

November 8, 2001

MEMORANDUM

TO: Members of the National Commission on Federal Election Reform

FROM: Philip Zelikow and Ryan Coonerty

SUBJ: Analysis of the Ney-Hoyer Election Reform Bill

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The Ney-Hoyer Bill is now the primary bipartisan legislation in the Congress and will be on a fast-track schedule over the next couple of weeks. The House leadership for both parties have cleared the bill and it may move quickly, at least in the House. The list of co-sponsors is impressive and growing. Members from both sides of the aisle, as well as long-time election experts and advocates are co-sponsors. There are more than 70 co-sponsors, including Roy Blunt, John Lewis, Eddie Bernice Johnson, Peter King, Pete Stark, Corrine Brown, and Curt Weldon. (A list of the original co-sponsors is at the back of this document).

We have been able to study the draft bill. We read it with a sense of growing amazement at how good it is, and how closely it follows the Commission's recommendations. Informally, staffers on both sides refer to it as the "Commission bill." Aside from the national holiday and TV issues, the bill essentially adopts all of the major recommendations from our Commission for the manner and substance of Congressional action. Much of the critical language is drawn word for word from the Commission's recommendations.

The bill goes beyond the Commission by directly legislating minimum standards for the states, in addition to setting indirect mandates through conditions on grants. But the bill uses the Commission's strategy on the substance and structure for imposing those standards (which the Justice Department is empowered to enforce if state certifications of compliance are found to be untrue). The bill also adopted the Commission's recommendations on the scale of funding for election assistance and on the basic mechanism for distributing and administering the assistance.

The bill adds a punch card buyout provision, but has modified it to respond to some of the critiques we made of that in July. It also has a nice program for recruiting poll workers, elaborating the Help America Vote idea.

Below is a summary and analysis of the major provisions of the Ney-Hoyer legislation, as Commissioners are likely to receive questions about the similarities and differences between the Commission Report and the bill.

### Minimum State Standards

The Ney-Hoyer bill uses three methods to set minimum standards for states: (1) directly requiring certification by the state election official that his/her state meets specific minimum standards outlined in the legislation and (2) making certain states meet (or set their own) minimal standards for voting system performance and standards as a condition to receiving federal matching funds (see section on Election Assistance and Conditions), and (3) revising federal programs to ensure greater access for military and overseas voters, reducing postage, and creating a poll worker recruitment program for students.

The minimum standards that the state election official must certify their state's compliance with to the new federal oversight Commission by two years from when the enactment of the Act (except for in-precinct provisional ballots which have to available by 2002) are:

1. The state must be in compliance with the existing applicable requirements of the Voting Rights Act, the National Voter Registration Act, the Uniformed and Overseas Citizens Absentee Voting Act, the Voting Accessibility for the Elderly and Handicapped Act, and the Americans with Disabilities Act.
2. A statewide voter registration database networked to every local jurisdiction.
3. A state election system that is accurate and updated regularly to remove ineligible registrants consistent with the provisions of the National Voter Registration Act.
4. In-precinct provisional voting for every voter who claims to be eligible to vote in that state by November 2002.
5. Adoption of uniform standards for what constitutes a vote for each category of certified voting equipment.
6. The existence of safeguards to ensure that military and overseas voters have the opportunity to vote and have their votes counted.
7. Providing voters with physical disabilities a practical and effective mean to cast a secret ballot.
8. Any state that has voting machines, which can give voters the opportunity to check for and correct errors under conditions that assure privacy, must do so. Any new voting systems must give voters the opportunity to correct errors before the vote is cast.

The methods for reaching these minimum standards are left to the states. The U.S. Attorney General may bring a civil action against a state if the state does not provide certification of compliance to the Election Assistance Commission or the Commission has credible evidence that a state's certification is false.

## Election Assistance and Conditions

The Ney-Hoyer bill authorizes \$2.25 billion over three fiscal years to be appropriated to state “Election Funds” based on 75-25 federal/state match. Each state’s fund, to which localities will then apply, will be granted funding based on the size of the state’s voting age population. There are 6 conditions for funding:

1. The state has authorized its share of the matching funds and that those federal funds will not supplant existing programs already funded in the state.
2. The state has set a uniform statewide benchmark for voting system performance based on the residual error rate at the top of the ballot and that the state will require local jurisdictions to report this data.
3. The state is in compliance with the voluntary voting system standards and certification processes adopted by the Commission or has adopted its own standards.
4. Each precinct in the state has at least one voting machine available which is fully accessible to individuals with physical disabilities.
5. The state election director certifies that the state is in compliance with the requirements of the Voting Rights Act, the National Voter Registration Act, and the Voting Accessibility for the Elderly and Handicapped Act.
6. That the state election directors certifies that the state provides voter education and poll worker training programs to improve access to and participation in the electoral process.

The creation of state funds is same approach recommended by the Commission. Once the state election director has certified that his/her state is in compliance, their state is granted federal funds to be dispersed to local applicants. This allows the states and localities freedom to devise and implement their own programs and allows for flexible investments (long- or short-term loans, grants, loan guarantees and other arrangements). The Ney-Hoyer bill uses word-for word the same requirements suggested by the Commission for the use of funds:

1. Establishing and maintaining accurate lists of eligible voters.
2. Encouraging eligible voters to voter.
3. Improving verification and identification of voters at polling places.
4. Improving equipment and methods for casting and counting votes.
5. Recruiting and training election officials and poll workers.
6. Improving the quality and quality of available polling places.
7. Educating voters about their rights and responsibilities.
8. Carrying out other activities to improve the administration of elections in the State.
9. Assuring access for voters with disabilities.

*Comment:*

*The Ney-Hoyer bill's use of these two methods to ensure that states reach minimum standards of election administration are nearly identical to the minimum standards recommended by the Commission. Additionally, by allowing the state's election directors to certify their own compliance (with a federal check by the Department of Justice in place to ensure observance to these standards) and to have the flexibility to devise and implement their own investment in their electoral processes over the long-term, the historical state/federal balance is maintained.*

### Punch Card Buyout

The Ney-Hoyer bill goes farther than the Commission's Report in offering a punch card buyout program for states and localities that used punch cards in the November 2000 elections. Also covered in the punch card buyout are lever machines and DRE machines placed in service before 1996. The bill authorizes \$400 million as a "one-time" payment (either directly or as reimbursement) for states and localities who will acquire new systems to assure that their jurisdiction "will continue to meet its duties under the Voting Accessibility for the Elderly and Handicapped Act and the Americans with Disabilities Act," as well as the language requirements of the Voting Rights Act of 1965. The federal matching rate is 90 percent or 95 percent for counties in the lowest quartile in average per capita income. The bill grants jurisdictions funds for leasing machines (which makes the use of touch-screens a more viable option for many localities). If localities do not want or are unable to abandon punch card machines, the bill grants up to \$2,000 per precinct to enhance the performance of existing voting equipment, providing it is compliant with the ADA and Voting Accessibility Act.

*Comment:*

*The Commission expressed concern about decertifying and replacing punch card systems because of the persuasive testimony of Los Angeles County Registrar Conny McCormack (who has since had her punch card system decertified by the California Secretary of State) and others that punch card systems can best serve some local particular needs, such as multiple languages and lengthy ballots. However, the Ney-Hoyer bill addresses these concerns. It allows for leasing programs, also assists localities that wish to keep punch card systems but want to improve performance, and does not penalize jurisdictions that upgraded their systems during the last year.*

## The Funding Mechanism

The Ney-Hoyer bill uses the same funding mechanism recommended by the Commission. Under Ney-Hoyer, the federal government will grant money to states that have certified their compliance

## The Agency

The Ney-Hoyer bill establishes a new federal commission, the Election Assistance Commission, to serve as “a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of federal elections.” The Commission will be composed of four members appointed by the President, each nominated by the minority and majority leader of each House of Congress to serve four-year terms. With a staff and a budget, as well as two advisory boards – a Standards Board to review voluntary engineering and procedural performance standards and an Advisory Board composed of state and local election administrators from each state and representatives of interest groups such as the U.S. Civil Rights Commission, NGA, NCSL, and a dozen other organizations – the Commission shall “develop, adopt, and update (not less than every 4 years) voluntary engineering and procedural standards for voting systems used in federal elections.” The Commission will provide the states with the following:

1. Voluntary system standards that include security (including documentary audit for non-ballot systems), the procedures for certification and decertification of software and hardware, assessments of usability, and guidelines for use and maintenance.
2. Procedures under which the voter will have the opportunity to correct errors under conditions that assure privacy at the precinct or polling place, either within the voting equipment itself or in operation guidelines to administrators for using the equipment.
3. Each certified voting system will have a proposed statement of what constitutes a proper voter in the design and operation of the system.
4. New voting systems should provide “practical and effective means” for voters with disabilities to cast a secret ballot.
5. The Commission will also provide voluntary testing, certification, decertification, and advice to the states on compliance with federal laws regarding accessibility of registration and polling places.
6. The Commission will make periodic reports available to the public comparing various rates of registration, turnout, ballot errors, and voting system functions.
7. Finally, the Commission will grant accreditation to independent laboratories based on the recommendations of the National Institute of Standards and Technology for the testing, certification, and recertification of voting systems.

*Comment:*

*The Ney-Hoyer approach to the establishment of a new federal commission to set voluntary standards, grant accreditations, and disperse federal funds mirrors the Commission's recommendations in both institutional structure and policy-making authority.*

### Other Provisions

The Ney-Hoyer bill also creates a foundation to run the Help America Vote College Program (HAV). HAV encourages secondary school and college students to serve as non-partisan poll workers and poll watchers. The Commission supported this program as a way of encouraging young peoples participation in democracy, as well as an effective recruiting mechanism for much-needed poll workers.

Finally, the Ney-Hoyer legislation seeks to improve the election assistance provided to military personnel by increasing the number and responsibilities of voting assistance officers and designating a single state office to provide all information on registration and absentee voting. This provision also matches the recommendation of the Commission.

Original Co-Sponsors of Help America Vote

Ney, Bob  
Hoyer, Steny  
Blunt, Roy  
Fattah, Chaka  
Ehlers, Vernon  
Price, David  
Mica, John  
Langevin, Jim  
Linder, John  
Hastings, Alcee  
Doolittle, John  
Davis, Jim  
Reynolds, Tom  
Reyes, Silvestre  
Buyer, Steve  
Johnson, Eddie Bernice  
Boehlert, Sherwood  
Lewis, John  
Castle, Michael  
Hinojosa, Ruben  
Portman, Rob  
Meek, Carrie  
English, Phil  
Thurman, Karen L.  
LaTourette, Steve  
Wynn, Albert  
King, Peter  
Spratt, John  
Tiberi, Pat  
Rush, Bobby L.  
Diaz-Ballart, Lincoln  
Thompson, Bennie G.  
Horn, Steve  
McKinney, Cynthia  
Hays, Robin  
Jones, Stephanie Tubbs  
Cooksey, John  
Dingell, John D.  
Walden, Greg  
Cummings, Elijah  
Foley, Mark  
Ackerman, Gary

Greenwood, James  
Brown, Corrine  
Wolf, Frank  
Cardin, Ben  
Ballenger, Cass  
Andrews, Robert  
Forbes, Randy  
Baird, Brian  
Hart, Melissa  
Capps, Lois  
LaHood, Ray  
Barcia, Jim  
Fletcher, Ernie  
Carson, Brad  
Grucci, Felix  
Hill, Baron  
Akin, Todd  
Etheridge, Bob  
Platts, Todd  
Crowley, Joe  
Terry, Lee  
Holt, Rush  
Matheson, Jim  
McCarthy, Karen  
Moore, Dennis  
Pascrell, Bill  
Tauscher, Ellen  
Stark, Pete  
Pomeroy, Earl  
Larsen, Rick  
Hoeffel, Joe  
Ganske, Greg  
Brown, Sherrod  
Clayton, Eva  
Weldon, Curt  
Lewis, Jerry