



# Grassroots Washington

A project of the Evergreen Freedom Foundation

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## **Recommendations to the Legislature Regarding the 2004 Election**

*From Bob Williams, President & Senior Research Analyst  
Evergreen Freedom Foundation*

Free and fair elections are indispensable to political freedom. While we do not know all the details about what is *alleged* to have happened during the November 2004 elections versus what *actually* did happen, we know enough to say we had neither free nor fair elections. When interviewed, the Secretary of State cannot say who won the gubernatorial election. Neither can the King County Director of Elections.

This is particularly troubling since Congress and the 2003 Washington State Legislature passed reform legislation that would have prevented nearly all the current mess had it just been implemented. Many elected officials are calling for new laws, and certainly some are needed. But it is hardly reassuring to get new laws when existing reform laws were mostly ignored.

This is not just about the gubernatorial election. It is not about one political party versus another. It isn't about the recall of a sitting elected official or a re-vote. In fact, conducting a re-vote before cleaning up the current mess means we face the prospect of another election rife with incompetence and fraud.

Our investigation to date has been extensive, and our final report will be issued shortly. We are forwarding suggestions we hope you will consider as you look at what really happened in this election and explore remedies to prevent the same abuses in the future.

*Grassroots Washington is a program of the Evergreen Freedom Foundation, a non-partisan, public policy watchdog organization based in Olympia, and focused on advancing individual liberty, a free-market economy, and limited and responsible government. For more information, visit: [www.effwa.org](http://www.effwa.org).*

**Evergreen Freedom Foundation**

P.O. Box 552  
Olympia, WA 98507  
(360) 956-3482

1. **Set up a joint select committee with subpoena powers to investigate the 2004 election.** Hearings should cover the following:
  - A. **Non-compliance with the new federal and state laws.** Require the Secretary of State (SOS) and county auditors to explain why they did not implement the 2002 Federal Help America Vote Act (HAVA) and the 2003 Legislative changes in SB 5221 which were effective July 1, 2004. Part of those revisions required the Secretary of State to issue new or revised administrative rules (WACs) in 52 areas (amended to 53 in the 2004 session) through RCW 29A.04.611. Those WACs were not issued. The SOS says changes in our state's primary system precluded his office spending time on this, but the law does not give this type of latitude.
  - B. **Determine why the SOS overrode the state canvassing law.** The SOS failed to change WAC 434-262-050 to agree with RCW 29A.60.210, which limited the authority of the canvassing board to canvass up to the day the board certified the election results. This year the certification date was November 17, 2004. Errors detected after certification are supposed to be remedied through a court challenge (RCW 29A.68.011), not through additional canvassing/re canvassing (RCW 29A.64).
  - C. **Determine why the significant problems with King County elections department identified in a 2003 Secretary of State election review and a 2004 Citizens Advisory Committee report to the King County Council were not corrected.** These problems were so serious that the SOS warned in February 2003 that a successful election challenge could be mounted.
  - D. **Determine why the SOS did not ensure every county election official had the new laws required to be implemented by July 1, 2004 (RCW 29A.04.235).**
  - E. **Determine why the SOS violated the statutory provisions for residency.** The Secretary of State's authority for permitting the homeless to use government buildings for their residence address on their voting applications (WAC 434-208-100) violates the statutory definition of residence (RCW 29A.04.151), the voters' oath (RCW 29A.08.230), and RCW 29A.08.110. Furthermore, RCW 29A.08.110 requires the auditor to send all new voters a registration acknowledgement to their mailing address, with a notice to the Post Office not to forward the registration to any other address. The registration is to be returned to the auditor if it is undeliverable to the voter. The auditor then sends the voter a confidence notice, to which the voter must respond before becoming eligible to vote. The Secretary of State's WAC is also in violation of RCW 29.08.230, the voter registration oath, which states, "I will have lived at this address for thirty days immediately before the election."
  - F. **Determine why dead people voted.** According to RCW 29A.08.510, voter files are supposed to be updated monthly against death certificates. This did not occur. Why?
  - G. **Review voting rights for people who are incapacitated and/or under guardianship.** When a court has imposed guardianship for an incapacitated person and has determined that person is incompetent for the purpose of rationally exercising his or her right to vote, under chapter RCW 11.88, that person cannot vote. The courts must give this information to county auditors who should then make sure this person is not an eligible voter. Apparently this system is not working very well. The legislature should review it.
  - H. **Determine why felons voted.** Upon receiving official notice of a person's felony conviction in either state or federal court, the county auditor has to cancel the defendant's voting address (RCW 29A.08.520). Effective January 1, 2006, by order of HAVA, the voter file must be matched against the Department of Corrections file. Our SOS reported

to the 2003 Legislature that a system was in place to do this. If so, it was not used in the 2004 elections. Why?

- I. **Correct unequal treatment of provisional ballots.** Standards vary all over the state. Some counties approved 44% of the provisional ballots and others 94%. This is a violation of the Equal Protection Clause of U.S. Constitution. Legislative hearings are needed to ensure county auditors are treating provisional ballots in accordance with RCW 29A.08.625. Inactive voters who cast provisional ballots cannot have their provisional ballot counted unless the reason for canceling their registration was an error. Additionally, confirmation notices for provisional ballots must be on a form prescribed by, or approved by the Secretary of State (RCW 29A.08.635).
- J. **Figure out the statutory authority for ballot enhancement.** We are unable to find any statutory authority for WAC 434-261-080—ballot enhancement. If the legislature consents to ballot enhancement, an RCW should be developed and the Secretary of State should be required to develop statewide standards for enhancing ballots. Voters should be notified if their ballot was enhanced.
- K. **Determine statutory authority for WAC 434-262-070** that allows canvassing as a method of correcting errors in a recount or canvassing “by the county canvassing board reconvened specifically for that purpose.” We cannot find authority in RCW 29A.64 for this WAC. In fact, the law does not provide for this.
- L. **Require distinction for different types of ballots.** The legislature needs to require that the Secretary of State develop clearly distinguishable ballots for each type: regular, absentee and provisional. That way, if provisional ballots illegally/accidentally get inserted into the vote-counting machines at a precinct, the vote can be corrected.
- M. **Require tested and certified election software.** Election software untested against the federal standards was used in the November 2004 election in Chelan, King, Kitsap, Klickitat, Pierce, Snohomish, and Yakima Counties. The legislature needs to require counties to test the software using federal standards before the February elections.
- N. **Ensure only legally qualified citizens are registered to vote.** The Secretary of State did not follow the law or his own guidelines which state: “By 2003, a voter who registers by mail must provide a copy of photo identification or a number of other pieces of identification. By 2004, individuals registering to vote must provide a driver’s license number or the last four digits of their Social Security Number if they do not have a driver’s license. Individuals who do not have either are assigned a unique identification number. Election officials must check either the driver’s license or Social Security Number against numbers in existing databases.” This did not occur. Why?
- O. **Ensure the necessary changes are made to allow the new HAVA standards to be enacted in our state by January 1, 2006.** How will the SB 5221 changes that go into effect January 1, 2006, be implemented by the counties and Secretary of State?  
Unresolved issues include:
  - a. Effective January 1, 2006, no one can vote until the Secretary of State does a verification check using the driver’s license files from Department of Licensing or the last four digits of the Social Security Number (RCW 29.A.08.107 and RCW 29A.08.651). How will the state get the driver’s license number or the last four digits of the Social Security Number for existing voters? (RCW 29A.08.010)
  - b. How will the state get a signature attesting that the voter is a U.S. citizen? (RCW 29A.08.010)
  - c. Effective January 1, 2006, the Secretary of State’s voter list is the official list of eligible voters for all elections. (RCW 29A.08.105). Before anyone can vote, the Secretary of State must review the information provided by each voter registration

- applicant to ensure that the driver's license number or the last four digits of the Social Security Number match the information provided by the Washington State Department of Licensing or DSHS. If a match is not made, the Secretary of State must correspond with the applicant to resolve the discrepancy. Only after the Secretary of State has confirmed that the applicant's driver license number or the last four digits of the Social Security Number match existing records may the applicant be placed on the official list of registered voters. (RCW 29A.08.107)
- d. Effective January 1, 2006, county auditors must screen all new voter registrations against the state voter database to prevent duplication. Dual registration or voting detection means "to detect persons registered in more than one county or voting in more than one county." (RCW 29A.08.610) How will this be accomplished?
  - e. How will the voter registration database be kept updated for last-minute voter registrations in thirty-nine counties? RCW 29A.08.651.

**2. Require all currently registered voters to reregister by December 31, 2005.** This is necessary in order to clean up the voter rolls and to comply with the January 1, 2006, requirement that the voter file contain the driver's license number or the last four digits of the Social Security Number. If voters are not required to reregister, then the legislature needs to determine specifically how the Secretary of State will get the key data for existing voters. RCW 28A.08.010 requires the following for all voters effective January 1, 2006:

- A. Applicant's name needs to be changed to their legal name. This is crucial in order to match the driver's license file, felons, death notices, and the Social Security Number files.
- B. Complete residence address.
- C. Date of birth.
- D. Washington state driver's license number, Washington state ID card number, or the last four digits of their Social Security Number.
- E. A signature attesting to the truth of the information provided on the application.
- F. A check or indication in a box confirming the individual is a U.S. citizen.
- G. If the individual does not have a Social Security Number or a driver's license number, he or she must be issued a unique voter registration number.

**3. Reduce Fraud.**

- A. Change RCW 29A.44.201 to require a voter to show a picture and signature identification (such as a driver's license) to be compared with the signature on the poll register. If the signature or photo does not match, the voter should be given a provisional ballot, with a notation made by the poll worker that identification could not be verified. This ballot should be processed with all other provisional ballots. If a bank can require this type of identification to cash a check, certainly the state can do this to reduce voter fraud.
- B. Motor Voter and Registration at State Agencies (RCW 29A.08.230) needs to be changed to require proof of identification and citizenship prior to registering to vote. The current system provides ample opportunity for fraud because non-citizens are allowed to get driver's licenses and apply for state social services. The state employee receiving the voter information should compare the addresses and signatures on the driver's license or other state record with the applicant's signature on the voter registration form.
- C. Deceased voters: The legislature needs to change RCW 29A.08.510 (effective January 1, 2006) to require:

- a. Monthly match of death notices against voter tapes as the current law requires, not “periodically” as the new law requires.
- b. Change “county auditor may also use newspaper obituary articles” to “county auditor must...”
- c. Registration list maintenance: Use postal service change of address information. (RCW 29A.08.605) Change (1) “The Secretary of State may...” to “The Secretary of State must...”

**4. Update provisional ballots statute.**

- A. The definition of provisional ballots needs to be added to definitions in RCW 29A.04. No statutory authority currently exists for the definition of provisional voters.
- B. Add a section to RCW 29A.44 to tighten up security at polling places so voters cannot insert provisional ballots directly into a vote-counting device.

**5. Tighten absentee voting requirements. (RCW 29A.40)**

- A. The standards for obtaining an absentee vote are too loose and offer ample opportunity for fraud. Absentee ballots should be limited to those in true need, such as the military, those on overseas business, persons unable to travel, and other special cases. Ongoing absentee ballots (RCW 29A.40.040) should be eliminated.
- B. Change “an auditor may require a person who requests an absentee ballot to identify the date of birth of the voter for whom the ballot is requested” to “an auditor must require a person who requests an absentee ballot to identify the date of birth and either the driver’s license number or the last four digits of the Social Security Number.”
- C. Delete RCW 29A.40.070 (6). Failure to have absentee ballots available and mailed on time should be one of the options for an election contest.
- D. Add to RCW 29A.40.110 a section on processing incoming ballots. The legislature needs to add tightened controls over returned absentee ballots and require an audit trail.
  - a. Add the requirement that all incoming ballots must be tallied and put in a secure container at least daily. Daily counts of the number of returned absentee ballots must be public information.
  - b. Add the requirement that once canvassing begins, a daily total of net absentee ballots must be made public. This would include: Beginning number of absentee ballots; number received in mail that day; number processed that day; number rejected; and the ending balance.

**6. Update canvassing law. (RCW 29A.60)** Add to certification of results (RCW 29A.60.190) that prior to certification, the canvassing board must do a 100% reconciliation of the number of voters vs. the count, and explain any variance.

**7. Require all meetings of the canvassing board be subject to the Open Meetings Act.** That is what RCW 29A.60.140 states. Several years ago, a Thurston County Judge found that Pierce County violated public access to ballot handling when they were discovered remaking ballots at an undisclosed location, a week prior to Election Day for the Sound Transit and Presidential Election of 1996. Pierce County remade more than 28,000 ballots in that election. The ruling against Pierce County was overturned largely due to an amicus brief from the Attorney General’s office stating that Pierce County did not violate the law, because when canvassing is delegated to canvassing board workers, ballot handling, including the remaking and enhancing of ballots, need no longer follow the Open Meetings Act. This is contrary to the legislative intent of RCW 29A.60.140.

- 8. Clarify the law for recounts. (RCW 29A.64)** The legislature needs to make it clear that there will be no more canvassing or recanvassing during a recount. A recount, by statute, is the process of retabulating ballots and producing amended election returns based on that retabulation.
- 9. Vigorously prosecute vote fraud and update crimes and penalties law. (RCW 29.84)** The legislature needs to add penalties for the failure of election officials to properly conduct their duties.
- 10. Change the law to require reviews of every county's election departments every four years.** Election law prior to the 2003 legislative changes (RCW 29.69.070) required the Secretary of State to conduct reviews of county election activities every four years. The new law has no set period to conduct these reviews. EFF recommends the four-year review of counties be reinstated and that it be conducted by an independent entity such as the State Auditor.
- 11. Require all computer systems to meet federal certification.** If banks and stock brokers can operate secure computer systems, the state should be able to do it, too. Any stockholder, who votes their proxy on-line or by using an electronic voting service, has confidence that their vote will be accurately counted.
- 12. The legislature needs to clarify the following:**
  - A. Article VI, Section 1A of the State Constitution appears to contradict Article VI, Sec. 1. What does it mean?
  - B. The second sentence of RCW 29A.04.031 needs to be clarified. The way it reads currently, an un-registered absentee voter could walk into an auditor's office after the election and demand the vote be counted.
  - C. When a canvassing board holds that the signature on the ballot is not the same as the signature on file, but they do not call it a fraudulent ballot, have they disenfranchised legal voters? If it is fraud, should they refer it to the County Prosecutor? Voters should be informed if their ballot is rejected and why.