

The Constitution Project



RECOMMENDATIONS FOR CONGRESSIONAL ACTION

THE CONSTITUTION PROJECT
ELECTION REFORM INITIATIVE

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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.

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In the aftermath of the historically close 2000 presidential election, the Constitution Project organized a Forum on Election Reform to explore areas of agreement among organizations and individuals who share an interest in election reform.¹ The work of the Forum has been premised on the conviction that a partnership between representatives of the nation's state and local election community and private groups concerned about voting rights – working with students of technology, politics, and law – will enhance the nation's opportunity to implement necessary reforms.

The Constitution Project is issuing a report that addresses a broad range of election reform issues that relate to all levels of governance. In light of the promise that the U.S. Congress will soon accelerate consideration of federal legislation, we are setting forth in this document the recommendations of our full report that apply to Congress.

Congress has broad constitutional authority to regulate federal elections and protect the voting rights of Americans. Nevertheless, state and local governments have been historically responsible for administering and funding elections. We share with many others the view that pri-

mary responsibility for conducting elections should remain there. It is essential, however, that all levels of government undertake the challenge and responsibility of reform. To that end, the federal government has a vital role to play.

Indeed, the federal government has become an active participant in establishing rules for the conduct of elections on matters ranging from voter registration to protections against discrimination. 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. Many states similarly turn the considerable burden of financing elections over to local governments, which are often unable to devote sufficient resources for necessary improvements in voting technologies and election administration.

The recommendations that follow are grounded in the belief that the federal government should assist states and local governments to modernize and improve their election systems. In undertaking that responsibility, Congress should strike a balance 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 promote, through incentives or requirements, improvements that reflect broadly shared national values. Our hope is that the following recommendations will help in attaining these goals. We urge that Congress act promptly on this issue.

1. CONGRESS SHOULD ESTABLISH A LONG-TERM FEDERAL PROGRAM TO FOSTER CONTINUING IMPROVEMENTS IN ELECTION ADMINISTRATION AND VOTING TECHNOLOGY

A sound foundation for our election system should include integrated efforts in research, development of standards, testing, and the sharing of information through a national clearinghouse. Congress should provide an agency of the federal government with authority and regular, sufficient funding to support these functions on a long term-basis in recognition that technology continues to develop and that other aspects of our large and complex election system also require sustained high-quality study.

a. Research

Improving election administration will require coordinated research in areas from technology to election management. These efforts serve broad democratic values that should not depend solely on budgets of local governments or equipment manufacturers. With respect to technology, Congress should provide funds for research and development on voting equipment, with particular emphasis on ease-of-use, enhanced accessibility for people with disabilities or low levels of English literacy, and measures to protect the accuracy and integrity of election results. Modernizing elections also requires bringing administrative processes as well as voting tech-

nologies up-to-date. Systematic research in elections management will assist in the continuing professionalization of election administration.

b. Standards

For more than 100 years, Congress has required states to authorize any use of voting machines; otherwise votes recorded on those machines may not be counted. For a little more than ten years, the Federal Election Commission has provided (and is now updating) voluntary standards to assist states in exercising that responsibility, but its standards have been limited to accuracy and security. In addition to the periodic updating of technology standards, Congress should provide for an expanded program that includes voluntary management or operational standards and performance or design standards to optimize ease of use and minimize voter confusion. The agency Congress charges with this responsibility should have discretion to select for particular matters the form of standards – such as minimum criteria, specifications, or best practices – most suitable for attaining progress while leaving sufficient room for innovation.

c. Testing

Congress should provide authority and resources for a voting equipment testing program to assure that voting machinery complies with established standards. The certification process sponsored by the National Association of State Election Directors provides a platform for assessing equipment durability and detecting errors in software. To avoid a testing bottleneck, Congress should provide the resources for an expanded testing program, including the use of multiple laboratories for testing election hardware and software.

d. Information clearinghouse

The federal government should support the establishment of a clearinghouse so that states, industry, and others can share experiences with the performance of voting technologies, best practices in election management, and information about compliance with federal requirements.

2. CONGRESS SHOULD ESTABLISH A MULTI-YEAR CAPITAL INVESTMENT GRANT PROGRAM FOR TECHNOLOGY IMPROVEMENTS

Congress should establish a multi-year grant program for capital investment in voting technology hardware and software. Important technology needs now emanate from requirements of federal law. These include information management challenges posed by the National Voter Registration Act and requirements of the Voting Rights Act on the use of multiple languages. Other challenges are presented by national aspirations that should not be dependent on local resources, such as assuring that disabled citizens have the same opportunity as others to vote privately and independently. More generally, the cost of investments in voting technology has rested mainly on the unequal capacities of local governments. The commitment of federal resources (together with any matching or other increased state contributions) is essential to protecting the equal opportunity of voters no matter where they may reside.

3. THE GRANT PROGRAM SHOULD BE FOR A RANGE OF PURPOSES

The program should provide a range of purposes within which individual states may establish priorities based upon their needs.

a. Improved registrations systems

Congress should provide funding 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 and between states, including change of address, death, and other such matters. An important objective is to make registration databases easily available at polling places to resolve registration questions.

b. Precinct-level voting and 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 by such means as alerting voters to overvotes and undervotes with an opportunity to correct mistakes or omissions. This investment should also be utilized to enable voters with disabilities to operate voting machinery independently and thereby vote secretly, as other voters may.

c. Election personnel training and voter education about the use of voting technologies

Part of a technology grant program should be the provision of funds for training and education in the operation and maintenance of voting equipment, both with respect to new technologies acquired with federal grants and for improved use of technologies that continue to be utilized.

Training and education will be essential to realizing the benefits of both new and existing systems.

4. THE LIFE OF THE GRANT PROGRAM SHOULD PROVIDE REASONABLE TIME TO STAGE INVESTMENTS WHILE ASSURING EARLY IMPLEMENTATION OF DISCERNABLE IMPROVEMENTS

The duration of the grant program should be sufficient to allow states to stage investments and for the voting equipment industry to produce for a market that is made more active by federal grants without inflating costs. In order not to unduly extend the national time line for appreciable voting system improvement, Congress should consider implementing voting improvements in time for the next three federal elections (2002, 2004, and 2006), a period that coincides with proposals to establish a five-year grant program. At that point the program should sunset and any extension should be subject to a fresh determination by Congress. In considering whether to extend the program, a key factor should be whether more time is needed to complete the modernization effort.

5. FUNDS SHOULD BE APPORTIONED AMONG THE STATES ACCORDING TO A FORMULA, EXCEPT FOR A PORTION THAT IS ALLOCATED FOR INNOVATIVE PROGRAMS

In light of the need for voting improvements throughout the nation, Congress should establish a formula for allocating grant funds among the states. (The District of Columbia, which also appoints presidential electors, should be treated

as a state under the grant program.) A likely formula is apportionment of funds according to a state's share of the nation's voting age population, although a prescribed uniform minimum allotment for each state would sensibly reflect that some costs (such as software for statewide registration systems) may not vary significantly from state to state.

A formula-based program would encourage broad participation by states in the grant program. The expectation of timely and regular receipt of predetermined funds will enable each state to engage in an orderly planning and implementation process. A formula-based approach should also reduce the costs of federal administration. There may be limited, defined circumstances in which funding should be deferred, as when a state is knowingly in violation of federal requirements.

In the next section we recommend that each state submit a plan for use of its allocation of grant funds. Accordingly, some funds should be released at the outset of the grant program to assist states in preparing plans. The formula for apportioning planning funds should take into account that each state, no matter its population, will incur some similar minimum costs in implementing a statewide planning process.

Finally, while the overall federal grant program should be principally formula-based, a portion of it (for example, 10 percent) should be reserved for pilot state or local programs that 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.

6. EACH STATE SHOULD SUBMIT A PLAN FOR THE USE OF ITS ALLOCATION

States should apply to the federal government for funding, after working with local governments to prepare the state application. If a state declines to participate, local governments in the state should be able to apply directly for grants that would have been available within the state's allocation.

A state application should include a plan that describes the state's election investment needs, how the state will use federal funds to address those needs, and how it will assure 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, 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; provide assurance that the 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 on a regular basis complete and accurate lists. 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 the grounds for being stricken from the registration list. So 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 state 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 its compliance with existing federal law, such as existing law on minority languages, and with the requirements of the law establishing the grant program.

7. VOTING TECHNOLOGY ACQUIRED WITH FEDERAL FUNDS SHOULD MEET MINIMUM STANDARDS

Congress should require that new technology purchases under the grant program comply with the Federal Election Commission's existing voting systems standards. These are now voluntary standards that only become mandatory when adopted by a state. By conditioning federal grants on compliance with them, Congress would make the standards mandatory in the minority of states that have not yet adopted them, insofar as technology purchased with federal grants is concerned. It should also provide that technology purchased with federal grants comply with any updated and new standards in existence at the time of the purchase.

While most standards should be developed administratively, Congress should assure in the grant law that technology grants are used to enable voters with disabilities to vote independently and therefore privately. A state that applies for technology 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 inde-

pendently. 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. The right to cast a secret ballot is so central to our democratic tradition that Congress should accelerate this opportunity.

8. CONGRESS SHOULD PROVIDE FOR USE OF PROVISIONAL BALLOTS AND NOTICES OF VOTER RIGHTS AND RESPONSIBILITIES

To protect rights of voters, Congress should provide, at least as a condition for federal grants, for universal adoption in federal elections of two important measures, provisional ballots and a notice of voter rights and responsibilities. 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.

Even with improved registration systems, some eligible voters will go to the polls on election day only to find that their names are not on the list of registered voters. If election officials are unable to resolve the matter at the polls, the voter should be given the opportunity to submit a provisional ballot, which will constitute his or her vote if it is determined that the voter is qualified. This procedure – sometimes called affidavit, conditional, or fail-safe voting – preserves each individual’s opportunity to vote.

Second, election officials should prominently post at polling places clear notices of the rights and responsibilities of voters under applicable federal and state law. We are not proposing that Congress mandate the specific contents of these statements. The key is that there should be a readily available frame of reference for poll workers, election officials, and voters to antici-

pate and resolve polling place issues.

Neither of these requirements would change the underlying requirements of federal or state law on who may vote or how they should do so. They will help to ensure that all eligible voters are able to exercise their franchise.

9. CONGRESS SHOULD ESTABLISH REQUIREMENTS FOR PUBLIC REPORTS ON THE USE OF FEDERAL FUNDS AND FOR PERIODIC AUDITS

As is standard in federal grant administration, Congress should provide that grant recipients report on what they have done with grant money. States should also provide statistical information on the performance of new and existing voting technologies, such as the number of undervotes and overvotes for different voting technologies, in order to help inform future technology decisions at local, state, and national levels. In addition, Congress should provide for agency review of adherence to all requirements of the grant program and for periodic audits to ensure funds under the program are expended for appropriate purposes. The results of these audits and reviews should be reported to Congress. Both the state reports and the agency reports should be made available to the public.

10. THE AGENCY THAT CARRIES OUT THE GRANT PROGRAM SHOULD BE INDEPENDENT OF PARTISAN INFLUENCES AND ORGANIZED TO MAKE DECISIONS IN A TIMELY MANNER

Bills in Congress place responsibility for election administration in different agencies – the Justice Department, the Commerce Department, or the Federal Elections Commission – or establish a

new federal agency. Without commenting on the merits of any of these proposals, the federal agency chosen (or established) to carry out the grant program, research, and other responsibilities 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, standard 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 naturally occur if Congress establishes a new agency. But it should also be the case even if Congress vests responsibility in an existing agency, so it is clear that funds for election purposes are protected from competing demands of a parent agency. The FEC's Office of Election Administration already has responsibility for some of these areas. 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, to strengthen public confidence it is important that the agency be independent of partisan influences. 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 in a timely manner, particularly decisions on grants and standards. If the grants

program is given to the FEC, it will be important to establish a decision-making process that avoids 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 with Senate confirmation; and 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 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.

In two existing areas, responsibility should remain where it now is. 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 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. If functions relating to military voters are transferred to a civilian agency, they might not be accorded the same level of priority among military commanders as communications from the Office of the Secretary of Defense. Congress should provide any added resources that are needed to ensure there is vigorous implementation of the election responsibilities that continue with the agencies that now have them.

**11. CONGRESS SHOULD ADEQUATELY
FUND THE GRANT PROGRAM**

Congress should authorize and appropriate ample 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 a year 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 for the appropriation of such sums as may be necessary to carry out the purposes of the grant program.

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 in the first year of the grant program. An important function of the federal agency responsible for the program, with the aid of the advisory board established to assist it, should be to submit to Congress during the first year, in time for the second annual appropriation for the program, a well-substantiated projection for the fiscal requirements of the program during the full term of the grant program. In the law establishing the program, Congress should direct the agency to prepare and submit those projections.

**12. CONGRESS SHOULD ESTABLISH A
NEW ELECTIONS CLASS OF
POSTAGE THAT PROVIDES FIRST
CLASS SERVICE AT HALF THE
FIRST CLASS RATE**

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.

The Congress should 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 new class of postage will also facilitate additional mailings to voters of such matters as sample ballots and information about procedures and voting rights. The important public ends that are served by official election mail amply support this recommendation.

ENDORSEMENTS

August 1, 2001

Please note that endorsements are in progress.

Stephen Ansolabehere, Professor of Political Science, Massachusetts Institute of Technology*

Charles Crawford, Executive Director, American Council of the Blind†

The Honorable Mickey Edwards, John Quincy Adams Lecturer in Legislative Politics, Kennedy School of Government, Harvard University*

Curtis Gans, Director, Committee for the Study of the American Electorate

Heather Gerken, Assistant Professor of Law, Harvard University*

Morton H. Halperin, Senior Fellow, Council on Foreign Relations*

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Thomas Mann, W. Averell Harriman Senior Fellow, Brookings Institution*

The Honorable Deborah Markowitz, Secretary of State, Vermont

Larry Naake, Executive Director, National Association of Counties

William Novelli, Executive Director, AARP

Norman Ornstein, Resident Scholar, American Enterprise Institute*

Trevor Potter, Partner, Caplin & Drysdale*, and former Chairman, Federal Election Commission

Cameron Quinn, Director, Virginia State Board of Elections*

Miles Rapoport, President, Demos

The Honorable Sam Reed, Secretary of State, Washington

Roy G. Saltman, Consultant on Election Policy and Technology

Richard Soudriette, President, International Foundation for Election Systems

Robert M. Stern, President, Center for Government Studies*

Cathy Pearsall-Stipek, President, National Association of County Recorders, Election Officials and Clerks

The Honorable Ron Thornburgh, Secretary of State, Kansas

* Affiliation is for the purpose of identification only.

† See attached supplemental statement.

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.

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.

**Pamela Karlan, Kenneth and Harle Montgomery
Professor 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.