

ing plans, and in doing so are able to consider nonbinding authority, such as the laws of other states.⁶⁹

Also important to consider are the misuses of redistricting power that regulation is meant to address. With regard to political gerrymandering, a comparison of court and commission effectiveness — given the partisan nature of judicial elections and the highly political commission membership selection process — may result in a wash. With regard to race and population malapportionment, however, Arizona's experience indicates that independent commissions may have some difficulty. Courts, on the other hand, deal with issues of racial discrimination regularly and may have some expertise in rooting it out.

In short, state courts are not perfect regulators of redistricting, but the evidence suggests that they have the potential to be better regulators than independent commissions, or at least to check abuses against which commissions are ineffective.

E. Conclusion

Without attracting much attention, state courts have, in the wake of diminished federal involvement, become more aggressive in their regulation of redistricting. Their role is likely only to expand: state courts seem keen to review the decisions of increasingly widely used independent redistricting commissions. Such expansion should be viewed favorably. State court regulation has the potential to provide a significant layer of defense against misuse of redistricting power⁷⁰ and thus deserves greater consideration as a complement or alternative to independent commissions.

VI. VOTING IN TIMES OF CRISIS

Over the past five years, Americans have witnessed two tragedies of epic proportions — one at the hand of man, the other at the whim of nature. The attacks of September 11, 2001, renewed a fear — not seen since the end of the Cold War — of losing government leaders in a targeted attack.¹ In the years since, congressional leaders and legal scholars have expended much energy discussing the best ways to ensure the continuity of legitimate government in the face of crippling

⁶⁹ See, e.g., *Stephenson v. Bartlett*, 562 S.E.2d 377, 390 n.3 (N.C. 2002) (finding persuasive authority in similar holdings by the courts of other states).

⁷⁰ Indeed, the effect of aggressive state court oversight of redistricting might extend beyond the bounds of individual states. For example, at least one scholar has argued that state court efforts could instigate and inform the reemergence of federal judicial regulation of political gerrymandering. See Gardner, *supra* note 41, at 645–47.

¹ Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 281–82 (2003).

attacks. Central to this debate has been the assumption that holding special elections to repopulate the government would be feasible.

Hurricane Katrina, the Category 3 hurricane that decimated New Orleans in August 2005, exposed the misguided optimism of this assumption. In the months following the hurricane, over 1.3 million Gulf Coast households were displaced, relocating to every state in the country and occupying 18,700 different ZIP codes.² A similar displacement could easily follow the detonation of a small nuclear device or the release of a biological agent. Yet the electoral consequences of such a disaster seem to have escaped American consciousness — probably because Americans have never before encountered such a massive internal refugee crisis. If faced with both a massive displacement of voters and a pressing need to hold elections, leaders at both the federal and state levels would likely find extant election law grossly inadequate. How would a state verify the identity and registration status of a displaced voter? How and where would he vote? Where would that vote count? Although federal and state legislators, as well as legal scholars, have yet to answer these questions, they assume that following any attack, elections will be unaffected by mass displacement.

The widely held assumption that elections will continue to be feasible is a dangerous one. The detonation of a small nuclear device or the release of a biological agent could cause a widespread panic in which millions flee their homes³ and create an internal displacement of citizens rivaling or exceeding the dispersion caused by Hurricane Katrina. Such a displacement would make holding elections difficult, if not impossible: a state would have to reach out to millions of voters across the country, verify their eligibility to vote, and then provide a mechanism for voting for all those who chose to exercise that right.⁴ It is apparent that running a fair election during a time of crisis is far more complicated than simply running a normal election quickly.

² Haya El Nasser & Paul Overberg, *Katrina Exodus Reaches All States*, USA TODAY, Sept. 29, 2005, at 1A.

³ See U.S. NUCLEAR REGULATORY COMM'N, FACT SHEET: DIRTY BOMBS 2003, available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/dirty-bombs.pdf> (“[C]ertain other radioactive materials, dispersed in the air, could contaminate up to several city blocks, creating fear and possibly panic and requiring potentially costly cleanup.”); Lisa D. Rotz et al., *Public Health Assessment of Potential Biological Terrorism Agents*, 8 EMERGING INFECTIOUS DISEASES 225, 228 (2002), available at <http://www.cdc.gov/ncidod/eid/vol8no2/pdf/Vol8No2.pdf> (noting how the release of some biological agents may lead to “mass public fear or panic” in addition to any sickness).

⁴ This scenario unfolded in New Orleans and was exacerbated by the Federal Emergency Management Agency’s (FEMA) refusal to provide contact information for displaced citizens. See Ed Anderson, *Election Deal Near, Secretary of State Says Evacuees Should Be Able To Vote Absentee*, TIMES-PICAYUNE (New Orleans), Nov. 1, 2005, at 3, LEXIS, News Library, Notpic File.

A failure to anticipate these problems endangers the legitimacy of post-attack governance. In the moments following an attack, the first question on the minds of most Americans would likely not concern constitutionality or government legitimacy.⁵ Such concerns, however, would quickly become crucial. Those at the helm would choose the nation's response to the attack, and those responses are best entrusted to leaders duly elected to make such decisions.⁶ In addition, post-attack leaders may take actions with lasting effects — doing everything from rebuilding entire cities⁷ to shaping the Supreme Court.⁸ Even leaders whose authority and legitimacy are unimpeachable can make questionable decisions, including those that threaten constitutional liberties and human rights,⁹ but these choices are most problematic when made by leaders whose authority *is* in doubt. Unfortunately, the law's failure to anticipate a massive displacement of voters threatens the legitimacy of any elections that might be held in those dire circumstances.

A. *Mass Displacement: A Problem Overlooked*

Following September 11, legal scholarship developed a cottage industry devoted to analyzing the weaknesses of American government following a catastrophic disaster. The debate has focused primarily on whether Congress can operate if less than half of its members are still alive,¹⁰ the order of succession following the death of both the President and Vice President,¹¹ and repopulating seats in the House of Rep-

⁵ Wasserman, *supra* note 1, at 284 (“The public as a whole is likely unconcerned with such legal niceties as the constitutional validity of what remains of the executive branch after an attack.”). Indeed, terrorist attacks are “deliberately designed to achieve maximum penetration into the nation’s cultural and imaginative life,” drawing attention away from constitutional concerns about voting or congressional quorum. Laurence H. Tribe & Patrick O. Gudridge, Essay, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1827 (2004).

⁶ Paul Taylor, *Proposals To Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435, 473 (2004).

⁷ See Jim VandeHei & Jonathan Weisman, *Bush Takes Responsibility for Failures of Response*, WASH. POST, Sept. 14, 2005, at A1 (discussing President Bush’s plan to rebuild New Orleans).

⁸ Colloquy, *The Continuity of Government*, 53 CATH. U. L. REV. 1073, 1079 (2004).

⁹ See Tribe & Gudridge, *supra* note 5, at 1842–43 (noting that after September 11th “there has . . . been much stock-taking underway . . . including efforts to assess the damage done legally, politically, and culturally by the initial governmental responses to the attacks”).

¹⁰ See, e.g., Taylor, *supra* note 6, at 447–65; Howard M. Wasserman, *Continuity of Congress: A Play in Three Stages*, 53 CATH. U. L. REV. 949, 959–66 (2004).

¹¹ See, e.g., John C. Fortier & Norman J. Ornstein, *If Terrorists Attacked Our Presidential Elections*, 3 ELECTION L.J. 597, 600–01 (2004); James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049, 1051–55 (2004); Taylor, *supra* note 6, at 465–72.

representatives following a large loss of membership.¹² This discussion of government continuity — a critical issue given the Constitution’s lack of guidance for dealing with a devastating attack on the presidency and Congress¹³ — myopically focuses on the danger to the federal government, evidences a belief that holding elections would be technically feasible, and belies an ignorance of the issues of mass displacement.

The current discussion therefore largely ignores the dangers posed to state electoral systems — systems critical for federal elections. Only Professor Howard Wasserman fully acknowledges the importance of states to the electoral process, but even he disregards how the electoral role interacts with emergency management.¹⁴ Most scholars ignore the state role, while others explicitly discount the danger of simultaneous attacks. Professor Paul Taylor, for example, argues that “while a catastrophic attack on Washington, D.C. would no doubt cause massive disruption in the nation’s capital, the situation is likely to be much less severe in localities throughout the country where special elections would be held.”¹⁵

The literature also assumes that states’ election capabilities will survive an attack unscathed. Professor Wasserman lists only grieving, panic, and handling the dead as the main impediments to holding elections.¹⁶ He also calls upon Congress to require special elections “as quickly as possible whenever anyone below the vice president assumes the presidency.”¹⁷ John Fortier and Norman Ornstein acknowledge that an attack might destroy voter registration records or voting machines, but they are unconcerned that those problems would cause more harm than a slight delay.¹⁸

Three different categories of attacks or disasters highlight the failure of imagination in the current scholarship. First, a dual-attack scenario demonstrates the danger of blindly relying upon state electoral

¹² See, e.g., Ho, *supra* note 11, at 1055–59. Senate repopulation is governed by the Seventeenth Amendment. See U.S. CONST. amend. XVII, cl. 2.

¹³ See Tribe & Gudridge, *supra* note 5, at 1839.

¹⁴ Although he acknowledges the state role, see Wasserman, *supra* note 1, at 307 (“States are significant because they are the entities that guarantee and ensure continuity and reestablishment of the federal government in the aftermath of the attack.”), he primarily describes the main challenges for a post-attack government as *federal* challenges, see *id.* at 298 (“A surviving executive branch cannot alone pass new legislation, appropriate or mint new money, declare war or appropriate funds to fight that war, or carry out many of the responsibilities of governance, powers vested exclusively in Congress.”).

¹⁵ Taylor, *supra* note 6, at 461–62.

¹⁶ See Wasserman, *supra* note 1, at 309.

¹⁷ *Id.* at 317.

¹⁸ See Fortier & Ornstein, *supra* note 11, at 602.

systems for the preservation of the federal government.¹⁹ If an attack on the Capitol were executed in conjunction with an attack on some other location, the electoral process in that second location might be crippled, thereby preventing full repopulation of the federal government.²⁰ For example, simultaneous attacks on the Capitol and New York City that displaced New York voters to neighboring Connecticut and New Jersey would seriously disrupt the city's ability to replace some or all of its thirteen representatives in the House.²¹ Although Congress, as a body, is fairly resilient because it is comprised of representatives from every state, and although it is unlikely that even a coordinated attack would displace voters from most states, a significant displacement of voters from any large state could alter the legitimacy or control of the federal government.²²

The second scenario imagines an attack that primarily affects state leadership, challenging the assumption that the most damaging attacks would target the federal government. The devastation of Hurricane Katrina and the resulting displacement of citizens caused Louisiana's Governor to delay indefinitely New Orleans's fall elections,²³ and the state will face many challenges when it ultimately decides to hold those elections.²⁴ However, the situation could have been more challenging: an attack that kills a governor and members of a state legislature might necessitate immediate elections to ensure legitimate leadership. In states without mechanisms for overcoming the technical challenges of elections in the face of a massive displacement of voters, indefinite postponement of elections would create a leadership vacuum.²⁵ Although Congress is constitutionally barred from mandating

¹⁹ This assumption is common to many scholarly works. See, e.g., Taylor, *supra* note 6, at 456–62 (asserting that states can and should execute rapid local elections).

²⁰ That enemies might use simultaneous, coordinated attacks is not a fanciful leap of imagination. For example, the attacks of September 11 involved four different airplanes departing from three different cities. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 1–4 (2004).

²¹ The September 11 attacks did not cause a massive displacement of voters but did interrupt the New York City mayoral primary, necessitating a postponement. Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523, 525–26 (2005).

²² Such a displacement could also determine which party controls Congress. In a closely divided nation, a small shift could have tremendous consequences, particularly if the losses are regional. For example, the absence of New York City's congressional delegation currently would give the Republican Party an additional eleven-vote advantage.

²³ Frank Donze & Ed Anderson, *February Elections Planned amid Immense Challenges*, TIMES-PICAYUNE (New Orleans), Oct. 11, 2005, at 1, LEXIS, News Library, Notpic File.

²⁴ See Clifford J. Levy, *New Orleans Elections Near, but Who Will Vote and How?*, N.Y. TIMES, Nov. 17, 2005, at A1 (reporting that the evacuation turned the city's black majority into a minority).

²⁵ The importance of state officials in a time of crisis cannot be overstated. Although it may be a long time before investigation reveals the true causes of the slow response to Hurricane

a solution,²⁶ it has thus far done nothing to encourage states to adopt prophylactic measures.

The third scenario supposes an attack that causes a massive displacement of voters near election day. Unlike the others, this scenario does not require the death of any government leaders in order to present a difficult problem for American democracy. Regular elections are a tempting and vulnerable target for terrorists.²⁷ An attack prior to a scheduled election could alter voter turnout or even the outcome of the election,²⁸ and the possibility of a changed outcome could be a valid reason for postponing the election.²⁹ Although elections might be postponed for days or even weeks, people might be displaced for months or even years. What mechanisms are in place to ensure that they would all be able to vote? The current debate ignores the challenges caused by a massive displacement of voters even for a regularly scheduled election.

B. Current Legal Mechanisms

Addressing the mass displacement problem requires laws that recognize that in such circumstances normal election processes will not work. Unfortunately, both federal and state laws are currently inadequate. The federal government has largely ignored the threat to state electoral systems. Despite Congress's limited influence over state election procedures,³⁰ it could use economic incentives to encourage states

Katrina, some have suggested that state leaders bear a significant share of the blame. See Raymond Hernandez, *Ex-FEMA Director Says He Issued Early Warnings*, N.Y. TIMES, Sept. 28, 2005, at A25 (describing testimony of former FEMA head, Michael Brown, placing the blame on Louisiana Governor Kathleen Babineaux Blanco).

²⁶ Despite this limitation, by regulating federal elections, Congress can make it too costly for states to follow separate state electoral procedures. See *Status of Miss. "Motor Voters" Still in Limbo*, COM. APPEAL (Memphis, Tenn.), May 3, 1997, at B2.

²⁷ See Fortier & Ornstein, *supra* note 11, at 597 (arguing that the 2004 pre-election terrorist attacks in Madrid highlight the "vulnerability of America's elections to terrorist attacks").

²⁸ *Id.* at 608. In the 2000 presidential election, Florida's margin was only 537 votes, see FED. ELECTION COMM'N, 2000 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS 1 (2001), <http://www.fec.gov/pubrec/2000presgeresults.htm>. The margin was 380,978 in 2004. See FED. ELECTION COMM'N, FEDERAL ELECTIONS 2004, at 6 (2005), available at <http://www.fec.gov/pubrec/fe2004/2004pres.pdf>. In either race, a massive displacement of voters to or from Florida prior to the election could have easily altered the result.

²⁹ See Goldfeder, *supra* note 21, at 559–63 (arguing for uniform standards for postponing elections in the aftermath of terrorist attacks). In the aftermath of hurricanes, Florida, for example, delayed Miami's participation in the 1992 state primary and almost delayed the 2004 state primary. See Phil Long et al., *Disaster Aid, State Primaries Are First Priorities*, MIAMI HERALD, Aug. 17, 2004, at 1A.

³⁰ Compare *Foster v. Love*, 522 U.S. 67, 69 (1997) ("Thus it is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 882–83 (1995))), with *Dobrovolny v. Nebraska*, 100 F. Supp. 2d 1012, 1028 (D. Neb. 2000)

to adopt specific electoral reforms.³¹ It has, however, refrained from taking such steps and instead the House of Representatives passed House Resolution 559, which simply encouraged states to “examine [their] existing statutes, practices, and procedures governing special elections so that, in the event of a catastrophe, vacancies in the House of Representatives may be filled in a timely fashion.”³²

Current law also fails to imagine election situations so disastrous that elections cannot merely be sped up. House Resolution 559 ignores the question *whether* elections can occur and instead asks only *how quickly* they can happen. Similarly, when debating a bill that would set a timeline for elections following the catastrophic loss of 100 U.S. Representatives, Congress amended the initial forty-five day window to provide a more generous forty-nine days.³³ Such an amendment indicates little awareness of the magnitude of potential problems for the electoral process.

State law is equally ill-equipped to handle a massive displacement of voters.³⁴ Most states have succession laws addressing the incapacitation of the governor and other top officials.³⁵ A few states go further and outline specific provisions for postponing elections during an emergency.³⁶ For instance, Louisiana law explicitly gives the governor

(“However, Article I, Section IV does not give Congress the power to directly regulate state voter registration procedures in state elections or state ballot issues.”).

³¹ See *United States v. Am. Library Ass’n*, 539 U.S. 194, 203 (2003) (“Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.”); cf. *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding legislation that tied federal highway funding to a state’s minimum drinking age).

³² H.R. Res. 559, 107th Cong. (2002).

³³ Continuity of Representation Act of 2005, H.R. 841, 109th Cong. § 2(2) (2005). The House declined to extend the time frame to sixty days. See 151 CONG. REC. H961–67 (daily ed. Mar. 3, 2005). By contrast, James Ho, Chief Counsel for the Senate Judiciary Subcommittee on the Constitution, muses that congressional special elections might take months to organize:

After all, it is one thing to plan for an election that has been scheduled months or even years in advance, but it is quite another to conduct an election from a standing start. It takes time to qualify the candidates, hire poll workers, prepare voter rolls and voting machines, reserve polling locations, conduct the actual election, and then determine and verify the election results.

Ho, *supra* note 11, at 1057; see also Wasserman, *supra* note 10, at 981. Professors Wasserman and Fortier have debated whether six or eight months is a reasonable time frame for expedited elections. See Colloquy, *supra* note 8, at 1074.

³⁴ Cf. Goldfeder, *supra* note 21, at 527–28 (noting that, in the election context, states “have not been diligent in enacting appropriate prophylactic statutes for emergency situations”).

³⁵ See, e.g., MISS. CONST. art. 4, § 103 (providing for emergency provisional appointments to vacant state offices); OHIO REV. CODE ANN. § 161.04 (West 2002) (providing for an extended order of succession and the designation of interim successors); VA. CODE ANN. § 24.2-228.1 (2003) (allowing the highest ranking officer or attorney to fill a vacancy).

³⁶ These provisions are often subject to severe time restraints. See, e.g., FLA. STAT. ANN. § 101.733 (West 2002) (requiring elections within ten days “or as soon . . . as is practicable”); GA. CODE ANN. § 21-2-50.1 (2003) (allowing postponement for up to forty-five days); OHIO REV.

emergency powers to suspend elections temporarily.³⁷ State emergency election law, however, is an uneven patchwork. Even those states that have taken extra steps are not prepared for a massive displacement of voters. Under Louisiana law, a replacement polling location must be the closest accessible location to the original polling place, ignoring the irrelevance of an “accessible” location in a vacated district.³⁸ These state laws, while potentially helpful in many cases, do not anticipate the unique problems posed by a massive displacement of voters.

*C. The Logistics of Elections Following Displacement:
Bosnia and Herzegovina*

Developing an effective legal plan to address a massive displacement of voters requires anticipating the unique logistical and political problems that might arise. Although American scholars and leaders have ignored these difficulties, other countries have faced the challenges of holding elections following a massive displacement. The experience of Bosnia and Herzegovina during its 1996 and 1998 elections provides one powerful example. The deadly conflict in the Balkans³⁹ displaced two-and-a-half million people from their homes.⁴⁰ While the subtleties of culture and history in this war-torn region are not applicable to the American experience, Bosnia and Herzegovina’s example can illuminate the daunting problems that are likely to emerge when running elections with numerous displaced voters.

The Dayton Accords,⁴¹ which marked the end of the Bosnian War, required Bosnians and the Organization for Security and Cooperation in Europe (OSCE) to face the very issue American law has not: how to conduct elections following a massive displacement of citizens.⁴² The Dayton Accords encouraged displaced persons to return to their pre-

CODE ANN. § 161.09 (allowing postponement for up to six months); TEXAS ELEC. CODE ANN. § 41.0011 (Vernon 2003) (allowing early elections during an emergency); VA. CODE ANN. § 24.2-603.1 (requiring elections within fourteen days unless a judicial panel allows for additional time up to thirty days).

³⁷ LA. REV. STAT. ANN. § 18:401.1 (2004). Governor Blanco invoked this provision on September 14, 2005, to delay New Orleans’s elections. See La. Exec. Order No. KBB 2005-36, available at http://www.sec.state.la.us/elections/MISC/36DelayVoting-10-15-05_11-12-05.pdf.

³⁸ LA. REV. STAT. ANN. § 18:401.2(A); see also CAL. ELEC. CODE § 12281 (West 2003).

³⁹ See generally Tim Ito, *Balkans Special Report: Bosnia Overview*, WASH. POST, Oct. 1998, <http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/overview/bosnia.htm>.

⁴⁰ Elizabeth M. Cousens, *Making Peace in Bosnia Work*, 30 CORNELL INT’L L.J. 789, 801 (1997).

⁴¹ General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75 [hereinafter General Framework].

⁴² *Id.* Annex 3, Agreement on Elections art. II, 35 I.L.M. at 115.

war homes,⁴³ but Annex 3 of the Accords allowed them to vote absentee in their original municipalities.⁴⁴ This plan “would re-establish the prewar ethnic heterogeneity of the Bosnian electorate” before the population reverted to the prewar demographics.⁴⁵

To carry out Annex 3, the OSCE developed a system giving voters two options for voting in their original municipalities. First, the OSCE preferred to have voters physically vote in their prewar municipalities.⁴⁶ Second, the OSCE provided special absentee polling stations in voters’ postwar municipalities.⁴⁷ If voters chose the latter, their votes would be securely transported to a central facility, sorted, and then delivered to the prewar municipalities to be counted.⁴⁸ This process required updating the voter registries. The efforts appeared successful when nearly 270,000 Bosniaks and Croats — 190,000 living in the Federation and 80,000 living in Republika Srpska — registered to vote by absentee ballot.⁴⁹

But running a large-scale election in the midst of a refugee crisis proved to be extremely difficult. Political and technical problems marred the absentee process during the 1996 elections. The political problems arose from a form dubbed “P-2” that allowed voters to register to vote in their current districts, rather than their prewar homes.⁵⁰ While this form was a sympathetic response to the harsh realities of life as a refugee, it became a tool for elected officials to manipulate the ethnic balances of communities and, consequently, the outcome of the

⁴³ *Id.* art. IV, 35 I.L.M. at 116; *see also* Cousens, *supra* note 40, at 801 (“The Agreement on Refugees and Displaced Persons is possibly the most radical provision in the entire accord, since full implementation could amount to a flat-out reversal of the course of the war.” (footnote omitted)).

⁴⁴ General Framework, *supra* note 41, Annex 3, Agreement on Elections art. IV, 35 I.L.M. at 116 (“A citizen who no longer lives in the municipality in which he or she resided in 1991 shall, as a general rule, be expected to vote, in person or by absentee ballot, in that municipality, provided that the person is determined to have been registered in that municipality as confirmed by the local election commission and the Provisional Election Commission.”).

⁴⁵ John Malik, Note, *The Dayton Agreement and Elections in Bosnia: Entrenching Ethnic Cleansing Through Democracy*, 36 STAN. J. INT’L L. 303, 305 (2000). Bosnia and Herzegovina is not the only country to implement this measure; in 1988, Sri Lanka made it possible for displaced citizens to vote in their original districts. Cathrine Brun, *Local Citizens or Internally Displaced Persons? Dilemmas of Long Term Displacement in Sri Lanka*, 16 J. REFUGEE STUD. 376, 388 (2003).

⁴⁶ PROVISIONAL ELECTION COMM’N, OSCE — MISSION TO BOSNIA AND HERZEGOVINA, RULES AND REGULATIONS art. 8 (1996) [hereinafter RULES AND REGULATIONS].

⁴⁷ Malik, *supra* note 45, at 327.

⁴⁸ RULES AND REGULATIONS, *supra* note 46, art. 114.

⁴⁹ Malik, *supra* note 45, at 336. Although the data were highly questionable, the total electorate of Bosnia and Herzegovina was estimated at 3.2 million with 2.43 million votes cast. *See id.* at 340–41.

⁵⁰ *See id.*

elections.⁵¹ In Republika Srpska, Serbian political parties sought to entrench the homogeneity of ethnic cleansing by coercing displaced voters into voting in their postwar municipalities, often telling voters they would lose their humanitarian aid if they did not reregister.⁵² While these efforts to reinforce ethnic cleansing may seem irrelevant to any electoral situation in the United States, the political parties in a jurisdiction that receives a large influx of displaced voters will likewise have significant incentives to reshape the electorate by encouraging those voters to become residents of certain districts.

Technical problems compounded political problems in the Bosnian election. Despite the tremendous efforts to get the voter data ready for the elections, creating an entire absentee voting infrastructure out of nothing proved too challenging.⁵³ One election observer noted the immense challenge:

[The] OSCE was pressed to complete voter registration, compile a voter list, and begin balloting within ten to twelve weeks. Given this time frame, it is hardly surprising that the voter list, already compromised by the inaccuracies of the 1990 Yugoslav census, resulted in disenfranchisement.⁵⁴

Indeed, when election day arrived, a large number of voters were unable to cast their votes because their names were left off the registries.⁵⁵

A change in the format of the voter lists caused further problems. Many poll workers were confused by the new organization of voter names, resulting in “an indeterminate number of citizens . . . [being] disenfranchised.”⁵⁶ In addition, the unique situation of managing registries that included a large number of displaced voters created opportunities for voter fraud. An investigation following the election revealed a total absence of antifraud precautions.⁵⁷

While some of these problems are attributable to trying to hold an election in a war-torn country, others seem to be connected to the more universal challenge of managing a voter registry that includes a large

⁵¹ See Cousens, *supra* note 40, at 811.

⁵² See Malik, *supra* note 45, at 336–37. The political parties coerced as many as 30,000 potential voters in this manner. Daniel J. Blessington, *From Dayton to Sarajevo: Enforcing Election Law in Post War Bosnia and Herzegovina*, 13 AM. U. INT’L L. REV. 553, 624–25 (1998).

⁵³ See Blessington, *supra* note 52, at 580 (“The OSCE Mission itself was created out of nothing.”).

⁵⁴ Malik, *supra* note 45, at 351. Compare this three-month window with the forty-nine days provided by the proposed Continuity of Representation Act of 2005, *see supra* note 33.

⁵⁵ See Malik, *supra* note 45, at 338.

⁵⁶ Blessington, *supra* note 52, at 621.

⁵⁷ *Id.* at 624 (citing *In re Allegations of Irregularities Regarding Refugee Voting from Serbia to Croatia*, 3 Bilten 191 (Bosnia & Herzegovina Election App. Sub-Comm’n 1996)).

number of displaced citizens. The OSCE's official report on the 1998 election noted that "serious problems emerged on the first election day, when it became apparent that a sizeable number of final voter registers across the country were either incomplete, inaccurate or had not been delivered at all."⁵⁸ By election day, some 20,000 to 30,000 voters had been told neither whether their registrations had been accepted nor where their polling stations were located.⁵⁹ Elections under the most ideal circumstances pose numerous technical challenges — handling thousands of displaced voters only complicates an already difficult process.

D. Improving an Inadequate American Response

American election law should be reformed to anticipate the problems evident in Bosnia and Herzegovina's management of a largely absentee election. First, maintaining an accurate, updated, centralized, and standardized voter registry is critical.⁶⁰ The Help America Vote Act of 2002⁶¹ (HAVA) is a good first step. One of the key provisions of the Act compelled states to implement a computerized voter registry no later than January 1, 2006.⁶² In addition, HAVA requires that states coordinate their lists with their various internal agencies,⁶³ providing an important level of redundancy. Yet HAVA does not do enough; it does not account for emergency scenarios. For instance, although it requires a computerized database, it does not require states to use compatible systems or formats. Thus, cooperation among states in a time of crisis would likely be nearly impossible. If the poll workers in Bosnia and Herzegovina were confused by a small change in the format of the voter registries, one could imagine the chaos that would ensue if one state tried to access the incompatible files of another state.

⁵⁸ OFFICE FOR DEMOCRATIC INSTS. & HUMAN RIGHTS, OSCE, BOSNIA AND HERZEGOVINA ELECTION 1998, 12–13 SEPTEMBER, at 4 [hereinafter 1998 ELECTION REPORT].

⁵⁹ *Id.* at 15.

⁶⁰ Electronic voter registration databases are not free from security concerns. Without proper security measures, servers can be destroyed and data can be illegally accessed. However, paper registries are subject to the same threats while lacking the benefits of duplication and interoperability that electronic systems provide.

⁶¹ Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 42 U.S.C.). Although passed after September 11, a search of the *Congressional Record* reveals that Congress did not discuss this Act in relation to terrorism.

⁶² See 42 U.S.C.A. § 15483(a)(1)(A) (Supp. II 2002) (“[E]ach State . . . shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State . . .”); *id.* § 15483(d)(1)(B) (allowing states to extend the deadline for transitioning to the new system from 2004 to 2006).

⁶³ See *id.* § 15483(a)(1)(A)(iv).

Perhaps more troubling in the short term is the potential for disenfranchisement if an attack immediately followed the transition to the computer registries. In a survey of Secretaries of State, forty-nine percent of the respondents said they would not add any voter to the new database if they could not verify the identification number of the voter.⁶⁴ At least twenty-four states missed the deadline altogether.⁶⁵ Accordingly, until voters verify their registration information, some of the new databases will be highly inaccurate and incomplete.

The single most important step that states can take is to improve their voter registries. The requirements of HAVA are not enough. States should implement registry accuracy standards so that the lists are reliable. The federal government should encourage states to use a common format for their electronic databases so that other states can help displaced voters exercise their right to vote.

In addition, the United States must develop an absentee voting infrastructure. The use of absentee polling stations could be much more effective than mailing ballots to millions of refugees, but it requires a system for distributing registries and ballots and then collecting results — a system that current American law does not provide. Therefore, states should adopt more flexible statutes that do not limit replacement polling stations to new locations within the same district; states should be able to move them to wherever displaced citizens are located. The federal government should encourage states to offer reciprocal support, including hosting polling stations, during emergency situations. In addition, states should create processes to communicate replacement polling locations to voters, possibly coordinating through the Federal Emergency Management Agency and the Red Cross.

Finally, the absentee voting system must reduce opportunities for fraud. The P-2 form and opportunities for double voting undermined the legitimacy of the 1996 election in Bosnia and Herzegovina. When displacement can last for years, it may be important to consider allowing displaced voters to change their voter registrations, but short of such permanent displacement, changing where voters are registered only creates opportunities for fraud.

⁶⁴ Press Release, Nat'l Ass'n of Sec'ys of State, NASS Survey Summary: States' Progress Implementing Two Key HAVA Mandates (Apr. 21, 2005), *available at* <http://www.nass.org/Surveys.htm> (follow "Summary and Highlights: States' Progress Implementing Two Key HAVA Mandates" hyperlink).

⁶⁵ See Press Release, Nat'l Ass'n of Sec'ys of State, NASS Survey Summary: The States and HAVA's Deadlines, *available at* <http://nass.org/HAVA%20implementation%20summary.pdf> (last visited Jan. 15, 2006); *see also* Press Release, U.S. Dep't of Justice, Justice Department Reaches Agreement with California on Federally Required Statewide Voter Registration Lists (Nov. 2, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/November/05_crt_585.html.

The adoption of these changes would lead to a more responsive voting system. A displaced voter would be able to visit the nearest polling location, no matter where he is. Poll workers could verify his identity using computerized and networked interstate voter registries. Next, the poll workers could update his status in the registry to ensure that his identity could not be used elsewhere. The poll workers could download his local ballot and then upload his votes so that they could be counted in his home state.

Attempting to hold elections under intense political pressure can ultimately lead to devastating results.⁶⁶ Without laws and procedures in place to ensure that such elections can be held fairly — when people most need to be assured of the legitimacy of their government — the process will fail. As the 1998 OSCE report noted: “The results of . . . administrative problems, apart from being humiliating for both voters and polling officials, are a decrease in confidence and general mistrust in the whole electoral process.”⁶⁷ In a time of crisis, the country can ill afford a decrease in confidence.

E. Conclusion

Fortunately, events that cause massive displacements of people are rare. The devastation of Hurricane Katrina was shocking because it was a unique event. However, as long as enemies of the United States seek to use increasingly terrible weapons, Americans should not presume that displacements of such an epic scale will not recur. If the towns, cities, and states of this nation are to hold special elections following an attack, governments should ensure that those elections are the true celebrations of democracy and legitimate government that they claim to be. A failure to act risks that preventable, yet serious, problems will occur in the moments of greatest vulnerability.

VII. ELECTION ADMINISTRATION: JUDICIAL REVIEW AND REMEDIAL DETERRENCE

Recent years have brought a dramatic increase in litigation challenging America’s elections.¹ Much election-related litigation concerns the details of election administration, with voters, voters’ groups, or

⁶⁶ See James Zahradka, “Reasonably Democratic, Balkans-Style:” *Observations on Municipal Elections in “Pax Americana” Bosnia and Herzegovina*, 4 U.C. DAVIS J. INT’L L. & POL’Y 201, 210 (1998).

⁶⁷ 1998 ELECTION REPORT, *supra* note 58, at 15.

¹ See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration To Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 958 (2005) (estimating a 100% increase in election-related litigation in 2000 over each of the prior four years and a further 50% increase from 2000 to 2002).