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## **ADVANCE SHEET- May 14 2021**

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### **President's Letter**

Recent months have seen passionate controversy about the rules governing future elections. Republicans stress the dangers of fraud; Democrats raise cries of voter suppression. It therefore seems useful to tender to our audience three documents generated by bi-partisan study groups after the fiercely contested Bush-Gore election in 2000. The first two were generated by an especially distinguished Commission on Federal Elections presided over by former Presidents Carter and Ford and convened by the Miller Center at the University of Virginia. The third is the product of a bi-partisan Task Force on Electoral Reform convened by the Constitution Project, a bi-partisan think tank. It is believed that perusal of these documents will generate light rather than heat and provide an antidote to partisan proposals.

George W. Liebmann

Owing to the length of the second document, 251 pages, rather than set it forth in the pages of the *Advance Sheet*, we thought it best to instead provide a link.

[https://web1.millercenter.org/commissions/comm\\_2001\\_taskforce.pdf](https://web1.millercenter.org/commissions/comm_2001_taskforce.pdf)



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### **The Library Company of the Baltimore Bar**

Most of you are probably familiar with the expression "If I had a nickel for every time..." Well, for me it might be every time someone asked, or even told me, that the Library was/is part of the bar association. Well for those of you who haven't asked me yet, the answer is no, we are not.

While the Library Company of the Baltimore Bar was founded in 1840, the Bar Association of Baltimore City was not founded until 1880 and the Maryland State Bar Association 1896. During the course of the past 141 years with the former and 125 years with the latter, our institutions have been autonomous. This is not to say that there has not been cooperation and collaboration over the years, particularly with the City Bar Association in matters such as the co-sponsoring of programs and the utilization by the Bar Association of the Library's George William Brown Room. One could not wish to work with more professional and nicer individuals than Kathy Sanzone and her assistant Patty DeGuilmi.

Black's Law Dictionary provides a rather cursory description of a "bar association" as "An organization of members of the legal profession." Far more helpful in discerning what a bar association is can be found in the mission statement of the Bar Association of Baltimore City which, includes among its objectives fostering collegiality among legal professionals.

Over the course of the past 181 years, the Bar Library has attempted to furnish a central point of contact for the lawyers of Baltimore City and the surrounding counties. This has particularly

been the case since the ascendancy of Mr. George W. Liebmann to the Presidency of the Library. On May 9, 2007, the late William Donald Schaefer came to the Library to speak on his early years in the practice of law, and things have not been the same since. On Wednesday, May 27, the Honorable Rod Rosenstein (see the flier below), will be the 103<sup>rd</sup> presentation in the Library's lecture series, which has included nationally known figures from across the country.

While the efforts of some to provide the aforementioned collegiality may have been slowed by the awful events of the past year, for the Library, they have intensified. Through utilization of Zoom, the Library has presented twelve programs since April 2020, a number of them in months where the series was traditionally on hiatus, i.e., winter and between Memorial and Labor Day, when many Marylanders, including lawyers, are "Down the ocean, hon."

In addition, the Library newsletter, a quarterly, rather humble publication, has now become a bi-weekly "magazine" featuring articles and material of a varied, engaging and illuminating nature. Informational and entertaining is that most excellent of all combinations.

In addition to the advancement of collegiality, the Bar Library with its massive Westlaw databases and circulating collections, continues to perform the role one generally associates with a library. When you consider support of the Library, and now more than ever **we need that support**, think of all that the Library does in so many ways: ways that perhaps you never considered before.

Joe Bennett



## The History Of The United States Attorneys & The Department Of Justice

On Thursday, May 27, 2021, at 6:00 p.m., the Honorable Rod J. Rosenstein will speak on *The History of the United States Attorneys & The Department of Justice*. We invite those that will be watching to participate by contributing their questions. Zoom is an interactive platform.

**Rod Rosenstein** served in leadership positions in the United States Department of Justice during the administrations of Presidents George W. Bush, Barack Obama and Donald Trump, including as Deputy Attorney General and United States Attorney for Maryland. He personally represented the United States in 23 jury trials and argued 21 appeals in various appellate courts and the United States Supreme Court.

As the second-highest ranking Department of Justice official from 2017 to 2019, Rod Rosenstein was responsible for overseeing 115,000 employees nationwide in the litigating divisions, law enforcement agencies and United States Attorney's Offices. He revised policies concerning corporate criminal prosecutions and parallel domestic and foreign investigations, Foreign Corrupt Practices Act matters, and health care fraud cases. He also reviewed significant proposed criminal and civil enforcement actions, False Claims Act settlements, and corporate monitor appointments. He led the Task Force on Market Integrity and Consumer Fraud and the Cyber-Digital Task Force, and handled national security matters reviewed by the Committee on Foreign Investment in the United States (CFIUS).

As the longest-serving United States Attorney in recent history, Rod Rosenstein oversaw federal criminal and civil litigation and developed and implemented federal law enforcement strategies in Maryland from 2005 to 2017. During his twelve-year tenure, he served on the Washington/Baltimore High-Intensity Drug Trafficking Area Task Force and on the Attorney General's Advisory Committee, including the subcommittees on White Collar Crime and Computer Crime/Intellectual Property Matters. He also personally litigated cases in the United States District Court and in the United States Court of Appeals for the Fourth Circuit.

Mr. Rosenstein is presently a Partner with King & Spalding. As a member of the U.S. Chamber Litigation Center's Board of Directors, he frequently speaks about federal enforcement policies and priorities. He taught semester-long courses for several years as an adjunct professor at the University of Maryland Carey School of Law and at the University of Baltimore School of Law.

Mr. Rosenstein received a J.D., Harvard Law School, cum laude and a B.S. Economics, Wharton School of the University of Pennsylvania, Phi Beta Kappa, summa cum laude, Beta Gamma Sigma, Royal Society of Arts Silver Medal.


**The Office of the United States Attorney** was created by the Judiciary Act of 1789, along with the office of Attorney General and the United States Marshals Service. The same act also specified the structure of the Supreme Court of the United States and established inferior courts making up the United States Federal Judiciary, including a district court system. Thus, the office of United States Attorney is older than the Department of Justice. The Judiciary Act of 1789 provided for the appointment in each judicial district of a "Person learned in the law to act as attorney for the United States...whose duty it shall be to prosecute in each district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions

in which the United States shall be concerned..." Prior to the existence of the Department of Justice, the United States Attorneys were independent of the Attorney General, and did not come under the Attorney General's supervision and authority until 1870, with the creation of the Department of Justice.

Charged with ensuring "that the laws be faithfully executed," the 93 United States Attorneys work to enforce federal laws throughout the country. The President appoints a United States Attorney to each of the 94 federal districts (Guam and the Northern Mariana Islands are separate districts but share a United States Attorney). The United States Attorney is the chief federal law enforcement officer in their district and is also involved in civil litigation where the United States is a party.


If you would like to join us for what should be a fascinating evening, please e-mail me at [jwbennett@barlib.org](mailto:jwbennett@barlib.org) and I will forward the **Zoom Link** to you the week of the program. If technology is not your cup of tea, do not let that stop you. Zoom is incredibly easy to use and we will send you the very simple instructions to use Zoom should you need them. Stay safe and we hope to see you with us on May 27.

**Time:** 6:00 p.m., Thursday, May 27, 2021.




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# **To Assure Pride and Confidence** *in the Electoral Process*

August 2001



## ***The National Commission*** **on Federal Election Reform**

*Organized by*  
Miller Center of Public Affairs,  
University of Virginia  
The Century Foundation

*Supported by*  
The David and Lucile Packard Foundation  
The William and Flora Hewlett Foundation  
The John S. and James L. Knight Foundation

**The Commission****Honorary Co-Chairs**

President Gerald R. Ford

President Jimmy Carter

**Co-Chairs**

Robert H. Michel

Lloyd N. Cutler

**Vice-Chairs**

Slade Gorton

Kathleen M. Sullivan

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Colleen C. McAndrews

Daniel Patrick Moynihan

Leon Panetta

Deval L. Patrick

Diane Ravitch

Bill Richardson

John Seigenthaler

Michael Steele

**Executive Director**

Philip D. Zelikow

**Public Hearings****March 26, 2001**

*Citizen Participation*

The Carter Center

Atlanta, Georgia

**April 12, 2001**

*Election Administration*  
The Ronald Reagan Presidential Library  
Simi Valley, California

**May 24, 2001**

*What Does the Law Require?*  
Lyndon B. Johnson Library and Museum  
Austin, Texas

**June 5, 2001**

*The American and International Experience*  
Gerald R. Ford Library  
Ann Arbor, Michigan

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# Letter

## *to the American People*

In 2000 the American electoral system was tested by a political ordeal unlike any in living memory. From November 7 until December 12 the outcome of the presidential election was fought out in bitter political and legal struggles that ranged throughout the state of Florida and ultimately extended to the Supreme Court of the United States. The American political system proved its resilience. But we must think about the future.

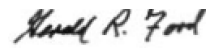
The ordinary institutions of election administration in the United States, and specifically Florida, just could not readily cope with an extremely close election. Many aspects of the election process were put under a microscope and viewed by an anxious nation. With dismay and growing anger we saw controversial ballot design; antiquated and error-prone voting machines; subjective and capricious processes for counting votes;

voter rolls that let unqualified voters vote in some counties and turned away qualified voters in others; confusion in the treatment of overseas military ballots; and a political process subjected to protracted litigation.

Stepping back from Florida, the picture is no more encouraging. The chief election official of Georgia, Cathy Cox, testified to our Commission that: "As the presidential election drama unfolded in Florida last November, one thought was foremost in my mind: there but for the grace of God go I. Because the truth is, if the presidential margin had been razor thin in Georgia and if our election systems had undergone the same microscopic scrutiny that Florida endured, we would have fared no better. In many respects, we might have fared even worse." Across America, we have heard from official after official who feels the same way.

There is good news, though. In the last few years, and now spurred by the events last year, election reform has returned to the legislative agenda in many states. In much of the country cadres of able and dedicated election administrators are in place who can show what is possible and carry reforms into practice. In a world of problems that often defy any solution, the weaknesses in election administration are, to a very great degree, problems that government actually can solve.

In this report we and our colleagues offer very specific recommendations on what should be done. In other words, Americans can and should expect their electoral system to be a source of national pride and a model to all the world.



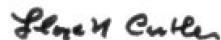
Gerald R. Ford



Jimmy Carter



Robert H. Michel



Lloyd N. Cutler

# **Preface**

## *to the Report*

The report begins with a summary of the principal policy recommendations. To understand why those recommendations were chosen, and why some others were not, readers should take the time to study the entire report before passing judgment.

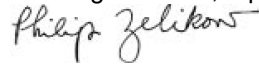
To share some of the wealth of background material that informed our work, please read the Background Papers prepared by the Commission's task forces on the Federal Election System and on Legal and Constitutional Issues. Those Background Papers are being published under a separate cover. They, like the transcripts of our Commission's public hearings around the country, are also available on the Commission's website—[www.reformelections.org](http://www.reformelections.org). The task force coordinators who performed such formidable labors are John Mark Hansen of the University of Chicago, David King of Harvard University, and Daniel Ortiz of the University of Virginia.

Richard Leone, president of The Century Foundation, was critical at every stage of the Commission's creation, development, and work. As much as anyone, he was the person who turned this Commission from an idea into reality. Robert Pastor of Emory University was a senior adviser to the Commission and offered especially valuable counsel. Leonard Shambon, of the law firm Wilmer, Cutler & Pickering, added his outstanding energy and professional judgment to our work.

This project would not have been successful without the work of the joint professional staff of the University of Virginia's Miller Center and The Century Foundation. Among our professional staff, day-in and day-out Ryan Coonerty's contribution was central. Margaret Edwards, Thad Hall, Mary McKinley, Wistar Morris, and Lisa-Joy Zgorski rounded out the core of our team, with frequent aid from Margaret Bell, Hillary Bracken, Anne Chesnut, Ryann Collins, Tina Doody, Kimberly Girard, Rick Gunning, Christy Hicks, Rachael Kelly, Shirley Kohut, Robin Kuzen, Cynthia Maertz, Carol Starmack, Tova Wang, and Garth Wermter.

The Carter Center, Ronald Reagan Presidential Library, Lyndon Johnson Presidential Library, and Gerald Ford Presidential Library all offered their facilities and staff to help with the Commission's public hearings in a gracious, hospitable spirit.

Finally, everything the Commission may accomplish is the result of the public-spirited generosity of Paul Brest, representing the William and Flora Hewlett Foundation; Richard T. Schlosberg, representing the David and Lucile Packard Foundation; and Hodding Carter III, representing the John S. and James L. Knight Foundation.



Philip Zelikow

*Executive Director*

## Summary

### *of Principal Recommendations*

#### **The Goals of Federal Election Reform**

When they choose the president, the vice president, and members of Congress, the American people should expect all levels of government to provide a democratic process that:

- \_ Maintains an accurate list of citizens who are qualified to vote;
  - \_ Encourages every eligible voter to participate effectively;
  - \_ Uses equipment that reliably clarifies and registers the voter's choices;
  - \_ Handles close elections in a foreseeable and fair way;
  - \_ Operates with equal effectiveness for every citizen and every community;
- and
- \_ Reflects limited but responsible federal participation.

For Americans, democracy is a precious birthright. But each generation must nourish and improve the processes of democracy for its successors. In the near-term, the next three to five years for instance, we envision a country where each state maintains accurate, computerized lists of who can vote, networked with local administrators. Using that system, qualified voters in our mobile society would be able to vote throughout their state without being turned away because of the vagaries of local administration. Using the system we recommend here, millions of military and other overseas voters would find it easier to get and return their ballots. Election Day would be held on a national holiday, freeing up more people to serve as poll workers and making polling places

more accessible. Voting machines would meet a common standard of excellent performance. Each state would have its uniform, objective definitions of what constitutes a vote. News organizations would exert necessary restraint in predicting election outcomes. Every jurisdiction and every official would obey the Voting Rights Act and other statutes that secure the franchise and prohibit discrimination. In all of this there would be a delicate balance of shared responsibilities between levels of government, and between officials and the voters they serve.

This report sets forth our recommendations for the next, immediate steps on the road to attainment of these goals.

#### **\_\_ Policy Recommendation \_\_ 1**

##### **Every state should adopt a system of statewide voter registration.**

1. The statewide computerized voter file should be networked with and accessible to every election jurisdiction in the state so that any level can initiate registrations and updates with prompt notification to the others. It should include provisions for sharing data with other states.

2. When a citizen either applies for a driver's license or registers to vote, each state should obtain residential address and other information, such as a digitized signature, in a form that is equally usable for both the motor vehicle and voter databases. The address information can then be linked to a statewide street index.

3. Each state's driver's license and voter registration applications should require applicants to provide at least the last four digits of their Social Security number. States should also ask applicants if they are registered in another state, so that that state can be notified of the new registration.

4. Each state's voter registration applications should require a separate and specific affirmation that the applicant is a U.S. citizen.

## **\_\_ Policy Recommendation \_\_ 2**

**Every state should permit provisional voting by any voter who claims to be qualified to vote in that state.**

1. Provisional voting authorizes any person whose name does not appear on the list of registered voters, but who wishes to vote, to be issued a ballot. The ballot shall be counted only upon verification by election officials that the provisional voter is eligible and qualified to vote within the state and only for the offices for which the voter is qualified to vote.

2. Another option, for states with statewide computerized voting lists, would be to let a voter who is not on the list submit proof of identification and swear to or affirm an appropriate affidavit of eligibility to vote in that jurisdiction. This information could then be used as an application for voter registration and the voter list would be amended accordingly. If qualified, the voter could either be issued a regular ballot or, if the state preferred, be allowed to vote provisionally pending confirmation of the voter's eligibility.

## **\_\_ Policy Recommendation \_\_ 3**

**Congress should enact legislation to hold presidential and congressional elections on a national holiday.**

1. Holding national elections on a national holiday will increase availability of poll workers and suitable polling places and might make voting easier for some workers.

2. One approach, which this Commission favors, would be to specify that in even numbered years the Veterans Day national holiday be held on the Tuesday next after the first Monday in November and serve also as our Election Day.

#### **\_\_ Policy Recommendation \_\_ 4**

#### **Congress should adopt legislation that simplifies and facilitates absentee voting by uniformed and overseas citizens.**

1. Each state should designate a responsible official for absentee voting by uniformed and overseas citizens who are residents of that state. That official should become the single point of contact for the citizens of that state who are served by the Federal Voting Assistance Program, which helps such uniformed and overseas citizens.

2. In 1986 Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to help eligible members of the armed services and their families, and other citizens overseas, to vote. Utilizing standardized forms for voter registration and absentee ballot requests, all UOCAVA-covered residents from a home state should be authorized to mail these applications to the designated official for their state. If that state uses a statewide voter registration system networked to local jurisdictions, as we have recommended, the state official should be authorized to act directly on these applications or to forward them for action by the appropriate local jurisdiction. States should accept one absentee ballot application as a valid application for all subsequent elections being held by that state in that year.

3. The designated state official should be authorized to accept either a voted ballot being returned for any jurisdiction of that state or a standardized Federal Write-In Absentee Ballot that is an option for a UOCAVA-covered citizen. States should be obliged to accept and tally a Federal Write-In Absentee Ballot for those contests in which they determine the voter was eligible to vote.

4. Properly filed absentee ballots should be accepted if they have been received by the time the polls of that state have closed on Election Day. States and the Federal Voting Assistance Program should develop common standards for validation of ballots that have been voted and mailed on or before Election Day, even if they are received after that date.



**\_\_ Policy Recommendation \_\_ 5**

**Each state should allow for restoration of voting rights to otherwise eligible citizens who have been convicted of a felony once they have fully served their sentence, including any term of probation or parole.**

**\_\_ Policy Recommendation \_\_ 6**

**The state and federal governments should take additional steps to assure the voting rights of all citizens and to enforce the principle of one person, one vote.**

1. Federal and state governments should intensify efforts to enforce compliance with the several statutes guaranteeing the right to vote and prohibiting various forms of discrimination in voting and registration.
2. The methods for funding and administering elections-from investments in equipment through voter education to procedures at the polling place-should seek to ensure that every qualified citizen has an equal opportunity to vote and that every individual's vote is equally effective. No individual, group, or community should be left with a justified belief that the electoral process works less well for some than for others.
3. Federal and state governments should consider uses of technology, for example when developing voting equipment system standards, that will make it feasible to provide greater assistance to language minorities.

**\_\_ Policy Recommendation \_\_ 7**

**Each state should set a benchmark for voting system performance, uniform in each local jurisdiction that conducts elections. The benchmark should be expressed as a percentage of residual vote (the combination of overvotes, spoiled votes, and undervotes) in the contest at the top of the ballot and should take account of deliberate decisions of voters not to make a choice.**

1. Benchmarks should consider the results obtained by best practices within that state, taking local circumstances into account. In general, we suggest that the benchmarks in

the next election cycle should be set no higher than 2%, with the goal of further reductions in succeeding cycles.

2. Each state should require its election jurisdictions to issue a public report on the number of residual votes after every statewide election, including the probable causes of error, if any.

3. Each state should determine for itself how to hold its election jurisdictions accountable for achieving the benchmarks.

#### **\_\_ Policy Recommendation \_\_ 8**

**The federal government should develop a comprehensive set of voting equipment system standards for the benefit of state and local election administration.**

1. Congress should grant statutory authority to an appropriate federal agency to develop such standards in consultation with state and local election officials.

2. The scope of the voting system standards should include security (including a documentary audit for non-ballot systems), procedures for decertification as well as certification of both software and hardware, assessment of human usability, and operational guidelines for proper use and maintenance of the equipment. The agency should maintain a clearinghouse of information about experience in practice.

3. Voters should have the opportunity to correct errors at the precinct or other polling place, either within the voting equipment itself or in the operational guidelines to administrators for using the equipment.

4. Each voting tally system certified for use should include, as part of the certification, a proposed statement of what constitutes a proper vote in the design and operation of the system.

5. New voting equipment systems certified either by the federal government or by any state should provide a practical and effective means for voters with physical disabilities to cast a secret ballot.

6. In addition to developing the voting system standards, the federal agency should provide its own certification and decertification of hardware and software, including components in voter registration systems. These federal certifications and

decertifications, like the remainder of the standards, will be recommendations to states which they can adopt or not.

7. This federal service should include selection and oversight of a federally supervised set of independent testing authorities who will apply the standards in assessing equipment. After the federal agency develops and approves the relevant voluntary voting system standards in consultation with state and local administrators, this further, technical task should be delegated to the highly regarded and relatively independent National Institute of Standards and Technology (NIST) of the Department of Commerce.

#### **\_\_ Policy Recommendation \_\_ 9**

**Each state should adopt uniform statewide standards for defining what will constitute a vote on each category of voting equipment certified for use in that state. Statewide recount, election certification, and contest procedures should take account of the timelines for selection of presidential electors.**

1. Statewide standards for defining a vote in advance of an election should be uniform and as objective as possible.

2. Each state should reevaluate its election code to consider adopting a predictable sequence of: a) vote tabulation and retabulation; b) machine or manual recounts to encompass the entire jurisdiction of the office being recounted, triggered by whatever threshold the state may choose; c) certification of a final count; followed then by d) contests of the certification limited to allegations of fraud or other misconduct.

3. In such a sequence, each state should allow at least 21 days before requiring certification of the final count. But we recommend retention of a federal deadline under which the "safe harbor" for conclusive state determination of presidential electors will expire.

4. Each state should also develop a uniform design for the federal portion of the state ballot, for use in each of that state's certified voting equipment systems.

#### **\_\_ Policy Recommendation \_\_ 10**

**News organizations should not project any presidential election results in any state so long as polls remain open elsewhere in the 48 contiguous states. If necessary, Congress and the states should consider legislation, within First Amendment limits, to protect the integrity of the electoral process.**

1. In practice, this would mean that news organizations would voluntarily refrain from projecting the outcomes of the presidential elections in any state until 11:00 p.m. Eastern Standard Time (8:00 p.m. Pacific Standard Time). Voluntary restraint is preferable to government action.

2. If news organizations refuse to exercise voluntary restraint, Congress and the states should consider prohibiting any public disclosure by government entities of official tallies in the race for president and vice-president at the precinct level and above until 11:00 p.m. EST (8:00 p.m. PST), where such regulations are consistent with existing provisions for public observation of the vote tabulation process.

3. If news organizations refuse to exercise voluntary restraint and other measures cannot protect the integrity of the electoral process, Congress should impose a plan for uniform poll closing hours in the continental United States for presidential elections.

4. National television broadcasters should provide, during the last thirty days of the presidential campaign, at least five minutes each night of free prime television time to each presidential candidate who has qualified for federal matching funds. They or their local affiliates should further make free time available for state and local election officials to provide necessary voter education.

#### **\_\_ Policy Recommendation \_\_ 11**

**The federal government, on a matching basis with the governments of the 50 states, should provide funds that will add another \$300-400 million to the level of annual spending on election administration in the United States. The federal share will require a federal contribution totaling \$1-2 billion spread out over two or three years to help capitalize state revolving funds that will provide long-term assistance.**

1. These responsibilities should be apportioned about 50-50 between the federal government and the states, so that the federal contribution has the effect of raising the annual federal and state level of spending on election administration by an added \$150-200 million. This is a modest sum, lower than some other current estimates about what is needed.

2. The federal expenditures should be made in the form of matching grants to the states, and the states should directly administer the disbursement of funds for administration at the state, county, and local level.

3. Instead of planning on permanent expenditures of federal funds, Congress should instead consider leveraging temporary funding over a two- or three-year period in an amount, totaling perhaps \$1-2 billion, that will be sufficient to capitalize the federal share of state revolving funds. These funds can leverage the initial federal contribution, after it has been matched by the states, to create a long-term source of federal and state support to election administration. The capitalization should be sufficient to sustain our proposed federal increment of \$150-200 million of continued additional spending on election administration that, when matched by state contributions to the funds, will reach the \$300-400 million annual nationwide target.

4. Such state revolving funds would be used to carry out flexible state programs, allowing the states to support a variety of election administration activities undertaken by state, county, and local governments and do so with a variety of financing options that can include grants, loans at or below market rates, loan guarantees, and other arrangements. States would assess relative needs among their election jurisdictions and be accountable for maintaining the fund.

5. Federal funds should be allocated among the states in proportion to the electoral votes that each state will cast in the presidential election of 2004. This reflects a slight per capita weighting toward rural states. Such a modest weighting is appropriate, given the greater average per capita cost of election administration in rural counties.

#### **\_\_ Policy Recommendation \_\_ 12**

**The federal responsibilities envisioned in this report should be assigned to a new agency, an Election Administration Commission (EAC).**

1. The number of governing commissioners in this agency should be small; the members should be distinguished citizens with a reputation for integrity.

2. The commission should: a) develop federal voting system standards in consultation with state and local election administrators; b) oversee the implementation of these standards in conjunction with the National Institute of Standards and Technology; c) maintain a national clearinghouse of information on best practices in election administration; and d) administer the limited federal assistance program to the states. 3. Enforcement of other federal election laws should remain a separate function, centered in the Civil Rights and Criminal Divisions of the Department of Justice. 4. States that do not have them should also consider establishing nonpartisan election commissions.

#### **\_\_ Policy Recommendation \_\_ 13**

**Congress should enact legislation that includes federal assistance for election administration, setting forth policy objectives for the states while leaving the choice of strategies to the discretion of the states.**

The Commission as a whole takes no position on whether Congress should use the powerful incentive of conditional grants or instead establish requirements or mandates wholly independent of funding. A majority of the Commission members suggests the approach described below. However, a minority suggests a more direct federal role as detailed in an additional statement of views appended to this report.

1. Congress should enact legislation to create a new federal election administration agency, to facilitate military and overseas citizen voting, to address a national election holiday, to constrain-if necessary-premature official disclosure of presidential election results, and to appropriate federal assistance in election administration.

2. To be eligible for federal assistance, states shall:

- a. match the federal assistance with an added contribution of their own in the proportion fixed by Congress;
- b. adopt legislation that will establish a statewide voter registration system networked to every local jurisdiction in that state, with provisions for sharing data with other states;
- c. permit on-site provisional voting by every voter who claims to be qualified to vote in that state, or adopt an alternative that achieves the same objective;
- d. set a uniform statewide benchmark for voting system performance in each local jurisdiction administering elections expressed as a percentage of residual vote in the contest at the top of the ballot, and require local jurisdictions to report data relevant to this benchmark;
- e. either agree to comply with the federal voting system standards and certification processes or develop their own state voting system standards and processes that, at a minimum:
  - i. give voters the opportunity to correct errors, either within the voting equipment itself or in the operational guidelines to administrators for using the equipment at a precinct or other polling place and

ii. require that new voting systems should provide a practical and effective means for voters with physical disabilities to cast a secret ballot; and

f. adopt uniform statewide standards that define what will constitute a vote on each category of voting equipment certified for use in that state;

g. certify that they are in compliance with existing federal voting rights statutes.

3. Specific choices on how to comply with these conditions should be left to the discretion of the states.

4. States that qualify for federal assistance should have broad discretion in how they disburse this money, so long as the money is expended on: a) establishing and maintaining accurate lists of eligible voters; b) encouraging eligible voters to vote; c) improving verification of voter identification at the polling place; d) improving equipment and methods for casting and counting votes; e) recruiting and training election officials and poll workers; f) improving the quantity and quality of available polling places; and g) educating voters about their rights and responsibilities.

## *The Commissioners*

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*Honorary Co-Chair*  
Jimmy Carter  
*Honorary Co-Chair*  
Robert H. Michel

*Co-Chair*

Lloyd N. Cutler

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# I

## **The Goals** *of Federal Election Reform*

In 2000 the American electoral system was tested by a political ordeal unlike any in living memory. From November 7 until December 12 the outcome of the presidential election was fought out in bitter political and legal struggles that ranged throughout the state of Florida and ultimately extended to the Supreme Court of the United States. Not since 1876-77 has the outcome of a national election remained so unsettled, for so long. That nineteenth century political crisis brought the United States close to a renewal of civil war. Fortunately no danger of armed conflict shadowed the country in this more recent crisis. The American political system proved its resilience.

Nonetheless, last year's election shook American faith in the legitimacy of the democratic process. The effect is measurable. In 1996, three-quarters of the population



thought the election had been at least somewhat fair. After 2000 that proportion fell to about one-half.

About three-quarters of Democrats doubted the fairness of the process. But this is not simply a story of happy Republicans and unhappy Democrats. In 1996 just 12% of Republicans thought the election was unfair. But that proportion doubled after 2000. Beliefs about fairness are influenced by whose candidate won, but people also become uneasy when the process begins to seem arbitrary. Among those who called themselves Independents, only 11% labeled the 1996 election as unfair, but in 2000 that number rose to more than 40%.<sup>1</sup>

This is not the first time the United States has undergone an election crisis. But the great electoral crises of the nineteenth century arose from serious structural problems. The 1800 crisis led to prompt passage in 1804 of a constitutional amendment, the Twelfth. The 1824 crisis transformed the American political system, forging the Democratic Party and leading to near-universal adoption of direct popular election for presidential electors. In 1824 only 27% of eligible voters went to the polls. Four years later 56% of the electorate cast ballots for president. The 1876 crisis arose from the special circumstances of the post-Civil War reconstruction of the South.

In the electoral crisis of 2000, by contrast, the ordinary institutions of election administration in the United States, and specifically Florida, simply could not readily cope with an extremely close election. Every aspect of the election process was put under a microscope and viewed by an anxious nation that saw controversial ballot design; antiquated and error-prone voting machines; subjective and capricious processes for counting votes; rolls that let unqualified voters vote in some counties and turned away qualified voters in others; confusion in the treatment of overseas military ballots; and a political process subjected to protracted litigation.

Stepping back from Florida, the picture is no more encouraging. The chief election official of Georgia, Cathy Cox, testified to this Commission that: "As the presidential election drama unfolded in Florida last November, one thought was foremost in my mind: there but for the grace of God go I. Because the truth is, if the presidential margin had been razor thin in Georgia and if our election systems had undergone the same microscopic scrutiny that Florida endured, we would have fared no better. In many respects, we might have fared even worse." Across America, we have heard the same from other election officials.

"There is probably no other phase of public administration in the United States which is so badly managed as the conduct of elections. Every investigation or election contest brings to light glaring irregularities, errors, misconduct on the part of precinct officers, disregard of election laws and instructions, slipshod practices, and downright frauds.... The truth of the matter is that the whole administration-organization, laws, methods and procedures, and records-are, for most states, quite obsolete. The whole system, including the election laws, requires a thorough revision and improvement." That

judgment, by election expert Joseph Harris, was published in 1934.<sup>2</sup> In the previous decade voter turnout had sunk to a low never again equaled before or since. So the problem is hardly new.

But the character of the problem has evolved. In the second half of the century the federal government and federal courts established national voting rights, nationally defined. Permanent voter registration replaced the old pattern of requiring voters to re-register again and again. Election administration became more professionalized and non-partisan. Voting machines were introduced to gain greater efficiency and reduce the opportunities for the election fraud that had so frequently accompanied human vote counts. Yet, in much of the country, too many counts of that 1934 indictment remain valid.

But in a world of problems that often defy any solution, the weaknesses in election administration are, to a very great degree, problems that government actually can solve. In the last few years, and now spurred by the events last year, election reform has returned to the legislative agenda in many states. In much of the country cadres of able and dedicated election administrators are in place who can show what is possible and carry reforms into practice. To support these efforts already underway and to encourage immediate and significant state and federal action, we make the following recommendations.

When they choose the president, the vice president, and members of Congress, the American people should expect all levels of government to provide a democratic process that:

- \_ Maintains an accurate list of citizens who are qualified to vote;
- \_ Encourages every eligible voter to participate effectively;
- \_ Uses equipment that reliably clarifies and registers the voter's choices;
- \_ Handles close elections in a foreseeable and fair way;
- \_ Operates with equal effectiveness for every citizen and every community; and
- \_ Reflects limited but responsible federal participation.

For Americans, democracy is a precious birthright. But each generation must nourish and improve the processes of democracy for its successors. In the near-term, the next three to five years for instance, we envision a country where each state maintains accurate, computerized lists of who can vote, networked with local administrators. Using that system, qualified voters in our mobile society would be able to vote throughout their state without being turned away because of the vagaries of local administration. Using the system we recommend here, millions of military and other overseas voters would find it easier to get and return their ballots. Election Day would be held on a national holiday, freeing up more people to serve as poll workers and making polling places more accessible. Voting machines would meet a common standard of excellent performance. Each state would have its own uniform, objective definitions of what constitutes a vote. News organizations would exert necessary restraint in predicting election outcomes. Every jurisdiction and every official would obey the Voting Rights Act and other statutes that secure the franchise and prohibit discrimination. In all of this there would be a delicate balance of shared responsibilities between levels of government, and between officials and the voters they serve.

This report sets forth our recommendations for the next, immediate steps on the road to attainment of these goals.

## **II.**

# **The Federal Government** *and the Federal Election System*

### **The Constitution's Allocation of Authority**

The conduct of federal elections is a federal function-as the Supreme Court reiterated just this year, states have no inherent or reserved powers over federal elections because federal elections only came into being when the United States Constitution was ratified.<sup>3</sup> Nonetheless, the framers of the Constitution foresaw a federal-state partnership in the administration of federal elections, and delegated to the states a substantial role in the conduct of those elections. Article 1, Section 4, of the U.S. Constitution states that: "The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." And Article II, in conjunction with the Twelfth Amendment, provides that the states shall choose electors for the President and Vice President, but that "the Congress may determine the Time of chusing the Electors and the Day on which they shall give their Votes," and specifies rules by which the Congress might settle contested presidential elections.

As Alexander Hamilton explained in Federalist No. 59, the Constitutional Convention deliberately chose to submit "the regulation of elections for the federal government" to local governments that, ordinarily, "may be both more convenient and more satisfactory." But the Constitution "reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety." After all, Hamilton wrote, the national government should not subject its existence "to the pleasure of state governments."<sup>4</sup>

The federal courts have therefore long ruled that Congress has broad authority to regulate elections where candidates for Congress are on the ballot, either in a primary or a general election.<sup>5</sup> State power to set neutral rules for federal elections is limited to time, place, and manner, and the federal government may pass laws to supersede any of these rules.<sup>6</sup> Thus the National Voter Registration Act of 1993 was upheld by the courts even though it effectively told states exactly how they had to register voters in federal elections, right down to the layout of the registration form.<sup>7</sup> Though in theory, and occasionally even in practice, states have tried to mitigate such federal edicts by setting up separate systems for federal and state elections, none has found such bifurcated systems sustainable.

The federal power created by the Elections Clause is reinforced by the constitutional authority granted Congress to enforce the Equal Protection Clause of the Fourteenth Amendment and by other constitutional amendments prohibiting discrimination in voting. Because the Supreme Court's decision in *Bush v. Gore* found that differing definitions of a vote within Florida during the recount violated the Equal Protection Clause, Congress may well have authority under the Fourteenth Amendment to legislate to ensure greater uniformity within each state's voting procedures.<sup>8</sup>

### **Presidential Elections and the Electoral College**

The Constitution confided the choice of how to select presidential electors to the judgment of "[e]ach state". For a generation, most electors were chosen by the state legislatures without any popular vote. But by the 1820s almost every state had decided to move to direct election of presidential electors by popular vote. By the Civil War, the practice had become universal. The Constitution was not, however, amended to reflect this new custom.

From the outset this Commission decided that it would not make recommendations about whether or how the Constitution should be amended in order to do away with or refashion the choice of presidential electors, the institution generally called the Electoral

College. We are aware of the critique that the Electoral College is an anachronism that can award an election to a candidate who did not win the majority of the popular vote and that it gives somewhat more proportional weight to the populations of small states.<sup>9</sup> The supposed disproportionate influence of small states may be counter-balanced by the "unit rule" adopted by 48 of the 50 states that allows the popular vote winner, whatever the margin, to claim all the state's electors.<sup>10</sup>

Yet the compromises embodied in the Electoral College are central to the organization of our republic. The basic political units of the country were the states; yet the president and vice president were to be elected by the entire nation. The Electoral College was a delicate compromise that solved one of the most difficult problems of the Constitutional Convention and did so in a way that satisfied even most anti-Federalist critics of the new document.<sup>11</sup> James Madison put it well:

The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society.... From this aspect of the government it appears to be of a mixed character, presenting at least as many federal as national features.<sup>12</sup>

Within the Commission there are different views about how to strike the balance of state and national "features" and we are reluctant to suggest refashioning such a fundamental balance unless our search for constructive answers compels us to do so. Fortunately, a strong and effective set of ideas for federal election reform is available that can satisfactorily address most of the problems that came into national view last year without reaching out to rewrite the Constitution.

### **The Primary Role of State Governments**

Even though the federal government has broad constitutional authority to mandate how the states conduct federal elections, we believe that state governments should have a primary role in the conduct of such elections for a simple reason: federal elections are, as a practical matter, conducted in conjunction with a vast array of state and local elections across widely varying conditions. The last presidential election involved more than 100 million voters casting ballots at more than 190,000 polling places, staffed by more than 1.4 million regular or temporary administrators and poll workers. The original constitutional premise, that state governments should oversee the conduct of elections, subject only to limited and necessary federal intervention, remains sound.

But we recommend that state governments should do far more to accept their lead responsibility for improving the conduct of elections, especially federal elections. Most congressional elections involve multiple local jurisdictions, and often more than one

county. All presidential and senatorial elections are statewide contests in their states. State governments should ensure uniformity of procedures and standards within the state and provide the essential guidance for the consistent and constitutional conduct of these elections.

Thus the states are vital partners to the federal government in any plan for nationwide reform. They are also a necessary bridge between federal policy and local administration.

### III.

## A Democratic Process *that Maintains an Accurate List of Citizens Who Are Qualified to Vote*

One of the most serious problems in America's elections is also one of the most basic—identifying who can vote. For some this is a problem of disfranchisement. For others this is a problem of the integrity of the voting system. The controversial effort to clean up voter rolls in Florida was itself a reaction to prior scandals, especially the 1997 election for mayor of Miami, an election invalidated by the courts due to widespread vote fraud.

The issue of voter lists now has well-drawn battle lines. Some argue that the "purging" of voter lists has been used to push minority voters off the rolls. Others maintain that "list maintenance" is essential to preventing fraud. A major development in this political struggle was the passage of the National Voter Registration Act of 1993, the "motor voter" law often referred to by its acronym, NVRA. This act strictly regulated the procedures that had to be followed before voters could be removed from lists and made such removals more difficult.

### **The Problem of Accurate Voter Lists**

State and local election administrators have testified to the Commission that they are generally comfortable with the NVRA and the Commission does not advocate making any changes to it. But, as a result of the law, administrators agree that their voter lists are now swollen with larger numbers of named voters who have moved, or died, or are no longer eligible to vote in the local jurisdiction where they are registered. Duplicate

registration is also common. In Oklahoma, which gathers statewide data in its unitary election system, the number of inactive voters had averaged about 15% of the list.<sup>13</sup> After NVRA that percentage grew to 25%. As might be expected, a number of jurisdictions have compared their voter lists to census numbers and observed that they have thousands, sometimes tens of thousands, more registered voters than people.

Some contend that swollen voter rolls are harmless, since the individuals have moved or died and therefore do not vote, and since poll worker scrutiny and signature verification can prevent fraud. We disagree:

— Significantly inaccurate voter lists add millions of dollars in unnecessary costs to already underfunded election administrators and undermine public confidence in the integrity of the election system and the quality of public administration.

— Significantly inaccurate voter lists invite schemes that use 'empty' names on voter lists for ballot box stuffing, ghost voting, or to solicit "repeaters" to use such available names. For generations these practices have been among the oldest and most frequently practiced forms of vote fraud. One of our Commissioners (President Jimmy Carter) has written a book mentioning his encounter with such practices early in his political career. The opportunities to commit such frauds are actually growing because of the trend toward more permissive absentee voting.<sup>14</sup>

— Significantly inaccurate voter lists often penalize poor or ill-educated voters. Among the most mobile citizens in the country, these voters find that even modest residential changes, within a state or county, will keep them from appearing on the list of eligible voters at their new residence.

Although we recognize the problem of accurately establishing who is eligible to vote, we do not simply endorse more aggressive measures to prune voter lists within the existing system. Rather than take a side in the ongoing partisan arguments, we think the problem needs to be recast in terms that can break away from the old controversies over "purging." Instead we should look toward the more positive objective of accurately registering every eligible voter on lists that people can trust. To do that we need to step back for a moment and take a broader perspective of what has happened to voter registration in America.

### **Voter Registration, Past and Present**

The U.S. Constitution does not provide a right to vote. It provides that state governments shall determine who is eligible to vote in either state or federal elections,

though subsequent amendments offer guards against discrimination in the grant or denial of the franchise.<sup>15</sup> In the first half of the nineteenth century state governments established that they, not municipal governments, were the final arbiters of who could vote in the state.<sup>16</sup>

The registration of voters before Election Day was a more modern innovation, adopted in most states as a good government reform, especially for the growing cities, in the years after the Civil War. With most voter registration systems tied to local residence and set up for locally run elections, practically all these systems relied on local administration. Further, new registrations of voters were usually conducted every two or four years, requiring every voter to register anew at least that often-and more often if they had changed their address. What followed was a new decentralization of power to determine the eligibility of voters, devolving from state governments down to the local and county governments that managed this process and maintained the rolls. Those governments, in turn, often delegated the work directly to precinct officers. The results were various but, too often, dismally predictable. By the 1920s, voter turnout in the United States had reached an all-time low.<sup>17</sup>

The next wave of reform in voter registration concentrated on replacing periodic registration with permanent registration, to reduce costs and the opportunity for fraud. In subsequent decades almost every state adopted permanent registration. Meanwhile, voting rights laws and litigation of the 1960s reduced residency requirements and did away with some of the other more elaborate devices that were used by local officials to thwart registration and were used, in particular, against black Americans. The NVRA effectively forced every state to offer voter registration in combination with the single civic act performed almost universally by American adults-obtaining a driver's license.

Thus we have created a system where voter registration is relatively easy and permanent but is still usually recorded and maintained in the separate files of the nearly 13,000 local election jurisdictions of the United States. There is no authoritative list of American citizens maintained by the federal government. Passport records cover only a fraction of the citizen population. Federal tax and social security records, whatever their value, are also insulated by law against inquiries from, or data sharing with, state and local election officials.

At the same time Americans have become a remarkably mobile society. About one-sixth of the population moves every year. The more local the database of permanently registered voters, the more likely it is that the voter will have moved into or out of it.<sup>18</sup>

**A Better Way:  
Statewide Voter Registration Systems**



Our preference for permanent voter registration and our observation of constant voter mobility prompt this conclusion:

**\_\_ Policy Recommendation \_\_**

**Every state should adopt a system of statewide voter registration.**

1. The statewide computerized voter file should be networked with and accessible to every election jurisdiction in the state so that any level can initiate registrations and updates with prompt notification to the others. It should include provisions for sharing data with other states.
2. When a citizen either applies for a driver's license or registers to vote, each state should obtain residential address and other information, such as a digitized signature, in a form that is equally usable for both the motor vehicle and voter databases. The address information can then be linked to a statewide street index.
3. Each state's driver's license and voter registration applications should require applicants to provide at least the last four digits of their Social Security number. States should also ask applicants if they are registered in another state so that that state can be notified of the new registration.
4. Each state's voter registration applications should require a separate and specific affirmation that the applicant is a U.S. citizen.

Eleven states and the District of Columbia have already implemented statewide registration systems that cover all their jurisdictions. Seven more states have adopted them and are in the process of implementing them; three more are close to adoption. A statewide registration system was part of the reform program adopted earlier this year in Florida. These 21 states and D.C. include 39.2% of the votingage population in the United States. In its June 2001 report to Congress, the bipartisan Federal Election Commission, after consulting with state and local election officials, recommended that states "1) develop and implement a statewide computerized voter registration database; 2) insure that all local registration offices are computerized; and 3) link their statewide computerized system, where feasible, with the computerized systems of the collateral public agencies relevant to the NVRA (motor vehicle offices, public assistance offices, etc.)"19

With a sense of how voter registration has evolved over the past century, we believe four factors weigh heavily in favor of placing the core responsibilities for voter registration in the hands of state governments.

*The constitutional allocation of responsibilities.* Under the U.S. Constitution, voter qualifications are defined primarily by state governments. So it makes sense to center registration responsibility at this same level of government. Local issues and ballots may vary, but a resident of a given state, voting in a state or presidential election, will find the same voter eligibility rules and the same candidates at the top of the ballot anywhere within the state.

*The nature of the data.* The most important source of applications for new voter registration has become the application for a driver's license. This is already a statewide database, and it is estimated that 92% of all registered voters also have a driver's license. The most effective systems have made DMV (Department of Motor Vehicles) information congruent, and thus interoperable, with the voter information called for by the state's election code. When people move within a state, they are still in the database even if they are slow to get a new license. When they move from one state to another, one of the first-and perhaps the only-civic act they must accomplish is to get a driver's license valid for that state. DMV change-of-address information is thus considered even more comprehensive and reliable than the useful National Change of Address database maintained by the U.S. Postal Service.<sup>20</sup>

*Accuracy can mean access.* People are mobile, but more than three-quarters of all moves are within the same state. An effective statewide database can therefore be quite useful, including its capacity to address such common issues as the registration of in-state college students and people with second homes within a state. But perhaps the most important beneficiaries of statewide registration systems will be members of lower-income groups, who are more likely to move than higher-income groups and, when they do move, are much more likely to move from one place to another within the same state. They are thus more likely to fall off local voter rolls and bear the burden of re-registration.

*Accountability.* A clear statewide registration system will be more transparent and accountable to outside scrutiny. Some advocates for disadvantaged groups are uneasy about statewide registration proposals, fearing that these will turn into still more powerful tools for "purging." Yet one of the clearest findings from the U.S. Civil Rights Commission's investigation in Florida is that, with purely local administration of list maintenance, local variations on statewide guidelines can be critical yet difficult to track.

Beyond the general recommendation in favor of statewide registration systems, several specific policy issues deserve mention. One is the question of whether to require voters to display some proof of identification at the polls.

All states hope that precinct officials and poll watchers will have at least some familiarity with the residents of their precincts. Seven states, all but one of them rural, do nothing more. In the rest, the most common practice now is to require voters to sign their names in an official registry or on a ballot application. About a third of the states require poll workers to check signatures against those provided at registration. Fourteen states insist that voters produce some form of identification.<sup>21</sup>

Most states that have histories of strong party rivalry or election fraud require signature verification or voter identification at the polls. Signature verification puts an extra burden upon administrators, and especially on often ill-trained poll workers practicing a very subjective, often impossible, task while voter lines lengthen. Also, many polling places lack the means to provide poll workers with accurate copies of the voter's actual signature (the one the voter used in order to register) and a signature may change over time.

One alternative, favored by several Commissioners, is to require those who are registering to vote and those who are casting their ballot to provide some form of official identification, such as a photo ID issued by a government agency (e.g., a driver's license). A photo ID is already required in many other transactions, such as check-cashing and using airline tickets. These Commissioners point out that those who register and vote should expect to identify themselves. If they do not have photo identification then they should be issued such cards from the government or have available alternative forms of official ID. They believe this burden is reasonable, that voters will understand it, and that most democratic nations recognize this act as a valid means of protecting the sanctity of the franchise.

A small percentage of adults, perhaps about 5 to 7%, do not possess a driver's license or other photo identification. They are disproportionately poor and urban (since they may use public transit rather than drive a car). Some Commissioners also object to requiring voters to produce a photo ID or some alternative form to verify their identity because some members of minority groups believe such a process can be used to intimidate voters or turn them away in a racially discriminatory fashion.

We believe that an assessment of how to strike the right balance between administrative burden and voter responsibility turns too much on the assessment of local conditions to be amenable to any categorical recommendation by this Commission. We do believe, however, that states should be able to verify a voter's identity.

In recommending the adoption of statewide voter registration systems, we looked at the experience of those states that have adopted them. The outstanding models appear to be Michigan and Kentucky. Michigan deserves particular scrutiny because it is the most populous state to have fully implemented such a system and it is also a state with a

larger number of separate election jurisdictions, more than 1600, than any other. The Michigan system is new, having been put in place just in the last few years, and it passed the test of the 2000 election with flying colors. The software solution developed in Michigan has been inexpensive and is not exclusive to a particular vendor. Any state can copy it. A more complete description of the Michigan voter registration system is attached in Appendix B to this report.<sup>22</sup>

Any state adopting a statewide voter registration system will confront the problem of uniquely identifying voters, figuring which Joseph Smith is the same as that Joe Smith. That is why, following the Michigan example, we recommend obtaining residential addresses, with the DMV and voter registration address required in identical form.

An added identifier is desirable, given the various spellings and the clerical errors that frustrate reliance only on a given name and address. For this purpose some numeric identifier can be useful. Given the danger from overuse of entire Social Security Numbers as an individual identifier we suggest that states obtain the last 4 digits of this number as an added identifier.<sup>23</sup> The Federal Election Commission has made the same recommendation.

Some states also seek added identifiers, such as information on the place of birth and prior residential address. We take no position on the value of having this added information, but we do believe that federal law and regulations should be amended over time where state experience provides evidence that a change is needed. Used cumulatively, this information could improve the accurate exchange of information affecting voter eligibility and help avoid mistaken voter removals like those that occurred in Florida.

Our policy recommendation need not require any immediate amendment of the NVRA. The NVRA specifies how voters can be registered. In general, those provisions will benefit from and work much more effectively with a statewide registration system. The NVRA also specifies how voter lists should be maintained. We believe those provisions do not take adequate account of the kind of statewide voter registration system we recommend. But we see no need to amend the list of maintenance provisions of the NVRA either to add more safeguards or pare them back until more and wider experience with new systems can give us more evidence about just what is needed.

All states require voters to declare, by their signature, that they are U.S. citizens and meet other criteria for eligibility to vote. Twelve states require applicants at least to check a box specifically affirming they are a citizen, though most of these accept the national mail-in and NVRA forms that do not have such a box. Inability to verify citizenship is a weakness in every state's voter registration system. The problem is not hypothetical. Non-citizens do vote, albeit illegally.<sup>24</sup> We therefore recommend that a specific enforceable affirmation of citizenship be included in all voter registration

applications. Combined with enforcement of the relevant state and federal vote fraud laws, this should be sufficient to contain this potential problem.

## **A Democratic Process** *that Encourages Every Eligible Voter to Participate Effectively*

An especially infuriating barrier eligible voters can face is to show up on Election Day, believing (perhaps rightly) that they are qualified to vote, and then be turned away because the poll worker cannot find their name on the list of qualified voters. In every recent national election there are certainly hundreds of thousands, and possibly millions, of such frustrating encounters.

Sometimes it is the voter's fault. Americans change their residence often, and often they forget to re-register or do not know they need to do it. This mobility has the effect of taking much of the population back to the requirements of temporary, periodic registration that were so widespread early in the 20th century. A reform movement starting in the 1920s and 1930s eventually led to adoption of permanent voter registration in every state. That reform now needs to be adapted to our still more mobile society. A statewide voter registration system can capture most of this social mobility.

Sometimes voters are turned away because of administrative errors. Poll workers may overlook their names or not match them up with a different spelling. The poll workers usually still work from printed lists of voters produced for each precinct—a process that must begin weeks before Election Day. Staff in the offices that produce those lists can make clerical errors. Motor vehicle departments or social service agencies that receive registration applications may fail to get them, get them in the wrong form, or fail to forward them quickly enough.

The NVRA has also had the unanticipated effect of causing the disfranchisement of many thousands of the very people it sought to bring into the political process. Although the act does not require it, most states allow practically anyone to go out and register voters by taking and transmitting their mail-in applications. These people thus act in effect as deputy registrars. Election administrators we have encountered in every part of the country tell us of numerous cases where these unofficial registrars, often meaning well, mishandle or lose such applications.<sup>25</sup> The applicants, of course, rightly believe they have registered. Then they show up on Election Day and find out they are not on the list.<sup>26</sup>

## Provisional Voting

The NVRA tried to tackle the problem of frustrated voters who are not found on voter lists with a set of mandates on "fail-safe" voting. Though these provisions are complicated enough to confuse experts, our best summary of what the NVRA requires is this: let us suppose a voter does not show up on a voter list because the voter has moved, or perhaps the registrar erroneously thinks the voter had moved. The state must still let the voter cast some sort of ballot if the voter is registered in that jurisdiction and claims to have stayed in the same registrar's jurisdiction (usually a county). Such a fail-safe ballot must be made available whether or not the registrar has sent a mailing to confirm the voter's new address and whether or not the voter has replied to such a mailing, if the voter is willing to swear to or (in special circumstances) present evidence to verify the claim. States can decide whether the person should vote at their old or new polling place.<sup>27</sup>

State practice follows no set pattern. Some states have very broad provision for fail-safe voting. A provisional ballot was pioneered more than ten years ago by California and Washington state (where it is called a special ballot). Nineteen states use provisional ballots to comply with NVRA. Florida has just adopted the provisional ballot in its new election law. These states include a majority of the voting-age population of the United States. Other states have a wide variety of procedures to comply with NVRA. Several states do not appear to comply with the "fail-safe" provisions of the Act at all.<sup>28</sup>

The NVRA's fail-safe provisions are oriented to voter files held by counties and cities. We have recommended adoption of statewide voter registration systems that are networked to local election jurisdictions. Our vision of provisional balloting is connected to this different world in which there are more accurate state voter files. In both we are motivated by a consistent goal: No American qualified to vote anywhere in her or his state should be turned away from a polling place in that state.

### -- Policy Recommendation --

**Every state should permit provisional voting by any voter who claims to be qualified to vote in that state.**

1. Provisional voting authorizes any person whose name does not appear on the list of registered voters, but who wishes to vote, to be issued a ballot. The ballot shall be counted only upon verification by election officials that the provisional voter is eligible and qualified to vote within the state and only for the offices for which the voter is qualified to vote.

2. Another option, for states with statewide computerized voting lists, would be to let a voter who is not on the list submit proof of identification and swear to or affirm an appropriate affidavit of eligibility to vote in that jurisdiction. This information could then be used as an application for voter registration and the voter list would be amended accordingly. If qualified, the voter could either be issued a regular ballot or, if the state preferred, be allowed to vote provisionally pending confirmation of the voter's eligibility.

The model for this recommendation is the provisional voting system used in the state of Washington. A provisional ballot is offered to defer resolution of arguments about eligibility, whether because people have moved, or claim they have no criminal record, or claim not to have received their absentee ballot, or because of other disputes. Washington also issues a "special ballot" to voters who have moved into a new county or have moved from another state. After the election, officials research the eligibility issue. If the voter is eligible to vote in another jurisdiction within the state, they mail the ballot there to be tallied. We think such an effort to relay ballots may not be possible in every state. That is why, instead, we have suggested counting such ballots as limited ballots, valid only for those races in which the voter was qualified to vote. California applies a similar law, but does so only within the counties. In Washington's King County (with the city of Seattle) about 17,000 such special ballots were cast, about 2% of the total, and 78% were eventually found valid and tallied. In California's Los Angeles County more than 100,000 provisional ballots were cast, about 4% of the total, of which 61% were ultimately tallied either fully or in part (depending on the contests in which the voter was entitled to vote). Provisional voting has three key advantages:

\_ Eligible voters are no longer turned away at the polls.

\_ Election administration is easier and more efficient. Poll workers have an easier option to handle angry, frustrated voters. These often ill-trained and low-paid temporary workers do not have to research or resolve cases on the spot, while other voters impatiently wait in line. Nor are more senior election officials tied down in resolving such questions during Election Day.

\_ Voter registration becomes more accurate. The process becomes another way to amend registrations for people who evidently wish to vote. Officials can catch and correct mistakes and the research process, by helping senior administrators notice which problems are causing the mistakes, thus can help many other current and potential voters.

Some caveats about this policy recommendation are in order, however. We certainly support county-wide provisional voting procedures. Our more ambitious recommendation of statewide provisional voting is linked to establishment of a statewide computerized voter file, networked to local jurisdictions, as we have also recommended.

That networking can help local officials check voter eligibility and note whether and where the voter has voted.

Our recommendation also would penalize voter error. If a voter turns up in the wrong jurisdiction within the state, states should not have to require local jurisdictions to somehow provide a ballot tailored for the voter's proper home jurisdiction. In such cases the voter would, in effect, be receiving a limited ballot, in that officials would only count the choices the voter can mark and is eligible to make on the ballot that is offered in the place he or she has chosen to vote.<sup>30</sup>

Post-election research does take time and money, similar to the staff resources required for processing absentee ballots. Handling the 17,000 "special ballots" in Washington's King County occupied 15 staff for nine days. Commission staff directly observed how the process worked in the counting rooms of Los Angeles County, which included individual verification of signatures. There the easy ballots took 5-10 minutes, the hard ones up to an hour to reconcile, so that administrators estimate it takes 30 staff two weeks to count 12,000 provisional ballots.

Since provisional ballots can mean additional work, like absentee and overseas military ballots, some officials are reluctant to count them. In at least some local jurisdictions, such ballots are not even counted in a national election if they are not numerous enough to make any predictable difference in the outcome of the presidential race, or whatever race is at the top of the ballot. This little noticed practice is disturbing, partly because every vote should count and partly because those ballots might still make a difference in some of the less publicized 'down-ballot' contests. This is one reason why the Commission recommends that any provisional voting plan should require that all provisional ballots be counted and included in the certified results.

Like the growing use of absentee ballots, use of provisional ballots slows official election counts. Although jurisdictions that receive many such ballots have not yet encountered major problems, growing use of provisional ballots may oblige some states to extend their current deadlines for certification of elections.

### **"Same Day" Registration?**

Election day, or "same day" voter registration has been proposed as a way of making it easier for citizens to register and vote (or as a way to get an exemption from the strictures of the NVRA). As a result of court rulings and legislation, no state has either a registration deadline or a residency requirement that extends more than 30 days before an election. But "same day" voter registration, already the law in six smaller states, is being considered by others-even California.



We make no recommendation on the appropriate deadline for voter registration. There is some evidence that "same day" voter registration might have a modest (5-8%) effect in improving voter turnout. But that evidence was largely gathered in elections before voter registration was simplified around the country by adoption of NVRA. In 1996, the next presidential election after passage of NVRA, voter registration was up but voter turnout was down.<sup>31</sup> Nor is there much evidence on how durable such an added effect may be.

Even if there is a slight turnout benefit in allowing "same day" registration, that benefit must be substantial enough to outweigh the added administrative burden election officials would have to shoulder in states, especially large states, that strongly prefer to register voters in advance of Election Day so that they will not have to confront a deluge of new registrants at thousands of polling places. Another disadvantage of "same day" registration is the lost opportunity for voter education. Voters registered weeks before Election Day are often mailed information such as sample ballots, the location of their polling place, and a voter manual.

As a practical matter, large jurisdictions need a few weeks before Election Day in order to prepare and distribute the lists of voters to all the polling places. If registration deadlines are set shortly before an election, many voters will not be included in the printed lists. Their omission will thus dramatically increase the number of provisional votes to be counted on and after Election Day which, as we mentioned, takes time. This is one reason why veteran administrators believe that citizens can have "same day" voter registration in large states, or they can have "same day" election results, but they are unlikely to be able to have both.

Although we have not adopted a recommendation for "same day" registration, we do agree that states requiring advance registration need to make some allowance for citizens who have just moved to their new home. We have already noted repeatedly how mobile our population is, and a large number of these moves occurs in the month or two before a November election. No person should be denied the right to vote in a federal election just because that person has changed his or her residence shortly before an election.

This goal can be recognized within the allowance for provisional voting that we have recommended above. If a voter does not show up on the voter lists because the voter has moved to the jurisdiction shortly before Election Day, we recommend that states allow such voters to cast a provisional ballot, especially if the voter is prepared to offer some type of proof that they have established such a new residence. In such cases, as in Michigan, the provisional or affidavit ballot can then also become a tool for registering a new voter and amending the statewide voter list accordingly.

## **Improving Voter Participation**

If we want to encourage eligible voters to turn out, a good place to start is to ask those citizens who did not vote, "Why?" After the 2000 election the Census Bureau posed this question to thousands of non-voters. Here are the top ten reasons that non-voters gave for not voting:

- 1 Too busy, conflicting work or school schedule 22.6%
- 2 Illness or disability 16.0%
- 3 Not interested, felt my vote wouldn't matter 13.2%
- 4 Out of town or away from home 11.0%
- 5 Didn't like candidates or campaign issues 8.3%
- 6 Registration problems 7.4%
- 7 Forgot 4.3%
- 8 Inconvenient polling place or hours or  
lines too long 2.8%
- 9 Transportation problems 2.6%
- 10 Bad weather conditions 0.7%

Registration problems are relatively low on the list, and concerns about convenient access to polling places or the hours they are open are lower still.

We are concerned about whether our system does enough to welcome eligible, disabled voters to the polls. Allowing absentee voting is not a sufficient solution. We believe Americans with disabilities should have the same right as their fellow citizens to be able to vote at the polls on Election Day. Poll workers should be trained to respect this right.

This concern is not new. In 1984 Congress enacted the Voting Accessibility for the Elderly and Handicapped Act. Broader protections were adopted in 1990 in the Americans with Disabilities Act of 1990 (ADA). Courts have held that Title II of that Act applies to all elections and requires election jurisdictions to make adequate numbers of polling places accessible to voters with physical disabilities.<sup>32</sup> The General Accounting Office is completing a substantial study of voting and the disabled, to be published later in 2001, that we expect will shed much more light on the extent of compliance and noncompliance with the ADA. That law does create a right of private action to enforce its provisions, so pressure on governments to provide the required physical access may grow.

As that pressure grows, state and local officials face a difficult tradeoff. On the one hand they want to expand or maintain a large number of polling places. On the other hand, the only polling places they can often rely on to be accessible to Americans with disabilities are those in a relatively small number of public buildings, particularly in

public schools. Rebuilding requirements should not be mandatorily imposed on private buildings, like churches, just as a cost of being able to borrow them from time to time as polling places. So this issue seems to require very particular state and local assessments of what can be done, especially as more and more private buildings around the country become ADA-compliant. But we think the laws on the books are sufficient to encourage continued progress.

### **Election Day Holiday**

One way of addressing the shortage of accessible polling places, low voter turnout, and the challenge of recruiting poll workers is to move or redefine Election Day. There are calls to establish a national holiday on Election Day. Others have suggested turning Election Day into an Election Weekend or opening the polls for much longer portions of the day. However, many local jurisdictions already have difficulty finding qualified poll workers to staff current polling hours. There is also little evidence that longer hours would have much effect on voter turnout.

The idea of a national holiday is better founded. It would help working people vote without having to hire poll workers to staff added or longer shifts. Skeptics counter that many Americans will find other things to do with a holiday than go to the polls. Some election administrators who have experience with local elections held on weekends observe no particular benefit in voter turnout. Putting aside those clashing speculations about turnout, a holiday has other advantages for election administration. More public buildings, especially schools, would be available for use as polling places.<sup>33</sup> More, and better trained, poll workers might be available to staff polling places. Several encouraging programs have been created around the nation to engage civic-minded high school and college students to work at the polls on Election Day and a holiday from classes may release more students into the pool of potential candidates. Notably, at our Ann Arbor hearing we heard testimony from Congressman Steny Hoyer about his proposed 'Help America Vote' (HAV). HAV will make money available to colleges and universities across the United States to recruit and train students to be poll workers, helping to solve the poll worker shortage and, at the same time, helping to spark young people's interest and participation in elections. Similarly the nonpartisan effort to create a Youth Voter Corps is a promising idea for how to encourage and train school and election administrators to recruit and energize high school students as poll workers and poll watchers.

True, national holidays are very expensive, mainly to employers.<sup>34</sup> But these employers have already assumed the cost of a national holiday every year during the second week of November-Veterans Day. That leads us to an idea with considerable civic virtue as well as practical merit.

### **\_\_ Policy Recommendation \_\_**

**Congress should enact legislation to hold presidential and congressional elections on a national holiday.**

1. Holding national elections on a national holiday will increase availability of poll workers and suitable polling places and might make voting easier for some workers.
2. One approach, which this Commission favors, would be to specify that in even numbered years the Veterans Day national holiday be held on the Tuesday next after the first Monday in November and serve also as our Election Day.

Veterans Day honors those who have served in the armed forces and those who died in the service of this country. It originated as Armistice Day, set aside to commemorate the end of the First World War on November 11, 1918. After World War II it became a day of tribute to the veterans and those who lost their lives in that conflict as well. In 1954, after the Korean War, the date was officially designated as Veterans Day to honor those who served in all the nation's wars.<sup>35</sup> After being moved into October for several years, Veterans Day was moved back to November 11, but is generally observed on the second Monday of November.

Could Congress establish a national holiday on which elections were held? The Constitution grants Congress the power to set the date of congressional elections and the time at which presidential electors are chosen. A federal statute now places Election Day on the "Tuesday next after the first Monday in November."<sup>36</sup> And it would be a reasonable corollary to this power for Congress to declare Election Day a national holiday.

Whenever this proposal is mentioned, politicians tell us, almost as a reflex, that veterans groups may not like it. Certainly veterans groups will have a decisive say in any adjustment in the Veterans Day national holiday, and well they should. But such an automatic assumption about their views may underestimate the people who lead these groups, and the men and women who belong to them. Starting with our chairmen, we understand the perspectives of veterans. Gerald Ford is a combat veteran who served with the Navy in the Pacific Theater in World War II. Jimmy Carter is a graduate of Annapolis who served as a naval officer from 1946 to 1953. Bob Michel is a decorated combat veteran who served with the Army in the European Theater in World War II. Lloyd Cutler served during that conflict as well. So we would not endorse any idea that would dilute the significance of Veterans Day, and what it represents.

For many Americans, Veterans Day is a day for ceremony and remembrance, ceremonies often held at the gravesites of soldiers, sailors, and airmen. That is fitting. We reflected on the notion of holding the supreme national exercise of our freedom on

the day we honor those who preserved it. On reflection, we found something very fitting about that too. There is time enough to do both these things, once every two years. Perhaps some veterans organizations may even encourage some of their members to serve again, at the nation's polling places, as one way to start or finish this day. We certainly hope that the private sector will permit and even encourage their employees to volunteer in this way. Many businesses are already setting a good example.

### **Military and Overseas Voting**

It is in this context that we turn to the problems encountered by servicemen and women when they try to cast their own votes. Understandably, voter turnout among members of the armed forces is very high. So too is the level of frustration when their votes cannot be counted through no fault of their own. The most serious problems are:

\_ The time needed to apply for an absentee ballot, receive one, and return it, especially when each of these three steps requires a mailing to and from someone stationed overseas. This is not a new problem. One of our co-chairs, Bob Michel, recalls applying for an absentee ballot while moving with his unit across France well before the election of 1944, but not receiving it until he was trying to fight into Germany well after the election was over. He mailed it in anyway, sure that he wanted to vote though he was not so sure that anyone would count it.

\_ Numerous and varying local requirements for ballot return, registration deadlines, and ballot format.

In 1986 Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to help eligible members of the armed services and their families, and other citizens overseas, to vote. The GAO estimates that UOCAVA covers more than six million U.S. citizens, including 2.7 million active military personnel and their relatives.<sup>37</sup>

We have already recommended adoption of statewide voter registration systems and new procedures for provisional voting. Those innovations can yield a further payoff here, allowing a more streamlined process for getting and voting absentee ballots from citizens living overseas. Overseas and military ballots should also be counted according to uniform statewide rules. We emphasize later, in Chapter VI, the importance of having foreseeable, objective, statewide standards for defining what constitutes a vote. That applies to absentee ballots too.

### **\_\_ Policy Recommendation \_\_ \_\_**

**Congress should adopt legislation that simplifies and facilitates absentee voting by uniformed and overseas citizens.**

1. Each state should designate a responsible official for absentee voting by uniformed and overseas citizens who are residents of that state. That official should become the single point of contact for the citizens of that state who are served by the Federal Voting Assistance Program, which helps such uniformed and overseas citizens.<sup>38</sup>

2. In 1986 Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to help eligible members of the armed services and their families, and other citizens overseas, to vote. Utilizing standardized forms for voter registration and absentee ballot requests, all UOCAVA-covered residents from a home state should be authorized to mail these applications to the designated official for their state.<sup>39</sup> If that state uses a statewide voter registration system networked to local jurisdictions, as we have recommended, the state official should be authorized to act directly on these applications or to forward them for action by the appropriate local jurisdiction. States should accept one absentee ballot application as a valid application for all subsequent elections being held by that state in that year.

3. The designated state official should be authorized to accept either a voted ballot being returned for any jurisdiction of that state or a standardized Federal Write-In Absentee Ballot that is an option for a UOCAVA-covered citizen. States should be obliged to accept and tally a Federal Write-In Absentee Ballot for those contests in which they determine the voter was eligible to vote.<sup>40</sup>

4. Properly filed absentee ballots should be accepted if they have been received by the time the polls of that state have closed on Election Day. States and the Federal Voting Assistance Program should develop common standards for validation of ballots that have been voted and mailed on or before Election Day, even if they are received after that date.

**Early, Remote, and Internet Voting**

We wish to comment on one final trend to encourage eligible voters to participate. It is a trend that troubles us, however. This is the increasing adoption of procedures that encourage "no excuse" absentee voting, early voting, and voting-by-mail. Though this trend is justified as promoting voter turnout, the evidence for this effect is thin.<sup>41</sup> Analysts have even noted the possibility that voter turnout in such states may eventually decline, as the civic significance of Election Day loses its meaning.

This trend is adopted in the name of voter turnout, but often seems to be motivated at least as much by considerations of administrative convenience and saving money. More

votes by mail mean less need for polling places and poll workers.

The benefits of the new remote and early voting schemes should be weighed against some important costs and dangers:

\_ Federal law states that presidential elections should be held on the same day throughout the nation.<sup>42</sup> Courts nonetheless have understandably been reluctant to invalidate state laws on this basis. But we believe the statutory plan offers wise guidance.

\_ Citizens should vote with a common base of information about candidates. If they vote over a period of weeks before Election Day, they vote based on the knowledge available on a scattering of different dates.

\_ Wherever possible, citizens should vote alone and in secret. The United States adopted the secret ballot a century ago in order to help voters resist pressure to disclose their choices, whether to relatives or to interested "friends." Permissive early voting threatens the hard won right to a secret ballot.

\_ The institution of a national Election Day is one of the only remaining occasions in which Americans come together as a nation to perform a collective civic duty. We think rituals and ceremonies do have a part in forming a nation's traditions and habits. We think this one should not be discarded lightly.

\_ Growing use of absentee voting has turned this area of voting into the most likely opportunity for election fraud now encountered by law enforcement officials. These cases are especially difficult to prosecute, since the misuse of a voter's ballot or the pressure on voters occurs away from the polling place or any other outside scrutiny.<sup>43</sup> These opportunities for abuse should be contained, not enlarged.

\_ Absentee ballots are often counted last. As their numbers rise, timely reporting of election results is more difficult. After Election Day 2000 California alone had more than a million absentee ballots waiting to be tallied over the following weeks.

We know how difficult it will be for states that have already adopted such practices to roll them back. We do hope to do what we can to undermine the hitherto largely uncritical acceptance of this "convenient" trend and discourage states that have not yet traveled down this problematical path.

Our concerns about early and remote voting plans are even stronger as we contemplate the possibility of Internet voting. In addition to the more general objections, the Commission has heard persuasive testimony that Internet voting brings a fresh set of technical and security dangers all its own.<sup>44</sup> This is an idea whose time most certainly has not yet come.

### **Citizens with Criminal Records**

We also considered the issue of felon disenfranchisement. Almost all the states provide that citizens lose their right to vote, at least temporarily, if they are convicted of a felony. States vary in the crimes that trigger this disenfranchisement. Also, in some states felons only lose the right to vote while they are in prison. In others they can petition for restoration of their voting rights. In others the loss of the franchise is permanent and irrevocable. In states that enact a permanent loss of the right to vote, this feature combined with the demographics of the criminal justice system produces a significant and disproportionate effect on black citizens, to the extent that as many as one-sixth of the black population is permanently disenfranchised in some states.

The practice of denying the vote to individuals convicted of certain crimes is a very old one that existed under English law, in the colonies, and in the earliest suffrage laws of the states. But these laws have evolved. Over the last forty years the most significant trends in the treatment of felons and voting have been that states have narrowed the list of relevant crimes, and more than 15 states have eliminated lifetime disenfranchisement, making the loss temporary or creating some procedure that could allow restoration.<sup>45</sup>

Except in the rare case where a felon disenfranchisement law was provably passed with the intent of disenfranchising black voters, the courts have held that such laws are constitutional. The U.S. Supreme Court has specifically ruled that these laws do not violate the Equal Protection Clause, as there is language in Section 2 of the Fourteenth Amendment that appears to carve out a specific exception allowing denial of the right to vote "for participation in rebellion, or other crime." Taken together with the Qualifications Clause's grant to state governments of responsibility for determining eligibility to vote, we doubt that Congress has the constitutional power to legislate a federal prescription on this subject.<sup>46</sup>

We believe the question of whether felons should lose the right to vote is one that requires a moral judgment by the citizens of each state. In this realm we have no special advantage of experience or wisdom that entitles us to instruct them. We can say, however, that we are equally modest about our ability to judge the individual circumstances of all the citizens convicted of felonies.



Therefore, since the judicial process attempts to tailor the punishment to the individual crime, we think a strong case can be made in favor of restoration of voting rights when an individual has completed the full sentence the process chose to impose, including any period of probation or parole. In those states that disagree with our recommendation and choose to disfranchise felons for life, we recommend that they at least include some provision that will grant some scope for reconsidering this edict in particular cases, just as the sovereign reserves some power of clemency even for those convicted of the most serious crimes.

### **-- Policy Recommendation --**

**Each state should allow for restoration of voting rights to otherwise eligible citizens who have been convicted of a felony once they have fully served their sentence, including any term of probation or parole.**

### **Ensuring the Voting Rights of All Citizens**

Voting rights in the United States have come a long way since the bloodshed and political strife of the 1960s. The Voting Rights Act and related legislation have outlawed and dramatically reduced most forms of voter discrimination and disfranchisement. There are still instances, however, where these laws are violated and not enforced. The Commission has heard testimony-as have Congress and others studying election reform-of instances where the election system did not work equally for all citizens or groups of citizens. In response to court decisions, Congress amended the Voting Rights Act to make clear that proof of racial animus or intent to discriminate is not necessary to find a violation of law. Practices that have a racially disparate impact can suffice if, based on the totality of circumstances, equal opportunity to participate in the political process has been abridged.

Moreover, it is critical that all Americans have confidence in our electoral system, and we should strive to eliminate any reasonable perception that the basic mechanisms of democratic participation favor some citizens over others. No voter should ever feel that the process of voting was intimidating or that there were improper barriers, either intentional or unintentional, that prevented the exercise of their right to vote.

A number of civil rights organizations have alleged that minority voters are discriminated against because of the greater use of inferior voting technologies in heavily minority and low-income districts, perhaps in combination with such other factors as inadequate numbers of well trained poll workers in those same districts. For example, several studies and news accounts in the last several months point to poor technologies and other factors as possible explanations for the very troubling observation that the

proportions of uncounted ballots are often higher, sometimes dramatically so, in precincts and counties with heavily minority populations. Nor is this just an issue of race. Elsewhere in this report we address the difficulties, some of them illegal, faced by voters with disabilities.

Voters and election administrators also told us that the provisions of the NVRA are not being followed or enforced as Congress intended. For example, in our task force work we heard many stories of public agencies that are responsible for offering and processing voter registration but do not offer registration as required, or do not complete the paperwork accurately, or do not transmit the applications in a timely manner to election administrators. When such agencies make these mistakes, voters often show up to the polls to find they are not on the voting list, and hence are denied the ability to vote. Some have alleged that such failures by these public entities have had a discriminatory impact. (Our recommendations concerning provisional ballots and state-wide voter lists will only help with some of these problems.)

Finally, one other area that should be closely watched is the level of service provided to language minority voters. Data from the 2000 Census show that our nation's ethnic minority populations have grown dramatically over the past decade, and the growth can be expected to continue. Many of our new citizens are not yet fluent in English and need ballots written in their native language. Many of them also come from countries that do not have a democratic tradition of voting, and they are unfamiliar with our election processes. They may also be unaccustomed to questioning or challenging a poll worker who has the trappings of official authority. Election administrators must ensure that language minority voters receive the assistance at the polls that is legally required-and wherever feasible go beyond that to provide what the voter actually needs-such as translators, bilingual poll workers, translated voter education materials, and assistance in the voting booth. Interest groups that represent language minority voters should work with their local elections administrators to assist in recruiting translators and bilingual poll workers to assist in polling places. Voter education is especially important for these citizens. Los Angeles, for example, tries to prevent many problems at the polls by providing translated sample ballots to voters before every election.

#### **\_\_ Policy Recommendation \_\_**

**The state and federal governments should take additional steps to assure the voting rights of all citizens and to enforce the principle of one person, one vote.**

1. Federal and state governments should intensify efforts to enforce compliance with the several statutes guaranteeing the right to vote and prohibiting various forms of discrimination in voting and registration.

2. The methods for funding and administering elections-from investments in equipment through voter education to procedures at the polling place-should seek to ensure that every qualified citizen has an equal opportunity to vote and that every individual's vote is equally effective. No individual, group, or community should be left with a justified belief that the electoral process works less well for some than for others.

3. Federal and state governments should consider uses of technology, for example when developing voting equipment system standards, that will make it feasible to provide greater assistance to language minorities.

There are important opportunities to lower barriers by using emerging technologies, as we discuss in the next chapter. Specifically the newer, programmable ATM-like machines, can make translated ballots more readily available for a wider range of language minorities, on demand. The Commission saw a demonstration of equipment used in some southern California voting places that allows voters to choose a ballot in English, Cantonese, Japanese, Korean, Spanish, Tagalog and Vietnamese. The Voting Rights Act requires jurisdictions to provide various forms of language assistance when that language group exceeds a threshold population in the country. The statutory thresholds reflect a balancing of voter need and administrative burden. With shifting technology and accelerating demographic change, jurisdictions will have opportunities to consider, on a voluntary basis, striking a different balance. The same technologies offer potential advantages to people who are blind or visually impaired, because audio equipment can be readily incorporated.

Many of the problems that occur in elections are caused or exacerbated by poll workers who were not fully educated about the rights of voters. We heard testimony that the electoral system works most effectively when poll workers are well educated about the rights of voters and the procedures for handling voters with special needs. Additionally, when all states implement the provisional balloting recommendation made by the Commission, no voter will ever need to be turned away from a polling place again.

Of course, administration of elections is likely to be more effective, and the effectuation of voting rights more complete, if voters understand both their rights and their obligations. The Commission heard witnesses describe the importance of educating voters about how the process works. We heard about the lack of effective civics education in our schools, which should be providing the bedrock of citizens' knowledge about the electoral process, as well as providing some inoculation against the civic cynicism that leads too many citizens to opt out of democratic participation. Election officials should continue their efforts to educate voters through the use of sample ballots, voter pamphlets, demonstration equipment, and public outreach in a broad and diverse range of settings.

No one should believe, however, that poll worker training and voter education alone will eliminate the disparities in the performance of election systems across communities. Nor can campaigns to promote voter awareness, especially when framed as obligations of the individual voter, substitute for concerted efforts by officials to obey the law.

**V.**

## **A Democratic Process**

*which Uses Equipment that Reliably  
Clarifies and Registers the Voter's Choices*

In the 2000 presidential election, more than two million voters went to the polls but did not have any vote counted in the race for president. Specialists call these votes in which no choice is counted "residual votes." These millions of voters either spoiled their ballots by overvoting (appearing to vote for more than one candidate), or by undervoting, i.e., they marked their choice in a manner that could not be counted, or they marked no choice at all—accidentally or intentionally.

In addition to those two million voters, some further, unknown number of voters may have had their votes counted, but voted for a different candidate than the one they were trying to choose. No one can know how often this happens. But some initial research disturbingly suggests that a significant number of voters commit errors simply because some voting systems are badly designed.<sup>47</sup> In addition, large numbers of disabled individuals encounter difficulty in using certain kinds of voting equipment at all, or cannot do so without disclosing their vote to others.

Every analyst of voting equipment agrees that the number of residual votes and the rate of voter error is greatly affected by the kind of equipment that is used. An important precept in "human usability engineering" (to use a technical term) is that predictably high levels of user error are evidence of system failure, just as constant complaints that people cannot seem to "follow instructions" are usually symptoms of flawed instructions or faulty system design.<sup>48</sup>

These effects matter. They matter in principle, since the choice of voting equipment should not be the reason why hundreds of thousands of votes will not be counted. They also matter in practice, since elections are frequently very, very close.

## **Very Close Elections Happen- Often**

Some might wonder if the extraordinary closeness of the 2000 vote in Florida was just a unique anomaly in American politics. But elections where the margin of error is as little as one percent or less are common.

In presidential elections since 1948, nearly half of all the states have had at least one occasion when the winner of their electoral votes was decided by less than one percent of the vote. In 1948 Truman carried California and Illinois each by margins of less than 1%; had he lost both states the election would have gone to the House of Representatives for decision. In 1960 the winner in six states was decided by this tiny margin, more than enough to have changed the outcome.<sup>49</sup> In 2000 the winners in four other states, in addition to Florida, was decided by less than 1% of the vote.<sup>50</sup> In a given election, past experience indicates a 90% chance that at least one state will have a presidential election decided within such a 1% technological margin of error. Very close elections are also common in elections for other federal offices or for governor. Since 1948 half of the states have had at least one senatorial race decided by less than 1% of the vote; some have had as many as three such narrowly decided senatorial races.

## **Benchmarks, Not Mandates**

Voting equipment is generally selected by local election jurisdictions, usually counties. Different kinds of systems are therefore used all over the country. There are five basic kinds of systems. In order of the percentage of people using them in 2000, they are:

Punch Card 34.4%  
Marksense (Optical Scan) 27.5  
Lever 17.8  
Electronic (DRE) 10.7  
Paper Ballots 1.3  
Mixed (within county) 8.1

During the last twenty years the biggest technological trend has been the shift away from lever machines toward newer electronic equipment, specifically optical scan types and the Direct Read Electronic (DRE, or touch-screen, ATM-like) machines. Punch card usage has held steady.<sup>51</sup> Various fixes have been proposed for improving voting equipment. One of the most popular is the idea of abolishing or buying out punch card voting machines.

We do not think, however, that the federal government can effectively pick winners and losers in rapidly evolving competition among private sellers of voting equipment. Nor do we think one size will fit all-for several reasons:

\_ The performance of voting systems is affected by several inputs that go beyond the equipment. Some of the most important are ballot design, voter education, and the skill and training of poll workers. Some administrators believe, with cause, that they can get more improvements, dollar for dollar, from voter education and poll worker training than they can from investments in new equipment.

\_ Punch card systems sometimes serve specific local needs. With a punch card machine, each voter just needs a blank punch card. With an optical scan machine, each voter needs a separate ballot. In Los Angeles County, with its 4 million voters, long ballots with many offices and propositions, and requirement to offer ballots in seven different languages (soon to be ten), punch cards thus make much more sense than optical scanners-at least unless enough money can be found to upgrade to high quality DRE (touch screen) machines.

\_ Punch card systems can be very different. The Datavote system, for instance, seems to have a much better performance record than the Votomatic-style systems most familiar from the television coverage of the Florida election.<sup>52</sup>

\_ Optical scan systems and DRE (touch-screen) systems can also be quite different. The different brands of optical scan systems vary, especially between those that are centrally counted and the precinct count systems that allow voters to correct errors. The earliest DRE systems had relatively high rates of voter error, which are now apparently being significantly reduced by more modern hardware and more sophisticated software designs that improve the user interface.<sup>53</sup>

These considerations lead us to favor a strategy of focusing on outputs rather than inputs for measuring improvements in the accuracy with which votes are counted. A benchmark expressed as a maximum acceptable percentage of residual votes would allow each state to set a standard for reliable performance and require election jurisdictions to disclose and be accountable to the public for how they did. This strategy lets state and local managers decide how they want to tackle the problem but gives citizens and their elected representatives a clear standard for judging the results.

#### **\_\_ Policy Recommendation \_\_**

**Each state should set a benchmark for voting system performance, uniform for that state in each local jurisdiction that conducts elections. The benchmark**

**should be expressed as a percentage of residual vote (the combination of overvotes, spoiled votes, and undervotes) in the contest at the top of the ballot and should take account of deliberate decisions of voters not to make a choice.**

1. Benchmarks should consider the results obtained by best practices within that state, taking local circumstances into account. In general, we suggest that the benchmarks in the next election cycle should be set no higher than 2%, with the goal of further reductions in succeeding cycles.
2. Each state should require its election jurisdictions to issue a public report on the number of residual votes after every statewide election, including the probable causes of error, if any.
3. Each state should determine for itself how to hold its election jurisdictions accountable for achieving the benchmarks.

In considering an appropriate benchmark, officials must make allowance for the voters' right to choose no one at all. Some portion of the residual vote number comes from such intentional undervotes, which can vary considerably from place to place along with local culture and traditions.

Scholars have made progress, however, in suggesting how often this practice occurs. Survey questions from the National Election Studies indicate that on average, between 1980 and 2000, about three-quarters of 1% of voters (0.73%) deliberately made no choice in the presidential race. Exit polling data from the Voter News Service allows another check on this estimate. In 1992, the only year of sufficient data on this point, again about three-quarters of 1% of voters (0.77%) said they had chosen not to cast a vote for president. The number of candidates on the ballot and the availability of straight ticket voting appear to make no difference in these numbers. Voters are more likely to pass on the presidential contest when there is a senatorial or governor's race on the ballot, or when the presidential race was not competitive in that state. Based on this data, ethnic and partisan differences were unimportant, but older and poorer voters were more likely to skip a presidential race. Even where intentional undervotes were more frequent, the rate was still under 1%.<sup>54</sup> Another way of bounding the problem is to look at the same jurisdictions as they move from one voting technology to another. Where, as in Detroit, the rate of invalid presidential ballots goes from 3.1% in 1996 to 1.1% in 2000, after a shift from punch card to precinct-count optical scan technology, observers can see that machines make a difference. A broader study of many counties across the country that changed from lever machines to other technologies between 1988 to 2000, after controlling for several variables, indicates that the underlying residual vote rate, the percentage unrelated to the type of technology, is no higher than 2%.<sup>55</sup>

Since there is bound to be some understandable variation in local conditions, we are reluctant to mandate any single federal benchmark. States should set their own standards. We encourage states (and their citizens) to judge performance at four levels. Residual vote rates at or below 1% should be considered good. Residual vote rates between 1 and 2% can be viewed as adequate, but citizens should consider local circumstances and decide what is possible. Rates between 2 and 3% should be viewed as worrying. Rates higher than 3% should be considered unacceptable.

### **Benchmarks Applied- The Forty Most Populous Counties**

For a concrete illustration of how transparency and accountability can work, we apply this scale below to the forty most populous election jurisdictions in the United States. In judging performance it is better to assess particular counties or cities, rather than look at statewide averages that wash out the differences between jurisdictions that are using different types of machines. This list is ranked by percentages of residual vote in the 2000 election, from lowest to highest.<sup>56</sup>

#### **Good Zero to 1%**

Hennepin County, Minnesota (Minneapolis) 0.3%  
City of Milwaukee, Wisconsin 0.3  
St. Louis County, Missouri (St. Louis) 0.3  
Dallas County, Texas (Dallas) 0.4  
King County, Washington (Seattle) 0.7  
Oakland County, Michigan 0.7  
Suffolk County, New York 0.7  
Bergen County, New Jersey 0.7  
Franklin County, Ohio (Columbus) 0.8  
Orange County, California 0.8  
Bexar County, Texas (San Antonio) 0.9  
Fairfax County, Virginia 0.9  
Riverside County, California 0.9  
Middlesex County, Massachusetts 1.0

#### **Adequate 1-2%**

Clark County, Nevada (Las Vegas) 1.1%  
Nassau County, New York 1.2  
Wayne County, Michigan (Detroit) 1.3  
Alameda County, California (Oakland) 1.5



Tarrant County, Texas (Fort Worth) 1.6  
Erie County, New York (Buffalo) 1.7  
Maricopa County, Arizona (Phoenix) 1.7  
Sacramento County, California (Sacramento) 1.7  
Santa Clara County, California (San Jose) 1.8  
Westchester County, New York 1.9  
San Bernardino County, California 2.0  
San Diego County, California (San Diego) 2.0

**Worrying 2-3%**

Pinellas County, Florida (St. Petersburg) 2.1%  
Harris County, Texas (Houston) 2.257  
Broward County, Florida (Fort Lauderdale) 2.5  
Cuyahoga County, Ohio (Cleveland) 2.7  
Los Angeles County, California (Los Angeles) 2.7

**Unacceptable Above 3%**

Manhattan County, New York 3.2%  
Queens County, New York 3.5  
Kings County, New York (Brooklyn) 4.0  
Miami-Dade County, Florida (Miami) 4.4  
Bronx County, New York 4.7  
Cook County, Illinois (Chicago) 6.2  
Palm Beach County, Florida 6.4

Philadelphia County, Pennsylvania (Philadelphia) and Allegheny County, Pennsylvania (which includes Pittsburgh) did not report total voter turnout.

This table highlights only forty out of the hundreds of counties in the United States. It also lists only urban counties, yet some of the most serious residual vote problems are in rural counties that are often especially short of resources. There are many counties in the United States with double-digit percentages of residual votes.

Setting benchmarks always has a downside. People may try hard to meet them. Sometimes they try too hard and create new problems. For instance, legislators will need to be more careful to be sure the data they receive is accurate. They should be watchful for any efforts that discourage less capable voters from attempting to cast a ballot. Officials will also have a strong incentive to count every vote. That is good. But, given that incentive, it is vital to be sure that election jurisdictions in a state share common, reasonably objective definitions of just what constitutes a vote-an issue we will take up in Chapter VI of this report.

## **Standards for More Effective and Accessible Voting Technology**

As computer technology was used more and more in voting, the FEC's small Office of Election Administration prepared a set of Voting System Standards, approved in 1990, to guide the certification of machines by state and local administrators. The standards have been adopted by 32 states. The National Association of State Election Directors chooses independent testing authorities (ITAs) to examine systems and determine whether they meet the federal standards. Implementation of the standards through the ITAs has been going on since 1995. The FEC is now preparing an updated set of standards for adoption this year.

This system provides a good foundation. But every aspect of it needs to be built up. Overhauling and simplifying the system is vital to encouraging innovation in the research and development of voting technology. Indeed, an able task force made up exclusively of state and local election administrators, organized under the auspices of the Elections Center, took "an unprecedented leap in recommending a more active federal involvement in developing standards for the processes involved in conducting elections." "[W]ith some trepidation" this task force of administrators decided in favor of "a major departure from an historic 'hands-off' attitude toward the federal government" and called for active federal involvement "in development and maintenance of, not only vote counting system standards, but operational standards and guidelines as well."<sup>58</sup> We agree.

### **\_\_ Policy Recommendation \_\_**

**The federal government should develop a comprehensive set of voting equipment system standards for the benefit of state and local election administration.**

1. Congress should grant statutory authority to an appropriate federal agency to develop such standards in consultation with state and local election officials.
2. The scope of the voting system standards should include security (including a documentary audit for non-ballot systems), procedures for decertification as well as certification of both software and hardware, assessment of human usability, and operational guidelines for proper use and maintenance of the equipment. The agency should maintain a clearinghouse of information about experience in practice.
3. Voters should have the opportunity to correct errors at the precinct or other polling place, either within the voting equipment itself or in the operational guidelines to administrators for using the equipment.

4. Each voting tally system certified for use should include, as part of the certification, a proposed statement of what constitutes a proper vote in the design and operation of the system.

5. New voting equipment systems certified either by the federal government or by any state should provide a practical and effective means for voters with physical disabilities to cast a secret ballot.

6. In addition to developing the voting system standards, the federal agency should provide its own certification and decertification of hardware and software, including components in voter registration systems. These federal certifications and decertifications, like the remainder of the standards, will be recommendations to states which they can adopt or not.

7. This federal service should include selection and oversight of a federally supervised set of independent testing authorities who will apply the standards in assessing equipment. After the federal agency develops and approves the relevant voluntary voting system standards in consultation with state and local administrators, this further, technical task should be delegated to the highly regarded and relatively independent National Institute of Standards and Technology (NIST) of the Department of Commerce.

Our recommendation does not just expand the scope of the standards. We stress the importance, borne out in practice, of insuring that systems permit second-chance voting in some suitable form. We note that voting equipment designers should place on the record their assumption about what should be tallied as a vote under their system.

The accessibility of voting technology by disabled individuals is a serious problem. In an earlier section of the report we discussed the issue of physical access to polling places. Here we address the issue of whether voting machines are accessible to those who can actually get to them. Of particular concern is access for the millions of people who are blind or visually impaired. Our solution, in point five of this recommendation, is modeled on the Texas statute signed into law by then-Governor Bush in 1999. Senior election officials in Texas are satisfied so far with this statute, as are advocates for the blind and disabled.

Like the Texas law, this recommendation for accessible voting technology will tend to promote the future acquisition of DRE (touch-screen) electronic systems equipped with an audio feedback device. Such systems are already on the market. Local jurisdictions can also opt to buy just one such system for each polling place, although that may be administratively inconvenient. The standard can be met with marksense (optical scan) or even lever machines, but the adaptation is not easy.<sup>59</sup>

Finally, and very important to the reform of the research and development system in voting technology, we think the federal government should offer to relieve each state of the burden of performing a separate testing and certification of whether a system meets the guidelines, which in principle can require a system to be tested again and again and force dozens of individual states to acquire the technical expertise to oversee such a process. Now this task is coordinated by the National Association of State Election Directors. We recommend instead that a technically expert institution of the federal government perform this service capably and transparently. Many states may find this service extremely helpful. Private firms may also prefer this simpler and more expeditious process. Other states need not heed the federal conclusions and can run their own testing and certification processes. But citizens and their representatives may then ask proper questions about why or how their election administrators were persuaded to buy systems that NIST supervised testers found unacceptable.

## VI.

# A Democratic Process

## *that Handles Close Elections in a Foreseeable and Fair Way*

Everyone who observed the 2000 election crisis was struck by the sheer unreadiness of every part of the system to deal with a close election. Recount and contest laws were not designed for statewide challenges. The relevant state deadlines did not mesh well with the federal schedule. Each county made its own decisions about what, when, or whether to recount. In performing the recounts the definition of a vote varied from county to county, and from official to official within the counties. Lawsuits materialized across Florida, urging judges to construct law that would overcome the alleged deficiencies of the statutes. The principal television networks also found themselves unready to deal with a very close election. Unable to handle extremely close results carefully and accurately, they dealt with them negligently and inaccurately-and loudly too-erring assertively again and again during the course of Election Night and thereby affecting the course of the very history they were supposedly only trying to report.

### **Objective Vote Definitions and Foreseeable Post-Election Procedures**

A major part of the problem in Florida was that the vote counting process was so subjective and variable. The Supreme Court of the United States found such a standardless process to be unconstitutional, a violation of the Equal Protection Clause of the Constitution. Florida is not alone. Most state statutes do not specify a legal

standard for election officials to follow in recounting votes. Amorphous statutory references to the "intent of the voter" invite still more divinations.

To the maximum extent possible, partisans on either side should be able to foresee, before a recount, how a vote will be defined by the recounters. In other words, the definition of a vote should be as objective as possible and spelled out in clear language before Election Day.<sup>60</sup>

#### **\_\_ Policy Recommendation \_\_**

**Each state should adopt uniform statewide standards for defining what will constitute a vote on each category of voting equipment certified for use in that state. Statewide recount, election certification, and contest procedures should take account of the timelines for selection of presidential electors.**

1. Statewide standards for defining a vote in advance of an election should be uniform and as objective as possible.
2. Each state should reevaluate its election code to consider adopting a predictable sequence of: a) vote tabulation and retabulation; b) machine or manual recounts to encompass the entire jurisdiction of the office being recounted, triggered by whatever threshold the state may choose; c) certification of a final count; followed then by d) contests of the certification limited to allegations of fraud or other misconduct.
3. In such a sequence, each state should allow at least 21 days before requiring certification of the final count. But we recommend retention of a federal deadline under which the "safe harbor" for conclusive state determination of presidential electors will expire.
4. Each state should also develop a uniform design for the federal portion of the state ballot, for use in each of that state's certified voting equipment systems.

The Florida Election Reform Act of 2001 rewrote the rules for manual recounts of ballots. Its approach to the problem of statewide definitions of a vote, if there is a manual recount, was to start with a sound general principle, to count a vote if there is "a clear indication on the ballot that the voter has made a definite choice." The Department of State is then commanded to adopt specific rules for each certified voting system prescribing what will constitute such clear indications. The law provides two boundaries for such rulemaking. On the one hand, the Department of State may not "exclusively provide that the voter must properly mark or designate his or her choice on the ballot." On the other, the rules may not "contain a catch-all provision that fails to identify specific standards, such as 'any other mark or indication clearly indicating that the voter has made a definite choice.'"<sup>61</sup>

In other words, the Florida law requires that some allowance be made for at least some voter errors that nonetheless indicate a clear choice, while it also warns that the varieties of voter error that will be tallied in a manual recount must still be specified, and specified statewide, before such a recount begins. This strikes us as a reasonable and

necessary balance that states should endeavor to find in drafting their own standards, either in statute or in published administrative rules.

In examining the procedures for recounts and contests, we are struck-like practically all others who have taken such inventories-by the bewildering variety of procedures, criteria, and deadlines found around the country. We are opposed to any uniform federally imposed system. But in our mobile society, with national elections and media scrutiny, we think some rudimentary consistency of approach from one state to another may make the workings of an inherently contentious process more foreseeable and understandable.<sup>62</sup>

Our evaluation of best practices envisions the following model sequence:

\_ Initial machine tabulation (and retabulation) of ballots, including the tabulation of all absentee and provisional ballots. Given our recommendation of greater use of provisional ballots and the time line for counting overseas votes, we think that at least 14 days should be allocated for this process, even if states call for more immediate transmission of unofficial machine tabulations.

\_ Manual recounts, triggered by criteria set by each state (Florida's new law has a suggestive set), that should extend throughout the area in which the contest was on the ballot. These recounts would be guided by the uniform statewide standards mentioned above. The U.S. Supreme Court decision in *Bush v. Gore* appears to require this reform. Nonpartisan appointees should supervise them. We believe at least 7 days should be allocated for this process, especially if the recount is statewide.

\_ Certification of the final vote count. In large election jurisdictions, at least 21 days should be allowed before requiring certification. But at this point all issues regarding the tabulation of votes should be settled.

\_ Contests. These contests would concede the accuracy of the count, hence they are different from recounts. In a contest the argument should instead be that the votes that were counted should be invalidated because of fraud or other misconduct in the electoral process. Under Florida's old law, and the law of thirteen other states, the distinction between recounts and contests is blurred by allowing a contest for any reason that casts the election outcome in doubt. Florida has now adopted the distinction we recommend. Since contests can involve extensive litigation and taking of evidence about possible misconduct, however, we think the contest phase should clearly be separated from the vote count and certification process itself.

Congress has established a deadline of December 12, about five weeks after the election, by which states should resolve controversies about the appointment of a state's electors if they want their resolution to be binding on the Congress's own consideration of the dispute.<sup>63</sup> That due date allows enough time for counting and recounting ballots and some time for resolution of contests as well. The December 12 date was adopted at a time when presidents were not inaugurated until March of the following year. Presidents are now inaugurated on January 20, as a result of the 20th Amendment to the Constitution. Though we do not recommend pushing the "safe

harbor" deadline even earlier than December 12, we also do not recommend setting this date any later. A new president needs a decent opportunity to get the minimally necessary elements of a new administration into place.

### **Media Projections of Election Results**

On Election Night 2000 the major television news organizations (ABC, CBS, NBC, CNN, and Fox) and Associated Press made a series of dramatic journalistic errors. While polls were still open in Florida's panhandle, they projected that Vice President Gore had won the state. They later had to retract this projection. They also projected that Bush had won Florida and, with it, the presidency. Gore then moved to concede the election, beginning with a call to Governor Bush. He then had to retract that call, and the news organizations had to retract theirs. (Associated Press did not; it had not made the second error.) The first set of errors may have influenced voters in Florida and in other states where the polls were still open. The second set of errors irretrievably influenced public perceptions of the apparent victor in the election, which then affected the subsequent controversy over the outcome in Florida.

These problems are not new and are not limited to close elections. Early projections of Johnson's victory in 1964 came well before the polls closed in the West. The same was true in 1972. In 1980, as a result of the media projections, President Carter felt obliged to concede his defeat while polls were still open in the West. In all these cases candidates further down the ballot felt the effect. In 1980 the estimated voter turnout was about 12% lower among those who had heard the projections and not yet voted when compared with those who had not heard them.

For decades, public opinion surveys have disclosed abiding irritation with early projection of election results by the news media-and that was when the news organizations projections were accurate. Then came the 2000 election. The media projection errors on Election Night 2000 highlight a foolish race for momentary bragging rights and a tiny ratings advantage.

The Commission condemns the controversial practice by which national news networks declare a projected winner in the presidential election before all polls close within the contiguous 48 states of the United States.

This practice demeans democracy. It discourages citizens from participating in the most basic and enriching aspect of self-government-voting. It robs candidates, from the White House to the state house to the courthouse, of votes they have a right to expect. It mocks the most salient lesson of the November election-that every vote is important and should be counted.

The assertion by network executives that it would be dangerous or wrong to delay calling the outcome of the presidential election until all polls close at 11:00 p.m. (EST) is disingenuous and dishonest. In fact, the networks in the last several presidential elections voluntarily have withheld calling the projected presidential winner in Eastern Time Zone states until after 7:00 p.m. (EST). In addition, as a result of the erroneous

news reporting in Florida on the night of November 7, the networks now voluntarily have agreed to withhold calling the projected presidential winner in states with two time zones until all polls have closed in those states. Networks contend there is no evidence that early reporting of a presidential winner deters voters from going to vote or remaining in line at the precincts. As the decisions recited above clearly indicate, they know better. The networks' refusal to adopt a national policy to withhold declaring a presidential winner until all polls close is knowingly inconsistent and discriminates against citizens and candidates in much of the nation.

Government cannot prohibit news organizations from irresponsible political reporting. It cannot bar the exit polls on which networks largely rely for their early calls of a projected winner. The Commission notes the body of evidence that has mounted since November documenting the unreliability of exit polls. The networks now know, from their internal investigations and from studies by their paid consultants that exit polling is seriously flawed. The dirty little secret of the last campaign was that exit polls conflicted with the actual final results in many states-and in five specific instances by as much as seven to sixteen percent.

Network officials acknowledge that these exit polls have become more fallible over the years as more and more voters have refused to participate in them. The Commission was shocked by reports that network interviewers at polling precincts have offered tawdry inducements, such as small sums of money or cigarettes, as enticements to citizens to participate in exit polling. Such conduct cheapens journalism and creates an unhealthy polling place environment. The Commission strongly encourages citizens not to participate in exit polling.

If candidates, political parties and election officials actively encouraged voters not to participate in the exit polling game, it could further erode the credibility of exit polls and network reliance on them.

At the same time, Congress and the states may not be completely powerless in making it difficult for the networks to call prematurely a projected winner in presidential elections. In addition to exit polls, networks rely for their early projections on official vote tallies from carefully selected precincts across a state and preliminary raw vote tallies from the state as a whole. Government officials need not be so cooperative. Statutes prohibiting public disclosure of official presidential election tallies until all polls close could limit the news media's ability to project an early winner and be consistent with the First Amendment. At the very least, withholding official vote tallies would leave the networks relying on unreliable exit polls.

#### **\_\_ Policy Recommendation \_\_ \_\_**

**News organizations should not project any presidential election results in any state so long as polls remain open elsewhere in the 48 contiguous states. If necessary, Congress and the states should consider legislation, within First Amendment limits, to protect the integrity of the electoral process.**

1. In practice, this would mean that news organizations would voluntarily refrain from projecting the outcomes of the presidential elections in any state until 11:00 p.m.



Eastern Standard Time (8:00 p.m. Pacific Standard Time). Voluntary restraint is preferable to government action.

2. If news organizations refuse to exercise voluntary restraint, Congress and the states should consider prohibiting any public disclosure by government entities of official election tallies in the race for president and vice-president at the precinct level and above until 11:00 p.m. EST (8:00 p.m. PST), where such regulations are consistent with existing provision for public observation of the vote tabulation process.

3. If news organizations refuse to exercise voluntary restraint and other measures cannot protect the integrity of the electoral process, Congress should impose a plan for uniform poll closing hours in the continental United States for presidential elections.

4. National television broadcasters should provide, during the last thirty days of the presidential campaign, at least five minutes each night of free prime television time to each presidential candidate who has qualified for federal matching funds. They or their local affiliates should further make free time available for state and local election officials to provide necessary voter education.

Government cannot prohibit exit polls, or even do very much to constrain them. But the First Amendment does allow government to control what its own officials do.

Even if the states do not act on their own, we believe Congress may be able to legislate directly in the limited fashion we have suggested under the Elections Clause (protecting the integrity of congressional elections by insuring that turn-out is not depressed by announcements of results for the top of the ballot). Or Congress can rely on Article II, Section I's power to set the "the time of choosing" electors and the Spending Clause. The networks could still discuss their polls, as they do before an election, but their capacity to call elections-already somewhat shaken-will erode still further.

These legislative remedies are not a sure cure. Deprived of or constrained in getting official tallies, the news organizations-through the Voter News Service-might choose to redouble their exit polling efforts. That source has become more fragile, though, as survey response rates fall and the prevalence of early and absentee voting rises. Nevertheless, by doubling or tripling or quadrupling the polling effort, VNS might offset some of this lost data. This approach would shift the burden in spending from media projections right back to where it belongs-to the television industry that hopes to profit from making them.

The most popular idea for discouraging media projection of presidential election results is to adopt a plan of uniform poll closing times. This Commission cannot summon much enthusiasm for this approach. For such a law to work, polls must stay open later in the East or close earlier in the West. Several problems arise. Extending poll closing hours can be very costly, especially if polls must remain open for 15 hours (currently true in New York). If polls end up being open longer in the East, Western voters could complain about the differential treatment. Closing polls earlier in the West is a bad option; many Western voters turn out in the hours between 6 and 8 p.m. local time. Obtaining conformity of poll closing times in the Central and Mountain time zones is also no easy

task. Some bills call for easing this burden by setting up special daylight savings time arrangements that would operate in presidential election years. This approach seems too complicated and disruptive.

In general, uniform poll closing time proposals would make voters and financially strapped counties pay the price because the television industry prefers to chase an ephemeral ratings edge. However, it may be the final option available to Congress as a last resort if voluntary restraint or prohibiting disclosure of tallies fails to protect the integrity of the electoral process.

## VII.

# A Democratic Process

*that Reflects Limited but  
Responsible Federal Participation*

### A Pattern of Neglect

Election administration gets so few resources from American governments that we do not even know how much is spent. The sums are literally too trivial to merit national accounting. The smallest general expenditure category listed in the Census of Government for the Statistical Abstract of the United States is garbage disposal (solid waste management), on which the many units of government spend a total of about \$14 billion. The Caltech/MIT Voting Technology Project has worked this year to figure out how much money is spent on running elections. Their best estimate, for operating expenditures just by counties, comes to a nationwide total of only about \$1 billion. As we reflect that the general election of 2000 alone involved more than 100 million voters going to more than 190,000 polling places staffed by 1.4 million poll workers, we can hardly be surprised that there are problems. It is amazing, and a tribute to dedicated professional election administrators and many poll workers who practically volunteer their time, that the system works as well as it does.

The costs of election administration are borne almost entirely by the level least able to afford them: county and city governments. These elections compete for funding every day against police and fire protection or solid waste management. The election infrastructure of democracy loses. It is commonplace to find local budgets that spend ten times more on parks and recreation, or on solid waste, than on running elections.

Thinly populated rural counties are even harder pressed. They must build and staff far-flung polling places. Measured simply as a rule of thumb against 2000 presidential voter turnout, the national average of county operating expenditures for elections, per capita, is about \$10. Rural counties (less than 25,000 in population) spend anywhere from \$2-32 per voter-a large proportion spends more than \$15-20 per voter to provide the needed service.

Thanks again to the Caltech/MIT work, we can estimate that about a third of the operating costs of administering elections goes to voter registration, another third goes to administrative overhead, and the remainder is split about equally between equipment costs and actually running the elections on Election Day.

These numbers begin to let us put the costs of modernization into context. Recall that we are estimating average operating expenditures of about \$10 per voter who turned out in the 2000 presidential election. The cost to buy modern DRE electronic (touch screen) voting equipment is about \$20-\$25 per voter, or more than double an average county's entire operating budget for elections. Marksense (optical scan) machines cost less up front (\$8-10 per voter) but add more to operating expenditures each year because of the extra ballot printing costs. These costs can be spread out

and financed over time. But since the operating budgets are so low, even an increment of \$1-2 per year is a 10-20% increase in the continuing budget that these low priority agencies can rarely claim.

The products of the election equipment industry have recently received considerable attention. Seldom in the course of human events have so many expected so much from such a small group of firms. As the Caltech/MIT scholars have observed, with annual revenues of about \$150-200 million per year the election equipment industry is less than one-tenth the size of, say, the residential lawnmower business.

### **Estimating and Allocating the Costs of Improvement**

The good news is that relatively modest public investments can effect significant improvements. But there is no objective methodology to spell out how much is needed. A few principles nonetheless stand out:

- \_ Costs should be calculated on a long-term basis, either in the financing or leasing of capital equipment, or in added operating expenditures.
- \_ The system has been chronically underfunded for a very long time.
- \_ State governments should assume a major responsibility in election administration.
- \_ The national government should become a limited partner in financing our federal election system.

Local, county, and state governments presently run congressional and presidential elections for the benefit of the national government. As they do so they must comply with a variety of unfunded federal mandates that instruct them on who can vote, how voters should be registered, how certain kinds of votes can be cast, which polling places are suitable, and other topics. There are no hard estimates of what factor these costs play as a total of local election expenditures. One thoughtful official put together a personal calculation that placed the federally imposed share of his costs at about twenty percent of the total.<sup>65</sup>

Our rough estimate is that overall spending on election administration nationwide should rise by about \$300-400 million per year, or about a 30-40% increase above current levels. We reach this figure in the following way:

\_ With the creation of statewide registration systems, much of the cost of voter registration should shift to the state level, or about \$50-75 million per year above current state spending on this problem. Some economies of scale will be achieved but new (though relatively inexpensive) capital purchases will be needed that, again spread over time, may cost another \$15-20 million per year, especially when the costs of networking local jurisdictions into the system is taken into account.

\_ Net county expenditures on election administration should increase by about 10%, or about \$100 million per year. States relieving counties of some of the burden of building and operating voter registration can free up more operating funds for necessary tasks like voter education and poll worker recruitment and training that can yield large payoffs in public satisfaction. But, in addition, counties need to make added investments in handling their end of maintaining and updating accurate voter files, handling an increase in provisional voting, and improved training of increasingly nonpartisan and professional officials.

\_ Purchases of new voting equipment, spread over time and averaged across the country, should cost about another \$150 million per year. This increased spending should remain constant as systems are regularly renewed and the focus of spending evolves more to software improvements and service support for relatively inexpensive computer hardware.

\_ The federal government will need to build up the agency that develops and oversees voting system standards and the national clearinghouse of election administration information. This still should be a modestly-sized national institution, with an annual budget of about \$5-10 million per year. If all levels of American government together were to spend about \$1.4 billion on election administration each year, and if this represented an addition of about \$300-400 million to the current spending level, what are the appropriate shares of the state and federal governments? We believe those two levels of government should furnish all of the added spending.

#### **\_ \_ Policy Recommendation \_ \_ \_**

**The federal government, on a matching basis with the governments of the 50 states, should provide funds that will add another \$300-400 million to the level of annual spending on election administration in the United States. The federal share will require a federal contribution totaling \$1-2 billion spread out over two or three years to help capitalize state revolving funds that will provide long-term assistance.**

1. These responsibilities should be apportioned about 50-50 between the federal government and the states, so that the federal contribution has the effect of raising the annual federal and state level of spending on election administration by an added \$150-200 million. This is a modest sum, lower than some other current estimates about what is needed.
2. The federal expenditures should be made in the form of matching grants to the states, and the states should directly administer the disbursement of funds for administration at the state, county, and local level.
3. Instead of planning on permanent expenditures of federal funds, Congress should instead consider leveraging temporary funding over a two or three-year period in an amount, totaling perhaps \$1-2 billion, that will be sufficient to capitalize the federal share of state revolving funds. These funds can leverage the initial federal contribution, after it has been matched by the states, to create a long-term source of federal and state support to election administration. The capitalization should be sufficient to sustain our proposed federal increment of \$150-200 million of continued additional spending on election administration that, when matched by state contributions to the funds, will reach the \$300-400 million annual nationwide target.
4. Such state revolving funds would be used to carry out flexible state programs, allowing the states to support a variety of election administration activities undertaken by state, county, and local governments and do so with a variety of financing options that can include grants, loans at or below market rates, loan guarantees, and other arrangements. States would assess relative needs among their election jurisdictions and be accountable for maintaining the fund.
5. Federal funds should be allocated among the states in proportion to the electoral votes that each state will cast in the presidential election of 2004. This reflects a slight per capita weighting toward rural states. Such a modest weighting is appropriate, given the greater average per capita cost of election administration in rural counties.

#### **The Federal Institutional Role**

Some legislation now pending in Congress calls for creation of a federal blue-ribbon investigatory commission as well as a new federal administrative agency. We do not see the need for another blue-ribbon commission or task force. Several bodies are providing a wealth of information and ideas to the Congress. If another year is spent deliberating what can be done, little or nothing will happen that can benefit voters who will go to the polls in 2002 or 2004.

But overall responsibility for the federal aspect of national election administration needs a better home. It is currently lodged in the Office of Election Administration in the Federal Election Commission. This office, with a staff of about five people, does a good job with what it has. But a new and larger entity is needed.

**\_\_ Policy Recommendation \_\_ \_\_**

**The federal responsibilities envisioned in this report should be assigned to a new agency, an Election Administration Commission (EAC).**

1. The number of governing commissioners in this agency should be small; the members should be distinguished citizens with a reputation for integrity.
2. The commission should: a) develop federal voting system standards in consultation with state and local election administrators; b) oversee the implementation of these standards in conjunction with the National Institute of Standards and Technology; c) maintain a national clearinghouse of information on best practices in election administration; and d) administer the limited federal assistance program to the states.
3. Enforcement of other federal election laws should remain a separate function, centered in the Civil Rights and Criminal Divisions of the Department of Justice.
4. States that do not have them should also consider establishing nonpartisan election commissions.

### **Structuring Federal Legislation and Financial Assistance**

Although we agree on the merits of what should be done, we have also disagreed about how or even if Congress should try to make these things happen. We considered several broad approaches.

\_ Rely entirely on state action. Though we have endorsed state primacy in rhetoric and substance throughout this report, all members of the Commission have concluded that at least some limited federal role is appropriate given the mixed, interdependent character of the federal election system. Having already required services (the election of federal officers) and issued mandates, the federal government does have a responsibility to help pay the bill.

\_ Rely on conditions attached to federal grants. Some members of the Commission believe that in return for accepting federal funds states should be required to adopt a limited number of critical reforms.

\_ Rely more heavily on federal requirements. Some members of the Commission believe that with respect to some critical reforms, greater uniformity and certainty are needed. Yet the day-to-day field work of election administration will remain at more local levels.

\_ Defer the hard choices to federal administrative rulemaking. This view would announce broad goals but leave the exact specification of conditions for federal assistance to be developed by the responsible federal agency in a rulemaking process. We believe that, if there are to be conditions, they should be clear, general, and imposed directly by Congress.

We therefore have struck a careful balance among mandates, conditional assistance, and voluntary standards.

**\_\_ Policy Recommendation \_\_**

**Congress should enact legislation that includes federal assistance for election administration, setting forth policy objectives for the states while leaving the choice of strategies to the discretion of the states.**

The Commission as a whole takes no position on whether Congress should use the powerful incentive of conditional grants or instead establish requirements or mandates wholly independent of funding. A majority of the Commission members suggests the approach described below. However, a minority suggests a more direct federal role as detailed in an additional statement of views appended to this report.

1. Congress should enact legislation to create a new federal election administration agency, to facilitate military and overseas citizen voting, to address a national election holiday, to constrain-if necessary-premature official disclosure of presidential election results, and to appropriate federal assistance in election administration.

2. To be eligible for federal assistance, states shall:

a. match the federal assistance with an added contribution of their own in the proportion fixed by Congress;

b. adopt legislation that will establish a statewide voter registration system networked to every local jurisdiction in that state, with provisions for sharing data with other states;

c. permit on-site provisional voting by every voter who claims to be qualified to vote in that state, or adopt an alternative that achieves the same objective;

d. set a uniform statewide benchmark for voting system performance in each local jurisdiction administering elections expressed as a percentage of residual vote in the contest at the top of the ballot, and require local jurisdictions to report data relevant to this benchmark;

e. either agree to comply with the federal voting system standards and certification processes or develop their own state voting system standards and processes that, at a minimum:

i. give voters the opportunity to correct errors, either within the voting equipment itself or in the operational guidelines to administrators for using the equipment at a precinct or other polling place and

ii. require that new voting systems should provide a practical and effective means for voters with physical disabilities to cast a secret ballot; and

f. adopt uniform statewide standards that define what will constitute a vote on each category of voting equipment certified for use in that state;

g. certify that they are in compliance with existing federal voting rights statutes.

3. Specific choices on how to comply with these conditions should be left to the discretion of the states.

4. States that qualify for federal assistance should have broad discretion in how they disburse this money, so long as the money is expended on: a) establishing and maintaining accurate lists of eligible voters; b) encouraging eligible voters to vote; c) improving verification of voter identification at the polling place; d) improving equipment and methods for casting and counting votes; e) recruiting and training election officials and poll workers; f) improving the quantity and quality of available polling places; and g) educating voters about their rights and responsibilities.

In most of our policy recommendations, we have suggested specifics for possible policy design. But we have deliberately set conditions on assistance that are general, not detailed. The federal legislation should give states room to adapt to local circumstance, remaining open to managerial and technical possibilities that future developments and experience may suggest.

## Endnotes

### *to the report*

1. The data is from the American National Election Studies for 1996 and 2000, with interviews completed in November and December of the election year, along with the Comparative Study of Electoral Systems. For more details, see the Background Papers prepared for this Commission by its Task Force on the Federal Election System.
2. Joseph P. Harris, *Election Administration in the United States* (Washington, DC: Brookings Institution, 1934), p. 1.
3. *Cook v. Gralike*, 531 U.S. 510 (2001)
4. Alexander Hamilton, Federalist No. 59 [1788], in *The Federalist Papers*, ed. Clinton Rossiter (New York: Penguin, 1961), pp. 362-63.
5. The major cases are *Ex Parte Siebold*, 100 U.S. 371 (1879); *Ex Parte Yarbrough*, 110 U.S. 651 (1884); *Smiley v. Holm*, 285 U.S. 355 (1932); *United States v. Classic*, 313 U.S. 299 (1941); and *Foster v. Love*, 522 U.S. 67 (1997). For a fuller discussion, see the Background Papers prepared for this Commission by its Task Force on Legal and Constitutional Issues; see also U.S. General Accounting Office, *Elections: The Scope of Congressional Authority in Election Administration*, GAO-01-470 (Washington, DC: GAO, 2001).
6. On the limits of state power over federal elections see, most recently, *Cook v. Gralike*, 531 U.S. 510 (2001).



In *Foster v. Love* the Supreme Court considered it settled that Congress could override state regulations, if it wished, "by establishing uniform rules for federal elections, binding on the States." 522 U.S. at 69.

7. Michigan, California, and Illinois, among other states, refused at first to comply with the NVRA. Their refusals were struck down in *ACORN v. Miller*, 129 F.3d 833 (6th Cir. 1997); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996); and *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995).

8. *Bush v. Gore*, 125 S.Ct. 525, 529 (2000). The landmark cases establishing congressional authority to legislate on state as well as federal voting practices using the authority of the 14th and 15th Amendments were *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) and *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Again, for a fuller discussion see the Background Papers prepared for this Commission by its Task Force on Legal and Constitutional Issues.

9. Current calls to amend the Electoral College system mainly argue that it does not adequately mirror the population or the popular vote. For an articulate presentation of the critique, see the testimony of Stanford University historian Jack Rakove to the Commission in the transcript of its March 26 hearing in Atlanta.

10. Recognizing this point, a group of smaller states actually attempted to bring a case contesting the constitutionality of the Electoral College, but the Supreme Court held that it did not have jurisdiction to hear such a complaint.

*Delaware v. New York*, 385 U.S. 895 (1966).

11. The compromise was crafted late in the Convention by Pierce Butler, one of South Carolina's delegates. For a concise summary see Forrest McDonald, *The American Presidency: An Intellectual History* (Lawrence: University Press of Kansas, 1994), pp. 160-91.

12. Federalist No. 39, in *The Federalist Papers*, Rossiter ed., p. 244; see also Hamilton's comments in Federalist No. 68.

13. Political professionals hire private firms to produce winnowed voter lists so that, unlike governments, they do not waste money trying to contact nonexistent voters. According to information supplied to the Commission, these private lists tend to show that an average of 16% of the names on all state rolls are "deadwood."

14. Vote fraud is difficult to discover and prosecute. But, for illustrations of ghost voting and "repeater" schemes, see *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), *cert. denied*, 474 U.S. 839 (1985); *United States v. Morado*, 454 F.2d 167 (5th Cir.), *cert. denied*, 406 U.S. 917 (1972). For an example of how ballot box stuffing is done with absentee

ballots, see *United States v. Boards*, 10 F.3d 587 (8th Cir. 1993). For the closely related practice of "nursing home" fraud (obtaining and voting the ballots of mentally incompetent individuals), see *United States v. Odom*, 736 F.2d 104 (4th Cir. 1984).

15. The Qualifications Clause of Article I states that "the Electors in each state [for congressional elections] shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature."

16. The main effect of the power shift was to lower the barriers to voting that had been erected by many cities.

"Almost everywhere, between 1790 and the 1850s, state suffrage laws and municipal suffrage laws became identical.

Behind this convergence were two important, and related, shifts in law. The first was the early nineteenth-century deterioration and then collapse of the notion that municipal charters were inviolable. The second was the ascent

of a broad concept of state supremacy, the idea that municipalities legally ought to be regarded as administrative

creatures of the state, rather than as separate sovereignties of any type.... One of its implications was that state

legislatures could set the franchise in municipal elections and compel cities and towns to adopt the same suffrage

provisions as the state." Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*

(New York: Basic Books, 2000), p. 31.

17. Some other countries, notably Canada, chose systems early in the 20th century that do not rely on voters to

initiate registration. Instead the federal government registers voters as part of a nationwide census. Beyond that,

however, Canada's successful list maintenance practices are analogous to those recently adopted in Michigan, and discussed below.

18. For the most recent report on population mobility, see U.S. Census Bureau (Jason Schachter), "Geographical

Mobility: March 1999 to March 2000," Current Population Reports P20-538, May 2001. The data is reaffirmed by

responses on residential duration in separate studies of voting behavior conducted as part of the Census

Bureau's Current Population Surveys after the 1996 and 1998 elections.

19. More information on the various voter registration systems is collected and can be found in the Background Papers

prepared for this Commission by its Task Force on the Federal Election System. The National Conference of State

Legislatures (NCSL) is also an invaluable source of up-to-date information on practices and pending legislation in

the different states. On the problem of agency data exchange see also the idea of developing a common Election

Markup Language discussed in the next note, note 20.

20. State governments are also better positioned to solve the sometimes difficult problems that have arisen in trying to exchange accurate data on deaths, felony convictions, and the like within a state. It is promising that the international Organization for the Advancement of Structures Information Standards (OASIS), which creates industry specifications for structured information processing, has formed an Election and Voter Services Technical Committee to develop Election Markup Language (EML), based on XML (extensible markup languages). Such an innovation will facilitate interchange of data among the agencies with information relevant to voter eligibility. Establishment of an open industry standard, independent of any particular vendor, will help states modernize their systems more effectively at a lower cost and lower the barriers of entry to possible software developers.

21. For more details on state identification practices, see the Background Papers prepared for this Commission by its Task Force on the Federal Election System.

22. According to Michigan officials it cost seven and a half million dollars to develop their system. That figure includes hardware and software for the local jurisdictions, building a network, and building the street index (which the state now also uses for many other useful tasks). Because the local offices are not tethered to the state in a traditional internet network, there was a higher cost in providing the 400 counties with the necessary hardware. It was also necessary to build a special server for Detroit. The system cost the state only \$1.5 million a year in operating expenditures. The system opens up new opportunities. Michigan is now working on an online database where voters can check their information, use a mapping program to get directions to the polling place, and even take a virtual tour of the polling place and its machines.

23. The Privacy Act prohibits most states from requiring voter applicants to provide a full SSN. It does not keep states from requesting that voters provide this information (which may be in the voter's own interest) and it does not preclude either a request or a requirement that applicants provide the last four digits of the SSN. Michigan does not need to request any SSN data because it uses the individual's driver's license number, which is different from the SSN, as a separate numeric identifier.

24. Some evidence was presented on this problem in the state and congressional investigations of the contested 1996 election in California's 46th Congressional District in which Loretta Sanchez defeated Robert Dornan by 984 votes.

Both investigations concluded that the number of verifiably illegal votes was fewer than 984; hence Congresswoman Sanchez retained her seat. She defeated Dornan by more than 14,000 votes in a 1998 rematch. The evidence indicated that, just in Orange County, about a thousand prospective jurors whose names were drawn from the voter list are excused from jury service every year because they are not citizens. The evidence also included records seized from an immigrant advocacy organization showing that 61% of the voters this organization had registered were aliens. More than 300 of these new Orange County voters had voted in the contested election.

25. Political professionals also believe that some unofficial deputy registrars solicit registration applications and then discard those which have come in from voters whom they think will not support their party or candidate. This is illegal, of course.

26. States that experience disfranchisement caused by the negligence or misconduct of unofficial third-party voter registrars should be able to establish a system for licensure of deputy registrars, analogous to the licensure and accountability of notaries public. Any private individual qualified to register voters under NVRA should be able to receive a license as a deputy registrar. Such a license could be revoked on proof to the local election supervisor of negligent performance or other specified misconduct. If necessary to permit states to consider this option, Congress should amend the NVRA.

27. See Federal Election Commission, *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples* (1994), Chapter Six. None of these problems apply in the same way to the six states that allow voters just to register on election day at the polling place or have no registration of voters at all. These states, to which the NVRA does not apply, are Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming.

28. For more detail, see the discussions of this issue in both the Background Paper prepared for this Commission by the Task Force on the Federal Election System and the Background Paper prepared by the Task Force on Legal and Constitutional Issues.

29. Michigan utilizes a version of this alternative, requiring photo identification as well as an affidavit, and then issuing a regular ballot. Illinois uses an analogous yet less satisfactory alternative, in which the voter executes an affidavit of eligibility, in some cases with a supporting affidavit, but no photo ID is required and, lacking a

statewide registration system, the voter list may not be corrected.

30. It is possible that, as electronic voting technology evolves, voting machines may be able to display the appropriate ballot for the local jurisdiction where the voter is registered, regardless of where in the state the voter chooses to cast that ballot.

31. A useful summary of the scholarship is Michael W. Traugott, "Why Electoral Reform Has Failed: If You Build It, Will They Come?," in *After 2000: The Politics of Election Reform*, ed. Ann N. Crigler and Marion R. Just (forthcoming).

32. On the relative significance of the ADA requirements, see the discussion of this law in the Background Papers prepared for this Commission by its Task force on Legal and Constitutional Issues.

33. Some local jurisdictions are reluctant to use schools as polling places while school is in session. Some officials, usually privately, cite concerns about the security and liability issues presented when large numbers of adults shuttle in and out of areas being used by schoolchildren.

34. Holidays could be very costly to hourly workers who lack benefits that include paid holidays. But many of these workers are in retail and service jobs and will be asked to help keep these businesses open on the holiday anyway. Depending on their employment agreements, employers may be obliged to shoulder the extra cost of paying them overtime.

35. In 1968 Veterans Day was moved to the 4th Monday of October. In 1975 it was moved back to November 11.

5 U.S.C. § 6103. The United States also sets aside Memorial Day to honor those who sacrificed their lives in the nation's wars. This holiday originated after the Civil War, when May 30 was designated for honoring the graves of the war dead. Most states now conform to the federal practice, adopted in 1971, of observing the holiday on the last Monday of May.

36. 2 U.S.C. §§ 1, 7.

37. Testimony of David Walker, Comptroller General of the United States, before the House Armed Services Committee, May 9, 2001.

38. Under Executive Order 12642 (1988), the Secretary of Defense is the agent responsible for implementing UOCAVA and handling the federal responsibilities under that Act. The Director of the Federal Voting

Assistance Program administers this program for the Secretary of Defense.

39. Military personnel should not lose their residency in a state if they are living elsewhere under orders, regardless of whether the person intends to return to that state.

40. States should permit provisional voting, and the effective waiver of a prior registration deadline (such as 30

days), if the service member (or relative) has recently moved through separation from the service 60 days or less before the election.

41. The weight of the evidence leans toward a conclusion that early voting and vote-by-mail have slightly increased turnout among committed partisan voters or in low interest local elections. Unrestricted absentee voting probably has not increased turnout at all. See the Background Papers prepared for this Commission by its Task Force on the Federal Election System.

42. "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." Article II, Section 1.

43. For recent illustrations, see *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994); and *United States v. Salisbury*, 983 F.2d 1369 (6th Cir. 1993).

44. See, for example, the testimony of David Jefferson, chair of the California Secretary of State's Internet Voting Task Force, in the transcript of the Commission hearing in Simi Valley, California on April 12.

45. To trace the evolution of laws disfranchising criminals between 1790 and 1920, see Tables A.7 and A.15 in Keyssar, *The Right to Vote*. On current practice, see *ibid.*, pp. 302-03 and the Background Paper of this Commission's Task Force on the Federal Election System.

46. The Supreme Court case was *Richardson v. Ramirez*, 418 U.S. 24 (1974). For further discussion, see the Background Paper of this Commission's Task Force on Legal and Constitutional Issues.

47. In one experimental study, 15% of the voters committed errors in casting their ballots. Poor ballot design and punch-card voting technology appeared to be the source of many of the errors. Susan King Roth, "Disenfranchised by Design: Voting Systems and the Election Process," *Information Design Journal*, vol. 9 (1998).

48. This point was made to us by representatives from the Committee on Communications and Information Policy of the Institute of Electrical and Electronics Engineers (IEEE).

49. Nixon won his home state of California by less than 1%. But Kennedy won Hawaii, Illinois, Missouri, New Jersey, and New Mexico by this thin margin (with 63 total electoral votes in an election where his margin of electoral victory was 33).

50. They were Iowa, New Mexico, Oregon, and Wisconsin—all of which were carried by Gore, thus making Florida so pivotal for Bush.

51. The data is from the helpful Caltech/MIT Voting Technology Project, "Residual Votes Attributable to Technology:

An Assessment of the Reliability of Existing Voting Equipment,"Version 2, March 30, 2001.The data does not distinguish between the voting equipment used at polling places and the voting equipment used in counties for absentee ballots.

52. Using relatively reliable data for all of California from the Secretary of State's office and the University of California's Statewide Database, Henry Brady and Gray Chynoweth (in an informal report provided to the Commission) found a mean spoiled vote of only 0.85% for communities using the Datavote punch card system, while the Votomatic-style systems had spoiled vote rates of 1.83% (Pollstar), 2.36% (Votomatic), and 2.23% (mix of Votomatic and Pollstar).

53. For more detail on the varieties and issues related to the different technologies, see the initial report of the

Caltech/MIT Voting Technology Project, *Voting: What Is, What Could Be*, July 2001.

54. Stephen Knack and Martha Kropf, "Roll Off at the Top of the Ballot: Intentional Undervoting in American Presidential Elections," April 2001 (unpublished manuscript made available to the Commission).

55. On Detroit, see "Technology Slashes Detroit Voting Error,"Washington Post, April 5, 2001; the broader study of underlying residual vote is the Caltech/MIT report, "Residual Votes Attributable to Technology."That study concludes, in essence, that new machines in counties should be expected to have no more residual votes than they had experienced in recent elections with their older lever machines.This equated to "a performance standard in practice-an average residual vote *not in excess* of 2 percent of total ballots cast," (emphasis added).

56. Data provided by the Caltech/MIT Voting Technology Project, gathered from state election sources.

57. Harris County decided in 2001 to change its voting system from punch cards to a DRE electronic model.

58. Report of the Election Center's Task Force on Election Reform (2001).

59. For explanation of how these alternatives can work, see sections 81.56 and 81.57 of the Texas Administrative Code (2000).

60. In this context, we mean objective both in the sense of a physical fact that exists regardless of anyone's attitude about it, and objective in the sense that-to the maximum extent possible-the judgment of what physical markings constitutes a vote should not depend on the stance, feelings, or opinions of the individual observers.

See generally John R. Searle, *The Construction of Social Reality* (New York: Free Press, 1995). p. 66.

61. Section 42 of the Florida Election Reform Act of 2001, adding new subsection (5) to section 102.166 of the Florida Statutes.

62. On the variety of state schemes, see the paper on "Recounts and Contests" prepared for this Commission by its Task Force on Legal and Constitutional Issues. On the desirability of some standardization across states, see the report of the Subcommittee on Governance and Administration in the Report of the Election Center's Task Force on Election Reform (2001).

63. See 3 U.S.C. § 5 and *Bush v. Palm Beach County Canvassing Bd.*, 121 S.Ct. 471, 474 (2000).

64. Our recommendation does not adequately address the concerns of the 0.6% of the voting age population that lives in Alaska and Hawaii, where the polls close another two hours later. But it would allow presidential election results to be reported on Election Night while adding to the integrity of the election process for the 52.4% of the electorate who live in the Central, Mountain, and Pacific time zones.

65. See the transcribed testimony of Ernest Hawkins, Clerk and Registrar of Sacramento County, California, at the Commission's June 7 hearing in Ann Arbor, Michigan.

66. The June 2001 report of the Governor of New York's bipartisan election modernization task force has recommended state capitalization of such a fund in that state, to be called an "Election Modernization Fund," with an initial investment of \$25 million.

67. A successful precedent is the State Revolving Fund administered by the Environmental Protection Agency. Created by the 1987 Amendments to the Clean Water Act, this system effectively replaced a long-running but often unsatisfactory federal grants-in-aid program.

## **Additional Statement**

*Concurring in Part and Dissenting in Part*

*by Christopher Edley,*

*Joined by Leon Panetta, Deval Patrick, Bill Richardson,*

*John Seigenthaler, and Kathleen Sullivan*

### **Federal Requirements and Enforcement**

The quality of our democracy's infrastructure should not depend on class or color, on party or precinct. "One person, one vote" is not a principle for local officials to trade off



against potholes or jails, nor should it be conditioned on the willingness of Congress to appropriate an incentive in any given budget cycle. Finally, Congress is honor bound—perhaps in this field as in no other—to ensure that the promises it makes through law to the American people will indeed be kept. For these reasons we must offer additional views on the Commission's recommendations and report.

The Commission majority declined to endorse a limited number of specific federal requirements for the administration of elections for federal office, trusting that the states will adopt vital reforms to fulfill conditions, or as *quid pro quo*, for receiving new federal grants. While we largely agree with the policy goals adopted by the Commission for federal legislation, certain reforms are fundamental enough to stand on their own as requirements, independent of any federal largesse.

We have several concerns with the incentive or "conditionality" approach. First, will the carrot be enticing enough? Even if Congress passes legislation to authorize a grant program, Congress may, after another bruising political battle, decline to appropriate the money, or enough of it. As the memory of 2000 fades, election financing could easily become just another game piece in the perennial battle over taxes and spending. Then some states may decline to take the bribe out of reluctance to pay the required 50-50 match, or because the federal funding may be too little to dissolve objections to all the strings and inevitable regulations. Second, if a state breaks or bends the conditions, experience teaches that the federal government will only slowly initiate enforcement and almost never press all the way to a meaningful sanction, like cutting off funds or seeking a court injunction. Third, if the funding will be limited in time, as the Commission proposes, then so will the conditions and the rights the legislation purports to ensure.

Our fourth and final concern is the most important. With the experiences of November 2000 fresh in mind, many Americans consider election reform a moral imperative because confidence in the fairness of our democracy must be made as deep and widespread as possible. At their core, these reforms are intended to vindicate our civil and constitutional rights. They are too fundamental to be framed as some intergovernmental fiscal deal, bargained out through an appropriations process.

What requirements should Congress insist upon, regardless of funds granted? We suggest at least the following, drawn from the Commission's recommendations to state officials:

1. *Residual votes or "spoiled" ballots.* Voting technologies and administrative practices should produce low rates of uncounted ballots, as the Commission argues in its Recommendation 6 and Chapter V. The right to vote means little if there is no right to have your vote counted. Therefore, at least for federal offices, Congress or the new agency should establish a maximum level of spoiled ballots considered acceptable, including overvotes and an estimate of unintended undervotes. Each state should be required to pick and achieve a benchmark, applicable in every precinct, no greater than the federal maximum. By federal law, states should be required to make every effort to make every vote count.

2. *Statewide provisional voting.* No voter who believes he or she is registered in the state should be denied a ballot at the polling place. Federal law should require all polling places to offer a provisional ballot to any voter who believes he or she is registered in that jurisdiction. Election officials should adopt procedures to count such ballots, after confirming the voter's registration status, before they certify the vote count. This requirement should be implemented regardless of whether a state has developed a statewide voter registration list, although that would make implementation easier.<sup>1</sup>

3. *Accessibility.* Congress should insist that states purchase and use voting technologies that are accessible to voters with disabilities, that are readily adaptable to non-English speakers, and that permit all voters, including those who are illiterate or visually impaired, to cast a secret ballot.<sup>2</sup>

4. *Basic voter information.* Every jurisdiction should provide every voter, in advance of the election, a sample ballot and basic information about voting procedures. This should include an understandable description of rights and responsibilities, and of how to make a complaint. (The Voting Rights Act already requires that whenever a jurisdiction subject to the act's language provision distributes sample ballots or other information, it must do so in all languages necessary for compliance.)

In elections for the Senate and House of Representatives, the Constitution provides Congress full authority to demand that these goals be honored. The Framers recognized the practical need to rely on local administration and state oversight. But they assigned ultimate authority in such matters to Congress because they foresaw dangers in leaving the mechanisms of national governance utterly at the mercy of state politics and peculiarities. The recent election should have made clear to everyone that the basic fairness and effectiveness of federal elections should not be left to local accident or parochial preference. Furthermore, the Supreme Court's reasoning in *Bush v. Gore* suggests that there may be a compelling interest and constitutional authority for the Congress to impose certain requirements for nonfederal elections as well, lest a state deny its residents the equal protection of the laws by having materially inferior elections systems for some voters or communities in comparison with others. Nevertheless, we recommend only that the legislation formally apply these requirements to elections for Congress, putting this urgent legislation beyond constitutional dispute. As a practical matter, of course, states will likely adopt the same processes and technology for their votes on presidential electors and on state and local matters.

Some will view these federal requirements as a heavy-handed imposition on state and local governments, but we believe they represent a limited and respectful assertion of Congress's responsibility under the Constitution to safeguard the election of federal officeholders, and a measured corrective for all too commonplace violations of the most fundamental of civil rights.

The Commission's Recommendation 8, calling for intensified efforts to enforce existing antidiscrimination statutes, is important. Combined with the new obligation that states certify their compliance with those laws (see Recommendation 13), the Report gives

much needed voice to legitimate frustrations felt by many. Congress made promises in the 1965 Voting Rights Act, and extended those promises in a series of statutes over the decades. Yet, after all these years, violations continue.

This leaves us all with a difficult but deeply important question: What is wrong with current laws that has made it possible for so many violations to continue, and why should our citizens feel confident that this time the promises Congress makes will be kept? What, in actual practice, will make the new promises truly enforceable?

No laws have perfect compliance. We take the Commission's report and the Commission's very existence, however, to mean we all agree more needs to be done. It is no answer to say that the U.S. Department of Justice (DOJ) will try harder, because it is inconceivable that any plausible increase in appropriations will give DOJ the resources to do its job at an acceptable level relative to the need. Surely the decades have taught us that. Therefore, we urge Congress to consider a range of possibilities for new legislation, including:

- i) ensure that private individuals, not just DOJ, can bring private actions to enforce all relevant voting rights and anti-discrimination laws with the absolute minimum of technical legal barriers, such as restrictions (other than any required by the Constitution) on who may bring suits, on class actions, and on remedies;
- ii) reverse the judicial misinterpretations of earlier statutes whereby courts have imposed restrictions on attorneys fees, making it more difficult for aggrieved voters to find capable lawyers and experts;
- iii) provide grants to state attorneys general to support new efforts on their part to enforce antidiscrimination laws in registration and voting; and
- iv) provide grants to community-based organizations to investigate and if necessary litigate, as the Department of Housing and Urban Development has long done to support fair housing and combat housing discrimination.

The Commission's report points the way forward with many sound recommendations and much useful analysis. Strong legislation is vitally important now because many of our citizens feel their confidence in our election system at a low ebb. America's challenges and America's increasing diversity should make us redouble our efforts to include people in the basic process of democracy. We cannot do that in the face of news accounts of precincts where 20 percent of ballots are not counted in an excruciatingly close presidential election. We cannot do it when voters are turned away because their names are inexplicably missing from some computer print out and the phone lines to county offices are busy for hours on end. We cannot do it when citizens with poor eyesight cannot track the columns of complex ballots, when citizens with disabilities are faced with barriers or humiliation, or when proud new citizens are made to feel second class in their own, new land.

## **Endnotes**

1. The National Voter Registration Act, or "Motor Voter", already mandates a "fail safe" balloting procedure as a protection against erroneous purging of registration lists. It is focused on problems of disputed changes of address, and applies only to voters who move within a county. It is burdensome to the voter and has not proven very workable. The Commission's proposal, Recommendation 2, is broader.

2. The 1975 amendments to the 1965 Voting Rights Act include certain protections for non-English speaking voters in counties above a population trigger. (Congress extended those provisions in 1982 for a period of ten years and in 1992 for fifteen years). Reports of jurisdictions failing to carry out the necessary procedures for complying with these provisions are widespread, and whether this is a matter of intent or negligence is unclear. However, in addition to enforcement difficulties, current law does not require technologies that will allow a secret ballot for voters needing assistance because they are illiterate or visually impaired. Nor is a secret ballot required by the Voting Accessibility for the Elderly and the Handicap Act. In practice, jurisdictions often comply with current law by forcing voters with disabilities to use absentee ballots.

## **Additional Statement**

*Concurring, by Colleen C. McAndrews,  
Joined by Slade Gorton and Leon Panetta*

We in the West have experienced first hand the effects of premature network election projections on voter turnout in down ballot races as well as the presidential race. Respect for the First Amendment, shared by all Commissioners, caused caution in our recommendations to Congress to address this controversial practice. No unanimity was achieved for a radical approach such as federal legislation to ban outright early projections until such time as the polls had closed in all the contiguous 48 states.

We do not urge this approach immediately. We support the Commission's incremental steps as set forth in Policy Recommendation 10. We also are wary of First Amendment challenges if an outright ban on network projections were attempted.

However, we wish to bring to the attention of Congress a line of legal reasoning that holds that a carefully crafted direct ban might withstand constitutional challenge. The Supreme Court has recognized some limitations on free speech in connection with elections in a line of cases culminating in *Burson v. Freeman*, 504 U.S. 191 (1992), which upheld a zone free of campaigning and electioneering within 100 feet of a polling place. The Court held that this intrusion on free speech was narrowly tailored to serve a compelling government interest in preventing intimidation and election fraud. The Court grappled with "a particularly difficult reconciliation: that accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy." *Id.* At 198. The Court cited earlier cases in which it "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself," and found these to be "indisputable compelling interests". *Id.* at 191 (citing to *Anderson v. Celebrezze*, 460 U.S.

780, 788, n.9 (1983); *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 228-229 (1989)).

If the broadcast media are merely delayed for a short period of time (no more than three hours) from projecting election results, it may be that the courts would agree that such restrictions on the networks' speech from 8 p.m. EST to 8 p.m. PST is outweighed by the need to protect the integrity of federal elections. These limits do not involve discourse on issues or limitations on particular viewpoints but only a practical delay of the announcement of the aftermath of the campaign, the networks' educated guessing about who won or lost the horse race.

The polling place campaign free zone in *Burson* passed the Court's test of strict scrutiny by comparing the exercise of free speech rights with another fundamental right, the right to cast a ballot in an election free from intimidation. *Id.* At 211. Perhaps the Court would view the early projections of a presidential race as intimidation or suppression of West coast voters who believe their votes no longer count.

## Additional Statement

*Concurring in Part and Dissenting in Part*

*by John Seigenthaler, Joined in Part by Griffin Bell*

*On Point 2 of Policy Recommendation 10.* The Commission's proposal for a law is wrongheaded and unrealistic. I dissent on three grounds. First, local election officials certainly have a First Amendment right to engage in political speech-and discussing election results clearly is political speech. I cannot believe that the Congress should or would seek to make a law that gags local officials from giving citizens and the news media-in their communities or in their state-presidential or Congressional election returns the moment they are available. Second, such a law, if enacted, surely would result in news media lawsuits challenging government action to directly and blatantly interfere with the First Amendment right of journalists to gather and report the news when it is news.

The legal theory on which some of my colleagues rely ignores the constitutional protection a free press enjoys to report without government interference news of great moment. They know it is a stretch. Their well-intended effort to protect West Coast voters from early presidential election projections is a bluff that the news media will call. It is a wasted effort.

Finally, the First Amendment aside, the bluff won't work. It is impractical and unrealistic. The relationship between local election officials at the precincts, and at places where votes are counted and reported, is long-standing and mutually beneficial. Elected and appointed local election officials feel a duty to get returns to the public-their constituents who elect them and pay their salaries-at the earliest possible moment on election night. Members of the news media are their allies in fulfilling this duty. In many polling and

vote-counting places news media representatives serve dual journalistic roles: they collect the returns and report them to their news organizations, and also serve as monitors on the integrity of the process.

The Commission is proposing a law that will never be enforceable. Election officials will be working to let voters-again, their constituents-know the outcome of races for governor, mayor, state legislator, and city council seats, etc. At the same time the Commission would gag them from reporting who won the congressional seat in their district and the U. S. Senate race in their state. They will be pressured by voters to release that information as soon as possible and to let local citizens know, as well, how their state and congressional districts voted in the presidential election. This stratagem won't intimidate the news media. The Commission should not pretend that this is a serious recommendation.

At the same time, the news media's reliance on exit polling is seriously flawed, as the Commission accurately states. Only about half the voters asked to participate at polling places now agree to do so. That percentage is too low to assure exit poll reliability. Only twenty percent of absentee and early voters agree to participate in telephone "exit" poll interviews. If the Commission wishes to halt early network projections in the presidential race, based on exit polls, it should urge Secretaries of State, political parties and civic groups sharing that concern to engage in voter education programs advising citizens that they contribute to possible election night chaos by participating in exit polling, either in person or by telephone.

*On Point 4 of Policy Recommendation 10.* I concur. This would be a great public service by the networks. They should voluntarily provide the time. The Commission is indebted to President Carter for urging the Commission to adopt it. I would oppose a law requiring the networks to provide time as volatile of the First Amendment.

*Griffin Bell does not join in the following portion of John Seigenthaler's statement.*

*On Point 1 of Policy Recommendation 11.* We are seeking to reform a serious ill in the most basic aspect of self-governance. The vitality and credibility of our democracy is at risk. Our funding proposal should be described as "adequate," not "modest." We can only hope that the \$2 billion we recommend (hardly a modest sum) is sufficient to restore faith in the system.

*On Policy Recommendation 13.* The Commission recommends the establishment of a new federal agency that will provide grants and oversight to states receiving this \$2 billion in funding. The federal dollars are to be matched by the states. Our recommendation falls far short of requiring strict accountability as to how the funding is expended. Nothing in our policy recommendation here bars, for example, states and local governments from diverting funds simply to defray costs created by the federal government's mandating Motor-Voter registration; nothing requires ongoing reporting statements from local and state election officials receiving money; nothing requires any prioritization of state reform efforts. Indeed, Part 4 of this policy recommendation "grants

broad discretion to the states" with no suggestion that there will be strict accountability. If we are to ask Congress to give states \$2 billion in federal money, to restore trust in the system, taxpayers are entitled to know that the new federal agency will demand accountability on every dollar spent. The fuzzy nature of this policy recommendation will invite abuse, diversion of funds, partisan favoritism and the risk of fraud. Not a word here suggests what sanctions will result if states fail to keep faith with the spirit of reform. And nothing gives the new agency the needed power to enforce the law we ask Congress to pass.

*The Electoral College Controversy.* From the outset, members of our Commission agreed that we would not wade into this constitutional quagmire. The Commission's commentary in this section violates our agreement. In effect, it states the Founders got it right at the Constitutional Convention by creating the Electoral College. For all their wisdom and vision, the Founders got it wrong in the convention by ignoring George Mason's plea for a Bill of Rights and by creating a chaotic situation as to the selection of a vice president. Within a decade, both of those flaws of the Founders were corrected. Public opinion polls tell us that a majority thinks the Founders got it wrong with the Electoral College. In my view, the Commission should have not so obviously taken sides on a matter we agreed to avoid.

*On Motor-Voter Registration.* The majority of the Commission agreed to leave this issue without critical comment. Readers certainly will find the commentary here as negative comment on this subject. In fact, Motor-Voter registration has added many thousands of legitimate, qualified voters to the rolls. We should acknowledge that the complaint that Motor-Voter registration has added millions of dollars in "unnecessary costs" comes, for the most part, from local governments unhappy that Congress mandated the Motor-Voter system without funding it. We should acknowledge that Motor-Voter registration has brought significantly more citizens into the system.

*On Early Voting.* The Commission did not look with favor on a policy recommendation that restricts early voting now effective in fourteen states. Nor did we take a position against relatively new and more permissive absentee voting procedures. Our rhetoric suggests that we are opposed to both early and absentee voting. Many states, including my own of Tennessee, report positive experiences with the early voting experiment. Nothing the Commission has heard from those states-or from Oregon, where in the last election all voters were "absentee"-justifies our statement that early voting "threatens the right to a secret ballot." In my view, we should commend efforts by local election officials who have sought to eliminate crowding and confusion at the polls on Election Day.

## A REPORT OF

# THE CONSTITUTION PROJECT'S FORUM ON ELECTION REFORM

## August 2001

### ABOUT THE CONSTITUTION PROJECT

The Constitution Project, based at Georgetown University's Public Policy Institute, Washington, DC, is a bipartisan nonprofit organization that seeks consensus on controversial constitutional and legal issues through a unique combination of scholarship and activism. The Constitution Project currently has four initiatives: on the death penalty, judicial independence, the process to amend the U.S. Constitution, and election reform.

## BUILDING CONSENSUS ON ELECTION REFORM

### **Chair, Forum on Election Reform**

Morton H. Halperin, Board Member, Constitution Project

### **Counsel and Reporter**

Michael Davidson

### **Working Group Chairs**

Stephen Ansolabehere, Massachusetts Institute of Technology\*

Marlene Cohn, League of Women Voters Education Fund

Norman Ornstein, American Enterprise Institute\*

Trevor Potter, The Reform Institute

Richard Soudriette, International Foundation for Election Systems

## CHAIR'S PREFACE

In 1997, Virginia Sloan and I founded the Constitution Project with the goal of developing and promoting bipartisan solutions to contemporary constitutional and legal



issues. Now based at Georgetown University in Washington, D.C., the Project continues to operate on the belief that building consensus among individuals and groups with different perspectives is critical to the democratic process. We bring this conviction to our work on election reform.

In February 2001, The Constitution Project launched an election reform initiative by convening the Forum on Election Reform. We, along with many others, were motivated to help address the deficiencies in our nation's election system that were brought to light in the 2000 elections. We felt that there was an opportunity to implement needed reforms, but that there was some danger that the issue could be cast in a partisan manner. For that reason, we set out to identify and forge consensus between individuals of both political parties, and organizations of all kinds with an interest in reform. Our goal was simple: to ensure that eligible voters are able to vote and to have their vote counted accurately. We specifically excluded, as part of this initial effort, larger questions about election reform such as the role of the electoral college or how to increase voter participation.

The Constitution Project invited state and local elected officials, other officials who run elections, advocates for voters, and experts in relevant fields to participate in the Forum on Election Reform. What follows is the result of that five-month effort - a report that identifies what we believe are the major points of agreement between the participants. Our hope is that this partnership will increase the chances for timely and responsible action by the Congress and state legislatures.

This initiative was made possible by a grant from The William and Flora Hewlett Foundation. We are grateful to Paul Brest, President of the Foundation, for his early support and commitment to improving the American election system.

A number of people deserve recognition. We deeply appreciate the dedication of the working group chairs who provided expertise, worked closely with participants, and guided the formulation of our recommendations: Stephen Ansolabehere, Massachusetts Institute of Technology (Technology); Marlene Cohn, League of Women Voters Education Fund (Education); Norman Ornstein, American Enterprise Institute (Voting Procedures); Trevor Potter, The Reform Institute (Federal, State and Local Roles); and Richard Soudriette, International Foundation for Election Systems (Vote Counting).

Our report reflects the hard work of a core group of individuals. Michael Davidson assisted the working groups in preparing their reports and the Forum in preparing its report. Pamela Karlan of Stanford University Law School provided legal guidance about constitutional issues relating to election reform. Mickey Edwards of Harvard University's Kennedy School of Government and a Constitution Project board member contributed substantial insight and guidance throughout. Ronald Weich and Carlos Angulo of the law firm of Zuckerman Spaeder, LLP furnished helpful analysis about existing and proposed legislation and pending litigation. Zoe Hudson, Director of the Election Reform Initiative, and Tracy Warren, Senior Policy Analyst, kept the entire undertaking on track.

Finally, we owe our deepest gratitude to the many participants in our Forum who took time to engage in a thoughtful debate over how to improve the conduct of elections in

the United States. We hope they continue to be our partners over the coming years as the nation turns to implementing election reform.

*Morton H. Halperin*

Chair, Forum on Election Reform  
Board Member, Constitution Project  
August 2001

## SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

### ESSENTIAL ELEMENTS OF REFORM

#### **A.** **Before Election Day**

*1. Voter Education and Election Personnel Training:* Sustained education efforts are needed

to ensure an informed electorate and trained election personnel. Election officials have primary responsibility for voter education, but they should also enlist others, beginning with the schools. Voter education should begin before election day, providing information to voters about how, when, and where to register and vote; how to update their address and confirm registration status; and identification requirements. Voters should be mailed sample ballots, instructions about the mechanics of voting, and notice of their rights and responsibilities. Correspondingly, election personnel should receive training in legal requirements and the operation of voting equipment. Overall, state officials should have a plan to assure that voter education and election personnel training commands the attention they merit throughout the state.

*2. Voting Technology Research, Standards, Testing, and Clearinghouses:* A system for fostering development of voting technologies is an essential foundation of a sound election system. Such a system should include: research on development of technologies that advance important objectives of our the election system (such as accessibility and equipment ease-of-use); standards for the design and performance of equipment to meet those objectives; testing to assure that equipment meets standards; and clearinghouses to collect and exchange information about the development and performance of voting systems.

In addition to technology improvements, the benefits of research, identification of best practices, and information clearinghouses also apply to a broad range of other election administration issues.

*3. Registration Systems:* All states should develop statewide registration databases, as now exist in some states. Accuracy of registration information should be maintained through integration or improved communications between voter registration and other databases, such as motor vehicle department records. A state's database should be available electronically at polling places on election day for timely resolution of registration questions. Any process to remove ineligible voters from registration lists should be non-partisan, be in compliance with voting laws, provide notice to voters they have been removed from the rolls, and afford them an opportunity to correct erroneous information. General programs to purge lists should be completed sufficiently in advance of election day to allow individuals to correct erroneous information.

**B.**  
**Election Day**

*1. Accessibility and Staffing:* Polling places should be fully accessible and accessibility should be broadly defined. It should include selection of polling places that allow access for voters with limited mobility and are convenient to the communities they serve. Materials, including directions to polling places, should be available in multiple languages and formats. Longer voting hours can be critical in making voting at polls accessible for all voters. It is also a worthwhile long-term goal to work toward a system that would allow people to vote at polling places close to work.

Additional resources should be provided for the hiring and training of election day personnel. To increase the number of poll workers, the following should be considered: split schedules; use of high school students; recruitment of retired people and other potential part-time employees; time off with pay for public and private employees; and cooperative efforts with civic groups.

*2. Posted Notices of Rights and Responsibilities:* To provide a common point of reference for election officials and voters in resolving disputes, there should be prominent notice in every polling place of applicable federal and state election law. It should include the voter's rights to a provisional ballot, a new ballot if a mistake has been made, assistance in voting, and a demonstration of the equipment. It should also include any relevant information, such as identification requirements and any time limit on voting.

*3. Preserving the Rights of Voters Who Come to the Polls:* Voters in line by poll closing time should be allowed to cast a ballot. If a voter's name does not appear on the registration list, and the voter affirms he or she is entitled to vote, the voter should be entitled to submit a provisional ballot that will be counted if the voter is determined to be an eligible voter. Voters should be notified whether the ballot was counted.

4. *Vote Casting*: Together with good ballot design, technologies should be used that enable voters to avoid error and record their choices accurately. Technologies that provide voters with an opportunity to correct overvotes or undervotes should be used, as should technologies that enable disabled voters to vote independently and therefore secretly. Voting technology should be flexible enough to allow states to choose among a variety of ballot methods. The ability of election officials to conduct an audit of the original count should be considered in the design and selection of voting technologies.

**C.**  
**After the Polls Close**

State election calendars should allow sufficient time for all counting and contest procedures to be completed in time for presidential electors to cast the state's vote. Each state should define what is a valid vote. As a matter of democratic principle, state law should establish a general rule that places a value on determining whether a voter's choice is clearly discernible. To apply that general rule, the state's chief election authority should be given authority to adopt regulations, through a public rule-making procedure, for addressing recurring anomalies associated with particular voting methods. States should establish clear rules for manual recounts, which should be conducted uniformly across the jurisdiction of the election.

States should provide for pre- and post-election audits of equipment to assure integrity of the final count. Every validly cast vote should be counted, including those submitted by military and other absentee voters and provisional ballots submitted by qualified voters.

**D.**  
**Alternate Methods of Voting**

Election day voting at polling places provides the best opportunity to achieve five objectives: assure the secrecy of the ballot and protect against coerced voting; verify that ballots are cast only by registered voters; safeguard ballots against loss or alteration; assure their prompt counting; and foster the communal aspect of citizens voting together on the same day, so as to benefit from a common pool of public information.

No form of alternative voting - Internet voting, voting entirely by mail, unlimited absentee voting, and early voting at election offices - has been devised that can provide every one of these benefits. Of these alternatives, early voting at election offices is the most consistent with these fundamental objectives.

No matter how states resolve questions about alternative forms of voting, it is essential to have a hospitable and efficient system of absentee voting with protections against fraud or other abuse for important segments of our population unable to cast votes at polling places. These include persons in military or civilian service overseas or voters who by reason of age or disability are unable to vote at polling places.

#### **E. Top-to-Bottom Review of State Election Codes**

Each state should review its election code to ensure that it is easily usable by participants in the voting process, clear to the courts, and comprehensible to the public. The review should take into consideration when uniform statewide requirements are needed to assure equal protection. State reviews should also consider other issues such as reinstating voting rights for people who have completed criminal sentences, minimizing partisan influences in election administration, and consolidating elections in order to reduce their frequency.

#### **PROPOSALS FOR CONGRESSIONAL ACTION**

##### **A. Federal Assistance for Research and Technology Standards**

Congress should provide authority and funds for the following:

- 1) research and development on voting equipment and equipment standards, with particular emphasis on ease-of-use, accessibility for people with disabilities or low levels of English literacy, and special issues relating to electronic equipment, including the ability to audit election results. A priority should be placed on the development of open source code and architecture in all voting software so that it can be subject to broad scrutiny to assure accuracy and integrity;
- 2) an expanded standards program that includes management or operational standards, and performance or design standards to optimize ease-of-use; 3) an expanded testing program to assure that voting machinery complies with established standards; and 4) a clearinghouse allowing states and industry to share experiences with the performance of voting technologies.

##### **B. Federal Grants for Capital Investment in Voting Systems Technology and Use**

Congress should establish a multi-year capital investment grant program for investment in voting technology improvements, including funds for training in the use of technologies.

1. *Scope:* The grant program should include funding for improved registration systems, including statewide databases and communication with polling places; precinct-level voting and counting equipment, including equipment that allows voters with disabilities to vote independently; and election personnel training and voter education about the use of voting technologies.

2. *Duration:* Congress should establish a duration for the program that provides states with the ability to stage investments but does not unduly prolong the time for discernible improvement. To that end, a program that permits systematic implementation of changes over the next three federal election cycles should be considered.

3. *Allotments:* In determining how to allocate funds among the states, Congress should give preference to a grant program that is principally formula-based, most likely according to voting age population. A formula-based program will encourage participation by all states, and facilitate an orderly planning process in the states by assuring the timely and regular receipt of funds. To encourage innovation, a portion of the program should be reserved for grants for pilot state or local programs that are awarded on a competitive basis.

4. *Applications:* Each state and its local governments should work together to formulate, with an opportunity for public comment, a plan that the state submits to the federal government. The plan should describe how federal funds will address identified needs, how the grant will help the state meet existing federal requirements, and how the state will assure equitable use of federal funds within the state. With respect to registration, the plan should describe efforts to maintain complete and accurate lists and to protect the rights of registrants. Each state should also provide assurances that new funds will supplement rather than lower current spending on elections, and that its plan does not conflict with federal law.

5. *Conditions Related to Technology:* New technology purchases should comply with the voting systems standards in existence at the time of a purchase. Each state that receives federal grants should commit, during the life of the grant program, to provide at least one voting device at each polling station that allows sight impaired voters to vote independently.

6. *Additional Requirements:* Congress should provide for two additional measures in federal elections, at least as a condition for federal grants: an opportunity to vote by provisional ballot if registration status cannot be determined on election day, and clear notification at polling places of the rights and responsibilities of voters under applicable federal and state law.

7. *Reporting:* To assist in evaluating whether federal grants are improving the administration of elections, states should regularly provide statistical information on the performance of new and existing voting technologies. At the end of a funding period, each state should publicly report what it has done with grants it has received.

8. *Federal Agency:* In selecting an existing agency or establishing a new one to carry out the research, standards development, and grant functions under an election reform act, Congress

should vest final responsibility in a single agency. It should provide for an independent line-item appropriation so that funds for election purposes are protected against competing demands. To strengthen public confidence, the agency should be independent of partisan influences, and be guided by an advisory board that reflects the viewpoints of key participants in the election process. It should be organized to make decisions in a timely manner.

*9. Appropriations for the Grant Program.* Congress should authorize and appropriate sufficient funds to provide a significant incentive to states to participate in the grant program and to enable them to make necessary improvements. During the first year, after analyzing state plans the agency charged with responsibility for the program should submit to Congress a well-substantiated projection for the fiscal requirements of the full grant program.

### **C. A Permanent Program to Defray Expenses of Federal Elections**

While other areas merit additional resources - such as voter education and training of election personnel - there is not agreement at this time on a permanent federal role in funding the conduct of federal elections. However, there is broad agreement that to assist states and local governments in part of their voter education programs (such as sending voters sample ballots) and in complying with election mail requirements for registration, Congress should establish a new class of postage for official election mail that provides first class service at half the rate.

## **INTRODUCTION**

Early this year the Constitution Project began an initiative to consider measures for achieving election reform. As described in the preface to this report, the Constitution Project seeks to formulate and promote, through scholarship and public education, bipartisan solutions to contemporary issues. Of the public issues that merit the nation's attention, the task of ensuring that our democracy is well served by our election system must be among the foremost.

The Project invited participation in a Forum for Election Reform of representatives of organizations of state and local officials who are responsible for running elections, private groups concerned about voting rights, and experts in technology, politics, and law. From the outset, the work of the Forum has been premised on a conviction that a partnership among these participants would enhance the nation's opportunity to implement necessary reforms.

Members of the Forum participated in five working groups. Four of these groups considered aspects of the voting process: voter education, voting procedures, technology, and vote counting. A fifth group focused on the allocation of federal, state, and local roles in the election process. The chairs of these groups prepared written reports to the Forum that were posted on our website and discussed at Forum meetings. As they proceeded, the working groups modified their recommendations in light of comments from Forum members and others.

The five working group reports were then integrated into a report to the Forum. As a continuing part of the Project's commitment to an open process, the combined report was posted on the Project website and discussed and modified in the course of three meetings of the Forum. What follows is the report of the Forum on Election Reform.

As many recognize, improved voting technologies should be part of a broader effort to assure that all eligible voters are able to vote and to have their votes counted accurately, all on terms of full equality. In Part I, the report highlights essential elements of reform in each major stage of the voting process: before election day, at the polls, and in counting votes. These are interrelated, not isolated stages; sound measures in one should increase the chance of success in another. The report recognizes that some reforms described in Part I will require additional resources beyond the new federal resources that we propose. There is an appreciable challenge to each level of American governance - federal, state, and local - to commit the resources that are needed to provide the nation's election system with the resources it requires.

The recommendations in Part I address matters principally related to responsibilities of state and local governments, although some reforms recommended in Part I also establish the predicate for congressional action. Part II addresses the need for Congress to aid in the development and acquisition of improved voting technologies, and the manner in which that aid should be provided.

The report represents the best efforts of our working group chairs, individual Forum participants, and mine as the reporter, to identify the main points of substantial agreement among the Forum's diverse participants. It is offered to the public with the conviction that it represents significant consensus on areas of importance to the future of American elections.

Our confidence that there are common themes on which to base an attainable and productive election reform agenda has been bolstered as the conclusions of other studies are announced.

Throughout the year state task forces and officials have released recommendations. In May,

the National Association of Counties (NACo) and the National Association of County Recorders, Election Officials and Clerks (NACRC) issued the report of their National Commission on Election Standards and Reform. The Caltech-MIT Voting Technology Project has issued its report on voting system improvements. The National Association of Secretaries of State has released a resolution on election reform. President Ford and Carter's National Commission on Election Reform has just reported. The Election Center's National Task Force on Election Reform and other bodies of state and local officials will soon report. The broad agreement that we have found within our Forum mirrors a comparable unity that is emerging in these major studies.

Nevertheless, a caveat is in order. At the end of the report we list the participants in our Forum. On any particular issue one or several participants may have a different view or emphasis. Many in the Forum are active participants in the legislative process now



underway in Congress and in the states. In that process, some will express a position on one or another issue that more precisely accords with that individual's or organization's exact views. Participation in the Forum does not indicate that each person or organization agrees with every particular in the report. Indeed, we have welcomed additional statements from participants in the Forum, which are set forth in Appendix B to this report.

Finally, the work of our Forum has convinced us that while a great deal of work lies ahead, there is reason to be optimistic about the future. The American election system rests on the strong foundation of our nation's constitutional and statutory guarantees and the commitment of state and local election officials. That foundation, the special and expanding opportunities that modern technology provides, and - importantly - an honest recognition of the challenges we face, combine to make the promise of reform bright.

To turn that promise into reality, continuing efforts to expand consensus, including among participants in our Forum, will be essential. Also of critical importance will be a willingness of America's political leadership to build on public consensus, lay partisanship aside, and work to the common goal of improving our nation's electoral system.

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The Constitution Project's Election  
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## I. ESSENTIAL ELEMENTS OF REFORM

Improvement of our election system requires attention to each major stage of the voting process: measures applicable to steps that mainly precede election day, measures that apply directly to election day and procedures at the polls, and rules and procedures for counting and recounting votes. In Part I of this report, we take each stage in turn.

### **A.** **Before Election Day**

#### **1 . VOTER EDUCATION AND ELECTION PERSONNEL TRAINING**

This past presidential election brought together more than one hundred million voters and over a million full- time and election- day officials. Informed participation is critical in

enabling this great volume of people to work together to produce an election in which all qualified voters have an opportunity to vote and have their choices accurately recorded and counted. To that end, voter education and training for election personnel are indispensable. Both should be sustained efforts. Both require commitment of enhanced resources.

The goal of voter education should be to provide voters with the information they need at each step of the election process in order to exercise their franchise successfully. A sound program should start well before election day. It should provide voters with timely information about how to register, confirm their registration status, and keep it up to date; where and when to vote; and how to operate voting devices correctly in order to cast a valid vote that accurately reflects each voter's intentions. Throughout the voting process, voters should be made aware of their rights and responsibilities as voters.

The principal responsibility for voter education lies with election officials, but it would be a mistake to think they have the sole responsibility. Voter education should be a continuous process that begins with civic education in schools. The education of students can also involve their assistance at the polls, thereby helping to address the problem of a shrinking pool of election-day workers. In addition to schools, election officials should engage a broad spectrum of public and non-governmental organizations to play an educational role.

While many voters can and should be reached at the places to which they go in their daily lives, such as shopping malls or other community gathering spots, all voters should be reached at home. Sample ballots that enable voters to see and study their choices as they will face them on election day, with clear instructions about the mechanics of voting and information about voter rights and responsibilities, are a fundamental tool of a sound voter education program. For some voters, who - because of language, age, or disability - need information in different formats, there should be well-designed methods to reach and communicate with them. For that reason, attention should be given to providing information in multiple formats and languages, using all forms of media - print, radio, and television.

Our recommendation does not address nonpartisan voter guides, for which we have heard substantial support, only because the focus of our project is on the voting process and not on broader questions about the extent or quality of voter information in making electoral choices.

Overall, there should be a plan for voter education. Our society has professions and skills, whether in education or public advertising, that can be brought to bear. In this area, as in others concerning election administration, it is important for state officials to assure that voter education commands the attention it merits throughout the state. Federal officials should assist by broadly disseminating information, including instructional guides, on the requirements of federal law.

Correspondingly, election personnel, both those whose profession it is and the larger number who are recruited for election day, deserve the training required to perform what is an appreciable task. They need to know essential things about federal and state law and about the operation of voting systems, each of which inevitably evolves and requires periodic updating of earlier training. While training of election-day personnel is likely to continue to be the principal responsibility of the local officials whom they will directly assist, states should assure that fulltime election officials receive the training that their responsibilities require.

## **2 . VOTING TECHNOLOGY RESEARCH, STANDARDS, TESTING, AND CLEARINGHOUSES**

An integrated system for fostering development and sound use of improved voting technologies is an essential underpinning of a sound election system. There should be four interconnected elements:

- \* research on development of technologies that advance important objectives of our election system;
- \* standards for the design and performance of equipment to meet those objectives;
- \* testing to assure that equipment actually meets these standards; and
- \* clearinghouses to collect and exchange information about the development and performance of voting systems.

These functions should be funded on a long-term basis in recognition that voting technologies will be continually developing.

Among participants in The Forum, there is broad agreement that the Federal Election Commission's 1990 voluntary engineering and performance standards need first to be brought up to date (as the FEC is now doing) and then kept current in response to technological changes in a rapidly developing field. Those standards should be expanded to add voluntary management or operational standards that include such matters as maintaining sensitive electronic equipment. There is also strong support for voluntary performance or design standards to optimize ease-of-use and minimize voter confusion. The latter are often described as human factor standards, which take into account how voters interact with technology.

The preceding section describes the importance of voter education. Although clear information should be posted and demonstration machines made available, there are limits to the amount of educating about voting machines that can be done at polling places. Preferable designs are ones in which the way to vote accurately is apparent to voters and therefore requires little instruction. Technologies that require polling place instruction introduce a risk of inaccuracy because often there is insufficient time on election day to provide that instruction, particularly at peak voting times.

In developing standards, care should be given so as not to inadvertently create barriers to innovation. For some purposes, standards may be expressed as minimum criteria for satisfactory performance in meeting particular voting system goals. For other purposes, standards may be specifications that set forth exact features. For yet others, progress may be promoted by identifying best practices and providing clearinghouses to inform the public about experiences in using different technologies. The public authority that has responsibility for issuing standards should have discretion to select the form most suitable for its purposes.

Another barrier to avoid is a testing bottleneck. The certification process sponsored by the

National Association of State Election Directors is recognized to be a good platform for assessing equipment durability and detecting errors in software. But as electronic equipment evolves, speed of certification will be an important concern, especially for newer firms. Slow certifications would act as a barrier to competition in the voting equipment industry. A public authority that is responsible for the overall system of basic support described in this section should facilitate use of multiple laboratories for testing hardware and software.

Long-term public funding for research and development on voting equipment and equipment

standards. There should be particular emphasis on ease-of-use, as well as accessibility for people with disabilities, low levels of English literacy or principal literacy in another language. A priority is also research on the security of electronic voting. Attainment of these objectives, all of which serve broad public and democratic values, should not depend solely on research budgets of equipment manufacturers. An example is the development of technologies to enable disabled voters to vote privately and independently.

Much of this research should be conducted under grants to universities and other research centers, under the overall plan and superintendence of a public authority to assure the soundness and integrity of the process. In conducting research and establishing standards, it is important to give weight to the interest of states in having several options for selecting equipment so that the nation's election system is not tied to the vulnerabilities or imperfections of a single system.

One product of publicly-assisted research should be development of open source code and architecture for voting software. This would allow the inner working of vote casting and tabulating machines to be subject to broad scrutiny in order to assure accuracy and integrity. Pending progress toward that objective, the current system of testing laboratories, whose examination of software is facilitated by non-disclosure agreements and software escrow, will continue to be needed to assure software correctness. Software standards should ensure correctness at each stage of the voting process from vote casting through vote counting.

There should be a clearinghouse of information about equipment performance in practice. Both the states and the federal government should regularly collect and report

on data about the incidence of such matters as overvotes and undervotes, as well as about other aspects of equipment use and experience. This information should be readily available to industry, state and local election officials, and the public. A governmental authority should have the responsibility to assure the quality of the data and the objectivity of the reports issued.

Finally, other aspects of elections and election administration should be the subject of research, best practices, and clearinghouse exchanges of information. This includes such matters as polling hours, voter education, and election official training, to name a few.

### **3 . REGISTRATION SYSTEMS**

Improvements in registration are essential to enfranchisement, efficient voting, and the integrity of the voting process. Accurate registration records and prompt availability of them

at polling places will facilitate voting by eligible citizens, including by enabling election officials and voters to concentrate on voting. Improving the technology for managing registration systems should also enable election officials to shorten the time between their state's registration deadline and election day, which will help to ensure that registration requirements are not barriers to participation.

All states should develop statewide electronic registration databases, as now exist in some states. Some states will establish a single database. Others may connect county databases

upon assuring that they are compatible and may be linked successfully with each other. In maintaining accuracy, statewide databases should be integrated or at least have improved communications with other databases. These include those of voter registration agencies (particularly state motor vehicle records and social services agencies), U.S. Postal Service change-of-address records, and state or local agencies that collect vital statistics. There could also be links to other states to correct records such as when a voter moves from one state to another. To make this information useful on election day, statewide registration databases should be electronically accessible from polling places. There should also be improved communications between polling places and higher election officials in order to resolve registration questions expeditiously.

For many states, a major effort must be undertaken to bring voter registration lists up to date.

To ensure fairness and credibility, election officials should involve non-partisan experts as well as adopt other procedures that eliminate any perception of political motivation in the design or implementation of programs to remove deceased or ineligible voters from registration rolls. Any removal process should be consistent with voting rights laws and have safeguards to ensure that eligible voters are not removed.

New technologies can be a boon. But the powerful tools of information technology, if poorly applied, can produce incorrect results that jeopardize legitimate expectations of validly registered voters. Of course, the first line of defense is a statewide system that eliminates occasions for sudden, large-scale, and error-prone purges by regularly and reliably updating records through the integration of new information.

Technology can carry only part of the burden of making registration records more accurate.

Improved administrative procedures in voter registration agencies are essential. It is also essential that voters be able to act promptly to prevent mistakes in the handling of their registrations. Registrars should give voters prompt notification when they have been removed from the registration rolls because the registrars have received information that the voters are ineligible. In response, voters should have an opportunity to correct erroneous information. To make that opportunity fully meaningful, general programs to purge lists (where the risks of error are greatest) should be completed sufficiently in advance of election day (as, for example, 90 days) so that notices can be sent to voters who may then respond in time to resolve registration questions prior to the election.

Our working groups did not address whether registration records should be made more precise by use of an identifying number that is unique to each registrant. For example, the

FEC, pursuant to its responsibility under the National Voter Registration Act, recommends

using a piece of the Social Security number. The Privacy Act of 1974 prohibits states from requiring use of a full Social Security number for voter registration unless they had done so prior to January 1975. Seven states now require full Social Security numbers; two states require the last four digits. Seventeen other states request full numbers; three request the last four numbers. The FEC has recommended that states require use of the last four digits for new registrations, and request that information from current registrants.<sup>1</sup> In the FEC's view, the combination of a voter's name, date of birth, and the last four Social Security digits would get states as close as practical to a unique personal identifier for each voter while still protecting voters from release of full numbers.

Each state will make its own evaluation. In particular states, it may be important whether the

state already uses Social Security information for public record keeping, such as for motor

vehicle records. The various experiences of states that have been using all or part of Social

Security numbers in their registration systems deserves evaluation. Ultimately, states will need to weigh the benefit of using a part of a registrant's Social Security number to establish more precise registration records against privacy concerns and any resulting disinclination to register. Whatever course a state chooses for its registration system, a registered voter's ability to cast a vote should not be contingent on remembering and providing an identification number to election officials on election day.

## **B. Election Day**

No subject has attracted as much debate within the Forum as the question whether or what kinds of general alternatives to election day polling places - such as early voting at polling places, voting by mail or Internet voting - should be encouraged or discouraged. That debate will be described in a subsequent section, which will also discuss particular questions such as voting opportunities of military personnel and citizens living overseas.

Whatever differences may exist about alternatives to voting at polls on election day, there is, we believe, overwhelming support for the proposition that voting at the polls serves basic and historically rooted objectives. The gathering of citizens to vote is a fundamental act of community and citizenship. It provides the greatest security for enabling voters to cast their ballots free of coercion. It facilitates prompt counting and verification of results, which is especially important in presidential elections given the constitutional and statutory time constraints in resolving any disputes about them.

For these reasons, it is essential to direct resources to improve voting at polling places on election day. Every step should be taken to make that a pleasant, accessible, expeditious, and efficient process. No matter how states resolve questions about alternative methods of voting, the national priority should be to correct deficiencies in the election-day, polling-place experience of voters.

Election day can present two very different pictures. One is of a remarkable event in which voters and election personnel succeed together in producing a crowning event of democracy. For too many Americans, however, the experience of voting on election day is marred by long lines at peak hours before and after work, insufficient numbers of personnel at their precincts, incomplete or inaccurate voter registration information, an inadequate number of voting machines or places, poorly maintained or aging voting machines, a lack of accessibility for voters with disabilities, poorly translated materials, and confusing ballots. In the preceding section of this report, we addressed the need to improve registration systems. In this section we will discuss accessibility, voting systems (which also involve accessibility questions), posted notices of voter rights and responsibilities, and provisional ballots.

### **1 . ACCESSIBILITY AND STAFFING**

Polling places should be fully accessible. One hundred percent accessibility should be the goal. Accessibility should be defined broadly. It should include selection of polling

places that are accessible by persons who utilize wheelchairs, are visually impaired, or whose other disabilities or age limit their ability to enter and move about the buildings in which polling places are located. It should include accessibility of polling places to the communities they serve, with respect to the adequacy of their number, location, and availability of public transportation in urban areas. Limited English proficiency can also be a barrier that should be addressed comprehensively, from directions to polling places to the languages used in materials in them. Training of election personnel to be of assistance to voters with disabilities or who speak other languages other than English is also important. (Accessibility of voting machines for voters with disabilities will be discussed below in 4 (b).)

Convenient access may also be increased by working toward methods by which persons may vote, -within the jurisdiction in which they reside - at polling places near where they work, and have their votes transmitted to the locations where they live. Secure local area networks (LANs) - in contrast to difficult to secure Internet voting - may be a feasible avenue for making voting at the polls available to those whose working hours now make voting at their home precincts a serious ordeal. We recognize that technological advances will be required to allow voters to vote at near-to-work polling places for some bottom-of-ballot offices that appear on the voter's home precinct ballot. Despite the challenges, we believe that development of that technological capacity is a worthwhile objective meriting funding at least in experimental ways in the short term.

For military and overseas voters, the feasibility of establishing polling places at U.S. military and diplomatic facilities should also be studied. If military or other overseas service or occupation makes absentee voting a necessity, it should not erase the opportunity to join fellow citizens in casting a secret ballot at a polling place.

A major accessibility problems in our election system is the time available for voting on election day. There are, of course, important balances to be struck, because additional time will require added resources, including for the hiring and training of poll workers. We recognize that state and local election officials cannot simply decree extended voting hours and hire and train poll workers. To make these things happen requires a substantial infusion of funds. We strongly recommend allocation of increased resources for these purposes.

There is no consensus now on proposals for shifting an existing holiday (e.g., Presidents' Day) for use as a new uniform federal election day, or for having one or two days of weekend voting. One concern about a major change, such as establishment of an election day holiday, is that it may result in lower turnouts, if many Americans (too many of whom are now tenuously engaged in our political process) simply decide to take a holiday. For that reason, any move to holiday or weekend voting should be adopted only on a trial basis so its impact can be evaluated before a decision is made whether it should become permanent.

Greater accessibility should also be achieved by an increase in polling hours to accommodate our growing population and varied daily schedules. Our voting



procedures working group recommended a nationwide norm of 15 hours; these hours are used by New York State, which keeps its polls open from 6 a.m. to 9 p.m. The precise number of hours of an expanded schedule should be studied further. We recognize that mandating longer voting hours will require serious study of poll worker arrangements and working hours, risks of inaccuracy due to fatigue, and other issues, not the least being cost. Nevertheless, longer voting hours can be a critical element in achieving the basic goal of making voting at the polls on election day accessible for all voters. Every effort should be made to achieve this goal as expeditiously as possible.

Hiring and training election day officials is difficult as it is. It will be more difficult, even with additional money, if efforts are made to expand their numbers. Still, a number of approaches merit consideration, such as experimentation with split schedules for poll workers, use of high school students, and more aggressive recruitment of retired people and other potential parttime employees. Election officials should work with civic organizations and with businesses and governmental units, which should be encouraged to give employees time off with pay to volunteer at the polls.

Since many schools are closed on election day in November, teachers, administrators, and high school students are available resources to be of assistance at polling places. School districts could provide academic credit for students who volunteer to work at the polls, and extra time off for teachers and administrative personnel who do so. States that require poll workers to be of voting age could relax that rule to accommodate high school students. For these and other election innovations, a clearinghouse should be used to share information both on what works and what does not.

Finally, states and localities should consider whether an increase in pay can help to recruit

more poll workers. Enlarging the pool of poll workers may also allow the recruitment of more poll workers who, on the basis of prior training or aptitude, are able to provide the required level of service. In the long run, increasing the number of available poll workers will help in efforts to meet minimum training requirements.

## **2 . POSTED NOTICES OF RIGHTS AND RESPONSIBILITIES**

Although most voter education should precede election day, there is an indispensable form of

election day education that is mutually important both to voters and election officials. A clearly written, prominently posted statement of principal rights and responsibilities can provide an easily available, common public point of reference to resolve most polling place issues. It should include the major requirements of federal and state laws as they apply to individual voters. It should cover such matters as a voter's right to a provisional ballot, to receive a replacement ballot to correct a mistake before submitting the ballot for counting, and a demonstration of the voting process. The posted statement should also include information on any identification requirements or time limits on voting. Consistent with previous recommendations, it should be available in multiple formats so that the information is accessible to blind voters and voters with limited English proficiency.

### 3 . PRESERVING THE RIGHTS OF VOTERS WHO COME TO THE POLLS

Among a voter's most disappointing experiences must be that of getting to the polls and then being precluded from casting a ballot.

#### **a. Closing Hour Lines**

On account of his or her work schedule or for other reasons, a voter might arrive at the end of the voting day while the polling place is open but not reach the front of the line before the polls close. Lines at the end of a day may result from factors well beyond the voter's control, including an inadequate number of voting machines or machine breakdowns. The principle should be clear: if a voter is in line by the poll closing time, he or she should be allowed to cast a ballot even if that ballot is cast after the polls have officially closed. No voter who shows up within the hours that polls are open should be turned away.

#### **b. Provisional Ballots**

A voter may discover that polling place records do not show his or her voter registration. A motor vehicle department or other registration agency might not have forwarded registration information to election officials. Or election officials may have canceled a registration on receiving incorrect information wrongfully attributing to a voter a disqualifying circumstance, such as a criminal conviction. Integrated statewide voter databases will reduce the occurrence of such problems. Additionally, electronic access to statewide databases and improved communications to higher election officials should help resolve, on the spot, many registration questions. But some will not be resolvable on election day.

Some states allow voters who moved and whose names are not on the rolls at their new polling place to cast a ballot. Some have extended this practice to cover any voter claiming to be registered whose name does not appear on the rolls. But a broader reform is needed. If a voter is turned away and leaves a polling place without voting or filling out a provisional ballot, that voter's opportunity to vote will be irretrievably lost even if the facts show on further inquiry that the voter is qualified.

In the event that registration questions cannot be promptly resolved on election day, voters, at a minimum, should have an opportunity to submit provisional ballots that will constitute their votes if it is determined that they are qualified. A prominent feature of a voter bill of rights posted at polling places should be information to voters about their right to submit provisional ballots. If a registration question arises that cannot be

resolved that day, it is good practice to use the voter's request for a provisional ballot as a registration application or to offer the voter an opportunity to fill out a registration form, even as efforts are made to resolve whether the voter is entitled to vote in the election and at that polling place. At the very least, the voter should be secure in knowing that the registration question will not arise at the next election.

In some places, state laws or administrative rules allow election authorities to include provisional ballots in the initial election-day count. If those ballots are not counted on election day, election officials should determine in the days immediately after whether the voter was entitled to vote and the ballot should be counted. In making that determination, they should check relevant records, including motor vehicle records or records of other voting registration agencies that may have failed to transmit registration information to voter registrars. A voter should be informed whether his or her provisional ballot was counted.

In some states, key functions of provisional ballots may be served by devices of a different name, such as affidavit, conditional, or fail-safe voting. The key, of course, is not the name, but the substance of the procedure afforded to voters to preserve their opportunity to vote. It may also be that procedures in some states, such as affidavit balloting, are more protective of voters than provisional balloting, if they allow voters to vote (actually, not provisionally) on showing basic identification, affirming the fact of their residency, and attesting they made a good faith effort to register. A recommendation for provisional balloting should not be construed as an argument for cutting back on existing protections. Instead, provisional balloting procedures should be a floor from which to proceed in any jurisdiction that turns voters away if a registration question is not resolvable on the basis of polling place records.

Provisional ballots, used when the name of a voter does not appear on the register, should be distinguished from ballots cast by voters who are on the rolls but whose eligibility is challenged. For example, a party worker might claim that the voter should not have been registered because of a lack of citizenship or that the voter is not the person who was registered. States should take steps to ensure that any challenge process will not be used to intimidate voters or to manufacture a prolonged contest.

#### **4 . VOTE CASTING**

In our discussions about vote casting, four objectives have been stressed:

- 1) to employ vote casting technologies and good ballot design that enhance the ability of voters to record intended choices accurately; avoid negation of votes by mistakenly casting more votes for an office than permitted (overvoting); and avoid inadvertently failing to cast a vote for an office (undervoting);
- 2) to provide voting technologies accessible to voters with disabilities or persons with limited English language literacy, that enable them to vote privately and therefore secretly;

3) to use voting technologies that are flexible enough to accommodate the various ballot methods currently in use; and

4) to use voting technologies that allow for auditability, namely, the ability to reconstruct each voter's original vote in the event of an election contest.

a.

#### **Overvotes and Undervotes**

Over the last four presidential elections, approximately two percent of all ballots cast were not counted as having recorded a valid presidential vote because they were unmarked, marked for more than one candidate, or marked in another way that led to their not being counted.<sup>2</sup> That rate has not changed over this period even though new technologies have been introduced. For some voting methods and some localities that rate is higher; for others, lower. Those differences present significant issues of equity. But even if the two percent rate had been evenly spread throughout the nation, and bore no relation to the wealth or racial or ethnic characteristics of various communities, two percent of 100,000,000 voters in a presidential election is 2,000,000 voters. That is an unacceptably high number. We should do better.

It now seems clear within the election community and among independent analysts that unmarked or spoiled ballots are due more to designs that lead to mistakes in voting than to

the physical breakdown of equipment, although improved maintenance is often needed. There is strong evidence that failures associated with voting equipment are produced by two things. One is the difficulty or confusion that too often arises from the way in which voters are presented choices through the design of the ballot or a touch screen. To reduce confusion, it is important to bring to bear a high level of professional, contemporary understanding of how good design can assist voters in making accurate choices and being confident that they have made them.

The other strong contributor to mistakes is the lack of timely feedback to voters that would

allow them to correct inadvertent errors before submitting their votes for counting. Some existing technologies offer especially poor feedback. Other than determining whether chads have been removed, it is particularly difficult for voters to determine whether they have properly recorded their votes on punch cards that do not include the names of candidates.

Two promising techniques are precinct scanning for optical or punch systems and ballot review in electronic machines. These allow voters to check if their ballots are properly marked before submitting them to be counted. If a voter learns before finally casting a vote that he or she mistakenly overvoted or undervoted, the voter should have a chance to correct the mistake. The field evidence is that second chance voting opportunities enable voters to reduce mistakes, in contrast to counting at central locations where ballots cast at precincts are transported and where voters no longer can correct

mistakes. We believe officials should employ systems that enable voters to check for ballot errors.

Overvoting, typically the casting of votes for two candidates for the same office when only one vote is permitted, is almost invariably a mistake. In contrast, undervoting, not casting a vote for an office or ballot question, may be a voter's deliberate decision. A voter may choose to abstain from voting for a high office or, more generally, experience fatigue by the time he or she reaches local offices on a long ballot.

Owing to the potential difference between overvotes and undervotes, a question has been raised whether election officials should exercise discretion in deciding whether to provide an opportunity for ballot review in both circumstances, or if the opportunity should be limited to notification of overvotes. A concern is that voting times and consequent lines will be lengthened if every voter is required to go through a second step of ascertaining whether the voter has made a mistake in completing his or her ballot. In this regard, the point to be stressed is that ballot review is an opportunity for voters to determine whether they have made a mistake. Voters may choose to bypass that chance. Also, in implementing any system of ballot review, voting devices should be developed over the long term that can limit and flag errors without the intervention of poll workers, in order to protect the sanctity of the secret ballot.

**b.**  
**Accessibility**

In addition to the physical accessibility of polling places and the other matters covered previously, the goal of full accessibility applies to each step in the voting process from registration to vote casting. In the past, voters with poor or no vision, motor impairments, or low levels of English literacy generally have not been able to vote without assistance.

Numbers of citizens will continue to need and therefore have a right to assistance in voting. But the goal of full accessibility also places a high value on the ability of each voter at every polling place to vote independently and therefore secretly - as all citizens should be able to do. There are important and encouraging developments. Some equipment vendors or election officials now offer recordings that guide blind voters through electronic voting sessions or provide tactile guides for voting with optically scanned paper ballots. Some electronic voting machines can be programmed in multiple languages for the nation's language minorities.

Further developments are needed. Technology provides the potential. Law and public resources should be enlisted to fulfill that potential.

**c.**

## **Ballot Methods**

In addition to employing vote-casting technologies that enhance the ability to vote accurately

and privately, voting technology should also be flexible enough to enable states to choose among a variety of ballot methods. In all federal elections and most others, voters are asked to vote for a single candidates for an office. But in various state or local elections, voters may be allowed to vote for more than one candidate for an office, such as voting for two at-large county or city council representatives. But other formats are possible, and have their strong advocates, such as formats that allocate more than one vote for a single candidate, as in cumulative voting; or rank candidates in order of choice, as in choice voting and instant runoff voting.

This report does not take a position on the merits of particular ballot methods. Our point is

only that voting technologies should have the capacity to accommodate various ballot methods. The development and selection of a particular voting technology ought not to impede the possibility of subsequent legislative adoption or modification of the kinds of ballot choices that should be made available to voters.

### **d. Auditability**

The administration of elections involves a massive computing task. Votes are cast locally in

precincts on dedicated machines. The votes cast for each office or ballot question must be tabulated quickly and accurately. Sometimes votes are tallied in the precinct and transmitted to a central location; sometimes the ballots themselves are transferred to a central location and tallied there. The opportunities for errors in aggregating the vote or for corruption of the

count seem inevitable. In the event of an alleged problem with the vote tally, officials must verify the accuracy of the count. The ability to reconstruct the original vote - to conduct an audit of the original count - is termed the auditability of the system.

Voting technologies differ in the ability of election officials to audit election results. Systems

based on paper (hand-counted paper and optically-scanned or punch card ballots) have an

advantage over direct recording technologies (lever machines and electronic voting machines) with respect to auditability. A tally of handcounted paper ballots or an electronic count of punch card or optically-scanned ballots may be audited by recounting the original ballots marked by the voters. Judgment about voter intent is sometimes required, as ballots may have stray marks or voters may have marked their ballots in an unconventional manner.

Nonetheless, there is an initial statement of the voters' intent that is separate from and remains after the counting process. Of course, paper-based ballots can be altered after

they have been cast, and accurate vote verification can be a challenge with regard to any voting technology or method.

In contrast to paper-based ballots, votes cast on lever or electronic machines are directly recorded on them. Individual votes cast on lever machines cannot be audited. While the count recorded on the back of the machine can be verified, votes may be lost if a lever machine breaks down. Many direct recording electronic machines have the same problem. Some now produce internal tapes of each voter's voting session, but programming failures or fraud may affect data recorded on the internal tapes as well. However, if voting data from direct recording electronic machines is altered after election day, the alterations can be detected by comparing the data to multiple and independently saved data sets.

A further audit issue is the ability to observe a count. Historically, in the United States, the primary method for guaranteeing accurate counts is openness. Allowing campaign representatives and the press to observe a count introduces checks on errors. Campaign observers commonly catch transcription errors in the recording of tallies from the backs of lever machines. The increased use of electronic counting procedures and closed source software means it is becoming difficult if not impossible for candidates and party organizations to verify the vote. Lack of openness of software presents technological and security concerns that should be addressed. For all these reason, standards for acceptable levels of auditability should be developed.

Pointing out these considerations is not intended to favor one kind of technology over another. There may be pluses to a form of technology, either generally or with respect to voters for whom that technology provides essential benefits that outweigh the shortcomings of that technology. Overall, it is important to recognize that there are significant choices to be made and progress to be achieved in the course of both responding to deficiencies in technologies and in developing their strengths. In order to provide the greatest voting benefits to a varied voting population, it may be that several forms of technology should be used. For example, it might be appropriate to provide, in each polling place, a direct electronic recording machine with audio capacity for blind voters and multilingual capacity for voters who require that (although, of course, any voter may use those machines), while also using less expensive optical scan systems that do not have those enhanced features.

### **C. After the Polls Close**

The key task after the polls close - vote counting - directly relates, of course, to the specific issues that dominated last year's election controversy: what should constitute a vote and how

should vote-counting disputes be handled? In the 2000 election, those issues arose in a presidential election, a setting that presents special questions about the available time for resolving disputes. Counting and contest issues can arise less dramatically in elections for other offices. Responses to the 2000 experience should work for all elections.

## **1 . TIMELINES**

Each state should review its election code to ensure that its election calendar includes a realistic timetable for procedures on counting and any recounting of ballots that assures prompt resolution of the official outcome of the election. By virtue of two longstanding federal laws, one establishing the first Tuesday after the first Monday in November as the national election day (3 U.S.C. § 1), the other establishing the first Monday after the second Wednesday in December as the date on which presidential electors shall meet and vote (3 U.S.C. § 7), there are only about 40 days between election day and the date the electoral college meets. Thus, each state's post-election timetable should aim for resolution of counting and contest procedures within that time in order to assure that they are completed in time for electors to cast the state's electoral votes.

## **2 . WHAT CONSTITUTES A VOTE**

Each state should define what is a valid vote. Many states have election code provisions that

(with variations in phrasing) require election officials to determine the intent of voters in deciding how to count ballots. In the aftermath of the Supreme Court's decision in *Bush v.*

*Gore*<sup>3</sup>, each state should review its general legislative policy on the definition of a valid vote,

and also the manner in which it should apply that policy in order to assure the equal treatment of voters.

Each state has a major choice to make. One possibility is to prescribe an exact form of casting a vote and to preclude the counting of any vote not cast in that precise manner. Casting votes in accordance with election rules is the standard to which voters and election authorities should aspire. Nevertheless, it is inevitable - when millions of people vote - that systems that require voters to physically mark ballots or to punch holes in them will give rise to variations that make some difficult to count. As a matter of democratic principle, we believe election law should place a value on an effort to evaluate whether a voter's choice is clearly discernible even if a voter did not follow instructions to the letter. Certainly, in the case of write in votes, exact spelling should not be required as long as the voter's choice is clear.

It is impossible to anticipate every anomaly. Still, as required by *Bush v. Gore*, rules should

be in place to assure equal protection of the law in resolving recurring questions that arise under various voting technologies. An example of a recurring question for which there should be a uniform rule throughout a state is what to do when a voter correctly marks a vote for a candidate and also writes in the name of the same candidate. In that



circumstance, the vote for the office should be treated as a single valid vote, as there can be no doubt about the voter's choice. The second marking may be understood to emphasize the voter's choice; it should not be the occasion to negate it.

State law should establish the general principle and procedures for developing specific rules for resolving counting issues. Because counting rules for different voting systems will be detailed and subject to change as technologies change, the task of filling in the details should be carried out in administrative rules, issued by the state's chief election authority in advance of an election, rather than fixed in permanent law. States should use procedures that give public notice of proposed rules and open them to public comment. The political parties whose candidates will be affected by the rules, and local election officials who will in many instances carry out the rules, should be an important part of the rulemaking process.

### **3 . MANUAL RECOUNTS**

Most states provide for an automatic retabulation of votes if the results are close. State law may also authorize candidates to petition for a retabulation. The latter may be conditioned on payment by the requesting candidate for the cost of the retabulation. In places with vote tabulating machines, retabulations can be conducted in accordance with established procedures, including procedures for auditing the machines for accuracy. This subject is discussed in the next section.

When should a recount go beyond machine retabulation of all votes and provide for the individual examination of some ballots? In response to its experience in the last election, Florida's answer is that manual recounts should be triggered in two circumstances. There will be an automatic trigger in elections with razor-thin margins of victory, where a candidate is defeated by one-quarter of a percent or less of votes cast for the office. In elections in which the difference is slightly larger but still small (between one-quarter and one-half percent) a manual recount shall be done on request.

In a manual recount, Florida now provides that approved software will be used to separate two kinds of ballots from all others: ballots in which no vote is tabulated for an office because none is identified by the tabulating machine (undervotes), and ballots in which no vote is counted because the machine has identified two or more votes for that office (overvotes). Only those ballots will be subject to individual review under Florida's new system. If on applying specific counting rules established for each certified voting system, counting teams cannot determine "a clear indication on the ballot that the voter has made a definite choice" (the state's new standard), the unresolved undervotes or overvotes will be submitted to a canvassing board for determination.

Because Florida's manual recount provision is triggered not by events in a limited geographic area (such as a machinery breakdown in one county), but by a margin of difference among all votes cast for an office, it follows that any manual recount should be throughout the electoral jurisdiction of the office in question. In Florida, as in all

states (other than for two electors each in Maine and Nebraska who are separately elected in each state's two congressional districts), all presidential electors are elected statewide. This means that in Florida, any future manual recount in a presidential election will be conducted statewide. This requirement addresses one of the equal protection issues raised by *Bush v. Gore*.

Florida has fashioned a thoughtful approach to manual recounts that merits consideration elsewhere. Other states may frame answers in different ways. Before making a recommendation that might apply to all states, there is more to learn about the range of possible responses. Clearly, the questions answered by Florida - when should individual ballots be examined, which ballots should be selected for examination, what should be the standard and procedure for examining them, and what should be the geographical extent of the examination - are questions that all states should answer.

#### **4 . AUDIT PROCEDURES**

Provisions for manual recounts are important safety valves in close elections. But confidence in the election system is needed even when electoral outcomes are not close. The challenges in maintaining that confidence have grown in light of technological changes that make the inner processes of machine vote counting less visible to parties, candidates, and the public. It is therefore critically important to establish and utilize regular systems to check the accuracy and integrity of vote tabulating machinery.

Audits of tabulating machinery should occur both before and after election day. A useful technique in auditing is to recount a small percentage of the ballots or electronic ballot images manually or on an independently programmed machine. For example, in California, a one-percent manual recount is required automatically, regardless of the spread of votes between the candidates. This process sometimes discovers errors due to programming errors or the assignment of votes to the wrong candidate.

#### **5 . ALL VOTES SHOULD BE COUNTED**

Our individual right to vote includes our individual right to have that vote counted no matter which of the methods permitted by state law we use to cast that vote. This is true whether we cast a ballot at the polls, submit a provisional ballot to be counted if a registration question is resolved favorably, or cast an absentee ballot as a military or overseas voter. No qualified voter should be in any doubt about the counting of his or her ballot.

##### **D. Alternative Methods of Voting**

No subject has generated as much debate in our proceedings as the question of alternatives to

voting on election day at a polling place. It is clear that there is not consensus on this issue. It is possible, however, to identify important areas of agreement while demarcating the principal significant area that presently eludes concurrence. Election day voting at polling places provides the best opportunity to achieve every one of five fundamental objectives:

- 1) assure the privacy of the secret ballot and protection against coerced voting;
- 2) verify that ballots are cast only by duly registered voters;
- 3) safeguard ballots against loss or alteration;
- 4) assure their prompt counting; and
- 5) foster the communal aspect of citizens voting together on the same day after having had the opportunity to hear the full common pool of public information the campaigns can provide.

No form of alternative voting has been devised that can provide every one of these benefits.

There are four alternatives to election-day, polling-place voting methods:

- \* Internet voting;
- \* voting entirely by mail;
- \* absentee voting - which itself has two components: absentee voting for voters who are unable to come to polls, and unlimited absentee voting as a matter of convenience; and
- \* early voting at election offices.

This report discusses each in turn.

## **1 . INTERNET VOTING**

Three types of Internet voting are imagined. One is poll-site Internet voting in which votes cast at regularly established polls are transmitted for counting. A second is voting at kiosk terminals placed in public places (other than regularly established and staffed polls). A third is remote Internet voting in which voters cast votes from any Internet accessible location.

Poll site and kiosk Internet voting present significant unresolved issues, but systematic research and evaluation may identify reasonable limited experiments to help advance the objectives previously described, such as permitting voting at election day locations close to places of work. As for the potentially vast category of remote Internet voting, a recent study sponsored by the National Science Foundation demonstrates the significant security risks it would pose to the integrity of voting.<sup>4</sup> The study urges that remote Internet voting not be used in public elections until substantial technical issues,

among others, are addressed. If security problems are ever solved, remote Internet voting would still face important additional issues concerning the impact of alternative voting. There is no present timeline on which remote Internet voting should become part of the nation's voting methods.

The National Science Foundation study suggested that remote Internet voting may be appropriate for special populations, such as the military and their dependents based overseas. We believe that experimental military voting experiments should be continued.

## **2 . VOTING ENTIRELY BY MAIL**

Only one state - Oregon - conducts its elections entirely by mail. The unique decision that Oregon voters and officials have made for themselves must, of course, be respected. However, whatever benefits there may be of having an alternative to polling place voting, voting entirely by mail is not an alternative, it is a replacement. The complete loss of polling place may be why no other state is considering the Oregon system.

## **3 . ABSENTEE VOTING**

### **a.**

#### **For Persons Unable to Vote at Polling Places**

Important parts of our population are unable to cast votes at polling places. These include persons who by reason of age or disability are unable to vote at polling places, persons in military or civilian service overseas, and other voters unavoidably away from home on election day. No matter how the broader debate about alternative voting methods is resolved, for these voters and others such as them, a hospitable and efficient system of absentee voting, with protections against fraud or other abuse, is essential to fulfilling our commitment to universal suffrage.

### **b.**

#### **Unlimited Absentee Voting**

The area of significant disagreement within our Forum is whether absentee voting should also be available to voters who are able to vote at polling places but as a matter of convenience prefer to absent themselves and vote by mail, as a number of states now permit. Absentee voting presents a risk to every one of the fundamental benefits of election day, polling place voting described at the outset of this section. For voters who are unable to come to a polling place on election day, the unavailability of absentee voting would cause the loss of that person's franchise. For all other voters, the unavailability of absentee voting would present at most a possibility that some voters will choose not to vote.

We know from the actual experience of recent elections that, in some states at least, the number of voters who vote as absentees as a matter of convenience can grow vastly.

Whatever any state may determine is appropriate for itself in state and local elections, in federal elections the consequence of unlimited absentee voting on the ability of the state to produce a final count and decide controversies about it in time for the resolution of a national election is something that the nation has a stake in. In presidential elections, both the sheer additional task of counting absentee ballots, and the multiplication of issues that may arise about the validity of individual ballots cast away from the protections and scrutiny of polling places, may overwhelm the ability of any state to resolve an election controversy within the spare six weeks that are available between election day and the meetings of presidential electors. Or the control, and hence, the organization of one or the other chamber of Congress may be at stake.

States that now employ unlimited absentee voting are not likely to roll back that voting method unless convinced by evidence from their own experiences. In the best tradition of federalism, any jurisdiction that has moved in that direction may serve as a laboratory for itself and others to examine. For any state that has adopted unlimited absentee voting, this report encourages, in light of the issues raised above, a regular reevaluation of the costs and benefits of their procedures. For any state that has not yet adopted unlimited absentee voting, the issues raised above warrant treating with caution and examining carefully any new proposal to move toward greatly expanded or unlimited absentee voting.

#### **4. EARLY VOTING AT ELECTION OFFICES**

Early voting at election offices (or at other places under the supervision of election officials)

is the method of alternative voting most consistent with the fundamental objectives described

at the outset of this section. It preserves all the secret ballot, fraud prevention, and ballot integrity aspects of polling place voting. It shares in a portion of the communal aspect of voting, because although the number of voters will be smaller, voting does not take place in isolation. It falls short only in that early voters will not receive all of the public information provided by the campaign and will not be able, as other voters may, to take account of events just before election day.

There are compensating advantages of early voting. Some voters who may have had to vote by absentee ballot because of travel on election day will be able to come to a polling place and vote in the several weeks before the election. Older or disabled voters, who may prefer to vote at a polling place but who would be impeded by the crowds or pace of election day voting (or, until remedied, the type of equipment at regular polling places) and therefore have to vote as absentees, also will be able to vote at a poll. Of course, other voters will vote early as a matter of convenience, but even for them there may be a reciprocal public benefit. Jurisdictions are able to use early voting at election offices or other election sites as an opportunity to test, on a smaller scale, voting machinery innovations that officials might prudently be reluctant to try first at polling places on election day. To ameliorate the impact of votes without a common base of information, the range of dates for early voting should be kept relatively narrow and close to the election.

One final concern is the impact of alternative forms of voting on voter participation. Enhanced turnout by itself would not necessarily outweigh the loss of the other combined benefits of voting achieved only by voting at the polls on election day. Nonetheless, in the course of evaluating the costs and benefits of alternatives to voting at the polls on election day, states should consider the impact on both overall voter turnout and turnout among different populations, such as people with disabilities, and people of different races, ethnicities, or income levels.<sup>5</sup>

**E.**

**Top-to-Bottom Review of State Election Codes**

As elemental as it may appear, a pillar of each state's election system is a sound state election code. Even if a major revision of a state election code is not required, many state legislatures will discover that, over time, inconsistencies have crept in and that their codes are not easily usable by participants in the electoral process, clear to the courts, or comprehensible to the public. Earlier in this report, we discussed the particular need to address state code provisions on such matters as what constitutes a valid vote and procedures for resolving issues about recounts or contests. More generally, in light of the Supreme Court's decision in *Bush v. Gore*, states should consider whether uniform statewide requirements should modify or replace various delegations to local election authorities that might result in the unequal application of law to various parts of the state's electorate.

As long as its state law is harmonious with the requirements of the U.S. Constitution and federal law, each state is free to fashion its own code. Nevertheless, there is a great deal that states can learn from each other. To that end, there are mechanisms through such bodies as the National Conference of Commissioners on Uniform State Laws or the American Law Institute for preparation of model codes for consideration by individual states. One lesson from the last election is that an election dispute in one state may have enormous implications for the country as a whole. In a sense, every state owes it to every other state, as well as to its own citizens, to have an election code that draws upon both the best of its own experiences as well as that of others.

Among additional areas that merit review by the states, this report notes the following.

First, states should review their laws and procedures for the restoration of voting rights. Where such a procedure is available, states should ensure that individuals are notified about the opportunity to restore voting rights and that decisions are communicated to the individual in a timely fashion.

Second, we encourage states to take steps to increase public confidence by reducing partisan influences, and the appearance of such influences, as much as possible. We recognize that many election officials hold elected office, or report to elected officials. The most important check on partisanship will be sound laws and procedures established in advance of an election. Membership in professional associations with a code of ethics may also help to balance any concerns about partisanship. It is important that a review of partisan influences include all aspects of the election process, including

registration, the design of ballots, absentee voting, oversight and observers at polling places, and the location of polling places.

Similar recommendations have been endorsed by the National Commission on Election Standards and Reform, a joint undertaking of the National Association of Counties (NACo) and National Association of County Recorders, Election Officials and Clerks (NACRC).<sup>6</sup>

Third, states and localities should consider reducing the frequency of elections by consolidating them while being mindful of the desirability of ballots of moderate length. This is especially important as part of an effort to increase participation in elections.

## **II. PROPOSALS FOR CONGRESSIONAL ACTION**

Congress has broad constitutional authority to regulate the times, places, and manner of conducting federal elections. As a result of that authority and other constitutional powers to ensure the voting rights of Americans, the federal government is today an active participant in establishing rules for federal elections on matters ranging from voter registration to protections against discrimination on grounds of race, language, and disabilities. But as pervasive as the federal role has become, Congress has never provided funds to state or local governments to assist them in administering federal elections or in defraying expenses for federal requirements that also affect state elections.

The proposals that follow do not come close to testing the limits of the constitutional authority of Congress to regulate federal elections. Historically, local governments (particularly counties) - and to a lesser extent states - have been primarily responsible for administering and funding elections. We share with many others the view that primary responsibility for conducting elections should remain at the state and local level.

We also believe the federal government should assist states and local governments in modernizing the nation's election system. An important balance must be struck between two important objectives. One is providing state and local governments with substantial discretion to make improvements that they identify as important. The other is to identify improvements that, as a matter of broadly shared national values not unique to individual states or locales, should be subject of special incentives or requirements. The pivotal mechanism for assisting the states is the power of Congress under the Constitution's General Welfare Clause, Art. I, § 8, cl. 1, which embraces the power to spend "as a means to reform the electoral process."<sup>7</sup>

### **A.**

#### **Federal Assistance for Research and Technology Standards**

For 130 years, Congress has legislated on the manner in which votes may be cast in congressional elections. In 1871, as part of a civil rights measure designed to protect against voter intimidation, Congress provided that all votes in House elections shall be

by "written or printed ballot" and that "all votes received or recorded contrary to the provisions of this section shall be to none effect." In 1899, it amended this provision to permit voting for the House by "voting machine the use of which has been duly authorized by the State law." These provisions are now found in 2 U.S.C. § 9.

Each state was on its own in determining what machines to authorize. In 1975, the National Bureau of Standards awakened attention to the lack of technical skills at the state and local level for developing written standards to evaluate voting system hardware and software.<sup>8</sup> Its report launched a process that resulted in the 1990 approval by the Federal Election Commission of voluntary engineering and performance standards for voting equipment. Thirty-seven states have adopted (or advised the FEC that they will soon adopt) those standards for new purchases.

Congress should now take the next step and enact statutory authority and provide appropriations for support of federally-conducted or assisted activities to enable states and local governments to benefit from research on improved voting technologies, the development and regular updating of standards for them, and a clearinghouse of experiences with voting technologies. These functions should be funded on a long-term basis in recognition that voting technologies will be continually developing.

The FEC is updating the voluntary engineering and performance standards that it issued in 1990.<sup>9</sup> As described earlier in this report in Part I (A)(2), an expanded standards program should also include voluntary management or operational standards and performance or design standards to optimize ease-of-use and minimize voter confusion. The federal agency that Congress charges with the responsibility to conduct the standards program should have discretion to select for particular purposes the form of standards - such as minimum criteria, specifications, or best practices - that is most suitable for making progress while leaving sufficient room for innovation.

This recommendation is grounded on several considerations. Even if some states can afford the costs of developing new voting technology standards and keeping them current, many cannot. Overall, it makes economic sense for the federal government to undertake this function for the benefit of all states. Also, some objectives of federally assisted research or the development of standards or performance goals will be to serve democratic values that are not readily supportable by the budgeting of individual states. Neither should these objectives, such as development of technologies to enable disabled voters to vote without assistance, depend solely on the research budgets of equipment manufacturers.

In sum, Congress, by law in effect for now more than 100 years, has required states to authorize any use of voting machines; otherwise votes recorded on those machines may not be counted. For ten years, Congress has undertaken to provide voluntary standards to assist states in the exercise of that responsibility. Those standards are out-of-date and more limited than they should be. In short, the federal government has imposed a responsibility on the states for authorizing the use of voting machinery and taken on a reciprocal one that is key to enabling the states to perform their congressionally mandated responsibility soundly. The modest investment called for by this recommendation is amply justified.



Finally, improvements in election administration require research, the identification of best practices, and exchanges of information about issues in addition to new technologies. To provide illustrations from other portions of this report, there is a need to gain systematic knowledge about such matters as the impact of poll locations, polling hours, and alternative methods of voting on voter participation. Election administrators could also benefit from research on systems management (e.g., the maintenance of accurate registration systems), human resource management (e.g., the recruitment and utilization of election day workers), and issues relating to compliance with federal law (e.g., the presentation of voting information in multiple languages).

Currently, Auburn University, in conjunction with the Election Center, provides one of the few professional training programs in election administration. Coordinated research on elections management, including development of curricula, would allow the nation's schools of public administration, an untapped resource, to play a constructive role in the continuing professionalization of election management.

## **B. Federal Grants for Capital Investment in Voting Systems Technology and Use**

Broadly speaking, two kinds of proposals for federal election system grants have been presented in congressional testimony and public reports during the last several months. One is for a capital investment program for acquisition of new voting system hardware and software by states and local governments during a limited number of years. The other is for a permanent federal formula for sharing with state and local governments the costs of election administration that may be attributable to elections for federal office. In this section, we discuss the proposal for a capital investment program. In discussing a grant program, our references to states include the District of Columbia, which by virtue of the 23rd Amendment also appoints presidential electors.

We believe it is an appropriate federal role to provide grants for a multi-year capital investment in voting technology, both hardware and software, and that a strong case has been made for a grant program. A number of important technology needs emanate from requirements of federal law. Examples include the information management challenge of the National Voter Registration Act and the translation requirements of the Voting Rights Act. National aspirations that should not be dependent on local resources, such as assuring that disabled citizens have the same voting opportunity as other citizens, present other technological challenges. The grant program should enhance the efforts states are making to comply with existing federal requirements.

Finally, funding for election investment is now dependent on local government resources, and therefore constrained by disparate or limited local tax bases. States should do more to modernize and equalize voting opportunities among their jurisdictions, but the task is large enough that there is ample need for both federal and state assistance and cooperation.

The program should be for a range of purposes that is broader than just voting machines, although voting machinery would surely be an important part of it. While public focus has been on vote-casting devices, state and local election officials have

demonstrated that there is a wider scope to voting system needs, including for investment in registration systems. As it should do for any appreciable federal expenditure, Congress should define clearly the program's scope and articulate its goals. Within that scope, states should be able to establish priorities that apply to their circumstances.

**1.**  
**SCOPE**

We recommend that the following be included within the scope and objectives of a federal grant program:

**1.**  
For improved registrations systems:

Funding should be provided for (a) development and maintenance of statewide databases - some states will establish a single database, other states may link county databases; (b) electronic integration of information from motor vehicle bureaus and other sources of registration information; and (c) electronic communications between and among polling places, county and other registrars, and central registration databases.

The purpose of this investment should be to enable states to develop and maintain accurate registration - databases that fully utilize key registration related information within each state, including change of address, death, and other such matters. Grant funds should be available for the development of links to other states to correct records as voters move from one state to another. Registration databases should be usable in a timely way at polling places to correctly and promptly resolve registration questions.

**2.**  
For precinct-level voting equipment, including counting equipment:

The purpose of this investment should be to enable states to acquire new voting machinery, including precinct counting machinery, that will be easy for voters to use and reduce voter mistakes or inadvertent omissions, including by alerting voters that they have cast more votes than permitted for an office or have not cast a vote for an office or ballot question, and that provide voters with an opportunity to correct those mistakes or omissions. The purpose of this investment should also be to enable voters with disabilities to operate voting machinery independently and thereby vote secretly, as other voters may.

**3.**  
For election personnel training and voter education about use of voting technologies:

We discuss below whether the federal government should provide general support for election administration. No matter how that question is resolved, we recommend that part of a technology grant program should be funds for training and education in the operation and maintenance of voting equipment, both with respect to new technologies that are acquired with federal grants and for improved use of existing technologies that continue to be utilized. Assistance in meeting these objectives should be integral to the basic investment.

## **2. DURATION**

Congress should determine the duration of a federal voting systems technology grant program. We have several recommendations about factors that should be considered in establishing the length of a capital investment program.

Some states, through legislation already adopted, are ready to purchase or lease new voting technology. They would be assisted by the appropriation of funds for a federal grant program that goes into effect for the fiscal year beginning October 1, 2001. Other states have established study or planning processes in order to help make technology and other decisions later this year or during next year. Their focus may be on the fiscal year beginning October 1, 2002. A state may wish to stage investments, such as by devoting initial efforts to registration improvements and then moving to voting machinery, or vice versa. States that have invested recently in new voting technology may wish to wait several years for the next generation of voting equipment. Consideration should also be given to the capacity of the voting equipment industry to produce for a market made more active by federal grants, so the pace of grants and acquisitions do not inflate the costs of new products.

In striking the right balance, there is also good reason not to extend unduly the national timeline for discernible voting system improvement. For planning purposes, it makes sense to think of the desirability of cooperative federal-state planning to effect stages of changes in time for the next three federal elections in 2002, 2004, and 2006. This period of time coincides with proposals in pending legislation to establish programs that are five or so years in length. A benefit of implementing modernization efforts by the 2006 election would be to ensure that there is an opportunity to work out any issues that may inevitably arise in adjusting to significant changes before the 2008 presidential election.

At the point selected by Congress, the program should sunset. Any extension would be subject to a fresh determination by Congress that, on evaluating experience under the program, renewal is warranted. Of course, in considering whether to extend the program, a major consideration should be whether a five-year program life has proven to be too short for effectuating soundly in all states the major modernization effort contemplated by the program.

## **3. ALLOTMENTS**

Congress has many options for structuring a grants program. A threshold decision is whether to award grants to states on a competitive basis (with the possibility that some states may not receive any funds), or whether to award grants to all states on the basis of a formula. In light of the significant and urgent need for federal assistance throughout the country, we believe preference should be given to a grant program that is principally formula-based.

A likely formula is apportionment of funds among the states according to the share of each in the nation's voting age population, although a prescribed uniform minimum allotment for each state might sensibly reflect that certain costs (for example, software for statewide registration systems) may not depend on the voting population of each state. Of course, some states may opt out of the program, either entirely or in part. To the extent that applications from a state (or from localities if a state does not apply) do not utilize the entire amount allotted to the state, the state's unused share of the federal authorization should be reallocated among the remaining states. There may also be limited, defined circumstances, such as when a state is knowingly in violation of federal requirements, that release to it of the state's share should be deferred pending compliance with applicable requirements.

Each state should be required to submit a plan for use of its allocation, as described in the next section. Accordingly, some funds should be released at the outset of the federal grant program to assist states in preparing plans. The formula for apportioning these funds should take into account that each state, no matter its population, will incur some similar minimum costs in establishing and implementing a statewide planning process.

There are several advantages to a principally formula-based approach. First, it will be useful to encourage participation by every state because all states can benefit from an investment in election administration. Second, the expectation of timely and regular receipt of a predetermined amount of funding will enable each state to engage in an orderly planning process. Third, a formula-based approach should reduce the costs of federal administration.

Finally, while the overall federal grant program should be principally formula-based, there is good reason to reserve a portion of it (for example, ten percent) for pilot state or local programs that may provide a testing ground for technologies or their applications. In the nature of pilot programs, the grants for them should be awarded on a competitive basis to encourage innovation.

#### **4. APPLICATIONS**

Congress should establish a process for application for federal grant funds and for the review of activities under those grants. As an ordinary matter, we believe local governments should submit requests to their states and that states should submit applications to the federal government. Each state will need to make a judgment, after collecting requests from local governments, about structuring its application so it fits within the amount that will be available to the state. There may be limited circumstances

- for example when a state declines to participate in the grant program - in which local governments should be authorized to apply directly to the federal government. In the main, states and local governments should be encouraged to work together to formulate a statewide plan. Otherwise, the federal task of sorting through individual local government applications could be daunting.

A state application should include a publicly available plan that describes the state's election investment needs, how the state will use federal funds to address those needs - including how the grant will help the state meet existing federal requirements - and how the state will assure the equitable use of federal funds within the state. It should describe the state's compliance with existing election administration requirements under the Voting Rights Act, the Uniformed and Overseas Citizens Absentee Voting Act, the Voting Assistance for the Elderly and Handicapped Act, the Americans with Disabilities Act, and the National Voter Registration Act. It should provide assurance that the state plan does not conflict with those requirements, and describe how grant funds will be used to meet them. These laws set out essential standards against which the lawfulness of every state's election system must be judged.

To illustrate, an important use of federal technology funds will be for improvements in registration systems. In the application process, states should describe how those improvements will enable them to maintain complete and accurate lists on a regular basis. Additionally, in order to prevent discriminatory or erroneous purging, states should describe the safeguards they have established, including timely notice and an opportunity for voters to rebut any grounds for being stricken from the registration list. To ensure that systems acquired with federal funds are available to all voters, states should describe their measures to assure that all voting locations are fully accessible.

The plan should provide assurance that federal funds (and any matching funds) will be used to supplement, rather than lower, current spending on elections. To facilitate resolution within each state of any issues about its plan, the application should be open to public comment during its formulation. The state's plan should also be publicly available after adoption. The application should be reviewed by the appropriate federal agency for compliance with existing federal law, such as existing law on minority languages, and with the requirements of the law establishing the grant program.

## **5. CONDITIONS RELATED TO TECHNOLOGY**

Congress should require new technology purchases to comply with the FEC's existing voting systems standards. These standards are, of course, now voluntary and only become mandatory when they are adopted by a state. By conditioning federal grants on compliance with them, Congress would be making the standards mandatory in the minority of states that have not yet adopted them, insofar as equipment purchased with federal grants is concerned. The justification for doing so is that the existing standards have become de facto a national norm.

A different issue is presented by whether technology purchased with federal grants should comply not only with existing standards but also with any new ones that are in existence at the time of a purchase. We believe there is good reason to require that.

New standards will represent the best understanding of what technology should achieve. We recognize this would partly alter the nature of the standards, which has depended on state decisions to adopt them. We are suggesting not that the new standards now be mandated for existing voting devices; but only that it is appropriate to use federal grants to give states an incentive to acquire new technologies in which voters have the greatest confidence that their voting opportunities will be secured by the best standards then available.

One technology objective that should be enacted into law is that federal technology funds be used to enable voters with disabilities to vote independently and therefore privately. A state applying for a technology grant should commit to provide, during the life of the grant program, at least one voting device at each polling station that allows sight-impaired voters to vote independently. Complete attainment of this objective with regard to some other disabilities may depend on further research, but the overall objective should be clear and reached as soon as feasible. Of course, individual voters may prefer as a matter of their own volition to have assistance in voting. But the right to cast a secret ballot is so central to our democratic tradition that Congress should accelerate this new opportunity that technology provides.

## **6. ADDITIONAL REQUIREMENTS**

Apart from capabilities that may be required for voting systems acquired with federal funds, there are two important measures that Congress should provide be universally adopted in federal elections, at least as a condition for federal grants. If a change in state law is required, the time for compliance should allow for a regular meeting of the state legislature to enact that change.

One is that if a voter's name does not appear on the list of registered voters, and election officials are unable to resolve at the polls the question of the voter's registration, the voter should be given the opportunity to submit a provisional ballot. The reasons for providing an opportunity to submit a provisional ballot are described in Part I (B)(3)(b) of this report, together with more detail about that process. The essential point is that if a registration issue cannot be resolved on election day, a provisional ballot ensures that the voter's opportunity to vote is not irretrievably lost.

Second, election officials should post at polling places clear notices of the rights and responsibilities of voters under applicable federal and state law. The posted information should be made available in alternate formats. We are not proposing that Congress mandate the specific contents of these statements. A number of states are in the process of fashioning them. Private groups are also recommending various forms of them. The key is that there be a prominent and readily available frame of reference for election personnel and voters to anticipate and then resolve polling place issues within the requirements of federal and state law.

Neither a provisional ballot requirement, nor one on posting bills of rights or statements of responsibility, would change the underlying requirements of federal or state law on who may vote or how they should do so. But they will both help promote an atmosphere and process that assures all participants in the voting process that decisions will be

made in accordance with applicable law. Of course, states on their own can adopt these measures. Some have done so; others will follow. There is considerable benefit in providing for the early universality of them in federal elections as a national down payment on other improvements and reforms that will follow.

These additional requirements supplement the plan submission requirements detailed in Section 4.

## **7. REPORTING**

To assist in making judgments about whether federal grants are helping to improve the administration of elections, states should regularly provide statistical information on the performance of new and existing voting technologies, at least in relation to elections for federal offices, although reporting on experience in other elections may be informative to the Congress and other states. The reports should include documentation about numbers of undervotes and overvotes with respect to various voting technologies. The information should be transmitted to the national clearinghouse so that it can be widely distributed in order to inform technology decisions at the local, state, and national levels. At the end of a funding period, each state should publicly report on what it has done with grants it has received. These reports should be evaluated by the federal grant-making agency.

## **8. FEDERAL AGENCY**

Bills before the Congress place responsibility for election administration in different agencies: the Justice Department, the Commerce Department, and the FEC. At least one bill would establish a new federal agency. Some bills send discrete functions to additional agencies. Without commenting on the merits of any of these proposals, the federal agency chosen (or established) to carry out the responsibilities we have described should have several attributes.

First, it is desirable for a single agency or office to have final responsibility for all of the functions identified in this report: research and development, standards setting, and grant-making and oversight. There may, of course, be circumstances in which Congress determines that the expertise of another agency should be made available to the one that has final responsibility for these functions.

Second, Congress should include an independent line-item in the budget to cover these functions. This would occur if the Congress establishes a new agency but should be the case even if Congress vests these responsibilities in an existing agency. Appropriations for election purposes should be protected from competing demands of a parent agency. The FEC's Office of Election Administration already has responsibility for some of these areas, and it is sensible to build on that agency's existing expertise, either by greatly expanding its mission and resources, or by relocating it elsewhere.

Third, it is important that the agency be independent of partisan influences to eliminate political considerations and thereby heighten public confidence in the agency's work.

Fourth, the agency should be guided by an advisory board that reflects viewpoints of key participants in the election process, including election administrators and representatives of voters. The advisory board should also include members with legal and technological expertise.

Finally, the agency should be organized to make decisions, particularly those on grants and standards, in a timely manner. If the grants program is given to the FEC, it will be important to establish an independent decision-making process to avoid potential deadlock on the even-numbered Commission. One technique for doing that would be to provide that the head of an election office within the FEC be appointed by the President (perhaps, as in the case of the Comptroller General, upon receipt of recommendations from the bipartisan leadership of Congress). There could be the added protection and status afforded by the advice and consent of the Senate, and a requirement that the head of the office have a vote on the Commission on all matters affecting the grant program.

We did not reach agreement on whether an existing agency or a new agency would best reflect these attributes. There is agreement, however, that time is of the essence. If the Congress decides to establish a new federal agency, it should provide for an interim arrangement so that the grant program can go forward while the agency is being established. We have two comments with regard to existing responsibilities of the federal government. The Department of Justice should retain all of its current responsibilities for enforcement of voting rights laws.

We also recommend that the Federal Voting Assistance Program (FVAP) be retained in the Department of Defense, although the agency given responsibility to carry out the grant program should be authorized to work cooperatively with that program to facilitate improvements. Military personnel and citizens living overseas face unique challenges in registering and voting. Timely delivery of ballots and other information is critical to enable these citizens to vote. We are concerned that if these functions as they relate to military voters are transferred to a civilian agency, they might not be accorded the same level of priority among military commanders as are communications from the Office of the Secretary of Defense.

Congress should provide the resources needed to ensure vigorous implementation of the responsibilities that remain in the Departments of Justice and Defense.

## **9. APPROPRIATIONS FOR THE GRANT PROGRAM**

Congress should authorize and appropriate sufficient funds to provide a significant incentive to the states to participate in the grant program, and to enable them to make necessary improvements. Several pending bills would authorize amounts such as \$500 million for five years. We believe this is a modest amount for the purpose of an initial authorization, given the cost of administering elections and the improvements that are warranted. Other bills provide more flexibility by appropriating such sums as may be necessary to carry out the purposes of the grant program.



Two recent studies offer cost estimates for updating voting equipment. The Caltech/MIT Voting Technology Project estimates that it will cost about \$2 per voter per year to achieve upgrades in voting equipment (assuming a 15- year life for voting machines). It will cost an additional \$2 per voter per year to lease laptops for polls on election day with voter registration lists. The total cost would be \$400 million per year for these two kinds of expenditures.<sup>10</sup>

A George Washington University report estimates that it will cost \$1.2 billion to replace punch-cards with optical scan voting machines.<sup>11</sup>

Costs, of course, will vary based on the kind of equipment purchased, whether states lease or buy, the needs of the state, and the matching requirement. A number of recent decisions by states and localities to replace voting equipment also provide a preliminary indication of how much money is needed. Florida,<sup>12</sup> Maryland,<sup>13</sup> and Michigan<sup>14</sup> estimate it will cost between \$24 and \$39 million to replace voting equipment in their state. Some large counties in the United States will alone require comparable levels of funding. Harris County, Texas, the third largest county in the United States, is planning to invest \$25 million to purchase direct recording electronic voting machines.<sup>15</sup>

The development of statewide registration systems also varies in cost. Several years ago Michigan invested \$7.6 million to establish its statewide voter registration file, including payment to localities for installation. The state now spends \$1.4 million annually to maintain the file.<sup>16</sup> Oregon estimates that establishing a centralized voter registration system will cost \$6 million. These figures do not include the important element of electronic communications with polls on election day.<sup>17</sup> And there is the need for voter education and training programs in the use of voting technologies.

More thorough estimates of the needs of the federal grant program should be made possible by analysis and compilation of the plans submitted by each state during the first year of the grant program. An important function of the federal agency responsible for the program, aided by an advisory board, should be to submit to Congress during the first year, in time for the second annual appropriation for the program, a wellsubstantiated projection for the fiscal requirements of the program during the full term of the grant program.

## **10. OVERSIGHT**

The federal agency responsible for awarding the grants should conduct periodic audits to ensure that funds made available under this section are expended for the stated purposes, and to review a State's activities in the areas required in sections (5) and (6) above.

### **C.**

#### **A Permanent Program to Defray Expenses of Federal Elections**

There is broad recognition that, in addition to a need for investment in voting systems technology, other areas of election administration - such as general voter education,

training of election administrators, and staffing of polling places - would benefit from increased funding.

There is one form of permanent support for election administration for which there is broad concurrence. A significant factor in the cost of election administration is mailing. In the National Voter Registration Act, Congress directed the Postal Service to make available to state and local registration officials the rate that is available to qualified nonprofit organizations. For various reasons, including technical ones under Postal Service regulations, the promise of financial assistance in the mailing of mandated registration materials has not been fulfilled.

State and local officials should, in fact, be undertaking more mailing to voters, including sample ballots and information about procedures and voting rights. To these ends, state and local election officials have been urging Congress to establish a new elections class of postage that would provide first class service at half the first class rate. This arrangement would provide speed of delivery and necessary services that are important in election administration (such as the return of mail if addressees have moved) at a rate befitting the high volume of that mailing. The important public ends that are served by official election mail amply support that recommendation. We believe the proposal merits a favorable response by Congress.

Beyond provision for a new postal rate, a number of members of our Forum favor the idea that Congress make a long-term commitment to expend federal funds to defray the costs incurred by state and local governments in conducting elections for federal office.<sup>18</sup> In their view, there is merit in the suggestion that the federal government reimburse states and localities for their expenses in conducting elections for federal office, or at least for the part of them attributable to federal requirements, such as the notification requirements included in the National Voter Registration Act. Other members of the Forum oppose, or at least oppose at this time, a permanent federal role in funding state and local government election administration.

The authorization of a permanent contribution to general election expenses, in contrast to a limited-term investment in the technology of elections and a new postal rate, raises questions about the relationship of federal and state governments in this area that are larger than can be readily resolved at this time. If the uncertainty within our Forum reflects uncertainty elsewhere, it may be that Congress and the states will wish to evaluate their experiences in carrying out a technology grant program for several years before considering whether to embark on a permanent cost-sharing one.

## **CONCLUSION**

As this report shows, there is a range of practical steps that can be taken by state and local officials to improve our nation's election system. There are also well-defined measures that Congress should take to support state and local government and advance broadly shared national values, while preserving historical balances. Above all, the participants in this Forum have laid out a path toward consensus, which of course remains a work in progress. Their efforts prove that there is an opportunity for reform. American political leadership has the responsibility to seize it.

## ENDNOTES

- 1 Federal Elections Commission, The Impact of The National Voter Registration Act of 1993 on the Administration of Elections for Federal Office, 1999-2000, A Report to the 107th Congress (June 2001).
- 2 Caltech/MIT Voting Technology Project, Voting - What Is, What Could Be 23-24, 80 (July 2001).
- 3 Bush v. Gore, 531 U.S. 98 (2000)
- 4 Internet Policy Institute, Report of the National Workshop on Internet Voting: Issues and Research Agenda 34 (March 2001) (<http://www.internetpolicy.org/research/results.html>).
- 5 We do not yet have exhaustive research on the impact of alternative voting procedures on turnout. A study of Oregon's vote-by-mail elections found some improvement in turnout among regular voters, but not among intermittent ones. A. Berinsky, N. Burns, M. Traugott, Who Votes by Mail? A Dynamic Model of the Individual-level Consequences of Vote-by-Mail Systems (October 2000) (copy of unpublished manuscript on file at the Constitution Project). Aggregate statistical analyses by Curtis Gans, Director, Committee for the Study of the American Electorate, found - for statewide elections - that all-mail voting, unlimited absentee voting, and early voting could lead to marginal declines in turnout. His full analysis is posted on our website ([http://www.constitutionproject.org/eri/voting\\_procedures\\_comments.html](http://www.constitutionproject.org/eri/voting_procedures_comments.html)).
- 6 National Commission on Election Standards and Reform, Report and Recommendations to Improve America's Election System (May 2001).
- 7 Buckley v. Valeo, 424 U.S. 1, 90 (1976).
- 8 Roy G. Saltman, Effective Use of Computing Technology in Vote-Tallying, National Bureau of Standards Report NBSIR 75-687 (March 1975) (reprinted as SP500-30, April 1978) [www.vote.caltech.edu/Links/#articles](http://www.vote.caltech.edu/Links/#articles).
- 9 Federal Election Commission, Updating the Voting Systems Performance and Test Standards: An Overview (June 2001) (<http://www.fec.gov/pages/standardsoverview.htm>).
- 10 Caltech/MIT Voting Technology Project, Voting - What Is, What Could Be 23-24, 80 (July 2001).
- 11 Norman Garfinkle and Patrick Glynn, Report on Election Systems Reform, Institute for Communitarian Policy Studies, George Washington University (July 2001). <http://www.gwu.edu/~icps/>
- 12 Florida appropriated \$24 million to replace voting equipment (small counties will receive \$7,500, others will receive \$3,750 per precinct). The state also appropriated an additional \$6 million for voter education programs. (2001 Fla. Laws ch. 40 (SB 1118), §§ 74 and 76.)
- 13 Maryland estimates that it will cost \$36.8 million to replace all voting machines with DRE's. Maintenance expenses are estimated to be almost an additional \$1 million. The same equipment could also be leased for \$5.8 million a year.
- 14 Michigan estimates that a statewide uniform optical scan system with precinct-based tabulation would cost between \$26.1 million to \$38.7 million. Secretary of State Candice Miller, Uniform Voting in Michigan: A Report to the Legislature, State of Michigan Secretary of State's Office (May 2001). The report is available at <http://www.sos.state.mi.us/election/elecadmin/2001web/uniformvotinginmichigan.pdf>.

15 Harris county will buy 8,170 voting machines, with 1,150 of them equipped for people with disabilities. S. Brewer, "Harris County OKs New Voting Machine," Houston Chronicle, June 6, 2001.

16 Candice Miller, Secretary of State, Michigan's Qualified Voter File System: Bringing New Efficiency to the Management of Voter Registration and Driver License Records, Bureau of Elections (February 1, 2001). For more information about Michigan's Qualified Voter File, go to: <http://www.sos.state.mi.us/election/qvf/index.html>.

17 Bill Bradbury, Oregon Secretary of State, Testimony before U.S. Senate Committee on Commerce, Science and Transportation (March 7, 2001).

18 See, for example, National Commission on Election Standards and Reform, Report and Recommendations to Improve America's Election System (May 2001).

## **APPENDIX B: SUPPLEMENTAL VIEWS**

### **American Council of the Blind**

The American Council of the Blind congratulates all the participants in the Constitution Project for their many contributions of wisdom and good faith as we worked together in our common goal of perfecting our democracy. ACB only adds this supplement to amplify and clarify points already present in the report.

If voting is to be truly accessible to persons who are either blind or have low vision, then the equipment necessary to accomplish this goal of a true ability to cast a secret ballot must be put in place at polling sites. ACB strongly supports the use of direct recording equipment (DRE) to insure accessible, independent, secret and verifiable voting rights for the millions of blind or visually impaired citizens who only seek to exercise our franchise along with all other Americans.

Direct recording voting equipment offers the advantage of maximum flexibility for future opportunities while costing less in the long run than do optical scanning devices.

ACB therefore strongly recommends that any federal legislation and financial support for the acquisition and deployment of voting equipment be done in such a way as to afford visually impaired voters with the ability to cast a secret ballot through the use of a direct recording device. ACB further recommends that at least one device be available at all polling places.

### **Center for Voting and Democracy**

Federal standards currently require that all electronic Direct Recording Equipment (DRE) record and store an electronic image of each ballot. The Center for Voting and Democracy believes that the federal standards should include the same requirement for all new voting equipment used to count paper-based ballots. This belief is driven by two

concerns. First, electronic ballot images increase the security of the electoral process by enabling the rapid detection of any alterations to paper ballots that occur between the casting of ballots and the final certification of results. Second, the storage of electronic ballot images ensures compatibility of the voting equipment with all four ballot types currently used in U.S. elections. We believe that new voting equipment should not create a barrier for jurisdictions wishing to adopt new ballot types.

### **Common Cause**

Common Cause supports the "Recommendations for Congressional Action" of the Constitution Project Election Reform Initiative. If followed, these comprehensive recommendations would result in a substantial federal investment in election system research and standard development, and in much needed improvements in voting equipment, registration systems, and voter education programs at the state and local level.

Because the serious flaws in our nation's election systems have denied citizens basic voting rights, Common Cause believes that Congress should play a more direct and proactive role in election reform than these recommendations envision. With constitutionally guaranteed protections at stake, Congress has a responsibility to act as necessary to ensure that citizens are treated fairly and equally in all stages of the voting process. Directly mandating basic changes for federal elections should not be ruled-out as a means to that end, and Congress should set other fundamental reforms as conditions for states seeking federal election grants.

### **Demos**

Demos applauds the Constitution Project for recommending to Congress and the states several very important election reform measures. If adopted, these suggestions will measurably improve the conduct of elections in America and advance the cause of full enfranchisement and fair representation of our nation's diverse voices and communities. Demos also takes this opportunity to comment on specific elements of the Report of the Forum on Election Reform ("Report") and recommend additional reform measures for accomplishing a comprehensive rejuvenation of our electoral system.

Demos strongly supports the Constitution Project's call for state adoption of provisional ballots, extended polling hours, and posted voter rights and responsibilities. These recommendations will substantially improve an individual's opportunity to have her vote properly tallied and counted. Administrative error in the formation of voter registration rolls are inevitable. The opportunity to cast a provisional ballot, at the polling place, offers a practical and workable remedy and safeguards an eligible voter's exercise of her constitutional right. Prominent posting at the polling place of a voter's rights and the procedures that have been adopted to effectuate it are an important additional safeguard and educational tool for voters and poll workers alike. Extended polling hours, like those adopted in New York, are an appropriate accommodation of the lengthening workdays, non-traditional work schedules, and increasingly competing demands of work and family that now characterize life in America.

The application process for state grants suggested in the Report is also noteworthy. As a condition for federal funds, state applications should indicate prospective plans for compliance with federal registration and voting requirements, allow for public input into the formulation of those applications, and anticipate federal agency review of the proposed compliance measures. These are welcome responses to the many instances of voting irregularities or abuses documented in last November's elections, especially in communities of color, low-income areas, and among naturalized citizens.

Several other measures to expand opportunities for voters to cast their votes were raised in the Report but not offered as thoroughgoing recommendations. Demos presents them here as important innovations that should be seriously considered for adoption. Like many other commentators, we strongly support an election day holiday and weekend or multi-day voting. Demos also recommends that Oregon's system of voting by mail and other alternative voting schemes be fully reviewed and considered by the states. In all instances, we value as paramount expanded opportunities for voter participation and a resultant vote that more fully expresses the will of the people.

Two other innovations must be considered in any discussion of election reform: election day registration and the restoration of ex-offenders' voting rights. Six states now allow eligible citizens to both register and vote on election day. These states also enjoy an average turnout rate that exceeds the national average by ten percentage points or more. Given the fact that voter interest typically peaks in the closing weeks of an election campaign, when media attention soars and the choice between candidates crystallizes, it make little sense to shut down the registration process-and the opportunity to subsequently cast a vote-30 days or so before election day. Six states have shown that election day registration is workable. Other states should follow their lead.

The restoration of voting rights for ex-offenders is raised but not altogether embraced in the Recommendations to Congress. We do so here. 4.2 million American citizens are now disenfranchised by state laws that deny them the vote upon conviction. Many of them have served their sentences and been reintegrated into the community. The burden falls most severely on people of color, who are disproportionately affected. Demos calls for an end to this blanket disenfranchisement and a return of the vote to ex-offenders upon their release from incarceration. Four states have adopted voter restoration laws over the past year. More should consider the same.

The Recommendations to Congress detailed herein, if embraced, would constitute a very important contribution to the ongoing realization of the ideals that underlie our democracy. More can and should also be done to break down the barriers to the vote. Additional reforms and more vigilantly enforced or appropriately implemented pre-existing measures or safeguards will also advance the cause of democracy. Demos looks forward in the years ahead to exploring every opportunity to expand the franchise with the many organizations that have contributed to the report, the many others who are not represented here, and to policymakers in the states and at the federal level.

**Pamela Karlan, Kenneth and Harle Montgomery P rofessor of Public Interest Law,  
Stanford University**

Many of the problems described in this Report are the product of a failure to comply with existing federal law, including the Voting Rights Act of 1965, the National Voter Registration Act, the Americans with Disabilities Act, and the Voting Assistance to the Elderly and Handicapped Act. While I endorse the recommendations in Section II of the Report, and think they will improve compliance levels, I am skeptical that, standing alone, they will produce full compliance. I therefore would support additional measures, such as strengthening attorney's fees provisions and providing additional resources to enforcement agencies, to ensure that every eligible citizen has full access to the electoral process.

### **The League of Women Voters**

The League of Women Voters appreciates the opportunity for dialogue and discussion on election reform issues that the Constitution Project has provided. A wide variety of important topics have been debated, and substantial agreement on best practices - the types of election administration that every state and locality should follow - has been achieved in Part I of the report.

However, the League of Women Voters does not endorse Part II of the report, the proposals for congressional action. We find that they fall significantly short of what will be needed to protect the fundamental rights of American voters. We wish to briefly highlight several points. First, many of the problems voters faced in the 2000 election, from not having their names on the voter registration lists to the lack of bilingual ballots where they were needed, were failures to implement existing federal laws. Yet the proposals contained in Part II do not ensure full implementation of these laws, such as the Voting Rights Act, the National Voter Registration Act, and the Voting Accessibility for the Elderly and Handicapped Act. Our nation must not risk, after a substantial commitment of federal funds such as is recommended here, continued noncompliance with basic voter protections.

Second, citizens in many states were purged from the voter lists without basic due process protections that would have prevented their erroneous removal from the lists. We believe protections against erroneous purges are a prerequisite in any federal program. We were disappointed that such a provision was not included in the requirements section of Part II.

Finally, the grants program proposed in Part II is simply too modest. It does not fully reflect the many recommendations in Part I. It is a shortterm program from which states can opt out. Those states that participate will receive an allotment, similar to a revenue sharing program, with minimal requirements. The League of Women Voters believes that a more substantial response is needed to ensure that the problems of Election 2000 are not repeated and to protect the voting rights of all American citizens.

**The National Asian Pacific American Legal Consortium and National Council of La Raza**

The National Asian Pacific American Legal Consortium (NAPALC), dedicated to advancing the rights of the Asian Pacific community, and the National Council of La Raza (NCLR), the nation's largest Latino civil rights organization, applauds the Constitution Project for its work toward making the electoral process fair and accessible to all Americans. However, we strongly believe that unless states are mandated to comply with the language assistance protections enumerated in the Voting Rights Act of 1965, limited-English-proficient voters will not have equal access to the voting process. Therefore, NAPALC and NCLR firmly urge that federal funding be determinate upon mandatory demonstration of state and local compliance with current federal voting laws.

#### National Conference of State Legislatures

The closeness of the most recent presidential election and the subsequent spotlight on flaws in the nation's complex system of election administration served as a clarion call that was heard by state lawmakers across the nation. Subsequently, more than 1,700 bills have been introduced in state legislative chambers and approximately 250 have been enacted into law. These include funding and establishing standards and procedures for updating voting technology, counting and recounting votes, training election-day workers, educating voters, reforming absentee voting procedures, designing ballots, registering voters and purging voter lists. To ensure that states have the resources and information to undertake this critical effort, NCSL established a bipartisan task force to assist states in ensuring the integrity of the ballot; identify and recommend best practices on election laws; study the effect of recent changes in the voting, such as early voting and mail-in ballots; and provide technical assistance to states on implementing state election reforms. Since early March, task force members have heard from experts on election reform and discussed the various kinds of legislation being considered in state legislatures and Congress on election reform. NCSL's task force plans to complete its work by mid-August with a report outlining recommendations and identifying model election laws and systems.

In addition, the task force has supported federal legislation such as H.R. 2398, a block grant formula which awards money to states for broadbased initiatives related to election reform, while opposing legislation which seeks to mandate specific requirements on the states. NCSL's task force also supports amendment of the National Voter Registration Act (NVRA) to grant states greater latitude to remove ineligible voters from registration lists and increased funding for the FEC Office of Election Administration for the development of voluntary equipment standards and the dissemination of election-related statistics and information. NCSL's recommendations for federal legislation, a database of the more than 1,700 bills that have been introduced in state legislatures, and further information on NCSL's task force on election reform can be found at NCSL's Web site at [www.ncsl.org](http://www.ncsl.org).

#### **John Pearson and David Elliott, Director and Assistant Director of Elections for Washington State**

Thank you for the opportunity to respond to the Constitution Project report. We have serious concerns about one aspect of the report and we are pleased to share those



concerns in this forum. Our concerns are centered on the section of the report dealing with alternative voting methods - specifically absentee voting and voting by mail generally.

Here in Washington State we have had vote by mail elections, ongoing absentee ballots, and absentee ballot on demand for nearly two decades. From our point of view, as leaders in this field, frankly, we found the section on absentee voting and voting by mail to be so out of touch with the realities of voting in the West as to be useless. Unfortunately, that particular section taints our opinion of the entire report - which does contain some good analysis and some useful recommendations. The conclusions in that section are based on premises which we believe have no basis in fact - at least in our state. No consideration is given to the point of view that one reason western states have enhanced voting by mail is because THE VOTERS LIKE IT! It is convenient for them, and they appreciate the extra time it gives them to consider their various choices and make informed, intelligent decisions.

We believe that we are in the business of facilitating the voting process for voters - and there is no doubt in our minds that safe, secure absentee voting does just that. There is no proof offered for any of the alleged evils of mail voting - just the very conservative opinion of the authors offered up as fact. The concern raised about timing of election results and the time needed to organize the houses of Congress are specious at best. The 2000 election in Washington State featured a very close race for the U.S. Senate. Partisan control of that body hung in the balance. The election was conducted with about half of the ballots transmitted through the mail, and the race was close enough to require a recount of every ballot. We were able to complete our work in a timely fashion and the results remain accepted and unchallenged.

As to the concerns raised by the author, asked and answered. The proper use of resources and training of election personnel can, and does, produce timely accurate elections by mail. We also found the dismissal of Oregon's experiences to be disturbing at best and insulting at worst.