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.[1]
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.[2]
4. *Basic voter information.* very 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

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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.

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 tCongress 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 non-federal 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.

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 even-handed 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 interfer 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 madating 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.