

## Changes in Florida Election Laws Since 2001

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### I. The Context: The Federal Framework for Elections<sup>1</sup>

The nation had a rude awakening when it took five weeks and a contentious U.S. Supreme Court decision to discover who had won the presidential election in 2000. During that uncertain interval, all eyes were on Florida as both major political parties argued over hanging, dimpled, and pregnant chads and problematic ballot designs. In contrast to the 2000 presidential election, the 2012 presidential election was not prolonged by Florida's election procedures. Nevertheless, Americans once again focused on Florida's election process as its voters stood in lines for hours and counties took days to determine the outcome of the election. On Saturday, November 10, four days after the polls closed, Florida's Secretary of State finally confirmed that President Barack Obama won the election in Florida by 74,000 or 0.9% of the state's votes.

In the aftermath of the November 2012 election, many Floridians asked how much responsibility the state and federal government had with respect to the actual operation of the election. Voting procedures and requirements are established largely by states and their laws, but the U.S. Constitution establishes a framework for participation in elections. Section 4 of Article 1 of the U.S. Constitution delegated the establishment of times, places and manner of holding elections for U.S. representatives and senators to states but reserved to Congress the right to make or alter such regulations. However, that constitutional provision applies only to federal elections and not to state and local elections. Amendment 10 of the U.S. Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That reservation of powers includes election laws which are not otherwise addressed in the Constitution.

While states have significant authority to establish procedures for the conduct of elections, states are prohibited by the Constitution from implementing certain qualifications for voters. Only citizens can vote in the U.S. in federal elections and the authority to establish naturalization rules lies with Congress. The Fourteenth Amendment states that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The same amendment provides for equal application of laws, including those governing voting, to all citizens: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

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<sup>1</sup> A list of relevant federal laws is included in Appendix A of this paper.

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Other amendments speak to qualifications of citizen-voters. The Fifteenth Amendment authorizes Congress to enforce the Amendment’s guarantee that “the right of U.S. citizens to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” The Nineteenth Amendment guarantees to women the right to vote: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” The Twenty-fourth Amendment prohibits imposition of poll or other taxes that would infringe on citizens’ rights to vote in federal elections: “The right of citizens of the United States to vote in any primary or other election for President or Vice President. . . . or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”<sup>2</sup> The Twenty-sixth Amendment established the voting age: “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”<sup>3</sup>

The relationship between states and the federal government with respect to elections has been the subject of much discussion and even contention. In general, states have established the country’s election laws and as a result, a patchwork of such laws exists throughout the nation. Nonetheless, several federal acts have affected states election laws or triggered state election reform initiatives in recent years. Although not an exhaustive list, several of those federal acts warrant mention:

### **1. The Voting Rights Act of 1965 (VRA)**

The Voting Rights Act (VRA) outlawed many practices that resulted in racial discrimination in voting. In enacting the VRA, Congress relied upon enforcement authority in the Fifteenth Amendment. Among the remedies included in the Act, Section 2 creates a private right of action to enforce the Fifteenth Amendment and bans any state practice that intentionally or unintentionally “results in a denial or abridgement” of voting rights. Section 2 also outlawed a variety of ballot-access restrictions being used at the time to disenfranchise African-Americans, and includes a provision that could subject any jurisdiction found to have violated constitutionally-protected voting rights to judicially-supervised preclearance. Section 2 applies to any jurisdiction in the nation.

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<sup>2</sup> The prohibition against imposition of poll or similar taxes that would limit citizens’ rights to vote in state elections was established in case law. In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the U.S. Supreme Court found Virginia’s poll tax to be unconstitutional under the equal protection clause of the 14th Amendment.

<sup>3</sup> In addition, U.S. Senators are elected by popular vote, rather than by state legislatures, pursuant to the Seventeenth Amendment: “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . .The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.” Also, citizens who reside in Washington, D.C., while they do not reside in a state, are eligible to vote for electors for President and Vice President of the U.S. pursuant to the Twenty-third Amendment.

Section 5 applies to named jurisdictions with a history of discrimination<sup>4</sup> and requires that the U.S. Department of Justice, administratively, or a three-judge panel of the federal District Court for the District of Columbia, by an order, "preclear" any alteration of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting..." in any "covered jurisdiction." When seeking preclearance, a covered jurisdiction must demonstrate that the proposed change does not have either the purpose or the effect of racial discrimination. (In some instances the jurisdiction seeking preclearance also must demonstrate that the proposed change does not have the purpose or effect of discriminating against a "language minority group.")

Section 5 has been challenged as being unconstitutional in an Alabama case currently pending before the U.S. Supreme Court, *Shelby County v. Holder*.<sup>5</sup> The fundamental question in that case is whether the preclearance requirement is still needed. Some observers believe that if the Supreme Court strikes down Section 5, it will become more difficult for minority voters to prevail in court in cases alleging discrimination in voting.<sup>6</sup>

## **2. The National Voter Registration Act (NVRA)( enacted1993)**

The National Voter Registration Act provides three ways for voters to register for federal elections: 1) when they apply for a driver's license or seek to renew a driver's license; 2) when they apply for public assistance; and 3) by mail using mail-in-forms developed by each state and the Election Assistance Commission. A case currently before the U.S. Supreme Court, *Arizona v. Inter Tribal Council of Arizona*,<sup>7</sup> deals with the mail-in registration provision in the Act. If prospective voters opt to register using the mail in procedure, they can use a federal registration form. The federal voter registration form asks them whether they are U.S. citizens and asks them to sign the form indicating that they have answered that question truthfully, under penalty of perjury, but it does not require proof of citizenship. After the enactment of the National Voter Registration Act, a referendum was passed in Arizona requiring proof of citizenship for voter registration beyond what is required in the NVRA.

The National Voter Registration Act also establishes requirements for how states should maintain voter registration lists for federal elections. The Act prohibits "systematic removals of voters less than 90 days before a federal election." This prohibition was cited by the U.S. Department of Justice in its request to halt the removal of non-citizens from Florida's voter

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<sup>4</sup> Section 5 of the VRA currently applies to nine states and certain counties and municipalities in other states, including Collier, Hardee, Hendry, Hillsborough and Monroe counties in Florida.

<sup>5</sup> Docket No. 12-96. Argued Feb. 27, 2013.

<sup>6</sup> Charlie Savage, "Decision on Voting Law Could Limit Oversight," *The New York Times*, March 1, 2013, p. A13.

<sup>7</sup> Docket No. 12-71. Argued March 18, 2013.

registration lists.<sup>8</sup> The Florida Voter Registration Act of 1995 adopted the major provisions of NVRA.

### **3. The Help America Vote Act (HAVA) (enacted October 2002)**

HAVA established minimum standards with which states are required to comply in administering federal elections. This act pertains specifically to the areas of provisional voting, voting information, voting equipment, statewide voter registration databases, voter identification procedures, and the treatment of administrative complaints. It also established the Election Assistance Commission to help administer federal elections. (Florida finally passed legislation in 2006 to comply with HAVA—including a statewide voter registration database.)

### **4. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) (enacted in 1986 and subsequently amended) and the Military and Overseas Voter Empowerment Act (MOVE) (enacted October 2009)**

UOCAVA authorizes military service members and their families who lived outside the United States to register and cast absentee ballots in federal elections. The Act has been amended several times. The most recent amendment was included in the National Defense Authorization Act for FY2010 which contained the provisions of the Military and Overseas Voter Empowerment Act (the MOVE Act). Among other provisions, the MOVE Act requires states to establish procedures to allow overseas uniformed services voters and voters to request voter registration and absentee ballot applications by mail and electronically for all federal elections. It also requires states to transmit validly-requested absentee ballots to voters no later than 45 days before a federal election, assuming the request has been received by that date. However, that requirement need not apply if a state is granted an undue hardship waiver approved by the Department of Defense for the election.<sup>9</sup>

## **II. The Context: The Statutory Framework for Florida's Elections<sup>10</sup>**

Against the backdrop of the federal structure for voting, how has Florida's statutory framework contributed to the state's election woes? During the 11 years following the 2000 presidential election (2001-2012), technological and procedural changes adopted in Florida made it possible to offer voters a broader array of ways to access voting. Provisional ballots were an outgrowth of the 2000 presidential election debacle and changes were made to improve access to the disabled and allow more people to vote using absentee ballots without needing to cite a cause for requesting them. There was also greater focus on poll worker and election official training, voter education, standardization of rules and procedures and transparency of the processes used. HAVA, in particular, helped spur some of those changes, as we note below. Arguably, at cross-purposes have been changes to third-party organization

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<sup>8</sup> "Judge Halts Federal Attempt to Halt Voter Purge," *The Miami Herald*, June 27, 2012, <http://www.miamiherald.com/2012/06/27/2871392/judge-halts-federal-attempt-to.html>.

<sup>9</sup> See Section 579 of the National Defense authorization Act for Fiscal Year 2010. See also Kevin J. Coleman, "The Uniformed and Overseas Citizens Absentee Voting Act," Congressional Research Service, October 4, 2012, <http://www.fas.org/sgp/crs/misc/RS20764.pdf>.

<sup>10</sup> A list of relevant statutes is included in Appendix A.

requirements, campaign finance, the treatment of initiatives and constitutional amendments, changes to primaries, and, more recently, registration requirements, as well as oversight and enforcement. The discussion of changes to Florida's laws from 2001 through 2012 captures some of these countervailing trends.

### **III. Voting Systems and Ballot Design**

Among the outcomes of the 2000 presidential election debacle were changes to Florida's voting system technology as well as a movement toward the standardization of the state's voting processes and procedures.

#### **Changes in Technology**

The framework for technological upgrades to Florida's voting system was established in the Florida Election Reform Act of 2001 (Ch. 2001-40). Punch cards, paper ballots, mechanical lever machines and central-count voting systems were outlawed in Florida, beginning with the 2002 primary election. Pursuant to the Act, any system certified for use in the state must rely on an electronic or electromechanical precinct-count tabulation voting system (Sec. 16) and provide voters an opportunity to correct the ballot (Sec. 18). In 2001, the only system that met those criteria in Florida, according to a legislative summary of the 2001 Act, was the precinct-based optical scan.<sup>11</sup> More technologically advanced "direct recording equipment" or touchscreen computer technology (included in the definitions of "electronic or electromechanical devices" and "electronic and electromechanical voting system") may be used if and when the Division of Elections certifies its use. Specifically, the 2001 legislation required, and current law continues to require, the Division of Elections to "review the voting systems certification standards and ensure that new technologies are available for selection boards of county commissioners which meet the requirements for voting systems and meet user standards" (Sec 6). The review is ongoing and the Division is required to "develop methods to determine the will of the public with respect to voting systems" (Sec. 6). Several years later, federal HAVA-related funding totaling almost \$28 million contributed to the adoption in Florida of optical scan voting equipment and ballot-on-demand technology, including optical scan tabulators, to replace touchscreen equipment (Ch. 2007-30, Sec. 11).

#### **Standardization**

Ballot design became more standardized with a requirement that the Department of State adopt rules prescribing a uniform primary and general election ballot for each certified voting system (Ch. 2001-40, Sec. 7). However, there is still considerable discretion on the part of supervisors of elections with respect to ballot design. The testing of electronic and electromechanical voting systems also was standardized by statute (Sec. 21). The treatment of recounts became increasingly standardized. The 2001 legislation required the local canvassing boards to adhere to specific guidelines when ordering a recount. Canvassing boards no longer have discretion to order recounts. With respect to manual

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<sup>11</sup> See the legislative summary of the 2001 legislation, <http://archive.flsenate.gov/publications/2001/senate/reports/summaries/pdf/ethics.pdf>, p. 143.

recounts, the Department of State was required to adopt detailed rules prescribing additional recount procedures for each certified voting system, to ensure that procedures are as uniform as possible. The rules had to address, at a minimum: 1. security of ballots during the recount process; 2. time and place of recounts; 3. public observation of recounts; 4. objections to ballot determinations; 5. record of recount proceedings; and 6. procedures relating to candidate and petitioner representatives (Ch. 2001-40, Sec. 42).

For their part, county canvassing boards must file reports with the Division of Elections regarding any problems associated with the conduct of elections. The content requirements for those reports are included in Ch. 2005-277, Sec. 58.

#### **IV. Increased Transparency**

Related to increased standardization of voting processes and procedures is a greater emphasis on transparency and public disclosure related to Florida's voting system processes and procedures.

Public testing and records of testing are included in requirements for electronic and electromechanical voting systems and tabulation devices (Ch. 2001-40, Sec. 21). In 2001, predating HAVA, the Department of State was authorized to expend up to \$2 million dollars to develop a statewide voter registration database containing voter registration information from all of the counties (Ch. 2001-40, Sec. 71). The Department was authorized to contract with the Florida Association of Court Clerks to analyze, design, develop, operate, and maintain the database.

The following year, enactment of HAVA required each state to develop a comprehensive statewide voter registration database. Federal funding to the Department of State was conditioned upon implementation of a statewide database by January 1, 2004. The Legislature recognized that such a registration system could not be implemented by that time and sought and received a waiver to extend the implementation date to January 1, 2006 (Ch. 2003-415, Sec. 10).

The Florida Voter Statewide Registration System (FVRS) was authorized to carry out the intent of HAVA: "The Legislature recognizes that the Help America Vote Act of 2002 requires the implementation of a new single, uniform, centralized, interactive, and computerized statewide voter registration system by January 1, 2006." (See Ch. 2005-279, Sec. 4(1).) The FVRS replaced the existing state's voter registration system. The FVRS was to be designed to interface with and integrate voter registration information and records from the offices of the state's supervisors of elections and to be the official list of Florida's registered voters. The 2001 law was explicit that "voter registration information of the state constitutes public records. Any citizen shall be allowed to examine the voter registration records, but may not make any copies or extract therefrom except as provided by this section." (See Ch. 2001-40, Sec. 72 (1) (a).)

Despite the general premise that voter information is subject to public disclosure, Florida's election laws created some public record exemptions. Notably, certain personal information is treated differently than general public record information under FVRS. Specifically, Social Security numbers, driver's license numbers, and voter identification numbers must be treated as confidential information and are exempt from disclosure. Voters' signatures on any document are considered exempt from public

disclosure via copying although signatures may be inspected. Address information in voter registration records cannot be disclosed for participants in the Address Confidentiality Program for Victims of Domestic Violence.

Statutory requirements for additional databases to be made available to the public have been created in recent years. Specifically, a 2007 enactment requires the Florida Elections Commission to maintain a database of all final orders and agency actions responding to alleged violations of the state election laws. Such a database must be available to the public and must be maintained in a manner that can be searched, at a minimum, by issue, statutes, individuals, or entities referenced (Ch. 2007-30, Sec. 48). The Division of Elections must maintain a database of all third-party voter registration organizations and the voter registration forms assigned to them (2011-40, Sec. 4).

## **V. Changing Methods of Voting**

The emergence of new technologies, combined with greater standardization in different realms of the election process, affected the ways in which Floridians were able to cast ballots. Three types of ballots received considerable media coverage in the 2012 presidential election: provisional ballots, early voting ballots, and absentee ballots. Changes in the law in recent years also may have contributed to some voter confusion as they sought to use one of those three methods of voting in November 2012.

### **Provisional Ballots**

Provisional ballots were statutorily authorized in Florida in 2001. (They were also required in Section 302 of HAVA.) The legislative summary of the 2001 legislation authorizing such ballots explained that “this change was made in response to reports that eligible voters were turned away from the polls on Election Day because their names were not on the precinct registers, and, conversely, that persons not eligible to vote were allowed to cast ballots.”<sup>12</sup>

Provisional ballots are authorized under current law for voters meeting one of three eligibility criteria: “a voter claiming to be properly registered in the state and eligible to vote at the precinct in the election but whose eligibility cannot be determined, a person whom an election official asserts is not eligible, and other persons specified in the code shall be entitled to vote a provisional ballot.”

The statutes governing provisional ballots have changed over time. The 2001 iteration authorized provisional ballots only for those voters claiming to be properly registered in the county and eligible to vote but whose eligibility could not be determined. The county canvassing board was required to examine each person’s provisional ballot signature to ascertain whether the person voting that ballot was entitled to vote in the precinct where his or her vote was cast and had not voted elsewhere. If the determination was made that the person was not registered or not entitled to vote, the provisional ballot would be rejected. Each provisional ballot voter was required to submit a certificate affirming his or her eligibility to vote (Ch. 2001-40, Sec. 35).

In 2002, the law was amended to include a requirement that voters using a provisional ballot affirm that they are aware of the penalty imposed for committing fraud or voting more than once in an election (Ch. 2002-17, Sec. 6).

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<sup>12</sup> See the legislative summary of the 2001 legislation, p. 143.

Additional amendments in 2003 created the procedure by which provisional ballots could be cast electronically via a free access system and voters could review whether their provisional votes counted (Ch. 2003-415, Sec. 15). The electronic platform was left up to the discretion of supervisors of elections but in 2005 was required to be provided for persons with disabilities (Ch. 2005-277, Sec. 24).

A 2005 enactment enabled those deemed ineligible by election officials to cast provisional ballots (Ch. 2005-277, Sec. 24). The legislation created a mechanism for people casting provisional ballots to provide evidence to support their eligibility to vote and for county canvassing boards to address that evidence. The timeframe for voters to present evidence in support of their eligibility is by 5 p.m. on the third day following the election (Ch. 2005-277, Sec. 24). That timeframe was compressed to two days pursuant to Ch. 2007-30, Sec. 27. In another piece of enacted legislation in 2005, voters seeking to cast provisional ballots only had to claim they were registered in the state, and not in the county as specified in prior law (Ch. 2005-278, Sec. 32).

Legislation enacted in 2011 imposed conditions on voters changing their addresses on an Election Day. Specifically, a voter can still vote using a regular ballot if he or she is: 1) voting in the same county in which the voter originally registered to vote; or 2) is an active military member or in the same family with an active military member. Other electors making inter-county address changes at the polls can only vote with a provisional ballot (Ch. 2011-40, Sec. 26(2)(a, b)).

In the November 2012 election, the number of provisional ballots in many counties was reported to have increased significantly. Provisional ballots were cast when voters reported to the wrong precinct, lacked an acceptable ID or registered to vote after the deadline. Provisional ballots also took time to review and inspect, on average 30 minutes according to one report.<sup>13</sup>

Of the 35,000 provisional votes cast in 2008, less than half the votes were accepted. By comparison, approximately 73% were accepted in 2012. Despite the high number of provisional votes reported in the November 2012 election, the total number of provisional votes actually cast was 32,065, approximately 3,000 less than in 2008.<sup>14</sup>

### **Early Voting**

Many of the complaints regarding long lines and lengthy waits to vote in Florida's November 2012 election related to a reduction in the number of hours for early voting, the limited number of voting machines and booths, and the reduced number of early voting sites.

Under current law, the supervisor of elections must allow electors to vote early in the main or branch office. Branch offices must be permanent facilities of the supervisor, which are designated and used for

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<sup>13</sup> Michael Van Sickler, "Provisional Ballots Spike, but Florida Elections Supervisors Say They're Not Needed," *The Miami Herald*, December 17, 2012.

<sup>14</sup> For information about the 2008 election, see <http://election.dos.state.fl.us/reports>. Comparisons between the presidential 2008 and 2012 elections were made by the author based on November 2012 election data furnished by Professor Daniel Smith, University of Florida.

that purpose at least one year before the election. City halls and libraries also may be designated as early voting sites. The supervisor is required to designate each voting site no later than the 30<sup>th</sup> day prior to the election. Early voting must begin on the 10<sup>th</sup> day before the election for state and federal races and end on the third day before the election. It must be provided for no less than 6 hours and no more than 12 hours per day at each site during the early voting period. The supervisor still has discretion to determine the hours of operation for elections not held in conjunction with state and federal elections. Any voter in line at the closing time of early voting must be allowed to vote.

Historically, early voting in Florida took the form of absentee voting in the office of the local supervisor of elections or in a branch office at the discretion of the supervisor. Early voting was available at the discretion of the supervisor of elections until 2004. With enactment of Ch. 2004-252, Sec. 13, all Florida supervisors of elections were required to offer early voting. If voting is to take place in branch offices, they had to be full-service facilities that have been designated for that purpose at least a year prior to the election. City halls and public libraries also may be designated as early voting sites provided that they are “geographically located so as to provide all voters in the county an equal opportunity to cast a ballot, insofar as is practicable.” Based on the 2004 law, early voting was to occur at least 15 days before an election and last a minimum of 8 hours during the weekdays and a total of 8 hours during the weekend.

Early voting requirements were changed by the legislature in 2005, with a qualification that early voting was to be provided “as a convenience to the voter,” and that the branch office voting sites have to be permanent facilities that are not only designated but also “used” as a permanent branch office at least a year before an election. Other amendments dealt with time frames. Specifically, the supervisor has to designate each early voting site no later than 30 days prior to an election, a provision that still applies under current law. In 2005, the time period within which early voting may occur was reduced by one day to 14 days from 15 days prior to the election. Early voting had to end on the second day before the election. Early voting shall take place 8 hours in aggregate each weekend. Finally, early voting sites were required to open no earlier than 7 a.m. and to close no later than 7 p.m. on the days during which early voting was allowed (Ch. 2005- 277, Sec. 45) .

Early voting requirements were once again revised in 2011 to reduce from 14 to 8 days, the period during which early voting may be conducted. Early voting must begin on the 10<sup>th</sup> day before an election and end on the 3<sup>rd</sup> day before the election. This meant that voting could not take place the Sunday before an election as had been the case in November 2008. Therefore, for the 2012 general election, early voting took place only on one entire weekend, the Saturday and Sunday that are 10th and 9th days, respectively, prior to Election Day. The 2011 amendments also limit those restrictions to state and federal races (not local). The duration of early voting on the assigned days was also modified to allow for no less than 6 hours and no more than 12 hours per day (Ch. 2011-40, Sec. 39). The 2005 provisions

required early voting sites to be open no less than 8 hours per assigned day. The 7 a.m. to 7 p.m. requirement imposed in 2005 was struck in the 2011 legislation.<sup>15</sup>

### **Absentee Ballots**

Absentee ballots can be used by voters who cannot or elect not to vote in person at designated voting sites on Election Day. As the lines grew longer during the 2012 November election in certain parts of the state, many voters opted for voting by absentee ballot or decided to forgo voting altogether.<sup>16</sup> Indeed, according to University of Florida Political Scientist Daniel Smith, the number of absentee ballots increased from Florida's presidential election in 2008 to 2012, in effect substituting for the curtailed number of early voting days from 2008 to 2012.

There are two general types of absentee ballot requirements: for people serving in military and their families and for other voters. Florida statutes treat those populations separately, at least to some extent.

Florida legislation enacted in 2001 amended a number of provisions of the 1998 Voter Fraud Act that were not approved for implementation by the U.S. Justice Department, or that proved difficult to implement.<sup>17</sup> Specifically, registered voters no longer had to articulate a reason for requesting absentee ballots (Ch. 2001-40, Sec. 53). Persons requesting absentee ballots were no longer required to provide Social Security numbers or voter registration numbers (Ch. 2001-40, Sec. 52). The procedure has not changed since enactment.

Under current law, a change that took effect in 2005, the supervisor of elections must receive a request for absentee ballots no later than 5 p.m. on the sixth day before the election and must mail the ballots to voters no later than four days before the election (Ch. 2005-277, Sec. 43; 101.62 (2), F.S.).

Timelines for canvassing ballots also have changed in recent years. Prior to 2007, the canvass of absentee ballots was authorized to begin four days before the election but no later than noon on the day following the election (Ch. 2001-40, Sec. 56). In 2007 the starting day for the canvass was six days before the election, but no later than noon on the day following the election (Ch. 2007-30, Sec. 31). In 2011, the law changed once again and the provision applies today: the canvass may begin 15 days before the election, but no later than noon on the day following the election (Ch. 2011-40, Sec. 40; 101.68(2) (a), F.S.).

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<sup>15</sup> See Michael Herron and Daniel A. Smith. 2012. "Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355," *Election Law Journal* 11 (3): 331-47.

<sup>16</sup> Under current law, a person can request and receive an absentee ballot on Election Day upon presenting an acceptable ID (101.62 (4)(3)(c), F.S.). An estimated 200,000 people may have been discouraged from voting due to long lines, according to a recent Ohio State University study. (See "Orlando Sentinel: 200,000+ Floridians Discouraged from Voting by Long Lines, Hassles," The Miami-Dade Herald Blog, January 13, 2014, <http://miamiherald.typepad.com/nakedpolitics/2013/01/orlando-sentinel-200000-floridians-discouraged-from-voting-by-long-lines-hassles.html>.)

<sup>17</sup> See the legislative summary of the 2001 legislation, p. 145.

## **VI. Treatments of Voters with Disabilities, Pollworker Training, and Voter Education**

Expanded access to the polls for persons with disabilities was spurred by HAVA (Section 301). Florida's legislation followed suit as the following passage expressing legislative intent conveys:

It is the intent of the Legislature that this state be eligible for any funds that are available from the Federal Government to assist states in providing or improving accessibility of voting systems and polling places for persons having a disability (Ch. 2002-281, Sec. 13).

The same concern with accessibility applied to absentee ballots:

It is the intent of the Legislature that voting by absentee ballot be by methods that are fully accessible to all voters, including voters having a disability. The Department of State shall work with the supervisors of elections and the disability community to develop and implement procedures and technologies, as possible, which will include procedures for providing absentee ballots, upon request, in alternative formats that will allow all voters to cast a secret, independent, and verifiable absentee ballot without the assistance of another person (Ch. 2002-281, Sec. 14).

Pollworkers' treatment of persons with disabilities also received legislative attention. Legislation enacted in 2002 required all county supervisors of elections to include sensitivity training for poll workers to help them better understand the needs of disabled voters (Ch. 2002-281, Sec. 18). Legislation enacted in 2008 requires all poll workers to complete disability training before working during each election cycle but injected more flexibility into the requirements (Ch. 2008-95, Sec. 24).

Closely linked to poll worker training was the emphasis on voter education. Funding of almost \$6 million was appropriated for FY 2001-2002 for comprehensive voter education programs and poll worker recruitment and training programs (Ch. 2001-40, Sec. 74). By March 2002, the Secretary of State was required to adopt rules prescribing minimum standards for the nonpartisan education of voters, to address voter registration, balloting procedures, voter rights and responsibilities, and public service announcements. These standards had to be implemented by each county supervisor (Ch. 2001-40, Sec. 59). This requirement has remained largely unchanged since 2001.

Florida legislation enacted in 2007 required all voters, except disabled voters, to cast an optical scan or "marksense" ballot beginning with the fall primary election of 2008. Disabled voters, on the other hand, were authorized to continue using touchscreen equipment through 2012. At that time, they were to be offered the means of casting a "marksense" ballot (Ch. 2007-30, Sec. 6).

## **VII. Registration Requirements**

Over the past 11 years, legislation has been amended affecting both voter registration requirements and requirements governing organizations that register prospective voters. Both are summarized briefly below.

## **Voter Registration Requirements**

Federal HAVA requirements ushered in changes affecting voter registration. Specifically, HAVA requires all new applicants to provide their driver's license numbers or the last four digits of their Social Security number. This information must be submitted with their registration application. If they lack that information, the state must assign a unique identification number (Sec. 303 (a)(5)(A)).

HAVA also established requirements for first-time voters registering by mail after January 1, 2003 and who have not voted previously in a federal election in the state. If they did not fall into an exception and had not been matched with an existing state record, voters had to present one of the following means of identification to election officials: current and valid photo ID, utility bill, bank statement, government check, pay check, or government documentation that shows the voter's name and address (Sec. 303(b)(A)).

Requirements for a uniform statewide voter registration application in Florida predated HAVA. However, 2003 legislation attempted to conform Florida law to HAVA by requiring applicants who submit their voter registration applications by mail to provide identification prior to voting for the first time (Ch. 2003-415, Sec. 3, further amended by Ch. 2005-277, Sec. 4; Ch. 2005-278, Sec. 5). Legislation enacted in 2005 conditioned the acceptance of an application for registration on the verification by the Department of State of "the authenticity or nonexistence of the driver's license number, the Florida identification card number, or the last four digits of the social security number provided by the applicant" (Ch. 2005-278, Sec. 6 (6)). If the application fails to meet those conditions, the applicant will be provided a provisional ballot. The verification procedures to establish voter eligibility in the registration process underwent several modifications in 2007 (Ch. 2007-30, Sec. 13) and 2008 (mostly clean-up amendments—Ch. 2008-95, Sec. 3).

According to the Brennan Center for Justice, Florida has the following components of a modernized registration system: automated registration, use of electronic rather than hard copy poll-books, preregistration on or after a prospective voter's 16<sup>th</sup> birthday.<sup>18</sup> As noted above, a statutory change in 2011 has limited registration portability for individuals who moved from one county to another. A feature of modernized registration processes, identified by the Brennan Center, but not implemented in Florida, is online registration which is authorized in at least 15 other states.

## **Felons and the Right to Vote**

Article VI, Section 4 of the state Constitution provides that "no person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." The uniform statewide voter registration application is designed to obtain information about, among other things, whether the applicant has been convicted of a felony. If the person has been convicted at any point, that person must so indicate in the registration application that he or she "has had his or her civil rights restored by including the

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<sup>18</sup> See "Voter Registration Modernization in the States," January 23, 2013, <http://www.brennancenter.org/analysis/voter-registration-modernization-states>.

statement ‘I affirm I am not a convicted felon, or, if I am, my rights relating to voting have been restored,’ and providing a box for the applicant to check to affirm the statement” (97.057(2)(s), F.S.). The Department of State is also required to identify registered voters who have been convicted of a felony and have not had their rights restored. This identification involves a comparison to information received from, but not limited to, a clerk of the circuit court, the Board of Executive Clemency, the Department of Corrections, the Department of Law Enforcement, or a U.S. Attorney’s Office. If the information received is determined to be “credible and reliable,” the Department must notify the supervisor of elections of the potential ineligibility of the voter to be registered and provide documentation so that the removal of that person’s name from the statewide voter registration system can be executed (98.075(5), F.S.).

The question of timing with respect to the restoration of a felon’s rights has been controversial: Governor Charlie Crist initiated a policy of restoring voting rights to nonviolent offenders immediately after their sentences were completed. That policy was changed by the Clemency Board in 2011: In general, a person’s civil rights cannot be restored unless that person has been free of arrests for five years upon completion of all sentences and has met other enumerated eligibility requirements.<sup>19</sup> For those who do not meet the conditions of that rule, a minimum seven-year waiting period and a hearing are required.<sup>20</sup>

### **Requirements Governing Third-Party Registration Organizations**

The treatment of third-party registration organizations has also undergone change in past years. Under current law, a “third-party registration organization” is defined as “any person, entity, or organization soliciting or collecting voter registration applications.” Excluded from that definition are: “(a) A person who seeks only to register to vote or collect voter registration applications from that person’s spouse, child, or parent; or (b) A person engaged in registering to vote or collecting voter registration applications as an employee or agent of the division, supervisor of elections, Department of Highway Safety and Motor Vehicles, or a voter registration agency” (97.021, F.S.). In 2005, the definition of “third-party registration organizations” excluded political parties along with the two other exceptions noted above (Ch. 2005-277, Sec. 2). However, in 2007, the definition of “third-party registration organizations” was amended to allow for the inclusion of political parties (Ch. 2007-30, Sec. 1).

Regulatory requirements and enforcement measures were imposed in 2005 on third-party registration organizations (Ch. 2005-277, Sec. 7). Fines were also lowered for individual violations with the aggregate fine per calendar year limited to \$1,000 (Ch. 2007-30, Sec. 2). The 2007 law also authorized the Secretary to waive fines for the failure to deliver the voter registration application promptly if there was a “force majeure or impossibility of performance” (Sec. 2).

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<sup>19</sup> See “Rules of Executive Clemency, 9. Restoration of Civil Rights or Alien Status under Florida Law without a Hearing; A. Criteria for Eligibility,” Rules revised March 9, 2011, effective March 9, 2011, [https://fpc.state.fl.us/PDFs/clemency\\_rules.pdf](https://fpc.state.fl.us/PDFs/clemency_rules.pdf).

<sup>20</sup> Ibid., “10. Restoration of Civil Rights or Alien Status under Florida Law with a Hearing.”

Another change affecting third-party registration organizations occurred in 2011. The time frames for third-party organizations to submit voter registration applications to the Division or Supervisor of Elections was compressed from 10 days to 48 hours (or the next business day if the office is closed for that 48-hour period) in 2011 (Ch. 2011-40, Sec. 4). Failure to submit the applications in the specified time frame subjects those organizations to fines. (A federal judge ruled in May 2012 against the timeframe restrictions in a lawsuit filed by the League of Women Voters, Rock the Vote and the Florida Public Interest Research Group Education Fund.)<sup>21</sup>

### **VIII. Second Primary Elections**

Second primary elections were authorized sometime around 1899-1903 in Florida. The initial provision required a second primary election to be held within four weeks of the first primary election “to choose in all cases where no person shall have received the highest vote for several candidates receiving the highest vote in the first primary election.”<sup>22</sup> The law went through several permutations thereafter. In the last iteration of the law governing second primary elections (1983), a second primary election was required if no candidate received a majority of the votes cast in the first primary election subject to certain specified exceptions related to ties of candidates in first and second place. The second primary election had to be held on the Tuesday five weeks prior to the general election.

A 2001, enactment eliminated the second primary for the 2002 election and retained a moratorium on the second primary until January 1, 2004. The 2002 primary had to be held on the second Tuesday in September (Ch. 2001-40, Sec. 46).

Legislation in 2003 eliminated the second primary election for 2004. The only primary election in 2004 was held on August 31, nine weeks before the general election. The moratorium on the second primary election was scheduled to continue until January 1, 2006. After that date, the second primary election procedure was to resume if the Legislature failed to affirmatively act to further suspend its operation or repeal it (Ch. 2003-415, Sec. 30). In 2005, the second primary election was permanently eliminated and conforming changes were made to other statutes (Ch. 2005-286, generally).

### **IX. Proposed Constitutional Amendments and Initiatives**

The Florida Legislature is authorized to adopt joint resolutions which, if adopted, can cause referenda to be placed on the ballot. Another method of amending Florida’s constitution is through the initiative process whereby citizens propose measures. The Secretary of State’s website notes: “It takes signatures from eight percent of the number of voters voting in the last presidential election to place a citizen initiative on the general election ballot. Eight percent of the number of voters voting in the 2012

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<sup>21</sup> League of Women Voters et al., v. Kurt S. Browning, *Order Granting a Preliminary Injunction*, Case No. 4:11 cv628-RH/WCS, May 31, 2012,

[http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/58\\_Order\\_Granteeing\\_PI.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/58_Order_Granteeing_PI.pdf). See also, Michael Herron and Daniel A. Smith. 2013. “House Bill 1355 and Voter Registration in Florida,” *State Politics and Policy Quarterly*, (forthcoming).

<sup>22</sup> Ch. 5014, Sec. 7, *Laws Governing Elections in the State of Florida, Passed in the regular Session 1985, as amended in 1897, 1899, 1903.*

presidential election is 683,149. That number must come from at least 14 of the 27 congressional districts.”

### **Proposed Constitutional Amendments**

The length of the ballot was one of the most criticized aspects of the 2012 presidential election in Florida. The ballot was especially long because of the number of proposed constitutional amendments. For example, the length of the ballot in Miami-Dade spanned 12 pages. All of the 11 measures on the November 2012 ballot were proposed by joint resolutions of the legislature.

In general, the length of the ballot summary cannot exceed 75 words in length for proposed constitutional amendments. However, an amendment in 2000 made an exception for amendments and ballot measures proposed by joint resolution. (Ch. 2000-361, Sec. 1). In 2002, the law was again amended to require the inclusion of a fiscal impact statement prepared by the Revenue Estimating Conference (Ch. 2002-390, Sec. 5). The fiscal impact requirement was imposed two years later (2004) for initiatives, as well (Ch. 2004-33, Sec. 5).

Legislation enacted in 2011 retained and clarified the exception for the 75 word limit for constitutional amendments and revisions proposed by joint resolution but added the following language: “A ballot statement that consists of the full text of an amendment or revision shall be presumed to be a clear and unambiguous statement of the substance and effect of the amendment or revision, providing fair notice to the electors of the content of the amendment or revision and sufficiently advising electors of the issue upon which they are to vote.” (See Ch. 2011-40, Sec. 29 (3)(b)(3).)

### **Initiative Petitions**

Article XI, Sec. 3 of the Florida Constitution authorizes citizens’ initiatives: “The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.”

The statutory framework for initiatives was established in 1979. Since 2001, several major changes to the initiative process have been codified. A fiscal impact analysis and statement of the proposed measure with a maximum word count of 50 was required, initially to be prepared by the Revenue Estimating Conference (Ch. 2002-390, Sec. 3). The Revenue Estimating Conference’s role in drafting the fiscal impact statement was replaced by that of the Fiscal Impact Estimating Conference in 2004, and the maximum length of the financial impact statement was expanded from 50 words to 75 words (2004-33, Sec. 3).

In 2006, the Legislature proposed, and the voters adopted, a constitutional amendment that requires “any proposed amendment to or revision of the State Constitution, whether proposed by the Legislature, by initiative, or by any other method, [to be] approved by at least 60 percent of the voters of the state voting on the measure, rather than by a simple majority.” (See *the Florida Constitution*, Article XI, Sec. 5 (e).) A higher vote percentage threshold for passage applies to proposed initiatives seeking to amend the constitution that would establish new taxes and fees (Article XI, Sec. 7).

Several changes to the initiative process were enacted in 2007. One of those changes requires that “the purported elector is, at the time he or she signs the form, a duly qualified and registered elector authorized to vote in the county in which his or her signature is submitted”(Ch. 2007-30, Sec. 25 (3)(d).) Petition revocation procedures were also established in the 2007 legislation (Ch. 2007-30, Sec. 25), and subsequently repealed in 2011 (Ch. 2011-40, Sec. 23).

A 2008 statutory amendment prohibited an initiative petition form circulated for obtaining signatures from being attached to, or coupled with, another initiative petition form. Finally, 2011 legislation reduced the validity of signatures collected in initiative petitions from four years to two years (Ch. 2011-40, Sec. 23). The four-year signature retention requirement was created in 1983 (Ch. 83-251, Sec. 12).

#### **X. Campaign Financing, Candidate Disclosure, and Reporting**

Campaign financing, candidate disclosure, and reporting are huge topics of controversy, well beyond the scope of this white paper. However, certain trends affecting the funding of elections and candidates in Florida in the past 11 years arguably contributed to both greater transparency in the election process, on the one hand, and less transparency, on the other. Many changes at the state level have been affected by changes in the federal law such as the passage of the Bipartisan Campaign Reform Act in 2002, the U.S. Supreme Court’s decision in 2003, *McConnell v. Federal Election Commission*, and ultimately in 2010, *Citizens United v. the Federal Election Commission*.

In 2006, a formal definition, “electioneering communications organizations” was created in Florida’s statutes for organizations engaged in paid electioneering using communications other than speech (“electioneering communication.”) An “electioneering communications organization” or ECO was defined as “any group, other than a political party, political committee, or committee of continuous existence, whose activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications.” (See Ch. 2006-300, Sec. 1.)<sup>23</sup>

ECOs are regulated and subject to registration and filing requirements. The requirements affecting ECOs were significantly amended in 2010, in the aftermath of *Citizens United v. the Federal Election Commission*. The 2010 law dropped the prohibition against an ECO’s acceptance of contributions from certain non-profit organizations and removed certain restrictions affecting and ECOs use of

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<sup>23</sup> Under current law, the definition also makes it clear that an ECO’s activities would not otherwise require the group to register as a political power, political committee, or committee of continuous existence. (See 106.011, (19), F.S.)

contributions (Ch. 2010-167, Sec. 26). In contrast to political committees and committees of continuous existence, there is no limit imposed on contributions made by ECOs.

The 2010 law also changed the definition of “electioneering communications,” which are now defined as: “any communication that is publicly distributed by a television station, radio station, cable television system, satellite system, newspaper, magazine, direct mail, or telephone and that: 1. Refers to or depicts a clearly identified candidate for office without expressly advocating the election or defeat of a candidate but that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate; 2. Is made within 30 days before a primary or special primary election or 60 days before any other election for the office sought by the candidate; and 3. Is targeted to the relevant electorate in the geographic area the candidate would represent if elected” (106.011 (18)(a), F.S.)

## **XI. Enforcement of Election Laws**

Since 2001 various statutory changes have affected the operations and enforcement capabilities of the Florida Elections Commission and the Secretary of State. Specifically, in 2004, 2007, 2010, and 2011, legislation was enacted to change and clarify the Commission’s approach to handling complaints. Several changes, particularly in 2005 and 2011, expanded the oversight and enforcement authority of the Department of State. Changes to the law affecting the Election Canvassing Commission in 2001 and again in 2010 modified the composition of its membership.

## **XII. Conclusion**

Over the past 11 years Florida has made substantial progress in modernizing its election system. Many of those advances were spurred by changes in technology and a greater emphasis on professionalizing and standardizing processes and procedures, spurred in part by HAVA which was enacted in 2002. At the same time that statutory changes curtailed early voting, other changes resulted in longer ballots and impeded portable registration.

In their book “It’s Even Worse Than It Looks,” Thomas Mann and Norman Ornstein offer several suggestions to change the way we elect our officials. Among their proposals are those that would allow people to vote in superstores or arenas where it is easier to park and provide online voter registration (not authorized in Florida). Many of their ideas transcend the limits of a state’s authority, such as changing the presidential election-day to a weekend instead of Tuesday or making attendance at polls mandatory as is done in Australia. Some of their ideas go to the heart of the discussion of the state-federal government partnership.

As states, such as Florida, pursue further election reform, one recurring concern is that of fairness. Specifically, why should people in one state be eligible to vote for a president when similarly situated people in another state may not be? Why should people in one state have easier access to voting than those in another state? Can and should there be a more federally-imposed comprehensive approach to access expansion for the election of federal offices? What are the implications of a more harmonized approach?

## APPENDIX A

### Select Relevant Federal Laws

The Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973aa-6). For a history of the Voting Rights Act, see U.S. Department of Justice, [http://www.justice.gov/crt/about/vot/intro/intro\\_b.php](http://www.justice.gov/crt/about/vot/intro/intro_b.php).

National Voter Registration Act of 1993, 42 U.S.C. § 1973gg (2006), [http://www.eac.gov/assets/1/workflow\\_staging/Page/27.PDF](http://www.eac.gov/assets/1/workflow_staging/Page/27.PDF).

Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as 42 U.S.C. §§ 15301-15545), [http://www.eac.gov/assets/1/workflow\\_staging/Page/41.PDF](http://www.eac.gov/assets/1/workflow_staging/Page/41.PDF).

The Military and Overseas Voter Empowerment Act of 2009, as part of the National Defense Authorization Act for FY2010, Pub.L. 111–84, 123 Stat. 2318- 2335, <http://www.gpo.gov/fdsys/pkg/PLAW-111publ84/html/PLAW-111publ84.htm>.

### Select Relevant Florida Statutes

#### Voting Systems and Ballot Design

|                |  |
|----------------|--|
| 101.015, F.S.  | Standards for voting systems   |
| 101.151, F.S.  | Specifications for ballots   |
| 102.166, F.S.  | Manual recounts  |
| 101.5604, F.S. | Adoption of system; procurement of equipment; commercial tabulations |
| 101.5606, F.S. | Requirements for approval of systems                                 |
| 101.5612, F.S. | Testing of tabulating equipment                                      |
| 102.141, F.S.  | County canvassing board; duties                                      |

#### Increased Transparency

|                |   |
|----------------|---|
| 97.0575, F.S.  | Third-party voter registrations   |
| 97.0585, F.S.  | Public-records exemption; information regarding voters and voter registration; confidentiality                                      |
| 98.0981, F.S.  | Reports; voting history; statewide voter registration system information; precinct-level election results; book closing statistics. |
| 101.5612, F.S. | Testing of tabulating equipment   |
| 741.465, F.S.  | Public records exemption for the Address Confidentiality Program for Victims of Domestic Violence                                   |

### **Changing Methods of Voting**

|               |   |
|---------------|---|
| 101.045, F.S. | Electors must be registered in precinct; provisions for change of residence or name |
| 101.048, F.S. | Provisional ballots   |
| 101.62, F.S.  | Request for absentee ballots  |
| 101.64, F.S.  | Delivery of absentee ballots; envelopes; form                                       |
| 101.657, F.S. | Early voting  |
| 101.68, F.S.  | Canvassing of absentee ballot   |

### **Treatment of Voters with disabilities, Pollworker Training, and Voter Education**

|                 |                                      |
|-----------------|--------------------------------------|
| 98.255, F.S.    | Voter education programs             |
| 101.56075, F.S. | Voting methods                       |
| 101.662, F.S.   | Accessibility of absentee ballots    |
| 102.014, F.S.   | Poll worker recruitment and training |

### **Voter Registration Requirements**

|              |  |
|--------------|--|
| 97.052, F.S. | Uniform statewide voter registration application |
| 97.053, F.S. | Acceptance of voter registration applications    |

### **Requirements Governing Third-Party Registration Organizations**

|               |                                 |
|---------------|---------------------------------|
| 97.021, F.S.  | Definitions                     |
| 97.0575, F.S. | Third-party voter registrations |

### **Second Primary Elections**

100.091, F.S.                Second primary election (repealed in 2005)

100.096, F.S.                Special election at second primary election (repealed in 2005)

### **Proposed Constitutional Amendments and Initiatives**

100.371, F.S.                Initiatives; procedure for placement on ballot

101.161, F.S.                Referenda; ballots

### **Campaign Financing, Candidate Disclosure, and Reporting**

106.011, F.S.                Definitions

106.08, F.S.                Contributions; limitations on

### **Enforcement of Election Laws**

97.012, F.S.                Secretary of State as chief election officer

102.111, F.S.                Elections Canvassing Commission

106.25, F.S.                Reports of alleged violations to Florida Elections Commission; disposition of findings