

May 12, 1977

ELECTION-DAY REGISTRATION:  
H.R. 5400; S. 1072

Summary

The Carter Administration's plan to mandate nationwide election-day registration raises several major issues. Concerns include: (1) whether the plan will significantly increase opportunities for fraud; (2) whether the state and local agencies called upon to implement the plan will have sufficient lead time and resources to do so in an orderly fashion; (3) whether the Federal Election Commission ought to, and can, extend its mandate to include technical assistance to local election agencies and broader enforcement powers in cases of suspected vote fraud; (4) whether election-day registration will alleviate or aggravate the problem of increasing political alienation at the grass roots.

(1) It seems certain that the plan would indeed make vote fraud easier. The heart of the matter is that fraud could not be prevented, only detected after it would be too late to take effective action. Also, false-identification documents are easy to procure and use. Experienced election officials and representatives of honest-ballot groups from places like Chicago and Los Angeles agree with this assessment. So does the head of the election-fraud section of the Justice Department's Criminal Division, who wrote a memo on the subject which Executive Branch officials ignored and tried to conceal.

(2) Election-day registration would impose a massive administrative burden on local officials, as is proved by the "administrative nightmare" which Wisconsin suffered last fall. Given normal tendencies to procrastination and the convenience of substituting one trip for two, many voters who would otherwise have registered in advance would wait until election day. The necessary hiring of more officials at polling places could not be financed by the federal election subsidies proposed under the Administration plan - especially in large metropolitan areas like Philadelphia. Such cities would be forced into vast outlays which they can ill afford. Furthermore, many state legislatures will not have any realistic chance to overhaul their election statutes soon enough to prepare for the 1978 deadline.

(3) The proposed plan gives the Federal Election Commission a new, broad, and ill-defined mandate to get involved in every phase of election administration and policing, without giving the FEC either enough money to carry out these tasks or enough clarity and specificity as to just what it is that the FEC is supposed to do. The FEC's representatives before the House Administration Committee pleaded for more explicitness, while conspicuously declining to take any position on the merits of the basic idea.

(4) By creating longer lines and waiting times at polling places, by making inevitable a dramatic increase in contested election outcomes, and by giving the public good reason for fresh doubts about the integrity and security of the electoral process, the proposal would heighten the popular spirit of cynicism, distrust, and alienation from politics. It would, therefore, aggravate the very problem which its supporters are trying to solve.

ELECTION-DAY REGISTRATION:

Status

Election-day voter registration, optimistically christened "Universal Voter Registration" by the Carter Administration, has received final action in the House Administration Committee and is nearing final action in the Senate Rules Committee. The bills - H.R. 5400 and S. 1072 - are expected to reach the floors of both Houses in late May.

Provisions

The House and Senate bills were identical when first introduced in March. Detailed provisions are summarized in the April Heritage Foundation Issue Bulletin "Carter's Election Reform Proposal."

Arguments For Election-Day  
Registration

Supporters of the Administration bills have used the following arguments:

- 1.) The history of the growth of democratic rule in America has seen a progressive removal of arbitrary and discriminatory barriers which keep some citizens from voting. Examples include women's suffrage and the abolition of literacy tests and poll taxes.
- 2.) Citizens with only a mild and sporadic interest in politics should have the same right to easy and convenient voting as citizens whose interest is intense and continuous.
- 3.) The United States is the only democratic country which imposes the burden of registration on the individual citizen. In other democracies, like Canada, qualified citizens need make no effort beyond appearing at the polls on election day.
- 4.) Fraud is unlikely to be more of a threat in the future than it is at present. A GAO study found that only 3 percent of the local election boards surveyed reported charges of registration fraud, and that the actual rate of convictions was far smaller.
- 5.) Wisconsin and Minnesota, whose election-day registration laws provided the model for the Administration bill, have had few charges of fraud since the November 1976 election, and no convictions. Other states can expect a similar outcome.

Arguments Against Election-Day  
Registration

Opponents of the Administration bills have made the following points:

- 1.) To call the advance registration requirement an "arbitrary, discriminatory barrier" is to use misleading terminology. Anyone physically able to vote is physically able to register; whether he does so depends on his decision, not the state's. Far from being "arbitrary", advance registration serves important administrative purposes. Leonard Panish, Registrar-Recorder of Los Angeles County described these as follows in his testimony before the House Administration Committee:

The present system of voter registration in advance of election day serves as the basis for determining the logistics of an election and for the planning that is required to administer an election.

A second purpose of advance registration is to provide service to the voters in the form of informal materials consisting of sample ballots, state pamphlets, analyses of county and local measures and statements of qualification.

A third benefit resulting from a system of advance registration is to permit a reasonable degree of control and order for the election officers at the polling places upon whom the effectiveness and integrity of the election depend on election day.

These purposes serve not just the officials' convenience, but the public's. In some Wisconsin precincts last fall, voters were still waiting in line at midnight.

- 2.) The fact that apathetic citizens are less likely to register is a strength, not a weakness, of advance registration. Dr. Peter Ordeshook, Professor of Political Science at Carnegie-Mellon University, put it this way:

Registration procedures....act as filters between the interested, informed and concerned citizen and the uninterested, uninformed, and unconcerned citizen. The existence of such filters is essential to the proper functioning of our society. One of the major problems in democratic theory is how, under majority or plurality rule procedures, we

avoid a tyranny of an indifferent majority over an intense minority. If we simply count the votes of all, then that tyranny can prevail. And so, instead, in our society, we make room for a variety of forms of participation - from voting, to ringing doorbells, to contributing money, to actively pursuing public office itself. But, to each of these we attribute a cost so that the modes of political activism in a democracy filter, however imperfectly, the intensity of an individual's preference....without these costs, we return to a dangerously simple majority rule, which even our Constitutional and philosophical forefathers sought to avoid.

....put simply, the imposition of some cost to voting is in accord with the simple premise that the right to vote is accompanied by a duty - a duty to be other than unconcerned and uninformed.

Election-day registration, then, is a step away from grass-roots civic idealism. In addition to rewarding laziness and apathy, it encourages last-minute demagogic maneuvers designed to stampede ill-informed voters to the polls.

- 3.) It is true that countries like Canada do not burden individuals with the responsibility of advance registration. But they do not have election-day registration. What they have is an administrative mechanism with door-to-door canvasses, comparable to a census, whereby the state compiles and maintains a scrupulously exact list of all eligible voters and their whereabouts. Perhaps Congress should consider adopting this system - bearing in mind that since the average American moves once every five years, record-keeping would be more expensive than in Canada, and would raise serious questions about privacy and other civil liberties.
- 4.) Infrequency of formal complaints of fraud may simply show that fraud is difficult to detect and punish. Congressman Thompson, the Administration bill's chief House sponsor, compares voting to paying taxes: the system works largely because the overwhelming majority of participants are honest. The comparison is especially applicable to "good government" states like Wisconsin.

But it does not follow that we should dismantle the practical safeguards that do exist, any more than we should terminate the auditing activities of the Internal Revenue Service.

- 5.) It is true that voter fraud in Wisconsin and Minnesota has not been proved: investigations by local district attorneys are still underway. In Milwaukee County alone, 2,421 cases of possible fraud have been under investigation. These and the cases under investigation elsewhere in Wisconsin typically involve election-day registrants who do not live (at least, not according to the Postal Service) at the addresses they gave when registering. Even assuming most such cases do not involve actual, deliberate fraud, one's faith in the security of the system is still not very high. At the very least, the new system clearly provided unprecedented opportunities for fraud in Wisconsin. Those who want to universalize the Wisconsin model should consider the following points:

a) The administrative overload caused by instant registration in Milwaukee was so great that, in the confusion, poll workers often resorted to registering new voters on scraps of paper, or even on the backs of campaign literature.

b) A post-election survey conducted in just twelve of Milwaukee's 333 wards, showed that 126 persons, everyone an election-day registrant, cast their ballots in the wrong wards. (Innocent mistakes like this obviously did not affect statewide or citywide races, but potentially could have changed the outcome of some local races.)

c) In Wauwatosa County, social workers bused 24 patients from the county infirmary to the polls - some of whom were apparently incapable of providing their names and other necessary information to the poll workers without assistance from the county employees who accompanied them. A Wauwatosa newspaper quoted a poll worker as saying, "I felt that they (the social workers) were assuming responsibility to register and vote. When we asked questions, the welfare worker was right there to say, "Look at the name on the wrist; take the information off the band. It was like

they were dummies, standing there because they were told to stand there."

d) Wisconsin State Senator James Sensenbrenner, who served on the 1972 task force which developed the present Wisconsin law, filed written testimony with the House Administration Committee urging the defeat of H.R. 5400. Among other problem areas, he noted that the administrative burden proved too heavy not just on election day but afterward:

"Verifying the correctness of names and addresses of on-site registrants has proven to be a significant problem for municipal clerks. Our law requires the clerks to send non-forwardable post cards to on-site registrants at the addresses listed on their registrations promptly after the elections and to turn those cards which have been returned by the Post Office over to the District Attorney. My office surveyed the 224 clerks in areas of Wisconsin where registration is required. Forty-nine of those clerks failed to comply with the new law two months after the election, citing lack of manpower and budget problems as their reason.... Those clerks who did comply ...reported that the Post Office couldn't find 3,189 of the on-site registrants by returning the cards. No one will ever know how many of these voters moved between the time of the election and how many of these votes were fraudulent. "

In short, if it is true that other states will have the same experience with election-day registration as Wisconsin, this is a good argument against the Administration plan.

- 6.) Concerns about fraud are reinforced by the fact that fake identification documents, of the sort that will satisfy the UVR bill's requirements, are easy to procure and use. One thinks of Linda Taylor, Chicago's famous "Welfare Queen", who had 250 aliases, 31 addresses, 3 Social Security numbers, and "records" of eight deceased husbands; or of the New Jersey engineer who created 300 phony ID's which he used to obtain 1,000 credit cards and \$660,000 in false loans.
- 7.) There is a specific concern about aliens, of whom 4.7 million are legally resident in the U. S., as are 8 million illegals. Many have driver's licenses, an acceptable proof

of identification under the Administration plan. Many are non-English speaking and ignorant of American law, and could easily be misled by unscrupulous organizers into the voting booths. Registrar Panish of Los Angeles believes that there is no workable system for screening out illegal aliens under instant registration.

- 8.) It is essential to understand that election-day registration makes it impossible to prevent vote fraud before the fact; at best one can only hope to detect fraud after it has been committed. Since illegal votes are intermingled with legal votes, it is impossible to subtract them from the totals once they have been cast. Unless we want to forsake the secret ballot, there is no way we can have both instant registration and a secure electoral process.
  
- 9.) One need not be an alarmist to see the possibilities election-day registration creates for contested election outcomes. A narrowly-defeated candidate need only invest in a rubber stamp that says "Postmaster: Do not Forward - If Undeliverable, return to Sender", in the cost of Xeroxing a complete list of election-day registrants at the county clerk's office and in mailing costs. He could then raise the possibility of fraud in the case of every unfindable voter, which in Milwaukee was between four and five percent of the total number of election-day registrants. It would be difficult for him to prove fraud case-by-case, but equally difficult for his opponent to disprove it. For the courts, of course, the burden of proof would be on the accuser; but the general public would feel that there was grave doubt about the integrity and reliability of the electoral process, and the public would be right. Challenges would drag on at wearisome and expensive length; disputes over House seats, like those in Louisiana's First District and Texas' 22nd District, would multiply; and the public's confidence in the system and trust in elected officials would decline even further.

#### Testimony Of Line Officials

Various state and local election officials raised important points about the practical effects of H.R. 5400 in testimony before the House Administration Committee. Since these officials are the ones who will have to try to make the plan work if it passes, their comments deserve close consideration.



One Supporter

Unlike the Secretaries of State who gave testimony, none of the on-line officials supported H.R. 5400 without serious qualifications and reservations. The one most favorable to the bill was Mrs. Marie Garber, Elections Administrator for Montgomery County, Maryland. Mrs. Garber reported that her office is flooded with calls from would-be-registrants during the period between the registration deadline and election day. She had no doubt that the proposal would help boost voter turnout. But she was concerned about deterrents to fraud, and wanted to see the bill strengthened in that area.

The other line officials were much cooler toward the bill. Among the concerns they raised were the following:

1.) COST: It was thought that the costs to localities imposed by the bill greatly exceeded the new federal subsidies, especially in the case of large municipalities.

Margaret Tartiglione, Chairwoman of the Philadelphia City Commissioners, noted that "the two-year payment period of course imposes a de facto lending policy of money to the federal government until in fact the bill is paid. The financial state of every American city is so well known to this body that it need only be mentioned in passing that this is an unfair burden to the citizens".

Leonard Panish, Registrar-Recorder of Los Angeles County, estimated "a shortage of between \$1,856,000 and \$2,549,000 is anticipated for the 1978 general election which would have to be financed by the County. Preliminary estimates for the 1980 presidential election indicate a deficit of \$3,100,000." (Note, however, that these projections are based on the original version of H.R. 5400, not on the version as amended in Committee. The new version would reduce the shortfall somewhat.)

Congressman Don Bonker of Washington State, a former election official, testified that if he were still an election official, he would recommend against his State's buying into the proposed bonus grants on the grounds that they would not cover costs.

2.) PERONNEL DIFFICULTIES: The Association of Election Commission Officials of Illinois noted that most precinct election judges and clerks in that state are housewives who serve only two or three days a year and

receive only four hours of annual training. Their ability, and willingness, to endure the extra burdens imposed by election-day registration cannot be taken for granted. "...it is sometimes extremely difficult to obtain and retain capable and reliable people to serve as precinct election clerks and judges...dignified and orderly elections do not just happen, they are the result of the preliminary work done by election officials days and weeks in advance in order to simplify, as much as possible, the work of the precinct judges and clerks on election day."

3.) OTHER CONCERNS: Bertera: "While many election jurisdictions could be prepared to implement H.R. 5400 by 1978, our information indicates many others, particularly those where election administration is extremely complex, is a major budget item, and involves literally thousands of workers, could not be ready until 1980 at the earliest....despite the mandates of H.R. 5400, state law would have to be amended in many states to implement the proposed legislation. At least ten state legislatures will not meet again until 1979. An additional three legislatures meet in even years but usually only for budgetary matters, and two more state legislatures may meet in even years but must take a special vote to do so."

Bernard J. Apol, State of Michigan Director of Elections: "...it is likely that unless pre-registration programs are vigorously followed, most registrations will occur on election day. From a voter's point of view, why register prior to election day when the process can be accomplished at the time of voting."

John Hanly, Chairman, Chicago Board of Election Commissioners: "...mandating registration at the polling place on election day will set the cause of honest elections back many years. It will erode the integrity of our elections since it is totally lacking in any safeguards at the front end at the time of registration and voting."

Bertera: "...in the voluminous mail we have received from (local) officials on H.R. 5400, the question of fraud emerges in almost every letter. I am not sure there is a resolution to this question except that I think it important that Congress realize it is very much on the minds of the nation's election officials."

#### The Justice Department Memo

In the first week of May, after a brief attempt to invoke executive privilege, the Administration yielded up a previously confidential Justice Department memo on the subject of election-day registration and vote fraud. The memo's author is Craig Donsanto, head of the election unit of the Justice Department's criminal division. The memo takes a position directly opposite Attorney General Bell's and Deputy A. G. Flaherty's.

It states flatly: "...the experience of the Criminal Division in enforcing the federal election laws indicates that there is a tremendous potential for fraud in H.R. 5400." Furthermore, the memo's text makes it clear that the criminal division was never consulted on the subject of H.R. 5400/S. 1072, either before the bill was drafted or afterward.

Totally apart from the dramatic circumstances surrounding its release, the memo makes several cogent points which deserve consideration on their own merits. It discusses traditional registration procedures from a criminal lawyer's standpoint and finds that they serve two important purposes which cannot be satisfied in any other way. The lead time - typically about thirty days - between the registration deadline and election day gives election officials "ample time to check the veracity of his claim to the franchise to assure that previous registrations he may have had are voided before the election takes place." Secondly, the requirement that the would-be voter sign his name when registering, and then again when appearing to vote, provides a simple, objective check "which in many places is the sole viable method of insuring that the person seeking to vote is indeed the same person whose registration the local election board has previously approved and accepted." This simple check is a classic method of proving vote fraud; it was on this basis that the officials in Louisiana's First District were prosecuted this year.

The Donsanto memo disagrees with the contention that vote fraud is rare: "...election fraud is widespread in both state and federal elections."

The memo also rebuts the contention that H.R. 5400's creation of a new federal felony will deter vote fraud. It recites a long list of existing federal penalties, and concludes: "Clearly, if all these statutes, many of which carry substantial penalties, have been unsuccessful in deterring those bent on corrupting the elective system through vote fraud, one more such statute will not help much."

#### The FEC Mandate

Intense interest in the most dramatic feature of the Administration program - mandatory election-day registration in every state - has prevented many observers from noticing that H.R. 5400 and S. 1072 are broader than one would guess from the bill title or from most of the debate. An explicit purpose of the bill (Sec. 2(b)(2)) is "to modernize the administration of elections and voter registration." Just what this means is not clear; the word "modernize" is never defined.

The Federal Election Commission presented 23 pages of prepared testimony on H.R. 5400. The FEC spokesmen made it clear that they were uncomfortable

with the lack of clarity and specificity in the mandate the Commission was being given. They requested further committee guidance in some areas and sought specific changes in others. They pointed out that the existing language "appeared to authorize an ever broader range of activities than voter registration and the modernization of election administration", including FEC activities designed to increase voter turnout or to help enforce the remaining safeguards against fraud. They were uncertain where Congress wished them to place their primary emphasis.

But in some areas, the FEC spokesmen did have quite specific ideas about the kinds of Congressional guidance they wanted. They sought considerably broader powers of enforcement - not just against fraud, but against any violation or possible violation of the Act's provisions. They sought more specific language which would trim even further the areas of choice left open to state and local officials. By specifying that state governors should be the sole designated recipients of the federal election subsidies, they sought language which would have the effect of further centralizing election administration within each state. "Modernization" begins to sound suspiciously like a synonym of "centralization".

The FEC spokesmen rightly noted a certain tension between Section 6(c) and Section 6(a). The former states: "Nothing contained in this Act shall be construed to limit the power of any state to prescribe the qualifications for voting in any federal election conducted in such state." Would existing state laws which make it relatively easy to disfranchise would-be voters through individual challenges on election day be tolerated under this section or crushed under Section 6(a), which requires states to register anyone who presents a single form of identification.

Professor Richard Smolka of American University observed in testimony before the Senate Rules Committee that S. 1072 "involves the federal government in every phase of election administration and in decisions about personnel and the purchase of supplies for all elections." The FEC gets more power than can possibly be justified under traditional criteria of Federalism; and more of a burden than it can possibly handle. The FEC's budget estimate for enforcement activities in FY 1978, he noted, worked out to \$4.69 for enforcement for each of the 175,000 polling places in the nation." Citing the \$75,000 spent by the House on investigating the recent Louisiana dispute, he concluded that FEC resources would be "minuscule" compared with what would really be needed. Broadening the FEC's mandate does nothing to redress the massive opportunities for fraud created by election-day registration; it only spreads the Commission thinner.

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