

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 choosing 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.