] of elections, Theresa LePore. Unfortunately, he told us her office had closed at 5 p.m. and her staff went home [and] we would have to complain the following day. We left,

¹² Marvin Rickles, Jr., Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 134.

¹³ Millard Suid Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 123, 132.

¹⁴ Randall Benston, precinct area chair, Precincts 6Z, 5Z, and 7B, Broward County, Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 457. See chap. 7 (Florida law does permit an individual to be issued a ballot in limited circumstances, upon execution of an affidavit).

¹⁵ John McGuire of Pinellas County, for example, complained that his polling place, Precinct 509, moved without prior notice. See “Complaint Received by Attorney General’s Office,” Nov. 8, 2000, Bates No. 0009246.

¹⁶ Denise Ballard of Palm Beach County observed poll workers turn away voters at her precinct at 7 p.m., even though they had been in line prior to 7 p.m. See “Complaint Received by Attorney General’s Office,” Bates No. 0009778. Similarly, Ted Dominick of Broward County complained that he arrived at the poll at 6:55 p.m. and was turned away. See “Complaint Received by Attorney General’s Office,” Bates No. 0009253.

¹⁷ Lavonna Lewis Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 102–06.

¹⁸ Donnise DeSouza Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 54–56.

realizing that we would have no opportunity to vote this year.¹⁹

Millard Suid, a poll worker at the Water Works Department on John Road in Boynton Beach, confirmed the above poll closing. He explained that the gates to the property are on an automatic timer that shuts them every day at 6:15 p.m. When the automatic timer shut the gates at 6:15 p.m. on Election Day, however, Mr. Suid stated, "It was a disaster. The people at the Water Works Department should have known about it or the people, Theresa LePore, who runs that particular district, should have known about that." When asked if he called the supervisor of elections to report that the gates had closed, Mr. Suid testified, "That wouldn't do any good, couldn't get in. I had called 911 and told the police. Now there was a young lady at the Water Works Department who worked there all day and she left at like 5:30 and she said, 'I'll be back at 7:30 to lock up.' Now she should have known this gate's going to lock automatically. . . . That wasn't the first time they used that. So somebody screwed up."²⁰

Robert Weisman, the county administrator for Palm Beach County, stated in a response to an interrogatory issued by the Commission after the February 16, 2001, hearing, that he did not know about the gate-closing incident until the Commission hearing. He further acknowledged that a subsequent investigation by representatives of the supervisor of elections office determined that the gate indeed had closed. Mr. Weisman did not dispute that the automatic locking of the gate blocked access to the Palm Beach County polling place before the official closing.²¹

Polling Places Moved Without Notice

If a supervisor of elections determines that a polling place must be moved, the supervisor must "not more than 30 days or fewer than seven days prior to the holding of an election,

give notice of the change."²² Such notice is to be published in a newspaper of general circulation within the county, and notices must be mailed to each registered voter at least 14 days prior to the election.²³ In case of an emergency, the supervisor of elections must post a notice at the old polling place advising voters of the new location.²⁴ Regardless of the reasons for the change, the new polling place must be accessible to all voters and conspicuously identified by a sign. On November 7, 2000, however, these requirements of Florida election law were not strictly followed.²⁵

Felix Boyle, a registered voter in Miami-Dade County, described his polling place as a "medieval labyrinth." There were "sulfuric odors from standing water, orange cones, barriers, deep pits, broken concrete. It was a real problem getting there." Although Mr. Boyle's polling place during the primary was very busy, the new location was "deserted" on November 7, 2000. He surmised that the appearance of the site might have resulted in fewer people voting there on Election Day.²⁶

NATIONAL VOTER REGISTRATION ACT: THE MOTOR VOTER LAW

In 1993, Congress enacted the National Voter Registration Act²⁷ in an effort to increase participation in federal elections.²⁸ Congress gave states three years to implement its provisions. To implement the act, Florida enacted the Florida Voter Registration Act²⁹ to "provide the opportunity to register to vote or update a voter

²² FLA. STAT. ch. 101.71(2) (1999).

²³ *Id.*

²⁴ *Id.*

²⁵ See Complaint of John McGuire of Pinellas County, "Complaints Received by Attorney General's Office," Nov. 8, 2000, Bates No. 0009246.

²⁶ Felix Boyle Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 78-79, 90-91. Photographs of Mr. Boyle's polling place are attached as app. III.

²⁷ 42 U.S.C. § 1973 (1988).

²⁸ Attempts to enact legislation to allow individuals to register to vote during driver's license registration date back to the 1970s. In 1992, President George Bush vetoed a "motor voter" bill. In 1993, the National Voter Registration Act was passed, despite severe opposition. Those opposing the motor voter registration regulation maintained that it unjustly interfered with state sovereignty—even for federal elections—and imposed unreasonable costs on states.

²⁹ FLA. STAT. ch. 97.032 (1999).

¹⁹ Susan Newman, affidavit submitted to U.S. Commission on Civil Rights, Jan. 31, 2001, p. 3.

²⁰ Millard Suid Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 123.

²¹ Robert Weisman, county administrator, Palm Beach County, Response to Commission's Interrogatory 1, Apr. 11, 2001, p. 2.

registration record to each individual who comes to an office of [the Department of Highway Safety and Motor Vehicles]"³⁰ to apply for or renew a driver's license, apply for a new identification card, or change an address on an existing driver's license or identification card.³¹ Since the Florida Voter Registration Act was enacted, more than 3,500,000 voter registration applications have been filed.³² There were 609,389 applications filed with the Department of Highway Safety and Motor Vehicles (DHSMV) in the calendar year 2000.³³

The DHSMV does not, in fact, register voters; rather, it provides a method for persons to apply to the county supervisors of elections to register while conducting license or identification card transactions. This process is commonly referred to as the "motor voter" process.

In 1995, training for the motor voter process began and was conducted by the Florida Division of Elections. Sandra Lambert, director of the Division of Driver Licenses, described the motor voter process at the Commission's Miami hearing:

When a customer comes into a driver license office to have any kind of driver license or identification card transaction, all basic information is initially processed. The customer is then asked if they would like to apply to register to vote. If that customer answers in the affirmative all the basic information is transferred from the computer screen on to an additional motor voter screen, so no additional information at that point has to be asked in duplication.

³⁰ FLA. STAT. ch. 97.057 (1999).

³¹ FLA. STAT. ch. 97.057(1)(a) (1999).

³² Sandra Lambert, director, Division of Driver Licenses, Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 172-73. Ms. Lambert testified, "Of the seven organizations that do take applications, the Division of Driver Licenses has taken approximately 45 percent of all applications." The testimony of Ms. Lambert regarding the dramatic increase in voter registration in the state of Florida was echoed by a member of the Election Canvassing Commission. See Robert Crawford, commissioner of agriculture, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 12, 2001, Verified Transcript, p. 186.

³³ Sandra Lambert, director, Division of Driver Licenses, letter to Edward A. Hailes, Jr., Mar. 14, 2001, p. 1. The division has a disciplinary system for employees who violate requirements of the motor voter process. Records indicate that in the year 2000 two employees received counseling, six employees received oral reprimands, and one employee received a written reprimand regarding violations of agency procedures for the motor voter process.

Some additional information does have to be gathered, such as party affiliation, homestead exemption address, [and] a few additional things by law. Once that is completed, the application is printed, it is given to the customer to verify for accuracy, the oath is administered, and the application is signed. If a person declines to apply to register to vote or to change their address, it is so noted on our computer files.

If a person is not in the office, but rather making a transaction by mail, having their renewal done by mail, there is information in that envelope which they receive and an application so that they can make any kind of changes to their voter registration or to make application to vote at that time. All of that information is mailed directly to the local supervisor of elections. And there is a list with all the addresses enclosed in their renewal information.

At the end of each day, in one of our offices, an end-of-the-day motor voter report is compiled, along with all of the applications, and then all of that information is forwarded within five days to the local supervisor of elections. It's pretty much of an electronic process up until this point, and then forwarded on to the local supervisor of elections.³⁴

Despite this effort to increase citizen participation through motor voter registration, problems exist in the implementation of the registration process. Curtis Gans, director of the Committee for the Study of the American Electorate, testified, "In this election, thousands of people, not only in Florida, but in other places, who registered at motor voter places, motor vehicle license bureaus, and in social service agencies were not on the rolls when they came to vote."³⁵ A poll worker who testified at the Commission's Miami hearing corroborated this observation:

[T]here were people who had registered to vote through motor voter and somehow their registration was not transmitted to the supervisor of elections office. I saw that with married couples in my own precinct. One person would be registered to vote, the other person would not. The person who was not registered to vote couldn't vote unless they physically went to the supervisor of elections office and picked up a piece of paper, which they then

³⁴ Sandra Lambert Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 173-75.

³⁵ Curtis Gans Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 135.

brought back to me, because we couldn't reach them on the telephone.³⁶

Congresswoman Corrine Brown also noted the failure of proper processing of motor voter registration, stating that "thousands of people went and got their driver's license, but to this date they did not . . . receive their voter card."³⁷

Despite these allegations, according to Ms. Lambert, the fault should not be assigned to the motor voter registration system set up by Florida. Ms. Lambert testified that although she did "receive a number of complaints after the November election," she investigated all complaints and "found a variety of reasons why the person was not on the list."³⁸ Ms. Lambert asserted that all complaints were resolved, and there was no failure on the part of the DHSMV.³⁹ In several cases, Ms. Lambert noted, "people said they registered to vote at the motor vehicle office when in fact they had renewed by mail and they had received the application in the mail."⁴⁰ In this instance, the individual is responsible for mailing the form to the applicable supervisor of elections office. In another instance, a voter did, in fact, visit a driver license office; he registered, however, after the closing date and was thus not eligible to vote in the November election.⁴¹

Finally, according to Ms. Lambert, there were several instances when the supervisor of elections never received the mail. In this instance, a supervisor of elections would call to notify her office of a complaint. Ms. Lambert said her office then "would check and discover that we mailed . . . a batch that day."⁴² If the supervisor of elections office had not received that registration, Ms. Lambert said her office "then recreated that day's report for the supervisor of elections."⁴³ Ms. Lambert claimed, however, that it is the supervisor of elections' "responsibility then to have

³⁶ Maria Desoto, poll worker, Palm Beach County, Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 146.

³⁷ Corrine Brown Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 315.

³⁸ Sandra Lambert Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 231.

³⁹ *Ibid.*, p. 232.

⁴⁰ *Ibid.*, p. 231.

⁴¹ *Ibid.*, p. 232.

⁴² *Ibid.*

⁴³ *Ibid.*

to make contact with that customer, or all those people, to get them to be on the rolls."⁴⁴

Many Floridians alleged that they registered to vote through the Department of Highway Safety and Motor Vehicles and learned later that they were not registered. Many of these disappointed citizens filed complaints with the attorney general's office and/or the Democratic Party. The following are some examples of individuals who used the motor voter provisions to register, but were denied the right to vote.

Marcia and George Seamans of Boynton Beach registered to vote at the DHSMV on two occasions and were told at the polls that their names were not on the voter rolls. While at the DHSMV to obtain their driver's licenses, they were asked to register to vote. They were directed to fill out a separate registration application and, upon its completion, were told they were registered. When they went to the polling place, however, their names were not on the rolls. When the poll worker called the central office to verify their registration status, they learned that their names were not on the central voter file, and they were not allowed to vote.⁴⁵

In response to the Commission's interrogatory regarding the Seamans' registration, Ms. Lambert stated that the Division of Driver Licenses' records confirmed that Mr. and Mrs. Seamans submitted their voter registration applications at the time of obtaining their driver's licenses.⁴⁶ The division's records also indicated that their voter registration applications and the transmittal reports were forwarded to the applicable supervisor of elections office. Ms. Lambert, however, was not able to explain the status of their voter registration. She reiterated that all voter registration applications and transmittal reports are forwarded to the supervisor of elections within five days of receipt.⁴⁷ With regard to the Seamans, Ms. Lambert explained that voter registration applications are forwarded to Palm Beach County by U.S. mail and that copies of the applications are not maintained in their field

⁴⁴ *Ibid.*

⁴⁵ Marcia Seamans Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 110-13.

⁴⁶ Sandra Lambert, director, Division of Driver Licenses, Response to Commission's Interrogatory 1-4, Apr. 16, 2001, pp. 3-5.

⁴⁷ *Ibid.*

driver license offices due to confidentiality.⁴⁸ Based on this response, it is impossible to determine whether the voter registration applications were actually transmitted to the supervisor of elections office or whether that office misplaced the applications once they were received. Nevertheless, Mr. and Mrs. Seamans properly registered to vote at their driver license office and were deprived of their right to vote on Election Day.

Bill Zannie of Palm Beach County registered to vote at the DHSMV when he went to obtain his Florida driver's license. He requested a confirmation to ensure that he was registered to vote. The DHSMV staff assured him that he was registered. He did not, however, obtain a confirmation. When he went to vote on the day of the election, he was told that his name was not on the voter rolls. He also learned that there was no record of his registration. Since he registered to vote at a governmental agency, he assumed he was registered properly and to his disappointment, he was not registered.⁴⁹

When asked about the voter registration status of Mr. Zannie, Sandra Lambert responded that according to the division's electronic transaction file for December 7, 1998, the date Mr. Zannie obtained his driver's license for the first time in Florida, the record indicated that he was currently registered to vote; therefore, DHSMV staff did not forward any forms to the supervisor of elections.⁵⁰ According to Mr. Zannie, December 7, 1998, was the first time he had obtained a driver's license in Florida and was the first time he requested to register to vote in the state of Florida. Because the Division of Driver Licenses' records indicated that he was already registered, it took no action to register him to vote.⁵¹

Ms. Lambert explained in an answer to the Commission's interrogatory that in the two times that Mr. Zannie moved in Florida and changed his address on his driver's license, his identification card/voter registration application indicated that he was currently registered to

vote,⁵² raising another serious issue. The fact that Mr. Zannie changed his address twice in Florida and the driver license office file seemed to be current indicates that his voter registration should have also reflected his change in address. However, the driver license office failed to forward these address change forms to the local supervisor of elections office despite Mr. Zannie's repeated requests.

Maria DeSoto, a poll worker in Palm Beach County, testified that many eligible voters who registered through the DHSMV found their registrations were not transmitted to the supervisor of elections office. She witnessed a couple that registered together at the DHSMV but only one person's name was on the voter rolls on Election Day.⁵³

The testimony of the witnesses who experienced problems voting after they had applied with the Division of Driver Licenses seems to run counter to contentions made by Ms. Lambert that its motor voter registration process is "very simple" and "very good." Despite some voters being disenfranchised by failures in the motor voter process, the division nevertheless maintains that it should not be blamed for the numbers of citizens who were deprived of their right to vote on Election Day.

ABSENTEE BALLOTS

Florida voters had various absentee ballot related complaints. The Commission heard testimony alleging there was an effort by organized groups to encourage their constituents to vote absentee for the November election. In other instances, voters complained that they had requested absentee ballots, but never received them. Still other voters complained that when they went to the polling place, they were denied ballots because the election records indicated they were sent absentee ballots. And some voters said they received absentee ballots even though they never requested them.

At the Tallahassee hearing, Alvin Peters, an attorney from Panama City, testified that Governor Bush sent out a letter encouraging selected citizens to vote by mail. Mr. Peters claimed that this "vote by mail letter" offered

⁴⁸ Ibid.

⁴⁹ Bill Zannie Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 466-71.

⁵⁰ Sandra Lambert, director, Division of Driver Licenses, Response to Commission's Interrogatory 5-6, Apr. 16, 2001, pp. 5-6.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Maria DeSoto Testimony Miami Verified Transcript, Feb. 16, 2001, p. 46.

selected citizens the opportunity to vote by mail, which is not allowed in Florida. He further pointed out the letter had the seal of the state of Florida and was signed by Governor Bush.⁵⁴

Governor Bush disagreed with the above characterization of the letter referred to by Mr. Peters. He indicated to the Commission that the letter did not bear the current state seal, but rather the state seal as it first appeared in 1868.⁵⁵

Following Mr. Peters' testimony and presentation of his supporting documents, Moya Burgess responded with outrage. She explained, "It makes me sick to think that . . . our governor basically sent out an infomercial to his party."⁵⁶ She added that she is registered with "the other party" and she never received any information from the governor. In Ms. Burgess' opinion, this letter should have been addressed to all voters.⁵⁷

POLICE PRESENCE AT OR NEAR POLLING SITES

Several Florida voters reported seeing Florida Highway Patrol (FHP) troopers in and around polling places. Troopers conducted an unauthorized vehicle checkpoint within a few miles of a polling place in a predominantly African American neighborhood. In another area, trooper vehicles were reportedly parked within sight of at least two polling places, which one resident characterized as "unusual." The FHP reported that troopers only visited polling places to vote on Election Day. In light of the high voter turnout that was expected during the 2000 presidential election, particularly among communities of color that may have a strained relationship with law enforcement, some Floridians questioned the timing of and the motivation for the FHP's actions.

The Florida Election Code provides:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten or coerce, any other person for the purpose of interfering with

the right of such other person to vote or not to vote as that person may choose.⁵⁸

The state of Florida also restricts the presence of law enforcement officers at polling places. Specifically, unless he or she enters the polling place to cast a ballot, no law enforcement officer may enter a polling place without the permission of the clerk or a majority of the inspectors.⁵⁹ The clerk or inspectors are required to make an affidavit for the arrest of any law enforcement officer who does not comply with the law.⁶⁰ Sheriffs also have a duty under Florida election law to "exercise strict vigilance in the detection of any violations of the election laws and in apprehending the violators."⁶¹

Charles Hall, director of the Florida Highway Patrol, testified at the Commission's Tallahassee hearing. He explained that the history of increased checkpoints by the FHP began in the early 1980s, when the vehicle inspection laws were repealed. The FHP determined that the most effective way to inspect a large number of vehicles was through driver's license/faulty vehicle equipment checkpoints.⁶² He also noted that he had no conversations with the office of the governor, the office of the attorney general, or the office of the secretary of state in preparation for the 2000 presidential election.

Colonel Hall admitted that on November 7, 2000, the FHP established a checkpoint on Oak Ridge Road in Southern Leon County between the hours of 10 a.m. and 11:30 a.m.⁶³ The demographic makeup of the precincts surrounding the Oak Ridge Road checkpoint are as follows: (1) Precinct 107 is 82 percent Caucasian and 13 percent African American; (2) Precinct 109 is 37 percent Caucasian and 57 percent African

⁵⁸ FLA. STAT. ch. 104.0515(3) (1999).

⁵⁹ FLA. STAT. ch. 102.101 (1999).

⁶⁰ *Id.*

⁶¹ FLA. STAT. ch. 102.091 (1999).

⁶² Charles Hall Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 119. Colonel Hall said, "Motorists who approach one of these checkpoints can expect to have their license, registration, insurance papers, tires, brake lights, and other safety equipment examined. And those with vehicles in good working order and have all their required paperwork normally will be delayed for less than a minute." *Ibid.*

⁶³ *Ibid.*, pp. 119-20. In addition to the Oak Ridge Road checkpoint, the FHP established checkpoints in Bay and Escambia counties on November 7, 2000.

⁵⁴ Alvin Peters Testimony Tallahassee Verified Transcript, Jan. 12, 2001, p. 370.

⁵⁵ See app. VI, Charles T. Canady, general counsel, Office of the Governor for the State of Florida, letter to Edward A. Hailes, Jr., June 6, 2001, p. 6.

⁵⁶ Moya Burgess Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 381.

⁵⁷ *Ibid.*

American; and (3) Precinct 110 is 70 percent Caucasian and 24 percent African American.⁶⁴ Approximately 150 vehicles were stopped as a result of the Oak Ridge Road checkpoint that day. According to FHP records, of the 16 citizens who received notices of faulty equipment, six (37 percent) were people of color.⁶⁵

On the afternoon of Election Day, the FHP received notice of a complaint to the attorney general's office that FHP troopers had hindered people of color from arriving at polling places due to the Oak Ridge Road checkpoint. Colonel Hall indicated that "the FHP was the first statewide law enforcement agency in the county to voluntarily begin collecting data concerning traffic stops in response to the racial profiling issue."⁶⁶ The racial breakdown of the 150 drivers stopped at that checkpoint on Election Day, however, is not available.

As a result of its investigation, the FHP found that some policy violations had occurred, but concluded that no citizen was unreasonably delayed or prohibited from voting as a result of the Oak Ridge Road checkpoint.⁶⁷ The policy violations cited by FHP's investigators included the fact that the checkpoint site was not on the monthly preapproved list and the media notification policy was not followed.⁶⁸ The investigators recommended "counseling" for the sergeant in charge of the checkpoint and the district commander in charge of the media notification.⁶⁹

Colonel Hall stated the FHP was "very concerned about the perception people may have

about what the patrol did that day."⁷⁰ The Commission heard testimony from voters in Tallahassee regarding their reaction to the FHP's actions on Election Day. Roberta Tucker, an African American woman and a longtime resident of Tallahassee, was driving along Oak Ridge Road on her way to vote. Before Ms. Tucker could reach her polling place, she was stopped at an FHP vehicle checkpoint conducted by approximately five white troopers. According to Ms. Tucker, the checkpoint was located at the only main road leading to her assigned polling place. One of the troopers approached Ms. Tucker's car, asked for her driver's license, and after looking at it, returned it to her and allowed her to proceed. Ms. Tucker considered the trooper's actions to be "suspicious" because "nothing was checked, my lights, signals, or anything that [the state patrol] usually check."⁷¹ She also recalled being "curious" about the checkpoint because she had never seen a checkpoint at this location. Ms. Tucker added that she felt "intimidated" because "it was an Election Day and it was a big election and there were only white officers there and like I said, they didn't ask me for anything else, so I was suspicious at that."⁷²

In response to the allegations of voter intimidation surrounding this checkpoint, Colonel Hall stated that "the checkpoint was properly conducted, and it was not anywhere near a polling facility, and I don't see how that could affect anybody's ability to vote."⁷³ He added that he was "not really" surprised to learn that a trooper may have asked for a driver's license and not registration. He explained that such an action could occur if vehicles had begun to back up.⁷⁴ Moreover, Colonel Hall stated he was "disappointed" that the FHP could not speak with Ms. Tucker because she refused to cooperate with their investigation.⁷⁵ Ms. Tucker testified, however, that she reported the incident to her local NAACP and never returned the FHP's calls be-

⁶⁴ *Ibid.*, p. 145.

⁶⁵ *Ibid.*, pp. 178-79. Colonel Hall added that the district commander, Captain Speers, did a "post survey of [the area surrounding the checkpoint] and out of the 100 cars that he checked during that period of time, I believe it was 82 percent were white . . . 18 percent minority in that area." *Ibid.*, p. 179.

⁶⁶ *Ibid.*, p. 32.

⁶⁷ *Ibid.*, p. 121. Colonel Hall was unable to confirm if the conversation with the attorney general's office was memorialized in any way other than in the FHP's investigative report of the Oak Ridge Road checkpoint. *Ibid.*, p. 138.

⁶⁸ *Ibid.* Colonel Hall referenced Florida Highway Patrol Policy Manual Section 17.07. According to Colonel Hall, the Oak Ridge Road checkpoint appeared on previous approved lists, but he did not believe the media notification procedures were avoided in order to prevent protests from civil rights organizations. *Ibid.*, pp. 179-80.

⁶⁹ Colonel Hall further clarified that the counseling received by the troopers did not constitute a formal reprimand. *Ibid.*, p. 141.

⁷⁰ *Ibid.*, p. 140.

⁷¹ Roberta Tucker Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 36-37.

⁷² *Ibid.*, p. 37.

⁷³ Charles Hall Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 140.

⁷⁴ *Ibid.*, p. 137.

⁷⁵ *Ibid.*, p. 142.

cause "I felt it was a civil rights issue . . . I felt like it was sort of discriminatory."⁷⁶

When John Nelson, an African American resident of Jefferson County in Tallahassee, went to his assigned polling place, Precinct 6, to vote, he saw an unoccupied FHP vehicle parked across the street. He considered this to be "unusual" because he has voted a number of times at the same precinct, but was not accustomed to seeing a law enforcement vehicle at the precinct.⁷⁷ Moreover, Mr. Nelson stated he did not see any FHP troopers voting inside the precinct or leaving the precinct. Mr. Nelson added that his precinct is usually frequented by a large number of African American voters.⁷⁸ The FHP vehicle's presence piqued Mr. Nelson's curiosity, and after voting, he drove to a precinct in the downtown area on North Washington Street and saw another FHP vehicle parked outside the precinct.⁷⁹

In response to Mr. Nelson's allegations, Colonel Hall explained that those troopers only visited polling places to vote, and no parking tickets were written in the parking lots of voting precincts.⁸⁰ He added that law enforcement personnel use a service station close to the polling place, which may have explained their presence.⁸¹ Furthermore, according to Colonel Hall, the FHP has "no policy that specifically excludes polling places from any law enforcement function."⁸² There is also no FHP policy against troopers wearing their uniforms or using their vehicles while voting at any election. At the request of supervisors of elections, the FHP has assisted in traffic control at polling places in the past, but the FHP received no such request for the November 2000 election.⁸³

⁷⁶ Roberta Tucker Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 64-65.

⁷⁷ John Nelson Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 26-27.

⁷⁸ *Ibid.*, p. 28. Mr. Nelson added that for the first time in his voting experience at his precinct, rather than simply showing his voter registration card, he was asked for two pieces of identification, which he considered to be "unusual." *Ibid.*, p. 29.

⁷⁹ *Ibid.*, p. 28.

⁸⁰ Charles Hall, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 147-48.

⁸¹ *Ibid.*, p. 148.

⁸² *Ibid.*, p. 143.

⁸³ *Ibid.*, pp. 143-44.

Florida Attorney General Robert A. Butterworth summarized his position on the use of law enforcement checkpoints on Election Day:

What we do know is that a checkpoint on that date, Election Day, was absolutely not necessary for law enforcement purposes and similar checkpoints should never again be implemented on Election Day . . . No law enforcement barriers should be placed on Florida's roadways when people are going to and from voting.⁸⁴

Regardless of the motivation for the Florida Highway Patrol's actions on Election Day, it appears that a number of voters perceived, at minimum, that they were negatively affected by the proximity of law enforcement officers to the precincts around Tallahassee.

CONCLUSION

A wide variety of concerns have been raised regarding the use and effectiveness of Florida's voting system controls during the 2000 presidential election. Many Floridians were denied their opportunity to vote, in what proved to be a historic general election because of the narrow vote margin separating the candidates. Some voters were turned away from their designated polling places because their names did not appear on the lists of registered voters. Other voters discovered that their precincts were no longer being used or had moved to another location, without notice from the supervisor of elections office. In other instances, voters who had been standing in line to vote at their precincts prior to closing, were told that they could not vote because the poll was closed. In addition, thousands of voters who had registered at motor vehicle licensing offices were not on the rolls when they came to vote. The Commission also heard from several voters who saw Florida Highway Patrol troopers

⁸⁴ Robert A. Butterworth Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 199. Attorney General Butterworth also testified: "Therefore, I have prepared the legislation that I am forwarding to the Florida legislature that would prevent routine safety traffic checkpoints on Election Days anywhere within the state of Florida. There would be exceptions for roadblocks dictated by fleeing felons or other extreme circumstances." *Ibid.*

in and around polling places, while other troopers conducted an unauthorized vehicle checkpoint within a few miles of a polling place in a predominantly African American neighborhood.

The Commission's investigation demonstrated an urgent need for attention to this issue by

Florida's state and local officials, particularly as it relates to the implementation of statewide election reforms. Without some effective redress, the pervasive problems that surfaced in the 2000 election will be repeated.

Responsibility Without Accountability?

In the first paragraph of the Declaration [of Independence], is the assertion of the natural right of all to the ballot: for how can the "consent of the governed" be given, if the right to vote be denied?¹

Article I, section 1, of the Florida Constitution provides that "[a]ll political power is inherent in the people."² The right to vote is the most obvious exercise of this inherent power. The Florida state election laws should be guided by this constitutional mandate. Further buttressing this constitutional mandate is the National Voter Registration Act of 1993 in which Congress emphasized "the right of citizens of the United States to vote is a fundamental right [and] it is the duty of the federal, state and local governments to promote the exercise of that right."³ State election laws should be drafted and interpreted in such a manner that every citizen's right to vote is cherished and protected. Instead, there are several provisions of the Florida election law that appear to impede rather than foster this precious right.⁴

Provisions impeding the right to vote include those that permit top government officials to plead an alleged "lack of authority" to evade any responsibility to ensure that elections are fairly and uniformly conducted. The governor of Florida claims moral authority over election matters but claims the legal authority rests with the secretary of state. The secretary of state, who has obvious legal power, claims no practical author-

ity stemming from a lack of enforcement authority, limited power to promulgate administrative regulations, and shared constitutional authority with county supervisors of elections in overseeing elections. The supervisors of elections have the constitutional authority to conduct elections, but maintain they are not given the resources necessary to ensure that every legal voter can exercise that right should he or she choose to vote. In addition, supervisors of elections, by default, perform responsibilities assigned by law to the governor and the secretary of state.

WHO'S IN CHARGE?

Florida's governor is the state's chief executive officer who "shall take care that the laws be faithfully executed."⁵ Florida's secretary of state is the chief election officer and oversees the Division of Elections.⁶ Each county has an elected supervisor of elections, except one.⁷ Together, the secretary of state and the county supervisors of elections preside over Florida's elections.

Governor John Ellis Bush

When asked about his responsibilities to ensure the election laws of Florida were faithfully executed during the November 2000 election, Governor Bush testified before the U.S. Commission on Civil Rights that he had no real legal authority over election matters except for certifying the election and serving as a member of the state canvassing board. He indicated that he recused

¹ Susan Brownell Anthony, *Is It a Crime for a Citizen of the United States to Vote*, speech given in 1873 prior to her trial for voting. At that time, laws prohibited women from voting.

² FLA. CONST. art. § 1 (1968).

³ 42 U.S.C. § 1973gg (2001).

⁴ This is not an exhaustive analysis of all Florida election law provisions that may serve to disenfranchise voters. Those discussed here were the subject of significant testimony during the Commission hearings.

⁵ FLA. CONST. art. IV, § 1(a).

⁶ FLA. STAT. ch. 97.012 (1999). See FLA. CONST. art. IV, § 5(a). Florida's secretary of state is an elected cabinet position.

⁷ FLA. CONST. art. VIII, § 1(d); FLA. STAT. ch. 98.015(1) (1999). There are 67 supervisors of elections; 66 are elected. The Miami-Dade County supervisor of elections is appointed under a county charter.

himself from participating on the state canvassing board because his brother was one of the presidential candidates.⁸ Governor Bush testified that “governors have the moral authority . . . to make sure that the laws, not only the state laws, but . . . also federal laws are upheld. . . .”⁹ When asked what authority and responsibility he had regarding preparation for the 2000 presidential election, Governor Bush testified that he had none and that “the secretary of state and the 67 supervisors of elections were responsible for that, and they carried out their duties.”¹⁰

Under the Florida Constitution, the governor is charged with ensuring that “the laws be faithfully executed,”¹¹ a responsibility Governor Bush apparently delegated to others with respect to elections.¹² Under Florida election law, the governor is also specifically empowered to “appoint special officers to investigate alleged violations of the election laws . . .”¹³ Governor Bush testified that he had not appointed any officers to do any investigation of alleged irregularities surrounding the November 2000 election but would “[i]f there was a reason to do so.”¹⁴ As of the date of this report there is no indication that the governor has exercised this authority by appointing special officers to investigate the widespread allegations of violations of the Florida election law.¹⁵

Secretary of State Katherine Harris

The Florida legislature was unequivocal and specific when it defined the responsibilities of the secretary of state in the Florida Election

Code.¹⁶ The secretary of state is obligated by Florida law to:

- obtain and maintain uniformity in the application, operation, and interpretation of the election laws;
- provide uniform standards for the proper and equitable implementation of the registration laws;
- actively seek out and collect the data and statistics necessary to knowledgeably scrutinize the effectiveness of election laws;
- provide technical assistance to the supervisors of elections on voter education and election personnel training services;
- provide technical assistance to the supervisors of elections on voting systems;
- provide voter education assistance to the public;
- coordinate the state’s responsibilities under the National Voter Registration Act of 1993;
- provide training to all affected state agencies on the necessary procedures for proper implementation of this chapter;
- ensure that all registration applications and forms prescribed or approved by the department are in compliance with the Voting Rights Act of 1965;
- coordinate with the United States Department of Defense so that armed forces recruitment offices administer voter registration in a manner consistent with the procedures set forth in this code for voter registration agencies;
- create and maintain a central voter file; and
- maintain a voter fraud hotline and provide election fraud education to the public.¹⁷

Despite these explicit statutory powers, Secretary of State Katherine Harris testified that the Florida Constitution created an election system founded upon local control.¹⁸ She testified, “[N]either I nor my staff are authorized to direct the conduct of these supervisors of elections.”¹⁹

Secretary Harris, detailing her official responsibilities, stated that within the framework

⁸ John Ellis Bush, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 11, 2001, Verified Transcript, pp. 97–100, 106.

⁹ *Ibid.*, p. 98.

¹⁰ *Ibid.*, pp. 99–100. Governor Bush testified he was aware of an increase in voter registration. He did not, however, think that the increase in voter registration was greater than in previous years. *Ibid.*, p. 100. Governor Bush also believed he should “show leadership” with respect to the felony purge issue, although he had “no direct responsibility” to do so. *Ibid.*, p. 116.

¹¹ FLA. CONST. art. IV, § 1(a).

¹² John Ellis Bush Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 99–100.

¹³ FLA. STAT. ch. 102.091 (1999).

¹⁴ John Ellis Bush Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 117.

¹⁵ See chaps. 1, 2, and 6.

¹⁶ FLA. STAT. ch. 97.012 (1999).

¹⁷ *Id.*

¹⁸ Katherine Harris Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 244.

¹⁹ *Ibid.*, p. 241.

provided by the Florida Constitution and the laws of the state, "the Department of State is responsible for the qualification of candidates for state and federal office and for district offices where the district comprises more than one county; for campaign finance reporting for candidates who qualify with the division; and for maintaining a central voter file."²⁰ Secretary Harris characterized her authority over the administration of elections as "ministerial" and stated, "[W]e attempt to achieve uniformity in the interpretation of the election code, but we are without authority to direct the conduct of county supervisors of elections."²¹

It is obvious that the county supervisors do not have unilateral authority over the administration of elections and that the secretary of state has substantial authority over the process. For example, the secretary of state is required to adopt rules establishing standards for voting systems, but the county supervisors are to establish written procedures to ensure the accuracy and security of voting systems and procedures used in their county.²² The voting systems must be certified by the secretary of state, but decisions about which system to use are made by the supervisors of elections.

The secretary of state's testimony before the Commission describing her authority over election matters as "ministerial" and, therefore, limited, is in sharp contrast to the position she took before the Supreme Court. The secretary of state's view of her role as limited in election matters also seems to be in conflict with the legal power given to her and as enunciated by the Supreme Court. Finally, her views expressed at the Commission hearing contrast with the power she wielded over election matters when she chose to exercise her authority.

In *Bush v. Gore*,²³ the secretary of state, in arguing against further manual recounts, rather than downplaying her authority over election matters as limited or merely ministerial, maintained that it was her office's Division of Elections that was "charged with interpreting and enforcing the Florida Election Code."²⁴ In effect,

the secretary of state argued that because the legislature gave the secretary of state such broad authority over election matters, her office's interpretations of the Florida election law should be given deference.

The Supreme Court repeatedly emphasized in *Bush v. Gore* that the secretary of state has tremendous authority over Florida election matters. "Importantly, the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State."²⁵ "The legislature has designated the secretary of state as the 'chief election officer,' with the responsibility to '[o]btain and maintain uniformity in the application, operation, and interpretation of the elections law.'"²⁶ The Supreme Court agreed, finding the secretary of state is the "state official charged by the legislature with 'the responsibility to' . . . obtain and maintain uniformity in the application, operation, and interpretation of the election laws. . . ."²⁷

There is no doubt that the secretary of state has power over election matters. Indeed, the secretary of state's actions over the past election demonstrate this authority. Her office issued binding mandates as to when vote totals were to be submitted, whether they could be amended after submission, and what would constitute "[a]n error in the vote tabulation" that could trigger a manual recount of the votes.²⁸

The Florida Election Code gives the secretary of state broad authority over election matters. However, the secretary of state has the discretion to exercise this authority. Jim Smith, co-chairperson of the Governor's Select Task Force on Election Procedures, Standards and Technology, and former attorney general and secretary of state for Florida, provided examples of acting in a proactive manner to attempt to ensure that all citizens of the state could be in a position to vote. His number one priority as secretary of state was election reform.²⁹ While in office, he pushed for initiatives on voter education and voter registration, e.g., same day registration.³⁰

²⁰ *Ibid.*, p. 242.

²¹ *Ibid.*, p. 243.

²² FLA. STAT. ch. 101.015(4)(a-b) (1999).

²³ 531 U.S. 98 (2000).

²⁴ Brief of Florida Secretary of State at 10, *Bush v. Gore*, No. 00-949.

²⁵ *Bush v. Gore*, 121 S. Ct. 525, 534 (2000).

²⁶ *Id.* at 535-36.

²⁷ *Id.* at 536.

²⁸ *Id.*

²⁹ Jim Smith Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 138.

³⁰ *Ibid.*, pp. 164, 169-70, 179.

There is no evidence that in preparation for the November 2000 election the secretary of state focused on similar initiatives. Rather, the evidence leads to the disturbing conclusion the secretary of state chose to exercise authority to ensure the vote count was discontinued and the vote was canvassed after the election, but did little to ensure that eligible Floridians were able to access the polls, be permitted to vote, or have their votes counted.³¹

Division of Elections

When asked about her responsibilities as chief election officer, Secretary Harris testified that she delegated, in a standard delegation authority letter, her statutory duties as chief election officer to the director of the Division of Elections.³² She stated:

I have delegated to Mr. Roberts [director of the Division of Elections] a high level of authority to operate the Division of Elections and to implement the statutory duties of the Division of Elections and the chief election office. Historically and at present, the day-to-day responsibilities for implementing the duties outlined in the Florida Election Code are assumed by the elections division director.³³

To meet his or her statutory duties, the secretary of state, through the Division of Elections, is to provide statewide coordination and direction for interpretation and enforcement of election laws. The Division of Elections issues advi-

sory opinions to supervisors of elections and prescribes rules and regulations in the Florida Administrative Code.³⁴ In practice, the Division of Elections carries out the secretary of state's statutory responsibility as chief election officer.

The ultimate responsibility for ensuring that the secretary of state's statutory obligations are fulfilled remains with the secretary of state and cannot be delegated. At the Tallahassee hearing, Commission Chairperson Mary Frances Berry asked, "You understand that you are the one that's responsible? Delegation takes no responsibility off your shoulders," to which Secretary Harris responded, "I couldn't agree more."³⁵

County Supervisors of Elections

The county supervisors of elections' statutory responsibilities are specified throughout the election code.³⁶ Unlike the secretary of state, county supervisors' statutory duties are not set forth in one statute. County supervisors are guided by various statutes in the election code and opinions issued by the Division of Elections. Opinion DE 98-11 entitled "Voting Systems and Standards for Ballots Used with Such Systems" advises that supervisors are allowed to use their discretion on matters not covered by the election code or the administrative code, as long as their elections are conducted in an efficient manner with "controls, procedures, and audit parameters" in place so the election is "accurate, fair, and capable of being reconstructed in the face of a protest or contest."³⁷ County supervisors may also enact election-related county ordinances provided the ordinances do not conflict with the election code.³⁸

³¹ An example of what could have been done to attempt to ensure that all legal voters would be permitted to vote is illustrated by the actions of the previous secretary of state and director of the Division of Elections. When confronted with inaccuracies in the voter purge lists being prepared by a private contractor that were used by some county supervisors of elections to remove voters, the then director of the Divisions of Elections in a memorandum to all supervisors of elections said, "In short, if there is a reasonable doubt as to the accuracy of the information, you should allow a person to vote." Ethel Baxter, director, Division of Elections, "Central Voter File Update," memorandum, Aug. 14, 1998. Despite continuing problems with the accuracy of these lists, discussed in detail in chapter 5 of this report, there is no evidence of any comparable attempt made by the secretary of state or the director of the Division of Elections during the 2000 presidential election to ensure that supervisors of elections were aware of continuing problems with these lists and to permit individuals to vote if there were reasonable doubts as to the accuracy of the information on the lists.

³² Katherine Harris Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 240.

³³ *Ibid.*

³⁴ *Ibid.*, p. 243. See also Florida Department of State, Division of Elections, "Director's Office," n.d., <<http://election.dos.state.fl.us/about/director.shtml>> (accessed May 24, 2001) (providing a description of the director's responsibilities in the Division of Elections).

³⁵ Katherine Harris Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 64-65.

³⁶ See generally FLA. STAT. ch. 98-106 (1999).

³⁷ Opinion of Florida Division of Elections "DE 98-11: Voting Systems and Standards for Ballots Used with Such Systems," Formal Opinions of the Division of Elections, July 31, 1998, <<http://election.dos.state.fl.us/opinions/de1998.shtml#9811>> (accessed May 24, 2001).

³⁸ Opinion of Florida Division of Elections, "DE 00-07: The Florida Elections Commission's Duty to Enforce Violations of Election-related Provisions of Local Charters and Ordinances," Formal Opinions of the Division of Elections, Sept.

Several supervisors of elections testified before the Commission about their responsibilities concerning the administration of elections and the actions they took to fulfill their duties. Linda Howell of Madison County testified that “the authority for the proper conduct of the elections in our county rests solely on me . . . I have a grave responsibility and duty to every citizen because I am employed by them, and this responsibility is taken seriously by me and I believe it’s taken seriously by the other 66 supervisors in the state.”³⁹

Although state law charges the secretary of state to “[p]rovide voter education assistance to the public,”⁴⁰ Ion Sancho, supervisor of elections for Leon County, testified that it falls on the supervisors to educate voters. He stated:

Efforts to educate voters are left totally up to the counties, with some supervisors of elections doing great jobs if they can get funding from their county commissioners, but with the great majority of supervisors of elections doing the minimum required under the law, buying one newspaper ad the Sunday before the election, which is all that Florida law requires that a supervisor of elections do to educate the voters as to the voting process on Election Day.⁴¹

When asked what guidance the Division of Elections or the state of Florida provided to the county for training election officials and poll workers on voting requirements and procedures, the supervisor of elections for Monroe County answered “None.”⁴² When asked whether the state of Florida or its Division of Elections provided any guidance or funding regarding voter education, the Monroe County supervisor of elections’ response was equally direct, “No.”⁴³

Under Florida law, supervisors of elections and the secretary of state have different respon-

sibilities for administration of elections. The election code requires the secretary of state’s office to provide technical assistance to supervisors of elections.⁴⁴ Ms. Howell testified she “kind of” received the technical assistance she requested from the state.⁴⁵ She said it is difficult to get technical assistance because there are so many different voting systems in the state.⁴⁶ The supervisor of elections for Monroe County testified that the only guidance his county received from the state of Florida or the Division of Elections in accordance with the secretary of state’s statutory obligation to ensure election uniformity was that it must “provide the names of qualified state candidates, and a ballot layout prior to elections.”⁴⁷

When asked about funding from the state for voter education, advertising, or expected problems, Denny Hutchinson, the supervisor of elections for Gadsden County from 1980 through 2000, testified that “there’s an assumption that you’re pretty much operating on your own on an individual county basis.”⁴⁸ Mr. Sancho testified he raised money from the private sector to fund voter education in his county because “as supervisor of elections, you’re sort of left on your own to do this without county resources or state resources, and there are no federal resources available at all.”⁴⁹

Mr. Sancho noted that “the secretary of state’s office asked for in their budget to the Florida legislature \$100,000 for a media budget [for elections], and the governor zero funded that and refused to fund it in his budget.”⁵⁰ L. Clayton Roberts, director of the Florida Division of Elections, concurred that \$100,000 was requested to help advertise and educate the public on voting but that the request did not make it

14, 2000, <<http://election.dos.state.fl.us/opinions/de2000/de00-07.shtml>> (accessed May 24, 2001).

³⁹ Linda Howell, supervisor of elections, Madison County, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 25.

⁴⁰ FLA. STAT. ch. 97.012(6) (1999).

⁴¹ Ion Sancho, supervisor of elections, Leon County, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 18.

⁴² Harry Sawyer, supervisor of elections, Monroe County, Response to Commission’s Interrogatory 13, Apr. 13, 2001.

⁴³ Harry Sawyer, supervisor of elections, Monroe County, Response to Commission’s Interrogatory 14, Apr. 13, 2001.

⁴⁴ FLA. STAT. ch. 97.012(5) (1999).

⁴⁵ Linda Howell Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, Jan. 12, 2001, p. 32.

⁴⁶ *Ibid.*

⁴⁷ Harry Sawyer, supervisor of elections, Monroe County, Response to Commission’s Interrogatory 12, Apr. 13, 2001.

⁴⁸ Denny Hutchinson Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 22, 102. Mr. Hutchinson was the supervisor of elections during the November 2000 election; his term expired in January 2001. *Ibid.*, pp. 9, 21–24.

⁴⁹ Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 35.

⁵⁰ *Ibid.*, p. 34.

through the governor's office to the legislature.⁵¹ Contrary to the sworn testimony of Mr. Roberts, the governor's office maintains "the Governor's Office of Policy and Budget has reviewed this matter and, in consultation with budget officials from the Department of State, has determined that the Department of State never made any such request."⁵²

Supervisors suggested simplifying and standardizing the Florida ballot and called for better guidance from the secretary of state's office on election matters.⁵³ The supervisors of elections are charged with the election in their counties, but their legal requirements do not mandate that they be provided with the resources necessary to meet these obligations.

MAINTAINING THE VOTER LISTS

The State's Obligations

The Florida voter list maintenance requirement places the burden on voters to remove themselves from a statutorily required purge list in order to be eligible to vote. This is a second way the Florida election law fosters disenfranchisement through the lack of specific accountability. The Florida election law requires the Division of Elections develop and maintain a "self-sustaining," "centrally maintained database" that contains voter registration information of all counties in the state.⁵⁴ Additionally, the Division of Elections must provide supervisors of elections with a list identifying each person included in the central voter file as a registered voter in the supervisors' county who—

- is deceased;
- has been convicted of a felony and *has not had his or her civil rights restored*; or

- has been adjudicated mentally incompetent and whose mental capacity with respect to voting has not been restored.⁵⁵

The Division of Elections updates its list annually and forwards the revised list to the county supervisors of elections by June 1 of each year. In fulfilling this duty, the division was required to contract with a private entity "to compare information in the central voter file with available information in other computer databases, including, without limitation, databases containing *reliable* criminal records and records of deceased persons."⁵⁶

Other state agencies have obligations regarding voter list maintenance requirements. The Department of Highway Safety and Motor Vehicles must annually provide a list of individuals who have been "purged from its driver's license database because they have been licensed in another state" to the appropriate supervisor of elections.⁵⁷ On a monthly basis, the Department of Health must provide each supervisor of elections with a list of all deceased persons 17 years of age and older who were residents of the supervisor's county.⁵⁸

The Supervisor of Elections' Obligations

Under the Florida statutory scheme in place in 2000, once supervisors of elections received the list from the state, they were required to "attempt to verify the information provided."⁵⁹ The statute continued, "If the supervisor *does not* determine that the information provided by the division is *incorrect*, the supervisor *must remove* [the voter's name] from the registration books by the next subsequent election . . ."⁶⁰

Without providing funding or appropriate assistance, the state of Florida placed the burdens of list maintenance squarely on the supervisors of elections.⁶¹ The obligations of supervisors of

⁵¹ L. Clayton Roberts Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 269–70.

⁵² See app. VI, Charles T. Canady, general counsel, Office of the Governor for the State of Florida, letter to Edward A. Hailes, Jr., general counsel, U.S. Commission on Civil Rights, June 6, 2001, pp. 6–7.

⁵³ See Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 23.

⁵⁴ FLA. STAT. ch. 98.097 (1999).

⁵⁵ FLA. STAT. ch. 98.0975(1) (1999) (emphasis added). The list contains the name, address, date of birth, race, gender, and any other information identifying the voter. *Id.*

⁵⁶ FLA. STAT. ch. 98.0975(2)–(3)(a) (1999) (emphasis added). This provision of the law was changed by the Florida Election Reform Act of 2001. See Epilogue.

⁵⁷ FLA. STAT. ch. 97.057(7)(1) (1999).

⁵⁸ FLA. STAT. ch. 98.093(1) (1999).

⁵⁹ FLA. STAT. ch. 98.0975(4) (1999).

⁶⁰ *Id.* (emphasis added).

⁶¹ See chap. 4.

elections include receiving information from numerous sources and using it to purge the voter lists. According to Florida laws, supervisors of elections are obligated to do the following:

- Use registration list maintenance forms prescribed by the Department of State that allow voters to confirm their addresses and receive information on how to register in their new jurisdiction(s) if they moved.⁶² Voters who do not return an address confirmation final notice and do “not offer to vote by the second general election thereafter . . . will be removed from the voter registration books.”⁶³
- Conduct a biennial “general registration list maintenance program to protect the integrity of the electoral process by ensuring the maintenance of accurate and current voter registration records.”⁶⁴ The U.S. Postal Service may supply change-of-address information.⁶⁵ Supervisors may determine change-of-address information from “returned nonforwardable return-if-undeliverable” mail sent to registered voters in the county, and “returned nonforwardable return-if-undeliverable” mail sent to voters who have not participated in two years or from jury notices signed by the voter indicating a new address.⁶⁶ Voters who have not responded to an address confirmation final notice within 30 days are placed on an inactive list.⁶⁷
- Require Floridians to produce evidence at a show cause hearing if the supervisor believes that the individual is under 18 years of age, not a U.S. citizen, is a fictitious person, or has listed an address other than his or her legal residence.⁶⁸

⁶² FLA. STAT. ch. 98.055(2)(c)(1) (1999).

⁶³ FLA. STAT. ch. 98.055(2)(b) (1999).

⁶⁴ FLA. STAT. ch. 98.065(1)–(3) (1999). The registration list program must be conducted in each odd-numbered year and no later than 90 days prior to any federal election.

⁶⁵ FLA. STAT. ch. 98.065(2)(a) (1999).

⁶⁶ FLA. STAT. ch. 98.065(2) (1999); FLA. STAT. ch. 98.065(4) (1999). See also FLA. STAT. ch. 98.075(2) (1999) (providing that supervisors may send address confirmation requests to voters believed to have moved from their legal residences).

⁶⁷ FLA. STAT. ch. 98.065(5) (1999). Voters on the inactive list should be allowed to vote and change their names and addresses at the polls. *Id.*

⁶⁸ FLA. STAT. ch. 98.075(3) (1999).

- Receive from each clerk of circuit court a list of persons convicted of a felony and a list of persons adjudicated mentally incapacitated with respect to voting during the previous month.⁶⁹
- Receive from the Department of State any listing of persons convicted of a felony in federal court upon receipt of the information from the United States attorney.⁷⁰

The Voter's Burden to Prove Innocence

The use of the purposefully crafted double negative in the list maintenance provision of the Florida Election Code created an obvious impact on the voter.⁷¹ It is noteworthy that inaction by an eligible voter triggers his or her removal from the registration list. Once a voter's name appeared on this list, even if by gross error, the burden was shifted to the voter to prove his or her right to vote.⁷² In some cases this could result in the voter being subject to fingerprinting in order to prove that he or she was erroneously placed on this list.⁷³ Even without considering the practical impact of how these lists are compiled, the statute on its face renders the eligible voter vulnerable to disenfranchisement because it placed the burden of attempting to verify proper placement on the purge list on already underfunded county supervisors.⁷⁴

⁶⁹ FLA. STAT. ch. 98.093(2) (1999).

⁷⁰ FLA. STAT. ch. 98.093(3) (1999).

⁷¹ The double negative was found in the Florida Election Code language that provided, “If the supervisor *does not* determine that the information provided by the division is *incorrect*, the supervisor must remove from the registration books by the next subsequent election [the voter's name].” FLA. STAT. ch. 98.0975(4) (1999) (emphasis added). This provision was changed by the Florida Election Reform Act of 2001. See Epilogue.

⁷² See David Leahy, supervisor of elections, Miami-Dade County, Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 315. David Leahy has been the supervisor of elections for Miami-Dade County since 1981. *Ibid.*, pp. 312–13. See also David Leahy, supervisor of elections, Miami-Dade County, Response to Commission's Interrogatory 8, Apr. 10, 2001 (explaining that if name is on the felon list erroneously, voter must provide response or proof).

⁷³ Linda Howell Testimony, Tallahassee Verified Transcript Jan. 12, 2001, p. 43. David Leahy, Response to Commission's Interrogatory 8.

⁷⁴ See chap. 5.

CONCLUSION

The ability of any state's citizens to participate fully and fairly in elections, without discrimination, is driven by the state's election laws and those laws' ability to ensure some uniformity in the election processes and procedures. Florida is no exception. In theory the Florida Election Code provides that authority. The governor is to ensure that all laws, including election laws, are faithfully executed.⁷⁵ The secretary of state is designated as the "chief election officer of the state" whose express statutory obligation is to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws."⁷⁶

In practice, this authority can be either delegated to the point of constructive nonexistence or exercised on such a discretionary basis as to be arbitrary. The end result is a system that delegates to the county supervisors of elections, who are subject to the budgetary and political constraints placed upon them by 67 separate county governments, the duty to ensure state-wide uniformity in election matters—a system that was so devoid of effective checks and balances that it failed many voters in the 2000 presidential election.

Similarly, while the duty for developing and maintaining a "centrally maintained database"

containing voter registration information for the entire state is placed upon the state, the responsibility for verifying that the database is accurate is delegated.⁷⁷ Florida state law shifted the responsibility for identifying individuals to be purged from this list initially to a private contractor⁷⁸ and then placed it on the shoulders of the county supervisors of elections.⁷⁹ Yet, this law provided no requirement to ensure the accuracy of the data provided in these purge lists.⁸⁰ Florida state law ultimately placed the burden of ensuring the accuracy of these purge lists on the voter.⁸¹

Chapter 1 demonstrates that persons of color stand a greater chance of appearing on the purge list than other persons and, more disturbingly, persons of color stand a greater chance of appearing on the purge list in error.

The Florida process ensures that some voters will be wrongfully placed on the purge list and, ultimately, denied their right to vote. Further, it provides that these denials of the right to vote will fall most squarely on persons of color. These statutory provisions that mandate responsibility without accountability are obviously key ingredients in a statutory recipe for voter disenfranchisement.

⁷⁵ FLA. CONST. art. IV, § 1(a).

⁷⁶ FLA. STAT. ch. 97.012 (1999).

⁷⁷ FLA. STAT. ch. 98.097 (1999).

⁷⁸ FLA. STAT. ch. 98.0975(3)(a) (1999).

⁷⁹ FLA. STAT. ch. 98.0975(4) (1999).

⁸⁰ FLA. STAT. ch. 98.0975 (1999).

⁸¹ FLA. STAT. ch. 98.0975(4) (1999).

CHAPTER 4

Resource Allocation

*I do know how to shop and bring home the bacon, but again, my concern is having the resources so that I can get my job done.*¹

The state of Florida annually provides funds for the state's election needs. The county supervisors of elections are responsible for providing citizens with election services; however, they receive limited state funding and depend primarily on appropriations from their respective boards of county commissioners for resources. As a result, factors such as varying county budgetary limits and the lack of state funding initiatives to supervisors of elections offices result in unequal election resources and the possibility of voter disenfranchisement.

WHO PAYS?

The State Budget Process

Financial resources are allocated for public needs through Florida's budget process. The state's budgetary fiscal year begins in July, while its legislature convenes annually from March to May.²

The budgetary process begins when Florida's state agencies present their appropriation requests to the governor each September. These requests are based on agencies' perceptions of their expected long-term program planning needs. The Governor's Office of Policy and Budget analyzes these requests and sends its

findings to the governor.³ The governor then compares the proposed budgets with the state's available financial resources and program priorities and submits his fiscal recommendations to the Florida legislature in January.⁴ During the next phase of the budget development process, the legislature reviews the governor's proposed budget and receives feedback from members of the public and agency officials in reference to anticipated fiscal allocations.⁵ Lastly, as part of Florida's legislative session, the state House of Representatives and the Senate each vote on general appropriations bills for the state.⁶ The speaker of the House of Representatives and the president of the Senate ultimately sign the new General Appropriations Act.⁷ The budgetary process is not completed until the governor signs the act.⁸ Although the governor of Florida has the authority to veto funding for line item budgetary requests, a majority vote in Florida's House of Representatives and the Senate is still required to pass the state's budget.⁹

¹ Miriam M. Oliphant, supervisor of elections, Broward County, Testimony before the U.S. Commission on Civil Rights, Miami, FL, Feb. 16, 2001, Verified Transcript, p. 287.

² American Chemical Society, Office of Legislative and Government Affairs, "Florida Budget Process," n.d., <<http://www.acs.org/government/stateinfo/flbg.pdf>> (accessed Mar. 20, 2001) (hereafter cited as ACS, "Florida Budget Process"). Although the legislative session is limited to 60 calendar days, the duration of the session may be extended by a three-fifths vote in the state House of Representatives and the Senate.

³ My Florida.com, "Budget Process Overview," Florida e-Budget, n.d., <<http://www.ebudget.state.fl.us/overview.asp>> (accessed Mar. 20, 2001).

⁴ Ibid.

⁵ Ibid.

⁶ Ibid. (providing, "Differences between the Senate and the House budgets are resolved in a joint conference committee").

⁷ Ibid.

⁸ Ibid. Once the legislature passes the budget, the new appropriation becomes valid beginning each July 1.

⁹ ACS, "Florida Budget Process"; see also My Florida.com, "Budget Process Overview"; L. Clayton Roberts, director, Division of Elections, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 269. Mr. Roberts cited the example of Governor Bush not approving the division's request for voter education funding. As a result, the request was not presented to the Florida legislature for approval.

Appropriations to the Division of Elections

According to Secretary of State Katherine Harris, the Division of Elections submits its budget requests to Florida's legislature and the governor's office, in accordance with the state's appropriations process. Although the secretary of state does not directly communicate with the governor on budgetary issues, the division directors of her office interact with the governor's staff on fiscal concerns.¹⁰ The secretary of state also has the opportunity to submit a supplemental budget that can include requests for additional funding to Florida's counties.¹¹

In terms of overall fiscal authority, Governor Bush testified before the Commission that he is responsible for funding election needs in the state, while the secretary of state is directly accountable for the Division of Elections. He explained that "funding to provide adequate training or for the [voting] machinery is determined by local county commissioners."¹² However, Governor Bush anticipated that this policy might be changed with the advent of recommendations from the Governor's Select Task Force on Election Procedures, Standards and Technology, "recognizing that some counties handled this job, because of their machines, in a way that yielded a dramatically different result than others."¹³

Secretary Harris testified that her office is divided into seven divisions, including one for elections. This division is managed by a director—L. Clayton Roberts—who is responsible for implementing the secretary of state's mandates. Ms. Harris is then accountable for supervising the operations and delegating daily operational functions to the division directors.¹⁴ The director's office of the Division of Elections serves as

the secretary of state's designee for functions pertaining to elections, such as:

- offering voter education assistance to the public;
- coordinating statewide workshops for supervisors of elections on election law updates;
- supervising and approving continuing education training courses for supervisors of elections;
- maintaining the state's voter fraud hotline;
- educating the public on voter fraud; and
- providing technical assistance on voter education and election training services for county supervisors of elections.¹⁵

In terms of resources allocated to the secretary of state's office, in 2001, the office employs 709 full-time-equivalent employees (FTEs), with a \$161 million budget.¹⁶ Her office generates approximately \$171 million in revenue.¹⁷

The following tables portray the Division of Elections' budget appropriations from fiscal year 1997 through fiscal year 2001. According to the data provided to the Commission, the division was appropriated the greatest amount of funding of approximately \$6.1 million in FY 1999–2000. The data also indicate that during the period of FY 1997 through FY 2001, the division employed the most full-time-equivalent employees (47) in FY 1997–FY 1998.¹⁸

¹⁰ Katherine Harris, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 12, 2001, Verified Transcript, pp. 280–81.

¹¹ *Ibid.*, p. 281.

¹² John Ellis Bush, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 11, 2001, Verified Transcript, pp. 98–99.

¹³ *Ibid.*, p. 99. See the Governor's Select Task Force on Election Procedures, Standards and Technology, *Revitalizing Democracy in Florida*, Mar. 1, 2001. The task force noted that the state of Florida should provide its counties with adequate funding in order to develop new voting systems and high standards to ensure that voters understand how to use these systems.

¹⁴ Katherine Harris Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 239–40.

¹⁵ Florida Department of State, Division of Elections, "About Us—Director's Office," n.d., <<http://www.election.dos.state.fl.us/about/director.shtml>> (accessed May 9, 2001). The office also interprets Florida's election laws, provides technical assistance to supervisors of elections on voting systems, offers procedural training to all relevant state agencies on implementing the National Voter Registration Act of 1993, collects statistics on the effectiveness of Florida's election laws, ensures that voter registration applications and forms comply with the parameters of the Voting Rights Act of 1965, and establishes rules to execute the state's election law provisions. *Ibid.*

¹⁶ Katherine Harris Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 267, 277–78.

¹⁷ *Ibid.*, pp. 277–78.

¹⁸ *But see* L. Clayton Roberts, director, Division of Elections, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 269. Mr. Roberts testified that previously the Division of Elections had 70 full-time-equivalent employees.

TABLE 4-1**Division of Elections Appropriations for Fiscal Years 1999–2000 and 2000–2001**

Fiscal year	Agency's requested budget	State appropriation	Total FTEs
2000–2001	\$5,871,581	\$4,600,000	39
1999–2000	\$6,616,019	\$6,108,016	43

NOTE: According to Secretary Harris's testimony at the Commission hearing, however, in 2001, the Division of Elections has 30 full-time-equivalent employees and is allocated approximately \$5.4 million.

SOURCES: State of Florida, BPEADL01 LAS/PBS System, Budget Period 1989–2000, Appropriation Category Summary, Exhibit A—"Issue Summary," May 14, 1999 (excerpt); State of Florida, BPEAD L01 LAS/PBS System, Budget Period 1990–2001, Exhibit D-3A—"Expenditures by Issue and Appropriation Category." The figure \$4,600,000 is from the Florida government's *Office Program Policy Analysis and Government Accountability*, n.d., <<http://www.opppa.state.fl.us/profiles/4098/print.asp>> (accessed Mar. 17, 2001) For FY 2000–2001, the state appropriated \$4.6 million in general revenue, and \$1.3 million in trust funds.

TABLE 4-2**Division of Elections Appropriations for Fiscal Year 1998–1999**

Fiscal year	Approved budget
1998–1999	\$3,974,746

NOTE: The approved unreleased budget for the Division of Elections was \$2,073,372 in FY 1998–1999.

SOURCE: State of Florida, BAALRL01 LAS/PBS System, 1997 Appropriation Ledger, Detail Report by Fund/Category, Tentative Original Approved Budget, June 29, 1997.

TABLE 4-3**Division of Elections Appropriations for Fiscal Year 1997–1998**

Fiscal year	Budget	Total FTEs
1997–1998	\$3,430,634	47

SOURCE: State of Florida, BPEXBL01 LAS/PBS System, Budget Period: 1989–2000, Exhibit B—"Appropriation Category Summary," May 14, 1999 (excerpt).

In addition, Ms. Harris testified before the Commission that "cuts in the Division of Elections occurred prior to my election as secretary of state [in 1998]."¹⁹ The above data indicate,

¹⁹ Katherine Harris Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 268. See also ABCnews.com, "Running the Recount—GOP Loyalist Vows Fairness in Overseeing Florida Tally," Nov. 15, 2000, <http://abcnews.go.com/sections/politics/dailynews/election_harrisbio001113.html>

however, that the Division of Elections also experienced a decrease in state appropriations and full-time equivalents from FY 1999–FY 2000 to FY 2000–FY 2001.

THE STATE'S CONTRIBUTION TO FLORIDA'S ELECTION RESOURCES

The state of Florida provides minimal, if any, direct financial support for election resources. In fact, Jane Carroll, former supervisor of elections for Broward County, maintained that she did not believe there was a legal provision that would have allowed her to request additional funding from the state's Division of Elections, even if the financial resources were available.²⁰ James Roberts, Monroe County administrator, reinforced Ms. Carroll's perspective, by stating, "There is no provision in the state statute that automatically allows Monroe County to ask the state of Florida to provide money for elections."²¹ However, Mr. Roberts indicated that legislative or administrative budget processes could be used to request supplemental funding for elections.²²

Other current and former government officials expressed similar positions regarding the state's contribution to local election needs:

- Linda Howell, supervisor of elections for Madison County, did not ask the Division of Elections for any additional funding for her county, because she knew the efforts would be futile.²³
- Harry Sawyer, supervisor of elections for Monroe County, indicated that his office relies on the Division of Elections for limited needs. These include providing a list of

(accessed Mar. 27, 2001) (Secretary Harris was elected secretary of state in 1998).

²⁰ Jane Carroll Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 304–05. Additionally, Ms. Carroll explained, "We have an unfunded mandate statute that says that the Florida legislature cannot mandate that the local governments or counties in particular spend dollars mandated by the Florida legislature if it goes above the amount of \$500,000." Ibid.

²¹ James L. Roberts, Monroe County administrator, Response to Commission's Interrogatory 6, Apr. 9, 2001.

²² Ibid.

²³ Linda Howell Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 102.

qualified election candidates, legal advice, and updates on legislation.²⁴

- Clay Roberts, director of the Division of Elections, testified that the state of Florida does not provide the counties with any funding for voter outreach/education purposes.²⁵

The Division of Elections did, however, initiate some level of voter education outreach to Florida residents.²⁶ In April 2000, the division entered into a contractual agreement with the Florida Cable Telecommunications Association to create a 30-second public service announcement (PSA) in English to educate Florida residents on voter fraud.²⁷ The Division of Elections

²⁴ Harry Sawyer Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 344–45.

²⁵ L. Clayton Roberts Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 287. *But see* Katherine Harris Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 291. Secretary Harris believed that the Florida legislature should be more responsive to local funding needs, due to the closeness of the 2000 presidential election.

²⁶ *See* Ion Sancho, supervisor of elections, Leon County, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 57. Mr. Sancho testified that in 1992, Jim Smith, in his former capacity as the secretary of state, made arrangements with the Florida Association of Broadcasters to obtain free 30-second television air time for voter outreach purposes. The county supervisors of elections then used this air time to educate Florida residents on voting. According to Mr. Sancho, “[w]e used some of those same spots in 1994, but no secretary of state after that has provided any resources like that to the Florida Association of Supervisor[s] of Elections or elections in general.” *Ibid.*, pp. 57–58.

²⁷ L. Clayton Roberts, director, Division of Elections, “Provider Contract,” Apr. 7, 2000, Bates No. 0014713; Katherine Harris, secretary of state, Florida Department of State, “General Requisition,” Apr. 11, 2000, Bates No. 0014737. *See* L. Clayton Roberts Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 270–71. *See also* Florida Outdoor Advertising Association, Inc., “Contract for Statewide Donated Advertising Space,” Apr. 21, 2000, Bates No. 0015151. (The Division of Elections spent \$51,000 for the installation of at least 200 billboards from August 2000 through November 2000. These signs announced “Stamp Out Voter Fraud”). *See generally* Florida Department of State, Division of Elections, “General Requisition,” Jan. 6, 1999, Bates No. 0015389; Florida Department of State, Division of Elections, “General Requisition,” Jan. 26, 1999, Bates No. 0015390; the Print Shop of Tallahassee, Inc., “Invoice,” Aug. 27, 1999, Bates No. 0015473; the Print Shop of Tallahassee, Inc., “Invoice,” Aug. 13, 1999, Bates No. 0015491 (Previously, in 1999, the Division of Elections expended approximately \$14,262 for voter fraud notice posters in English and Spanish. The posters were ordered for distribution to county supervisors of elections offices).

paid \$20,000 for the PSA.²⁸ The announcement aired between 6 a.m. and midnight from August 1, 2000, through November 7, 2000, in nine primary cable television areas in Florida.²⁹

Subsequently, in August 2000, the Division of Elections also contracted with Next Generation Network, Inc., a for-profit Minnesota corporation to provide locations to display voter fraud public service announcements in Florida.³⁰ Next Generation Network owns and operates video monitors in 706 convenience stores in the state, which are primarily used to broadcast messages of interest to the general public.³¹ Pursuant to the division’s contract with Next Generation Network, the state paid \$11,469.50 for these services.³² Similarly, the director of the Division of Elections testified before the Commission that “[w]e provide posters to the supervisor of elections in Spanish and English, which are posted in the polling place that explain to the voters the basics of voting. . . . As far as the mechanics of voting and showing voters how to vote, we do not participate in that because different counties have different systems.”³³

²⁸ L. Clayton Roberts, “Provider Contract,” Bates No. 0014713.

²⁹ *Ibid.*

³⁰ L. Clayton Roberts, director, Division of Elections, “Contract for Services,” Aug. 8, 2000, Bates No. 0014837; Florida Department of State, Division of Elections, Bates No. 0014853. The advertisement stated, “Call (toll free) 1-877-868-3737 [VOTER FRAUD] [Division of Elections] [Florida Department of State.” *Ibid.* *See also* Charlotte Brand, director and chief executive officer, Florida Outdoor Advertising Association, Inc., “Contract for Statewide Donated Advertising Space,” Apr. 21, 2000, Bates No. 0015151.

³¹ L. Clayton Roberts, “Contract for Services,” Bates No. 0014837. *See generally* L. Clayton Roberts, “Contract for Services,” Bates No. 0014838. “The Vendor [Next Generation Network] shall broadcast the Division’s announcement in three, 3-day broadcast periods for a total of nine (9) days coinciding with two days before and the day of the first primary, the second primary and the general election. Each broadcast period shall consist of 72 hours beginning at midnight (12:00 a.m.) on the commencement date and ending at 11:59 p.m. on the termination date. . . . During each broadcast period the Division’s announcement shall be broadcast at least 500 times per day at each of the 706 Florida locations.” *Ibid.*

³² L. Clayton Roberts, “Contract for Services,” Bates No. 0014838.

³³ L. Clayton Roberts Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 286–87. *See also* Ion Sancho, supervisor of elections, Leon County, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 101 (indicating that the only voter outreach assistance the state of Florida provides is

The Division of Elections then entered into an agreement in September 2000 with the Victory Group, Inc., a Maryland communications and media firm, to produce a 30-second television commercial entitled "The Power" in order to reinforce the "Get Out to Vote" campaign in Florida.³⁴ General Norman Schwartzkopf appeared in this advertisement.³⁵ The total cost to the Division of Elections for the commercial was \$34,500.³⁶

In spite of these efforts, some members of the public remained skeptical about the effectiveness of the Division of Elections' voter outreach. According to Tony Hill, a former state representative, "[t]he ad featured [Secretary of State Katherine Harris] at the beaches and thoroughbred horses and Norman Schwartzkopf. The message was not directed at voters least likely to vote. The code was protection of freedom, the question is for whom."³⁷ Mr. Hill added that the public service announcement was "a waste of time."³⁸ In contrast, Clay Roberts indicated that his office did not receive any requests from local county election officials for state assistance for their election preparation initiatives.³⁹

Nevertheless, one supervisor of elections maintained that the foundation was already established for the state's inadequate allocation of Election Day resources prior to the 2000 election.⁴⁰ According to Ion Sancho, supervisor of elections for Leon County, when Katherine Harris was campaigning for her current position as secretary of state, her campaign platform did not

focus on reforming Florida's election process.⁴¹ Instead, the emphasis was placed on other state program areas, such as cultural affairs and international trade relations. In addition, once Ms. Harris was elected as secretary of state, a number of her Division of Elections staff left their positions and were replaced by new and inexperienced employees.⁴² Mr. Sancho concluded these two factors contributed to why county supervisors of elections "didn't depend on that office this year because simply they were too new. We knew more about the [elections] process than they did."⁴³

COUNTY CONTRIBUTIONS TO FLORIDA'S ELECTION RESOURCES

Florida's county supervisors of elections generally anticipate a lack of state financial resources for election needs, such as voter education and outreach. As a result, county supervisors either try to seek financial assistance from their respective boards of county commissioners, supplement budgetary needs by other means, or have inadequate voter education and outreach initiatives in their counties. The supervisors of elections view voter education and outreach, particularly for first-time voters, as critical elements for successful election outcomes. For example, Ion Sancho maintained that voter education could have greatly reduced the number of voter errors made on Election Day.⁴⁴ According

supplying the counties with voter education pamphlets and posters).

³⁴ L. Clayton Roberts, director, Division of Elections, "Contract for Production of 'Get Out to Vote' Public Information Campaign," Sept. 9, 2000, Bates No. 0014745; the Victory Group, Inc., "Description of Services," Sept. 30, 2000, Bates No. 0014810.

³⁵ Katherine Harris, secretary of state, Florida Department of State, "[Draft] Letter to Station Managers," Oct. 6, 2000, Bates No. 0014792.

³⁶ The Victory Group, Inc., "Description of Services," Bates No. 0014810.

³⁷ Tony Hill Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 373.

³⁸ Ibid.

³⁹ L. Clayton Roberts Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 289-90.

⁴⁰ Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 56.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid. See also Harry Sawyer, supervisor of elections, Monroe County, Response to Commission's Interrogatory 14, Apr. 13, 2001 p. 3 (responding that the Division of Elections or the state of Florida did not provide any guidance or funding for voter education in Monroe County).

⁴⁴ Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 17-18. Mr. Sancho maintained that not only do new voters require voting education, but so do voters who are new to the jurisdiction and unfamiliar with the local voting system. He testified, "I don't think there was any conscious targeting or racial discrimination on the part of supervisors. I think some of the effects of not having the kinds of monies necessary to do ongoing voter education programs has the effect of in fact impacting on minorities and young people and senior citizens because this was an election that brought out voters that voted maybe only one time in the last 10 years." Ibid., pp. 52-54 (Mr. Sancho commended the NAACP for its \$7 million voter participation campaign, but said voter participation is not the responsibility of advocacy groups. He said states and counties must merge to be the predominate leaders in the area of voter education and participation).

to Mr. Sancho, if county supervisors of elections can get adequate funding from their respective boards of county commissioners, then they can usually offer sufficient outreach to their communities. He believes that in most instances, the supervisors of elections will satisfy the minimum state legal requirement of purchasing an advertisement in the newspaper to educate voters on the election process.⁴⁵

Similarly, supervisors of elections are often unsuccessful in obtaining sufficient funding from their respective boards of county commissioners for election needs. In addition, some counties have larger budgets for voting equipment, while smaller Florida counties do not have the resources to pay for similar equipment.⁴⁶

According to Denny Hutchinson, former Gadsden County supervisor of elections, county commissioners do not consider supervisors of elections offices as high priority funding needs.⁴⁷ Ms. Howell and Mr. Sancho also agreed with Mr. Hutchinson's testimony by stating that supervisors of elections' salaries are less than those of other Florida constitutional officers.⁴⁸ Jim Smith, co-chairperson of the Task Force on Election Procedures, Standards and Technology, testified that the task force heard testimony from various supervisors of elections who had requested that their county governments provide them with more modern voting equipment. Those requests were denied.⁴⁹

⁴⁵ *Ibid.*, pp. 17–18. See FLA. STAT. ch. 98.255 (1999) (providing "Each supervisor of elections is authorized to provide voter educational programs and materials of a nonpartisan nature in his or her county as he or she may deem appropriate").

⁴⁶ Jim Smith Testimony, co-chairperson of the Governor's Select Task Force on Election Procedures, Standards and Technology, Tallahassee Verified Transcript, Jan. 11, 2001, p. 165. See also the Florida Election Reform Act of 2001, S.B. 1118, 103d Reg. Sess. (Fla. 2001) at 95–96. The act uses factors such as the population size and number of voting precincts in each county to determine budget appropriations for local voting systems, voter education programs, and poll worker recruitment and training initiatives. Accordingly, for the purposes of this discussion, the Commission assumes that these factors were previously employed to appropriate counties' budgets to determine allocations for election purposes. See also Epilogue.

⁴⁷ Denny Hutchinson Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 104.

⁴⁸ Linda Howell Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 105–06; Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 105–06.

⁴⁹ Jim Smith Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 159.

In those instances when supervisors of elections are unsuccessful in obtaining funding from boards of county commissioners, there is little, if any, recourse.⁵⁰ Jane Carroll, former supervisor of elections for Broward County, explained that the supervisor of elections position is the only constitutional office that has no appeals process to challenge the approved funding amount.⁵¹ Her testimony described how in 1993, when the Broward County Board of County Commissioners denied her budget request for new voting machinery to replace the county's existing punch card voting system, there were no state or federal funds available to finance her request.⁵²

Similarly, Miriam M. Oliphant, the current supervisor of elections for Broward County, also confronts obstacles in obtaining sufficient funding for her county's voting needs. During the time of the Commission's Miami hearing, Ms. Oliphant had anticipated sufficient financial support from Broward County. An excerpt from the hearing transcript follows:

COMMISSIONER WILSON: My last question . . . is your budget. How have you tried to increase it and have you put forth plans to increase it and by how much?

MS. OLIPHANT: Yes, I have had the opportunity to speak with the [Broward] County administrator and he has given me [the] go ahead . . . to . . . prepare a budget. I'm looking at more outreach education [and] community voter registration. . . .

I'm concerned that when I go into a community, whether it is the Haitian American community or Hispanic community, that I have the diversity that I need and the professional communication to go in there and communicate. . . . I am looking to expand staff and bring in the resources into [the supervisor of elections] office so that we can go out into the community and . . . communicate and educate people on voter education awareness.

I right now operate on a \$5 million budget with approximately . . . 61 employees. . . . I am antici-

⁵⁰ See Harry Sawyer, supervisor of elections, Monroe County, Response to Commission's Interrogatory 17, Apr. 13, 2001, p. 4 ("At the present time we do not have a mechanism to challenge Monroe County's refusal of a submitted budget from the supervisor of elections office. We are working on a bill that would provide for such a challenge").

⁵¹ Jane Carroll Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 279–80.

⁵² *Ibid.*, pp. 270–71.

pating with the new voting equipment that we're going to be looking at some additional dollars. . . . [T]here's going to be additional dollars for technology, for the training of the people, and other outreach services.

So we're talking, and I mentioned [this] to the chairman of the county commission, maybe an additional \$2 million.⁵³

Despite the widespread call for election reform in Florida, the Broward County Board of County Commissioners recently requested the supervisor of elections office reduce its budget submission 5 percent for fiscal year 2002, due to expected economic difficulties in the county.⁵⁴ Moreover, the board—

acknowledge[d] the need to replace the current voting system and appreciated [Ms. Oliphant's] recent correspondence regarding the ballpark cost figures pending the outcome of the State legislature's decisions on this matter. [Mr. Desjarlais] encourage[d] [Ms. Oliphant] to search for efficiencies in [Broward County's] current operations and look toward the reprioritization of . . . existing funds to support any operating improvements that [she] deem[s] critical.⁵⁵

In response, the Broward County Supervisor of Elections Office emphasized the need for appropriate county funding to support voter out-

⁵³ Miriam M. Oliphant Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 286–88. See also John E. Rodstrom, chairman, Broward County Board of County Commissioners, Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 278–79 (describing how the board will be working with the supervisor of elections office for Broward County to address those concerns that arose during the 2000 presidential election); Interview Report, telephone interview with John E. Rodstrom, chairman, Broward County Board of County Commissioners, Jan. 30, 2001, p. 2 (indicating that the board usually “rubber stamps” the Broward County Supervisor of Elections Office’s budget proposals).

⁵⁴ Roger J. Desjarlais, county administrator, Broward County Board of County Commissioners, letter to Miriam M. Oliphant, Mar. 13, 2001; Miriam M. Oliphant, supervisor of elections, Broward County, memorandum to Roger J. Desjarlais, Mar. 22, 2001.

⁵⁵ Roger J. Desjarlais, county administrator, Broward County Board of County Commissioners, letter to Miriam M. Oliphant, Mar. 13, 2001 (“If the economy cools even more than anticipated or the State or Federal governments cut funding to counties or force additional unfunded mandates, we will undoubtedly need to look for reductions in our base budget which is why I am asking all tax supported agencies to prepare five percent reduction plans to accompany the budget submission”).

reach efforts to multicultural county residents, the replacement of the current punch card voting and tabulation system, advertising and public service announcements, initiatives that address systemic problems that occurred during the 2000 presidential election, and staffing increases.⁵⁶ Ms. Oliphant ultimately advised the Broward County board that she may need to again request supplemental funding from the board, if pending state legislation has a negative impact on her office’s fiscal year 2002 budget appropriations.⁵⁷

Another supervisor of elections has an alternative method of addressing reduced budget requests. Harry Sawyer of Monroe County contended that denied or reduced proposed budgets could be addressed by interpreting current Florida statutes that might allow redress.⁵⁸ Specifically, a Florida statutory provision requires that “each supervisor of elections shall certify to the board of county commissioners, or county budget commission . . . a proposed budget of income and expenditures to fulfill the duties, responsibilities, and operation of the office of the supervisor of elections for the ensuing fiscal year of the county.”⁵⁹ Moreover, a subsequent provision states, “The *independence* of the supervisor of elections shall be preserved concerning the purchase of supplies and equipment; the selection of personnel; and the hiring, firing, and setting of salaries of personnel.”⁶⁰ As a result, Mr. Sawyer suggested that the independent status of his position as a supervisor of elections requires that he must protect his proposed budget in order to fulfill his official duties.⁶¹ He indicated that if Monroe County reduced its supervisor of elections’ office budgetary request in these areas (i.e., supplies and equipment, the selection of personnel, and employee salaries), he would be “entitled to take legal action to bring my budget

⁵⁶ Miriam M. Oliphant, supervisor of elections, Broward County, memorandum to Roger J. Desjarlais, Mar. 22, 2001.

⁵⁷ *Ibid.* See Epilogue.

⁵⁸ See Harry Sawyer, supervisor of elections, Monroe County, Response to Commission’s Interrogatory 17, Apr. 13, 2001, p. 4.

⁵⁹ FLA. STAT. ch. 129.201(1) (1999).

⁶⁰ FLA. STAT. ch. 129.202(2) (1999) (emphasis added).

⁶¹ See Harry Sawyer, supervisor of elections, Monroe County, Response to Commission’s Interrogatory 17, Apr. 13, 2001, p. 4.

in compliance with state law.”⁶² Hence, supervisors of elections who are in similar budgetary scenarios have to devise their own strategies for supplementing unmet financial need or else witness the residents of their counties doing without needed voting resources.

State Support and Election Day Preparations

Similarly, the state provides relatively little, if any, financial support to ensure the supervisors of elections can meet their obligations on Election Day. Instead, the Division of Elections, under the secretary of state, sets forth the minimum requirements to meet these responsibilities. Further, Secretary of State Katherine Harris testified at the Commission hearing that:

As to the basic structure of how elections are conducted in Florida, its underlying foundations are the 67 supervisors of elections. Forty-four of these supervisors are Democrats, 19 are Republicans, three are nonpartisan, and one is a nonpartisan appointed officer. These are public officials that our constitution and statutes hold accountable for (1) carrying out the registration of qualified electors; (2) handling the qualifying process for candidates for county offices and for other local offices with jurisdiction in one county; and (3) conducting the elections, including the hiring and training of poll workers, selecting of poll sites, and purchase and maintenance of any state-approved voting systems.⁶³

While Secretary Harris acknowledged that the Department of State is charged with obtaining and maintaining uniformity in application, operation, and interpretation of election laws, she testified this “goal is achieved by the division’s authority to issue formal and informal advisory opinions to supervisors of elections and through the opportunities to provide training and educational assistance to our supervisors of elections, other agencies, and the public.”⁶⁴

Secretary Harris testified that she delegates the duty to provide technical assistance on voter education and election personnel training services to the Division of Elections because she “consider[s] those people to be the experts and [to] be able to give far greater technical assis-

tance than could I.”⁶⁵ She maintained that while the division does provide voter education and training services, the responsibilities of poll worker training and election matters are left to the supervisors of elections who are “independently elected local officials who conduct elections.”⁶⁶

When the secretary of state requested \$100,000 in funds from the Florida legislature for a media budget to aid in the “Get Out to Vote” efforts of associations in Florida, the governor, according to one supervisor of elections, “zero funded that and refused to fund it in his budget.”⁶⁷ As a consequence, “there was no budget in the state of Florida for voter education which relates to media.”⁶⁸ Thus, counties and their supervisors of elections were required to seek funding from county legislatures or from other fund-raising activities.⁶⁹ Ion Sancho testified that “the Association of Supervisors of Elections went out and raised our own money from private corporations in the attempt to set up some sort of a voter education and voter turnout fund. And essentially that’s how the process has worked in Florida.”⁷⁰

The Commission heard testimony that the Division of Elections does provide technical assistance to supervisors of elections on voter edu-

⁶⁵ *Ibid.*, p. 247.

⁶⁶ *Ibid.*, p. 243.

⁶⁷ Ion Sancho Testimony, supervisor of elections, Leon County, Tallahassee Verified Transcript, Jan. 12, 2001, p. 34. The governor maintains the Department of State never made this request. See app. VI, Charles T. Canady, general counsel, Office of the Governor for the State of Florida, letter to Edward A. Hailes, Jr., general counsel, U.S. Commission on Civil Rights, June 6, 2001, pp. 6–7.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* Mr. Sancho testified that he “personally raised money from teachers, lawyers, and other individuals of Leon County so that Leon County could spend a radio and television advertising budget that was totally separate from what the county [allotted] because the county did not provide much in that area.” *Ibid.*, pp. 34–35.

⁷⁰ *Ibid.*, pp. 34–35. These funds were allocated to a separate voter education advertising budget. See *ibid.*, pp. 57–58. Mr. Sancho noted, “The former Secretary of State Jim Smith contacted the Florida Association of Broadcasters . . . and they did free 30-second television spots that were distributed to the supervisor of elections office, so the supervisors could put 30-second television spots on the television to provide information and motivational information to the voters on voting. That was in 1992. We used some of those same spots in 1994, but no secretary of state after that has provided any resources like that to the Florida Association of Supervisors of Elections or elections in general.”

⁶² *Ibid.*

⁶³ Katherine Harris Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 247.

⁶⁴ *Ibid.*, p. 243.

cation and election personnel training services upon request. The problem, noted one witness, is “from county to county you’ve got so many different voting systems they might can provide that technical assistance for this county . . . [but] then you’ve got to turn around to another county and provide a different type of assistance, and you’ve got . . . 10, 12, or 14 different voting systems in the state of Florida.”⁷¹

The lack of funding, however, continues to be one of the most challenging obstacles that confront Florida’s supervisors of elections. According to Leon County’s supervisor of elections, the paucity of resources not only affected voter education, but also “the hiring and training of Election Day workers, as well as providing polling locations which must be convenient and accessible to our population if we want voters to vote.”⁷² Gadsden County’s supervisor of elections, Shirley Knight, also confirmed this by testifying that there must be more money for training poll workers and additional polling places. In Gadsden County, she noted, people drive “miles and miles” to vote.⁷³

Thus, counties struggle to shoulder the bulk of the responsibility for training poll workers. The counties vary widely in their approaches to poll worker training. As a result, it is unclear whether the training approaches and quantity and quality of instruction offered in different counties were beneficial to their respective poll workers.⁷⁴ For example, in Monroe County, the supervisor of elections holds a half-day training course for all poll workers and additional training for precinct leaders and workers responsible for the AccuVote machines used in the county. Theresa LePore, the supervisor of elections for Palm Beach County, testified:

⁷¹ Denny Hutchinson, former supervisor of elections, Gadsden County Florida, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 22.

⁷² Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 19.

⁷³ Shirley Knight Testimony, Jan. 12, 2001, Tallahassee Verified Transcript, Jan. 12, 2001, p. 28.

⁷⁴ See Marvin Rickles, Jr., precinct deputy, Precinct 74B in Palm Beach County, Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 127, 133–134. Mr. Rickles testified that some poll workers attend three yearly two-hour training classes. Poll workers, however, were given no special preparation for the expected large voter turnout on Election Day. He stated, “They merely go over the book, tell you . . . the duties of the deputy, and that’s the extent of it.” *Ibid.*

I have what I consider—I consider it extensive, my poll workers consider it over-extensive—training of my poll workers. My precinct clerks, the clerks are the ones that are in charge of the precinct, have to attend a two-hour workshop. The inspectors are the ones that give the demonstration, check in the voter, for about an hour and a half. The precinct deputy, who sits at the door greeting people coming in, is about an hour.

The clerk and inspectors, because they’re the ones that actually deal with the voters, I have a Power Point presentation and a poll worker manual which is in the documents that I submitted, detail by detail of how to handle a variety of situations.

First, when the voter comes in, all voters coming in are supposed to be offered a demonstration of the equipment. They’re not forced to take it, but the offer is supposed to be there.

The assistance devices are supposed to be out on the tables if somebody needs it. We also have, in addition to the page magnifier . . . we use punch card obviously—a handicap stylus is what it’s called. It looks like a small tennis ball with a stylus on the end of it so people who might have trouble holding the small punching device can use that to punch their ballots.

I explain to them about if somebody comes in and needs assistance in voting, the procedure to do that. They can bring someone of their own choosing in or two poll workers of the opposite political party to come in and help them.

About the spoiled ballot, the time limit, we go through this in detail.⁷⁵

Nevertheless, Ms. LePore recognized the limitations in training a large number of poll workers:

As far as the voting machines, I tell them all to put at least one machine on a table so that somebody who might have trouble standing can sit and vote, or somebody in a wheelchair can come up to the table and vote in private. I can’t guarantee that they all do it. I have 531 precincts in my county and like I said, almost 4,000 workers. I instruct them. They have the written materials. And I can only hope that they do what they’re told to do.⁷⁶

⁷⁵ Theresa LePore Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 375.

⁷⁶ *Ibid.*, p. 376.

ELECTION DAY RESOURCES

After November 7, 2000, one of the most significant Election Day issues became the availability of resources to handle the large number of voters. Voters and poll workers who testified at Commission hearings in Tallahassee and Miami were in accord about the various problems that occurred, such as inadequate telephone communication systems in the offices of the supervisor of elections, the inability to reach their respective supervisors of elections offices on Election Day to verify individuals' voter registration, and the accessibility of computerized voter registration information.⁷⁷

Difficulties on Election Day

The Commission heard testimony from some of Florida's voters and poll workers who expressed their dissatisfaction with the resources available to them on November 7, 2000. Specifically, several witnesses observed that on Election Day inadequate telephone systems in supervisors of elections offices affected precinct workers' abilities to confirm voters' registration status.⁷⁸ The following line of questioning during the Commission's Miami hearing portrays this difficulty:

⁷⁷ Bob Poe, Democratic National Party, "Voting Problems List," Bates No. 0000465. See also Marvin Rickles, Jr., precinct deputy in Precincts 74B and 74G in Palm Beach County, affidavit submitted to the U.S. Commission on Civil Rights, Nov. 9, 2000 (other problems included the number of poll workers and the adequacy of their training, access to bilingual poll workers, and the availability of ballots in non-English languages). "On November 7, 2000, I observed many people leaving the two precincts who were denied the right to vote because the precinct clerks could not reach the supervisor of elections to confirm their voter eligibility. Throughout the day, many individuals who were not allowed to vote told me that the clerk could not reach the supervisor of elections because the telephone lines were continuously busy. I personally counted 17 individuals in a two-hour period during the afternoon who told me they were not allowed to vote because the clerk could not reach the supervisor of elections. Many of these individuals were angry." Ibid.

⁷⁸ A panel of poll workers that testified before the Commission agreed it was harder to get through to supervisors of elections in this election than in the past. See generally Poll Workers Panel, Miami Verified Transcript, Feb. 16, 2001, pp. 150-72. See also Angenora Ramsey Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 96 (testifying that it took her three hours to get through to the Palm Beach County Supervisor of Elections Office, which was unprecedented in her 16 years as a poll worker).

MR. FOREMAN [questioning witness]: Ms. Phoele, can you give me an idea of how long people were waiting in your precinct in order to verify whether they would be eligible to vote?

MS. PHOELE: Hours, and a lot of them got discouraged and left and didn't vote, because our clerk could not get through to the Board of Elections. It's the same thing over and over. . . .⁷⁹

MR. FOREMAN [to witness Marilyn Nelson]: Could you share with us your observation?

MS. NELSON: Of course, we couldn't get through to downtown. We were on the phone the majority of the day. And sometimes the phone would ring for hours, just ring and ring and ring. No one would ever pick it up and when they finally picked it up, you'd be on there for hours again. We had lines of people waiting just to see if they could vote.⁸⁰

One poll worker also noted that some African Americans with current voter registration cards were unable to vote because their names were not included on the county's registered voter list.⁸¹ Moreover, poll workers believed they could not remedy this problem by using affidavits as an alternative.⁸² This belief ultimately contributed to the number of Florida residents who were unable to cast their vote on Election Day. For example, Maria DeSoto, a Broward County poll worker, testified that in her opinion at least 40 people were turned away from the voting precinct, due to poll workers' inability to contact the supervisor of elections office.⁸³

⁷⁹ Barbara Phoele, poll worker, Precinct 6C in Broward County, Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 125, 136.

⁸⁰ Marilyn Nelson, poll worker, Precinct 232 in Miami-Dade County, Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 129-30.

⁸¹ Ibid., p. 140.

⁸² See Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 63; Linda Howell Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 63; Maria DeSoto Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 144 (testifying that if voters' names were not on the precinct rolls and workers could not reach the supervisor of elections office, voters could vote by affidavit).

⁸³ Maria DeSoto Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 136, 142 (noting that she was only able to get through to the supervisor of elections two or three times despite her numerous attempts). See also Barbara Phoele Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 136 (testifying that she was aware of 40-50 people, mostly African Americans and Hispanics, who were frustrated with long lines and left).

Computer Access

Telephonic communication was not the only method for some election precincts to verify the accuracy of their voter registration lists. In one county, precinct workers were provided with laptop computers in order to check the accuracy of the precinct registers against the master county registration list. For example, David Leahy, supervisor of elections for Miami-Dade County, had access to 18 laptop computers.⁸⁴ Mr. Leahy testified that he placed most of these computers, regardless of the demographic composition of the precinct, in precincts where the voting population was the most transient.⁸⁵ As a result, the vast majority of the laptop computers in Miami-Dade were situated in mostly Cuban American voting precincts.⁸⁶ Mr. Leahy noted that only one laptop computer was located in a largely African American precinct.⁸⁷

Broward County also used laptop computers in 31 of its largest precincts on Election Day. The supervisor of elections for Broward County explained that the original purpose for these computers was to facilitate access to county

voter registration information at the precinct level.⁸⁸ In retrospect, Ms. Carroll determined there was limited success with this technological venture. In spite of the training that the staff received, "they didn't always know exactly what they were looking up on the computer."⁸⁹

CONCLUSION

The state's Division of Elections receives yearly fiscal appropriations for Florida's elections. The state of Florida, however, provides few, if any, direct financial resources to supervisors of elections offices. As a result, county supervisors of elections rely on their respective boards of county commissioners and/or private financing sources to fund various election preparation needs, such as voter education and outreach, voting equipment, polling place resources, poll worker training, and appropriate polling locations and communication systems.

This lack of financial support hinders the ability of Florida's supervisors of elections in providing all their county residents an equal opportunity to vote.

⁸⁴ David Leahy Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 324.

⁸⁵ *Ibid.* (Mr. Leahy explained that the Miami-Dade County Supervisor of Elections Office receives the most inquiries from those precincts in areas in which the population is growing, as determined by the number of new residents).

⁸⁶ Interview Report, telephone interviews with David Leahy, supervisor of elections, Miami-Dade County, Feb. 1 and Feb. 5, 2001.

⁸⁷ David Leahy Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 324.

⁸⁸ Jane Carroll Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 296-97.

⁸⁹ *Ibid.*, p. 297 (Ms. Carroll noted that these individuals were not the same workers who were routinely employed by her office).

The Reality of List Maintenance

*We wanted these lists to be fairly broad and encompassing. It was never intended to be a cure-all.*¹

Convicted criminal offenders are the only class of mentally competent Americans denied the basic right to vote. This is the result of rigid sentencing guidelines and voter removal requirements for reformed offenders.² Advocates of stricter punishment of particular crimes seldom acknowledge that people of color are often convicted more frequently than their white counterparts. Thus, the disenfranchisement³ of this class of citizens is sometimes overlooked in debates about the electoral process.

Since the Reconstruction Era following the Civil War, conviction of certain types of crimes supposedly committed more often by African Americans than other ethnic groups resulted in their disenfranchisement.⁴ During the Reconstruction Era, South Carolina, for example, cited the following as crimes “to which [the Negro] was especially prone”: theft, arson, attempted

rape, adultery, “wife beating,” and “housebreaking.”⁵ Crimes equally or more likely to be committed by whites, such as murder and fighting, generally did not result in disenfranchisement.⁶ The long-term effects of the disparity in consequences for alleged criminal behavior between races of people still ripple throughout the United States. Around 3.9 million Americans are disenfranchised.⁷ Thirteen percent of African American men are disenfranchised and they account for over 36 percent of the total disenfranchised population.⁸

The state of Florida is one of eight states that permanently disenfranchise felons or former felons who have satisfied all sentencing requirements.⁹ JoNel Newman, a Florida Justice Institute staff attorney, testified that Florida leads the nation in disenfranchising felons and in prosecuting children as felons.¹⁰ Over 31 percent of the disenfranchised population in Florida are African American men.¹¹ Of all the disenfran-

¹ George Bruder, vice president, DBT Online, Testimony before the U.S. Commission on Civil Rights, Miami, FL, Feb. 16, 2001, Verified Transcript, p. 178 (quoting Emmett Mitchell, a former Division of Elections assistant general counsel who led the purge effort). Mr. Bruder stated he was quoting the December 10, 2000, edition of the *Miami Herald*.

² The Sentencing Project and Human Rights Watch, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, October 1998, p. 1 (hereafter cited as the Sentencing Project, *Losing the Vote*).

³ BLACK'S LAW DICTIONARY 712 (7th ed. 1999). Disenfranchisement is defined as the “act of taking away the right to vote in public elections from a citizen or class of citizens.” Disenfranchise is defined as to “deprive [a person] of the right to exercise a franchise or a privilege, especially to vote.”

⁴ Virginia E. Hench, “The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters,” *Case Western Reserve Law Review*, vol. 48 (Summer 1998), p. 738. During Reconstruction, Caucasian advocates for disenfranchisement denounced African Americans as ignorant, lazy, criminally inclined, and a race demonstrably unqualified to vote. *Ibid.*

⁵ The Sentencing Project, *Losing the Vote* (citing Andrew L. Shapiro, “Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy,” *Yale Law Journal*, vol. 103, p. 540 (November 1993)), p. 3 (quoting Francis B. Simpkins, Pitchfork Ben Tillman).

⁶ The Sentencing Project, *Losing the Vote* (citing Andrew L. Shapiro, “Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy,” *Yale Law Journal*, vol. 103, p. 540 (November 1993)), p. 3.

⁷ The Sentencing Project, *Losing the Vote*, p. 2.

⁸ *Ibid.*

⁹ *Ibid.*, p. 5. A former felon or felon who satisfies all sentence requirements has complied with any prison, probation, and parole consequences attached to his or her conviction. The other states that disenfranchise former felons for life are Alabama, Delaware, Iowa, Kentucky, Mississippi, Nevada, New Mexico, Virginia, and Wyoming. *Ibid.*

¹⁰ JoNel Newman, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 11, 2001, Verified Transcript, p. 32.

¹¹ The Sentencing Project, *Losing the Vote*, pp. 8–9. Of African American men in Florida, 31.2 percent are permanently

chised former felons in the United States, one-third are found within the borders of Florida.¹² As discussed in chapter 1, people of color, particularly African Americans, have a greater likelihood of appearing on the Florida felon exclusion list.¹³ Moreover, African Americans have a better chance of erroneously appearing on the Florida felon exclusion list. For example, in Miami-Dade County, over half of the African Americans who appealed from the Florida felon exclusion list were successfully reinstated to the voter rolls.¹⁴

One commentator calls the disenfranchisement of voters a “stark reality” that—

necessarily depletes a minority community’s voting strength over time by consistently placing a greater proportion of minority than majority voters under a voting disability at any given time. For this reason, the effects of the intentional discrimination that originally motivated felon disenfranchisement still linger.¹⁵

Former U.S. Supreme Court Justice Thurgood Marshall explained that disenfranchisement—

doubtless has been brought forward into modern statutes without fully realizing the effect of its literal significance or the extent of its infringement upon the spirit of our system of government.¹⁶

The “[d]enial of voting rights creates permanent outcasts from society, persons internally exiled who are left without any opportunity ever to regain their full status as citizens.”¹⁷ As the

disenfranchised. Alabama leads the country with 31.5 percent of African American men within its borders permanently disenfranchised. *Ibid.*, p. 9.

¹² *Ibid.*, p. 8.

¹³ The term “exclusion list” is used interchangeably with “exceptions list,” which is the term preferred by DBT Online. See J. Michael de Janes, general counsel and secretary, ChoicePoint, Inc., letter to Edward A. Hailes, Jr., general counsel, U.S. Commission on Civil Rights, June 5, 2001, p. 2 (hereafter cited as de Janes Letter).

¹⁴ See chap. 1.

¹⁵ Hench, “The Death of Voting Rights,” p. 767.

¹⁶ The Sentencing Project, *Losing the Vote*, pp. 14–15 (citing *Byers v. Sun Savings Bank*, 41 Okla. 728 (1914), quoted by Justice Marshall in his dissent in *Richardson v. Ramirez*, 418 U.S. 24, 78 (1974)).

¹⁷ Nora V. Demleitner, “Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement

statistics indicate, African Americans and other racial minority groups are overrepresented among the disenfranchised, and the denial of voting rights based on felony conviction has a discriminatory impact on these groups.¹⁸

Chapter 3 of this report discusses the statutory provisions regarding list maintenance and explains how these provisions on their face could disenfranchise voters. These concerns are not, however, hypothetical. In the November 2000 election, voters lost their rights because of these provisions and how they were implemented. This chapter will provide further details on how the list maintenance law was implemented and its practical effect on Florida voters.

HOW FLORIDA CONTRACTED FOR LIST MAINTENANCE

The statutory requirement to hire a private agency to assist in purging the voter files was enacted after the incidents of voter fraud in the 1997 Miami mayoral election that included votes cast in the names of deceased persons.¹⁹ At the Commission hearing in Tallahassee, L. Clayton Roberts, director of the Division of Elections, described the history of chapter 98.0975 of the Florida statutes:

This section of the statute was passed in response to a 1997 Miami mayoral election where it was challenged in court and went up through the court system in the state of Florida. The gentleman who originally won that mayor’s race was turned out of office. There was a grand jury investigation. There was a Senate select committee appointed to investigate that election. There was [an] allegation and it was eventually proven that a large number of people who were deceased cast ballots—well, someone cast ballots in the name of some people who were deceased in that election. People who were convicted felons who had lost their right to vote under the Florida Constitution cast ballots in that election, and people who were also registered in another municipality or another county within that area cast ballots in the city of Miami mayor’s race.²⁰

as an Alternative,” *Minnesota Law Review*, vol. 84 (April 2000), p. 775.

¹⁸ *Ibid.*

¹⁹ Florida’s list maintenance provision was changed by the Florida Election Reform Act of 2001. See Epilogue.

²⁰ L. Clayton Roberts, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 12, 2001, Verified Transcript, pp. 254–55. In 1998, Mr. Roberts was employed

George Bruder, a vice president for DBT Online, a ChoicePoint Company, provided sworn testimony to the Commission about key elements of Florida's list maintenance activities and responsibilities prior to the 2000 presidential election. Mr. Bruder represented the private firm that was awarded a contract to perform state-sponsored list maintenance tasks before the election. His testimony offered a snapshot of the reality of list maintenance activities in Florida, including a description of the process that led to the Division of Elections' awarding the contract to his company.²¹

According to Mr. Bruder, the Division of Elections initially solicited private entities to bid for its list maintenance contract through requests for proposals. The first request resulted in an award to a private firm named Professional Analytical Systems & Services. Following its award of a contract to Professional Analytical Systems & Services, the Division of Elections, for reasons not evident in the record, submitted a second request for proposal.²² Next, the Division of Elections extended an invitation to negotiate to a Florida company then known as Database Technologies, Inc., and to Computer Business Services, a Georgia company.²³

as the legislative research director of the House Election Reform Committee. L. Clayton Roberts, "DBT Assessment," Aug. 17, 1998.

The biggest problem in the Miami mayoral race was the abuse of absentee ballots, not the voting of convicted felons. "State agents uncovered hundreds of fraudulent examples: people who didn't live in the city voting in the election; phony signatures on absentee ballots; and campaign vote brokers acting as witnesses for most of these ballots. The abuses were discovered almost exclusively in the City Commission district of Humberto Hernandez." Jay Weaver, "Vote Reform Back to Square One; Justice Department Ruling Means State Legislature Must Draft New Law," *The Sun-Sentinel* (Fort Lauderdale), Aug. 23, 1998, p. 6B.

Mr. Hernandez was a city commissioner who was convicted on Aug. 14, 1998, of "helping to cover up vote fraud." *Ibid.*

²¹ George Bruder, the signatory on the Division of Elections' list maintenance contract and former vice president of Database Technologies, Inc., is now vice president of the Public Records Group for ChoicePoint, Inc. Mr. Bruder testified under oath at the Commission's Miami hearing and subsequently in a Commission deposition.

²² George Bruder Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 200. The record does not indicate the basis for the Division of Elections' need to submit another request for proposals.

²³ *Ibid.*, pp. 176, 200, 227-28. The record does not indicate whether Computer Business Services eventually submitted a bid.

In response to the Division of Elections' second request for proposal, Database Technologies bid around \$3.1 million, an amount nearly 100 times higher than its first bid. DBT structured its bid, this time, in three different price levels based on the advice of "a little bird."²⁴ The company asserts that this substantial increase reflects the change in scope of work requiring "additional data processing expertise."²⁵ Mr. Bruder said:

What we brought to the table is the ability to . . . [take] different types of data from different types of platforms and being able to draw answers out of them that are useful.²⁶

At the time Database Technologies was ultimately awarded the contract, the company also had a contract with the Florida Department of Law Enforcement.²⁷ The contract provided the Florida Department of Law Enforcement access to databases held by Database Technologies.²⁸

DBT Online, A ChoicePoint Company

After Database Technologies was awarded the Division of Elections' list maintenance contract, it merged with ChoicePoint, Inc., and changed its name to DBT Online, a ChoicePoint Company. ChoicePoint and DBT Online issued a February 14, 2000, press release announcing the merger of the two companies.²⁹ Most of DBT Online's efforts for the list maintenance contract were completed at the time the press release was issued. On May 16, 2000, ChoicePoint and DBT Online shareholders agreed to approve the merger of the two companies.³⁰ As a result, sev-

²⁴ George Bruder Unverified Deposition, p. 7. See also George Bruder, vice president, DBT Online, "Voter Registration," e-mail, Aug. 5, 1998.

²⁵ Bruder Unverified Deposition, p. 7.

²⁶ *Ibid.*, pp. 8-9.

²⁷ George Bruder Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 199. Neither Database Technologies, Inc., nor its successor, DBT Online, a ChoicePoint Company, currently has a contract with the Florida Department of Law Enforcement.

²⁸ Bruder Unverified Deposition, p. 10.

²⁹ ChoicePoint, "ChoicePoint and DBT Online Unite, Becoming Leading Provider of On-demand Public Records in the U.S.," press release, Feb. 14, 2000, <<http://www.ChoicePoint.net>> (accessed Mar. 24, 2001).

³⁰ DBT Online, "Shareholders Approve Merger of ChoicePoint and DBT Online," press release, May 16, 2000.

eral DBT board members were appointed to ChoicePoint's board of directors.³¹

CONTRACTUAL PROVISIONS

The Division of Elections instructed DBT Online on the information it was to use in the data processing/data matching procedure.³² George Bruder maintained that the "color blind" search criteria used to create a list of voters with a potential problem included name, date of birth, and social security number.³³ He claimed that neither race nor party affiliation was used to create the list.³⁴ But when Mr. Bruder was questioned regarding a June 9, 2000, letter, in which he informed the supervisors of elections that race and gender *had been* used as matching criteria, he testified that he had misinformed the supervisors of elections.³⁵ Mr. Bruder testified that he did not understand the contract to dictate that race, gender, and social security numbers were to be used as matching criteria for the felon list.³⁶ The Division of Elections gave DBT Online a "Requirements Document" that prescribed last name, first name, and date of birth as matching criteria for the felon list.³⁷

To date, there has been no evidence that DBT Online made any further efforts to advise county or state officials that the information in the June

9, 2000, letter was erroneous. Mr. Bruder asserted that DBT Online would have to—

fully investigated where the letter went. I believe this was transmitted to the Division of Elections, and I don't know if it was communicated out to the supervisors; however, I have not had that discussion with the people at the division because this would have been sent to Bucky Mitchell.³⁸

Mr. Bruder was referring to Emmett "Bucky" Mitchell, former assistant general counsel for the Division of Elections. Mr. Mitchell is no longer employed with the Division of Elections.

Although Mr. Bruder did not address the supervisors of elections regarding the content of his June 9, 2000, letter, he offered his views on the letter's content to the Commission. In a letter dated March 16, 2001, Mr. Bruder admits that the sentence regarding the use of race and gender was "inartfully drafted" and may have confused the supervisors of elections.³⁹ Mr. Bruder wrote:

What I was trying to convey was that, while race and gender were a part of the database that we received and returned to the Division of Elections, neither were used as matching criteria. As I reiterated at the hearing, DBT's function was simply to provide the data. We had neither the statutory nor the contractual right to remove a single voter from the registration lists. That was the function of the county supervisors of elections.⁴⁰

Contract Scope and Databases

Persons adjudicated mentally incapacitated with respect to voting must be excluded from the voter lists according to Florida election law.⁴¹ George Bruder stated, however, that the contract did not require DBT Online to include such data in its list.⁴² The Division of Elections provided DBT Online with the following databases in order to create the exclusion list: the central voter file, the Florida Department of Law Enforcement file, the Bureau of Vital Statistics de-

³¹ Ibid. "Today's meeting also confirmed the appointment of several new members to ChoicePoint's board of directors including Doug Curling, ChoicePoint's chief operating officer, and former DBT board members Charles G. Betty, Frank Borman, Kenneth G. Langone, and Bernard Marcus. Mr. Betty is currently president and CEO of EarthLink Network, Inc., the nation's second largest Internet service provider. Mr. Borman, a former astronaut, has served as chairman and CEO in a number of companies including Eastern Airlines, and is currently on the board of directors for The Home Depot, Inc., and American Semiconductor Corporation. Mr. Langone is one of the co-founders of The Home Depot and a director of the Company since 1978. He also serves as a director of the New York Stock Exchange, Inc., General Electric Company, Unifi, Inc., and Tricon Global Restaurants. Mr. Marcus is a co-founder and chairman of The Home Depot, Inc. He also serves on the boards of National Service Industries, Inc., Westfield America, Inc., and the National Foundation for Disease Control and Prevention." Ibid.

³² George Bruder Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 177.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid., pp. 204-06.

³⁶ Bruder Unverified Deposition, p. 46.

³⁷ Ibid.

³⁸ Ibid.

³⁹ George Bruder, vice president, DBT Online, "Testimony Clarification," letter to Mary Frances Berry, chairperson, U.S. Commission on Civil Rights, Mar. 16, 2001.

⁴⁰ Ibid.

⁴¹ See FLA. STAT. ch. 98.0975(4) (1999).

⁴² George Bruder Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 202-03.

ceased persons file, and the Executive Board of Clemency file.⁴³ As dictated by the terms of the contract and the Division of Elections, DBT Online was expected to—

take the files that [the Division of Elections] gave us, take the process that they specified to us, develop a list, an exceptions list completely separate from the central voter file, provide that back to the Division of Elections, who would then take that list, disseminate it to the supervisors of elections, who would then take their individual list and do the verification process of the names on it.⁴⁴

Some of the data provided by the Division of Elections to DBT Online were copied from the Florida Department of Highway Safety and Motor Vehicles (DHSMV) database.⁴⁵ Once the data have been copied from the DHSMV database, DBT Online no longer has any control over the integrity of the data contained therein.⁴⁶ Thus, DBT Online does not have the access to manipulate the “live” DHSMV database. Under the name of ChoicePoint’s predecessor, Equifax, the DHSMV entered into the agreement to provide access to its database on February 10, 1993.⁴⁷ On August 1, 1997, the contract was assigned to ChoicePoint and remains in effect.⁴⁸

On November 5, 1993, DBT Online contracted for “interactive access to the driver’s license database” for its “corporate/professional licensed clients.”⁴⁹ Randolph A. Esser, information systems director for the DHSMV, defined

interactive access as “rapid two-way communications between an end user and a computer program. In this context, the end user will submit a driver’s license number(s) to the Department’s computer system and receive the information corresponding to that driver’s license number within a few seconds.”⁵⁰ Then, DBT Online determines which clients will have interactive access to the driver’s license database with no “input from, or explanation to” the DHSMV.⁵¹ Each company with access authority has its own password and other identification. All requests to enter the driver’s license database are automatically logged by the computer system for later billing purposes.⁵²

The driver’s license database contains the following personal identifiers: driver’s license number, full name, address, gender, race, and birth date.⁵³

Simplified Verification of Accuracy

George Bruder explained that DBT Online hired a statistician “to build a model that would tell us how many records we would need to manually verify to give us a level of accuracy on the process . . . that was developed per the direction of the Division of Elections.”⁵⁴ DBT Online conducted its own assessment of the percentage by which, if any, its methodology failed to identify voters who had duplicate registrations, were convicted as felons without civil rights restoration, or were deceased. In a letter to Emmett Mitchell, former Division of Elections assistant general counsel, dated March 22, 1999, DBT Online reported that its statistician found that the margin of error was less than 0.4 percent.⁵⁵

⁴³ *Ibid.*, p. 203.

⁴⁴ *Ibid.*, pp. 224–25.

⁴⁵ Randolph A. Esser, information systems director, Department of Highway Safety and Motor Vehicles, Response to Commission’s Interrogatory 1, Apr. 12, 2001, p. 3. *See also* Enoch J. Whitney, general counsel, Department of Highway Safety and Motor Vehicles, letter to Edward A. Hailes, Jr., June 5, 2001, p. 2.

⁴⁶ Randolph A. Esser, Response to Commission’s Interrogatory 1, p. 3.

⁴⁷ *Ibid.* *See also* de Janes Letter, p. 2; Enoch J. Whitney, general counsel, Department of Highway Safety and Motor Vehicles, letter to Edward A. Hailes, Jr., June 5, 2001, p. 2.

⁴⁸ Randolph A. Esser, Response to Commission’s Interrogatory 1, p. 3. *See also* Kent E. Mast, general counsel and secretary, Equifax, Inc., letter to Edward A. Hailes, Jr., June 1, 2001.

⁴⁹ Randolph A. Esser, information systems director, Department of Highway Safety and Motor Vehicles, Response to Commission’s Interrogatory 2, Apr. 12, 2001, p. 4. *See also* <<http://www.hsmv.state.fl.us/data/internet2.html>> (accessed Mar. 16, 2001).

⁵⁰ Randolph A. Esser, Response to Commission’s Interrogatory 2, p. 4.

⁵¹ *Ibid.*

⁵² Randolph A. Esser, information systems director, Department of Highway Safety and Motor Vehicles, Response to Commission’s Interrogatory 3, Apr. 12, 2001, p. 4.

⁵³ Randolph A. Esser, information systems director, Department of Highway Safety and Motor Vehicles, Response to Commission’s Interrogatory 4, Apr. 12, 2001, p. 4.

⁵⁴ George Bruder Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 207. DBT Online paid approximately \$1,641 or \$100 per hour to a Florida Atlantic University mathematics graduate assistant to perform the statistical analysis of its methodology for the Division of Elections contract. Marlene Thorogood, project manager, DBT Online, “Check Requests and Invoices,” March 1999, April 1999, and May 1999.

⁵⁵ Marlene Thorogood, project manager, DBT Online, “Statistical Verification and Phase I Concerns,” letter to Emmett

DBT Online randomly selected 6,760 records to be manually verified to determine its percentage of errors. Because this method found five errors, the statistician reported the confidence level at 99.9 percent.⁵⁶ DBT attributed the errors to its previous failure to increase the character count to capture hyphenated last names and the “multiple first name formatting errors” created in the merging of the county information into the central voter file.⁵⁷ Mr. Bruder claimed that he was unaware of any other efforts having been made to verify data on the list.⁵⁸

Accuracy of the Felon Exclusion List

Clay Roberts, director of the Division of Elections, testified that a list of 3,993 possible felons was compiled by DBT Online and sent to the 67 supervisors of elections.⁵⁹ Janet Modrow, technical assistant for the Division of Elections, clarified the number provided by Mr. Roberts. Ultimately, DBT Online provided a list of 3,993 possible felons from its own databases and 38,329 possible felons based on the databases provided by the state of Florida.⁶⁰ Mr. Bruder stated the list created was not inaccurate, but rather it contained “false positives.” He explained:

A false positive is an industry term that means some but not all the data elements match the data provided. The fact that there were names on the list that were not ultimately verified as deceased, registered in more than one place, or convicted felons does not mean the list was inaccurate, but reflects the nature of the search parameters established by the Division of Elections.⁶¹

DBT Online advised the Division of Elections of the likelihood that a significant number of false positives existed and made recommendations to reduce those numbers, according to Mr.

Bruder.⁶² He further asserted that DBT Online specifically suggested to state officials that narrow criteria be used in creating the lists, which would lower the false-positive rate, and therefore, minimize errors in the number of names matched.⁶³ Mr. Bruder testified that the company recommended, for example, that it develop criteria requiring an exact match on the first and middle names. Thus, a Floridian named Deborah Ann would not match with the name Ann Deborah.⁶⁴ But the Division of Elections favored more inclusive criteria and chose to “make it go both ways,” as Mr. Bruder recalls it.⁶⁵ In addition, he pointed out that state officials set parameters that required a 90 percent match in the last name, rather than an exact match.⁶⁶ Mr. Bruder insisted that “the state dictated to us that they wanted to go broader, and we did it in the fashion that they requested.”⁶⁷

Mr. Roberts also testified that the Division of Elections contacted the Florida State Association of Supervisors of Elections regarding the contract. He stated:

[The Association of Supervisors of Elections] established a committee on this issue. We got the committee together with people from [the Florida Department of Law Enforcement], with people from the Board of Executive Clemency, with DBT. We got together to come up with a framework and a methodology that the supervisors could go through in verifying this information, to go through in a methodical way to verify before anyone’s name was removed from the voter rolls.⁶⁸

Mr. Bruder disagrees with the above characterization of the meeting. At a deposition taken of Mr. Bruder, he recalled a meeting with the

Mitchell, assistant general counsel, Division of Elections, Mar. 22, 1999.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ George Bruder Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 208.

⁵⁹ L. Clayton Roberts Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 258.

⁶⁰ Interview Report, interview with Janet Modrow, May 15, 2001, p. 1.

⁶¹ George Bruder Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 177–78.

⁶² Ibid., p. 178.

⁶³ Ibid., pp. 218–19.

⁶⁴ Ibid., p. 220.

⁶⁵ Ibid. At the time the parameter decisions were made, Emmett Mitchell (assistant general counsel for the Division of Elections), Janet Modrow (Division of Elections technical specialist), and Ethel Baxter (director of the Division of Elections) worked with DBT Online. Ibid., p. 221.

⁶⁶ Ibid., pp. 220–21.

⁶⁷ Ibid., p. 219. At the February 16, 2001, Commission hearing, George Bruder agreed to submit to a deposition for further examination of the role DBT Online played in the removal of purported felons from the Florida voter files. The deposition was held on March 21, 2001, in Miami, Florida.

⁶⁸ L. Clayton Roberts Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 257–58.

Division of Elections and the Executive Board of the Florida State Association of Supervisors of Elections in early 1999.⁶⁹ At the meeting, the executive board members of the Florida State Association of Supervisors of Elections gave DBT Online its input "as far as what they wanted and our being able to tell them what we could and could not do in response to that."⁷⁰ Mr. Bruder recalled that the supervisors of elections present at that meeting wanted—

to be as exacting as possible on the matches. If I condense it down to a major concern, that was what they were looking for.

And being that the Division of Elections was the entity that I was contracting with, they would be the ones that would be giving us the specifications. So they [Division of Elections] were there, they heard what the supervisors [of elections] wanted. They had technical representation there also to then give us advice as far as how they wanted us to construct the matching logic.⁷¹

Instead of providing an exclusion list with exact matches, the state decided to proceed with requiring the matching logic to "go both ways," according to Mr. Bruder, who insisted that DBT Online "continued processing at the direction of the Division of Elections."⁷² DBT Online made no recommendations or instructions on how the supervisors of elections should implement their verification processes.⁷³ Emmett Mitchell reiterated to DBT Online the desire of the Division of Elections to cast a wide net for the exclusion lists. Mr. Mitchell said:

Obviously, we want to capture more names that possibly aren't matches and let the supervisors make a final determination rather than exclude certain matches altogether.⁷⁴

Mr. Bruder also testified he did not believe all the supervisors of elections understood the matching logic used by DBT Online at the direc-

tion of the Division of Elections.⁷⁵ Mr. Bruder believed the supervisors of elections had a "lack of understanding of the methodologies used to derive the list."⁷⁶ In June 1999, DBT Online attended a meeting with the Division of Elections and all 67 supervisors of elections or their representatives.⁷⁷ During that meeting, Mr. Bruder addressed questions regarding specific incidents posed by the supervisors of elections.⁷⁸ As a result of the June 1999 meeting, Mr. Bruder recalled that he advised that the supervisors of elections receive individual training on the matching logic.⁷⁹ Mr. Bruder elaborated:

Subsequent to that meeting, immediately thereafter I walked out of that meeting with Emmett Mitchell and told him that my suggestion to the Division of Elections was that we begin an immediate training program, to go to each and every supervisor to explain to them the logic that was used and why and to help them with whatever issues they had in doing their part of the verification.

Subsequent to that discussion we did five regional trainings that DBT orchestrated with the Division of Elections and the Florida Department of Law Enforcement in which we invited all counties to bring whoever their representatives were, either the supervisor or their designee, multiple people, and we built training materials for them. We sat with them and answered their questions.⁸⁰

Mr. Bruder testified he also made a similar suggestion earlier in the data matching process:

I originally expressed to the Division of Elections early on in the process before we started doing any

⁶⁹ Bruder Unverified Deposition, pp. 14, 16.

⁷⁰ Ibid., p. 14.

⁷¹ Ibid., pp. 15–16.

⁷² Ibid., p. 15.

⁷³ Ibid., p. 17.

⁷⁴ Emmett Mitchell, assistant general counsel, Division of Elections, "Your letter," Mar. 23, 1999.

⁷⁵ Bruder Unverified Deposition, p. 17.

⁷⁶ Ibid.

⁷⁷ Ibid., pp. 49–56. Each supervisor of elections was invited to the meeting. It is unconfirmed if all supervisors of elections attended the meeting and/or sent a representative to the June 1999 meeting.

⁷⁸ Ibid., p. 55.

⁷⁹ Ibid. Former Broward County Supervisor of Elections Jane Carroll also recalled the June meeting with the Division of Elections, DBT Online, and the other supervisors of elections. Ms. Carroll recalled that "inaccuracies" were discussed at the meeting. Ms. Carroll did not remove anyone from the Broward County voter rolls based on the two exclusion lists DBT Online gave to the Division of Elections. Jane Carroll Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 290.

⁸⁰ Ibid., pp. 56–57. Mr. Bruder testified that the regional training sessions occurred over a couple of months. Ibid.

data processing that there would probably be a need for training the eventual users of this data because it was a complex data processing job, and allow us to do that because we had trainers that understood that. I again suggested it after that [June 1999] meeting and DBT did that and we did it at no additional expense to the state.⁸¹

Division of Elections' Payment and Contract Status

The amount paid to DBT Online for its performance of the contract with the Division of Elections was \$3,221,800.⁸² DBT representatives offered vague testimony about the actual costs of the services rendered under the contract, insisting that the payment encompassed hours of work, in addition to its "intellectual property, existing databases, and [our] experience."⁸³ The

⁸¹ *Ibid.*, pp. 57–58.

⁸² George Bruder, vice president, DBT Online, "Testimony Clarification," letter to Mary Frances Berry, chairperson, U.S. Commission on Civil Rights, Mar. 16, 2001. The contract allowed a total payment of \$4,365,800 for completion of four phases of the contract, including renewal through 2001. Because the Division of Elections did not renew its option with DBT Online through 2001, DBT Online was not paid the full contract price. Exhibit A, "Data Processing Services Agreement," Nov. 28, 1998.

⁸³ *Ibid.* DBT Online incorporated in 1992 and has been a provider of anti-fraud services to the following Florida agencies: Department of Children and Family Services, Department of Law Enforcement, Department of Corrections, Department of Business and Consumer Affairs, Department of Revenue, Department of State, Department of Insurance, Office of the Attorney General, and Agency for Health Care Administration. DBT Online, "DBT—a Florida Company," n.d. In October 1998, DBT Online, then called DBT, submitted the above to the Division of Elections as part of a presentation to the Division of Elections.

DBT Online also is the intellectual property owner of the following products: AutoTrack Plus & Auto Track XP—online investigative database service; SOS—online insurance industry service; PFATS—Medicaid anti-fraud service (provider fraud analysis and tracking service); CLAWS—arrest warrant tracking service (criminal locator and warrant service); DataCase—online public access system for New York Unified Courts; PQS—anti-fraud service for private insurance carriers (provider query system). See "Products," n.d. In October 1998, DBT Online, then called DBT, submitted the above to the Division of Elections as part of a presentation to the Division of Elections.

DBT Online is either the intellectual property owner of or has access to the following types of national databases containing over four billion records on over 200 million adults: aircraft, boats and vessels, businesses (including American Business Information and Dun & Bradstreet), corporations, criminal histories (including felony convictions and criminal arrests), driver's licenses, individuals, motor vehicles, properties, professional licenses, social security death file, and

Division of Elections, in addition to paying over \$3 million to DBT Online, compensated the Florida Department of Law Enforcement for its role in the removal of felons from the voter rolls. In addition to its own toll-free hotline for voters who wished to confirm their eligibility status,⁸⁴ the Florida Department of Law Enforcement (FDLE) performed record checks on a listing of 13,190 alleged felons in December 1999.⁸⁵ At a cost of \$8 per record, the Division of Elections received an invoice for \$105,520 from the Florida Department of Law Enforcement.⁸⁶ The FDLE responded to approximately 5,000 voters whose names appeared on the felon exclusion list.⁸⁷ Of those voters who contacted the FDLE to appeal the notice from a local supervisor of elections that they were ineligible to vote, approximately 50 percent were found to be convicted of felonies in Florida and 50 percent were determined to not have Florida felony convictions.⁸⁸

The list maintenance contract between DBT Online and the Division of Elections has expired and it will not be renewed.⁸⁹

real-time access to telephone numbers. See "National Databases," n.d. In October 1998, DBT Online, then called DBT, submitted the above to the Division of Elections as part of a presentation to the Division of Elections.

DBT Online is either the intellectual property owner of or has access to the following types of Florida databases: arrest warrants, banking licensing, beverage licensing, boat registrations, business ownership, convicted felons, corporations, concealed weapons, driver licenses, divorces, marriages, motor vehicles, professional licenses, real estate ownership, and sexual predators. See "Florida Databases," n.d. In October 1998, DBT Online, then called DBT, submitted the above to the Division of Elections as part of a presentation to the Division of Elections.

⁸⁴ Michael R. Ramage, general counsel, Florida Department of Law Enforcement, "Comments in Response to Draft Report by U.S. Commission on Civil Rights," June 6, 2001, p. 1. The FDLE hotline was available to the "public 7 days a week, 12 hours a day, and resulted in written confirmation to voters and supervisors of elections, typically in less than 72 hours." *Ibid.*

⁸⁵ Florida Department of State, Division of Elections, "Felony Check Invoice," Dec. 1, 1999, Bates Nos. 0015531, 0015532, 0015533.

⁸⁶ *Ibid.*

⁸⁷ Michael R. Ramage, general counsel, Florida Department of Law Enforcement, "Comments in Response to Draft Report by U.S. Commission on Civil Rights," June 6, 2001, p. 1.

⁸⁸ *Ibid.*, p. 2.

⁸⁹ Bruder Unverified Deposition, p. 12.

CONVICTED FELONS AND CLEMENCY STATUS

The list maintenance contract originally stated that only Florida felony convictions would be used to create an exceptions list.⁹⁰ Subsequently, George Bruder understood that the convicted felon and clemency status parameters were expanded to include other states when the Division of Elections discovered “that [DBT Online] had databases of other felony convictions and they asked us to include some of those states in the first year in the processing.”⁹¹ Based on a review of the documents submitted to the Commission, DBT Online used its access to felony conviction data from the following states for its contract with the Division of Elections: Florida, Texas, Ohio, Wisconsin, South Carolina, Kentucky, New Jersey, Virginia, Washington, Connecticut, and Illinois.⁹² Following the instructions DBT Online received from the Division of Elections, felons convicted in the following states, which have automatic restoration of civil rights, must apply for clemency through the Florida Executive Board of Clemency: Texas, Connecticut, South Carolina, Illinois, and Wisconsin.⁹³ The following states, which do not have automatic civil rights restoration for felons, required the foregoing verification process described by Mr. Bruder: New Jersey, Virginia, Washington, and Ohio.⁹⁴ The states that were

⁹⁰ While the term “list maintenance” is used in this report in relation to DBT Online responsibilities, it is the state and county that have the responsibility to maintain the exclusion list. DBT Online is not required to continually update the list. *See de Janes Letter*, p. 2.

⁹¹ George Bruder Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 208.

⁹² Scarlet Kirner, DBT Online, “Statewide criminal histories,” e-mail, Apr. 14, 1999. DBT Online had the following information for these states as of the date of the e-mail: Florida—predator information, current as of 6/24/98; Department of Corrections (DOC), current as of 2/28/99; Ohio—DOC, current as of 3/15/99; South Carolina—DOC, current as of 3/9/99; New Jersey—active inmates and departures, current as of 6/30/98; Connecticut—court convictions, current as of 2/28/99; Texas—predator information, current as of 11/14/98, DOC, current as of 3/8/99, parole, current as of 2/28/99; Wisconsin—DOC, current as of 11/6/98; Kentucky—DOC, current as of 7/14/98; Virginia—parole, current as of 2/28/99; Washington—releases, current as of 12/31/98; Illinois—DOC, current as of 12/97. Ms. Kirner’s e-mail also states that the current Texas DOC and the Florida DOC as well as predator information were available on-line.

⁹³ Marlene Thorogood, project manager, DBT Online, “DOE Clemency Queries,” Mar. 4, 2000.

“reciprocal” for clemency were Kentucky, New Jersey, Virginia, and Washington.⁹⁵

Mr. Bruder asserts that DBT Online did, however, make a recommendation as to which states should be added to the felon and clemency exclusion lists. He explained:

Clemency from those states that had a similar clemency process as the state of Florida, we identified that and we provided that information to the Division [of Elections]. And those states that did not have a similar clemency process, we identified that and provided that information to the state.⁹⁶

The clemency status of those listed as convicted felons was matched against the Florida Executive Board of Clemency file and similar boards of clemency in other states.⁹⁷

Automatic Restoration of Civil Rights

DBT Online performed the following procedures when dealing with felons from states providing automatic restoration of civil rights:

- Verified information with the executive board of clemency in the state where the felon was convicted, if one existed.
- If no Executive Board of Clemency existed in the other state, then DBT Online “ran [conviction information] solely against the Florida Executive Board of Clemency file.”
- If the state where the felon was convicted had an executive board of clemency and a “repository type of agreement [existed] between that state and Florida to reinstate those civil rights, we checked with those boards of clemency to verify that [the] individual had been granted that right.”⁹⁸

⁹⁴ *Ibid.* Ms. Thorogood was unsure of Ohio’s clemency status at the time she wrote the e-mail. Ohio requires convicted felons to apply for clemency. *See Ohio Rev. Code Ann. § 2967.07* (2001). *See also Marie Smith*, state of Washington, Department of Corrections, Information Technology, “Fax Information,” Mar. 28, 2000.

⁹⁵ Marlene Thorogood, project manager, DBT Online, “Reciprocal States for Clemency,” Aug. 8, 2000.

⁹⁶ George Bruder Unverified Deposition, p. 19.

⁹⁷ George Bruder Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 209.

⁹⁸ *Ibid.*, pp. 210, 211, 217.

Emmett Mitchell, former assistant general counsel for the Division of Elections, instructed DBT Online that felons from states with no executive board of clemency must apply for clemency in Florida to have their voting rights reinstated.⁹⁹ This interpretation of the executive clemency laws further compounds the disenfranchisement of African American voters. Further, it does not assess the interpretation of comparable statutes that require Florida's acceptance of a sister state's restoration of civil rights conferred upon a convicted felon. Although the issue of voting rights was not specifically addressed, two Florida courts of appeal have ruled that if an individual enters Florida with his or her civil rights, then through the full faith and credit clause¹⁰⁰ of the U.S. Constitution, he or she need not apply for clemency upon arriving in Florida.¹⁰¹

⁹⁹ *Ibid.*, pp. 211–12.

¹⁰⁰ U.S. CONST. art. IV, § 1 provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

¹⁰¹ Both cases involved men who were convicted in other states, had their rights restored, and upon moving to Florida were denied concealed weapon permits. In *Schlenther v. Florida Dep't of State*, a Florida resident was convicted of a felony while he lived in Connecticut. 743 So. 2d 536, 537 (1998). Prior to his move to Florida, the state of Connecticut reinstated his civil rights. Mr. Schlenther applied for and received a concealed weapons permit after moving to Florida. *Id.* at 537. The permit was subsequently revoked when the Florida Licensing Division determined that Mr. Schlenther neither applied for nor received civil rights restoration in Florida. The Second District Court of Appeals ruled that when section 8, article IV, of the Florida Constitution (which grants authority to the governor with the approval of three cabinet members to restore civil rights) was drafted—

it was anticipated that the governor would be granting pardons, commuting punishments and remitting fines and forfeitures for Florida offenders, since the Governor of Florida could not do such things for out-of-state offenders. We believe the same analysis applies to the restoration of civil rights. Once another state restores the civil rights of one of its citizens whose rights had been lost because of a conviction in that state, they are restored and the State of Florida has no authority to suspend or restore them at that point. The matter is simply at an end.

We conclude that the restoration of [Schlenther]'s civil rights in Connecticut is entitled to full faith and credit in this State. *Id.* at 537.

In *Doyle v. Florida Dep't of State*, a Florida resident was convicted of a misdemeanor in New York that would have been a felony if committed in Florida. *Doyle v. Florida Dep't of State*, 748 So. 2d 353, 354 (1999). Because Mr. Doyle was

Mr. Bruder testified that DBT Online "relied upon the information that was given to us by the Division of Elections, who was giving us the criteria in which to use to do the data processing."¹⁰² His testimony was corroborated by e-mails from the Division of Elections assistant general counsel.¹⁰³ These e-mails were produced pursuant to a Commission subpoena.

Executive Clemency in Florida

Florida's Constitution empowers the governor to restore civil rights to those convicted of crimes, other than treason, with the approval of three members of the governor's cabinet.¹⁰⁴ Members of the governor's cabinet consist of the following: the secretary of state, attorney general, comptroller, treasurer, commissioner of agriculture, and commissioner of education.¹⁰⁵ Although the cabinet meets twice a month for 11 months each year,¹⁰⁶ it only meets as a clemency board on a quarterly basis.¹⁰⁷ During the months

convicted of a misdemeanor, his civil rights were never suspended in the state of New York. *Id.* at 355–56.

Mr. Doyle's application for a concealed weapon permit was denied by the Florida Licensing Division because the crime for which he was convicted in New York carried felonious penalties in Florida. Relying on *Schlenther*, the First District Court of Appeals ruled that once a sister state restores a person's civil rights, then Florida is required to give full faith and credit to the civil rights restoration. *Id.* at 356. Moreover, the Court found that Mr. Doyle could not prove that his civil rights were restored in Florida because they had never been suspended in New York. *Id.* The Court stated: "The governor of Florida has neither the power to restore the civil rights of out-of-state offenders which have already been restored by another state, nor the authority to restore the civil rights of those whose rights were never suspended by another jurisdiction." *Id.*

¹⁰² George Bruder Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 212.

¹⁰³ See de Janes Letter, p. 2. See also Emmett Mitchell, assistant general counsel, Division of Elections, e-mail to Marlene Thorogood, project manager, DBT Online (Mar. 23, 1999, 3:57 p.m.); Emmett Mitchell, assistant general counsel, Division of Elections, e-mail to Marlene Thorogood, project manager, DBT Online (Dec. 21, 1999, 3:46 p.m.).

¹⁰⁴ FLA. CONST. art. IV, § 8(a). In 2003, only two members of the cabinet will be required to agree with the governor in order to restore the civil rights of a convicted felon.

¹⁰⁵ FLA. CONST. art. IV, § 4(a). Effective in 2003, the governor's cabinet will consist of only an attorney general, a chief financial officer, and the commissioner of agriculture.

¹⁰⁶ L. Clayton Roberts, director, Division of Elections, "Resign to Run Law" (responding to a request for an opinion on Florida law), letter to Katherine Harris, Florida secretary of state, Aug. 22, 2000, Bates No. 0022024.

¹⁰⁷ *Ibid.*

of May, June, and July 2000, the cabinet met six times, but only met once as the clemency board.¹⁰⁸

The Department of Corrections is obligated to not only inform inmates and offenders under community supervision about civil rights restoration, but also to assist them in completing the clemency application.¹⁰⁹ The information that may be required to be filed with the clemency application includes the following: certified copy of the applicant's indictment or information, judgment adjudicating the applicant as guilty, and the sentence (if imposed).¹¹⁰ Applicants for clemency in the state of Florida must also send a copy of their application to the current chief judge and current prosecuting attorney of the court in which they were convicted.¹¹¹ The clemency application, excluding the required attachments, is one page and requires the applicant to state a reason for consideration. The clemency process also requires applicants who were found guilty of a felony outside the state of Florida to complete the same application as those adjudicated in Florida.¹¹²

Seven days after the Commission hearing in Miami, where the policy of requiring out-of-state felons with restored civil rights to apply for Florida clemency was called into question, the Office of Executive Clemency sent a letter addressing the issue. In a letter to Ed Kast, assistant director of the Division of Elections, Janet H. Keels, coordinator for the Office of Executive Clemency, writes in pertinent part:

If a former felon's civil rights were restored in another state, or if a person's civil rights were never lost after being convicted of a felony in another state, the individual possessed his or her civil

rights in Florida and need not apply for restoration of civil rights in Florida. If a former felon attempting to register to vote in Florida claims that his or her civil rights were restored in another state or that his or her civil rights were not lost in another state, but the individual cannot produce supporting documentation, please refer that individual to my office.

My office will attempt to confirm the individual's claim by contacting the state that assertedly restored the individual's civil rights. If possession of civil rights is confirmed, the individual does not need to apply for restoration of civil rights in Florida.¹¹³

Ms. Keels, in the above-referenced letter, then requested that the Division of Elections accept a letter from her office confirming the individual's possession of civil rights as sufficient proof to allow the former felon to vote.¹¹⁴ The director of the Division of Elections and all supervisors of elections were copied on the letter.¹¹⁵

Although Ms. Keels insists that her letter merely reiterated the Office of Executive Clemency policy, other mandates suggest that the letter actually changed it. Rule 9 states that felons "convicted in a court other than a Florida court" must be a legal Florida resident before requesting civil rights restoration.¹¹⁶ Rule 9D states that persons convicted in out-of-state or federal courts *must* apply for civil rights restoration.¹¹⁷

State Senator Daryl Jones, a member of the Governor's Select Task Force on Election Procedures, Standards and Technology,¹¹⁸ noted that

¹⁰⁸ Ibid. "Fifty-seven cases were heard and acted upon by the Clemency Board in June." Ibid.

¹⁰⁹ FLA. STAT. ch. 940.061 (1999).

¹¹⁰ FLA. STAT. ch. 940.03 (1999).

¹¹¹ *Id.* Although the statutory language states that the applicant "may" be required to send a copy of his or her application to the appropriate judge and prosecutor of the court in which he or she was convicted, the clemency application requires the applicant to certify that he or she has mailed a copy to the judge and prosecutor. The clemency application also requests that the applicant certify that he or she has no pending charges at the time. The application makes no distinction between pending felony, misdemeanor, or infraction charges against the applicant.

¹¹² A copy of the clemency application was provided by the Florida Office of Executive Clemency.

¹¹³ Janet H. Keels, coordinator, Office of Executive Clemency, letter to Ed Kast, assistant director, Division of Elections, Feb. 23, 2001.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ State of Florida rules of Executive Clemency, Rule 9, pp. 5-6.

¹¹⁷ Ibid., p. 7.

¹¹⁸ In an executive order issued by Governor Jeb Bush on Dec. 14, 2000, the Select Task Force on Election Procedures, Standards and Technology was created to study and make policy recommendations and/or propose legislation to improve the election procedures, standards and technology employed in each of Florida's 67 counties. The Governor's Select Task Force on Election Procedures, Standards and Technology, *Revitalizing Democracy in Florida*, Mar. 1, 2001, p. 4.

the clemency process is extremely difficult in Florida:

[I]n order to have any chance of getting through it, and it does require today a full-blown hearing in front of the full cabinet, with not only you but your employer, your family, your pastor, and all kinds of people. This is about a \$10,000 effort for the average person. And what that means is that for the largest number, by far, of people who are former felons in Florida—and probably in the country—are poor people. And so this . . . is not an option. It has essentially barred the process from those people.¹¹⁹

Number of Felons and Out-of-State Clemency Verification

The first list DBT Online provided to the Division of Elections in April 2000 contained the names of 181,157 possible duplicate registrants, deceased persons, and felons without civil rights restoration.¹²⁰ Approximately 65,776 of those included on the first list were identified as felons.¹²¹ In May 2000, DBT discovered that approximately 8,000 names were erroneously placed on the exclusion list.¹²² Later in the month, DBT Online provided a revised list to the Division of Elections containing a total of 173,127 possible duplicate registrants, deceased persons, and felons without civil rights restoration.¹²³ Of those included on the “corrected list,” 57,746 were identified as felons.¹²⁴

The documents received by the Commission from DBT Online indicate that the process for clemency verification for purported felons convicted in a court other than a Florida state court consisted of faxing a list of possible felons to the appropriate state agency. For example, the following state agencies responded to DBT Online’s clemency inquiries:

- State of Washington Department of Corrections;¹²⁵
- Kentucky Secretary of State’s Office;¹²⁶
- New Jersey Extradition Secretary, Office of the Governor;¹²⁷ and
- Virginia Secretary of State’s Office.¹²⁸

DATA VERIFICATION

Although Florida election law required that the supervisors of elections, who received the exclusion lists compiled by Professional Analytical Systems & Services and DBT Online, attempt to verify the accuracy of those lists,¹²⁹ it appears that this procedure was not followed with any degree of uniformity. The first exclusion list was provided by Professional Analytical Systems & Services in 1998, and DBT Online provided exclusion lists in 1999 and 2000.¹³⁰

At least one election official predicted and planned provisions for voters who arrived at the polls and discovered their names were removed from the voter rolls. Then director of the Division of Elections, Ethel Baxter, issued the first of a series of memos on August 11, 1998, regarding the list maintenance activities performed by the supervisors of elections. At that time, Ms. Baxter described the central voter file as the division’s “first experience with a statewide database” and said that it “cannot be a 100 percent accurate list.”¹³¹ Ms. Baxter made particular note of the concerns with the felony information in the central voter file because of the potential use of aliases. As a result, Ms. Baxter recommended that the supervisors of elections “exercise caution

¹¹⁹ Daryl Jones, Testimony before the Hearing of the Governor’s Select Task Force on Election Procedures, Standards and Technology, Tallahassee, FL, Jan. 9, 2001, transcript, p. 307.

¹²⁰ Interview Report Addendum, interview with Michael de Janes, May 14, 2001, p. 1 (hereafter cited as de Janes Interview Report Addendum). Derek Smith, ChoicePoint, Inc., chairman, president, and CEO, “Letter to all ChoicePoint Associates from Derek Smith,” Jan. 12, 2001 (hereafter cited as Smith Letter).

¹²¹ de Janes Interview Report Addendum, p. 1.

¹²² Smith Letter.

¹²³ de Janes Interview Report Addendum, p. 1. Smith Letter.

¹²⁴ de Janes Interview Report Addendum, p. 1.

¹²⁵ Marie Smith, state of Washington, Department of Corrections, Information Technology, “Fax Information,” Mar. 28, 2000.

¹²⁶ Dottie Swanagan, state of Kentucky, secretary of state’s office, “Kentucky Clemency information,” June 15, 1999. *See also* Dottie Swanagan, state of Kentucky, secretary of state’s office, “Restoration of Civil Rights,” Mar. 29, 2000.

¹²⁷ Marlene Thorogood, project manager, DBT Online, “Clemency Verification,” Apr. 26, 1999. *See also* Donna Van Nostrand, administrator for policy analysis and planning, state of New Jersey, Department of Corrections, “Per Our Conversation,” June 13, 2000.

¹²⁸ Marlene Thorogood, project manager, DBT Online, “Clemency/Felons,” May 11, 1999.

¹²⁹ FLA. STAT. ch. 98.0975(4) (1999).

¹³⁰ *See* de Janes Letter, p. 2.

¹³¹ Ethel Baxter, director, Division of Elections, “Central Voter File Update and Discussion,” memorandum to the supervisors of elections, Aug. 11, 1998.

when deciding to remove someone who shows up as a convicted felon on the [central voter file].”¹³² Ms. Baxter also advised the supervisors of elections of the following:

If you have doubts as to whether or not the felony information is accurate or are unable to verify the accuracy of the information, we recommend that affected persons execute the affidavit prescribed in section 101.49.¹³³

In a memorandum dated August 14, 1998, Ms. Baxter forwarded the first exclusion list to the supervisors of elections. Ms. Baxter again advised supervisors to allow alleged felons to vote by affidavit, as provided in section 101.49 of the Florida statutes, if the supervisor of elections is unable to verify the accuracy of the information.¹³⁴ The use of affidavit voting under these circumstances provides a reasonable opportunity within the law for eligible persons to participate in the electoral process when election officials are unable to resolve routine conflicts generated by the government’s inefficiency or error. Ms. Baxter specifically advised:

It is your responsibility to attempt to verify the accuracy of the information on the list, and remove, prior to the next election, any person who is deceased, convicted of a felony, or mentally incapacitated with respect to voting. If you have doubts as to whether or not the felony information is accurate or are unable to verify the accuracy of the information, we recommend that affected persons execute the affidavit prescribed in section 101.49, Florida statutes. *In short, if there is reasonable doubt as to the accuracy of the information, you should allow a person to vote.*¹³⁵

In a follow-up memorandum dated August 18, 1998, Ms. Baxter recommended that the supervisors of elections “proceed with caution” while verifying the information on the exclusion list she forwarded just days prior.¹³⁶ Ms. Baxter advised the supervisors of elections as follows:

¹³² Ibid.

¹³³ Ibid. (emphasis deleted).

¹³⁴ Ethel Baxter, director, Division of Elections, “Central Voter File Update,” memorandum to the supervisors of elections, Aug. 14, 1998.

¹³⁵ Ibid. (emphasis added).

¹³⁶ Ethel Baxter, director, Division of Elections, “Central Voter File Update II,” memorandum to the supervisors of elections, Aug. 18, 1998.

When notifying voters of potential problems with their registration you should refrain from being accusatory keeping in mind that the information in the list may contain some inaccuracies and is not completely foolproof.¹³⁷

Ms. Baxter also suggested the supervisors contact the Office of Executive Clemency to identify persons who appear on the exclusion list but had their civil rights restored.¹³⁸

Two days later, Ms. Baxter issued another memorandum to the supervisors of elections regarding their list maintenance activities. This August 20, 1998, memorandum states in pertinent part:

As a follow up to our August 11, August 14 and August 18 memorandums regarding the central voter file, we again want to emphasize the importance of verification of the names of the voters on the list provided for your county, who are . . . convicted felons. . . . As we cautioned in our previous memos, we are again recommending that you confirm this information prior to removing any names from the registration rolls.¹³⁹

In this memorandum, Ms. Baxter, for a third time, advised the supervisors of elections to allow alleged felons to vote by affidavit, if he or she had “doubts as to whether or not the felon information is accurate, or [the supervisors of elections were] unable to verify the accuracy of this information. . . .”¹⁴⁰

It appears that Ms. Baxter, through her memoranda, attempted to urge the supervisors of elections to exercise great caution in performing their list maintenance responsibilities. She specifically attempted to alert election officials of the possibility of eligible Floridians being wrongfully denied the right to vote if these officials failed to confirm the information compiled by DBT Online. In contrast, state officials apparently failed to issue similar warnings concerning the probable risk of the state mistakenly denying a legitimate voter the opportunity to participate in the November 2000 election. The complaints from the supervisors of elections and

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ethel Baxter, director, Division of Elections, “Central Voter File Update II,” memorandum to the supervisors of elections, Aug. 20, 1998.

¹⁴⁰ Ibid.

from Floridians in the aftermath of the election illustrate that indifferent attitudes and careless practices prevailed over the more cautious approach for the protection of voting rights advocated by Ms. Baxter.

Supervisors of Elections' Exclusion List Verification Methods

In his testimony before the Governor's Select Task Force on Election Procedures, Standards and Technology, Clay Roberts explained there was no clear statutory guideline on the manner in which the supervisors of elections were expected to verify the information supplied by DBT Online; as a result, each county supervisor established his or her own policy.¹⁴¹ The lack of uniformity among the counties regarding felon list verification processes is evidenced in letters drafted by Miami-Dade Supervisor of Elections David Leahy and Leon County Supervisor of Elections Ion Sancho.¹⁴² Mr. Leahy's form letter to alleged felons states in pertinent part:

According to information received from the Florida Department of Law Enforcement, *you have a felony conviction* and have not had your civil rights restored. Therefore, your name will be removed from the voter registration rolls thirty (30) days from the date of this letter unless information is received that you have not been convicted of a felony or have had your civil rights restored.¹⁴³

The Miami-Dade letter further instructs the alleged felon to complete a form and provides three addresses to which he or she may forward the information.¹⁴⁴ If an alleged felon had, in

fact, been convicted of a felony and did not have his or her civil rights restored, the letter instructs him or her to obtain a clemency application form from the Office of Executive Clemency and to contact the office of the supervisor of elections to obtain voter registration information once restoration has been granted.¹⁴⁵ While Mr. Leahy's letter appears to place confidence in the veracity of the DBT Online felon list, the Leon County form letter to alleged felons demonstrates an understanding of the lists' inclusion of "false positives." Mr. Sancho's form letter provides in pertinent part:

Your name has been submitted to our office by the Florida Division of Elections on a list of voters who have allegedly been convicted of a felony, but not had their right to vote restored. *We do not know if this list is accurate.* Our office is required to remove you from the voter rolls if you have been convicted of a felony and your right to vote has not been restored.

If you have never been convicted of a felony, we want to help you clear this up.¹⁴⁶

The letter instructs the alleged felon to fill out a form and return it to the supervisor of elections office within 30 days or be removed from the voter list.¹⁴⁷ The form requests the alleged felon to self-identify as one of the following: never convicted of a felony; convicted of a felony, but civil rights have been restored and eligible to vote; or convicted of a felony, but civil rights have not been restored.¹⁴⁸

Mr. Sancho's letter suggests a partnership between his office and the alleged felon to "clear up" any confusion regarding his or her voting status; whereas Mr. Leahy's letter requires the alleged felon prove his or her eligibility status. The simplicity of Mr. Sancho's letter may have

and identifying information are being confused with that of a convicted felon. If the alleged felon was convicted of a felony and had his or her civil rights restored, then he or she is instructed to request proof from the Office of Executive Clemency. Otherwise, the alleged felon is instructed to send the completed form to the Florida Department of Law Enforcement disposition address.

¹⁴⁵ Ibid.

¹⁴⁶ Ion Sancho, supervisor of elections, Leon County, letter to alleged felons, n.d. (emphasis added).

¹⁴⁷ Ibid.

¹⁴⁸ Ibid. The alleged felon must check a block, sign, and date the form.

¹⁴¹ L. Clayton Roberts, director, Division of Elections, Testimony before the Hearing of the Governor's Select Task Force on Election Procedures, Standards and Technology, Tallahassee, FL, Jan. 9, 2001, transcript, p. 288.

¹⁴² Both letters were included as examples in a Division of Elections-sponsored training course in 1999.

¹⁴³ David Leahy, supervisor of elections, Miami-Dade County, letter to alleged felons, n.d. (hereafter cited as Leahy Letter) (emphasis added). In 1999 and 2000, Mr. Leahy deleted the phrase "you have a felony conviction"; instead, Mr. Leahy used the following wording: "Your name has been submitted to our office by the Florida Division of Elections on a list of voters who have allegedly been convicted of felony, but have not had their civil rights restored." David Leahy, supervisor of elections, Miami-Dade County, letter to Edward A. Hailes, Jr., June 1, 2001, Exhibit E.

¹⁴⁴ Leahy Letter. The alleged felon is instructed to send the completed form to the Florida Department of Law Enforcement Special Desk if he or she believes that his or her name

even been preferred by DBT Online. When asked about the language used in Mr. Leahy's letter, Mr. Bruder responded:

Are you asking me should he have drafted this letter to say "you possibly have a felon conviction and we're trying to verify that"? I would have wrote it that way.¹⁴⁹

Patricia M. Hollarn, the 1998 president of the Florida State Association of Supervisors of Elections and then supervisor of elections for Okaloosa County, drafted a letter to alleged felons that read in pertinent part:

We have received a list of convicted felons on which your name appears. This list was sent to us by the state and we have been informed it may contain errors. We are asking our voters whose names appear on the list to please assist us with verification so that we don't incorrectly remove any names from our rolls.¹⁵⁰

Ms. Hollarn's letter then asks the recipient to identify him or herself in one of three categories. The first category is that the individual was convicted of a felony with his or her civil rights restored. The recipient is informed that his or her civil rights restoration status will be confirmed with the Office of Executive Clemency.¹⁵¹ If the recipient self-identifies in the second category as a convicted felon without civil rights restoration, then Ms. Hollarn's office promises to assist in the paperwork. The third category is that the individual has never been convicted of a felony. Ms. Hollarn offers an apology to this recipient. Ms. Hollarn's letter enclosed a prepaid self-addressed envelope with each letter.¹⁵²

In a letter transmitted by facsimile to the Division of Elections from the Florida Department of Law Enforcement on August 14, 1998, the instruction on voter eligibility verification through fingerprints was clarified. A form provided by the Florida Department of Law Enforcement required that both the supervisor of elections and the voter complete separate sections of the

form requesting the voter's complete name, date of birth, gender, and social security number.¹⁵³ The voter must also authorize that the information be used to "confirm or deny a felony conviction" and be fingerprinted in the space provided on the form.¹⁵⁴

The supervisors of elections were not required to report to the Division of Elections if they removed someone based on the possible felon list.¹⁵⁵ Once an individual was identified as a "possible" felon by DBT Online, the supervisors of elections sent a letter to the voter at his or her registration address.¹⁵⁶ Some supervisors sent their letters by certified mail, while others did not.¹⁵⁷ If the voter did not respond to the letter, some supervisors may have attempted to contact the voter again, while others did not.¹⁵⁸

Clay Roberts also acknowledged that "miscommunication" led to approximately 8,000 persons who committed misdemeanors in Texas being incorrectly identified as felons in Florida; consequently, many of these voters were erroneously notified of their removal by county supervisors.¹⁵⁹ Mr. Roberts stated he believed the problem was addressed and "no person was removed from the voter rolls based on that erroneous information."¹⁶⁰

County supervisors and other local officials noted their frustration with the election problems that resulted from the false positives on the felon list. Linda Howell, Madison County supervisor of elections, testified that she found the disenfranchisement of felons "most distressing."¹⁶¹ Yet, elected African American officials asserted that by the time the error was caught, it was too late for the counties to correct it and that the first time any of these voters realized

¹⁴⁹ Bruder Unverified Deposition, p. 53.

¹⁵⁰ Patricia M. Hollarn, supervisor of elections, Okaloosa County, letter to alleged felons, 1998.

¹⁵¹ Ibid. The letter makes no distinction among those convicted in a Florida court, a federal court, or an out-of-state court.

¹⁵² Ibid.

¹⁵³ Florida Department of Law Enforcement, "Verification of Voting Status," fax to the Division of Elections, Aug. 14, 1998.

¹⁵⁴ Ibid.

¹⁵⁵ L. Clayton Roberts, director, Division of Elections, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 258.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Linda Howell Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 26.

they had been removed from the voter rolls was on Election Day.¹⁶² Ms. Howell testified:

There needs to be something done with the law with regard to a person being able to get their civil rights restored. It's a very different thing in Florida to have that done. Some people—it's been 20 years and they still haven't gotten their civil rights. Sometimes that is because they don't even know they are supposed to do something. You have to apply to have your civil rights restored. If I applied today, it would take me from six months to a year to get them restored. So that is an area that has been very distressful for us in our county.¹⁶³

Ms. Howell stated that the first list her office received from the Division of Elections was in 1998 and had no indication of the origin of the information.¹⁶⁴ Floridians who had been convicted of a misdemeanor with an adjudication withheld or people who had received clemency or were pardoned were included in the first Madison County list.¹⁶⁵ Ms. Howell recalled that one person on the list received a pardon in 1967. "The first list was so inaccurate that you were almost afraid to do anything with it," she said.¹⁶⁶

Ms. Howell attempted to verify the names on the list by requesting felony conviction confirmation with the Madison County clerk's office and sending letters to the alleged felons on the list.¹⁶⁷ The letters sent to the alleged felons included a voter verification form that is sent to the Florida Department of Law Enforcement.¹⁶⁸ The FDLE would then verify the felon status of the voter and send the alleged felon a letter including its determination. A fingerprint card to determine whether he or she was the same person listed as a felon was sent along with the letter when appropriate.¹⁶⁹ The alleged felons to

whom Ms. Howell sent letters had 30 days to respond.¹⁷⁰ Ms. Howell stated she removed some names of people who appeared on that first list from the Madison County voter file. Ms. Howell received a second list in June 2000, which had only two names, but she chose not to use that list.¹⁷¹

Even Ms. Howell, who is not a convicted felon, erroneously received a form letter referencing a prior felony conviction from the Florida Department of Law Enforcement.¹⁷² The letter, dated March 27, 2000, states in pertinent part:

The Florida Department of Law Enforcement (FDLE) received your Voter Registration Appeal Form. After reviewing your Florida criminal history, we have determined that you have a Florida felony conviction in our repository. FDLE will notify your supervisor of elections that we have data indicating that you meet the criteria of a convicted felon.¹⁷³

The form letter informs the recipient that he or she may obtain and review a copy of his or her personal criminal history at no charge.¹⁷⁴ If the recipient obtained a Certificate of Restoration of Civil Rights, the letter instructs the individual to forward a copy of the certificate to the county supervisor of elections and the FDLE.¹⁷⁵

At the Commission hearing in Tallahassee, Ms. Howell recalled her response to receiving the letter:

I had sent the letter to one of my voters and he sent in the verification form. Instead of picking up his name, they picked up my name and sent me the information. Now the thing that really upset me was that . . . they were not taking their job seriously. The law said that they had to verify this, but they were not taking it seriously. And that could destroy a person's life. You get that on your record, how do you get it off?¹⁷⁶

¹⁶² See State Senator Daryl Jones and State Representative Chris Smith, "Report: Accuracy and Fairness for Florida's Voters—Analysis and Recommendations by Democratic Legislators Serving on the Task Force on Election Procedures, Standards and Technology," Jan. 8, 2001 <<http://www.leg.stat.fl.us>> (accessed Mar. 21, 2001).

¹⁶³ Linda Howell Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 26.

¹⁶⁴ *Ibid.*, pp. 39, 41. Ms. Howell testified that she received the list compiled by DBT Online from the Division of Elections.

¹⁶⁵ *Ibid.*, p. 40.

¹⁶⁶ *Ibid.*, p. 39.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*, p. 43.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, p. 39.

¹⁷¹ *Ibid.*, p. 40.

¹⁷² *Ibid.*, p. 43.

¹⁷³ Martha Wright, chief, User Services Bureau, Florida Department of Law Enforcement, Howell "yes-felon.doc," Mar. 27, 2000, Bates No. 0004576.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Linda Howell Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 44.

Ms. Howell later learned she was never on the felon list provided by the Division of Elections or the Florida Department of Law Enforcement.¹⁷⁷

The FDLE explained to the Commission that Ms. Howell's receipt of the letter was due to a clerical error in its "haste to provide a quick response to a voter and to the Madison County Supervisor of Elections."¹⁷⁸ The FDLE asserted that anyone who received such a letter in error could contact the department through the toll-free number and have the issue resolved as one caused by clerical error.¹⁷⁹

Ms. Howell described the position of supervisors of elections with the felon list as "precarious" and testified:

We have a law that says that a felon cannot be on your rolls, and if I remove that person, you know, from information that I've received and I've done it improperly, then I'm violating a person's right to vote. So where is the middle ground here?¹⁸⁰

Ms. Howell recommended there be a link between the Florida Department of Law Enforcement, the Florida Executive Board of Clemency, and the Florida Department of Corrections to improve the accuracy of the lists.¹⁸¹

Ion Sancho, Leon County supervisor of elections, recalled the process in his county:

[T]he workers at the polling place are given a precinct register, a countywide register, and in Leon County you have special numbers set aside that the public doesn't have access to so that we can communicate telephonically with the Election Day workers. An individual . . . would come in and present themselves to the precinct, they wouldn't be on the rolls. They would be sent to see the clerk, who is basically the CEO of the operation. That individual then would look in their countywide register to see if that individual is eligible anywhere to vote in Leon County. Failing to find your name there—and if you have been dropped as a felon, your name wouldn't be there—then that clerk would then call—be instructed—this is the way the procedure is supposed to work. They call

the elections office and present the facts to a troubleshooter that we have in our office, who then would try to research the records in our office. And that's where this would have to be resolved because the list would be there.¹⁸²

If the Leon County troubleshooter was unable to make a determination, then his or her supervisor, the assistant supervisor of elections, would make the decision.¹⁸³ Mr. Sancho explained:

If the troubleshooter can't make a determination, then they would have to ask permission of their supervisor, who in our jurisdiction is the assistant supervisor of elections who is in charge of Election Day problems of all the Election Day problem workers, and it may differ in other counties.

And again, the person may have not been able to resolve the problem but then presented it to their direct supervisor, who made the decision to tell the person that they're given authorization to vote. Then the clerk would then write down on the precinct register that they were instructed by—and write down the name of the individual in our office that gave them the authorization to allow the person to vote and then the person would be required to just fill out a form, what we call the rule pages, which are any sort of trouble or problem and then fill those out and then vote.¹⁸⁴

Former Broward County Supervisor of Elections Jane Carroll testified that she also found the felon exclusion list to be inaccurate. As a result, Ms. Carroll chose not to use the felon exclusion list provided to her office. An excerpt from the Miami hearing transcript follows:

COMMISSIONER EDLEY: Did you have responsibility for verifying the correctness of the felony exclusion list?

MS. CARROLL: Had we chosen to use that list that you're discussing, we would have attempted to verify it. We did with the previous list that came out, the first time that list came out, which was two years ago prior to the '98 elections. We wrote to everyone who was on the list and we didn't use the word felon in the letter for fear it would fall into

¹⁷⁷ Ibid.

¹⁷⁸ Michael R. Ramage, general counsel, Florida Department of Law Enforcement, "Comments in Response to Draft Report by U.S. Commission on Civil Rights," June 6, 2001, p. 2.

¹⁷⁹ Ibid.

¹⁸⁰ Linda Howell Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 41.

¹⁸¹ Ibid.

¹⁸² Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 70–71.

¹⁸³ Ibid., p. 72. Mr. Sancho explained that this process may work differently in other counties.

¹⁸⁴ Ibid., pp. 72–73.

someone else's hands and might be embarrassing. We said, "Your voting status has come under question from information we've received from the secretary of state and would you please call us to discuss this."

Most of them did call. We cleared it up. Either it was not accurate information or it was. If they didn't call we did not remove them.

When the list came the next time there was a great deal of discussion among the supervisors as to the validity of the list. So we chose not to use it. So actually in Broward County no one was removed due to that second and third list. If you remember, there was a second list that was corrected later, according to testimony that I heard earlier.

But when I attended the supervisors' meeting in June in Key West, there was much discussion of the inaccuracies of the list. So we opted not to remove anybody that was on that list.¹⁸⁵

Ms. Carroll also testified that she attempted to work with the Executive Board of Clemency to verify the felon list but found that it was "very understaffed" and without "all the technical equipment to check all of these things." Ms. Carroll exercised her "discretion" to not remove names from the voter rolls based on the felon exclusion list.¹⁸⁶

Miami-Dade County Supervisor of Elections David Leahy found the statutory language that ultimately places the burden on alleged felons to prove their "innocence" to be a "reversed process." Mr. Leahy explained:

Under Florida law when I'm provided with a list of individuals who the state maintains are convicted felons who have not had their rights restored, it is my responsibility to verify that information to the best of my ability, and if I do not have any information that they are not convicted or that they haven't had their rights restored, then I'm required to remove them from the rolls.

[But you're correct, in essence,] the way it works in reality, the persons on that list who I send notices out to are responsible for giving me information that they are not convicted. So it's kind of a re-

verse process. They have to prove that they're not convicted felons in order to remain on the list.¹⁸⁷

In addition to sending notices in the mail, Miami-Dade County also held administrative hearings where alleged felons could present their "evidence." Mr. Leahy explained:

We don't remove these individuals that do not send us information back as convicted felons, because I don't know that for a fact. We go through what is called an administrative hearing process, which is set out in state law, where if people who are provided proper notice that there may be a problem with their registration do not contact us, either in writing or by phone or at an administrative hearing, then they are removed from the rolls.

So we remove many of these individuals because they did not contact us. As part of the administrative hearing process we don't remove them as felons unless we have specific information that they are indeed felons who have not had their rights restored.¹⁸⁸

Supervisors of elections are required to submit their voter registration files to the Division of Elections upon request. Their voter registration files are compiled into the central voter file, which was used by DBT to provide the felon list.¹⁸⁹

Mr. Leahy admitted that even the administrative hearing process does not provide complete protection for those wrongfully placed on the felon list. He recalled that some alleged felons proved their "innocence" through the submission of fingerprints to the Florida Department of Law Enforcement.¹⁹⁰ Mr. Leahy explained:

I'm concerned mainly with the process, in that so many of these people don't respond, and I don't know whether it's because they don't get notice or they're confused or what the problem is. But we're removing a lot of people from the rolls when I know for a fact based on the appeal forms that I get back that this is not a truly accurate list. It's

¹⁸⁵ Jane Carroll Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 289-90.

¹⁸⁶ Ibid., pp. 298-99.

¹⁸⁷ David Leahy Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 315.

¹⁸⁸ Ibid., pp. 315-18.

¹⁸⁹ Ibid., pp. 325-26.

¹⁹⁰ Ibid., pp. 320-26. Mr. Leahy also observed that "there are some instances where the response came back that they were a convicted felon according to FDLE and then they submitted fingerprints and it was determined it was actually somebody else who was the convicted felon, that they were not." Ibid.

drawn off the Florida Department of Law's database and that database was never intended for this purpose, but it's being used for this purpose.

And so I am concerned that we may be removing people through the administrative hearing process that are truly not convicted felons, and that will cause them a problem when they show up to vote in the next election.¹⁹¹

Palm Beach County Supervisor of Elections Theresa LePore also decided not to use the felon exclusion list provided by DBT Online. Ms. LePore testified that she found errors through her own study of the list and thought that a thorough verification process would be "tedious." Ms. LePore added:

The last list we got, the infamous list that's been talked about statewide, which was in summer of 2000, statewide had a tremendous amount of problems. One supervisor of elections' name even appeared on it and she had nothing more than a traffic ticket. We did some spot checking, found that there were errors, and I felt that I'd rather err on the side of the voter than to take somebody off with the chance that it was an error and to deny someone their right to vote by mistake. It's very time consuming and tedious to try to verify every single name on that list and to—if somebody calls on Election Day, they're on the list and they say they're on there in error, to go through the procedure of trying to make sure that they're eligible to vote, I decided to err on the side of the voter.¹⁹²

Although the Commission's record reflects that some supervisors of elections registered general complaints regarding the use of the exclusion lists, the record does not reflect that the Division of Elections was flooded with specific examples of Floridians erroneously identified as felons. For example, Beverly Hill, then Alachua County supervisor of elections, registered her complaints regarding the first exclusion list provided by DBT Online.¹⁹³ Ms. Hill was concerned that a person, whose clemency papers were dated prior to 1975, still appeared on the felon list.¹⁹⁴

¹⁹¹ Ibid., pp. 327–28.

¹⁹² Theresa LePore Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 399–400.

¹⁹³ Beverly Hill, supervisor of elections, Alachua County, "Central Voter File Reports," Mar. 9, 1999.

¹⁹⁴ Ibid. Ms. Hill noted that "one person who was restored earlier than 1975 (I saw his papers) is still on our list, and

Three examples of false positives occurred in Monroe County when a supervisor of elections employee, the spouse of another supervisor of elections, and the father of Harry Sawyer, the supervisor of elections, were all listed as potential felons.¹⁹⁵

Division of Elections' Responsibilities

Among the duties assigned to Clay Roberts, director of the Division of Elections, are the following:

- provide technical assistance to the supervisors of elections on voter education and election personnel training services;
- oversee and approve training courses for continuing education for supervisors of elections; and
- coordinate, on an annual basis, two statewide workshops for the supervisors of elections by reviewing and providing updates on the election laws to ensure uniformity statewide in the interpretation of the election laws.¹⁹⁶

In the fall of 1999, the Division of Elections held training for the supervisors of elections on the central voter file as refined by DBT Online.¹⁹⁷ In an e-mail to Marlene Thorogood dated April 28, 2000, Janet Modrow, a Division of Elections employee working on the contract, informed DBT that she and then Assistant General Counsel Emmett Mitchell were "swamped with work" and did not feel that training workshops were "really necessary."¹⁹⁸ Consequently, state officials may have missed an important opportunity to reduce the risk of removing eligible voters from the voter rolls.

one is still on the list from the last time [whose adjudication was withheld], and we informed FDLE." Ibid.

¹⁹⁵ Marlene Thorogood, project manager, DBT Online, "Felony Information," e-mail, June 17, 1999.

¹⁹⁶ Florida Department of State, Division of Elections, "Director's Office; Administrative/Legal," n.d., <<http://election.dos.state.fl.us/about/director.shtml>> (May 9, 2001).

¹⁹⁷ Emmett Mitchell, assistant general counsel, Division of Elections, "CVF Training Sessions," letter, Oct. 5, 1999. The letter also credits DBT Online project manager Marlene Thorogood for her participation in the training for which the Division of Elections "received very positive feedback from the supervisors and staff who attended." Ibid.

¹⁹⁸ Janet Modrow, Division of Elections, "Workshops," Apr. 28, 2000.

Responses to Implementation of the List Maintenance Contract

Florida State Senator Daryl Jones and State Representative Chris Smith, both members of the Governor's Select Task Force on Election Procedures, Standards and Technology, noted their opposition to the use of DBT Online's information in Florida's voter list maintenance:

Other voters were disenfranchised because a company hired by the Department of State to match voter rolls against other databases to ensure that felons and the dead could not vote did not properly do so. Database Technologies included in their list the names of more than 8,000 voters who should not have been removed from the voting rolls. However, by the time the error was caught, it was too late for the counties to fix it; in fact, the first time many of these voters realized they had been removed from the voter rolls was on Election Day.

In Leon County, the supervisor of elections was provided a list of nearly 700 names to purge from the voting rolls. Yet the Supervisor could only confirm 34 as actual felons (St. Pete Times, 12/6/00). In fact, Leon County's supervisor of elections always confirms the names by social security number and birth date—two pieces of information not used to match the lists by Database Technologies—because he does not trust the information provided to him by this company (St. Pete Times, 12/6/00).¹⁹⁹

Phyllis Hampton, general counsel of the Florida Elections Commission, testified that her office could investigate the wrongful removal of a Floridian from the voter rolls if there was evidence of a willful violation. Ms. Hampton stated:

If we had a sworn complaint, which on its face was legally sufficient, we would proceed and look into the matter and see. But one of the requirements to find a violation is that there is willfulness. So if you had a person who had accidentally been removed during the purging of the election records, that would not be a willful violation. You would

have to have someone who was deliberately removing people when they should not be removed, for there to be an election law violation.²⁰⁰

Barry Krischer, state's attorney for Palm Beach County, testified that although his office has a civil rights unit that is in contact with the community, it received no complaints of criminal misconduct, fraud, police presence, limited access, or discrimination at polling places.²⁰¹ When asked to what he attributed the lack of complaints received by his office, Mr. Krischer opined that the public does not perceive his office as the appropriate agency to receive these complaints. An excerpt from the Commission hearing transcript follows:

COMMISSIONER LEE: You mentioned that you had not received any complaints from your office regarding ineligible and race violations. How does the public know about getting to your office to file complaints? Is it a common knowledge?

MR. KRISCHER: Actually, the public doesn't perceive that the prosecutor's office is the place to go with those complaints. Law enforcement investigates. Then we receive them and we prosecute them. So the public will generally go to the supervisor of elections or call Tallahassee.

COMMISSIONER LEE: So it's safe to say that it's not that no one filed complaints, it's just that it never got to your office?

MR. KRISCHER: Correct. They don't perceive our office as the appropriate agency to receive those complaints.²⁰²

Human Consequences of Felon Exclusion List

The use of the parameters dictated by Florida state officials and the lack of any meaningful verification process left many county supervisors confused. As a result, many Floridians were erroneously removed from the voter lists.²⁰³

One such Floridian was Willie D. Whiting, Jr., a member of the clergy and registered voter in Tallahassee, who went with his family to vote

¹⁹⁹ State Senator Daryl Jones and State Representative Chris Smith, "Report: Accuracy and Fairness for Florida's Voters—Analysis and Recommendations by Democratic Legislators Serving on the Task Force on Election Procedures, Standards and Technology," Jan. 8, 2001 <<http://www.leg.state.fl.us>> (accessed Mar. 21, 2001). *But see* L. Clayton Roberts, director, Division of Elections, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 258 (testifying the problem was addressed and that "no person was removed from the voter roll based on that erroneous information").

²⁰⁰ Phyllis Hampton Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 153–54.

²⁰¹ Barry Krischer, state's attorney, Florida's Fifteenth Judicial Circuit, Palm Beach County, Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 191–92, 194–95.

²⁰² *Ibid.*, pp. 229–30.

²⁰³ *See de Janes Letter*, p. 2.

at his assigned polling place, Precinct 42 in Leon County. When Apostle Whiting presented his driver's license for identification purposes, the poll worker said his name was not on the registration list and called the supervisor of elections for Leon County to verify his registration status. Apostle Whiting asked to speak with a supervisor at that office, and he was told that an individual named Willie J. Whiting, born two days after Apostle Whiting, had been convicted of a felony in the state of Florida. Consequently, Apostle Whiting learned he had been wrongfully removed from the registration list. After Apostle Whiting threatened to contact an attorney, he was allowed to vote.²⁰⁴

William J. Snow, Jr., a Miami-Dade resident, testified that he received notice that he would be ineligible to vote in the November 2000 election because of a felony conviction. Receiving the notice "caused a great stress" upon Mr. Snow's heart because he had never been convicted of a felony. Mr. Snow testified that the problem has been corrected. Mr. Snow has been a Miami-Dade County resident for more than 33 years and voted in the 1996 election without incident.²⁰⁵

Marilyn Nelson, a poll worker with 15 years of experience in Precinct 232 in Miami-Dade County, encountered "quite a few" people whose names did not appear on the rolls at her precinct. When she called the supervisor of elections office, she was told that their rights had been taken away from them due to an alleged felony conviction. She was further instructed by the supervisor's office that she could not inform those voters of the reason for their removal from the rolls, but she was instructed to "tell them to call downtown at a later date."²⁰⁶

Professor Darryl Paulson testified that the Hillsborough County supervisor of elections estimated that 15 percent of those purged were purged in error and they were disproportionately

²⁰⁴ Willie D. Whiting Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 32.

²⁰⁵ William J. Snow, Jr., Miami-Dade County, affidavit submitted to the U.S. Commission on Civil Rights, Mar. 5, 2001. Mr. Snow did not state the extent to which this great stress upon his heart affected his health. Mr. Snow neither explained the process by which the confusion of his voting eligibility was corrected nor when the correction was made. Ibid.

²⁰⁶ Marilyn Nelson Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 130.

African American. According to Professor Paulson, another source estimated that 7,000 voters, mostly African Americans and registered Democrats, were removed from the list.²⁰⁷

According to news reports, even those who had received a full pardon for their offenses were listed on DBT's exclusion list.

Reverend Willie Dixon, a Tampa resident, received a full pardon for drug offenses in 1985, and has since become a youth leader, a bible preacher, and a "pillar of the Tampa African American community who has voted in every presidential election."²⁰⁸ But despite his 15 years of voting status, Pam Iorio, the supervisor of elections for Hillsborough County, sent Reverend Dixon a letter informing him that he had been removed from the rolls because of a prior conviction.²⁰⁹ Eventually, Reverend Dixon was able to verify his status as a registered voter.²¹⁰

Media accounts also captured the impact of list maintenance activities and the frustration they caused for Florida voters.²¹¹

Wallace McDonald, in 1959, was convicted of a misdemeanor, vagrancy, for falling asleep on a bench in Tampa while he waited for a bus. In 2000, Mr. McDonald received a letter from Ms. Iorio informing him that as an ex-felon, his name had been removed from the rolls. Despite the efforts of his attorney to correct the problem, Mr. Wallace was not allowed to vote.²¹² Mr. McDonald stated:

I could not believe it, after voting all these years since the 50s, without a problem . . . I knew something was unfair about that. To be able to vote all your life then to have somebody reach in a bag and take some technicality that you can't vote. Why now? Something's wrong.²¹³

²⁰⁷ Darryl Paulson Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 186-89.

²⁰⁸ Julian Borger, "How Florida Played the Race Card," *The Guardian Observer*, Dec. 4, 2000 <<http://www.guardianunlimited.co.uk>> (accessed Dec. 6, 2000).

²⁰⁹ Ibid.

²¹⁰ It is not known whether Reverend Dixon was able to vote in the November 7, 2000, election.

²¹¹ See, e.g., Robert E. Pierre, "Botched Name Purge Denied Some the Right to Vote," *The Washington Post*, May 31, 2001, p. A1; Scott Hiaasen, Gary Kane, and Elliot Jaspin, "Felon Purge Sacrificed Innocent Voters," *The Palm Beach Post*, May 27, 2001, p. 1A.

²¹² Borger, "How Florida Played the Race Card."

²¹³ Ibid.

CONCLUSION

Historically, individuals convicted of certain types of crimes alleged to be committed more by African Americans are affected by felon disenfranchisement. The practice of felon disenfranchisement has resulted in the greater likelihood of people of color, particularly African Americans, appearing erroneously on the Florida felon exclusion list.

In claiming to address the same types of fraud found during the 1997 Miami mayoral election, the Florida legislature enacted chapter 98.0975 of the Florida statutes, which required the Division of Elections to contract with a private entity to purge its voter file of deceased persons, duplicate registrants, individuals declared mentally incompetent, and convicted felons without civil rights restoration.²¹⁴ As a result, DBT Online was eventually retained to assist the Division of Elections in the removal of ineligible voter registrants from the voter file.

DBT Online performed an automated matching process against databases provided by the state of Florida and its own databases. Ultimately 173,127 Floridians were identified as potentially ineligible to vote in the November 2000 election. Of those on the list, 57,746 were identified as convicted felons. Based on DBT Online's statistical verification, the list it provided to the Division of Elections was 99.9 percent accurate. The Division of Elections distributed the relevant portions of the list to the 67 supervisors of elections.

The Division of Elections instructed DBT Online to verify the clemency status of any alleged convicted felon, even those convicted in states with automatic civil rights restoration, with the Florida Executive Clemency Board. Among those states with their own executive clemency boards, DBT Online was instructed to confirm the alleged felons' clemency status with the board. The methodology adopted by DBT Online to verify the clemency status of those alleged felons basically consisted of faxing a list to the appropriate state agency.

DBT Online was not required to provide a list of exact name matches. Rather, the matching logic only required a 90 percent name match, which produced "false positives" or partial

matches of the data. Moreover, the Division of Elections required that DBT Online perform "nickname matches" for first names and to "make it go both ways." Thus, the name Deborah Ann would also match the name Ann Deborah.

At a meeting in early 1999, the supervisors of elections expressed a preference for exact matches on the list as opposed to a "fairly broad and encompassing" collection of names. DBT Online advised the Division of Elections that it could produce a list with exact matches. Despite this, the Division of Elections nevertheless opted to cast a wide net for the exclusion lists.

Former director of the Division of Elections, Ethel Baxter, in 1998, recommended to the supervisors of elections that if there was any doubt as to the accuracy of an individual's status, the voter should be allowed to vote by affidavit. Despite knowing the exclusion lists contained many errors, there is no record that the Division of Elections provided similar cautionary advice to the supervisors of elections for the 2000 presidential election. The evidence does show that some election officials decided that it further served the state's interests to capture as many names as possible on these exclusion lists.

The process by which each county verified its exclusion list was as varied and unique as the supervisors of elections themselves. Some supervisors of elections sent letters to the alleged felons and held hearings to allow them to produce evidence of their clemency status or establish they were on the list in error. Other supervisors chose not to use the exclusion list at all.

Although the Commission's record reflects that the Division of Elections is responsible for coordinating two statewide workshops annually for the supervisors of elections to ensure uniformity in the interpretation of Florida election laws, the complaints registered by some supervisors of elections suggest that there was no common understanding of the use of the exclusion lists. The Florida legislature's decision to privatize its list maintenance procedures without establishing effective clear guidance for these private efforts from the highest levels, coupled with the absence of uniform and reliable verification procedures, resulted in countless eligible voters being deprived of their right to vote.

²¹⁴ This law was changed by the Florida Election Reform Act of 2001. See Epilogue.

Accessibility Issues

*The right to vote is not only a sacred testament to the struggles of the past. It is an indispensable weapon in our current arsenal of efforts to empower those who have traditionally been left out.*¹

After the November 7, 2000, election, newspapers were plastered with headlines about the complaints of Americans alleging their ability to vote was delayed, blocked, or otherwise impeded. The grievances voiced by Floridians at the Commission hearings on Election Day irregularities held in Tallahassee and Miami included inaccessible polling places for people with disabilities and the inability to receive language assistance. This chapter focuses on accessibility—the physical barriers and language barriers that disenfranchised some Florida voters.

SPECIAL NEEDS ASSISTANCE

The Voting Rights Act of 1965 and its subsequent amendments are designed to ensure every citizen entitled to vote can both register to vote and have access to his or her polling site—both physical accessibility and ballot accessibility. Physical accessibility includes not only accessible entrance into a voting precinct, but also physical access to a polling booth. Ballot accessibility includes ballots that do not discriminate against blind or visually impaired individuals as well as individuals who are unable to read English. The Commission hearings in Florida included testimony from Floridians with disabilities and of limited English proficiency contending they were disenfranchised in the November 2000 election because their precincts were not accessible.²

¹ President Clinton's Message to Congress on the Unfinished Work of Building One America, *Federal Department and Agency Documents*, Jan. 15, 2000.

² There are various laws that mandate states and the federal government to achieve comparable access for individuals

ACCESS TO POLLING PLACES FOR PEOPLE WITH DISABILITIES

In 1984, Congress passed the Voter Accessibility for the Elderly and Handicapped Act, which requires that all polling places be physically accessible to voters with disabilities.³ When a polling place is not accessible, it must be relocated or made temporarily accessible.⁴ If neither option is achievable, election officials might be allowed to employ an alternate method, such as curbside voting.⁵ Specifically, the statute provides:

with disabilities or special needs. These include the Americans with Disabilities Act and the Rehabilitation Act. For example, Title II of the Americans with Disabilities Act of 1990 prohibits discrimination in the election process by state and local entities, ensuring access to people with disabilities, and section 504 of the Rehabilitation Act of 1973 requires that state and local governments receiving federal funds ensure that their programs are accessible to persons with disabilities.

³ 42 U.S.C. § 1973ee (1984). Prior to its passage, the few cases challenging the right to vote by individuals with disabilities were rejected on the basis that because absentee ballot voting was available, there was no requirement that polling places be accessible.

⁴ An example of the proper implementation of the physical accessibility provisions of the Voter Accessibility for the Elderly and Handicapped Act is found in Monroe County, Florida. The day before any election—local or national—the Department of Public Works goes to each precinct that is inaccessible and installs a temporary ramp and other modifications to ensure accessibility to those with physical disabilities.

⁵ For example, in Miami-Dade, a deputy sheriff, at 7 a.m. on Election Day, posts a sign near the front entrance of a polling place that reads, "Voters who find the polling place inaccessible should see the Deputy Sheriff." The deputy sheriff, should be "stationed near the front entrance of the polling place while the polls are open [to] watch for voters with mobility impairment" that prevents them from gaining access to the voting area. A clerk or assistant clerk is then dispatched to the curbside to confirm that the voter is properly registered and then provides a ballot card, secrecy envelope, and voting device for the voter. After the "elector [places] the ballot in the secrecy envelope" the clerk brings the ballot and

(a) within each State . . . each political subdivision within each State . . . responsible for conducting elections shall assure that all polling places for Federal elections are accessible to handicapped and elderly voters.⁶

The statute required the Federal Election Commission (FEC) to report to Congress “no later than December 31 of each even-numbered year . . . the number of accessible and inaccessible polling places in such State on the date of the preceding general federal election, and the reasons for such inaccessibility.” The FEC was only required to file these reports for a period of 10 years beginning in 1984.⁷ The FEC fulfilled this duty, collecting data through self-reporting by local jurisdictions. The FEC’s final report in 1992 found that 86 percent of polling places in the United States were physically accessible to individuals with disabilities seeking to exercise their right to vote.

Disability advocacy groups, routinely hearing from their constituents, were skeptical of these numbers and have challenged these numbers, conducting their own surveys to determine compliance with the Voter Accessibility for the Elderly and Handicapped Act. In fact, a recent report titled *Voters Denied Equal Access at the Polls* found numbers startlingly different from those of the FEC.⁸ *Voters Denied* found that “voters with disabilities frequently encountered physical accessibility problems at their polling places.”⁹ The report noted that independent surveys and court cases suggest that potentially 40 percent of polling places “continue to pose sig-

voting device back to the ballot box and “with [an] inspector observing” casts the ballot into the ballot box for the individual with the disability. See David Leahy, supervisor of elections, Miami-Dade County, Response to Commission’s Interrogatory 6, Exhibit C, p. 31. Miami-Dade also provides procedures for disabled voters requiring assistance. The voter completes a “Declaration to Secure Assistance” affidavit. The voter is then escorted with a clerk and a “person of the voter’s choice to a votomatic” or has two election board members assigned to assist the voter. *Ibid.*, Exhibit C. It is unclear from Mr. Leahy’s response to the interrogatory whether the deputy sheriffs providing curbside assistance were in uniform or plainclothes. See chap. 2.

⁶ 42 U.S.C. § 1973ee-1(a) (1984).

⁷ 42 U.S.C. § 1973ee-1(c)(3) (1984).

⁸ New Hampshire Developmental Disabilities Council, National Voter Independence Project, *Voters Denied Equal Access at the Polls, A Report on the Status of Accessibility to Polling Places in the United States*, 2000.

⁹ *Ibid.*, p. 6.

nificant accessibility problems for voters with disabilities.”¹⁰

Florida’s Inaccessible Polling Places for People with Disabilities

At the Commission’s Tallahassee hearing, Jim Dickson of the National Organization on Disability testified that the inaccessibility of the nation’s voting systems means that many people with disabilities are unable to vote.¹¹ In addition, many of these people with disabilities found themselves forced to cope with inaccessible polling places that failed to provide proper accommodations. In some polling places, individuals using wheelchairs had to negotiate steps and unreachable polling booths. Some visually impaired voters were not provided with proper equipment to assist them in reading the ballots. As a result, they had to rely on poll workers and others to cast their ballots, denying them the right to a secret ballot. Many poll workers were not adequately trained to provide proper assistance to individuals with disabilities, denying these voters their rights.

The following examples present vivid illustrations of the barriers individuals with disabilities encountered when attempting to vote.

- **Joy Cohen**, an elderly woman from Broward County who uses a wheelchair, said her polling place did not have wheelchair-accessible ramps and did not provide curbside voting. As a result, she had to be lifted into her polling place. She testified how disappointing it was for her that she had spent her life advocating for legislation that would provide proper assistance for individuals with disabilities, and the one time she was in need of help, that assistance was not provided for her.¹²
- **Harold Cousminer**, a visually impaired voter from Palm Beach County, was given improper equipment to assist him in voting.

¹⁰ *Ibid.* The report cites many examples and found in one state that a shocking 60 percent of polling places were inaccessible. Perhaps most egregious are two New York counties in which every polling place, with the exception of one, was physically inaccessible to voters with disabilities. *Ibid.*

¹¹ Jim Dickson Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 204.

¹² Joy Cohen, Testimony before the U.S. Commission on Civil Rights, Miami, FL, Feb. 16, 2001, Verified Transcript, pp. 115–16.

The poll workers were unfamiliar with providing assistance and accommodations to individuals with disabilities. He was given a magnifying screen to see the ballot, but the magnifying screen could not be used for his butterfly ballot. He ultimately relied on his wife to cast his ballot and his right to a secret ballot was compromised.¹³

- **Dr. Frederick Shotz**, a resident of Broward County, had to use his upper body to lift himself up the steps in order to access his polling place. Once he was inside the polling place, he was not given a wheelchair accessible polling booth. Once again, he had to use his arms to lift himself to see the ballot and, while balancing on his arms, simultaneously attempt to cast his ballot. He testified that an individual using a wheelchair who did not have the same upper body strength could not have accessed his polling place. He also said his polling place did not provide curbside voting and described curbside voting as a “wonderful fantasy that never came true.”¹⁴

¹³ Harold Cousminer Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 58–60. Mr. Cousminer suggested that the disabled population votes 15 percent to 20 percent less than other communities because of the insufficient accommodations at polling places. Mr. Cousminer recommended that supervisors of elections utilize the following: (1) disability advisory groups to assess “whether the entire voting process is accessible and to determine what makes a polling place or ballot inaccessible”; (2) a polling place access guide provided by the National Task Force on Election Accessibility; (3) buildings already deemed accessible for polling places; (4) signs to direct people to disabled accessible entrances; (5) wheelchair accessible voting booths; and (6) larger print ballots for the visually impaired. *Ibid.*, pp. 62–65.

¹⁴ Frederick Shotz Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 20–25. Dr. Shotz stated that he was not offered the accommodation to which he was accustomed at his polling place for the November 2000 election. Dr. Shotz described his experience as follows:

“And then, much to my surprise, the accommodation I’ve been given in the past to have the voting platter placed on a table for me where I could actually see to vote was denied with the excuse being, ‘We have no spare tables and we are too busy today.’ But there was a votomatic machine with a wheelchair symbol taped to the machine. And somebody had actually lowered two of the legs to make it at wheelchair accessible height, but the machine has four legs, not two. So the front of the machine was higher than the back of the machine causing it to tilt away from me and making it almost impossible to see the ballot. The legs were not wide enough apart for my wheelchair so I could not sit close to the machine. I fortunately was able to use my arms to lift myself up and attempt to read the ballot and to cast my vote. I have

- **Felix Boyle**, a resident of Miami-Dade County, testified that his polling place was under construction and that it would have been impossible for individuals using wheelchairs to access. The pavement leading to the main entrance of the building was broken and the surrounding areas were muddy.¹⁵
- **Alan Fields**, a Palm Beach resident in poor health, brought his wife and his nurse to assist him in voting. Neither was allowed to assist the resident to vote. Rather, a precinct worker assisted the voter and told him to fill in the first bubble if he wanted Bush or the second bubble if he wanted Gore, which was in fact the bubble for Buchanan. Thus, the resident did not vote for the candidate of his choice.¹⁶
- In one particularly egregious situation in Palm Beach, a group of people with disabilities had arranged for a bus to transport them from their condominium to their polling place. When they arrived, they discovered that the polls were on the second floor of the building with no elevator. “Those people who were disabled, therefore, one by one, using the wheelchair lift in the bus, got back on the bus, went back to their condominium association buildings without ever casting a vote.”¹⁷

Miriam M. Oliphant, supervisor of elections for Broward County, conceded that some precincts in her district are inaccessible and need ramps to comply with accessibility requirements.¹⁸ Ms. Oliphant also admitted that some

the strength in my arms to do that. Many people that use wheelchairs do not.”

Ibid., pp. 24–25. Although some may propose that absentee ballots are a reasonable accommodation to people with special needs, Dr. Shotz testified that while absentee ballots may provide access to the voting process, it does “not provide equal access for people who want to vote on Election Day.” *Ibid.*, p. 20.

¹⁵ Felix Boyle Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 97.

¹⁶ Robert A. Butterworth, Florida attorney general, “Ballot in Palm Beach County,” letter to addressee, Nov. 8, 2000, Bates No. 0010150.

¹⁷ Frederick Shotz Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 35.

¹⁸ Miriam M. Oliphant, supervisor of elections, Broward County, Response to Commission’s Interrogatory 1, Apr. 16, 2001.

precincts were not only inaccessible, but could not be ramped or made accessible and needed to “be replaced.”¹⁹

These are not isolated instances. Based on the hearings held by the Commission and the testimony of witnesses, numerous Florida residents encountered obstacles to polling places and were thus disenfranchised.

Requirements of accessibility are not limited to individuals with physical disabilities. The Voting Rights Act requires “ballot accessibility.” This includes voters who are blind or visually impaired and those with language barriers. Accessibility means that individuals with accessibility issues—whether they be physical or language issues—should have the same access to precincts and ballots as individuals without these barriers.

ACCESS TO POLLING PLACES FOR PEOPLE NEEDING LANGUAGE ASSISTANCE

The majority of non-English-speaking Americans are native-born citizens constitutionally entitled to vote.²⁰ Congress responded in 1975 by enacting amendments to the Voting Rights Act addressing voting discrimination against members of “language minority groups,”²¹ which prohibit states from providing voting materials exclusively in English when certain conditions exist.²² Prior to the 1975 legislation,²³ which requires multilingual voting assistance in areas with large numbers of non-English speakers, people who did not understand English were effectively disenfranchised by elections held only

in English. Congress enacted a multilingual requirement if:

- (i)(I) more than five percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient;
 - (II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or
 - (III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than five percent of the . . . citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and
- (ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.²⁴

The law requires that when this provision applies, all “voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots[,]” be provided in the appropriate language of the minority group as well as English.²⁵

Florida’s Inaccessible Ballots for Non-English or Limited-English-Proficient Voters

Despite the requirements that non-English-proficient voters be provided with some form of language assistance, large numbers of limited English-speaking voters were denied this assistance at polling places all around Florida. This occurred in counties and precincts where bilingual ballots and language assistance are mandated. Because of this failure to provide proper language assistance, voters faced problems understanding the ballots or the fundamental procedure for voting. The groups disproportionately affected were Haitian Americans and Spanish-speaking Latinos.

Many poll workers were not properly trained to handle language assistance issues. Some voters found that even when volunteers were avail-

¹⁹ Ibid.

²⁰ It is estimated that over 23 million Americans speak languages other than English in their homes. See Bureau of the Census, U.S. Department of Commerce, Statistical Abstract of the United States (1996).

²¹ 42 U.S.C. § 1973b(f)(1) (1994).

²² 42 U.S.C. § 1973aa-1a (1994). The Voting Rights Act defines “language minorities” or “language minority groups” as persons who are “American Indian, Asian American, Alaskan Natives or of Spanish heritage.” 42 U.S.C. § 1973(c)(3) (1994).

²³ 42 U.S.C. § 1973b(f)(4) (1982). The 1975 amendments to the Voting Rights Act of 1965 provide that in any jurisdiction covered by the act “[w]henver any [jurisdiction] . . . provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots,” it shall provide them on a multilingual basis to members of applicable language minority groups.

²⁴ 42 U.S.C. § 1973aa-1a(b)(2)(A) (1994).

²⁵ 42 U.S.C. § 1973aa-1a(c) (1994). This provision compels “any State or political subdivision subject to [42 U.S.C. § 1973aa-1a(b) to] provide[] any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots . . . in the language of the applicable minority group as well as in the English language.”

able 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. Thus, these non-English minority voters found their polling places to have ballots that were, essentially, inaccessible to them.

Marleine Bastien, a Haitian American community leader, testified at the Commission's Miami hearing that she received an overwhelming number of complaints on Election Day. She visited polling places that were required by county ordinance to provide bilingual ballots. Ms. Bastien was disturbed to learn that the precincts, in violation of the law, did not have bilingual ballots. Many Haitian American voters were, in effect, turned away from their polling places without the opportunity to vote.²⁶

Similarly, Jackson Chin, associate counsel at the Puerto Rican Legal Defense and Education Fund (PRLDEF), testified at the Tallahassee hearing that after a "groundswell of complaints from Latino Floridians," the PRLDEF "dispatched a team of lawyers to investigate and to assess multiple complaints."²⁷ PRLDEF's field investigation revealed that many eligible Puerto Rican voters were turned away from polling places without proper language assistance. Mr. Chin expressed his surprise that counties subject to section 203 of the Voting Rights Act failed to meet their "legal obligations to guarantee meaningful electoral access to its growing Spanish-speaking language minority voters."²⁸ In

²⁶ Marlene Bastien Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 25-28.

²⁷ Jackson Chin Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 197.

²⁸ *Ibid.* In 1975, Congress enacted Public Law 94-73, which amended the Voting Rights Act of 1965 (VRA). Section 203 of that law amended section 4 of the VRA and was enacted after "Congress [found] that voting discrimination against citizens of language minorities [was] pervasive and national in scope." Among other things, the subsection provided that "no voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group." 42 U.S.C. § 1973b(f)(2) (1984). The objective of the VRA's new provisions was to enable members of applicable language minority groups to participate effectively in the electoral process, including a requirement that materials and assistance be provided in a way that allows members of applicable language minority

some counties, many Latino voters did not receive bilingual assistance.²⁹ PRLDEF believes that certain election practices and policies in Florida led to widespread voter disenfranchisement of possibly several thousand Latino voters.³⁰

At the Tallahassee hearing, however, the director of the Division of Elections, L. Clayton Roberts, testified that his office in fact provided posters to the supervisors of elections in Spanish and English.³¹ He stated:

The extent of what we've done on mechanics of voting is we provide posters to the supervisor of elections in Spanish and English, which are posted in the polling place that explain to voters the basics of voting; to get their ballot, take it to their voting system to vote it, if they make an error on it, they are entitled to get another ballot.³²

Similarly, Florida Attorney General Robert A. Butterworth testified that approximately 11 counties have ballots in English and Spanish.³³ Attorney General Butterworth said preclearance³⁴ counties are required to have ballots in both English and Spanish.³⁵ He also commended Miami-Dade County for its ordinance that requires ballots to be translated into Creole because of its large Haitian community.³⁶ Ap-

groups to be informed of and participate in voting-connected activities.

²⁹ *Ibid.*, pp. 200-01.

³⁰ *Ibid.*, p. 198.

³¹ L. Clayton Roberts, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 12, 2001, Verified Transcript, p. 286.

³² *Ibid.*

³³ Robert A. Butterworth Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 201.

³⁴ When a state or political subdivision has violated the Voting Rights Act (VRA), it becomes subject to preclearance obligations under section 5 of the VRA. The jurisdiction subject to section 5 must obtain preclearance—procedures the state must follow whenever it enacts or seeks to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting. 42 U.S.C. § 1973c (1994). Preclearance requires proof that the proposed voting change does not deny or abridge the right to vote on account of race, color, or membership in a language minority group. Section 5 provides that preclearance may be obtained only from the United States District Court for the District of Columbia or from the United States attorney general.

³⁵ Robert A. Butterworth Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 218.

³⁶ *Ibid.*

proximately 60 Miami-Dade County precincts had ballots in both English and Creole.³⁷ Attorney General Butterworth nevertheless conceded the Miami-Dade County ordinance does not resolve all the language assistance issues. He noted:

Now there might not have been enough handouts in Creole or enough interpreters there to assist, but I think at least the counties went in the right direction, and with the strong enrollment, this time the Haitian American community had a tremendous enrollment, a tremendous turnout and it appears that there may not have been enough materials for this election.³⁸

Attorney General Butterworth defended Miami-Dade County from criticisms that it was not prepared for the voter turnout on November 7, 2000, remarking:

When you see a community like Miami-Dade attempting to reach out and do what they believe is appropriate and they miss the estimates—well, gee, all the news media missed the estimate twice when it came to Florida. But they tried to, as they predict what the election is going to be, how many machines they'll need in each precinct, they have to go by their own experience and the people in the community.³⁹

After the November election and upon further reflection, Attorney General Butterworth recommended that Broward County enact an ordinance requiring Creole translation in certain precincts.⁴⁰ He conceded that so many languages are spoken in Florida that accommodations are essential.⁴¹

CONCLUSION

The inaccessibility of polling places—for both individuals with physical disabilities needing barrier-free access to buildings and those needing ballot accessibility—was an issue presented at the Commission's Florida hearings.

It is estimated that voter participation among people with disabilities is at least 15 to 20 per-

cent below that of the population at large.⁴² Despite the enactment of the federal law requiring polling places to be accessible to people with disabilities, the law is not enforced and barriers that prevent individuals with disabilities from voting have not been removed at all polling places. Credible testimony established that many voters, unable to access (enter) the precincts, returned home without voting. Others, while able to gain physical access to their precinct, found the booths or ballots inaccessible and were deprived of their voting rights.

Many language minority voters were also effectively prevented from casting a ballot because election officials refused to provide bilingual ballots or assistance on Election Day, and many persons who were not literate were denied adequate assistance in casting their ballots. Remarkably, while being denied this assistance, other language minority voters were forced to vacate the voting booth after five minutes, a limitation imposed by Florida law.⁴³ These failures meant that language minority voters were denied meaningful participation in the November 2000 election.

Florida's chief legal officer, Robert A. Butterworth, conceded that more "accommodations" must be made to enfranchise voters with special needs. He noted, "We should also target those communities with the most urgent needs and Florida has communities with many urgent needs, especially language needs, people who are elderly and minority communities who are voting sometimes for the first time."⁴⁴ He added, "We have so many languages that are being spoken throughout Florida . . . that we have to make accommodations."⁴⁵

Unless and until these accommodations are made, for both persons with disabilities and language minority voters, the struggles to gain the right to vote and the history of barriers being erected remain.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid., p. 220.

⁴¹ Ibid., p. 219.

⁴² Genevieve Cousminer, coordinator of advocacy services, Coalition for Independent Living Options, Miami Verified Transcript, Feb. 16, 2001, p. 62.

⁴³ FLA. STAT. ch. 101.51 (1999).

⁴⁴ Robert A. Butterworth Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 201.

⁴⁵ Ibid., p. 219.

CHAPTER 7

Casting a Ballot

*The right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.*¹

PROVING ONE SHOULD BE PERMITTED TO VOTE

In the 2000 presidential election, many Floridians arrived at their polling places expecting to cast ballots for the candidates of their choice, but left frustrated after being denied this right. This chapter focuses on the mechanisms provided by Florida election law that are intended to safeguard the right to vote. In Florida, affidavits are used to cure problems arising at the polling place, while absentee ballots are used when the voter cannot physically be at the polling place on Election Day. At the time of the 2000 election, Florida law did not allow “provisional” balloting.² A provisional ballot allows a person to cast a ballot, but the ballot is not counted until the eligibility of the voter is determined.³

Affidavits

When there is doubt that a person who seeks to vote is registered, yet that person is willing to swear that he or she did in fact register to vote, the Florida Election Code authorizes voting by affidavit in certain circumstances. Although affidavits seem able to remedy many situations, they are of no use when poll workers are unable to reach supervisors of elections, a complaint

heard frequently at the Commission hearings.⁴ In those cases, the individuals were denied the right to vote. The Florida Election Code provides for affidavit voting in the following circumstances:

- **Discrepancy between Signatures.** Under Florida law, individuals identify themselves as duly qualified electors by signing an identification slip. The election clerk compares this signature with the signature in the precinct registration book. If the official is satisfied that the signature is the same, the person is then permitted to vote. If the election official has doubts that the signature is actually that of the person attempting to vote, the person may be still permitted to vote if he or she executes an affidavit.⁵
- **Change of Address.** An elector who moves from one precinct to another precinct within the county in which the elector is registered may be permitted to vote in the precinct that is the legal residence at the time of voting, provided the elector completes an affidavit providing information as to where he or she is legally registered to vote.⁶
- **Change of Name.** An elector whose name changes because of marriage or another legal process may be permitted to vote if he or she completes an affidavit providing the name

¹ Reynolds v. Sims, 377 U.S. 533 (1964).

² After the 2000 election the Florida legislature provided for the limited use of provisional ballots. See Epilogue.

³ The use of provisional balloting is discussed in greater detail later in this chapter.

⁴ In her testimony at the Commission hearing, Theresa LePore agreed with the characterization that in the “vast majority of circumstances,” would-be affidavit voters needed to contact her office before being permitted to vote. Theresa LePore, supervisor of elections, Palm Beach County, Testimony before the U.S. Commission on Civil Rights, Miami, FL, Feb. 16, 2001, Verified Transcript, p. 381.

⁵ FLA. STAT. ch. 101.47(1)–(2); ch. 101.49(1) (1999).

⁶ FLA. STAT. ch. 105.045(2)(a) (1999).

under which the elector is legally registered to vote.⁷

- **Assistance by Reason of Disability.** An elector who requires assistance because of “blindness, disability, or inability to read or write” is entitled to vote if the elector executes an affidavit attesting to this need for assistance.⁸
- **Challenged Ballots.** An affidavit is used to allow an individual to vote when another elector, or an observer, challenges the right of the person to vote. The challenger is required to swear that the reasons given for the challenge are true. The challenged elector then executes an affidavit stating that he or she is authorized to vote. If the voter executes the affidavit, the election officials will decide by a majority vote whether the challenged person may vote.⁹
- **Elector’s Name Does Not Appear on the List.** When an elector’s name does not appear in the registration books of the election precinct where the elector is registered, and when the elector cannot present a valid registration identification card, the elector may have his or her name restored, if the supervisor of elections for the county where the polling place is located authorizes the vote.¹⁰

⁷ FLA. STAT. ch. 101.045(2)(b) (1999).

⁸ FLA. STAT. ch. 101.051 (1999).

⁹ FLA. STAT. ch. 101.111(1)–(3) (1999). According to George Reeves, attorney for Madison County, this procedure has been interpreted to apply only if the person whose right to vote is challenged is listed on the registration rolls. George Reeves, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 11, 2001, Verified Transcript, p. 68.

¹⁰ FLA. STAT. ch. 101.045(3) (1999). While this provision does not specifically reference the use of an affidavit, it appears that in order to be satisfied the supervisor would want the elector’s position in an affidavit form. According to Ion Sancho, poll workers are given a countywide register and special telephone numbers so they can communicate with the office of the supervisor. When a person is not on the rolls, the clerk will look in the register to see if the person is eligible to vote. If the person is not on the countywide register, the clerk will call the office of the supervisor of elections to verify the information before issuing a ballot. Ion Sancho, supervisor of elections, Leon County, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 12, 2001, Verified Transcript, p. 70. According to Linda Howell, most situations where this provision was used involved persons who moved yet went to their former voting places to vote. Linda Howell, supervisor of elections, Madison County, Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 73–74.

Florida permits affidavits to be used to remedy many situations where a potential voter could be denied the right to vote. Florida Election Code section 101.111 conceivably solves many problems that would disenfranchise voters. This provision permits an individual to be issued a ballot even if the person’s name does not appear on the precinct register and the voter cannot present a valid registration identification card. Nevertheless, this person can only be restored to the registration lists and be permitted to vote “if the supervisor is otherwise satisfied that the voter is validly registered, that the voter’s name has been erroneously omitted from the books, and that the voter is entitled to have his or her name restored. . . .”¹¹

Under these statutory provisions tremendous discretion is vested in the supervisor of elections. If the supervisor is not satisfied with the individual’s voting eligibility then the person’s right to vote is denied. Equally important, the law vests the supervisor, no one else, with power to deny or permit an individual to vote. If the supervisor cannot be contacted, the right to vote is denied. As discussed more fully in chapter 2, one of the biggest problems during the November 2000 election was the great difficulty contacting supervisors of elections.

Some election officials in Florida may have unduly restricted the use of affidavit voting when faced with mounting confusion over confirming the eligibility status of voters on Election Day. For example, if the name of an eligible voter did not appear on the voter registration list at a polling place due to governmental inefficiency or error, that person was not allowed to cast a ballot that could be counted even if it was later confirmed that that person was eligible to vote. The officials, however, maintain this is done because once a ballot is cast as authorized by affidavit ballot, it is indistinguishable from the ballots of individuals on the registration list. They emphasize that if it is discovered that the information in the affidavit is false, the fraudulent vote cannot be annulled. Anyone submitting a false affidavit regarding his or her ability to vote is subject to criminal prosecution; yet, there is no remedy for the eligible voter who was wrongly denied an opportunity to vote due to the government’s inefficiency or error.¹² The lack of

¹¹ FLA. STAT. ch. 101.045(3) (1999).

¹² FLA. STAT. ch. 104.011 (1999).

sufficient training of poll workers also contributed to the problem of confirming the eligibility status of registered voters whose names did not appear on lists at certain polling places.

Provisional Ballots

One way to help protect the rights of registered voters is the provisional ballot. In May 2001, Governor Bush signed into law a provision that permits the use of provisional ballots in some circumstances.¹³ A provisional ballot is issued to a voter at a polling place if there is a question about the voter's eligibility. Provisional ballots allow those eligible to vote to do so and at the same time protect the integrity of the elections by not counting the provisional ballots of those persons who are not eligible to vote. If the election official issues a provisional ballot, the voter's ballot is usually sealed in a special provisional voter's envelope that the voter signs under penalty of perjury. The voter states his or her eligibility to vote, and the inspector notes the reasons for issuing the provisional ballot on the envelope. Provisional ballots are not opened until voting officials research the registration information and the eligibility of the voter is determined. This research occurs during the official vote count, during the days immediately following the election. Eligible ballots are added during the vote count period.

Ion Sancho, Leon County supervisor of elections, testified to the advantages of a provisional ballot:

Well, let me give you the experience in Hillsborough County, [where] . . . I visited. It's a wonderful county who added 40 [telephone] lines. There are going to be times when I don't care if you add 40 lines . . . it's not enough. Which is one of the reasons why in our legislative meeting in Tampa on December 12, the supervisor of the legislative committee has made a recommendation . . . that we will present to the legislature this spring. So let's go to [a] provisional ballot because we recognize that under certain elections, I don't care if you add 50 lines, . . . you're not going to be able to deal with all you need to. And the other aspect of that is, do you have 50 trained individuals who know intimately all of the intricacies of the Florida elec-

tion law that would be able to answer the person's problem?¹⁴

The use of provisional balloting is not a new or unique practice. The following are a few examples of states using provisional ballots and when they can be used.

- **California.** At all elections, a voter claiming to be properly registered is entitled to vote by provisional ballot. A provisional ballot is sealed in a special envelope and deposited in the ballot box. The color of the envelope is different from that of absentee ballots. These provisional ballots are not counted until the registration information is researched by the registrar's office and the voter is determined to be eligible to vote. Provisional ballots are also authorized for absentee voters who vote at the polls but are unable to surrender their unvoted absentee voter ballots.¹⁵
- **New Jersey.** Any voter who prior to an election moves within the same county but has no confirmation of that move may still vote in the district to which he or she has moved by use of a provisional vote.¹⁶ After voting by provisional ballot and completing the affirmation statement, the voter places the provisional ballot in an envelope. The voter then hands the envelope to a member of the district board, who places the envelope in the provisional ballot bag to be opened and counted at a later time if it is established that the person is entitled to vote.¹⁷
- **Kansas.** When a registered voter changes name by marriage, divorce, or another legal proceeding and is otherwise qualified to vote at the polling place that voter is allowed to vote by a provisional ballot. When a registrant moves from an address on the registration book to another address within the county and has not reregistered, that individual is allowed to vote by provisional ballot.¹⁸ If a person's right to vote is challenged, the person is permitted to vote by provisional ballot, which is opened and reviewed

¹⁴ Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 82–83.

¹⁵ CAL. ELEC. CODE § 14310(a)–(e) (2001).

¹⁶ N.J. STAT. § 19:53C-1 (2001).

¹⁷ N.J. STAT. § 19:53C-10(a)–(b) (2001).

¹⁸ KAN. STAT. ANN. § 25-2316c(a)–(b) (1999).

¹³ See Epilogue.

by the county board of canvassers, which determines whether to accept the vote.¹⁹

- **West Virginia.** A voter whose registration record lists one address but who has since moved to another address in a different precinct in the same county is permitted to update the registration at the polling place in the new precinct. He or she is permitted to vote by provisional ballot at the new polling place. If the voter's registration is found on the registration records within the county during the canvass and no other challenge of eligibility was entered on Election Day, the ballot is counted.²⁰

The Governor's Select Task Force on Election Procedures, Standards and Technology endorsed "the concept of provisional ballots as a way of encouraging votes by those whose registration status could not be clarified quickly at the polls, but also urged the Division of Elections to look carefully at various alternatives."²¹

Absentee Ballots

Although there was little testimony at the Commission hearings regarding the use absentee ballots, an overview of Florida's voting systems cannot overlook the statutory provisions regarding absentee ballots. The rules that applied to absentee ballots in Florida's 2000 presidential election were a combination of federal, state, and local laws. The Florida Election Reform Act of 2001 changed several provisions regarding absentee ballots.²² The discussion that follows is based on Florida law at the time of the 2000 presidential election.

Requests for Absentee Ballots

Florida law provides that an elector may request an absentee ballot in person or in writing.²³ One request is deemed sufficient to receive an absentee ballot for all elections held within a calendar year and the request may be considered canceled when any first-class mail sent by the supervisor of elections to the elector is returned

as undeliverable.²⁴ The supervisor may also accept a written or telephonic request for an absentee ballot from the elector, or, if directly instructed by the elector, a member of the elector's immediate family or the elector's legal guardian.²⁵

The person making the request must disclose: (1) the name of the elector for whom the vote is requested; (2) the elector's address; (3) the last four digits of the elector's social security number; (4) the registration number on the elector's registration identification card; (5) the requester's name; (6) the requester's address; (7) the requester's social security number and, if available, driver's license number; (8) the requester's relationship to the elector; and (9) the requester's signature.²⁶

Florida law allows voting by absentee ballot for any registered and qualified voter who—

- is unable without another's assistance to attend the polls;
- is an inspector, a poll worker, a deputy voting machine custodian, a deputy sheriff, a supervisor of elections, or a deputy supervisor who is assigned to a different precinct than that in which he or she is registered to vote;
- on account of the tenets of his or her religion, cannot attend the polls on the day of the general, special, or primary election;
- may not be in the precinct of his or her residence during the hours the polls are open for voting on the day of the election;
- has changed his or her residency to another county in this state within the time period during which the registration books are closed for the election for which the ballot is requested; or
- has changed his or her residency to another state and is ineligible under the laws of that state to vote in the general election; however, only for presidential ballots.²⁷

¹⁹ KAN. STAT. ANN. § 25-409 (1999).

²⁰ W.VA. CODE § 3-2-31(c) (2000).

²¹ The Governor's Select Task Force on Election Procedures, Standards and Technology, *Revitalizing Democracy in Florida*, Mar. 1, 2001, p. 56.

²² See Epilogue.

²³ FLA. STAT. ch. 101.62(1)(a) (1999).

²⁴ *Id.*

²⁵ FLA. STAT. ch. 101.62(1)(b) (1999).

²⁶ *Id.*

²⁷ FLA. STAT. ch. 97.021(1)(a)-(f) (1999).

Florida also provides for absentee voting for any registered and qualified voter residing overseas, specifically—

- members of the Armed Forces while in the active service who are permanent residents of the state and are temporarily residing outside the territorial limits of the United States and the District of Columbia;
- members of the Merchant Marine of the United States who are permanent residents of the state and are temporarily residing outside the territorial limits of the United States and the District of Columbia; and
- other citizens of the United States who are permanent residents of the state and are temporarily residing outside the territorial limits of the United States and the District of Columbia.²⁸

Florida law requires absentee ballots for overseas electors to be sent 45 days prior to the general election²⁹ and be received by the supervisor of elections by 7 p.m. on the day of the election.³⁰

Conversely, Florida has an administrative provision³¹ that allows overseas ballots to be counted up to 10 days after the general election if they are postmarked and dated by Election Day and they have a foreign postmark.³² This administrative rule was promulgated as the result of a 1980 complaint in which the United States attorney general sued the state of Florida to enforce the provisions of the Overseas Citizens Voting Rights Act³³ and the Federal Voting

Assistance Act.³⁴ The complaint alleged that because of Florida's late scheduling of primary elections in 1980 and the delayed mailing of absentee ballots, overseas voters would be deprived of their right to vote.³⁵ Florida subsequently reached an agreement with the United States and entered into a consent decree in which it agreed, among other things, to accept overseas absentee ballots received up to 5 p.m. 10 days after Election Day and inform overseas absentee voters of the 10-day extension.³⁶ The parts of the consent decree regarding absentee ballots are now provisions in the Florida Administrative Code.³⁷

In the aftermath of the 2000 presidential election, the conflict between the Florida statute and the administrative rule became the subject of litigation. A lawsuit was filed seeking to exclude the 2,411 overseas ballots received up to 10 days after the election that were included by the Florida Elections Canvassing Commission in the final election results.³⁸ The district court and the 11th Circuit allowed the administrative rule to trump the statutory provision.³⁹ Consequently, ballots of overseas voters can now be counted if received within 10 days of the election.

²⁸ FLA. STAT. ch. 101.62(7)(a)(1)–(3) (1999). The Florida statute is nearly identical to the Uniformed and Overseas Citizens Absentee Voting Act of 1986. See 42 U.S.C. §§ 1973ff-1–1973ff-6 (2001). The administrative responsibilities for the Uniformed and Overseas Absentee Voting Act are assigned to the secretary of defense; the attorney general has enforcement responsibilities. 42 U.S.C. §§ 1973ff-6, 1973ff-4.

²⁹ FLA. STAT. ch. 101.62(4)(a) (1999).

³⁰ FLA. STAT. ch. 11.67(2) (1999).

³¹ FLA. ADMIN. CODE ANN. r. 1S-2.013(7)–(8) (2000).

³² Robert A. Butterworth, Florida's attorney general, issued an opinion that a date entered by the elector can substitute for a postmark. In his view, overseas military ballots lacking postmarks but containing handwritten or notarized dates should be counted. See Jon Steinman and Kevin Spear, "Official Look at Discarded Ballots; Attorney General Bob Butterworth Responded to GOP Concerns About Military Absentee Ballots," *The Orlando Sentinel*, Nov. 21, 2000, p. A1.

³³ 42 U.S.C. §§ 1973 *et seq.*

³⁴ 42 U.S.C. § 1973cc(b).

³⁵ *Harris v. Florida Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1322 (2000).

³⁶ *Id.* at 1322.

³⁷ FLA. ADMIN. CODE r. 1S-2.013(7)–(8) (2000).

³⁸ The counting of these overseas ballots received after 7 p.m. on Election Day became relevant because of the vote margin. The plaintiffs stipulated that 1,575 of the overseas absentee votes received after November 7 were cast for Bush and 836 votes were cast for Gore. Consequently, overseas absentee votes received after November 7 resulted in a net gain to Bush of 739 votes. The parties also agreed that the certified difference between the two candidates in the state as a whole was 537 votes, in favor of Bush. Therefore, if all the overseas absentee votes received after November 7 were excluded, the result would be that Gore would have a margin of 202 votes over Bush.

³⁹ See *Harris v. Florida Elections Canvassing Comm'n*, 235 F.3d 578 (2000). In the district court case, the court acknowledged that when statutes and administrative rules are in conflict, the statute usually prevails. The court observed, "This is the opposite of the traditional interplay between the administrative code and the statutes, but is in recognition of the fact that the administrative code mechanism was merely the expression of a federal court detailing . . . the manner in which a state must remedy its statute's conflict with federal law." *Harris v. Florida Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1324 (2000).

CONCLUSION

There was consistent, uncontroverted testimony regarding the persistent and pervasive inability of poll workers to reach the offices of the county supervisors of elections to verify voter eligibility during the 2000 presidential election.⁴⁰ In situations when a potential voter's name does not appear on the precinct registration books, and when he or she cannot present a valid registration card, voting is permitted only "if the supervisor is otherwise satisfied that the elector is validly registered, that the elector's

name has been erroneously omitted from the books, and the elector is entitled to have his or her name restored."⁴¹ If—as occurred in Florida—the supervisor of elections cannot be contacted, then voter eligibility cannot be verified and corrected on Election Day. While in many states this problem can be addressed through the use of provisional ballots, the use of such ballots was not available under Florida law on November 7, 2000, and this led to numerous Floridians being denied their right to vote.

⁴⁰ See chap. 2.

⁴¹ FLA. STAT. ch. 101.045(3) (1999).

The Machinery of Elections

*As long as ours is a representative form of government . . . the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.*¹

Florida lacks uniform voting systems for its 8.4 million voters.² Each county is authorized to select its voting method from the list of systems certified by the secretary of state and the state Division of Elections.³ The federal role is extremely limited. While Federal Election Commission (FEC) standards govern all voting systems other than paper ballots and lever machines, state adherence to the standards is completely voluntary. Douglas Jones, associate professor of computer science at the University of Iowa and chair of the Iowa Board of Examiners of Voting Machines and Electronic Voting Systems, said the FEC's standards are "far from perfect, they are significantly out of date . . . and the number of states that don't even write any reference to the standards into their state law governing voting machines is embarrassing."⁴

¹ Reynolds v. Sims, 377 U.S. 533, 562 (1964).

² The Florida Election Reform Act of 2001 attempted to achieve uniformity of election systems in Florida.

³ The secretary of state is required to examine all models of electronic or electromechanical voting systems to determine if they comply with state law. The director of the Division of Elections is responsible for adopting uniform rules for the purchase, use, and sale of voting equipment in the state and for voting system standards and certification. See FLA. STAT ch. 101.28, 101.5605.

⁴ Douglas Jones, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 11, 2001, Verified Transcript, p. 282. Florida is one of the 31 states that have adopted the FEC's voting system standards. See the Governor's Select Task Force on Election Procedures, Standards and Technology, *Revitalizing Democracy in Florida*, Mar. 1, 2001, p. 43 (hereafter cited as Governor's Task Force, *Revitalizing Democracy*).

THE MACHINES

There are five voting systems used in Florida's 67 counties: punch cards (24 counties), optical scan *central tabulation* (16 counties), optical scan *precinct tabulation* (25 counties), paper ballot (one county), and machine lever (one county).⁵

Punch Cards

Punch cards were developed for data processing in the 1890s, and they started being used as ballots in 1964. After the polls close, the ballots are counted at a central counting center using an industry-standard punch card reader attached to a computer system. Because the punch card is a physical ballot, any questions about the correctness or accuracy of the vote-counting software can be resolved—or attempted to be resolved—by a hand recount of the ballots.⁶

⁵ Douglas Jones also stressed that regardless of what system is used, "[w]e must not trust any particular participant, mechanism or computer program; in fact, we must expect every participant, the maintainer of every mechanism, and the designer of every computer program to be a partisan." Douglas Jones, associate professor of computer science, University of Iowa, "Evaluating Voting Technology," Jan. 11, 2001, Bates Nos. 0003399–0003400.

⁶ Ibid., Bates Nos. 0003402–0003404. Punch card voting was hailed as a big step forward when it was invented in 1962. The basic technology drew on the punch card readers that stored data for IBM mainframe computers. Its advantage was that it tallied the cards quickly. However, it was soon discovered that the tiny pre-perforated rectangles—called "chads"—do not always fall away from the cards. And when they stick—whether it becomes a hanging chad, a swinging chad, or a dimpled or pregnant chad—they can obscure the holes, making the votes unreadable by the counting machines. See David Von Drehle, et al., "A Wild Ride into Uncharted Territory: Two Candidates Caught a Whiff of Defeat—and Then Rapidly Mobilized for a Recount War," *The Washington Post*, Jan. 28, 2001, p. A1.

Optical Scan Central Tabulation

In this system, a ballot card has candidates' names preprinted next to an empty oval, circle, rectangle, or an incomplete arrow. A voter records his or her choices by filling in the empty oval, circle, or rectangle or by completing the incomplete arrow with a pencil. After the polls close, the ballots are sent to a central location for counting by a high-speed reader.⁷ Like the punch card, because physical ballots are used, questions about how the vote is tabulated can be resolved by reviewing the ballots.

Optical Scan Precinct Tabulation

This is the same system as the optical scan central tabulation system described above, except that once the voter is finished completing the ballot, it is fed into a tabulating device at the precinct. Because the machine can be programmed to "kick out" ballots that have been voted incorrectly, a voter has the opportunity to immediately correct any errors before he or she leaves the precinct.⁸

Paper Ballot

The voter takes one of the paper ballots and makes a mark next the candidate(s) of his or her choice—the only requirement is that any ballot containing a clear indication of the voter's intent be counted.⁹ If properly used, the paper ballot system sets a standard for fair and honest elections that is not easy to match with more recent voting technologies. Paper ballots may be transported to a counting center, or they may be counted at the precinct immediately after the

polls close.¹⁰ An honest count is ensured by having each ballot inspected by two election workers, representing opposing parties, with observers from opposing parties allowed to watch over their shoulders. If there is any doubt about the count, it may be resolved by a recount.¹¹

Machine Lever

Lever machines completely eliminate the problems of ballot interpretation that accompany paper ballots. In addition, lever machines contain interlocks preventing voters from selecting too many candidates—an overvote—which invalidates the ballot. However, counters in lever machines are extremely complex, with thousands of moving parts. Exhaustive tests of these counters are difficult and therefore rare, and the vote counts obtained from these machines are only as trustworthy as the technicians who maintain them.¹²

VOTES IN COMMUNITIES OF PEOPLE OF COLOR LESS LIKELY TO BE COUNTED

The Governor's Select Task Force on Election Procedures, Standards and Technology stated in its March 2001 report that error—or "spoilage"—rates in Florida's November 2000 election varied widely by type of voting system. The report concluded:

In statewide or national elections, when different kinds of voting systems with different error rates are used, every voter does NOT have the same chance to have his or her vote counted accurately.¹³

The task force continued that "[u]sing different systems with different 'spoilage' rates for voters in the same statewide or national elections creates substantial questions about equal protection."¹⁴

⁷ Douglas Jones, associate professor of computer science, University of Iowa, "Evaluating Voting Technology," Jan. 11, 2001, Bates Nos. 0003404–0003406.

⁸ It is clear, however, that simply having this "kick out" feature on a voting machine does not guarantee the feature will be activated during the voting process. Both the Florida counties of Escambia and Manatee had machines with kick out capacity during the 2000 presidential election, but the feature was turned off to save money and speed up voting lines. As a result, approximately 5,400 flawed ballots that might have been corrected were not counted. See Roger Roy and David Damron, "New System Fumbles Votes, Optical-Scan Machines Tossed out Thousands of Ballots in 2000, Denying Voters a Second Chance," *The Orlando Sentinel*, May 6, 2001, p. A1.

⁹ Douglas Jones, associate professor of computer science, University of Iowa, "Evaluating Voting Technology," Jan. 11, 2001, Bates No. 0003401.

¹⁰ Ibid.

¹¹ Ibid., Bates Nos. 0003404–0003406.

¹² Ibid., Bates No. 0003402. Furthermore, because there are no physical ballots, if there is any suspicion of malfunction or tampering, there is nothing to recount. When people speak of a recount with lever machines, they are speaking of repeating the tabulation of the canvass of the election, starting with the totals in the machines. This can correct errors in tabulation and transcription, but it cannot verify that the machines did, in fact, operate correctly. Ibid.

¹³ Governor's Task Force, *Revitalizing Democracy*, p. 36.

¹⁴ Ibid.

The available statistical evidence indicates that Florida voters in poorer, predominantly people of color communities were more likely to use voting systems with higher spoilage rates—meaning those voters had a lower chance of having their votes counted accurately. For example, Gadsden County, which used an optical *central* tabulation system, had a spoilage rate of 12.4 percent. Just on the other side of the Ochlockonee River, in Leon County, which used an optical *precinct* tabulation system, the spoilage rate was only 0.18 percent.¹⁵

Gadsden County had the highest spoilage rate in the state. In addition to being rural and poor, it is also approximately 63 percent African American—the only county in the state with an African American majority.¹⁶ On November 7, approximately one in eight Gadsden County voters was effectively disenfranchised. Leon County, on the other hand, which is approximately 28 percent African American, had the lowest spoilage rate in the state. It is the home of the prosperous state capital and two state universities. There, fewer than two votes in 1,000 were not counted.¹⁷

Other studies show a similar relationship between race and discounted votes.¹⁸ The *New York Times* conducted a study of voting systems in Florida and concluded that “the majority of the state’s African American voters . . . cast their ballots on punch cards that are more prone to voter error and miscounts.”¹⁹ The *Times* study found that, across the state, nearly 4 percent of the type of punch card ballots most widely used

¹⁵ See app. I, “Population and voting characteristics of Florida counties, ranked by percentage of votes spoiled.” See also Governor’s Task Force, *Revitalizing Democracy*, chart 4, “Lost Votes? Blank or spoiled ballots in the last presidential election, by percentage,” pp. 31–32.

¹⁶ Shirley Knight, supervisor of elections, Gadsden County, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 12, 2001, Verified Transcript, p. 31.

¹⁷ See app. I, “Population and voting characteristics of Florida counties, ranked by percentage of votes spoiled.”

¹⁸ See chap. 1.

¹⁹ Josh Barbanel and Ford Fessenden, “Racial Pattern in Demographics of Error-Prone Ballots,” *The New York Times*, Nov. 29, 2000, p. A19 (hereafter cited as Barbanel and Fessenden, “Demographics of Error-Prone Ballots”). See also *Gore v. Harris*, 772 So. 2d 1243, 1258 (Fla. 2000) (finding that “the record shows voter error, and/or less than total accuracy in regard to the punch card voting devices utilized in Miami-Dade and Palm Beach counties, which these counties have been aware of for many years”).

in Florida were thrown out because the machines read them as blank or invalid.²⁰ Ion Sancho, who has served as supervisor of elections for 12 years in Florida’s Leon County, testified that approximately 90,000 people were disenfranchised in the punch card jurisdictions due to “failure in voter technology, failure in training the citizens to vote in those technologies, and failure to administer the process properly.”²¹

By contrast, the more modern optical scan systems rejected far fewer votes—only about 1.4 percent of those cast.²² And while 64 percent of the state’s African American voters live in counties that used punch cards, only 56 percent of whites do so. The *Times* reported:

The impact of these differences on the outcome [of the presidential race] will never be known but their potential magnitude is evident in Miami-Dade County, where predominantly black precincts saw their votes thrown out at twice the rate as Hispanic precincts and nearly four times the rate of white precincts. In all, 1 out of 11 ballots in predominantly black precincts were rejected, a total of 9,904.²³

²⁰ Barbanel and Fessenden, “Demographics of Error-Prone Ballots,” p. A19.

²¹ Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 16. Mr. Sancho testified further that Florida “spends not one dollar on radio and TV ads informing voters how to vote. This in a state that in the past has spent over \$35 million in one year telling Floridians how to play the lottery.” *Ibid.*, pp. 17–18.

²² Barbanel and Fessenden, “Demographics of Error-Prone Ballots,” p. A19. In *Siegel v. LePore*, 234 F.3d 1163, 1215–18 (11th Cir. 2000), the court discussed data indicating that the percentage of ballots recorded as having no vote in Florida counties using a punch card system was 3.92 percent, while the error rate for the optical scan systems in use elsewhere in Florida was 1.43 percent (charts C and F).

²³ Barbanel and Fessenden, “Demographics of Error-Prone Ballots,” p. A19. The *Washington Post* conducted a precinct-by-precinct analysis of Florida’s spoilage rates and came to a similar conclusion. According to the *Post*, in those Miami-Dade County precincts where less than 30 percent of the voters are African American, about 3 percent of ballots did not register a vote for president. However, in the same county, in those precincts where more than 70 percent of voters are African American, the number of ballots not registering a vote for president rose to nearly 10 percent. In addition, the *Post* determined that as many as one in three ballots in African American sections of Jacksonville (part of Duval County) did not count in the presidential contest. That was four times as many as in white precincts elsewhere in the same county. The *Post* concluded, “Heavily Democratic and African American neighborhoods in Florida lost many more presidential votes than other areas because of outmoded voting machines and rampant confusion about bal-

A study conducted by *USA Today* and *The Miami Herald* concluded, "Voters in Florida's majority-African American precincts were nearly four times as likely to have their presidential election ballots invalidated than voters in precincts that are overwhelmingly made up of white voters."²⁴ The study also found that among the 100 precincts with the highest numbers of disqualified ballots, 83 of them are majority-African American precincts.²⁵

Governor Bush's Select Task Force on Election Procedures, Standards and Technology stated that while "[s]ome voter errors are caused primarily by uneducated, uninformed, or disinterested voters . . . the error rates for those reasons seem to be less than 1 percent."²⁶ It stated that the large differences found in error rates for different kinds of voting systems "appear to be directly related to the type of equipment used."²⁷ The report went on to say that "[t]he differences in error rates among various kinds of voting systems are much too high to be accounted for solely by uneducated, uninformed or disinterested voters."²⁸

That conclusion by the governor's task force appears to be buttressed by a recent congressional study produced by the staff of Representative Henry Waxman, a ranking member of the Committee on Government Reform. The study documented how voting results were affected in the city of Detroit by a switch in voting technology combined with voter education on how to use the new machine.²⁹

lots." John Mintz and Dan Keating, "Spoilage Likelier for Blacks," *The Washington Post*, Dec. 3, 2000, p. A1.

²⁴ Laura Parker and Peter Eisler, "Ballots in Black Florida Precincts Invalidated More," *USA Today*, Apr. 6, 2001, p. A1.

²⁵ *Ibid.*

²⁶ Governor's Task Force, *Revitalizing Democracy*, p. 36.

²⁷ *Ibid.* Testimony was presented before the Commission that error rates can also be influenced by how equipment is maintained. For example, Jim Smith, co-chairperson of the Governor's Select Task Force on Election Procedures, Standards and Technology, testified that some of the voting machines are more than 30 years old, and in Miami-Dade County, "one reason they had a significant problem with chads is the machines hadn't been cleaned, maybe ever." Jim Smith Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 166-67.

²⁸ Governor's Task Force, *Revitalizing Democracy*, p. 37.

²⁹ See U.S. House of Representatives, Special Investigations Division, Committee on Government Reform, Minority Staff, *Election Reform in Detroit: New Voting Technology and In-*

The report analyzed precinct-level results for Detroit for the 1996 and 2000 presidential elections. It was determined that the number of Detroit voters whose ballots were invalidated decreased nearly two-thirds—from 3.1 percent to 1.1 percent—after the city switched from punch card to optical scan machines that warn of errors and allow an immediate revote.³⁰ Moreover, the report stated that the reduction in the undercount was especially large in precincts with high rates of uncounted votes in 1996; precincts that had over 7 percent uncounted votes for president in 1996 had less than 1 percent uncounted votes in 2000.³¹

PRECINCT-BASED COUNTING SYSTEMS

There was testimony at the Commission hearings to indicate that using precinct-based counting (PBC) systems—or counting mechanisms placed at each polling site—dramatically decreases spoilage rates.³² PBC systems count ballots as they are cast. If a voter improperly votes for too many candidates (i.e., if he or she overvotes), the PBC system can be programmed to reject the invalid ballot. The ballot can then be set aside and the voter can be given another chance to cast a valid ballot.³³

Dan Gloger, an expert on voting machinery with Melbourne Technical Services in Melbourne, Florida, testified that when PBC systems were used the drop off rate³⁴ in those jurisd-

created Voter Education Significantly Reduced Uncounted Ballots, Apr. 5, 2001.

³⁰ *Ibid.*, pp. 5-6. The city of Detroit spent nearly \$100,000 to introduce voters to the new system. This introduction included: (1) demonstrations in community centers, churches, festivals, etc., on how to use the new machine; (2) public service announcements on television, radio, and billboards informing voters about the new system; and (3) blanketing the city with flyers and pamphlets explaining how to vote with the new machine. *Ibid.*, p. 5.

³¹ *Ibid.*, p. 1.

³² Dan Gloger, voting technology expert, Melbourne Technical Services of Melbourne, Florida, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 268-70.

³³ *Ibid.*, p. 268. See also the testimony of Shirley Knight, supervisor of elections, Gadsden County, who said precinct counters are needed to "stop the high number of overvoted ballots. And that's the main thing I saw in the county, that we had just a tremendous high number of overvoted ballots, which I think disenfranchised voters of their opportunity to vote on the president." Shirley Knight Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 30.

³⁴ The drop off rate is the number of overvotes and undervotes added together. An overvote occurs when a person

dictions was 0.8 percent.³⁵ However, when PBCs were not used—meaning when voters were not informed they had cast an invalid overvote ballot—the drop off rate rose to 4.8 percent.³⁶ Commissioner Christopher Edley, Jr., asked, “So the effect of having the overvote protection was essentially to give 4 percent of the voters back their franchise.”³⁷ “That’s correct,” responded Election Data Services machine expert Kimball Brace.³⁸

Ion Sancho, supervisor of elections in Leon County, arrived at the same conclusion in his testimony before the Commission:

There was a failure for voting systems in Florida, but it went far beyond punch cards and chads that we saw highlighted by the media. Voters who cast their ballots in the presidential race and then had those ballots tabulated at some central or regional location lost their votes at a rate four to five times higher than voters who voted in counties that used precinct-based counting technology. Why? Because precinct-based voting systems allow the voters to correct any overvote errors they may have made.³⁹

Supervisors of elections from both Monroe and Leon counties use precinct tabulation systems (the AccuVote system is used in both counties), and both supervisors of elections speak

votes for too many candidates, thereby invalidating his or her ballot; an undervote occurs when a voter, for whatever reason, does not select a candidate for an office. Kimball Brace, election technology expert, Election Data Services, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 245, 284–85.

³⁵ Dan Gloger, voting technology expert, Melbourne Technical Services of Melbourne, Florida, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 268.

³⁶ Kimball Brace, election technology expert, Election Data Services, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, pp. 284–85, 268–69. The testimony suggests that the type of voting machine used for the study was “optical scan,” but the transcript is not entirely clear. *Ibid.*

³⁷ Christopher Edley, Jr., commissioner, U.S. Commission on Civil Rights, Tallahassee Verified Transcript, Jan. 11, 2001, p. 270.

³⁸ Kimball Brace, election technology expert, Election Data Services, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 270. It is estimated that 26 percent of African American voters and 34 percent of white voters live in Florida counties that verify ballots as valid immediately after they are cast. John Mintz and Dan Keating, “Spoilage Likelier for Blacks,” *The Washington Post*, Dec. 3, 2000, p. A1.

³⁹ Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, pp. 12–13.

very highly of the machines.⁴⁰ Leon County Supervisor of Elections Ion Sancho, whose county had the lowest spoilage rate in Florida at 0.18 percent, is particularly enthusiastic about the system. He called it “the simplest voting system in use in the United States of America”⁴¹ and said the technology it uses (precinct-based optical scan technology) is “the only one that accurately reflected the will of the voters in the state of Florida.”⁴²

Statistical data appear to bolster these favorable opinions: On average, the spoilage rate for counties using the precinct-based optical scan technology was 0.83 percent—far lower than the average spoilage rates for either central-based optical scan technology (5.68 percent) or central-based punch card technology (3.93 percent). Put another way, 22 of the 23 counties with the lowest spoilage rates used precinct-based optical scan technology (the remaining one used lever machines).⁴³

⁴⁰ Monroe County purchased the AccuVote system in 1993, and the county elections supervisor, Harry Sawyer, believes the system provides a fast, simple, and secure means of conducting elections. The day before the vote, all machines and phone lines are tested for accuracy. During the vote, voters mark an optically readable paper ballot in the privacy of a voting booth. The ballot is inserted into the AccuVote tabulator that immediately reads the votes cast, adds them to the total for the precinct, and drops the ballot into the secured ballot box. Precinct results can then be transmitted to a host server for accumulation. The size of the lettering on the ballot is changeable, allowing large print for those with visual difficulties. In addition, the system can be programmed for different languages to accommodate non-English-speaking individuals. Finally, if the ballot is not properly filled out, the AccuVote reader will immediately “kick out” the ballot with an explanation of the problem—for example, overvotes. When a ballot is spoiled, the voter places it in a sealed envelope and is given a new ballot. At the end of the voting day, each AccuVote machine, at each precinct is plugged into a phone line and the votes are uploaded to a computer located in the office of the county elections supervisor. After the ballots are run, the system is confirmed for accuracy. Mr. Sawyer reported no problems for Monroe County during the November 2000 election. The AccuVote has a sealed memory card that cannot be tampered with, and a clerk and inspector validate the numbers and forms. *See* Interview Report, interview with Harry Sawyer, supervisor of elections, Monroe County, Feb. 1, 2001.

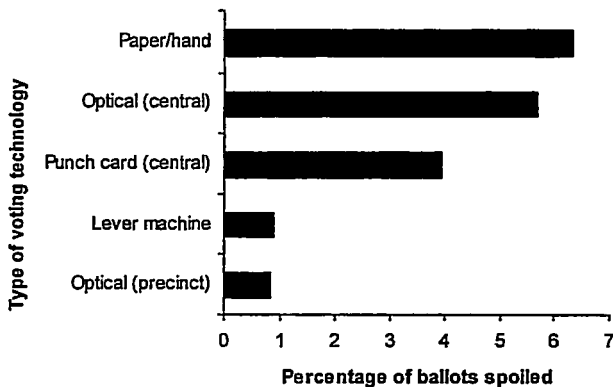
⁴¹ Ion Sancho Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 48.

⁴² *Ibid.*, p. 15.

⁴³ *See* chart 8-1.

CHART 8-1

Percentage of Spoiled Ballots by Voting Technology



SOURCE: Figure generated by U.S. Commission on Civil Rights staff, based on *Orlando Sentinel* survey as updated by the Collins Center.

BALLOT CONFUSION

Closely related to the equipment issue is ballot design and its effect on accurately recording votes. In Florida's November 7 general election, there were 12 candidates listed on the ballot for President—compared with only three or four in previous years. Across the state, election officials wrestled with ways to get more names into the available space.⁴⁴

Palm Beach County

Theresa LePore, supervisor of elections for Palm Beach County, decided that because tens of thousands of her voters were elderly, she would not be able to solve the space problem by using extremely small typeface.⁴⁵ Instead, Ms.

⁴⁴ Linda Howell, supervisor of elections, Madison County, testified that in the past, all ballots had to be certified by the state elections division. "Now," said Ms. Howell, "we're on our own to prepare a ballot." Linda Howell Testimony, Tallahassee Verified Transcript, Jan. 12, 2001, p. 25. See also David Von Drehle, et al., "A Wild Ride into Uncharted Territory; Two Candidates Caught a Whiff of Defeat—and Then Rapidly Mobilized for a Recount War," *The Washington Post*, Jan. 28, 2001, p. A1.

⁴⁵ See Theresa LePore, supervisor of elections, Palm Beach County, Testimony before the U.S. Commission on Civil Rights, Miami, FL, Feb. 16, 2001 (testifying "I basically use my own judgment and that of my staff to try to make the print a little bit larger for people that might have a problem reading").

LePore decided to place the names on two facing pages, with punch holes running down the center, and arrows pointing from the names to the holes. Wing-like in appearance, the ballot came to be known as the butterfly ballot.⁴⁶

When the ballot cards were fed into the voting machines, some voters said the holes did not line up with the arrows. Moreover, there was confusion because the hole for Reform Party candidate Patrick J. Buchanan was the second hole down the center of the ballot, between the holes for George W. Bush and Al Gore—this despite the fact that Bush and Gore were listed first and second on the left-hand side of the ballot. The result was that in Palm Beach County, which has 337 Reform Party members, Buchanan received 3,407 votes—four times higher than the next highest county vote total he received in the state.⁴⁷ Even Buchanan acknowledged that he ordinarily would not have won so many votes in heavily Democratic Palm Beach County.⁴⁸

Moreover, more than 19,000 Palm Beach County voters punched two separate holes when voting for President, thereby invalidating their ballots with an overvote.⁴⁹ That means approximately 63 percent of the 29,702 spoiled ballots in Palm Beach County were overvotes.⁵⁰ According to Kimball Brace, an election machine expert from Election Data Services, this "extremely high" percentage of overvotes is "just the opposite of what we normally observe," which is 5 percent or less of the spoiled ballots.⁵¹ Mr. Kimball testified that the high number of overvotes cast indicates confusion on the part of voters.⁵² Based on this expert testimony, it appears clear

⁴⁶ See app. IV, excerpt from "Official Sample Ballot: Palm Beach County, Florida General Election," Nov. 7, 2000, prepared by Theresa LePore, supervisor of elections, Palm Beach County.

⁴⁷ Stephanie Desmon, "Judge Denies New Vote in Palm Beach," *The Baltimore Sun*, Nov. 21, 2000, p. 12A.

⁴⁸ Ibid.

⁴⁹ Matt Bai and Michael Isikoff, "Clouds Over the Sunshine State," *Newsweek*, Nov. 20, 2000, p. 16. See also FLA. STAT. ch. 101.28, 101.5606 (1999) (prohibiting the use of voting systems or machines that permit the voter to cast a simultaneous ballot for two different candidates for a single office).

⁵⁰ Kimball Brace, election technology expert, Election Data Services, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 249.

⁵¹ Ibid.

⁵² Ibid., p. 258.

that the Palm Beach County butterfly ballot, designed by Ms. LePore's office, led to the invalidation of thousands of ballots.

Before the November 2000, election, the butterfly ballot was shown to the major party county chairs and to campaign officials for every candidate. Ms. LePore stated that none of those campaign officials objected to the ballot's design.⁵³ However, after the election, the Commission heard testimony from several witnesses who criticized the ballot design.

Witnesses Confirm Confusion in Palm Beach

Joanna Carbone testified that she took her children to vote with her on November 7. She and her 14-year-old daughter entered the polling booth together. Ms. Carbone testified:

We placed our ballot into the little slot, lined up the red pegs, and proceeded to select our candidates. At first glance it looked like Al Gore was the second hole to be punched, so we punched the second hole. . . . Upon a second glance, a third look, a fourth, "What have I done," I realized that the second hole was for Pat Buchanan.⁵⁴

Ms. Carbone said she took her ballot to a poll worker and asked for a second ballot, telling him she made a mistake. The poll worker said, "No, just take that ballot and place it into the box."⁵⁵ Ms. Carbone said she had "no reason to question" the poll worker because she "thought he knew his job."⁵⁶ Several days later, Ms. Carbone learned that, by law, she was allowed up to three ballots in casting her vote.⁵⁷ Testifying that her "civil and constitutional rights were violated," Ms. Carbone said she "went from being upset to angry to outraged."⁵⁸

⁵³ Interview Report, interview with Theresa LePore, supervisor of elections, Palm Beach County, Jan. 30, 2001.

⁵⁴ Joanna Carbone Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 107.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, pp. 107-08.

⁵⁷ FLA. STAT. ch. 101.5608(2)(b) (1999) (providing that "in no case shall a voter be furnished more than three ballots").

⁵⁸ Joanna Carbone Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 108. It is impossible to know the number of voters who, like Ms. Carbone, alerted poll workers of making ballot mistakes but were nevertheless directed to place the invalid ballots into the box. However, there was testimony from a poll worker who did know the law—that voters are allowed up to three ballots in casting a vote—and who replaced 68 ballots in his precinct alone on Election Day. See

Jim Dickson is vice president of the National Organization on Disability. Mr. Dickson, who is legally blind, testified that the butterfly ballot was a "classic case of blaming the victim."⁵⁹ He testified that although Palm Beach County Supervisor of Elections Theresa LePore said she designed the butterfly ballot to provide assistance for voters with low vision—

[LePore] not only failed to request the assistance of those who know how to develop effective large print media, but she consistently rebuffed the offers from activists in her county to provide assistance.⁶⁰

Mr. Dickson explained that persons with low vision often experience difficulty with "tracking" on ballots with columns, and he said the butterfly ballot "took what would have been a two column problem and made it into a five column problem."⁶¹ He concluded the ballot was "absolutely irresponsible to say the least."⁶² At the Commission's Miami hearing when Ms. LePore was told of Mr. Dickson's testimony, she stated:

To my knowledge, nobody contacted my office to offer assistance. I had contacted other agencies, not with regard to the sight problem with the ballot, but as far as the language, and received no response in trying to go out and ask for assistance. . . .⁶³

Rabbi Richard Yellin is a rabbi of a 2,800-member synagogue—"the largest retiree synagogue in Florida, maybe in the United States."⁶⁴ The rabbi testified there were so many voting problems in his synagogue-precinct that he "summoned the supervisor and . . . told her that the precinct should be closed until an announcement was made to all of those voting that the butterfly ballot was problematic."⁶⁵

Millard Suid, poll worker, Palm Beach County, Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 130-31.

⁵⁹ Jim Dickson Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 206.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, p. 207.

⁶² *Ibid.*

⁶³ Theresa LePore, supervisor of elections, Palm Beach County, Testimony, Miami Verified Transcript, Feb. 16, 2001, p. 372.

⁶⁴ Rabbi Richard Yellin Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 28-29.

⁶⁵ *Ibid.*, p. 29.

Rabbi Yellin reported that many of the people at his synagogue told him they mistakenly voted for Patrick J. Buchanan. The rabbi testified, "In my synagogue there's more than 100 Holocaust survivors. There's no way that anybody in my congregation would have voted or cast a vote for Buchanan."⁶⁶ He said that of the approximately 1,100 elderly Jewish voters with whom he had contact shortly after the election, 20 percent of them "had the same misprinted, misaligned experience in their voting booth."⁶⁷ The rabbi testified that these individuals were "experienced" voters who turn out to vote over 90 percent of the time and who "don't make mistakes."⁶⁸

Testifying that the ballot's "arrows did not line up with the holes," Rabbi Yellin provided the Commission with an official copy of what he called a "misprinted" voting booklet containing "a total mistake in the instructions."⁶⁹ The rabbi concluded that "[b]ecause of negligence of the Palm Beach County election authorities who permitted the use of tainted machines and brochures to confuse the electorate, the nation ridiculed Palm Beach County citizens."⁷⁰

Duval County

Testimony indicated there was confusion with the ballot in Duval County. The list of presidential candidates was spread over two pages, and voters were only permitted to vote for one candidate. Some people, however, voted for one candidate on each of the two pages, thereby invalidating their ballot with an overvote. Moreover, this problem was exacerbated by the fact that the sample ballot in Duval County explicitly instructed people to "vote all pages" of the ballot, leading to thousands of spoiled ballots.⁷¹ Kimball Brace from Election Data Services testified that of the 26,909 spoiled ballots found in Duval County, 81 percent—or 21,796—were "overvotes." Mr. Brace attributes these mistakes to voter confusion.⁷²

CONCLUSION

During Florida's 2000 presidential election, different voting systems, with different error rates, were used throughout the state. Compelling evidence indicates that voters in poorer, predominantly people of color communities were more likely to have voting systems with higher spoilage rates. These voters, therefore, had a decreased chance of having their votes counted accurately—if counted at all.

It is also clear that Florida voters who cast their ballots and then had those ballots tabulated at a central location were more likely to lose their vote because of a spoiled ballot than were voters who used precinct-based counting (PBC) technology. PBC voting systems reject invalid ballots and allow voters to immediately correct overvote errors at the polling place. In fact, in Florida, 22 of the 23 counties with the lowest spoilage rates used PBC technology.⁷³ There is strong evidence that whatever voting system(s) Florida uses in future elections, incorporating PBC technology will significantly increase the chances that a voter will have his or her vote counted.

Finally, the evidence demonstrates there was substantial ballot confusion during Florida's November 2000 election, which led, in some jurisdictions, to unprecedented numbers of invalidated ballots through overvoting. The majority of the complaints were registered in Palm Beach and Duval counties. In Palm Beach County, the so-called butterfly ballot caused people to mistakenly vote for the wrong candidate and to complain of a "misprinted, misaligned experience in their voting booth."⁷⁴ A representative of the National Organization on Disability concluded the butterfly ballot's design was "absolutely irresponsible" when it came to persons with visual impairments.⁷⁵ In Duval County, the ballot spread presidential names over two pages, leading thousands of voters to invalidate their ballots by voting on both pages—a problem com-

⁶⁶ Ibid.

⁶⁷ Ibid., p. 30.

⁶⁸ Ibid., p. 47.

⁶⁹ Ibid., pp. 31–32. See app. IV.

⁷⁰ Ibid., p. 32.

⁷¹ Kimball Brace, election technology expert, Election Data Services, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 252.

⁷² Ibid., pp. 250, 258.

⁷³ See app. I, "Population and voting characteristics of Florida counties, ranked by percentage of votes spoiled." See also Governor's Task Force, *Revitalizing Democracy*, chart 4, "Lost Votes? Blank or spoiled ballots in the last presidential election, by percentage," pp. 31–32.

⁷⁴ Rabbi Richard Yellin Testimony, Miami Verified Transcript, Feb. 16, 2001, pp. 29–30.

⁷⁵ Jim Dickson, vice president, National Organization on Disability, Testimony, Tallahassee Verified Transcript, Jan. 11, 2001, p. 207.

pounded by the sample ballot explicitly instructing people to "vote all pages" of the ballot.

While nothing can be done to restore votes lost by Florida voters in the November 2000 election due to machine disparities and ballot

design flaws, the Commission believes that illuminating and cataloguing these various difficulties can prevent their recurrence in Florida and elsewhere.

CHAPTER 9

Findings and Recommendations

*The great majority of Americans . . . are uneasy with injustice but unwilling yet to pay a significant price to eradicate it.*¹

OVERVIEW

The U.S. Commission on Civil Rights conducted an extensive public investigation of allegations of voting irregularities during the 2000 presidential election in Florida. The investigation, utilizing the Commission's subpoena power, included three days of hearings, more than 30 hours of testimony, 100 witnesses, and a systematic review of more than 118,000 pages of pertinent documents.²

Perhaps the most dramatic undercount in Florida's election was the uncast ballots of countless eligible voters who were turned away at the polls or wrongfully purged from voter registration rolls.

While statistical data, reinforced by credible anecdotal evidence, point to widespread disenfranchisement and denial of voting rights, it is impossible to determine the extent of the disenfranchisement or to provide an adequate remedy to the persons whose voices were silenced in this historic election by a pattern and practice of injustice, ineptitude, and inefficiency.

Despite the closeness of the election, it was widespread voter disenfranchisement, not the

dead-heat contest, that was the extraordinary feature in the Florida election. The disenfranchisement was not isolated or episodic. And state officials failed to fulfill their duties in a manner that would prevent this disenfranchisement.

The Commission does not adjudicate violations of the law, hold trials, or determine civil or criminal liability. Therefore, the recommendations that follow urge the U.S. Department of Justice and Florida officials to institute formal investigations based on the facts in this report to determine liability and to seek appropriate remedies.

The Commission is charged to "investigate allegations in writing under oath or affirmation relating to deprivations—(A) because of color, race, religion, sex, age, disability, or national origin; or (B) as a result of any pattern or practice of fraud; of the right of citizens of the United States to vote and have votes counted. . . ."³ The Commission is also charged with reporting its findings to the President and Congress as appropriate.⁴ The uncontroverted evidence leads the Commission to the following findings and recommendations.

CHAPTER 1: VOTING SYSTEM CONTROLS AND FAILURES

Voter Disenfranchisement

Findings

- During Florida's 2000 presidential election, restrictive statutory provisions, wide-ranging errors, and inadequate resources in the Florida

¹ Reverend Dr. Martin Luther King, Jr., "Where Do We Go From Here: Chaos or Community?" in *A Testament of Hope: the Essential Writings and Speeches of Martin Luther King, Jr.*, ed. James Melvin Washington (Harper Collins Publishers, 1991), p. 562.

² This report was subjected to required reviews to ensure its legal integrity and to give affected agencies an opportunity to review and provide comments. The governor, secretary of state, and the Florida attorney general, among others, were given an opportunity to review and respond to those portions of the report affecting their offices. These comments were then considered and where appropriate are reflected in this final report.

³ 42 U.S.C. § 1975a(a)(1) (2000) (emphasis added).

⁴ 42 U.S.C. § 1975a(c)(2) (2000).

election process denied countless Floridians of their right to vote.

- This disenfranchisement of Florida voters fell most harshly on the shoulders of African Americans. Statewide, based on county-level statistical estimates, African American voters were nearly 10 times more likely than white voters to have their ballots rejected in the November 2000 election.⁵

- Poorer counties, particularly those with large minority populations, were more likely to use voting systems with higher spoilage rates than more affluent counties with significant white populations. For example, in Gadsden County, the only county in the state with an African American majority, approximately one in eight voters was disenfranchised. In Leon County, on the other hand, which is home to the prosperous state capital and two state universities, fewer than two votes in 1,000 were not counted. In Florida, of the 100 precincts with the highest numbers of disqualified ballots, 83 of them are majority-black precincts.

- Even in counties where the same voting technology was used, blacks were far more likely to have their votes rejected than whites.

- The recently enacted election reform law mandates that a county must use an electronic or electromechanical precinct-count tabulation voting system and that as of September 2, 2002, a voting system that uses a device for the punching of ballots by the voter may not be used in Florida.

- While technology improvements and the adoption of state-of-the-art voting systems statewide should reduce overall ballot spoilage rates and lessen the disparity between the rate that African Americans' and white voters' ballots are rejected, these enhancements will not, standing alone, eliminate the racial disparity in ballot rejection rates.

- The allocation of adequate financial resources and enhanced, effective training of poll workers, other election workers, educating voters, and accountability standards for state and local officials, as well as technological improvements in voting systems, should reduce the rate at which ballots are spoiled and should lessen

the disparity in vote spoilage rates between whites and blacks.

- The Voting Rights Act of 1965, as amended, prohibits intentional discrimination and forbids practices or procedures that (when considering the "totality of the circumstances") result in people of color being denied equal access to the political process.

- Under the Voting Rights Act of 1965, as amended, jurisdictions covered under section 5 of the act cannot make voting changes unless and until they obtain approval (preclearance) either from the federal district court in Washington, D.C., or from the U.S. attorney general. Five Florida counties are subject to section 5 requirements: Collier, Hardee, Hendry, Hillsborough, and Monroe.

Recommendations

1.1 The U.S. Department of Justice should immediately initiate the litigation process against the governor, secretary of state, director of the Division of Elections, specific supervisors of elections, and other state and local officials responsible for the execution of election laws, practices, and procedures, regarding their contributions, if any, to the extraordinary racial disparity in the rate that votes were rejected, through their actions or failure to act before and during the 2000 presidential election, in violation of the Voting Rights Act of 1965, as amended. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

1.2 The Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials who violated the Voting Rights Act of 1965, as amended, and/or Title IX of the Florida statutes through their actions or failure to act before, during, and after the November 2000 election. Based on the results of the investigation, appropriate enforcement action should be initiated to ensure full compliance with the election laws.

1.3 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against all state election officials who through their actions or failure to act violated the Voting Rights Act of 1965, as amended, by

⁵ These figures are based on a complex statistical analysis of statewide estimates using county-level data. The analysis is more fully presented in a report prepared by Dr. Allan Lichtman. See app. VII.

not obtaining preclearance either from the federal district court of Washington, D.C., or the U.S. attorney general. Based on the results of the investigation, appropriate enforcement action should be initiated to ensure full compliance with the election laws.

1.4 The state of Florida should institute effective monitoring systems to ensure the uniform implementation of any voting system that allows for a precinct count and an opportunity for the voter to correct his or her ballot; annually analyze the rejection rates of the voting systems used in the previous year; consider, based upon that analysis, decertifying any voting system that minimizes the rejection of spoiled ballots; and ensure that there is a consistent ballot rejection rate throughout the state. The funding authorized by the state legislature, but not yet distributed to the counties, must be sufficient to support this mandate. More specifically, the funding should ensure that all counties can obtain the required technology; and can provide appropriate voter education and effective training for poll workers and other election workers and officials. Appropriate administrative rules should be adopted that provide clear guidance and targeted oversight responsibilities for election officials at every level to ensure proper implementation of these requirements.

1.5 The state of Florida should retain knowledgeable experts to undertake a formal study to ascertain the reasons for the disparity in the vote rejection rates between white voters and persons of color and then adopt and publicize procedures to eliminate this disparity. The study should target “best practices” that ensure comprehensive poll worker training, enhanced education for first-time voters, and the delivery of adequate resources in all counties to resolve problems as they arise on Election Day.

1.6 The five counties subject to section 5—Collier, Hardee, Hendry, Hillsborough, and Monroe—should take immediate steps to determine if certain specifications, particularly the “voter responsibilities” provisions set forth in the recently enacted Florida election law changes, constitute tests or devices that trigger preclearance action by the U.S. Department of Justice.

Moreover, the U.S. Department of Justice should review these concerns.

1.7 Adequate financial resources should be allocated to educate voters, poll workers, and state election officials on all appropriate policies and procedures, including, but not limited to, general voting rights, a voter’s rights while at the polling place, how the voter should use the technology to vote for his or her candidate of choice, and the proper procedures to resolve issues that arise at the polling place on Election Day.

The Impact of the Purge List on Persons of Color

Findings

- The state of Florida’s statutorily mandated purge list, compiled by a private firm, was provided to county supervisors of elections with names that were inexact matches. The data provided demonstrated that this list had at least a 14.1 percent error rate.
- African Americans had a significantly greater chance of being listed on Florida’s mandated purge list. The probability of names of African Americans appearing on the list in error was significantly greater than the likelihood of the names of whites being erroneously included on the purge list.
- The state of Florida’s use of this purge list, combined with the state law that places the burden on voters to remove themselves from the list, resulted in denying countless African Americans the right to vote.

Recommendations

1.8 The U.S. Department of Justice should immediately initiate the litigation process against Florida state officials whose list maintenance activities during the 2000 presidential election discriminated against people of color in violation of federal law or resulted in the denial of people of color to have equal access to the political process. The process should focus on at least the following factors: the rate African Americans appear on the purge list, the rate that African Americans appear on this list in error, the fact that state law places the burden on the voter to prove his or her innocence to be

permitted to vote, and the awareness of state officials that names would be placed on these lists in error. Appropriate enforcement action should be initiated to ensure compliance with the Voting Rights Act of 1965, as amended.

1.9 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials who implemented list maintenance activities before, during, and after the November 2000 election that either intentionally discriminated against people of color or resulted in the denial of people of color to have equal access to the political process. The litigation process should include, but not be limited to, the methodology for the compilation of names for the exclusion lists, the burden upon the voter to prove his or her eligibility status before he or she could remain on the voter rolls, the forecast of inexact matches on the exclusion lists, the methodology for data verification, and the criteria for removal of a voter's name from the voter rolls. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

1.10 The state of Florida should swiftly and uniformly implement specific provisions of its recently adopted electoral reform laws, to eliminate the current practice that places the burden on eligible voters to prove they have not lost their civil rights to be permitted to vote. Sufficient funding should be provided to support this mandate. The appropriate administrative rules should be promulgated to ensure implementation of the legislation.

CHAPTER 2: FIRST-HAND ACCOUNTS OF VOTER DISENFRANCHISEMENT

Voters Not on Rolls and Unable to Appeal

Findings

- Many voters who attempted to register to vote were not notified of alleged application errors until Election Day, or in some instances, after Election Day. These voters were also denied the opportunity to correct the information so that they could vote.

- Other voters in Florida submitted their voter registration applications well before the deadline, but on Election Day were informed by poll workers that there was no evidence of their registrations.

- Many Floridians who were registered and voted in past elections were informed for the first time on November 7, 2000, that their names had been removed prior to Election Day. These individuals were given no opportunity to appeal this determination.

- On November 7, 2000, countless voters in Florida were denied the opportunity to vote because their names did not appear on the lists of registered voters.

- Voters (whose names were removed without notice prior to the November 2000 election) were neither allowed to vote by affidavit nor appeal their removal from the voter rolls.

- During the 2000 presidential election, poll workers in numerous Florida counties confronted significant obstacles to communicating with supervisors of elections offices to verify the accuracy of voters' registrations. Because of factors such as insufficient telephone systems in supervisors of elections offices, incorrect use of laptop computers intended to access county voter registration information, and the lack of a computer in each voting precinct, a significant number of eligible Florida residents were denied their right to vote.

- The state of Florida enacted a new provision in the law that permits provisional balloting under restricted circumstances. This law is too restrictive to address the numerous instances caused by governmental inefficiency or error in which eligible voters may be denied opportunities to vote in an election.

Recommendations

2.1 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated relevant federal and/or state laws that required poll workers be able to communicate with election officials or access data to resolve issues during the November 2000 election. The process should include, but not be limited to, insufficient telephone systems in supervisors of elections offices, incorrect

use of laptop computers intended to access county voter registration information, and the lack of at least one computer in each voting precinct to access voter registration information. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

2.2 While the newly enacted Florida legislation provides for a provisional ballot to those whose eligibility cannot be determined at the precinct where he or she should be properly registered, the Florida legislature should enact legislation and/or appropriate administrative rule promulgation to provide for access to a provisional ballot in every polling place and where the voter executes an appropriate affidavit attesting that he or she is legally entitled to vote on Election Day, even if the voter mistakenly believes it is the precinct where he or she should be properly registered. The state of Florida should also provide an immediate right to appeal the discarding of a ballot with resolution prior to the canvassing of the election or counting of ballots. Sufficient funding should be provided to support this mandate.

2.3 Any voter who is denied the opportunity to vote on Election Day should have an absolute right to appeal this determination, as well as a right to receive resolution of the issue prior to the canvassing of the election or the counting of ballots. Thus, any voter wrongfully denied the right to vote will have an opportunity for his or her vote to count in the same election in which the denial initially occurred.

2.4 Resources should be allocated to create a system of voter reminder cards. These cards should be mailed to voters before every election and inform them of their registration status and the location of their polling place. In addition, an electronic or automated telephone system could be devised that would allow voters to access their registration status and polling place location via the Internet or by telephone.

2.5 Each supervisor of elections should devise systems to process voter registration applications and notify voters of any errors or missing data within a reasonable time to maintain eligibility to vote in the next election.

2.6 The Division of Elections should mandate through legislation and/or appropriate administrative rule promulgation proactive measures to verify and update the information received from the supervisors of elections on a regular basis to ensure that all properly registered voters are allowed to exercise their right to vote.

2.7 Supervisors of elections should ensure there is a sufficient number of properly trained staff available at their central offices to answer calls and resolve problems throughout the day during every election. Moreover, supervisors of elections should routinely examine the capability of their respective offices' telephone systems to determine whether additional resources should be requested to supplement their communication procedures during elections where a high volume of voters is expected. Accordingly, during those times, supervisors of elections offices should have the capability of increasing the number of available phone lines in order to meet the demand. Supervisors of elections should be provided with sufficient funding to accomplish this mandate.

2.8 Poll workers should be adequately trained to use any available measure under Florida election law that would permit properly registered individuals to vote, including, but not limited to, voting by affidavit, provisional ballot, and all language and special needs assistance. Poll workers should continue to be given training on the use of laptop computers that are designated for accessing current voter registration information. Further, all polling places in each county should have computers for this purpose. Supervisors of elections' staff who are thoroughly familiar with computerized methods of accessing voter registration data should be available at each polling site on Election Day to assist poll workers.

2.9 Counties should allocate sufficient resources for the effective implementation of Florida election laws, including, but not limited to, laws that mandate voter education, poll worker training, laptop computers for each precinct, additional phone lines on Election Day, automated registration systems/software, and administrative costs of appeals.

2.10 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act, violated relevant federal and/or state laws that ensure polling places are neither closed during official poll hours nor moved without the required notification to affected voters. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

2.11 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated relevant federal and/or state laws by denying voters who arrived at a polling place during official poll hours their right to vote. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

2.12 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated relevant federal and/or state laws by neither uniformly informing drivers of the "motor voter" registration process nor ensuring that the voter registration applications arrived at the appropriate supervisor of elections office and were processed in a timely fashion. The process should include, but not be limited to, the failure to include the names of drivers who satisfactorily completed voter registration applications to appear on the voter rolls for the November 2000 election, the failure to inform voter registration applicants that a driver's license change does not automatically update voter registration, and lack of a verification system to ensure that the appropriate supervisor of elections received all voter registration applications in a timely manner. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

Polling Places Closed Early or Moved Without Notice

Findings

- The official statewide poll hours on November 7, 2000, were 7 a.m. to 7 p.m. Eastern Standard Time and Central Standard Time. During these times, polls were to be open and anyone present in a precinct prior to 7 p.m. maintained his or her right to vote.
- In several instances, voters who had been standing in line before 7 p.m. were not allowed to vote, because poll workers stopped the voting at 7 p.m.
- In other instances, voters were prevented from entering a polling place when the gates automatically locked at 6:15 p.m.
- Some polling places were moved without prior notice to the affected voters.
- Some voters who reported to their assigned polling places on Election Day neither received notice of the move nor were given further instructions on the location of their new polling place.
- The above voters were not allowed to vote by affidavit or provisional ballot.

Recommendations

2.13 Once a supervisor of elections determines that a polling place should be moved, all affected voters should be promptly notified by mail and the information should be posted on the county's Web site and otherwise publicized in a manner most effective in reaching the voters of that precinct.

2.14 The former polling place should have clearly posted signs throughout the location at a reasonable time preceding the election and on Election Day, which not only identify the new polling place, but also provide clear directions to the polling place.

2.15 Poll workers should also be provided with a list of all polling places, including those that were recently moved and closed. Poll workers should be able to inform voters of the location of the new polling place.

2.16 Poll workers should be educated regarding proper poll closing procedures to ensure that all voters who arrive at the polls before closing time are permitted to vote. Florida election law should be changed to permit those wrongfully denied an opportunity to vote an immediate right to appeal with resolution of the issue prior to the canvassing of the election or counting of ballots. A listing of all polling places should be widely distributed and featured prominently in the print media within one week of the election.

National Voter Registration Act: The Motor Voter Law

Findings

- Many voters who completed voter registration applications at the Department of Highway Safety and Motor Vehicles (DHSMV) when they updated their driver's license information discovered on Election Day that they were not registered or their names did not appear on the rolls.
- DHSMV examiners did not inform voters that changing their address on their driver's license does not automatically register them to vote in the new county of residence. In addition, DHSMV does not retain copies of voter registration applications, which are subsequently transmitted to supervisors of elections.
- Once DHSMV has transmitted voter registration applications to supervisors of elections offices, there is no verification system in place to ensure that the supervisors of elections received this information.
- Once a driver changes his or her driver's license address, the DHSMV is not required to forward voter registration applications to supervisors of elections offices for the new resident county of the driver.

Recommendations

2.17 The DHSMV should be mandated through legislation and/or appropriate administrative rule promulgation to forward completed voter registration applications to the supervisor of elections office of the new county of residence for the voter.

2.18 Driver's license examiners should be trained to inform applicants that any change in their driver's license files does not automatically update their voter registration information. Examiners should inform voters that completion of registration applications does not guarantee the appearance of their names on the voter rolls in their county of residence and that applicants should contact local supervisors of elections offices for information on their voter registration status.

2.19 The DHSMV, through enacted legislation and/or appropriate administrative rule promulgation, should be required to devise a uniform statewide system of review to verify that supervisors of elections offices received DHSMV voter registration applications in a timely manner. Copies of transmitted voter registration applications should be kept in the DHSMV database or files for a reasonable time after transmission.

2.20 Resources should be allocated to the DHSMV for the additional staff and training required to provide the services recommended.

Police Presence at or Near Polling Sites

Findings

- Florida Highway Patrol troopers conducted an unauthorized vehicle checkpoint within a few miles of a polling place in a predominately African American neighborhood. Several Florida voters reported seeing Florida Highway Patrol troopers and other uniformed law enforcement officials in and around polling places on Election Day.
- The Florida Highway Patrol did not anticipate that the existence of the checkpoint would intimidate voters.

Recommendations

2.21 No law enforcement agency should conduct routine checkpoints or other traffic barriers around polling locations. Checkpoints and other traffic barriers should only occur on Election Day in case of emergencies or exigent circumstances.

2.22 As recommended in previous Commission reports, public forums involving both the community and Florida law enforcement agencies should take place at regular intervals throughout the year. These forums would allow all in attendance—including law enforcement officers and officials, elected officials, and community members—to learn about and develop a greater respect for the racial, economic, and cultural diversity of Floridians. The dialogue and idea exchange at the public forum should allow concerns to be addressed before they become serious grievances, e.g., the perceived use of checkpoints predominantly in communities of color, the perceived use of checkpoints on Election Day to prevent certain communities from participating in the electoral process, and the perceived intimidation in the use of checkpoints on Election Day.

CHAPTER 3: RESPONSIBILITY WITHOUT ACCOUNTABILITY?

Delegation of Responsibilities

Findings

- Florida’s statutory scheme for elections provides responsibility without accountability and contributed significantly to the disenfranchisement of Florida voters.
- The governor chose not to exercise his authority to appoint special officers to investigate alleged election law violations in response to the allegations of impropriety in the 2000 presidential election.
- The secretary of state chose to exercise authority to ensure the vote count was discontinued and that the vote was canvassed after the election, but did little to ensure that Floridians would be able to get to the polls and be permitted to vote. The secretary’s office did little to ensure that the state was prepared for the election, adequate resources were available to address problems arising on Election Day, Florida voters received adequate education on voting processes, election precincts were appropriately staffed, and election workers received needed education and training.
- The secretary of state delegated her statutory obligation before and during the 2000 presidential election, to “[o]btain and maintain uniformity in the application, operation and interpretation of the election laws” (as it relates

pretation of the election laws” (as it relates to ensuring that legal voters would be permitted to vote) to the degree that her duty was exercised on such a discretionary basis as to be arbitrary.

Recommendations

3.1 The U.S. Department of Justice should initiate the litigation process against the governor regarding his failure to appoint special officers to investigate alleged election law violations that discriminated against people of color. Appropriate enforcement action should be initiated to ensure compliance with the Voting Rights Act of 1965, as amended.

3.2 The U.S. Department of Justice should initiate the litigation process against the secretary of state regarding her disregard of statutory obligations (as they relate to ensuring legal voters were permitted to vote during Florida’s 2000 presidential election), which either discriminated against people of color or resulted in their denial of equal access to the political process in violation of federal law. Appropriate enforcement action should be initiated to ensure compliance with the Voting Rights Act of 1965, as amended.

3.3 The state of Florida should pass legislation requiring the secretary of state to ensure that the state is prepared for elections, adequate resources are available to address problems arising on Election Day, Florida voters receive adequate education on voting processes, election precincts are appropriately staffed, and election workers receive needed education and training. These changes should ensure that there is an effective process for challenging a secretary if he or she does not fulfill these statutory mandates.

3.4 The governor of Florida should immediately appoint special officers to investigate alleged violations of election laws under the authority vested in him by section 102.091 of the Florida Election Code. If violations are found, then the governor should ensure that the violators are prosecuted as provided for under the law.

3.5 The Civil Rights Division in the Office of the Florida Attorney General should develop a

cooperative relationship with the Florida Elections Commission and the Florida Division of Elections to ensure that all individuals complaining that they were denied the right to vote have their complaints processed by the appropriate agency in an expeditious manner.

CHAPTER 4: RESOURCE ALLOCATION

Voter Education

Findings

- Although the state Division of Elections is mandated to provide voter education assistance to the public, as well as voter education technical support to supervisors of elections, Florida's supervisors of elections generally expect the state to provide limited support (e.g., legislative updates and legal advice) and/or do not anticipate that they will receive direct resources from the division (such as financial assistance for local voter education initiatives).
- The omission of this possible financial resource contributes to the counties' lack of success in providing extensive and consistent outreach to first-time voters and those residents with special needs. Currently, it is unclear whether supervisors of elections would receive state financial support to fund local voter education initiatives if they seek the state's assistance.

Recommendation

4.1 The Division of Elections should cooperate with the appropriate state and local authorities (e.g., Florida's legislature and county boards of commissioners) to devise a mechanism for supervisors of elections to request and receive supplemental state funding for essential voter education initiatives that address the particular needs of the residents in their respective counties.

Educating the Public on Voter Fraud and the Mechanics of Voting

Findings

- The Division of Elections expended funds to provide public service announcements and other

advertising to fulfill its mandate of educating the public on voter fraud. In spite of these expenditures, it is unclear whether the public was informed of the essential elements of voter fraud, as defined by Florida law. As a result, state estimates of the incidence of voter fraud that are based on public reports of alleged fraudulent voting practices may not be accurate.

- There is no evidence that the Division of Elections spent a comparable amount of funds for voter education and/or instructing Florida residents on how to cast their votes properly.
- The Division of Elections failed to fulfill its obligation to educate Florida residents on the mechanics of voting.

Recommendations

4.2 Future public service announcements and advertisements should plainly define voter fraud, provide succinct examples of when fraud occurs, and suggest measures that members of the public can take to prevent and/or report its occurrence.

4.3 The Division of Elections should also provide an appropriate level of funding for advertisements and public service announcements that educate Florida residents on the mechanics of voting, as well as the importance of voting.

4.4 The Division of Elections should maintain a routine and working relationship with all supervisors of elections, to become familiar with voter education assistance needs of each county, as well as the types of voting systems used in each jurisdiction.

4.5 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated relevant federal and/or state laws through the manner by which funds were distributed to polling places or precincts. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

No Process for Challenging Reduced Supervisors of Elections' Budgets

Finding

▪ Florida's supervisors of elections do not have a specific process to challenge the level of funding approved by their respective county boards of commissioners to update voting equipment, provide relevant voter education resources, and/or supplement poll worker training. Consequently, expected voting needs in various counties remain unmet, since supervisors of elections have limited financing alternatives to augment reduced budget proposals.

Recommendations

4.6 The secretary of state's office, the Florida legislature, county boards of commissioners, and supervisors of elections should jointly create a process for supervisors of elections to challenge local funding decisions. Possible solutions include requiring an amendment to the Florida statutes in order to permit supervisors of elections access to an appeals process (as constitutional officers); or providing state financing to fund proposed budgets of supervisors of elections offices, if specific prerequisites have been met (e.g., the anticipated unavailability of county financing).

4.7 The state of Florida should enact a specific law to authorize use of state emergency funds that are earmarked for elections preparation in order to supplement proposed budgets of supervisors of elections offices. This funding would be accessible to supervisors of elections when adequate county financing is not available. Sufficient funding should be provided to support this mandate, and appropriate administrative rules should be promulgated to ensure meaningful implementation of the law.

Inconsistent Poll Worker Training among Florida's Counties

Findings

▪ The quantity and quality of training provided to poll workers vary among counties. As a result, poll workers throughout the state do not receive consistent guidance on issues that affect

an individual's right to vote (e.g., instructing residents on the mechanics of voting, appropriately assisting voters with disabilities, offering substitute ballots when spoilage occurs, and verifying voters' registration).

▪ The secretary of state and the Division of Elections failed to provide clear and consistent guidance for the training of poll workers.

Recommendations

4.8 Each county board of commissioners should regularly review its respective county's financial allocation for poll worker training. Input from the secretary of state's office may be required to ensure uniform instruction materials and guidance on state voting regulations, as well as funding for supplemental training. To determine the effectiveness of training curricula, supervisors of elections offices should routinely obtain responses from a representative sample of each county's poll workers regarding any difficulties they encountered on Election Day, how prepared they were to solve these problems, and suggestions on improving their training courses. Information derived from these responses should be included in the design of future poll worker training curricula.

4.9 State and county officials should establish certification requirements for poll workers to assure the public that poll workers have recently been instructed in the basics of election law and procedures.

CHAPTER 5: THE REALITY OF LIST MAINTENANCE

Who Are the Disenfranchised?

Findings

▪ Approximately 3.9 million Americans are disenfranchised or separated from their right to vote in public elections due to their status as former offenders.

▪ Over 36 percent of the total disenfranchised population of these offenders consists of African American men.

▪ Thirteen percent of African American men are disenfranchised.

- Thirty-one percent of the Florida disenfranchised population consists of African American men.
- Florida's recently enacted electoral reform law failed to change the state's policy of permanently disenfranchising former felons, which produces a stark disparity in disenfranchisement rates of African American men compared with their white counterparts. The state also failed to reform the laborious and protracted executive clemency application procedures.

Recommendations

5.1 The state of Florida should authorize legal measures to ensure that former felons receive automatic restoration of their civil rights upon satisfaction of their sentences, including probation. Sufficient funding should be provided to support this mandate. Moreover, appropriate administrative rules should be promulgated to monitor the implementation of the law. The governor should issue an executive order to streamline the executive clemency application procedures to provide the swift restoration of civil rights to persons who are so entitled.

5.2 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated relevant federal and/or state laws by permanently disenfranchising voters on the basis of felony conviction. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

5.3 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated relevant federal and/or state laws through the method by which private entities were involved with list maintenance activities. The process should include, but not be limited to, the failure to include persons adjudicated mentally incompetent to vote in the compilation of the exclusion lists, the matching logic prescribing for false positives or inexact matches, the inclusion of criminal history information from states other than Florida, and the failure to prescribe uniform provisions for voters

who erroneously appeared on the exclusion lists. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

5.4 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated relevant federal and/or state laws by failing to provide standard training to election employees. The process should include, but not be limited to, whether the Division of Elections provided technical assistance to the supervisors of elections on voter education and election personnel training services; monitored and approved training courses for continuing education for supervisors of elections; and coordinated, on an annual basis, two statewide workshops for the supervisors of elections by reviewing and providing updates on the election laws to ensure uniformity statewide in the interpretation of the election laws. The process should also consider the standards by which names were removed from the voter rolls. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

5.5 The Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated the Voting Rights Act of 1965, as amended, and/or Title IX of the Florida statutes through the failure to give full faith and credit to the automatic restoration of civil rights in other states; and the inconsistencies in the Executive Clemency Board's policy statement (that felons who enter Florida with their civil rights need not apply for civil rights in Florida) and its rules (requiring that the felons who enter Florida must apply for civil rights in that state). Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

Data Verification

Findings

- The 1997 Miami mayoral election, with its high incidence of voter fraud, gave impetus to the drive for a statutory requirement for the

state to award a contract to a private entity to assist in purging the voter files.

- The Division of Elections solicited bids from private entities through requests for proposals. The first contract was awarded to Professional Analytical Systems & Services. DBT Online was ultimately awarded the contract through an invitation to negotiate.

- The Division of Elections instructed DBT Online, through a Requirements Document, to use last name, first name, and date of birth as matching criteria for the felon exclusion list.

- Although persons adjudicated as mentally incompetent to vote, in accordance with Florida election laws are to be purged from the voter rolls, DBT Online was not required to include such data in its list. DBT Online provided a list of duplicate registrants, deceased persons, and felons whose civil rights have not been restored.

- The purge list was compiled using certain state-provided databases. DBT Online provided databases in conjunction with the matching logic prescribed by the Division of Elections. The matching logic prescribed by the Division of Elections for compiling the purge list resulted in inexact matches (“false positives”). The Division of Elections contracted for the more inclusive methodology of processing the data and did not require DBT Online to produce a list of exact matches.

- There were no clear guidelines from the governor, the secretary of state, or the director of the Division of Elections to subordinates to employ list maintenance strategies that would protect eligible voters, particularly historically disenfranchised populations, from being wrongfully removed from the voter registration rolls.

- An official of the Division of Elections dictated to representatives of the private firm to employ a strategy that resulted in a disproportionate number of eligible African American voters being removed from the voter registration rolls in error.

- The Division of Elections failed to take the same cautionary steps before the 2000 presidential election that were taken before the 1998 election to alert supervisors of elections to verify the exclusion lists with the greatest of care and to provide opportunities for persons to vote by affidavit ballot in those instances in which the voter makes a credible challenge to his or her removal from the voter registration rolls.

- Weary state officials missed opportunities to provide necessary training to supervisors of elections on verification procedures, even when scheduled or requested.

Recommendation

5.6 The state of Florida should authorize legal measures to ensure that no registered voter is purged from voter rolls or files, unless he or she is an exact match of someone who is deceased, also registered to vote in another jurisdiction, a convicted felon without restoration of his or her civil rights, or someone adjudicated as mentally incompetent to vote. The state of Florida should provide clear guidance to the Division of Elections on how to use information provided from its own state agencies to determine the eligibility of registered voters. Sufficient funding should be provided to support this mandate, and the appropriate administrative rules should be promulgated that establish, with clear guidance, accountability standards and effective monitoring mechanisms to protect voters and the integrity of the voter registration rolls.

Executive Clemency in Florida

Findings

- The Division of Elections required DBT Online to include felony conviction and clemency information from 11 other states. Five of the 11 states have automatic restoration of civil rights for former felons. Thus, there was no clemency board database from which DBT Online could easily match the names of probable felons. Six of the 11 states do not have automatic restoration of civil rights for former felons. DBT Online matched the names of felons against the clemency databases of each of those states.

- The Division of Elections instructed DBT Online that those felons who were convicted outside the state of Florida and restored their civil rights in a state other than Florida should apply for clemency in Florida.

- Florida case law states that the full faith and credit clause of the United States Constitution requires the state of Florida to recognize the restoration of an individual’s civil rights from another state(s).

- On February 16, 2001, the Commission questioned the policy of requiring felons whose civil rights were restored in another state to apply for clemency in Florida. On February 23, 2001, the Office of Executive Clemency issued a letter stating that former felons who enter the state of Florida with restored civil rights need not apply for civil rights in Florida.

Recommendations

5.7 The state of Florida should establish clear guidance and monitoring systems to ensure that a practical appeal mechanism exists for those Florida residents whose names appear on a purge list. Sufficient funding should be provided to support this mandate, and the appropriate administrative rules should be promulgated.

5.8 The state of Florida should authorize legal measures, as the Florida legislature appears to have done in recently enacted legislation, to ensure that the policy statement issued by the Office of Executive Clemency on February 23, 2001, is codified through enacted legislation and/or appropriate administrative rule promulgation. Sufficient funding should be provided to support this mandate.

5.9 The state of Florida should ensure through enacted legislation and/or other appropriate action that modifications are made in the state's statutes and constitution to comply with the policy statement issued by the Office of Executive Clemency on February 23, 2001.

List Verification and Removal of Names

Findings

- Supervisors of elections had no uniform method to verify the information on the exclusion lists.
- Some supervisors of elections chose not to use the information on the exclusion lists in any manner.
- One supervisor of elections, who has never been convicted of a felony, received a letter stating that she was identified as a convicted felon.

- Former director of the Division of Elections, Ethel Baxter, instructed supervisors of elections that if they had any doubts as to the accuracy of the felony information, they should allow the person to vote by affidavit.

- There is no evidence that in preparation for the 2000 presidential election, the director of the Division of Elections took proper steps to ensure that supervisors of elections were informed about the errors in the exclusion lists.

- The Florida Elections Commission has authority to investigate the wrongful removal of a Floridian from the voter rolls with evidence of a willful violation.

Recommendations

5.10 Although the recently enacted Florida legislation appears to provide some level of instruction on list verification, the Division of Elections should provide step-by-step instructions on how supervisors of elections verify the accuracy of any information that may purge a voter from the central voter file.

5.11 Supervisors of elections should verify the veracity of any information that may purge a voter from the central voter file, prior to the removal of any name from the voter rolls.

5.12 The Florida legislature should broaden the scope of the Florida Elections Commission's authority to investigate the wrongful removal of a Floridian from the voter rolls, with not only evidence of a willful violation, but also negligent removal of a Floridian from the voter rolls.

5.13 The Florida Elections Commission should better advertise the scope of its investigative and enforcement authority to the public, by not only posting information on its Web site, but also by using other forms of media most effective in reaching the voters of each community.

5.14 The Florida legislature should appropriate funding to support the broader scope of investigative authority of the Florida Elections Commission and its additional advertising efforts.

CHAPTER 6: ACCESSIBILITY ISSUES

Special Needs

Findings

- In the November 2000 election, countless Floridian voters with special needs were denied their right to vote due to inaccessible precincts and ballots.
- Many precinct managers and poll workers were not properly trained to handle individuals with accessibility needs, including those with physical disabilities and language barriers.

Access to Polling Places for People with Disabilities

Findings

- It is estimated that voter participation for individuals with physical disabilities is 15 percent to 20 percent below that of the general population.
- The inaccessibility of the nation's voting systems means that many individuals with disabilities are unable to vote. In addition, many people with disabilities find themselves forced to cope with inaccessible polling places that fail to provide accommodations.
- In the November 2000 election, Florida voters with disabilities who rely on wheelchairs were forced to negotiate steps and unreachable polling booths or undergo humiliation by relying on others to lift them into the polling places to exercise their right to vote. Others who did not have these options were simply turned away, which denied them their right to vote.
- Some voters with visual impairments found that the precincts did not have proper equipment to assist them in reading their ballots and, therefore, they had to rely on others to cast their votes, which denied them a secret ballot.
- As one supervisor of elections conceded, many precincts are inaccessible. Some require ramps to comply with the accessibility requirements and others should be "replaced" as they cannot be made accessible.
- Although a 1992 Federal Election Commission study of local jurisdiction data collected through self-reporting found that 86 percent of the polling places in the United States are

physically accessible to individuals with disabilities, a recent report using data based on independent surveys and court documents suggests that potentially over 40 percent of polling places "continue to pose significant accessibility problems for voters with disabilities."

- Despite the Voter Accessibility for the Elderly and Handicapped Act, which requires that all polling places be physically accessible to voters with disabilities, numerous Florida precincts are not accessible to voters with disabilities. Thus, many Floridians with disabilities were disenfranchised in the November 2000 election.

Access to Polling Places for People Needing Language Assistance

Findings

- Despite the requirements that non-English-proficient voters be provided with some form of language assistance, many limited-English-speaking voters were denied this assistance at Florida's polling places in the November 2000 election.
- Many poll workers were not properly trained on the requirements of language assistance and thus failed to assist non-English-proficient voters. Even bilingual members of the public were prevented from providing language support. In some instances, bilingual poll workers were directed not to provide language assistance. Thus, these non-English-speaking voters found that their polling places offered ballots that were essentially inaccessible to them.
- Haitian Americans and Spanish-speaking voters were disproportionately affected.
- In some central Florida counties, Spanish-speaking voters did not receive bilingual assistance and some of these counties were subject to section 203 of the Voting Rights Act. This failure to provide proper language support led to widespread voter disenfranchisement of possibly several thousand Spanish-speaking voters in central Florida.
- Numerous Haitian Americans did not receive proper language assistance. Even in precincts where a county ordinance required bilingual ballots, the precincts failed to do so; as a result, many Haitian American voters were denied the opportunity to vote.

▪ Under Florida law, voters are allowed five minutes to cast their ballots. It is difficult for some limited English proficient voters to cast ballots within this time period. These voters either did not have a complete opportunity to cast their votes or their votes were not counted. As a result, they were denied meaningful participation in the November 2000 election.

Recommendations

6.1 State and county officials should allocate funding and resources to train precinct managers and poll workers on providing required assistance to individuals with disabilities and non-English-speaking voters. This training should not only focus on the mechanics of providing assistance, but it should also include sensitivity training to provide services to better assist and accommodate individuals with special needs.

6.2 The Florida legislature should enact similar legislation to the Voter Accessibility for the Elderly and Handicapped Act that directs the state Elections Commission to study and collect data on accessibility of polling places in Florida.

6.3 State and county officials should establish minimum standards for polling places, ensuring that they are fully accessible to individuals with disabilities and that individuals with special language needs receive proper language assistance in order to exercise their right to vote.

6.4 To ensure the uniformity of the application of election laws in Florida, the secretary of state should require that each supervisor of elections submit a report to the secretary of state that certifies that each polling site in the county is accessible to persons with disabilities and individuals with special language needs. In response, the secretary of state should assess the certification no later than 30 days prior to an election. All polling places deemed inaccessible through the above assessment process should be made accessible through a cooperative relationship between the secretary of state, supervisors of elections, and county commissioners.

6.5 The Florida legislature should enact legislation and/or appropriate administrative rule promulgation ensuring that the state of Florida

complies with the requirements of the Voter Accessibility for the Elderly and Handicapped Act and other applicable federal laws.

6.6 All inaccessible precincts should be relocated to buildings that are accessible or made accessible through the use of ramps. At a minimum, curbside voting should be provided to voters with disabilities.

6.7 All curbside voting should be conducted by poll workers or plain-clothed sheriffs when a county law requires that the sheriffs be used for this process. No uniformed law enforcement officers should be required to be present at or near polling places, where this presence may cause intimidation of voters.

6.8 The Division of Elections and the supervisors of elections should provide accessible ballots for non-English-speaking voters. Florida voting machinery should contain the ability to accommodate the language needs of the multilingual population of Florida. The new optical scan voting machines can be programmed in most, if not all, languages, eliminating language barriers that exist with old voting systems (e.g., punch cards).

6.9 The Florida legislature should pass legislation and/or appropriate administrative rule promulgation that would allow the secretary of state to mandate that each supervisor of elections submit a report detailing steps and procedures that each county has taken to comply with legal language assistance requirements.

6.10 Supervisors of elections should actively recruit bilingual poll workers to assist bilingual voters. Furthermore, there should be a language assistance mechanism that is readily available for voters who need such support on Election Day.

6.11 The U.S. Department of Justice should initiate the litigation process against state election officials who implemented practices during the 2000 presidential election that either intentionally discriminated or resulted in discrimination against persons with disabilities and language minorities, including, but not limited to, the enforcement of a five-minute voting rule and

the requirement to enter the voting booth alone. Appropriate enforcement action should be initiated to ensure compliance with the Voting Rights Act of 1965, as amended, as well as other applicable federal laws. The state of Florida should amend section 101.51 of the Florida statutes through enacted legislation and/or appropriate administrative rule promulgation to affirm (1) that persons with disabilities and those requiring language assistance have “sufficient reason” to occupy a voting booth for more than five minutes, and (2) that persons requiring language assistance may enter the voting booth with someone to assist them with casting ballots for the candidates of their choice.

6.12 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated the Voting Rights Act of 1965, as amended, the Voter Accessibility for the Elderly and Handicapped Act, and other relevant federal and/or state laws by failing to provide reasonable accommodations to people with disabilities and voters with limited English proficiency. The process should include, but not be limited to, whether polling places, polling booths, and ballots were accessible to all voters, including individuals with disabilities; and whether voters with limited English proficiency and individuals with disabilities were provided with assistance to not only understand the ballot, but also to cast the ballot for the candidates of his or her choice. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

6.13 The state of Florida should require through legislation or appropriate administrative rule promulgation that supervisors of elections consult people with disabilities, people with limited English proficiency, and their advocacy and affected community groups to ensure that ballots are readily understood by voters. State officials should establish strategies to provide adequate assistance for persons with disabilities and persons with limited English proficiency.

CHAPTER 7: CASTING A BALLOT

Voting by Affidavit and Provisional Ballot

Findings

- Florida election law grants supervisors of elections tremendous discretion in determining who will ultimately be permitted to vote.
- The Florida Election Code authorizes voting by affidavit in numerous situations, based on prior approval of the supervisor of elections. An individual may seek to vote by affidavit if there is a change of address, a change of name, the voter requires assistance due to disability, his or her right to vote is challenged, or if the voter’s name does not appear in the precinct registration book.
- The Florida Office of the Secretary of State and its Division of Elections failed to provide clear guidance and proper training to ensure supervisors of elections acted uniformly in providing equal opportunities in the use of affidavits.
- On November 7, 2000, some voters who were eligible to vote by affidavit were not informed of that right—or were led to believe they did *not* have such a right—by poll workers who did not clearly understand the law or did not convey accurate information.
- One of the key irregularities in Florida during the 2000 election was a near-statewide inability of poll workers to reach supervisors of elections to verify voter eligibility or to obtain authorization to permit the individual to vote by affidavit. Thus, countless citizens were denied the right to vote.
- Provisional ballots protect the rights of eligible voters as well as the integrity of the electoral process by counting the provisional ballot only after election officials have verified the voter’s registration status and eligibility. Eligible votes are then added during the final tally.
- The Election Reform Act allows for voting by provisional ballot but specifically holds that if the voter is registered in a different precinct from the one in which the ballot is cast, then the provisional ballot will not be counted.

Recommendations

7.1 The state of Florida must effectively implement the provisions of its recently enacted Election Reform Act and ensure (1) poll workers are no longer required to contact supervisors of elections for authorization to vote by affidavit, and (2) alternative measures to verify voter eligibility are created that would minimize or eliminate the need to contact supervisors of elections on the day of an election.

7.2 Sufficient funding should be provided to support the mandates of the Election Reform Act that relate to affidavit voting and provisional ballots, and the appropriate administrative rules should be promulgated to provide effective monitoring mechanisms that will ensure implementation of the legislation.

7.3 Poll workers should be trained on the use of affidavits and provisional ballots during elections. If a voter's eligibility cannot be immediately determined, poll workers should be instructed to inform the voter of the affidavit procedure and know how to assist the voter in properly casting his or her vote.

7.4 When a person votes by affidavit, the ballot should be distinguishable from other ballots. If it is discovered that information in the affidavit is false, a mechanism should be in place during the verification process that would capture and annul the fraudulent vote, as well as notify the voter of the reason for the rejection of the ballot.

7.5 While the recently enacted Election Reform Act provides for limited use of voting by provisional ballot, the state of Florida should provide an absolute right to a provisional ballot in every polling location where the voter executes an appropriate affidavit attesting that he or she is eligible to vote.

7.6 The state of Florida should provide voters with an immediate right to appeal the discarding of any ballot or the refusal of any opportunity to vote prior to the final canvassing of the election.

7.7 The secretary of state should require each supervisor of elections to submit a report to the Division of Elections providing detailed information on the specific steps that will be taken to ensure that voters are given adequate notice and other information about opportunities and requirements relating to voting by affidavit or provisional ballot. The report must also include detailed information about the training of poll workers and other election officials to implement these provisions. Based on these reports, the secretary of state must assess the voter education and training needs in each county and provide adequate resources as needed.

7.8 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated the Voting Rights Act of 1965, as amended, and other relevant federal and/or state laws by failing to allow voters to cast ballots through the use of affidavit procedures prescribed in the election code. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.

CHAPTER 8: THE MACHINERY OF ELECTIONS

Voting Systems and Spoiled Ballots

Findings

- During Florida's 2000 presidential election, different voting systems, with varying error rates, were used throughout the state. The evidence indicates that Florida voters in poorer communities, as well as voters in communities where the majority of residents are people of color, were more likely to use voting systems that cause higher spoilage rates. It is clear that every voter did not have an equal opportunity to have his or her vote counted.
- Florida voters who cast their ballots and then had those ballots tabulated at a central location were more likely to lose their votes through spoiled ballots than were voters who used precinct-based counting (PBC) technology. PBC voting systems can be programmed to "kick out" invalid ballots and allow voters to correct overvote errors occurring at the polling site.

Florida law gives voters three opportunities to cast a correct ballot.

- Even if machines incorporate PBC technology to identify and kick out invalid ballots so voters can try again, it does not guarantee the feature will be used. During the November 2000 election, at least two Florida counties turned off that part of the machine to cut costs and save time. Disabling the kick out feature of this technology, which can easily be done, resulted in thousands of spoiled ballots that otherwise might have been corrected.

- In Florida, 22 of the 23 counties with the lowest spoilage rates used precinct-based optical scan technology. On average, the spoilage rate for counties using the precinct-based optical scan technology was 0.83 percent—far lower than the average spoilage rates for either central-based optical scan technology (5.68 percent) or central-based punch card technology (3.93 percent).

Recommendation

8.1 The state of Florida should enact legislation requiring the use of an electronic or electromechanical precinct-count tabulation voting system. These technologies will significantly increase the chances that a voter will have his or her vote count. The legislation should specifically prohibit the dismantling of the kick out feature of the machines since the main purpose of the technology is to identify and kick out invalid ballots, allowing voters to try again if necessary. Sufficient funding should be provided for this mandate. The appropriate administrative rules should be promulgated to ensure proper monitoring of each stage of the implementation of the new law.

Ballot Confusion

Findings

- There was substantial voter ballot confusion during Florida's 2000 presidential election. In some jurisdictions this led to unprecedented numbers of invalidated ballots through overvoting. The majority of the complaints were registered in Palm Beach and Duval counties.

- In Palm Beach County, there was massive voter confusion due to the design of the so-called

butterfly ballot. The confusion played a role in more than 19,000 Palm Beach County voters punching two separate holes when voting for President, thereby invalidating their ballots with an overvote. The confusion also played a role in Reform Party candidate Patrick J. Buchanan receiving approximately 3,400 votes in Palm Beach County—far more than anywhere else in the state—despite the fact there were only 337 Reform Party members in the county.

- The Commission concurs with the findings of a representative of the National Organization on Disability, who concluded that the butterfly ballot's design was "absolutely irresponsible" for use by persons with visual impairments.

- In Duval County, the ballot placed the names of presidential candidates over two pages, leading thousands of voters to invalidate their ballots by voting on both pages. This problem was compounded by the sample ballot's instructions, which explicitly guided voters to "vote all pages" of the ballot.

Recommendation

8.2 The state of Florida should ensure through legislation or administrative rulemaking that ballot designs are as uniform and as easy to read and understand as possible for all Florida residents, including individuals with disabilities and those with language assistance needs. Because of their instrumental role in creating and/or approving ballot designs, this should include training for supervisors of elections and their staffs—including training on how to conduct effective outreach efforts seeking advice and input from disability rights and other community groups. Sufficient funding should be provided for this mandate, and the appropriate administrative rules should be promulgated to monitor the implementation of the legislation.

CONCLUSION

While some of those denied the right to vote in the November 2000 election no doubt were legally denied that right, others who should have been legally entitled to vote were also denied that right. Indeed as this report demonstrates, Florida state law in some instances virtually guaranteed that some citizens who were legally entitled to vote would be denied that right. The statute's silence on other instances

provided tacit approval for the denial of some to vote. Not all voices were heard on Election Day, and the law provides no meaningful way for their voices to now be heard. Picking winners and losers is rarely an easy task. Justice Stevens in his dissenting opinion in *Bush v. Gore* opined, "Although we may never know with complete certainty the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as the impartial guardian of the rule of law."⁶ There are, however, those like Cathy Jackson and Donnise DeSouza who lost the chance to speak through their ballots on Election Day but who now speak to the nation through this report about their Election Day experiences. "Voting is the language of our democracy and regrettably,

when it mattered most, real people lost real opportunities to speak."⁷

Florida officials have a formidable challenge and responsibility. First, they must hold themselves accountable for the significant array of voting irregularities that occurred on their watch. Second, they must move swiftly to meaningfully implement reform measures signed into law by Governor Bush. They must establish monitoring and control systems to facilitate effective communications among all levels of officials in the electoral system. There must be adequate funding, better training, more voter education resources, increased access for special needs populations, and greater responsiveness to the voting rights of all people.

⁶ *Bush v. Gore*, 121 S. Ct. at 542.

⁷ U.S. Commission on Civil Rights, "Status Report on Probe of Election Practices in Florida During the 2000 Presidential Election," Mar. 9, 2001, p. 3.

Epilogue

Days after receiving allegations of voter disenfranchisement in Florida during the November 2000 election, the U.S. Commission on Civil Rights began a preliminary investigation. As the Commission's investigation was in progress, Florida's governor appointed a task force to investigate the alleged election irregularities and suggest reforms to the state election laws. The task force was mandated to complete its study by March 1, 2001. After the Commission hearings in January and February, the secretary of state presented a proposal to revamp the state's voting systems. The Florida House of Representatives and Florida Senate also considered proposed legislation to reform the state's voting systems. The Florida legislature ultimately passed comprehensive election reform legislation, the Florida Election Reform Act, which was signed into law by the governor on May 9, 2001.

GOVERNOR BUSH'S SELECT TASK FORCE

On December 14, 2000, Florida Governor Jeb Bush issued an executive order creating the Select Task Force on Election Procedures, Standards and Technology.¹ The task force co-chairperson, Jim Smith, originally believed that Governor Bush wanted the task force to focus on technology.² Subsequent to the Commission's

¹ Exec. Order No. 00-349, Dec. 14, 2000. See the Governor's Select Task Force on Election Procedures, Standards and Technology, *Revitalizing Democracy in Florida*, Mar. 1, 2001, p. 4 (hereafter cited as Governor's Task Force, *Revitalizing Democracy*).

² Jim Smith, Testimony before the Hearing of the Governor's Select Task Force on Election Procedures, Standards and Technology, Tallahassee, FL, Jan. 9, 2001, transcript, p. 480. Mr. Smith testified, "I'm happy to go anywhere and, really, do anything, but I think we really need to think about what the governor asked us to do. We're here at his invitation. And he really didn't ask us to go hold public hearings. He asked us to look at, you know, the standards, procedures, and technology." Ibid.

announcement that it would hold hearings to investigate allegations of election irregularities, the scope of the task force's investigation expanded and when Governor Bush testified at the Commission's Tallahassee hearing he was questioned by Commissioners about the scope of his task force. The governor confirmed that the task force was charged with investigating all questions raised by the 2000 presidential election.³ On March 1, 2001, the governor's task force published its conclusions in an 80-page report, which includes 35 recommendations.⁴ The proposals range from minimum standards for voter education to expanding the time between an election and the certification of the results of that election.⁵

SECRETARY OF STATE'S PROPOSED REFORMS

After testifying before the Commission on January 12, 2001, about her limited involvement in election matters,⁶ Florida Secretary of State Katherine Harris proposed a three-year, \$200 million plan to modify the voting system.⁷ She suggested leasing optical scan voting systems

³ John Ellis Bush, governor of Florida, Testimony before the U.S. Commission on Civil Rights, Tallahassee, FL, Jan. 11, 2001, Verified Transcript, p. 108. At the hearing Governor Bush was asked if he "put any restrictions on the work of the task force, apart from the timeframe in which they are to report back to you?" Governor Bush responded, "No, it's fairly flexible." Ibid.

⁴ See generally Governor's Task Force, *Revitalizing Democracy*.

⁵ Ibid., pp. 70-77.

⁶ See chap. 3.

⁷ See Florida Department of State, "The Honorable Katherine Harris, Congressional Testimony—Election Reform," press release, Apr. 25, 2001. See also Mark Hollis, "Official Urges High-Tech New Voting System for Florida," *The Chicago Tribune*, Mar. 21, 2001, p. A10. Ms. Harris announced a three-year plan, stating, "How can we confirm the principles of freedom if we're shackled by outdated technology and processes that have grown passé?" Ibid.

before the 2002 elections and then urged the legislature to consider changing to touch screen systems before 2004.⁸

FLORIDA LEGISLATURE'S PROPOSED REFORMS

In the aftermath of the presidential election and the Commission's ongoing investigation, the Florida legislature considered numerous bills and resolutions.⁹ Many of these legislative proposals were eventually consolidated into one bill. On May 4, 2001, the Florida legislature passed the Florida Election Reform Act of 2001,¹⁰ and on May 9, 2001, Governor Bush signed the bill into law. To place the law that was ultimately passed in some perspective, the following is a brief discussion of the proposed changes that were considered by the Florida legislature.

Absentee and Military/Overseas Voting

There were 10 Senate bills that proposed changes in the casting and tabulating of absent-

tee ballots.¹¹ Senate Bill 1150 and its counterpart, House Bill 749, would have eliminated the requirement that a person requesting an absentee ballot disclose his or her social security number as well as the requirement that the last four digits of the elector's social security number be on the ballot for it to be tabulated.¹² Although these bills would simplify the absentee ballot process,¹³ they appear to be inconsistent with earlier legislation passed to eliminate voter fraud after the problems that arose with absentee voting in the 1997 Miami mayoral election.¹⁴ In fact, some senators suggested that the former rules should be enforced.

Election Day Registration

The Commission heard testimony from Floridians who believed they properly registered to vote but were turned away on Election Day because their names did not appear on the voter rolls.¹⁵ Senate Bill 1574 proposed that—

registration books be open on Election Day during the time election polls are open and at other times during the regular office hours of the supervisor of elections.¹⁶

⁸ Florida Department of State, "The Honorable Katherine Harris, Congressional Testimony—Election Reform," press release, Apr. 25, 2001. See also Mark Hollis, "Official Urges High-Tech New Voting System for Florida," *The Chicago Tribune*, Mar. 21, 2001, p. A10. Katherine Harris presented her proposal on April 25, 2001, when she testified in front of the House of Representatives Committee on House Appropriations at its hearings on election reform along with four other secretaries of state: J. Kenneth Blackwell, Ohio secretary of state; Sharon Priest, Arkansas secretary of state; Rebecca Vigil-Giron, New Mexico secretary of state; and Ron Thornburgh, Kansas secretary of state. U.S. Congress, House, Committee on House Appropriations, Hearing on Election Reform, 107th Congress, 1st Sess., 2001, <<http://www.house.gov/cha/business/042501testimonies/9.pdf>>.

⁹ The past election has also spurred the U.S. Congress into considering election reform. Senator Chris Dodd (D-Conn.) and Representative John Conyers (D-Mich) have cosponsored a bill that would allocate \$3.5 billion to assist states in adopting uniform standards for election equipment by 2004. The bill would also require states to permit "provisional voting." The Dodd-Conyers proposal, however, is just one of many before members of both houses of the U.S. Congress. Senator Charles Schumer (D-N.Y.) and Senator Sam Brownback (R-Kan.) have cosponsored a bill that would provide \$2.5 billion and create a commission that would become responsible for drafting new voting procedures. Likewise, Senators John McCain (R-Ariz.) and Fritz Hollings (D-S.C.) are pushing efforts for voluntary standards that would improve voting accuracy, voter education, and voting machinery and Representative Asa Hutchinson (R-Ark.) is sponsoring a \$1.5 billion bill. See "Democrats Seek Voting Rights Update," *The Associated Press*, Mar. 18, 2001.

These proposals could have a major impact on the manner in which Americans cast vote in future elections.

¹⁰ Senate Bill 1118, 103d Reg. Sess. (Fla. 2001).

¹¹ S.B. 200, 103d Reg. Sess. (Fla. 2001); S.B. 448, 103d Reg. Sess. (Fla. 2001); S.B. 748, 103d Reg. Sess. (Fla. 2001); S.B. 1150, 103d Reg. Sess. (Fla. 2001); S.B. 1252, 103d Reg. Sess. (Fla. 2001); S.B. 1308, 103d Reg. Sess. (Fla. 2001); S.B. 1420, 103d Reg. Sess. (Fla. 2001); S.B. 1590, 103d Reg. Sess. (Fla. 2001); S.B. 1660, 103d Reg. Sess. (Fla. 2001); S.B. 1712, 103d Reg. Sess. (Fla. 2001).

¹² See S.B. 1150, 103d Reg. Sess. (Fla. 2001). Senator Durrell Peaden, Jr., sponsored this bill. See H.B. 749, 103d Reg. Sess. (Fla. 2001). Senator Paula Bono Dockery sponsored this bill.

¹³ By eliminating the possibility of error, e.g., someone forgetting to place his or her social security number on a ballot or placing the wrong social security number on a ballot, the changes would make it easier for persons voting absentee to vote correctly and have that ballot counted.

¹⁴ FLA. STAT. ch. 97.053(5)(a) (1999) (listing requirements for a complete voter registration application). See also Jay Weaver, "Vote Reform Back to Square One: Justice Department Ruling Means that State Legislators Must Draft New Law," *The Sun-Sentinel* (Fort Lauderdale), Aug. 23, 1998, p. 6B (noting that the law passed by the state "requires people to show a photo ID when they vote at the polls and to write the last four digits of their Social Security number on absentee ballot envelopes").

¹⁵ See chap. 2.

¹⁶ S.B. 1574, 103d Reg. Sess. (Fla. 2001). Senator Kendrick Meek sponsored this bill.

Senate Bill 1590 proposed that voters be permitted to register and request absentee ballots on-line. Senate Bill 1950 and House Bill 673 proposed that each school district establish voter registration programs that offer eligible high school students the opportunity to register to vote and/or update their voter registration records at least once a year.¹⁷

Former Felons

Senate Bill 152, entitled "Felons' Right to Vote," called for the automatic restoration of convicted felons' voting rights one year after the completion of the sentence, unless objected to by a majority of the Board of Executive Clemency. Senate Bill 404 and House Bill 51 proposed creating the Citizens' Empowerment Act, which mandated the automatic restoration of former felons' voting rights following completion of the sentence of incarceration and community supervision.¹⁸ The bill would have also required the Department of Corrections to complete any necessary paperwork and file it with the Board of Executive Clemency.¹⁹

Florida Senate Joint Resolution 406 and House Joint Resolution 49 proposed amending section 4 of article VI of the state constitution as it relates to the rights of convicted felons to vote.²⁰

¹⁷ See S.B. 1590, 103d Reg. Sess. (Fla. 2001). Senator Darryl L. Jones sponsored this bill. S.B. 1950, 103d Reg. Sess. (Fla. 2001). Senator Darryl L. Jones sponsored this bill. H.B. 673, 103d Reg. Sess. (Fla. 2001). Representative Frederica S. Wilson sponsored this bill.

¹⁸ See S.B. 152, 103d Reg. Sess. (Fla. 2001). Senator Mandy M. Dawson sponsored this bill. S.B. 404, 103d Reg. Sess. (Fla. 2001). Senators Darryl L. Jones and Kendrick Meek sponsored this bill. H.B. 51, 103d Reg. Sess. (Fla. 2001). Representative Christopher Smith sponsored this bill.

¹⁹ S.B. 404, 103d Reg. Sess. (Fla. 2001), H.B. 51, 103d Reg. Sess. (Fla. 2001).

²⁰ See S.J. Res. 406, 103d Reg. Sess. (Fla. 2001). Representative Jerry Paul sponsored this bill. H.J. Res. 49, 103d Reg., Sess. (Fla. 2001). Representatives James Harper, Jr., and Phillip Brutus were the chief sponsors of this resolution. There have been some allegations in the press that efforts by the state to restrict the rights of convicted felons to vote were aimed at depressing the voting of minorities, particularly African Americans and Latinos, who are disproportionately convicted of felonies. See, e.g., Gregory Palast, "Florida's Disappeared Voters: Disfranchised by the GOP," *The Nation*, Feb. 5, 2001, p. 20.

People with Limited English Proficiency and Those with Disabilities

Assistance to those with limited English proficiency was another issue on which the Commission heard testimony.²¹ House Bill 173²² proposed to make it easier for Floridians who do not speak English both to register and to vote. The bill would revise the information mandated for the statewide uniform registration form and requires that the registration forms be available in languages other than English, including Spanish and Creole. Under this bill, voting assistance would be provided for a member of a language minority group, if the group constituted more than 1 percent of the county's population.²³

The bill also requires precinct workers to permit voters whose primary language is not English to receive assistance in voting booths while voting. Any person who is eligible to register and unable to read or write, whose primary language is other than English, or who, because of a disability, needs assistance in voting would upon that person's request be registered by the supervisor and would be entitled to receive assistance at the polls under the conditions prescribed by this section.²⁴

Poll Closings

Senate Bill 748 proposed uniform opening and closing of polls across the state because Florida is in two time zones. Specifically, the bill provided for opening polls at 7:30 a.m. Eastern Standard Time and 6:30 a.m. Central Standard Time and for closing polls at 7:30 p.m. Eastern Standard Time and 6:30 p.m. Central Standard Time.²⁵

Provisional Ballots

Senate Bill 1118 included a provision that would create procedures for casting and counting provisional ballots. The bill would require verification of a voter's eligibility if the voter's name was not on the precinct register. The bill would also permit a voter who requests an absentee ballot, then appears at the polls on Elec-

²¹ See chap. 6.

²² H.B. 173, 103d Reg. Sess. (Fla. 2001). Representative Philip Brutus sponsored this bill.

²³ *Id.*

²⁴ *Id.*

²⁵ S.B. 748, 103d Reg. Sess. (Fla. 2001). The Ethics Committee and Senator Charlie Clary sponsored this bill.

tion Day, to vote through a provisional ballot if the absentee ballot has not been submitted.²⁶

Purging of Voters

Senate Bill 1739 would have eliminated the statutory obligation to have the voter purge lists developed by a private contractor. It would have restored the roles of the Florida Department of Law Enforcement, the Board of Executive Clemency, and the Office of Vital Statistics in directly furnishing information to the supervisors of elections that relates to the rights of citizens to vote.²⁷

Voter's Bill of Rights

The Voter's Bill of Rights was originally proposed as Senate Bill 2098 and included a 10-point list of a voter's rights. It, like many proposals, was incorporated into the Election Reform Act.²⁸

THE NEW LAW: THE FLORIDA ELECTION REFORM ACT OF 2001

The new Election Reform Act is comprehensive legislation that combines aspects of several bills considered by the Florida legislature.²⁹ The act makes major changes to the election laws of the state in areas of concern addressed by the Commission during the hearings in Tallahassee and Miami, including absentee ballots, ballot uniformity, poll worker training and education, provisional ballots, the purging of people from voter lists, voter education, and voting system modernization. The act, however, was silent on several areas of concern raised at the Commission hearings, including Election Day registration, former felons' voting rights, language assistance, and roadblocks. The following discussion is a brief review of some of the key provisions of the new law.

²⁶ See the Florida Election Reform Act of 2001, S.B. 1118, 103d Reg. Sess. (Fla. 2001). The Committee on Ethics and Elections and Senator Bill Posey sponsored this bill. The Florida Election Reform Act of 2001, S.B. 1118, 103d Reg. Sess. (Fla. 2001).

²⁷ See S.B. 1739, 103d Reg. Sess. (Fla. 2001). The Fiscal Responsibility Council and Representative Randy Johnson sponsored this bill. S.B. 1739, 103d Reg. Sess. (Fla. 2001).

²⁸ See S.B. 2098, 103d Reg. Sess. (Fla. 2001). Senator Darryl L. Jones sponsored this bill. The Florida Election Reform Act of 2001, S.B. 1118, 103d Reg. Sess. (Fla. 2001) at 82.

²⁹ The Florida Election Reform Act of 2001, S.B. 1118, 103d Reg. Sess. (Fla. 2001).

Absentee Voting and Military/Overseas Voting

The Election Reform Act includes provisions that eliminate the need to provide social security numbers or voter identification numbers on absentee ballots.³⁰ Moreover, the act redefines "absent elector" to include any qualified voter who casts an absentee ballot.³¹

Poll Closings

The Election Reform Act calls for a study by the Division of Elections and the Florida State Association of Supervisors of Elections into the potential benefits and drawbacks of having uniform poll opening and closing times throughout the state.³²

Poll Workers

The Election Reform Act has a section on poll worker recruitment and training.³³ The act requires the supervisor of elections to ensure minimum poll worker training and education and requires the Division of Elections "to distribute the sum of \$5,949,375 in fiscal year 2001-2002 to the counties to fund comprehensive voter education programs and poll worker recruitment and training programs provided in the act."³⁴ The law makes clear, however, that no county shall receive any funds under that provision until the "supervisor of elections provides the Department of State a detailed description of the voter education programs to be implemented . . . for the 2002 election cycle."³⁵

Provisional Ballots

The inability of voters to cast provisional ballots when their registration status could not be confirmed by the supervisors of elections offices was a topic of significant testimony at the Commission hearings.³⁶ The Election Reform Act allows for voting by provisional ballot but states that if the voter is registered in a different pre-

³⁰ The Florida Election Reform Act of 2001, S.B. 1118, 103d Reg. Sess. (Fla. 2001) at 78.

³¹ *Id.* at 33.

³² *Id.* at 102.

³³ See the Florida Election Reform Act of 2001, S.B. 1118, 103d Reg. Sess. (Fla. 2001) at 85-87.

³⁴ *Id.* at 95.

³⁵ *Id.*

³⁶ See chap. 2.

cinct from the one in which the ballot is cast, then the provisional ballot will not be counted.³⁷

Purging of Voters

The Election Reform Act creates a new section of the election code in section 98.0977. The new provisions mandate the creation of the statewide voter registration database.³⁸ The act provides that “the [Department of State] may contract with the Florida Association of Court Clerks to analyze, design, develop, operate and maintain a statewide on-line voter registration database and associated web site, to be fully operational statewide by June 1, 2002.”³⁹ The database will contain all the voter registration information from each of the 67 supervisors of elections and will be on-line. The Election Reform Act repealed section 98.0975 entirely, which called for the state to contract with a private entity to maintain the state’s voter registration lists.⁴⁰

Uniform Ballots

The Election Reform Act amends section 101.151 to define, in detail, the specifications for ballots. For example, it addresses the issue of uniformity of the ballot: “The department rules shall graphically depict a sample uniform primary and general election ballot form for each certified voting system.”⁴¹

Voting Systems

The Election Reform Act decertifies punch card machines⁴² and at the same time certifies touch screen systems.⁴³ It authorizes the distribution of \$7,500 per precinct for counties with populations of 75,000 or less and \$3,750 per pre-

cinct for all other counties.⁴⁴ Moreover, the act requires second-chance technology, e.g., scanners, at the precinct level that would determine whether voters made mistakes, specifically over-votes or undervotes, and allow voters to correct those mistakes.⁴⁵

Voter’s Bill of Rights and Responsibilities

The Election Reform Act requires a 10-point list of voter’s rights be published and posted inside every precinct in the state. The Voter’s Bill of Rights provides that each registered voter has the right to:

- vote and have his or her vote accurately counted;
- cast a vote if he or she is in line when the polls are closing;
- ask for and receive assistance in voting;
- a replacement ballot if he or she has voted in error;
- an explanation if his or her registration is in question;
- cast a provisional ballot if his or her registration is in question;
- prove his or her identity by signing an affidavit if election officials doubt the voter’s identity;
- written instructions to use when voting, and, upon request, oral instructions in voting from elections officers;
- vote free from coercion or intimidation by elections officers or any other person; and
- vote on a voting machine that is in working condition and that allows votes to be accurately cast.⁴⁶

The Election Reform Act includes the following list of voter responsibilities:

- study and know candidates and issues;
- keep his or her voter address current;
- know his or her precinct and its hours of operation;
- bring proper identification to the polling station;
- know how to operate voting equipment properly;

³⁷ The Florida Election Reform Act of 2001, S.B. 1118, 103d Reg. Sess. (Fla. 2001) at 41.

³⁸ *Id.* at 90–93.

³⁹ *Id.*

⁴⁰ *Id.* at 95.

⁴¹ *Id.* at 5–10.

⁴² *Id.* at 15. “Section 17. Effective Sept. 2, 2002, a voting system that uses an apparatus or device for the piercing of ballots by the voter may not be used in this state.” *Id.*

⁴³ *Id.* at 14. “‘Electronic or electromechanical voting systems’ means a system of casting votes by use of voting systems devices or marking a system of casting voting devices or marking devices and counting ballots by employing automatic tabulating equipment or data processing equipment, and the term includes touchscreen systems.” *Id.*

⁴⁴ *Id.* at 96.

⁴⁵ *Id.* at 16.

⁴⁶ *Id.* at 82.

- treat precinct workers with courtesy;
- respect the privacy of other voters;
- report problems or violations of election law;
- ask questions when confused; and
- check his or her completed ballot for accuracy.⁴⁷

CONTINUING ISSUES

Former Felons

The Commission heard testimony and secured documents on the issue of felon disenfranchisement.⁴⁸ In some states, individuals convicted of felonies retain their right to vote or have that right automatically restored upon completion of their felony sentence. Seven days after the Commission's Miami hearing, the Florida Office of Executive Clemency issued a letter revising the state's policy so that individuals with felony convictions from jurisdictions with automatic civil rights restoration need not apply for restoration of their voting rights in Florida.⁴⁹ Despite this, Florida still requires these individuals to apply for clemency in order to vote in Florida. Some civil rights organizations charge this practice is unconstitutional.⁵⁰

While the Senate voted for the automatic restoration of ex-offenders' voting rights, House Speaker Tom Feeney rejected automatic restoration of convicted felons' voting rights.⁵¹ In the alternative, House legislators supported an easier process for applying for restoration of voting rights.⁵² The Florida legislature ultimately rejected changes that would have allowed for the automatic restoration of convicted felons' voting rights, and the Election Reform Act does not address the voting status of former felons.

⁴⁷ *Id.* at 82–83.

⁴⁸ See chap. 5.

⁴⁹ Janet H. Keels, coordinator, Office of Executive Clemency, letter to Ed Kast, assistant director, Division of Elections, Feb. 23, 2001. See chap. 5.

⁵⁰ David Ruppe, "Florida Changes Policy on Ex-Felons' Voting Rights: Government Practice May Have Been a Factor in Bush Victory" <http://www.abcnews.go.com/sections/us/dailynews/floridafelonvote_010321.html> (accessed Mar. 26, 2001).

⁵¹ Mark Silva, "Election Overhaul is Approved," *The Miami Herald*, May 3, 2001, p. A1.

⁵² *Ibid.*

People with Limited English Proficiency and Those with Disabilities

The Election Reform Act fails to address issues confronting voters with special needs. First, it proposes no changes to assist individuals whose primary language is not English, specifically Spanish or Creole speakers, in casting their votes. Similarly, the Election Reform Act proposes no specific changes to assist individuals with disabilities.

Absentee Ballots

The Election Reform Act, in trying to correct one problem, has reopened the door to past abuses of the absentee ballot. By not requiring the requestor or the elector to provide social security numbers on ballots, the Election Reform Act ignores a potential fraud problem in absentee voting. Moreover, persons who present themselves at the poll must present identification; absentee voters are not required to provide identification.⁵³

CONCLUSION

The Election Reform Act of 2001 must be viewed as a much-needed step toward ensuring Floridians the right to vote. The Florida legislature attempted to address some of the major problems caused by the failure of voting procedures and systems in the 2000 presidential election.⁵⁴ The new law has provisions that reform and improve absentee voting, military and overseas registration and voting, poll worker education and training, and the voter registration maintenance system. It also provides for the use, although limited, of provisional balloting.

Despite this positive change, only time will tell if this legislation will be effective. Much depends on how its provisions are implemented by state and local officials. It is unknown whether adequate resources will be budgeted by the state and local governments to ensure the law's effective-

⁵³ Thomas B. Edsall, "A Long Road for Election Reform," *The Washington Post*, May 9, 2001 <www.washingtonpost.com/wp-dyn/politics/elections/2002/> ("Hans A. von Spakovsky, a Republican member of the Fulton County Board of Registrations and Elections in Georgia, was sharply critical of election reforms that provide easier use of absentee ballots. Von Spakovsky argued that absentee ballots make voter fraud simpler because 'multiple registration and multiple votes' are far more accessible and much more difficult to regulate").

⁵⁴ See app. V for a general overview of proposed and implemented changes.

tiveness.⁵⁵ Several million dollars have been authorized for voter education, poll worker selection and training, and new machinery;⁵⁶ it remains to be seen whether it is enough to equip all voters, rural and urban, with the best machinery to ensure that their votes will be correctly tallied.

Several important issues were not addressed by this legislation. The failure to address these issues continues the legacy of disenfranchisement. These issues include the failure to extend voting rights to former felons, the lack of required language assistance to non-English-speaking voters, and the failure to provide

meaningful voting assistance to individuals with disabilities. Additionally, Florida's new election law still provides no meaningful process for a person whose right to vote on Election Day is denied to challenge that denial.

Ultimately, the success or failure of Florida's election reform efforts depends on the leadership provided by Florida's highest elected officials. The Commission hopes the lessons learned from the November 2000 election will lead to the effective implementation of long-lasting reforms throughout the state that send a clear message to the country about the importance of the right to vote and the consequences of its denial.

⁵⁵ For this reason, the Commission has made a commitment to continue its investigation. The Commission "will travel to Florida to assess the impact of the legislation and to encourage appropriate distribution of resources to eliminate the well-publicized difficulties that were experienced in the last election." See U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights Commends Florida Leaders' Proposed Overhaul of Voting System," May 4, 2001.

⁵⁶ S.B. 1118, 103d Reg. Sess. (Fla. 2001) at 95-96.

Statement of Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners Christopher Edley, Jr., Yvonne Y. Lee, Elsie Meeks, and Victoria Wilson

Citizens must have a voice in the election of those who make the laws under which we all must live. As this report, *Voting Irregularities in Florida During the 2000 Presidential Election*, concludes, the voices of many voters, particularly African Americans, Latinos and Haitians with language assistance needs, and persons with disabilities, were silenced in Florida. This report's unique blend of statistical analyses, combined with the presentation of striking eyewitness testimony and voluminous documentary evidence, provides a compelling portrait of disenfranchisement. We commend the staff for their swift response to the innumerable allegations of voting irregularities they considered.

The report emphasizes the barriers that Hispanics encountered during the November 2000 election. However, due to the limitations of the available data, Hispanics could not be easily distinguished from nonblacks in statistical analysis. However, the work of the Commission's expert, Dr. Allan Lichtman, suggests that if the data on the Hispanic group were further isolated, the racial disparities between blacks and nonblacks would be greater.

Governor Jeb Bush's Select Task Force on Election Procedures, Standards and Technology revealed that less than 1 percent of the problems minority voters faced during the election resulted from "voter error." Our report demonstrates that independent of income, poverty rates, and literacy, factors that are all deeply intertwined with race, a double-digit difference exists in the ballot rejection rates for African Americans. Standing alone, the major racial disparities in ballot rejection rates in Florida's election appear to establish a prima facie violation of the Voting Rights Act, which protects the franchise for all eligible persons.

There are no permanent majority or minority factions within the United States Commission on Civil Rights. Nor does the Commission issue majority or minority reports. Once any report is approved by the vote of a majority of Commission members it is the Commission's report. Commissioners who dissent or wish to concur or add additional remarks may do so in statements commenting on the report that may be published with the report as long as they comply with our statute.

We want to ensure that nothing detracts from a focus on the documented disenfranchisement that occurred in Florida. Therefore, we have included documents validating the fairness and routine nature of the process used to produce this report in the appendix. The Commission has reviewed and updated its procedures, where necessary, in response to a 1997 General Accounting Office (GAO) report that found managerial "disarray" in that certain administrative deficiencies had not been addressed by Republican and Democratic appointees since the early 1980s. Some of these problems were analyzed in a 1988 GAO report, *Concerns About Commission Operations*.

Our report concludes that there were election policies and practices in place that prevented some of Florida's residents from voting and others from having their votes counted. American voters are no longer disenfranchised through the use of poll taxes, literacy requirements, grandfather clauses, and other similar procedures. The Commission's investigation, however, revealed a more subtle and possibly more insidious form of disenfranchisement caused by the inexplicable lack of needed election resources and accountability of public officials entrusted to protect this critical and fundamental right. We will continue to monitor events in Florida in the hope that these barriers to the right to vote have been removed.

Statement of Commissioner Victoria Wilson

I am delighted to vote in support of the U.S. Commission on Civil Rights report, *Voting Irregularities in Florida During the 2000 Presidential Election*. It is a report that shows grasp and reflects a profound belief in one of the basic principles of American democracy: that wrongs can be looked at and identified and spoken about, and that there is the hope that these wrongs can be corrected. I applaud the staff of the Commission for so quickly analyzing and giving shape and coherence to the 118,000 pages of documentary evidence and the 30 hours worth of testimony from the 100 witnesses who came before the Commission to testify under oath.

The U.S. Commission on Civil Rights has been underfunded for 13 years. There have been no increases to meet either rising standard costs or the increasing demands placed upon the Commission's services. In fact, the funding for the Commission during this decade or so has consistently been cut, year after year. Yet in times of crisis, it is to the U.S. Commission on Civil Rights that people have turned. And it is the Commission that has risen above the general state of fear, inertia, and politics and has willingly moved toward the flashpoint, in an effort to sort out truth from distortion.

While I am in agreement with most of the Commission's findings on the Florida voting irregularities, I should like to comment on the issue of conspiracy, which the Commission report does not even discuss. Conspiracy is defined by *Black's Law Dictionary* as an agreement by two or more persons to commit an unlawful act. Was there a conspiracy in the 2000 presidential election in Florida? Not provable—as of today.

But from the many hours of disparate testimony that I heard in both Tallahassee and Miami, regarding the November 2000 election process in Florida, there emerges an interesting confluence of circumstances, a confluence of circumstances that indicates intimidation and harassment of the Florida voters and that was set in motion long before the November election.

I listen as a profession. I listen to writers—historians, scientists, journalists, biographers, playwrights, essayists, psychologists, scholars, and novelists. I listen to them tell stories, true and imagined; and I read narratives. That's what I do to earn a living.

In Florida, I listened to many hours of testimony, as did the other commissioners and the staff. I listened to a great many narratives. And the disparate details come together to provide an unsettling account of what led up to the events of November 7, 2000.

It begins almost 18 months before November 2000 with the election of a new secretary of state and her taking office in January 1998. To quote from one of the supervisors of elections who testified before the Commission in Tallahassee: Florida's new secretary of state soon "cleaned out the institutional memory to a large degree of the Division of Elections."

The Florida Division of Elections director and the assistant director, both of whom had served for many years as key officials of the division, left those positions. Both former officials, who were acquainted with the voting regulations for each of the 67 counties of Florida, were replaced by a new director who was inexperienced and was not familiar with the ways that voting problems and procedures had been resolved in the past.

In a letter dated January 3, 2001, from General Counsel Charles T. Canady of the Office of the Governor for the State of Florida, addressed to Edward A. Hailes, Jr., general counsel of the U.S. Commission on Civil Rights, Mr. Canady wrote, regarding the "statutory responsibility over election and voter related issues," that, it is the secretary of state that has been entrusted by the legislature with the comprehensive obligation to "obtain and maintain uniformity in the application, operation and interpretation of the election laws."

Yet the individual supervisors representing the 67 counties of Florida "knew enough not to depend on that office this year because surely they [the Division of Elections officials] were too new. We [the election supervisors] knew more about the process in some cases than they did."

In addition, there was the testimony of a former Florida secretary of state who served from 1979 to 1986, and whose "number one priority" during his term in office was "election reform." Jim Smith

testified at the Commission's hearing, that the Division of Elections "shrank over a four-year period from 65 officials down to 37," making "the ability to supervise and give direction, very, very difficult." Mr. Smith went on to suggest "that that should be looked into." Jim Smith also served as the attorney general for the state of Florida, and was most recently co-chair of Governor Jeb Bush's Select Task Force on Election Procedures, Standards and Technology.

No Funds for Voter Education

Officials knew months in advance that the election was going to be complex. There was an unusually large number of presidential candidates on a ballot that would be confusing to even the most experienced of voters. It was also known that tens of thousands of voters, newly registered, would be voting for the first time.

The secretary of state testified that \$100,000 was requested for voter education in her budget but that the request for those funds was turned down. However, the governor of Florida testified that there had been no request of \$100,000 in the budget for voter education.

There was \$51,000 spent for billboards that warned about voter fraud, and a pamphlet on the same subject was sent out to all Florida voters. But there were no instructions about the ballot itself or sample ballots of each county that would show the voter what the ballot actually looked like; this, in an election where there were 12 candidates for president on the Florida ballot.

During the hearing, I, along with the other commissioners, was shown a sample Florida ballot that had no consistency of layout regarding type, no clarity of design within the row of candidates, and a row of names of presidential candidates that continued on the back of the sample ballot. Much has been written about the lack of clarity in the design of the butterfly ballot. But the sample ballot I saw from Duval County made the butterfly ballot seem, by comparison, a snap to navigate. The Duval ballot looked more like a take-out menu from a delicatessen than a ballot designed to make it easy for an American to vote. Its design was more a dare, than a design that would enable a voter to make a clear, knowing choice of candidates.

Had I seen the ballot for the first time on Election Day, in a voting booth, under pressure of time, with people in line outside of the booth waiting for their turn, I would have looked at the jumble of names in different type faces and the maze of columns, and thrown up my hands and left without voting at all. Voter inexperience would not have been the cause of my blank ballot. I have voted in eight presidential elections and consider myself an experienced voter.

Election supervisors testified before the Commission that they knew there was no money for voter education to be carried out in the weeks and months before the November election. Many of the supervisors testified to their helplessness and frustration in the face of what they knew in advance would be a large voter turnout. They knew they were on their own, without help or resources from the Division of Elections.

One supervisor from Leon Country spoke of his efforts to circumvent what he knew could easily evolve into a state of chaos on November 7, and valiantly tried to head it off by raising funds for voter education on his own, knowing no help would be forthcoming from the Division of Elections, "this in a state that in the past has spent more than \$35 million in one year telling Floridians how to play the lottery."

This supervisor "personally raised money from teachers, lawyers, and other individuals of Leon County so that Leon County could spend a radio and television advertising budget that was totally separate from what the county had given me because the county did not provide much in that area as well, in order to meet some of the needs that we saw coming down the road." [my underlining]

His plan worked. Leon County had less than 1 percent of spoiled ballots—one of the two lowest counties in the state. But in many of the other counties, where no additional funds were raised to help the voters, chaos and confusion indeed prevailed.

The Mysterious Missing Registration Cards from Motor-Voter

More than 600,000 people were registered by a system called motor-voter when they registered for a driver's license months in advance of November 2000. They were told their names would appear

on registration lists at their polling place. But on November 7, the names of too many motor-voter registrants inexplicably did not appear on registration lists, and those citizens were not allowed to vote.

Inaccurate Lists Compiled by Database Technologies

The state of Florida spent more than \$3 million of taxpayer money to hire a company, Database Technologies, whose mandate was to compile the names of former, or present, convicted felons who, under Florida law, had forfeited their civil rights, and would not be eligible to vote.

Election supervisors heard in advance that the Database Technologies lists were inaccurate and should not be relied upon. Many of the poll workers who did use the Database lists were unwittingly contributing to a state of chaos and confusion and intimidation where many law-abiding Americans, anticipating the casting of their vote for the 43rd President of the United States, were told by an election staffer, "Sorry. Step this way. You need to talk to a supervisor. There is a problem." And were subsequently told something along the lines of, "Sorry but you can't vote. Your name is on this list of convicted felons. Your civil rights have been revoked."

In Sum, An Interesting Confluence of Circumstances . . .

- A Division of Elections whose key election officials of many years, who knew about the complexities of the voting law in each of the 67 counties, left their positions, and were replaced by a new secretary of state and an inexperienced Elections Division who knew less than the local election supervisors. . . .
- No money allocated by the secretary of state to help the voters in an election that was going to be complicated and with extremely heavy voter turnout, and with tens of thousands of first-time voters . . .
- A motor-voter registrations glitch in which 600,000 voters registered for the first time, months in advance, many of whom, on their arrival at the polling place, did not find their names on the registration lists and were therefore not allowed to vote . . .
- A database company hired by the state of Florida at a cost to the taxpayers of millions of dollars, to compile a list of convicted felons, who by law were prohibited from voting, but that, in addition erroneously listed thousands of names of law-abiding Americans who at their voting place either were forced to argue their standing in the community or, if too intimidated, or disheartened to rally to their own defense, were denied their most fundamental, inalienable right: to vote as citizens and taxpayers of this country . . .

As my colleague, Commissioner Thernstrom, said in her testimony before the Committee on Rules and Administration of the United States Senate, "Process matters. But when the process is corrupt, the conclusions themselves (current and future) are deeply suspect."

Commissioner Thernstrom also stated at the same hearing that Dr. Allan Lichtman, the historian who conducted the statistical analysis used in the Commission's report on Florida's voting irregularities, had "close ties to Albert Gore, Jr." as an example of the "perfectly obvious partisan passions that not only destroyed the credibility of the [Commission's] report but informed the entire process that led up to the final draft." According to Dr. Lichtman, his alleged close ties to Albert Gore, Jr., were nothing more than a few memos written by him six years ago when Albert Gore, Jr., was serving as the Vice President of the United States.

Here's a how-de-do . . . here's a pretty mess.

If Dr. Lichtman's preparation of a few memos for the then Vice President—who undoubtedly received thousands of memos during his eight-year term in office—is to be construed as having "close ties" to a candidate six years later, and is considered an example of partisan judgment, and therefore, suspect, then what are we to make of other close ties to a candidate, ties that may have affected crucial decisions months before the Florida elections took place: the ties implicit in the fact that Florida's secretary of state (the chief election officer of the state, whose responsibilities and duties in-

cluded “the obligation to obtain and maintain uniformity in the application, operation and interpretation of election laws,”) was at the same time, the co-chairwoman of George Bush’s presidential election campaign for the state of Florida.

Or, the close ties of the governor of this same state, whose emotional bond to the same presidential candidate couldn’t possibly have been any closer, or run any deeper?

In an article in the *New York Times*, June 4, 2001, regarding the leaking of the Commission’s report, long before most of the commissioners, including myself, had even received their copies, Commissioner Redenbaugh incorrectly attributes the leak to Chairperson Berry. Commissioner Redenbaugh is quoted in the same article as saying: “Sometimes people who believe that their cause is a correct one, lose sight of the procedural violations and believe that the means they pursue are justified by the goodness of the ends they desire.”

An apt description of the confluence of circumstances I have outlined here, that explains the disenfranchisement of one out of every eight African American voters in Florida in the November 2000 presidential election.

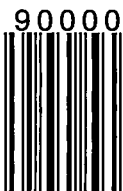
Dissenting Statement

Commissioners Redenbaugh and Thernstrom voted against approving the report and submitted a dissent. However, public acknowledgments and the contents show that the dissent was prepared in a manner that violates the Commission's statute. Specifically,

"(c) VOLUNTARY OR UNCOMPENSATED PERSONNEL—The Commission shall not accept or use the services of voluntary or uncompensated persons. This limitation shall apply with respect to services of members of the Commission as it does with respect to services by other persons."
42 U.S.C. § 1975.

The Commission provided the dissenting Commissioners with an opportunity to work with the General Counsel to address the illegality so that a dissenting statement could be included, but the Commissioners did not avail themselves of the opportunity. Although the Commission could not publish the dissenting opinion, the appendix to this report includes the complete dissenting statement of Commissioners Redenbaugh and Thernstrom submitted to the U.S. Senate Committee on Rules and Administration to ensure that their views are heard. A full explanation of the Commission's decision on this matter, with supporting documents, and the bases for the decision are provided in the appendix.

ISBN 0-16-050927-0



9 780160 509278

U.S. COMMISSION ON CIVIL RIGHTS
Washington, DC 20425

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300

