



The Case for a New Federal Elections Governance Agency

A Blueprint for Securing America's Voting
Systems and Strengthening Democracy

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Introduction

The [preliminary results of the 2020 U.S. general elections](#) unfortunately demonstrated that election administration officials at the state and local level across the United States faced a tremendous onslaught of challenges and attacks against a basic function of democracy: the ease for voters to cast a ballot. Similar to the primary season, we witnessed [long lines of voters](#) under a global health pandemic which has claimed over 230,000 lives in the United States (as of November 6, 2020). In the 2020 election cycle, State and Local Election Officials (SEOs and LEOs respectively) administered [over 100 million early votes](#) combined with a [shortage of poll workers](#) to accommodate those voters who chose to vote in person at polling stations on Election Day. The strong undercurrent of elections being administered during a pandemic is the [continued lack of fiscal and human resources](#) to carry out our most essential function of democracy. Unfortunately, there is very little action that can be taken by any U.S. elected representative at all levels of government that can ameliorate these election administration



challenges in the short-run, but there are actions that could be taken in the long-run to ensure that U.S. election officials are properly resourced and funded to implement a basic cornerstone of an American institution. In sum, U.S. elected officials at the federal level need to establish a **new federal elections governance agency** with shared responsibilities with state and local elections officials to ensure that all eligible Americans are able to vote with minimal challenges.

Background

Heather Gerken, the Dean and Sol & Lillian Goldman Professor of Law at Yale Law School, published a book in 2009 entitled, “*The Democracy Index: Why Our Election System is Failing and How to Fix It.*” The central thesis of her book was that election administration reform has significant a “here to there” problem: supporters of elections reform spend a significant amount of time thinking about the problem (“here”) and how to fix the problem (“there”), but very little time thinking about to create an environment where those reforms can firmly established (“here to there”).¹ In her book, Gerken conceived a quantitative tool called the Democracy Index which ranks states and localities based on their election performance.² Her concept would lay the future foundations for what is now the [Elections Performance Index \(EPI\) managed by the Massachusetts Institute of Technology’s Election Data and Science Lab.](#)³ Gerken argued that current election administration suffers from two deeply entrenched problems: [negative partisanship](#) and **localism**.

On **partisanship**, election administration includes the classic “foxes guarding the henhouse” scenario where elected officials at the state and local levels choose election administrators based on their political affiliation. Gerken noted this phenomenon of highly partisan elected officials conducting oversight of the administration of elections as **hyper-decentralization**,⁴ **hyper-federalism**,⁵ or **failed federalism**.⁶ Compared to other western democracies

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- 1 Gerken, Heather, “[The Democracy Index: Why Our Election System is Failing, and How to Fix It.](#)” Princeton University Press, 2009, p. 6.
 - 2 Gerken, Heather, “[The Democracy Index: Why Our Election System is Failing, and How to Fix It.](#)” Princeton University Press, 2009, p. 5.
 - 3 The EPI, first launched in 2013 by The Pew Charitable Trusts, provides a non-partisan, objective measure of how well each state is faring in managing national elections.
 - 4 Gerken, Heather, “[The Democracy Index: Why Our Election System is Failing, and How to Fix It.](#)” Princeton University Press, 2009, p. 19.
 - 5 Weinsten-Tull, Justin, “Election Law Federalism,” 114 Michigan Law Review 747 (2016), p. 778.
 - 6 Gerken, Heather, “[The Democracy Index: Why Our Election System is Failing, and How to Fix It.](#)” Princeton University Press, 2009,



which [institutionalized elections administration as part of their national bureaucratic infrastructure](#), the United States demonstrates the second problem of American elections: localism. Elections administration in the United States is highly decentralized, and its activities are delegated from state officials to local (i.e., counties, townships, and municipalities) officials. The over 10,000 elections jurisdictions in the U.S. are also in constant need of funding and recruitment of poll workers. The 2020 election cycle is no different. The [Senate excluded additional funding](#) for SEOs and LEOs to implement safe and secure elections in the middle of a deadly pandemic. In addition, since 58% of surveyed poll workers are aged 60 or over, and are thus the demographic group that COVID-19 places at highest risk, [election jurisdictions face a dramatic shortage of poll workers](#). Many millennials, however, are heeding the call to their civic duty to [volunteer as poll workers](#) in light of this shortage.

Again, Gerken correctly identified the lack of professionalism in the election administration space as a consequence of the partisanship from elected state and local government officials. The overriding qualification of some election administration officials is often party membership, and not qualifications.⁷ As a result, many LEOs are either full-time (but not professionally trained), part-time, or are volunteers temporarily serving in one federal, state, or local election. Although many LEOs have been professionally trained through a number certification programs offered by the [National Association of Election Officials](#), the [International Association of Government Officials](#), the [University of Auburn's Graduate Certificate in Election Administration](#), or [University of Minnesota's Certificate in Elections Administration](#), these professional qualifications are not required for all elected SEOs appointing LEOs who are trusted with ensuring the integrity of U.S. elections.

Partisanship is but one aspect of the imbalances found in election administration. Other imbalances between state and local authorities with regard to implementing U.S. election statutes also exist. Justin Weinstein-Tull, Associate Professor at the University of Arizona's Sandra Day O'Connor College of Law, coined the term **election law federalism** where states delegate the implementation of federal election statutes down to local levels of government. This form of **hyper-federalism** creates inconsistencies between the states in the implementation of federal election statutes such as the [National Voter Registration Act of 1993 \(NVRA\)](#) and the [Uniformed Overseas Citizens Absentee](#)

p. 20.

7 Gerken, Heather, "The Democracy Index: Why Our Election System is Failing, and How to Fix It," Princeton University Press, 2009, p. 17.



Voter Act (UOCAVA).⁸ While states do need to uniformly adhere to federal statutes in general, there are two caveats to consider:

1. The uniqueness and the diversity of state legal systems creates the necessary resilience for election architectures and voting systems against certain vulnerabilities. For example, due to the decentralization of election architectures, malign state actors would be unable to target every state, county, or municipal election jurisdiction in the same manner if every state and locality had the same election architectures. (Admittedly, a centralized election institutional body would make potential vulnerabilities a commonality across the country. However, such commonalities would also make the effectiveness of election administration less prone to the distortions found in election administration such as **hyper-federalism**.)
2. The federal government needs to allocate sufficient resources to the states to implement federal requirements. As mentioned earlier in this paper, the administering of elections is chronically underfunded, and are subject to heavy partisan influence.⁹

As discussed later in this paper, a new federal elections governance agency would

⁸ UOCAVA was amended by the [Military and Overseas Voter Empowerment Act of 2009](#) to provide greater protections for military servicemembers and their families.

⁹ The author thanks the Rainey Center's Co-Founder, Ms. Sarah E. Hunt, for these clarifying points.



rectify the funding shortfall to states to properly implement federal election statutes but would defer on how such implementations would occur depending on each state's constitutions. In addition, such an agency would seek to continue Congressionally appropriated funding on a yearly basis to ensure that federal requirements are enforced.

Election law federalism has two distinct features:

1. The expansive power to regulate
2. The widespread state prerogative to delegate to local government officials in counties and townships¹⁰

When states do not comply with federal election laws, **liability mismatch** takes root where federal statutes hold states responsible for conduct that states have delegated to local governments.¹¹ For example, the NVRA, better known as the “Motor Voter Act,” requires that “all states...adopt federal registration procedures detailed in the Act, except for states that have no registration requirements, or that permit Election Day registration with respect to federal elections.” Since the NVRA, however, allows these two exemptions, the NVRA substantially defers to state discretion.¹² In this case, many states have either ignored the NVRA statute, or sued the federal government over the implementation of the NVRA.¹³ In fact, the Presidential Commission on Election Administration called the NVRA “the election statute most often ignored.”¹⁴

With **partisanship, hyper-decentralization, election law federalism**, and the professionalization of election administration as the major challenges to administering elections in the United States, how do we set forth a framework to overcome these deeply entrenched challenges? This paper argues that the elected leaders at the federal level should seek to create an independent federal government agency called the U.S. Agency for Election Governance. **Such an agency would share a deeper responsibility of elections between the federal government and states consistent with the U.S. Constitution.**

¹⁰ Weinsten-Tull, Justin, “Election Law Federalism,” 114 Michigan Law Review 747 (2016), p. 775.

¹¹ Weinsten-Tull, Justin, “Election Law Federalism,” 114 Michigan Law Review 747 (2016), p. 764.

¹² Monticello, Allaire P., *Protecting America's Elections from Foreign Tampering: Realizing the Benefits of Classifying Elections Infrastructure as Critical Infrastructure Under the United States Code*, 51 U. Rich L. Rev. 1239 (2017), p. 1254.

¹³ During the mid-2000s, Ohio, Illinois, and Missouri sued the federal government over the implementation of the NVRA with mixed outcomes.

¹⁴ *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, January 2014, p. 17.



A New Federal Elections Agency

The vision of establishing an independent agency of the U.S. government charged with the oversight and regulation of federal elections in the U.S. states and territories would most certainly be met with intense skepticism, and some would consider the creation of such an agency as unconstitutional. At the very least, Constitutional scholars would argue that any federal encroachment on the states to regulate elections would violate the “anti-commandeering principle” of the 10th Amendment. In addition, many would argue that the U.S. government already has such an agency called the Election Assistance Commission (EAC) created by the Help America Vote Act (HAVA) of 2002. This paper seeks to propose three counterpoints to these potential criticisms:

1. The establishment of an independent, federal election oversight agency is within the bounds of the **Elections Clause** of the U.S. Constitution.
2. The establishment of an independent agency to rectify Section 209 of HAVA (which purposely created the EAC with no regulatory enforcement mechanism).



3. The mandate of an independent regulatory agency that would exclusively regulate, and fully enforce federal election statutes (and would not interfere in the administration of elections by states and localities).

The Elections Clause

Although the states are charged with administering elections, Congress has the broad authority to regulate federal elections including Presidential and Congressional elections. Article I, Section 4, Clause 1 of the U.S. Constitution, known as the **Elections Clause**, states:

“The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”

Congress may pass federal laws regulating Congressional elections that automatically displace, or preempt, any contrary state statutes, or enact its own regulations concerning those aspects of elections that states may not have addressed.¹⁵ There have been, however, few examples where the court has decided cases interpreting the **Elections Clause** of the Constitution. In 1879, the Supreme Court ruled in the *Ex Parte Siebold* case that “the power to regulate Congressional elections ‘may be exercised as and when Congress sees fit,’ and ‘when exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.”¹⁶ In 1884, the Supreme Court ruled in *Ex Parte Yarbrough* that “when Congress ‘finds it necessary to make additional laws for the free, pure, and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons.”¹⁷ In 1941, the Supreme Court interpreted the **Elections Clause** in the *United States v. Classic* “as a means of protecting the integrity of the elections, to grant Congress the authority to regulate Congressional primary elections.”¹⁸ And more recently in 1997, the Supreme Court ruled in *Foster v. Love* that the “**Elections Clause** invests the states with the responsibility for the mechanics of Congressional elections,

15 “Elections: The Scope of Congressional Authority in Election Administration,” *Government Accountability Office*, Report #GAO-01-470, March 2001, p. 3.

16 “Elections: The Scope of Congressional Authority in Election Administration,” *Government Accountability Office*, Report #GAO-01-470, March 2001, p. 4, quoting *Ex parte Siebold*, 100 U.S. 371, 383 (1879).

17 “Elections: The Scope of Congressional Authority in Election Administration,” *Government Accountability Office*, Report #GAO-01-470, March 2001, p. 4, quoting *Ex parte Yarbrough and others*, 110 U.S. 651, 662, 4 S.Ct. 152, 28 L. Ed. 274 (1884).

18 “Elections: The Scope of Congressional Authority in Election Administration,” *Government Accountability Office*, Report #GAO-01-470, March 2001, p. 5, quoting *U.S. v. Classic*, 313 U.S. 219, 317, 61 S.Ct. 1031, 85 L.Ed 1368 (1941).



but only as so far as Congress declines to preempt state legislative choices.”¹⁹

Given the limited case law on the interpretation of the **Elections Cause**, the establishment of a federal independent agency to conduct stronger oversight of federal elections, the full enforcement of existing federal election statutes, and the creation of additional federal statutes pertaining to federal elections seems likely within the bounds of the **Elections Cause**. After the U.S. Department of Homeland Security (DHS) designated elections infrastructure as critical infrastructure in January 2017, many Constitutional experts declared that such a move was the encroachment of the federal government on states’ purview to administer elections. However, according to Paul Rosenzweig, former Deputy Assistant Secretary for Policy in the Department of Homeland Security stated that DHS’s designation of elections as critical infrastructure did “not, by itself, bring with it regulatory authority over the sector designated. When, and if, Congress wants to extend regulatory authority to enhance infrastructure security, it does so by separate express legislation.”²⁰

Congressional legislative action to create an independent federal regulatory agency exclusively to conduct oversight of federal elections would be the “separate express legislation” that Mr. Rosenzweig noted. Such legislation under these terms, however, would not preclude Congress from its Constitutional power to strengthen its oversight of federal elections so long as such legislation does not interfere with the states’ Constitutional authority to administer those elections. For example, an independent federal regulatory agency conducting oversight in the administration of federal elections would be similar to how the Federal Election Commission conducts oversight of federal campaign statutes. Through the Federal Election Campaign Act of 1971, the FEC was created in 1974 to enforce and regulate [federal] campaign finance law.²¹ The FEC has the responsibility and duty of ensuring that those involved in legislative and presidential campaigns adhere to the regulations concerning the conduct of federal campaigns and elections.²² *Thus, the FEC does not encroach on state and local campaigns with regard to campaign finance, and leaving such issues under the jurisdiction of the states.*²³ This paper will later discuss the rationale for establishing such an independent federal regulatory agency to encourage states to properly administer

19 Elections: The Scope of Congressional Authority in Election Administration,” *Government Accountability Office*, Report #GAO-01-470, March 2001, p. 5, quoting *Foster v. Love*, 522 U.S. 67, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997).

20 Rosenzweig, Paul, “No, DHS is Not Going to ‘Take Over’ the Electoral System,” *Lawfare Blog*, <https://www.lawfareblog.com/no-dhs-not-going-take-over-electoral-system>, September 6, 2016.

21 Padilla-Babilonia, Alvin (2020) “Reforming the Federal Election Commission: Storable Voting,” *Wyoming Law Review*: Vol. 20, No. 2, Article 6, p. 4.

22 Sheppard, Maurice C., *The Federal Election Commission: Policy, Politics, and Administration*, University Press of America, 2007, p. 32.

23 The author thanks the Rainey Center’s co-founder, Ms. Sarah E. Hunt, for this point.



federal elections tied to those states' performance in administering federal elections.

The Necessary and Proper Clause

If Congress were to make a successful legal argument with the states for establishing an independent federal agency, such an agency will need to have the power of federal law similar to other independent federal agencies such as the [Federal Energy Regulatory Commission \(FERC\)](#), or the [Environmental Protection Agency \(EPA\)](#). Per the Administrative Procedure Act (APA) of 1946, independent federal agencies adopt rules to implement statutes enacted by Congress. Through the APA, independent agencies prescribe procedures for agency rulemakings and adjudications.²⁴ Thus, an independent agency regulating federal elections should have the mandate of fully enforcing existing and new election statues passed by

²⁴ Garvey, Todd, *A Brief Overview of Rulemaking and Judicial Review*, Congressional Research Service Report # R41546, March 27, 2017, p.1. The APA describes rulemaking as the “agency process for formulating, amending, or repealing a rule.”³ A “rule,” for purposes of the statute, is defined expansively to include any “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”



Congress such as the NVRA.

In addition, Congress should create this independent regulatory agency not only through the **Elections Clause**, but in tandem with the **Necessary and Proper Clause** (Article I, Section 8, Clause 18) of the U.S. Constitution. Congress should view such legislation as “necessary” and “proper” to ensure the integrity of federal elections for every eligible American voter. In fact, Congress’ power to establish agencies may be enhanced by the Necessary and Proper Clause which permits Congress to enact laws that are convenient, useful, or conducive to the exercise of Congress’ enumerated powers.²⁵ This paper will explore that establishing an independent regulatory agency of federal elections as both “necessary” and “proper” under the U.S. Constitution.

Even if Congress were successful in making the argument that an independent agency to regulate federal elections is “necessary” and “proper” under the Elections Clause, critics may immediately state that such an agency already exists: the Elections Assistance Commission (EAC). The EAC and its Commissioners, however, experienced significant growing pains, and setbacks as an organization since its establishment through the Help American Vote Act (HAVA) of 2002. The challenges the EAC faced included being:

- + **Highly politicized** among Members of Congress
- + **Poorly funded** in light of cyber attacks against election infrastructure collectively to agree by the **U.S. Senate** and the **U.S. intelligence community**
- + Counterproductive through a lack Commissioners to vote on highly important voting and election-related matters resulting in deadlock
- + On the receiving end from **states who grew frustrated** over the agency’s slow progress in advancing its primary mandate to set long overdue voting system certification standards through the agency’s **Voluntary Voting System Guidelines (VMSG)**. Since the technology to manufacture voting machines and voter registration systems advances very quickly, previously EAC approved certification standards also become quickly outdated.²⁶ As a result, issues with the EAC’s certification process have likely **prevented more states from relying more on the EAC’s voluntary standards for testing and certifying their voting systems.**

²⁵ Cole, Jared P., *Organizing Executive Branch Agencies: Who Makes the Call?*, Congressional Research Service Report # LSB10158, p. 1.

²⁶ The last approved VMSG 1.1 guidelines was in 2005, and the updated VMSG 2.0 guidelines are currently being circulated for public comment.



In addition, per Section 209 of HAVA, the EAC was purposely created without any “authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government.”²⁷ The EAC’s lack of regulatory enforcement caused many legal scholars to note that HAVA’s attempt at centralizing voting processes and increasing standards for voting infrastructure [as] *ineffective*.²⁸ Also, the EAC’s lack of regulatory powers encourages the continued **liability mismatch of failed federalism** in election administration.

A combination of a highly partisan, poorly funded independent federal agency without any regulatory enforcements sets the backdrop for a unified Congress²⁹ to establish a non-partisan, Senate confirmed Board of Governors for a new **U.S. Agency for Election Governance (AEG)** with regulatory powers to ensure the integrity in the administration of federal elections to fully defend the most important cornerstone of our U.S. democracy. Thus, the creation of an independent federal agency regulating Presidential and Congressional elections would effectively replace the EAC. Those staffed at the EAC would be grandfathered over to the new federal agency with either new, or modified responsibilities consistent with the mandate of the **U.S. Agency for Elections Governance**. Since, however, such an agency would purposely not interfere with the states’ Constitutional authority to administer elections, it is the hope that this agency will serve as a model for the states themselves to follow the federal agency’s lead at the state and local level to curb **localism** and **failed federalism**.

27 Public Law 107-252, Section 209, “Limitation on Rulemaking Authority.”

28 Monticello, Allaire P., *Protecting America’s Elections from Foreign Tampering: Realizing the Benefits of Classifying Elections Infrastructure as Critical Infrastructure Under the United States Code*, 51 U. Rich L. Rev. 1239 (2017), p.1256 (Author’s emphasis).

29 Given the effects of negative partisanship mentioned earlier in this paper, the author is fully aware that a “unified Congress” may not be fully realized for many years into the future.



The Benefits of a New Regulatory Elections Agency

Now that we have made the Constitutional case for a future Congressional meeting to establish a federal independent regulatory agency, what should such an agency look like? The author's proposed **U.S. Agency for Election Governance** has, in fact, its mandate in its name: **election governance**. When academics speak of **governance** conceptually, the term is typically used in an economic development context where sovereign governments, international organizations, and civil societies focus on rebuilding societies damaged by severe [conflict and war](#); [poverty and economic depression](#); societies aiming to improve or build their [defense or security capacities](#); or societies building [embryonic democracies](#). The word **governance** derives from the Greek word *kubernáo* which was first used by the Greek political philosopher Plato meaning to “steer.”³⁰ The concept of **governance** may be applied to any form of collective action, but governance is

30 Argüden, Yilmaz, *Keys to Governance*, Palgrave Macmillan, 2011, p. 1.



about the more strategic aspects of steering: the larger decisions about direction and roles. **Governance** is not only about *where to go*, but also about *who should be involved in deciding*, and in what capacity.³¹ In addition, **governance** is the way a society organizes itself to make and implement decisions — achieving mutual understanding, agreement, and action.³²

The five principles of good **governance**³³ as defined by the [United Nations Development Program](#) include the following:

1. Legitimacy and Voice

PARTICIPATION

All men and women should have a voice in decision-making, either directly, or through legitimate intermediate institutions that represent their intention.

CONSENSUS ORIENTATION

Good governance mediates differing interest to reach broad consensus on what is in the best interests of the group, and where possible, on policies and procedures.

2. Direction

STRATEGIC VISION

Leaders and the public have a broad and long-term perspective on good governance and human behavior.

3. Performance

RESPONSIVENESS

Institutions and processes try to serve all stakeholders.

EFFECTIVENESS AND EFFICIENCY

Processes and institutions produce results that meet needs while making the best use of resources.

31 Graham, John; Amos, Bruce; Plumptre, Tim, *Principles for Good Governance in the 21st Century: Policy Brief No. 15*, The Institute on Governance, 2003, p.2.

32 “Governance Principles, Institutional Capacity and Quality,” *Towards Human Resilience: Sustaining [Millennium Development Goals] MDG Progress in an Age of Economic Uncertainty*, United Nations Development Program, November 3, 2015, p. 287.

33 Graham, John; Amos, Bruce; Plumptre, Tim, *Principles for Good Governance in the 21st Century: Policy Brief No. 15*, The Institute on Governance, 2003, p.3.



4. Accountability

ACCOUNTABILITY

Decision-makers in government, the private sector, and civil society organizations are accountable to the public.

TRANSPARENCY

Transparency is built on the free flow of information. Processes, institutions, and information are directly accessible to those concerned with the free flow of information, and enough information is provided to understand and monitor them.

5. Fairness

EQUITY

All men and women have opportunities to improve or maintain their well-being.

RULE OF LAW

Legal frameworks should be fair and enforced impartially, particularly the laws on human rights.



To answer questions mentioned earlier in this paper, a new U.S. Agency for Elections Governance (AEG) will satisfy the theory of good **governance** of federal elections in the following ways:

- 1. Establish a Board of Elections Governors, similar to the U.S. Federal Reserve Board of Governors, whom require confirmation from the U.S. Senate.**
 - a.** A Board of Elections Governors would be five to seven odd-numbered³⁴ representatives in number and would be required to be at full quorum every fiscal year.
 - b.** Each Elections Governor would be term limited to two Presidential cycles.
 - c.** Each Elections Governor would be nominated based on merit in that particular Governor’s experience in administering elections for all levels of government.
 - d.** Unlike the EAC, each Elections Governor would be prohibited to engage in any political activities (i.e., political speech or fundraising) per the Hatch Act of 1939.
 - e.** The Board of Governors would properly advocate the needed fiscal and human resources with its own Congressional fiscal and appropriations authorities to make through submissions to the President’s Budget through the Office of Management and Budget. The Agency would need a unique budget authority to fully enforce the mandate of the Agency.
 - f.** Most importantly, a Board of Governors would help to implement and “steer” all **five principles of good governance** to ensure the integrity, and the proper administration of federal elections for all eligible American voters.

³⁴ Currently, the EAC and the FEC have an even-numbered of commissioners which often leads to voting deadlock. Having an odd-numbered of Election Governors would seek to rectify this problem.



2. Build a [federal civil service](#) workforce of Federal Elections Officers (FEO) dedicated to properly resource and staff state and local election offices.

- a. The first task of the Board of Elections Governors would be to fulfill a Congressional mandate to establish a “corps” of FEOs.
- b. By comparison, the [Edward M Kennedy Serve America Act of 2009](#), this Act encouraged the youth of America to volunteer in programs such as [AmeriCorps](#) to help military veterans; help communities recover after natural disasters; and promote environmental sustainability.
- c. A similar program could be developed to encourage young adults, beginning in high school, to fulfill their civic duty by receiving federal elections training, and staff offices in the over 10,000 election jurisdictions across the country to administer federal elections.
- d. The goal for such a program is for average Americans to realize that the administration of elections is a year-round activity, and is not restricted to preparations of every two, or four years (mid-terms and Presidential elections). Elections occur at the state and local levels more frequently than at the federal level.
- e. Similar to the [U.S. Foreign Service Officers at the U.S. Department of State](#), FEOs could have the potential of serving in life-long careers deployed³⁵ to a number of election jurisdictions throughout the country for one to two President general election cycles.³⁶ FEOs could work in five specific “cones” of expertise such as **Cybersecurity (CS)**, **Election Law (EL)**, **Voting and Registration Equipment (VRE)**, **Foreign Language (FL)**,³⁷ and **Election Office Administration (EOA)**.
- f. FEOs should also undergo U.S.-funded security background checks with clearances granted at the SECRET level. Many U.S. citizens who volunteer as election judges, or poll workers for one or two elections often do not have security background checks. In addition, after DHS

35 The AEG would be responsible for deployments of FEOs similar to how the U.S. Department of State and Department of Defense deploys its personnel overseas through [Permanent Change of Station](#) orders. FEOs would be deployed to election jurisdictions based on the greatest need of state and local election offices to properly administer federal elections. Demand would be in the form of poorly resourced elections jurisdictions that need cybersecurity specialists, foreign language specialists, etc.

36 FEOs would be given the option of serving in one election jurisdiction for four or eight years, or move to another election jurisdiction every four years. The ultimate goal is to ensure that no FEOs serves more than eight years in any one election jurisdiction so FEOs can obtain broad knowledge of how different state and local election jurisdictions operate.

37 Section 203 of the Voting Rights Act of 1965 (amended in 1975) states that “whenever any State or political subdivision [covered by the section] provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.”



designated elections as critical infrastructure, DHS faced the problem of being unable to provide classified information to Secretaries of State who were not legally cleared to receive such information on cybersecurity breaches on their respective state networks.

- g.** In addition to training in federal election statutes, FEOs would also require at least six-months to a year of training in state and local election laws when deployed to their election jurisdiction.

3. Establishing, or designating *Federal Elections Centers of Excellence* to properly train and educate FEOs in the administrative, legal, and historical aspects of U.S. federal elections.

- a.** Similar to the joint effort between the U.S. Department of Homeland Security and the U.S. National Security Agency’s [National Centers of Academic Excellence](#), the U.S. Agency for Elections Governance could also designate private sector or academic institutions as certified Federal **Elections Centers of Excellence** for those organizations specializing in elections administration drawing upon



interdisciplinary areas such as public policy, political science, public administration, cybersecurity, and information technology.

- b. For example, [University of Auburn](#) and [University of Minnesota's](#) election administration programs would serve as good starting points for the agency to designate these academic institutions as Federal Elections Centers of Excellence. Elections certifications offered by the private sector such as the [National Association of Elections Officials](#), and the [International Association of Government Officials](#) could also be placed under the Agency's training and education programs for FEOs.

4. The U.S. Agency for Elections Governance seek Congressional authorization to merge the U.S. Department of Defense's [Federal Voting Assistance Program \(FVAP\)](#), and the U.S. Department of Homeland Security's [Election Infrastructure Security](#) activities under the AEG's leadership.

- a. FVAP administers the [Uniformed and Overseas Citizens Absentee Voting Act \(UOCAVA\)](#) and the [Military and Overseas Voter Empowerment Act \(MOVE\)](#), which amended UOCAVA, on behalf of the U.S. Secretary of Defense.³⁸ FVAP ensures that members of the military, their dependent families, and U.S. citizens living outside of the U.S. are able to register to vote, and cast their respective U.S. state and territory's ballots from their overseas locations.
- b. DHS' [Cybersecurity and Infrastructure Security Agency](#) works with state and local governments, election officials, federal partners, and commercial vendors to manage risk to the country's election infrastructure.
- c. The AEG should conduct oversight of these two organizations to ensure that all aspects of voting and election security to ensure that voting and election security are seamlessly managed under one authority.
- d. The AEG should also be mandated to coordinate very closely with the [Voting Section of the Department of Justice's Civil Rights Division](#)³⁹

³⁸ The U.S. Department of State is required to work with FVAP under the DoD to assist military and civilian voters through overseas U.S. Embassies and Consulates.

³⁹ Between 2000 and 2015, the Department of Justice successfully won twenty-eight UOCAVA suits against nineteen separate states or territories. Weinsten-Tull, Justin, "Election Law Federalism," 114 Michigan Law Review 747 (2016), p. 761.



to properly ensure that election statutes are fully enforced to avoid aspects of **election law federalism**.

5. The AEG would issue performance-based Congressionally appropriated funding to state and local jurisdictions based on the MIT Election Center and Design Lab's Elections Performance Index (EPI).
 - a. Similar to how the U.S. government uses various statistical metrics, or indices such as the [Gross Domestic Product](#) and the [Consumer Price Index](#) to assess the strength of its economy, so too should the AEG use the EPI to determine the strength and performance of states who improve their to administer elections.
 - b. The AEG using the EPI as a benchmark for state performance would create incentives for U.S. states and territories to improve their capabilities to avoid state tendencies towards **hyper-decentralization**, and focus on following the AEG's enforcement of federal election statutes as a model for states to improve their own election statutes.



Putting it All Together

As mentioned previously, one of the critical, key ingredients in establishing a **U.S. Agency for Elections Governance** is a **unified Congress**. As noted by Dean Gerken earlier in this paper, elections administration is heavily influenced by **partisanship** and political patronage with the only qualifications for senior elections officials is that they are of the same political affiliation as their elected leaders. In addition, since **negative partisanship** characterizes current U.S. politics, the idea of a unified Congress would seem far-fetched. If, however, a future [Congressional session](#) that has both houses of the U.S. legislature controlled by the same political party as the President would help to prioritize the regulation of federal elections establishing such an agency may be within the realm of possibility. Unfortunately, politics must come first before any legal arguments can be assessed in creating this type of independent federal agency.

States would also naturally balk at the idea of the U.S. government establishing an independent federal regulatory agency with oversight responsibilities over federal elections. However, as emphasized earlier, this agency would be charged with *exclusively conducting oversight of federal elections*, and not state and local



elections. Congress would honor the Constitutionality of the states administering elections under the **Article I, Section 2, Clause 1** of the U.S. Constitution, and under the **10th Amendment**. A future Congressional session creating such an independent agency would hopefully encourage states to follow the federal government's lead in establishing a robust, transparent, and accountable infrastructure in following the **five principles of good governance**: establishing **direction** for the nation towards creating a federal elections system that is fully **accountable, legitimate, transparent, and fair** for all eligible U.S. voters. The measurement for how well states are **performing** as measured by the EPI would be the most transparent view the U.S. taxpayer would have on the effectiveness of the AEG.

A **U.S. Agency for Elections Governance** with a Board of Elections Governors would be isolated from any political influence and prohibited from participating in any political activities that would compromise their positions to ensure the full integrity of federal elections. The enforcement of the Hatch Act would be applicable to these Elections Governors like any other federal employee. Thus, a fully empowered independent federal elections agency would be the natural U.S. federal bureaucracy to counter any unsubstantiated challenges to the integrity of U.S. elections. The AEG would also have its own Congressional fiscal and appropriations authorities to enforce election legislation passed by Congress. Like other U.S. federal agencies, the AEG would also be charged to submit a budget request to the Office of Management and Budget to ensure that the AEG is well resourced. Like any other federal agency, the Elections Governors would need to ensure that the AEG is a responsible fiscal steward of U.S. taxpayer dollars to execute the mandate that all eligible American voters are able to register and cast ballots for candidates of federal elections (and for state and local elections as a by-product of that mandate). In the case of extreme circumstances such as the COVID-19 pandemic, the AEG would be better positioned to sufficiently fund states and localities to implement federal elections on an emergency basis.⁴⁰

The AEG would naturally work with the Secretaries of State (SoS) to ensure that clear lines of Constitutional authority exists between the federal government and the states. The AEG would seek to rectify the failed federalism that currently exists to eliminate the political influence over the administration of federal elections. In addition, the AEG can ensure that the states fully implement existing federal election statues such as the NVRA and UOCAVA. The SoSs are, of course,

⁴⁰ For example, in 1938 during the Great Depression, Congress enacted several temporary, emergency relief grant-in-aid programs that distributed federal funds to states according to the state's fiscal capacity. Dilger, Robert Jay and Cecire, Michael H., *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues*, Congressional Research Service Report # R40638, May 22, 2019, p.18.



absolutely free to implement the laws and policies necessary and relevant to their respective states over the administration of state and local elections. When those elections, however, involve the administering of federal elections, the AEG would be in its Constitutional purview to ensure that a sufficient number of poll workers (or FEOs) are available at polling stations, and that state and local election jurisdictions are sufficiently funded to implement the administering of federal elections. The indirect assistance to state and local elections that are on the same ballot as federal election candidates would be a by-product of federal involvement.

The 2020 U.S. elections brought no shortage of “MVPs” of elections administration officials whom were highlighted on the national scene including [Joe Gloria of Clark County, Nevada](#); [Karen Brinson Bell of North Carolina](#); [Rick Barron and the election workers of Fulton County, Georgia](#); [Meagan Wolfe of Wisconsin](#), [City Commissioner Al Schmidt of Philadelphia, Pennsylvania](#), and [Michigan Secretary of State Jocelyn Benson](#).⁴¹ The hard work of election administrators and chiefs of elections working diligently behind the scenes to ensure the integrity

⁴¹ Although a majority of Secretaries of State positions are elected positions subject to heavy political influence, Secretary Benson was one of the few exceptions to challenge allegations of malfeasance in Michigan’s conduct of the 2020 U.S. general elections.



of U.S. elections often go unnoticed, or unrecognized by the general public. Similar to how U.S. federal employees are acknowledged for their value-added contributions as civil servants, the AEG would be positioned to formally recognize FEOs for their fastidious work to ensure a high quality of elections governance in the United States. The AEG would also help entrench the civic duty of high school students to become active participants in the elections process. Those students could receive credit at their local high schools when serving as a “junior” FEOs in their respective election jurisdictions. As part of the recruitment of future FEOs, those high school students could enter into service as an FEO after high school or college. In addition, mid-career professionals whom are willing to answer the call to serve their country could serve to strengthen our American democracy through joining the AEG’s Federal Election Officer “corps.” The deployment of FEOs in election jurisdictions would naturally solve the problem of jurisdictions relying on retired, part-time, or volunteer poll workers that typically staff a polling station for upcoming elections. Lastly, the deployment of FEOs across the country can help the average American to understand the importance of creating a robust elections infrastructure that is secure, transparent, and open to all U.S. citizens eligible to vote overseas at home and abroad.

The creation of a U.S. Agency for Elections Governance would be created to enshrine, strengthen, and defend the most important cornerstone of U.S. democracy: the continued integrity of our U.S. elections.



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