

supporting material on EAC's website at least thirty, (30) days prior to the next meeting of the Standards Board.

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- 4. The bylaws may be amended by on a two-thirds (2/3) vote of the members present and voting at any Standards Board meeting.

**Article XI. Expenses and Reimbursement.**

- 1. Expenses related to Standards Board operations will be borne by the EAC.
- 2. Expenditures of any kind must be approved in advance by the DFO.
- 3. Standards Board members shall not receive any compensation for their services, but shall be paid travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of federal agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in performance of their services for the Standards Board.

**Article XII. Roberts Rules**

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- 1. The rules contained in the current edition of *Robert's Rules of Order Newly Revised* shall govern the Standards Board in all cases to which they are applicable and in which they are not inconsistent with these bylaws and any special rules of order the Standards Board may adopt.
- 2. Voting procedures for the Standards Board, the Executive Board, and the subcommittees shall follow the accepted procedure, in the latest edition of Robert's Rules of Order.

**Article XIII. Effective Date**

- 1. These By-Laws are effective upon adoption by the Standards Board.

**Article XIV. Transition Procedures and Ratification**

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- 1. The adoption of the bylaws has no effect on the selection, terms or appointment of the officers or members of the Standards Board, the Executive Board, or a committee of the Board serving on the effective date of these bylaws.
- 2. All acts of the Standards Board, the Executive Board, or a committee of the Board are hereby ratified, except to the extent that an act does not conform with a resolution adopted by the Standards Board before the effective date of these bylaws.

\_\_\_\_\_  
Chair Date

\_\_\_\_\_  
DFO Date

These bylaws were last updated on \_\_\_\_\_, 20\_\_\_, and supersede all previous versions.

DRAFT

Unless otherwise determined in advance, all Standards Board meetings will be open to the public.

Once an open meeting has begun, it will not be closed unless prior approval of the closure has been obtained and proper notice of the closed session has been given to the public.

Notices of closed meetings will be published in the Federal Register at least 15 calendar days in advance.

If, during the course of an open meeting, matters inappropriate for public disclosure arise during discussions, the Chair will order such discussion to cease and will schedule it for closed session.

All materials brought before, or presented to, the Board during the conduct of an open meeting, including, but not limited to, the minutes of the proceedings of the previous open meeting, will be available to the public for review or copying at the time of the scheduled meeting.

Members of the public may attend any meeting or portion of a meeting that is not closed to the public and may, at the determination of the Chair, offer oral comment at such meeting. The Chair may decide in advance to exclude oral public comment during a meeting, in which case the meeting announcement published in the Federal Register will note that oral comment from the public is excluded. In such a case, the Standards Board will accept written comments as an alternative. In addition, members of the public may submit written statements to the EAC at any time.

Standards Board meetings will be closed only in limited circumstances and in accordance with applicable law. The Standards Board must obtain prior approval to conduct a closed session. Requests for closed meetings must be submitted to EAC's Office of General Counsel a minimum of 45 days in advance of the proposed closed session.

Where the DFO, in conjunction with the Office of General Counsel, has determined in advance that discussions during a Standards Board meeting will involve matters about which public disclosure would be harmful to the interests of the government, industry, or others, an advance notice of a closed meeting, citing the applicable exemptions of the Government in the Sunshine Act (GISA), shall be published in the Federal Register. The notice may announce the closing of all or just part of a meeting.

Minutes of open meetings shall be available to the public upon request. Minutes of closed meetings shall be available to the public upon request, subject to the Freedom of Information Act (FOIA).

BYLAWS

UNITED STATES ELECTION ASSISTANCE COMMISSION STANDARDS BOARD

The U.S. Election Assistance Commission Standards Board, hereinafter referred to as Standards Board, embodies the vision of Congress to forge a partnership among federal, state and local election officials whose goal is to promote public confidence in the conduct of federal elections in the United States.

Article I. Authority

1. Pursuant to the Federal Advisory Committee Act and the Help America Vote Act of 2002 (HAVA) [Public Law 107-252], as such statutes may be amended from time to time, the Standards Board has been granted its authority through its charter with the United States Election Assistance Commission (EAC) (filed with Congress on June 14, 2004).

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Article II. Objectives:

The Standards Board will:

1. Advise the EAC through review of the voluntary voting system guidelines described in Title II Part 3 of HAVA; through review of the voluntary guidance described under Title III of HAVA; and through the review of the best practices recommendations described in Section 241 of Title II of HAVA, as required by HAVA or as may be developed by EAC.
2. Provide guidance and advice to the EAC on a variety of topics related to the administration of elections for Federal office.
3. Function solely as an advisory body and will comply fully with the provisions of the Federal Advisory Committee Act (FACA), and all other applicable Federal laws.

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Article III. Standards Board Membership

1. Pursuant to Section 213(a) of HAVA, the Standards Board shall consist of 110 members, as follows:
  - a. Fifty-five (55) shall be state election officials selected by the chief State election official of each State.
  - b. Fifty-five (55) shall be local election officials selected as follows:
    - ii. Each state's local election officials, including the local election officials of Puerto Rico and the United States Virgin Islands, shall select a representative local election official from the state in a process supervised by the chief election official of the state.
    - iii. In the case of the District of Columbia, Guam, and American Samoa, the chief election official shall establish a procedure for selecting an individual to serve as a local election official. The individual selected under such a procedure may not be a member of the same political party as the chief election official.

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- c. The two Standards Board members who represent the same state may not be members of the same political party.

**Article IV. Standards Board Member Vacancies**

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1. The chief election official of each state shall notify the EAC and Executive Board of the Standards Board within five (5) business days of any vacancy or membership changes to the Standards Board.
2. Vacancy appointments to the Standards Board shall be made in accordance with Section 213(a) of HAVA.

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**Article V. Executive Board of the Standards Board**

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1. Pursuant to Section 213(c) of HAVA, the Standards Board shall select nine (9) of its members to serve as the Executive Board of the Standards Board as follows:
  - a. Membership.
    - i. Not more than five (5) members of the Executive Board may be state election officials.
    - ii. Not more than five (5) members of the Executive Board may be local election officials.
    - iii. Not more than five (5) members of the Executive Board may be of the same political party.
  - b. Nominations.

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i. Expired Terms.

- (a) The Nominating Committee shall solicit nominations for the Executive Board from Standards Board members. The Nominating Committee shall send to Standards Board members a solicitation no later than December 1<sup>st</sup> immediately prior to the expiration of any Executive Board member's term. The solicitations shall designate the address and form for submitting nominations.
- (b) Standards Board members may nominate themselves or other Standards Board members by responding to the solicitation.
- (c) Nominations shall be submitted to the Standards Board's Designated Federal Officer (DFO) in writing and may be submitted electronically no later than January 15.
- (d) Upon receipt of nominations, the Nominating Committee shall prepare a ballot to be distributed to the Standards Board at least 15 days prior to the date of the Standards Board meeting immediately following the submission deadline.

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ii. Vacancies Before the End of a Term.

- (a) In the event of a vacancy on the Executive Board prior to the expiration of a member's term on the Executive Board, the Nominating Committee shall send to Standards Board members a solicitation no later than sixty (60) days before the next meeting of the Standards Board. The solicitations shall designate the address and form for submitting nominations.

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- (b) Standards Board members may nominate themselves or other Standards Board members by responding to the solicitation.
- (c) Nominations shall be submitted to the Standards Board's Designated Federal Officer (DFO) in writing and may be submitted electronically no later than the date indicated on the solicitation.
- (d) Upon receipt of nominations, the Nominating Committee shall prepare a ballot to be distributed to the Standards Board at least 15 days prior to the date of the Standards Board meeting immediately following the submission deadline.

c. Elections.

- i. Elections to the Executive Board shall be by secret ballot and shall take place at a meeting of the Standards Board.
- ii. The ballot shall be designed to enable Standards Board members to select candidates based on the following: (1) With which party the candidate affiliates, (2) whether the candidate is a state or local election official, (3) which state or territory the candidate represents, (4) whether the candidate was elected or appointed, and (5) in the case of state election officials, whether the candidate is a Secretary of State, a member of a Citizen Board, or a State Election Director. The ballot shall also include concise biographical information for each candidate.
- iii. For nominations following the first election (2005), not including any special elections to fill unexpired terms, two (2) of the three positions shall be local election officials. For nominations following the second election (2007), two of the three positions shall be for state election officials. The number of state and local nominations shall continue to alternate in subsequent elections.
- iv. Within thirty (30) days of an Executive Board election, the Executive Board members shall convene to elect a Chair, Vice-Chair, Secretary, and Parliamentarian.

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d. Executive Board Members Terms of Service and Vacancies.

- i. Generally.
  - (a) The Chair of the Executive Board shall notify the EAC and Nominations Committee Chair within five (5) business days of any vacancy on the Executive Board.
  - (b) The Chair, Vice-Chair, and Secretary, shall not serve for a term of more than one (1) year. An Executive Board member shall not serve for two (2) consecutive terms for the same office, except in the case of a member serving the unexpired term of an office, in which case the member may be elected to the same office for the succeeding terms.
  - (c) An Executive Board member may be removed from the Executive Board for cause by a vote of two-thirds (2/3) of Standards Board members at a Standards Board meeting.
  - (d) In the event of a vacancy in the Executive Board, the remaining members of the Executive Board may appoint an interim member to the Executive Board until the next Standards Board meeting.

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- (e)
- ii. Initial Term.
  - (a) Pursuant to Section 213(c)(3) of HAVA, of the members first selected to serve on the Executive Board of the Standards Board:
    - (i) Three (3) shall serve for one (1) term.
    - (ii) Three (3) shall serve for two (2) consecutive terms.
    - (iii) Three (3) shall serve for three (3) consecutive terms.

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- iii. Subsequent Terms.
  - (a) Pursuant to Section 213(c)(2) of HAVA, members of the Executive Board shall serve for a term of two (2) years and may not serve for more than three (3) consecutive terms.
  - (b) Members of the Standards Board who have previously served on the Executive Board shall be eligible to be nominated to the Executive Board no sooner than two (2) years from the last term in which they served on the Executive Board.

e. Meetings.

- i. Any two members of the Executive Board may call an Executive Board meeting by filing the original call of the meeting with the DFO, including the stated reason for calling the meeting.
- ii. A majority of Executive Board Members shall be present for a quorum.
- iii. The Executive Board shall agree to actions by a majority vote of the Executive Board.
- iv. Proxy voting will not be allowed in Executive Board votes.
- v. Any member of the Standards Board may attend and at the discretion of the Chair, may participate in any and all discussions at an Executive Board meeting, but may not vote.
- vi. If the Executive Board decides to hold an open meeting, it shall do so in accordance with the requirements FACA.

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**Article VI. Executive Board Duties**

- 1. Chair. The Chair shall:
  - a. Preside over all meetings of the Executive Board and Standards Board.
  - b. Appoint the chair of standing committees and any ad hoc committees of the Standards Board.
  - c. Establish the agenda for meetings of the Executive Board and Standards Board in consultation with the DFO.
  - d. Call meetings of the Executive Board and Standards Board in consultation with the DFO.
  - e. Act as the official liaison between the Standards Board and the EAC for all resolutions, recommendations, and information requests.
  - f. Serve as an *ex officio* member of all committees.
  - g. Appoint a Parliamentarian to preside over all Standards Board meetings.
    - i. The Parliamentarian shall provide advice and assistance to the Chair so that the Chair can run all meetings in accordance with Roberts Rules of Order.
- 2. Vice-Chair. The Vice-Chair shall:

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- a. Preside over meetings of the Executive Board and Standards Board in the Chair's absence.
  - b. Perform other duties as may be appropriate in the Chair's absence.
  - c. Assist the Chair from time to time as the Chair may designate.
  - d. In the event of a vacancy before the completion of the Chair's term, serve as the Chair.
3. Secretary. The Secretary shall:
- a. Oversee preparation and transmission of the minutes at Executive Board and Standards Board meetings, with assistance from the DFO.
  - b. Assist the Chair at meetings and from time to time as the Chair may designate.
4. Executive Board, Generally. The Executive Board shall:
- a. Perform all duties required under HAVA and other applicable Federal law.
  - b. Appoint the membership of appropriate standing committees and ad hoc committees by soliciting interest from the Standards Board membership.
  - c. Meet as necessary to address issues of concern in between Standards Board meetings.
  - d. Approve the minutes of the Executive Board meetings.
  - e. Convene Standards Board meetings, including, but not limited to, meetings by conference call and virtual meetings. Such meetings must allow each Standards Board member to include their comments and view or hear others' comments.
  - f. Consult with the DFO to ensure compliance with federal statutes and other applicable regulations.
  - g. Attend Executive Board meetings, including, but not limited to, meetings by conference call and virtual meetings, in accordance with these bylaws. In the event that an Executive Board member fails to attend or participate in at least one (1) Executive Board meeting within the the preceding twelve (12) month period, such Executive Board member shall forfeit his or her position on the Executive Board, thereby creating a vacancy. Such vacancy shall be filled in accordance with these bylaws.
  - h. As soon as possible, provide Standards Board Members all guidelines proposed to be adopted pursuant to Section 222(b)(3) of HAVA. Executive Board recommendations to the Standards Board pursuant to Section 222(b)(3) of HAVA shall include an appendix of all dissenting comments from Executive Board members.
  - i. Perform all other duties as from time to time the Standards Board may delegate to the Executive Board.
  - j. Upon notice of an Executive Board meeting, the Executive Board shall notify the Standards Board.
5. Designated Federal Officer (DFO). The DFO shall:
- a. Serve as the government's agent for all Standards Board activities.
  - b. Approve or call Standards Board meetings.
  - c. Approve agendas proposed by the Executive Committee.
  - d. Attend all Standards Board and Executive Board meetings.
  - e. Adjourn Standards Board and Executive Board meetings when such adjournment is in the public interest.
  - f. Provide adequate staff support to the Standards Board, to assist with:
    - i. Notice. The DFO shall:
      - (a) Notify members of the time and place for each meeting.
      - (b) Upon notice of an open Executive Board meeting, notify the Standards Board and public of time and place for the meeting.

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- (c) Notify appointing authorities of any and all vacancies on the Standards Board.
- ii. Recordkeeping and Administration. The DFO shall:
  - (a) Maintain records for all meetings, including subgroup or working group activities, as required by law.
  - (b) Maintain the roll.
  - (c) Assure that minutes of all Standards Board and Executive Board meetings, including subgroup and working group activities are prepared and distributed.
  - (d) House at the EAC and maintain official Standards Board records, including subgroup and working group activities.
  - (e) Filing all papers and submissions prepared for or by the Standards Board, including those items generated by subgroups and working groups.
  - (f) Respond to official correspondence.
  - (g) Prepare and handle all reports, including the annual report as required by FACA.
  - (h) Acting as the Standard Board's agent to collect, validate, and pay vouchers for pre-approved expenditures.

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**Article VII. Meetings**

1. Pursuant to Sections 215(a)-(c) of HAVA, the Standards Board shall hold a meeting of its members:
  - a. At such times as it considers appropriate for the purposes of conducting such business as it considers appropriate under HAVA.
  - b. In any event, not less frequently than once every two (2) years for purposes of selecting the Executive Board.
  - c. For the purposes of voting on voluntary voting system guidelines referred to it under Section 222 of HAVA, not less frequently than once every year.
2. Meetings shall be called by the DFO in consultation with the Executive Board.
3. The DFO shall approve the agenda for all meetings. The EAC shall distribute the agenda to Standards Board members prior to each meeting and shall publish notice of the meeting in the Federal Register as required by FACA.
4. Standards Board members and members of the public may submit agenda items to the DFO or Executive Board Chair.
5. Meetings.
  - a. Open Meetings.
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
  - b. Closed Meetings.
  - c. Unless otherwise determined in advance, all Standards Board meetings will be open to the public.
  - d. Once an open meeting has begun, it will not be closed unless prior approval of the closure has been obtained and proper notice of the closed session has been given to the public.

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 Standards Board shall be conducted in  
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- e. Notices of closed meetings will be published in the Federal Register at least 15 calendar days in advance.
- f. If, during the course of an open meeting, matters inappropriate for public disclosure arise during discussions, the Chair will order such discussion to cease and will schedule it for closed session.
- g. All materials brought before, or presented to, the Board during the conduct of an open meeting, including, but not limited to, the minutes of the proceedings of the previous open meeting, will be available to the public for review or copying at the time of the scheduled meeting.
- h. Members of the public may attend any meeting or portion of a meeting that is not closed to the public and may, at the determination of the Chair, offer oral comment at such meeting. The Chair may decide in advance to exclude oral public comment during a meeting, in which case the meeting announcement published in the Federal Register will note that oral comment from the public is excluded. In such a case, the Standards Board will accept written comments as an alternative. In addition, members of the public may submit written statements to the EAC at any time.
- i. Standards Board meetings will be closed only in limited circumstances and in accordance with applicable law. The Standards Board must obtain prior approval to conduct a closed session. Requests for closed meetings must be submitted to EAC's Office of General Counsel a minimum of 45 days in advance of the proposed closed session.
- j. Where the DFO, in conjunction with the Office of General Counsel, has determined in advance that discussions during a Standards Board meeting will involve matters about which public disclosure would be harmful to the interests of the government, industry, or others, an advance notice of a closed meeting, citing the applicable exemptions of the Government in the Sunshine Act (GISA), shall be published in the Federal Register. The notice may announce the closing of all or just part of a meeting.

6. Minutes.

- a. The DFO, or his or her designee, shall assure that detailed minutes of each minute are prepared and distributed to Standards Board members.
- b. Minutes of open meetings shall be available to the public upon request. Minutes of closed meetings shall be available to the public upon request, subject to the Freedom of Information Act (FOIA).
- c. Meeting minutes shall include the following: (1) Time, (2) date, (3) location, (4) record of persons present, including the names of Standards Board members, staff, and the names of members of the public making written or oral presentations, (5) a complete and accurate description of the matters discussed and conclusions reached, and (6) copies of all reports received, issued, or approved by the Standards Board.
- d. All documents, reports, or other materials prepared by or for the Standards Board constitute official government records and will housed at the EAC and maintained according to the Federal Records Act.

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Article VIII. Quorum and Proxy Voting

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1. A quorum shall be established when fifty percent (50%) plus one of Standards Board members is present for a meeting or are present by proxy.
  - a. Only other Standards Board members may declare another Standards Board member present by proxy.
  - b. Proxy designations may be submitted in writing to the Chair up to the day of the Standards Board meeting.
2. The Standards Board shall agree to actions by majority vote of those present and voting unless otherwise specified by these bylaws.
3. Proxy votes may only be cast by Standards Board members, provided proxy designations have been timely filed in advance with the Chair clearly identifying the Standards Board member to cast an absent member's proxy vote.
4. The Chair shall appoint a proxy committee to verify the eligibility of proxy votes.
5. Voting procedures for the Standards Board, the Executive Board, and the subcommittees will follow the accepted procedure, in the latest edition of Robert's Rules of Order. Votes by the Standard Board on recommendations to EAC shall have the ayes, nays, and abstentions recorded.

#### Article IX. Committees

In appointing members to committees, the Standards Board shall pay particular attention to ensuring diverse membership. Accordingly, the Executive Board shall do due diligence to ensure that committee members (1) affiliate with diverse parties, (2) are representative of both state and local election officials, (3) represent different states and territories, and (4) representative of both elected and appointed officials.

1. Meetings.
  - a. All committees may meet informally at any time for the purpose of conducting their business, including telephonically or through electronic media.
2. Standing Committees.
  - a. Nominating Committee. The Nominating Committee shall:
    - i. Be comprised of five (5) members.
    - ii. Solicit nominations for the Executive Board from Standards Board members.
    - iii. Prepare and distribute to Standards Board members ballots that include all the information listed in Article V, section 1, subsection c, paragraph ii of these Bylaws.
  - b. Bylaws Committee. The Bylaws Committee shall:
    - i. Be comprised of seven (7) members.
    - ii. Be Chaired by the Parliamentarian.
    - iii. Submit all recommended amendments to the Executive Board for a two (2) day comment period before submitting recommendations to the Standards Board for resolution and adoption.
3. Ad-Hoc Committees.
  - a. The Standards Board may, at any time, by majority vote, establish an ad-hoc committee.

- b. The Standards Board member wishing to establish an ad-hoc committee must present to the Standards Board the reason(s) he/she is requesting the committee.
- c. Once an ad-hoc committee has been established, the Executive Board shall appoint members to the ad-hoc committee.
- d. No ad-hoc committee shall be comprised of more than ten (10) Standards Board Members.

#### **Article X. Amendments**

1. The bylaws may be amended based on a two-thirds (2/3) vote of the members present and voting at any Standards Board meeting.
2. The Standards Board's Bylaws Committee shall promulgate a form for proposing an amendment to the Standards Board's Bylaws. The form shall require the specific language of the proposed amendment to be included, identify the author of the amendment, and be designed to elicit the rationale and impact statement.
3. All proposed bylaw changes must be submitted in writing to the DFO, who shall thereafter forward the proposed changes to the Standards Board Bylaws Committee and the EAC's General Counsel.
  - a. The General Counsel shall report in an expeditious manner to the Bylaws Committee and the Executive Board whether or not a proposed change to the Bylaws is consistent with federal law and/or rules.
  - b. The Standards Board's Executive Committee shall place the report on the proposed change to the Standards Board's Bylaws on the agenda for the next meeting of the Standards Board.
4. The Executive Board shall forward all proposed changes to Standards Board members at least thirty-five (35) days prior to the next meeting of the Standards Board via email and U.S. Mail to the applicable address of record on file with the EAC. The Executive Board shall request that EAC post the proposed change to the bylaws and all supporting material on EAC's website at least thirty-five (35) days prior to the next meeting of the Standards Board.

#### **Article XI. Expenses and Reimbursement.**

1. Expenses related to Standards Board operations will be borne by the EAC.
2. Expenditures of any kind must be approved in advance by the DFO.
3. Standards Board members shall not receive any compensation for their services, but shall be paid travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of federal agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in performance of their services for the Standards Board.

#### **Section XII. Effective Date**

1. These By-Laws are effective upon adoption by the Standards Board.

#### **Section XII: Transition Procedures and Ratification**

1. The adoption of the bylaws has no effect on the selection, terms or appointment of the officers or members of the Standards Board, the Executive Board, or a committee of the Board serving on the effective date of these bylaws.
2. All acts of the Standards Board, the Executive Board, or a committee of the Board are hereby ratified, except to the extent that an act does not conform with a resolution adopted by the Standards Board before the effective date of these bylaws.

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**Bylaws  
of  
The Standards Board  
of  
The U.S. Election Assistance  
Commission**



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## BYLAWS

### UNITED STATES ELECTION ASSISTANCE COMMISSION STANDARDS BOARD

The U.S. Election Assistance Commission Standards Board, hereinafter referred to as Standards Board, embodies the vision of Congress to forge a partnership among federal, state and local election officials whose goal is to promote public confidence in the conduct of federal elections in the United States.

#### Article I. Authority

1. Pursuant to the Federal Advisory Committee Act and the Help America Vote Act of 2002 (HAVA) [Public Law 107-252], as such statutes may be amended from time to time, the Standards Board has been granted its authority through its charter with the United States Election Assistance Commission (EAC) (as first filed with Congress on June 14, 2004, and renewed every two (2) years). The Standards Board, Executive Board and the committees of the Standards Board will comply fully with the provisions of the Federal Advisory Committee Act (FACA) and all other applicable Federal laws

#### Article II. Objectives

The Standards Board will:

1. Advise EAC through review of the voluntary voting system guidelines described in Title II Part 3 of HAVA; through review of the voluntary guidance described under Title III of HAVA; and through the review of the best practices recommendations described in Section 241 of Title II of HAVA, as required by HAVA or as may be developed by EAC.
2. Provide guidance and advice to EAC on a variety of topics related to the administration of elections for Federal office
3. Make recommendations to EAC. Neither the Executive Board nor any subcommittees of the Standards Board may make recommendations to EAC without the consideration and approval of the Standards Board.
4. Function solely as an advisory body.

#### Article III. Standards Board Membership

1. Pursuant to Section 213(a) of HAVA, the Standards Board shall consist of 110 members, as follows:
  - a. Fifty-five (55) shall be state election officials selected by the chief State election official of each State.
  - b. Fifty-five (55) shall be local election officials selected as follows:
    - i. Each state's local election officials, including the local election officials of Puerto Rico and the United States Virgin Islands, shall select a representative local election official from the state in a process supervised by the chief election official of the state.
    - ii. In the case of the District of Columbia, Guam, and American Samoa, the chief election official shall establish a procedure for selecting an

individual to serve as a local election official. The individual selected under such a procedure may not be a member of the same political party as the chief election official.

- c. The two (2) Standards Board members who represent the same state may not be members of the same political party.

#### **Article IV. Standards Board Member Vacancies**

1. The chief election official of each state shall notify EAC and the Executive Board of the Standards Board within five (5) business days of any vacancy or membership changes to the Standards Board.
2. Vacancy appointments to the Standards Board shall be made in accordance with Section 213(a) of HAVA, as follows:
  - a. Fifty-five (55) shall be state election officials selected by the chief State election official of each State.
  - b. Fifty-five (55) shall be local election officials selected as follows:
    - i. Each state's local election officials, including the local election officials of Puerto Rico and the United States Virgin Islands, shall select a representative local election official from the state in a process supervised by the chief election official of the state.
    - ii. In the case of the District of Columbia, Guam, and American Samoa, the chief election official shall establish a procedure for selecting an individual to serve as a local election official. The individual selected under such a procedure may not be a member of the same political party as the chief election official.
  - c. The two (2) Standards Board members who represent the same state may not be members of the same political party.
3. In December of each year, EAC shall notify the appointing authority of each state or territory as to who represents their state or territory on the Standards Board.

#### **Article V. Executive Board of the Standards Board**

1. Pursuant to Section 213(c) of HAVA, the Standards Board shall select nine (9) of its members to serve as the Executive Board of the Standards Board as follows:
  - a. Membership.
    - i. Not more than five (5) members of the Executive Board may be state election officials.
    - ii. Not more than five (5) members of the Executive Board may be local election officials.
    - iii. Not more than five (5) members of the Executive Board may be of the same political party.
  - b. Nominations.
    - i. Expired Terms.
      - (a) The Nominating Committee shall solicit nominations for the Executive Board from Standards Board members. The Nominating Committee shall send to Standards Board members a solicitation no

later than December 1<sup>st</sup> immediately prior to the expiration of any Executive Board member's term. The solicitations shall designate the address and form for submitting nominations.

- (b) Standards Board members may nominate themselves or other Standards Board members by responding to the solicitation.
- (c) Nominations shall be submitted to the Standards Board's Designated Federal Officer (DFO) in writing and may be submitted electronically no later than January 15<sup>th</sup> immediately prior to the expiration of any Executive Board member's term. In the event that January 15<sup>th</sup> is a federal holiday, nominations are due no later than January 16<sup>th</sup>.
- (d) Upon receipt of nominations, the Nominating Committee shall prepare ballot information to be distributed to the Standards Board at least fifteen (15) days prior to the date of the Standards Board meeting immediately following the submission deadline.
- (e) Nominations for membership on the Executive Board shall not be accepted from the floor of a Standards Board meeting.

ii. Vacancies Before the End of a Term.

- (a) In the event of a vacancy on the Executive Board prior to the expiration of a member's term on the Executive Board, the Nominating Committee shall send to Standards Board members a solicitation no later than sixty (60) days before the next meeting of the Standards Board. The solicitations shall designate the address and form for submitting nominations.
- (b) Standards Board members may nominate themselves or other Standards Board members by responding to the solicitation.
- (c) Nominations shall be submitted to the Standards Board's Designated Federal Officer (DFO) in writing and may be submitted electronically no later than the date indicated on the solicitation.
- (d) Upon receipt of nominations, the Nominating Committee shall prepare ballot information to be distributed to the Standards Board at least fifteen (15) days prior to the date of the Standards Board meeting immediately following the submission deadline.
- (e) Nominations for membership on the Executive Board shall not be accepted from the floor of a Standards Board meeting.

c. Elections.

- i. Elections to the Executive Board shall be by secret ballot and shall take place at a meeting of the Standards Board.
- ii. The ballot shall be designed to enable Standards Board members to select candidates based on the following: (1) The Candidate's political party affiliation, (2) whether the candidate is a state or local election official, (3) which state or territory the candidate represents, (4) whether the candidate was elected or appointed, and (5) in the case of state election officials, what position the candidate holds. Concise biographical information for each candidate shall be provided to each Standards Board member in advance of the election.

- iii. For elections following the first election (2005), not including any special elections to fill unexpired terms, two (2) of the three (3) positions shall be for local election officials. For elections following the second election (2007), two (2) of the (3) three positions shall be for state election officials. The number of positions for state and local election officials on the Executive Board shall continue to alternate in subsequent elections.
- iv. Within thirty (30) days of an Executive Board election, the Executive Board members shall convene to elect a Chair, Vice-Chair, and Secretary.
- v. In the event that the Standards Board is unable to meet for elections before the end of an Executive Board member's term, the sitting members of the Executive Board shall remain in their elected capacity until such time as the Standards Board is able to meet again and a new member is elected.
- vi. Votes for Executive Board elections may be made by absentee ballot --- **Formatted: Bullets and Numbering**

provided the following:

- (a) The Nominating committee shall create a form for absentee voting. --- **Formatted: Indent: First line: 0", Numbered + Level: 2 + Numbering Style: a, b, c, ... + Start at: 1 + Alignment: Left + Aligned at: 0.75" + Tab after: 1.25" + Indent at: 1.25"**
- (b) Absentee ballots shall be sent to the DFO at the address indicated on the absentee ballot no later than eight (8) days prior to the date of the Standards Board meeting immediately following the nominations submission deadline.
- (c) The DFO shall review all absentee ballots received by the deadline to ensure that they include all information requested on the form. Where information is missing, the DFO shall contact Standards Board members to complete the form.
- (d) The DFO shall give all absentee ballots received by the deadline indicated in these bylaws to the appointed election committee head at the Standards Board meeting immediately following the nominations submission deadline.
- (e) The appointed election committee head shall record each absentee ballot and include absentee ballots in election results.

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d. Executive Board Members Terms of Service and Vacancies.

i. Generally.

- (a) The Chair of the Executive Board shall notify EAC and the Nominating Committee Chair within five (5) business days of any vacancy on the Executive Board.
- (b) The Chair, Vice-Chair, and Secretary, shall serve for a term of not more than one (1) year. An Executive Board member shall not serve for two (2) consecutive terms for the same office, except in the case of a member serving the unexpired term of an office, in which case the member may be elected to the same office for the succeeding term.
- (c) An Executive Board member may be removed from the Executive Board, for cause, by a vote of two-thirds (2/3) of Standards Board members at a Standards Board meeting.
- (d) In the event of a vacancy on the Executive Board, the remaining members of the Executive Board may appoint an interim member of the Executive Board until the next Standards Board meeting.

- ii. Initial Term.
  - (a) Pursuant to Section 213(c)(3) of HAVA, of the members first selected to serve on the Executive Board of the Standards Board:
    - (i) Three (3) shall serve for one (1) term.
    - (ii) Three (3) shall serve for two (2) consecutive terms.
    - (iii) Three (3) shall serve for three (3) consecutive terms.
- iii. Subsequent Terms.
  - (a) Pursuant to Section 213(c)(2) of HAVA, members of the Executive Board shall serve for a term of two (2) years and may not serve for more than three (3) consecutive terms.
  - (b) Members of the Standards Board who have previously served on the Executive Board shall be eligible to be nominated to the Executive Board no sooner than two (2) years from the last term in which they served on the Executive Board.
- e. Meetings.
  - i. Any two (2) members of the Executive Board may call an Executive Board meeting by filing the original call of the meeting with and obtaining approval from the DFO, including the stated reason for calling the meeting, and the date and time of the meeting. Such meetings include, but are not limited to meetings by conference call and virtual (electronic media) meetings. These meetings must allow each Executive Board member to include their comments and hear or view others' comments.
  - ii. A majority of Executive Board Members shall be present for a quorum.
  - iii. The Executive Board shall agree to actions by a majority roll call vote of seated members of the Executive Board.
  - iv. Proxy voting shall not be allowed in Executive Board votes.
  - v. Any member of the Standards Board may attend and at the discretion of the Chair, may participate in any and all discussions at an Executive Board meeting, but may not vote.

#### **Article VI. Executive Board Duties**

- 1. Chair. The Chair shall:
  - a. Preside over all meetings of the Executive Board and Standards Board.
  - b. Appoint the chair of standing committees and any ad hoc committees of the Standards Board.
  - c. Establish the agenda for meetings of the Executive Board and Standards Board in consultation with the DFO.
  - d. Call meetings of the Executive Board and Standards Board in consultation with the DFO.
  - e. Act as the official liaison between the Standards Board and EAC for all resolutions, recommendations, and information requests.
  - f. Serve as an *ex officio* member of all committees.
  - g. Appoint a Parliamentarian to preside over all Standards Board meetings in order to advise and assist the Chair in running all meetings in accordance with Roberts Rules of

Order.

2. Vice-Chair. The Vice-Chair shall:
  - a. Preside over meetings of the Executive Board and Standards Board in the Chair's absence.
  - b. Perform other duties as may be appropriate in the Chair's absence.
  - c. Assist the Chair, from time to time, as the Chair may designate.
  - d. In the event of a vacancy before the completion of the Chair's term, serve as the Chair.
3. Secretary. The Secretary shall:
  - a. Review Board minutes before distribution to Standards Board members.
  - b. Ensure, with assistance from the DFO, that meeting minutes are properly on file at EAC.
  - c. Assist the Chair at meetings and, from time to time, as the Chair may designate.
4. Executive Board, Generally. The Executive Board shall:
  - a. Perform all duties required under HAVA and other applicable Federal laws.
  - b. Appoint the membership of appropriate standing committees and ad hoc committees by soliciting interest from the Standards Board membership.
  - c. Meet as necessary to address issues of concern in between Standards Board meetings.
  - d. Convene Standards Board meetings, including, but not limited to, meetings by conference call and virtual (electronic media) meetings. Such meetings must allow each Standards Board member to include their comments and view or hear others' comments. Such meetings shall be held in accordance with all applicable federal laws.
  - e. Consult with the DFO to ensure compliance with federal statutes and other applicable regulations.
  - f. Attend Executive Board meetings, including, but not limited to, meetings by conference call and virtual meetings, in accordance with these bylaws.
  - g. As soon as possible and in consultation with the DFO, provide Standards Board Members all proposed guidelines to be adopted pursuant to Section 222(b)(3) of HAVA. Executive Board recommendations to the Standards Board pursuant to Section 222(b)(3) of HAVA shall include an appendix of all dissenting comments from Executive Board members.
  - h. Perform all other duties as from time to time the Standards Board may delegate to the Executive Board.
  - i. Immediately upon notice of an Executive Board meeting, the Executive Board shall notify the Standards Board of the Executive Board meeting.
5. Designated Federal Officer (DFO). The DFO shall:
  - a. Serve as the government's agent for all Standards Board activities.
  - b. Approve or call Standards Board meetings.
  - c. Approve agendas proposed by the Executive Committee.
  - d. Attend all Standards Board and Executive Board meetings.
  - e. Adjourn Standards Board and Executive Board meetings when such adjournment is in the public interest.
  - f. Provide adequate staff support to the Standards Board, to assist with:
    - i. Notice. The DFO shall:
      - (a) Notify members of the time and place for each meeting of the Standards Board and the Executive Board.
      - (b) Notify the public of time and place for the meeting of the Standards

- (c) Notify appointing authorities of any and all vacancies on the Standards Board.
- (d) Perform other duties as required in these Bylaws.
- ii. Recordkeeping and Administration. The DFO shall:
  - (a) Maintain records for all meetings, including subgroup or working group activities, as required by law.
  - (b) Maintain the roll.
  - (c) Assure that minutes of all Standards Board meetings are prepared and distributed.
  - (d) Maintain and house at EAC all official Standards Board records, including subgroup and working group activities.
  - (e) File all papers and submissions prepared for or by the Standards Board, including those items generated by subgroups and working groups.
  - (f) Respond to official correspondence.
  - (g) Prepare and handle all reports, including the annual report as required by FACA.
  - (h) Act as the Standard Board's agent to collect, validate, and pay all vouchers for pre-approved expenditures.

## Article VII. Meetings

1. Consistent with the requirements of HAVA 215(a)(2), the Standards Board shall meet on an annual basis or otherwise as requested by EAC to address its responsibilities under HAVA and attend to other issues presented by EAC. Such meetings include, but are not limited to, meetings by conference call and virtual (electronic media) meetings. These meetings must allow each Standards Board member to include their comments and view or hear others' comments. Such meetings shall be held in accordance with all applicable Federal laws.
2. Meetings shall be called by the DFO in consultation with the Executive Board.
3. The DFO shall approve the agenda for all meetings. EAC shall distribute the agenda to Standards Board members prior to each meeting and shall publish notice of the meeting in the Federal Register as required by FACA.
4. Standards Board members and members of the public may submit agenda items to the DFO or Executive Board Chair.
5. Meetings.
  - a. Open Meetings.
    - i. Unless otherwise determined in advance, all Standards Board meetings shall be open to the public.
    - ii. Members of the public may attend any meeting or portion of a meeting that is not closed to the public and may, at the determination of the Chair, offer oral comment at such meeting. The Chair may decide in advance to exclude oral public comment during a meeting, in which case the meeting announcement published in the Federal Register will note that oral comment from the public is excluded. In such a case, the

Standards Board will accept written comments as an alternative. In addition, members of the public may submit written statements to EAC at any time.

- iii. All materials brought before, or presented to, the Board during the conduct of an open meeting, including, but not limited to, the minutes of the proceedings of the previous open meeting, will be available to the public for review or copying at the time of the scheduled meeting.
  - iv. Minutes of open meetings shall be available to the public upon request.
  - v. Once an open meeting has begun, it will not be closed to the public unless prior approval of the closure has been obtained and proper notice of the closed meeting has been given to the public.
  - vi. If, during the course of an open meeting, matters inappropriate for public disclosure arise during discussions, the Chair will order such discussion to cease and will schedule it for a closed meeting.
- b. Closed Sessions.
- i. Notices regarding portions of meetings to be closed (to be referred to as sessions hereinafter) will be published in the Federal Register at least fifteen (15) calendar days in advance.
  - ii. Standards Board sessions will be closed to the public only in limited circumstances and in accordance with applicable law. The Standards Board must obtain prior approval to conduct a closed session. Requests for closed sessions must be submitted by the DFO to EAC's Office of General Counsel a minimum of forty-five (45) days in advance of the proposed closed session.
  - iii. Where the DFO, in conjunction with the Office of General Counsel, has determined in advance that discussions during a Standards Board meeting will involve matters about which public disclosure would be harmful to the interests of the government, industry, or others, an advance notice of a closed session, citing the applicable exemptions of the Government in the Sunshine Act (GISA), shall be published in the Federal Register. The notice may announce the closing of all or just part of a meeting.
  - iv. Minutes of closed sessions are not available to the public, and as a result, not subject to the Freedom of Information Act (FOIA).
6. Minutes.
- a. The DFO, or his or her designee, shall assure that detailed minutes of each meeting are prepared and distributed to Standards Board members.
  - b. Meeting minutes shall include the following: (1) Time, (2) date, (3) location, (4) record of persons present, including the names of Standards Board members, EAC Commissioners and staff, and the names of members of the public making written or oral presentations, (5) a complete and accurate description of the matters discussed and conclusions reached, and (6) copies of all reports received, issued, or approved by the Standards Board.
  - c. Meeting minutes are considered part of the official government record.
  - d. All documents, reports, or other materials prepared by or for the Standards Board constitute official government records and shall be housed at EAC and

maintained according to the Federal Records Act.

### Article VIII. Quorum and Proxy Voting

1. Quorum.
  - a. A quorum shall be established when 56 Standards Board members are present for a meeting as determined by a roll call or quorum call of the Standards Board members.
2. Proxy Votes.
  - a. Proxy designations may be submitted in writing to the Chair up to the day of the Standards Board meeting by the designated meeting start time established via the meeting agenda.
  - b. Proxy votes may only be cast by Standards Board members, provided proxy designations have been timely filed in advance with the Chair clearly identifying the Standards Board member selected to cast an absent member's proxy vote.
  - c. The Chair shall appoint a proxy committee to verify the eligibility of a member(s) designating a proxy vote and of the member(s) designated to cast a proxy vote(s) on behalf of absent Standards Board members.
  - d. Proxy voting shall only be allowed for general business matters.
  - e. Proxy voting shall not be allowed for Executive Board elections.
3. Voting Generally.
  - a. The Standards Board shall agree to actions by majority vote of those present and voting unless otherwise specified by these bylaws.
  - b. Votes by the Standard Board on recommendations to EAC shall have the ayes, nays, and abstentions recorded.
  - c. Votes taken during meetings conducted by conference call and through virtual (electronic media) means shall have a quorum established prior to voting.

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### Article IX. Committees

In appointing members to committees, the Standards Board shall pay particular attention to ensuring diverse membership. Accordingly, the Executive Board shall do due diligence to ensure that committee members (1) affiliate with diverse parties, (2) are representative of both state and local election officials, (3) represent different states and territories, and (4) are representative of both elected and appointed officials.

1. Meetings.
  - a. All committees may meet informally at any time for the purpose of conducting their business, including telephonically or through electronic media.
2. Standing Committees.
  - a. Nominating Committee. The Nominating Committee shall:
    - i. Be comprised of five (5) members.
    - ii. Solicit nominations for the Executive Board from Standards Board members.
    - iii. Prepare and distribute to Standards Board members ballots that include all the information listed in Article V, section 1, subsection c, paragraph

- ii of these Bylaws.
- b. Bylaws Committee. The Bylaws Committee shall:
  - i. Be comprised of seven (7) members.
  - ii. Submit a report with all recommended bylaws amendments to the Executive Board for a seven (7) day comment period before submitting recommendations to the Standards Board for resolution and adoption.
- 3. Ad-Hoc Committees.
  - a. A Standards Board member wishing to establish an ad-hoc committee must present to the Standards Board the reason(s) he/she is requesting the committee.
  - b. The Standards Board may, at any time, by majority vote, establish an ad-hoc committee.
  - c. Once an ad-hoc committee has been established, the Executive Board shall appoint members to the ad-hoc committee.
- 4. Special Committees.
  - a. The Chair of the Standards Board Executive Board shall appoint Standards Board members to a special election certification committee following each Executive Board election. The special election certification committee shall count and certify all Executive Board election results.
  - b. As necessary, the Chair of the Standards Board Executive Board shall appoint Standards Board members to special committees for limited purposes.

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#### **Article X. Amendments**

- 1. The Standards Board's Bylaws Committee shall promulgate a form for proposing an amendment to the Standards Board's Bylaws.
  - a. The form shall require the specific language of the proposed amendment to be included, identify the author of the amendment, and be designed to elicit the rationale and impact of the proposed amendment.
- 2. All proposed bylaw changes must be submitted in writing to the DFO:
  - a. No later than December 1st; or
  - b. Within the seventy (70) day timeframe established by the Executive Board at the time of the call of the Standards Board Meeting; with immediate notification to all Standards Board members to be issued by the DFO.
- 3. After receiving proposed bylaw changes, the DFO shall forward the proposed changes to the Standards Board Bylaws Committee and EAC's General Counsel.
  - a. The General Counsel shall report in an expeditious manner to the Bylaws Committee and the Executive Board whether or not a proposed change to the Bylaws is consistent with federal law and/or rules.
  - b. The Bylaws Committee shall transmit a report containing the proposed bylaw changes to the Executive Board.
  - c. The Standards Board's Executive Board shall place the report on the proposed change to the Standards Board's Bylaws on the agenda for the next meeting of the Standards Board.
- 4. The Executive Board shall forward all proposed changes to Standards Board members at least thirty (30) days prior to the next meeting of the Standards

Board via email and U.S. Mail to the applicable address of record on file with EAC. The Executive Board shall request that EAC post the proposed change to the bylaws and all supporting material on EAC's website at least thirty (30) days prior to the next meeting of the Standards Board.

5. The bylaws may be amended by a two-thirds (2/3) vote of the members present and voting at any Standards Board meeting.

#### **Article XI. Expenses and Reimbursement**

1. Expenses related to Standards Board operations will be borne by EAC.
2. Expenditures of any kind must be approved in advance by the DFO.
3. Standards Board members shall not receive any compensation for their services, but shall be paid travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of federal agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in performance of their services for the Standards Board.

#### **Article XII. Parliamentary Authority**

1. The rules contained in the current edition of *Robert's Rules of Order Newly Revised* shall govern the Standards Board in all cases to which they are applicable and in which they are not inconsistent with these bylaws and any special rules of order the Standards Board may adopt.
2. Voting procedures for the Standards Board, the Executive Board, and the subcommittees shall follow the accepted procedure according to Robert's Rules of Order.

**Article XIII. Effective Date**

1. These By-Laws are effective upon adoption by the Standards Board.

**Article XIV. Transition Procedures and Ratification**

1. The adoption of the bylaws has no effect on the selection, terms or appointment of the officers or members of the Standards Board, the Executive Board, or a committee of the Board serving on the effective date of these bylaws.
2. All acts of the Standards Board, the Executive Board, or a committee of the Board are hereby ratified, except to the extent that an act does not conform with a resolution adopted by the Standards Board before the effective date of these bylaws.

*Sonni G. Bartholomew*

Chair

March 2, 2007  
Date

*Jason M. Bellman*

DFO

March 2, 2007  
Date

These bylaws were adopted February 23, 2007, and supersede all previous versions.

**Deliberative Process  
Privilege**

WHEREAS, the United States Election Assistance Commission's (EAC) Standards Board provides valuable guidance to the EAC; and

WHEREAS, the Standards Board is required by statute to meet a minimum of once every two years; and

WHEREAS, the Standards Board finds it useful and important to meet at least once in each calendar year.

RESOLVED that the Standards Board recommends:

- Meeting face-to-face a minimum of one time in each calendar year to discuss Standards Board business and provide guidance to the EAC.
- Scheduling an annual meeting in or around the same month in each calendar year.

A True Record Attest:

---

Secretary of the Standards  
Board Executive Board

DRAFT

**Deliberative Process  
Privilege**

Juliet E. Hodgkins/EAC/GOV

11/17/2006 01:40 PM

To "Davidson, Donetta" <ddavidson@eac.gov>, Gracia Hillman/EAC/GOV@EAC, Paul DeGregorio/EAC/GOV@EAC, Thomas R. Banks/EAC/GOV@EAC, Elieen L. Collver/EAC/GOV@EAC, Matthew Masterson/EAC/GOV@EAC, Gavin S.

bcc

Subject Draft Voting Fraud and Voter Intimidation Report

Commissioners and Tom,

I have attached a draft version of the EAC Voting Fraud and Voter Intimidation report. **Please have your comments ready no later than Tuesday, Nov. 28, COB, so that I will be prepared to discuss them at our briefing on Wednesday, Nov. 29 at 10:30.**

You will note that there are appendixes referenced in the report. These documents are quite lengthy. Thus, I did not attach them to this email. If, however, you want to read the documents, DeAnna has access to them in my absence and can either email them to you or print them for you.

I think that the report is fairly self-explanatory. However, there are two questions that we need to address and that the Commissioners need to comment on:

1. The consultants provided summaries of articles, books, and reports that they read, as well as summaries of the interviews that they conducted. Peggy created two tables summarizing the consultants' summaries of books, article and reports as well as interviews. We need to make a determination of which summaries we want to attach as appendixes. The only issue that I am aware of (and I have a question pending to Peggy about the quality of these summaries) is a significant disagreement over the summaries of interviews with Craig Donsanto and John Tanner of the Dept. of Justice. They disagree with the characterization given by the consultants to what they said in the interview. Obviously, this matter would have to be resolved if we decide to use the consultants' summaries.

2. Tom and I had a conversation with Tova and Job about the fact that we are going to issue a report. Tova was quite insistent about being able to see the report before it is released. I am NOT inclined to give her a copy of the report before it is released. Neither Tova nor Job are still on contract with the EAC. Thus, they are just like any other member of the public. I believe that if we release it to them, then we may have a significant problem withholding the document from others that may ask for it via FOIA request. I believe that the course of action should be to release it to all persons simultaneously.

Happy reading and Happy Thanksgiving!



Voter Fraud & Intimidation Report.doc

Juliet Thompson Hodgkins  
General Counsel  
United States Election Assistance Commission  
1225 New York Ave., NW, Ste 1100  
Washington, DC 20005  
(202) 566-3100

006493



Gracia Hillman/EAC/GOV

11/30/2006 08:09 AM

To Juliet E. Thompson/EAC/GOV@EAC

cc

bcc

Subject Fraud Report

Julie:

When you draft proposed language for the DOJ interview section, I am asking that you put yourself in the position of the consultants. Ask yourself how you would want EAC to present this difference of opinion between what DOJ says it meant and what the consultants heard and wrote, as if you were the consultant.

Also, I just want to be clear that while I agree that we should include DOJ's retort, I do not believe we should "re-write" what the consultants presented. Rather, we should leave it intact and present the consultants writings in a context that addresses DOJ's objections.

Thanks,  
Gracia

-----  
Sent from my BlackBerry Wireless Handheld

000494

Juliet E. Hodgkins/EAC/GOV  
12/01/2006 03:23 PM

To Paul DeGregorio/EAC/GOV@EAC, Gracia Hillman/EAC/GOV@EAC, "Davidson, Donetta" <ddavidson@eac.gov>, Thomas R. Wilkey/EAC/GOV@EAC  
cc jlayson@eac.gov

bcc

Subject Revised summaries of interviews with Donsanto and Tanner

History:  This message has been replied to.

Commissioners,

Per your request, please see attached the proposed edits to the summaries of the interviews with Craig Donsanto and John Tanner.

Please get me your comments by Monday COB so that we can finalize this document in time for the meeting next week.



Summaries of Interviews with Donsanto-Tanner redacted-revised.doc

Juliet Thompson Hodgkins  
General Counsel  
United States Election Assistance Commission  
1225 New York Ave., NW, Ste 1100  
Washington, DC 20005  
(202) 566-3100

006495

**Interview with Craig Donsanto, Director, Elections Crimes Branch, Public Integrity Section, U.S. Department of Justice**  
January 13, 2006

The Department of Justice's (DOJ) Election Crimes Branch is responsible for supervising federal criminal investigations and prosecutions of election crimes.

Questions

*How are Prosecution Decisions Made?*

Craig Donsanto must approve all investigations that go beyond a preliminary stage, all charges, search warrant applications and subpoenas and all prosecutions. The decision to investigate is very sensitive because of the public officials involved. If a charge seems political, Donsanto will reject it. Donsanto gives possible theories for investigation. Donsanto and Noel Hillman will decide whether to farm out the case to an Assistant U.S. Attorney (AUSA). Donsanto uses a concept called predication. In-other-words, there must be enough evidence to suggest a crime has been committed. The method of evaluation of this evidence depends on the type of evidence and its source. There are two types of evidence---factual (antisocial behavior) and legal (antisocial behavior leading to statutory violations). Whether an indictment will be brought depends on the likelihood of success before a jury. Much depends on the type of evidence and the source. Donsanto said he "knows it when he sees it." Donsanto will only indict if he is confident of a conviction assuming the worst case scenario – a jury trial.

A person under investigation will first receive a target letter. Often, a defendant who gets a target letter will ask for a departmental hearing. The defendant's case will be heard by Donsanto and Hillman. On occasion, the assistant attorney general will review the case. The department grants such hearings because such defendants are likely to provide information about others involved.

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The Civil Rights Division, Voting Rights Section makes its own decisions on prosecution. The head of that division is John Tanner. There is a lot of cooperation between the Voting Section and the Election Crimes Branch.

*Does the Decision to Prosecute Incorporate Particular Political Considerations within a State Such as a One Party System or a System in which the Party in Power Controls the Means of Prosecution and Suppresses Opposition Complaints?*

Yes. Before, the department would leave it to the states. Now, if there is racial animus involved in the case, there is political bias involved, or the prosecutor is not impartial, the department will take it over.

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*Does it Matter if the Complaint Comes from a Member of a Racial Minority?*

No. But if the question involves racial animus, that has also always been an aggravating

| factor, making it more likely the department will take it over

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*What Kinds of Complaints Would Routinely Override Principles of Federalism?*

Federalism is no longer big issue. DOJ is permitted to prosecute whenever there is a candidate for federal office on the ballot.

*Are There Too Few Prosecutions?*

DOJ can't prosecute everything.

*What Should Be Done to Improve the System?*

The problem is asserting federal jurisdiction in non-federal elections. It is preferable for the federal government to pursue these cases for the following reasons: federal districts draw from a bigger and more diverse jury pool; the DOJ is politically detached; local district attorneys are hamstrung by the need to be re-elected; DOJ has more resources – local prosecutors need to focus on personal and property crimes---fraud cases are too big and too complex for them; DOJ can use the grand jury process as a discovery technique and to test the strength of the case.

In *U.S. v. McNally*, the court ruled that the mail fraud statute does not apply to election fraud. It was through the mail fraud statute that the department had routinely gotten federal jurisdiction over election fraud cases. 18 USC 1346, the congressional effort to “fix” *McNally*, did not include voter fraud.

As a result, the department needs a new federal law that allows federal prosecution whenever a federal instrumentality is used, e.g. the mail, federal funding, interstate commerce. The department has drafted such legislation, which was introduced but not passed in the early 1990s. A federal law is needed that permits prosecution in any election where any federal instrumentality is used.

*Other Information*

| The Department has held four symposia for District Election Officers (DEOs) and FBI agents since the initiation of the Ballot Access and Voting Integrity Initiative. In 2003, civil rights leaders were invited to make speeches, but were not permitted to take part in the rest of the symposium. All other symposia have been closed to the public. ,

There are two types of attorneys in the division: prosecutors, who take on cases when the jurisdiction of the section requires it; the US Attorney has recused him or herself; or when the US Attorney is unable to handle the case (most frequent reason) and braintrust attorneys who analyze the facts, formulate theories, and draft legal documents.

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| Cases

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Donsanto provided us with three case lists: cases still being investigated as of January 13, 2006 – confidential; election fraud prosecutions and convictions as a result of the Ballot Access and Voting Integrity Initiative October 2002-January 13, 2006; and cases closed for lack of evidence as of January 13, 2006.

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If we want more documents related to any case, we must get those documents from the states. The department will not release them to us.

Although the number of election fraud related complaints have not gone up since 2002, nor has the proportion of legitimate to illegitimate complaints of fraud, *the number of cases that the department is investigating and the number of indictments the department is pursuing are both up dramatically.*

Since 2002, the department has brought more cases against alien voters, felon voters, and double voters than ever before. Previously, cases were only brought against conspiracies to corrupt the process rather than individual offenders acting alone. For deterrence purposes, the Attorney General decided to add the pursuit of individuals who vote when not eligible to vote (noncitizens, felons) or who vote more than once. The department is currently undertaking three pilot projects to determine what works in developing the cases and obtaining convictions and what works with juries in such matters to gain convictions:

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Deleted: Charges were not brought against individuals – those cases went unprosecuted. This change in direction, focus, and level of aggression was by the decision of the Attorney General. The reason for the change was for deterrence purposes.  
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1. Felon voters in Milwaukee.
2. Alien voters in the Southern District of Florida. FYI – under 18 USC 611, to prosecute for “alien voting” there is no intent requirement. Conviction can lead to deportation. Nonetheless, the department feels compelled to look at mitigating factors such as was the alien told it was OK to vote, does the alien have a spouse that is a citizen.
3. Double voters in a variety of jurisdictions.

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The department does not maintain records of the complaints that come in from DEOs, U.S attorneys and others during the election that are not pursued by the department. Donsanto asserted that U.S. attorneys never initiate frivolous investigations.

*According to the new handbook, the department can take on a case whenever there is a federal candidate on the ballot*

**Interview with John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Department of Justice**

Deleted: Director

February 24, 2006

The Department of Justice's (DOJ) Voting Section is charged with the civil enforcement of the Voting Rights Act, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the National Voter Registration Act (NVRA), and Title III of the Help America Vote Act (HAVA).

Authority and Process

The Voting Section, in contrast to the Public Integrity Section as Craig Donsanto described it, typically focuses only on systemic problems resulting from government action or inaction, not problems caused by individuals. Indeed, the section never goes after individuals because it does not have the statutory authority to do so. In situations in which individuals are causing problems at the polls and interfering with voting rights, the section calls the local election officials to resolve it.

Federal voting laws enforced by the section only apply to state action, so the section only sues state and local governments – it does not have any enforcement power over individuals. Most often, the section enters into consent agreements with governments that focus on poll worker training, takes steps to restructure how polls are run, and deals with problems on Election Day on the spot. Doing it this way has been most effective – for example, while the section used to have the most observers in the South, with systematic changes forced upon those jurisdictions, the section now does not get complaints from the South.

The section can get involved even where there is no federal candidate on the ballot if there is a racial issue under the 14<sup>th</sup> and 15<sup>th</sup> Amendments.

When the section receives a complaint, attorneys first determine whether it is a matter that involves individual offenders or a systemic problem. When deciding what to do with the complaint, the section errs on the side of referring it criminally to avoid having any civil litigation complicate a possible criminal case.

When a complaint comes in, the attorneys ask questions to see if there are even problems there that the complainant is not aware are violations of the law. For example, in the Boston case, the attorney did not just look at Spanish language cases under section 203, but also brought a Section 2 case for violations regarding Chinese and Vietnamese voters. When looking into a case, the attorneys look for specificity, witnesses and supporting evidence.

Often, lawsuits bring voluntary compliance.

Voter Intimidation

Deleted: Note: Mr. Tanner's reluctance to share data, information and his perspective on solving the problems presented an obstacle to conducting the type of interview that would help inform this project as much as we would have hoped. Mr. Tanner would not give us any information about or data from the section's election complaint in-take phone logs; data or even general information from the Interactive Case Management (ICM) system-its formal process for tracking and managing work activities in pursuing complaints and potential violations of the voting laws; and would give us only a selected few samples of attorney-observer reports, reports that every Voting Section attorney who is observing elections at poll sites on Election Day is required to submit. He would not discuss in any manner any current investigations or cases the section is involved in. He also did not believe it was his position to offer us recommendations as to how his office, elections, or the voting process might be improved.¶

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Many instances of what some people refer to as voter intimidation are more unclear now. For example, photographing voters at the polls has been called intimidating, but now everyone is at the polls with a camera. It is hard to know when something is intimidation and it is difficult to show that it was an act of intimidation.

The fact that both parties are engaging in these tactics now makes it more complicated. It makes it difficult to point the finger at any one side.

The inappropriate use of challengers on the basis of race would be a violation of the law. Mr. Tanner was unaware that such allegations were made in Ohio in 2004. He said there had never been a formal investigation into the abusive use of challengers.

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Mr. Tanner said a lot of the challenges are legitimate because you have a lot of voter registration fraud as a result of groups paying people to register voters by the form. They turn in bogus registration forms. Then the parties examine the registration forms and challenge them because 200 of them, for example, have addresses of a vacant lot.

However, Mr. Tanner said the department was able to informally intervene in challenger situations in Florida, Atkinson County, Georgia and in Alabama, as was referenced in a February 23 Op-Ed in USA Today. Mr. Tanner reiterated the section takes racial targeting very seriously.

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Refusal to provide provisional ballots would be a violation of the law that the section would investigate.

Deceptive practices are committed by individuals and would be a matter for the Public Integrity Section. Local government would have to be involved for the Voting Section to become involved.

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Unequal implementation of ID rules, or asking minority voters only for ID would be something the section would go after. Mr. Tanner was unaware of allegations of this in 2004. He said this is usually a problem where you have language minorities and the poll workers cannot understand the voters when they say their names. The section has never formally investigated or solely focused a case based on abuse of ID provisions. However, implementation of ID rules was part of the Section 2 case in San Diego. Mr. Tanner reiterated that the section is doing more than ever before.

When asked about the section's references to incidents of vote fraud in the documents related to the new state photo identification requirements, Mr. Tanner said the section only looks at retrogression, not at the wisdom of what a legislature does. In Georgia, for example, everyone statistically has identification, and more blacks have ID than whites. With respect to the letter to Senator Kit Bond regarding voter ID, the section did refer to the perception of concern about dead voters because of reporting by the Atlanta Journal-Constitution. It is understandable that when you have thousands of bogus registrations that there would be concerns about polling place fraud. Very close elections make this even more of an understandable concern. Putting control of registration lists in the hands

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of the states will be helpful because at this higher level of government you find a higher level of professionalism.

It is hard to know how much vote suppression and intimidation is taking place because it depends on one's definition of the terms – they are used very loosely by some people. However, the enforcement of federal law over the years has made an astounding difference so that the level of discrimination has plummeted. Registration of minorities has soared, as can be seen on the section's website. Mr. Tanner was unsure if the same was true with respect to turnout, but the gap is less. That information is not on the section's website.

The section is not filing as many Section 2 cases as compared to Section 203 cases because many of the jurisdictions sued under Section 2 in the past do not have issues anymore. Mr. Tanner said that race based problems are rare now.

NVRA has been effective in opening up the registration process. In terms of enforcement, Mr. Tanner said they do what they can when they have credible allegations. There is a big gap between complaints and what can be substantiated. Mr. Tanner stated that given the high quality of the attorneys now in the section, if they do not investigate it or bring action, that act complained of did not happen.

#### Recommendations

Mr. Tanner did not feel it was appropriate to make recommendations.

Note: We contend that Mr. Tanner's reluctance to share data, information and his perspective on solving the problems presented an obstacle to conducting the type of interview that would help inform this project as much as we would have hoped. We did not have access to any information about or data from the section's election complaint intake phone logs or data or even general information from the Interactive Case Management (ICM) system-its formal process for tracking and managing work activities in pursuing complaints and potential violations of the voting laws. Only a selected few samples of attorney-observer reports were provided, reports that every Voting Section attorney who is observing elections at poll sites on Election Day is required to submit. Mr. Tanner would not discuss any current investigations or cases the section is involved in.

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Juliet E. Hodgkins/EAC/GOV  
12/01/2006 04:39 PM

To Paul DeGregorio/EAC/GOV@EAC, Gracia Hillman/EAC/GOV@EAC, "Davidson, Donetta" <ddavidson@eac.gov>, Thomas R. Wilkey/EAC/GOV@EAC  
cc  
bcc

Subject Draft Fraud/Intimidation Report with Executive Summary

Commissioners,

The draft attached below contains the Executive Summary as well as the suggestions made by Commissioner Hillman. Please let me know if you have any additional changes by COB Monday, Dec. 4, so that I can incorporate these and have this document ready for consideration at Thursday's meeting.



Voter Fraud & Intimidation Report - 120106.doc

In addition, I have had another request from Tova Wang for an embargoed copy of this report. I have not heard from any of you on this matter. I assume that this means that you agree with my opinion that we cannot release this document to her since she is no longer under contract with us, as it would be tantamount to releasing this document to the public. Please let me know ASAP if this is not your understanding and belief.

Juliet Thompson Hodgkins  
General Counsel  
United States Election Assistance Commission  
1225 New York Ave., NW, Ste 1100  
Washington, DC 20005  
(202) 566-3100

006502



Gracia Hillman/EAC/GOV

12/04/2006 12:52 PM

To Juliet E. Thompson/EAC/GOV@EAC

cc pdegregorio@eac.gov, Ddavidson@eac.gov, Thomas R. Wilkey/EAC/GOV@EAC

bcc

Subject Fraud Report Executive Summary

Attached are my suggested edits to the Executive Summary. (I am still reviewing the report and may comment on other sections.)



EAC REPORT ON VOTING FRAUD AND VOTER INTIMIDATION STUDY.doc

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EAC REPORT ON VOTING FRAUD AND VOTER INTIMIDATION STUDY

**EXECUTIVE SUMMARY**

The Help America Vote Act of 2002 (HAVA) requires the U.S. Election Assistance Commission (EAC) to study a host of topics, including “voting fraud” and “voter intimidation.” In 2005, EAC embarked on an initial review of the existing knowledge of voting fraud and voter intimidation. The goal of that study was to develop a working definition of “voting fraud” and “voter intimidation” and to identify research methodology to conduct a comprehensive, nationwide study of these topics.

EAC staff along with two, bipartisan consultants reviewed the existing information available about voting fraud and voter intimidation, including reading articles, books and reports; interviewing subject matter experts; reviewing media reports of fraud and intimidation; and studying reported cases of prosecutions of these types of crimes. It is clear from this review that there is a great deal of debate on the pervasiveness of fraud in elections as well as what constitute the most common acts of fraud or intimidation. There is also no apparent consensus on the meaning of the phrases “voting fraud” and “voter intimidation.” Some think of voting fraud and voter intimidation only as criminal acts, while others include actions that may constitute civil wrongs, civil rights violations, and even legal activities.

In order to facilitate future study of these topics, EAC developed a working definition of “election crimes.” “Election crimes” are intentional acts or willful failures to act, prohibited by state or federal law, that are designed to cause ineligible persons to participate in the election process; eligible persons to be excluded from the election process; ineligible votes to be cast in an election; eligible votes not to be cast or counted; or other interference with or invalidation of election results. Election crimes generally fall into one of four categories: acts of deception, acts of coercion, acts of damage or destruction, and failures or refusals to act.

From EAC’s review of existing information on the issue, it was apparent that there have been a number of studies that touched on various topics and regions of the country concerning voting fraud and intimidation, but that there had never been a comprehensive, nationwide study of these topics. EAC will conduct further research to provide a comprehensive, nationwide look at “election crimes.” Future EAC study of this topic will focus on election-related, criminal activity and will not include acts that are exclusively civil wrongs, campaign finance violations, and violations of ethical provisions. EAC will study these concepts by surveying the states’ chief election officials about complaints they received, election crime investigation units regarding complaints received and those referred to law enforcement, and law enforcement and prosecutorial agencies regarding complaints received, charges filed, and final disposition of each complaint.

**Comment [GH1]:** Ethical provisions of what?

**Comment [GH2]:** We should learn about all complaints received by election officials, not just those received through the admin complaint process.

**Deleted:** through their administrative complaint processes

**Comment [GH3]:** Our study should also include final disposition of each case where charges were filed.

**Deleted:** and



Gracia Hillman/EAC/GOV

12/04/2006 01:49 PM

To Juliet E. Thompson/EAC/GOV@EAC

cc pdegregorio@eac.gov, Ddavidson@eac.gov, Thomas R. Wilkey/EAC/GOV@EAC

bcc

Subject Edits to the Fraud Report

I offer edits to two sections of the report, on pages 14 and 19. Please see the attached one pager. I did a copy and paste of the two sections rather than resending back to you the entire report.



What is not an Election Crime for Purposes of this Study.doc

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## What is not an Election Crime for Purposes of this Study

There are some actions or inactions that may constitute crimes or civil wrongs that we do not include in our definition of "election crimes." All criminal or civil violations related to campaign finance contribution limitations, prohibitions, and reporting either at the state or federal level are not "election crimes" for purposes of this study and any future study conducted by EAC. Similarly, criminal acts that are unrelated to elections, voting, or voter registration are not "election crimes," even when those offenses occur in a polling place, voter registration office, or a candidate's office or appearance. For example, an assault or battery that results from a fight in a polling place or at a candidate's office is not an election crime. Last, violations of ethical provisions and the Hatch Act are not "election crimes." Similarly, civil or other wrongs that do not rise to the level of criminal activity (i.e., a misdemeanor, relative felony or felony) are not "election crimes."

.....

**Comment [GH1]:** Ethical provisions of what?

## *Survey Chief Election Officers Regarding Administrative Complaints*

Likely sources of complaints concerning election crimes are the administrative complaint processes that states were required to establish to comply with Section 402 of HAVA. These complaint procedures were required to be in place prior to a state receiving any funds under HAVA. Citizens are permitted to file complaints alleging violations of HAVA Title III provisions under these procedures with the state's chief election official. Those complaints must be resolved within 60 days. The procedures also allow for alternative dispute resolution of claims. Some states have expanded this process to include complaints of other violations, such as election crimes.

In order to determine how many of these complaints allege the commission of election crimes, EAC will survey the states' chief election officers regarding complaints that have been filed, investigated, and resolved since January 1, 2004. The data collected will also include complaints that have been filed outside of the administrative complaint procedures. EAC will use the definition of election crimes provided above in this report in its survey so that data regarding a uniform set of offenses will be collected.

**Comment [GH2]:** We can be pretty certain that legitimate complaints will be filed outside of the Admin Complaint Procedure.

006506

**Deliberative Process  
Privilege**

To: Peggy Sims  
From: Tova Wang  
Re: Working Group Recommendations  
Date: November 12, 2005

\*Wendy R. Weiser, Associate Counsel in the Democracy Program at the Brennan Center for Justice at NYU School of Law and an expert in federal and constitutional law, has done a great deal of research, writing, speaking, and litigating on voting rights and election law issues. As part of the Brennan Center's wide ranging activities in the area of democracy, Ms. Weiser is currently overseeing an analysis and investigation of recent allegations of voter fraud throughout the country.

\*Barbara Arnwine is Executive Director of the Lawyers Committee for Civil Rights Under Law, an organization that for four decades has been at the forefront of the legal struggle to secure racial justice and equal access to the electoral process for all voters. Notably, Ms. Arnwine and the organization have led the Election Protection program for the last several years, a nationwide grassroots education and legal effort deploying thousands of volunteers and using a nationally recognized voter hotline to protect voters' rights on election day.

\*Daniel Tokaji, professor and associate director of the Election Law Center at the Moritz College of Law at the Ohio State University, is one of the nation's foremost experts in election law and reform and ensuring equality in the voting system. Professor Tokaji frequently writes and speaks on democracy related issues at academic and practitioner conferences, on such issues as voting technology, fraud, registration, and identification requirements, as well as the interplay between the election administration practices and voting rights laws.

Donna Brazile is Chair of the Democratic National Committee's Voting Rights Institute, the Democratic Party's major initiative to promote and protect the right to vote created in response to the irregularities of the 2000 election, and former Campaign Manager for Gore-Lieberman 2000 (the first African American to lead a major presidential campaign.) Brazile is a weekly contributor and political commentator on CNN's Inside Politics and American Morning, a columnist for Roll Call Newspaper and a contributing writer for Ms. Magazine.

Wade Henderson is the Executive Director of the Leadership Conference on Civil Rights (LCCR) and Counsel to the Leadership Conference on Civil Rights Education Fund (LCCREF), an organization at the forefront of defending voting rights for the last fifty years. Prior to his role with the Leadership Conference, Mr. Henderson was the Washington Bureau Director of the National Association for the Advancement of Colored People (NAACP)

Robert Bauer is the Chair of the Political Law Practice at the law firm of Perkins Coie, National Counsel for Voter Protection, Democratic National Committee, Counsel to the Democratic Senatorial and Congressional Campaign Committees and Co-Author, Report

006507

of Counsel to the Senate Rules and Administration Committee in the Matter of the United States Senate Seat from Louisiana in the 105<sup>th</sup> Congress of the United States, (March 27, 1997). He is the author of *United States Federal Election Law*, and one of the foremost attorneys in the country in the area of federal/state campaign finance and election laws.

Laughlin McDonald has been the executive director of the Southern Regional Office of the ACLU since 1972 and as the Director of the ACLU Voting Rights Project, McDonald has played a leading role eradicating discriminatory election practices and protecting the gains in political participation won by racial minorities since passage of the 1965 federal Voting Rights Act. During the past two decades, McDonald has broken new ground by expanding ACLU voting rights cases to include representation of Native Americans in various western states, and written innumerable publications on voting rights issues.

Joseph E. Sandler is a member of the firm of Sandler, Reiff & Young, P.C., in Washington, D.C., concentrating in campaign finance and election law matters, and general counsel to the Democratic National Committee. As an attorney he has handled campaign finance and election law matters for Democratic national and state party organizations, Members of Congress, candidates and campaigns. He served as general co-counsel of the Association of State Democratic Chairs, as general counsel for the Democratic Governors' Association and as counsel to several state Democratic parties.

Cathy Cox is serving her second term as Georgia's Secretary of State, having first been elected in 1998. In 2002 she earned re-election with over 61 percent of the vote, winning 146 out of 159 counties. Because of Secretary Cox's efforts Georgia has become a national leader in election reform. Her initiative made Georgia the first state in America to deploy a modern, uniform electronic voting system in every county

006508

**Possible Working Group Members - Serebrov**

I recommend the first four with an \*

\***Mark (Thor) Hearne II**-Counsel to Republican National Committee; National Counsel to American Center for Voting Rights; National election counsel to Bush-Cheney, '04; Testified before U.S. House Administration Committee hearings into conduct of Ohio presidential election; Academic Advisor to Commission on Federal Election Reform (Baker-Carter Commission).

\***Todd Rokita**-Secretary of State, Indiana; Secretary Rokita strives to reform Indiana's election practices to ensure Indiana's elections are as fair, accurate and accessible as possible; Secretary Rokita serves on the nine-member Executive Board of the Election Assistance Commission Standards Board, charged by federal law to address election reform issues.

\***Patrick J. Rogers**-Partner/Shareholder, Modrall, Sperling, Roehl, Harris and Sisk, P.A., Albuquerque, New Mexico; 1991-2003 General Counsel to the New Mexico Republican Party; Election cases: *The Coalition to Expose Ballot Deception, et al v. Judy N. Chavez, et al*; Second Judicial District Court of Bernalillo County, New Mexico (2005); represented plaintiffs challenging petition procedures; *Miguel Gomez v. Ken Sanchez and Judy Chaves*; Second Judicial District Court of Bernalillo County, New Mexico (2005); residency challenge; *Moises Griego, et al v. Rebecca Vigil-Giron v. Ralph Nader and Peter Miguel Camejo*, Supreme Court for the State of New Mexico (2004); represented Ralph Nader and Peter Camejo, ballot access issues; *Larry Larrañaga, et al v. Mary E. Herrera and Rebecca Vigil-Giron*, Supreme Court of New Mexico (2004); voter identification and fraudulent registration issues; *Decker, et al v. Kunko, et al*; District Court of Chaves County, New Mexico (2004); voter identification and fraudulent registration issues; *Kunko, et al v. Decker, et al*; Supreme Court of New Mexico (2004); voter identification and fraudulent registration issues; *In the Matter of the Security of Ballots Cast in Bernalillo County in the 2000 General Election*; Second Judicial District Court of Bernalillo County, New Mexico (2000); voting and counting irregularities and fraud.

\***David A. Norcross**- Partner, Blank Rome LLP, Trenton NJ, Washington D.C; Chairman, New Jersey Republican State Committee, 1977 – 1981; General Counsel, Republican National Committee, 1993 – 1997; General Counsel, International Republican Institute; Counsel, The Center for Democracy; Vice Chairman, Commission on Presidential Debates; Executive Director, New Jersey Election Law Enforcement Commission

**Benjamin L. Ginsberg**-Served as national counsel to the Bush-Cheney presidential campaign; He played a central role in the 2000 Florida recount; He also represents the campaigns and leadership PACs of numerous members of the Senate and House, as well as the Republican National Committee, National Republican Senatorial Committee and

National Republican Congressional Committee; His expertise is more in campaign finance.

**Cleta Mitchell**-Partner in the Washington, D.C. office of Foley & Lardner LLP; She advises corporations, nonprofit organizations, candidates, campaigns, and individuals on state and federal election and campaign finance law, and compliance issues related to lobbying, ethics and financial disclosure; Ms. Mitchell practices before the Federal Election Commission and similar federal and state enforcement agencies; Her expertise is more in campaign finance law.

**Mark Braden**-Of counsel at Baker & Hostetler; He concentrates his work principally on election law and governmental affairs, including work with Congress, the Federal Election Commission, state campaign finance agencies, public integrity issues, political broadcast regulation, contests, recounts, the Voting Rights Act, initiatives, referendums and redistricting; His expertise is mainly outside of the voter fraud area.

Donetta L.  
Davidson/EAC/GOV  
01/11/2007 09:32 AM

To Paul DeGregorio/EAC/GOV@EAC, Matthew  
Masterson/EAC/GOV@EAC  
cc  
bcc  
Subject Fw: Draft EAC report on Voter Identification

Please print for Paul to take on the trip

----- Forwarded by Donetta L. Davidson/EAC/GOV on 01/11/2007 09:30 AM -----

Karen Lynn-Dyson/EAC/GOV

01/04/2007 04:27 PM

To Donetta L. Davidson/EAC/GOV@EAC, twilkey@eac.gov  
cc  
Subject Draft EAC report on Voter Identification

Chair Davidson and Tom-

You may recall that during your last Commissioner's meeting you requested that a draft of the EAC Voter ID report be ready by January 5. Attached please find the first draft of such a report that I have prepared, based on the Eagleton Voter ID report and study.

There are several points in the document where I raise questions about the data or Eagleton's findings from their analysis. Certainly, before we would publish this report, we would need Eagleton to review it and to verify that we have accurately represented their findings and conclusions.

Hopefully, this is a first good step towards publishing something on voter identification. I look forward to your suggestions for next steps.



EAC Voter ID Report.doc  
K

Karen Lynn-Dyson  
Research Director  
U.S. Election Assistance Commission  
1225 New York Avenue, NW Suite 1100  
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**006511**

# EAC Report on Voter Identification

## Executive Summary

The Help America Vote Act of 2002 (HAVA) authorizes the United States Election Assistance Commission (EAC) to conduct periodic studies of election administration issues. HAVA Section 303 (b) mandates that first time voters who register by mail are required to show proof of identity before being allowed to cast a ballot. The law prescribes certain requirements concerning this section, but also leaves considerable discretion to the States for its implementation. The EAC sought to examine how these voter identification requirements were implemented in the 2004 general elections and to prepare guidance for the states on this topic.

In May 2005 EAC entered into a contract with the Eagleton Institute of Politics at Rutgers, the State University of New Jersey and the Moritz College of Law at the Ohio State University to perform a review and legal analysis of state legislation, administrative procedures and court cases, and to perform a literature review on other research and data available on the topic of voter identification requirements. Further, the contractor was to analyze the problems and challenges of voter identification, to hypothesize alternative approaches and recommend various policies that could be applied to these approaches.

The contractor also performed a statistical analysis of the relationship of various requirements for voter identification to voter turnout in the 2004 election. Using two sets of data, aggregate turnout data at the county level for each state, and reports of individual voters collected in the November 2004 Current Population Survey conducted by the U.S. Census Bureau, the contractor found the overall relationship between the stringency of ID requirements and turnout to be fairly small, but statistically significant.

Based on The Eagleton Institute year-long inquiry into voter identification requirements EAC will implement one or more of the following recommendations:

- Further research into the connection between voter ID requirements and the number of ballots cast and counted;
- A state-by-state review of the impact that voter ID requirements are having on voter's participation;
- A state-by-state review of the relationship between ballot access and ballot security and the number of voters whose ballot is counted;
- A state-by-state review of time periods between voters casting of provisional ballots and the time allowed to return with an ID as well as a review of acceptable forms of identification other than photo ID.

## **Introduction**

This study was conducted at a time in which considerable attention is being paid to the issue of voter identification. Proponents of stricter identification requirements base their case on improving the security of the ballot by reducing opportunities for multiple voting or voting by those who are not eligible. The goal is to ensure that only those legally entitled to vote do so, and do so only once at each election. Opponents of stricter ID requirements seek to ensure board access to a regular ballot. There is a fear that some voters -- racial and ethnic minorities, young and elderly voters-- lack convenient access to required ID documents, or that these voters may be fearful of submitting their ID documents for official scrutiny.

This report considers policy issues associated with the voter ID debate. It examines the relationships between voter ID requirements and voter turnout along with the various policy implications of the issue.

## **Methodology of the Study**

In May 2005, under contract with the EAC, the Eagleton Institute of Politics at Rutgers, the State University of New Jersey, and the Moritz College of Law at the Ohio State University undertook a review and legal analysis of state statutes, regulations and litigation concerning voter identification and provisional voting as well as a statistical analysis of the relationship of various requirements for voter identification to turnout in the 2004 election. The contract also included research and study related to provisional voting requirements. These research findings were submitted and reviewed by the EAC as a separate study.

The Eagleton Institute of Politics gathered information on the voter identification requirements in 50 states and the District of Columbia for 2004. Based on interpretations of state statutes and supplemental information provided through conversations with state election officials, state ID requirements were divided into five categories, with each category of identification more rigorous than the one preceding: stating name, signing name, signature match, presenting an ID, and the most rigorous, presenting a government photo ID. The Eagleton Institute also categorized and identified each state according to maximum and minimum identification requirements. Maximum requirements refer to the most that voters may be asked to do or show at the polling place. Minimum requirements refer to the most that voters can be required to do or show in order to cast a regular ballot. These definitions and the subsequent state-by-state analysis of voter identification requirements omitted those cases in which a particular voter's eligibility might be questioned using a state's voter ballot challenge process.

Two data sets were used to apply the criteria (variables) that were developed above: aggregate voter turnout data at the county level which was gathered from the EAC's 2004 Election Day Survey and; reports of individual voters collected through the November 2004 Current Population Survey administered by the U.S. Census Bureau. Use of EAC

survey data and Census Bureau CPS data provided a way to cross-check the validity of the analysis and conclusions that would be drawn regarding the effect of voter ID requirements on voter turnout.

## **Study Oversight and Methodological Review**

A draft of the Eagleton Institute report and findings on voter identification requirements was critiqued by a peer review group convened by the Eagleton Institute. A second review of the study's research and statistical methodologies was conducted using a group of research and statistical experts independently convened by the EAC. Comments and insights of the peer review group members were taken into account in the drafting of a study report although there was not unanimous agreement among the individual reviewers regarding the study findings and recommendations.

### **The Eagleton Institute of Politics Peer Review Group**

R Michael Alvarez, California Institute of Technology  
John C. Harrison, University of Virginia School of Law  
Martha E. Kropf, University of Missouri-Kansas City  
Daniel H. Lowenstein, University of California at Los Angeles  
Timothy G. O'Rourke, Salisbury University  
Bradley Smith, Capital University Law School  
Tim Storey, National Conference of State Legislatures  
Peter G. Verniero, former Attorney General, State of New Jersey

### **The EAC Peer Review Group**

Jonathan Nagler, New York University  
Jan Leighley, University of Arizona  
Adam Berninsky, Massachusetts Institute of Technology

## **Summary of the Research**

### **Maximum and Minimum Voter Identification Requirements**

In order to analyze what, if any, correlation may exist between a State's voter identification requirements and voter turnout, the Eagleton Institute first coded a state according to how demanding its voter ID requirement was. The voter ID requirement, ranked from lowest to highest was as follows: stating one's name, signing one's name, matching one's signature to a signature on file, providing a form of identification and, providing a form of photo identification. Several possible caveats to this ranking system were noted. For all states which had photo identification requirements in 2004, voters

without a photo ID were permitted to cast a regular ballot after signing an affidavit regarding his or her identity and eligibility. These voters were also allowed to provide other forms of ID. The researchers also noted that while each state may be assigned to a category, that categorization may not reflect the actual practice related to voter identification that may or may not have taken place at many polling places.

Research performed for this study by the Moritz College of Law found that states had five different types of **maximum** identification requirements in place on Election Day 2004. For the purposes of this study a requirement that called for a signed affidavit or the provision of other forms of ID was considered the most rigorous or the “maximum” requirement. At the polling place voters were asked to:

- State his or her name (10 states)
- Sign his or her name (13 states and the District of Columbia)
- Sign his or her name, which would be matched to a signature on file (seven states)
- Provide a form of identification that did not necessarily include a photo (15 states)
- Provide a photo identification (five states)

Using the same criteria, but applying them as **minimum** rather than maximum criteria for voting the research showed: **(check this section- it doesn't really make sense)**

- State his or her name (12 states)
- Sign his or her name (14 states and the District of Columbia)
- Matching the voter's signature to the signature on file (6 states)
- Provide a non-photo identification (14 states)
- Swear by an affidavit (4 states)

The results of the research are summarized in Table 1.

Election laws in several states offer exceptions to these ID requirements if potential voters lack the necessary form of identification. Laws in these states set a minimum requirement that a voter may be required to satisfy in order to vote using a regular ballot. In 2004 none of the states required photo identification as a minimum standard for voting with a regular ballot. That is, voters who lacked photo ID were allowed to vote in all states, if he or she was able to meet another ID requirement.

### **The Relationship of Voter Identification Requirements to Voter Turnout**

A statistical analysis examining the variation in turnout rates based on the type of voter ID required by each state in the 2004 election was conducted using two sets of data: 1) aggregate turnout data at the county level for each state (compiled by the Eagleton Institute of Politics-footnote about how they collected the data) and 2) individual level survey data included in the November 2004 Current Population Survey (CPS), conducted by the U.S. Census Bureau.

The analysis looked at the voter identification requirements as a continuous variable and as a series of discrete variables. As a continuous variable the maximum voter identification requirements were ranked according to how demanding they were judged to be, with photo identification considered to be the most demanding requirement (**what about affidavit????**). Used as discrete variable, the statistical analysis considered stating the name as the least demanding ID requirement; the other ID requirements were then compared to that requirement.

### **Aggregate-level statistical analysis**

The statistical analysis performed by the Eagleton Institute of Politics found that when averaging across counties in each state, statewide turnout is negatively correlated to maximum voter identification requirements ( $r = -.30$ ,  $p$  less than .05). When a statistical analysis is performed on the other minimum voter ID requirements (with affidavit being the most demanding requirement), the correlation between voter identification and turnout is negative, but not statistically significant ( $r = -.20$ ,  $p = .16$ ). These findings would suggest that the relationship between turnout rates and minimum requirements may not be linear.

The aggregate data show that 60.9 percent of the estimated citizen voting age population voted in 2004. Taking into account the maximum requirements, an average of 64.6 percent of the voting age population turned out in states that required voters to state their names, compared to 58.1 percent in states that required photo identification. A similar trend was found when analyzing minimum ID requirements. Sixty-three percent of the voting age population turned out in states requiring voters to state their name, compared to 60.1 percent in states that required an affidavit from voters. This analysis showed there was not a clear, consistent linear relationship between turnout and minimum identification requirements.

**(insert table 2- Variation in 2004 State Turnout Based on Voter Identification Requirements)**

### **Multivariate models of analysis using aggregate-level data**

The Eagleton Institute of Politics performed an additional analysis that would estimate the effects of voter identification requirements, that took into account the electoral context in 2004 and, the demographic characteristics of the population in each county. The model also considers such variables as whether or not the county was 1) in a presidential battleground state, 2) if the county was in a state with a competitive race for government and/or the U.S. Senate, 3) the percentage of voting-age population in each county that was Hispanic or African-American 4) the percentage of county residents age 65 and older, 5) the percent of county residents below the poverty line, and 6) the number of days between each state's registration deadline and the election.

The results of this statistical modeling and subsequent analysis indicated that the stricter voter ID requirements of matching a voter's signature to a signature on file or with presenting a non-photo identification are associated with lower voter turnout when compared to voter turnout in states that required voters to simply state his or her name. These conclusions were reached when variables 1-5 listed above were held constant.

Other results from the Eagleton Institute analysis of stricter voter identification requirements showed that:

- Increased voter turnout was associated with whether the county was in a battleground state or whether that state have a competitive race for governor and/or U.S.Senate.
- A slight negative effect on turnout was correlated with those state's with a longer time between the closing date for registration and the election.
- Voter turnout declined as the percentage of Hispanics in a county's population increased.
- Higher turnout (and a positive correlation) was associated with a higher percentage of senior citizens and household median income.
- The percentage of African-Americans in the county did not have a significant effect on turnout.

The Eagleton Institute analysis of minimum voter identification requirements showed that:

- A relationship between minimum voter ID requirements and turnout was not demonstrated.
- Battleground states and those with competitive state races had a significant and positive correlation to turnout.
- A higher percentage of senior citizens in the county and higher household median income were associated with higher turnout and showed a positive correlation to turnout.
- The percentage of Hispanics in the county was associated with reduced turnout.
- The increased number of days between the closing date for registration was associated with reduced turnout.

The analysis of these aggregate, county-level data showed a significant correlation, between maximum voter identification requirements (a signature match and non-photo

identification, but not a photo identification) and lower turnout in the 2004 election. This correlation was also significant when compared to the minimum voter ID requirement of the voter simply having to state his or her name.

### **Multivariate analysis using individual level turnout data**

This analysis which used November 2004 Current Population Survey data conducted by the U.S. Census Bureau is based on reports from self-described registered voters. Not included in the analysis are persons who said they are not registered to vote, those who said they cast absentee ballots and those who said they were not U.S. citizens. The CPS' Voting and Registration Supplement consisted of interviews, either by telephone or in person, with 96,452 respondents. ( **why is the N is Table 3-54,973?**)

In addition to the five maximum voter identification requirements (enumerated on page XX) the analysis performed included other socioeconomic, demographic and political factors that could have influenced turnout in the 2004 election. These independent variables were analyzed against the dependent variable of whether or not the respondent said he or she voted in the November 2004 election.

In this analysis three of the voter identification requirements were shown to have a statistically significant correlation with whether or not the survey respondents said they have voted in 2004. Lower voter turnout was associated with:

- those states with maximum voter requirements to sign one's name,
- those states with maximum voter requirements to provide a non-photo ID or photo ID, or
- those states with the minimum voter requirement to swear by an affidavit in order to cast a ballot without the state-required identification

Increased voter turnout showed:

- A significant correlation with the competitiveness of the Presidential race (**explain**).
- African-American voters were more likely than white or other voters to say they have voted.
- Income and marital status were positive predictors of voting (**high income or low income, single, married?**),
- Women were more likely to say they voted than men.
- Those ages 45 to 64 and 65 and older were more likely to say they voted than those ages 18 to 24.
- Those who earned a high school diploma, attended some college, graduated from college or attended graduate school were more likely to say they have voted than those who had not finished high school.

## **Analysis of the predicted probability of voter turnout using the individual data**

Using this Census Bureau Current Population Survey data the Eagleton Institute of Politics performed an additional statistical analysis in which they calculated the effect of various independent variables on the probability that a respondent said he or she voted. This analysis, involving 54,973 voters cross-tabulated the maximum and minimum voter identification requirements in each state with the five levels of voting requirements: stating name, signing name, matching the signature, a non-photo ID, photo-ID signing an affidavit. The results of these **Predicted Probability of Voter Turnout for all Voter** tabulations are summarized in Table 3 below:

From this analysis, the Eagleton Institute of Politics found that three of the voter identification requirements (**which ones?**) exerted a statistically significant, negative effect on whether or not the CPS survey respondents said they had voted in 2004. That is, compared to states that require voters to only state their name, those states which require the voter to sign his or her name, to provide a non-photo ID, or to provide a photo ID as a maximum requirement, were shown to have a negative influence on turnout. Also, a negative influence on turnout was found when comparing those states that require voters to only state their name, as compared to those states which have as a minimum requirement for verifying voter ID, signing an affidavit.

This probability analysis also found that the competitiveness of the presidential race had a significant effect on turnout as well as some significant demographic and educational effects. For the entire voting population signature, non-photo identification and photo identification requirements were all associated with lower turnout rates compared to the requirements that voter simply state their names. The analysis further found that:

- The predicted probability that Hispanics would vote in states that required non-photo identification was about 10 percentage points lower than in states where Hispanic voters gave their names and that Hispanic voters were less likely to vote in states that required non-photo identification as opposed to only having to state one's name.
- Hispanic voters were 10 percent less likely to vote in non-photo identification states compared to states where voters only had to give their name. African American and Asian-American voters were about 6 percent less likely, while white voters were about 2 percent less likely.
- Asian-American voters were 8.5 percent less likely to vote in states that required non-photo identification compared to states that require voters to state their names under the maximum requirements, while they were 6.1

percent less likely to vote where non-photo identification was the minimum requirement.

- For those with less than a high school diploma, the probability of voting was 5.1 percent lower in states that required photo identification as the maximum requirement and 7 percent lower in those states that required an affidavit as the minimum requirement. These percentages were arrived at when comparing these states to ones that use as a minimum or maximum requirement, the voter to merely state his or her name.

### **Conclusions from the statistical analysis**

The statistical analysis found that as voter identification requirements vary, so do voter turnout rates. These findings were borne out through analyses conducted on aggregate data and individual-level data. There were, however, some distinctions found depending upon whether or not the state's particular voter identification requirements were set as minimums or maximums.

- The overall relationship between voter identification requirements and turnout for all registered voters was found to be small but statistically significant.
- Using the aggregate data the signature match and the non-photo identification requirement correlated with lower turnout. The photo identification requirement did not have a statistically significant effect.
- In the individual-level data the signature, no-photo identification and photo identification requirement were all correlated with lower turnout when compared to the requirements that voter simply state their names.
- Across various demographic groups (African-Americans, Asian-Americans and Hispanics) a statistically significant relationship was found between the non-photo identification requirement and voter turnout

### **Caveats to the Analysis**

The Eagleton Institute for Politics and the EAC make note that while this analysis is a good beginning, significant questions remain regarding the relationship between voter identification requirements and turnout. These analyses are unable, for example, to capture how or why identification requirements might lower turnout. That is, is it because voters are aware of the identification requirements and stay away from the polls because of them? Alternatively, do the requirements result in some voters being turned away when they cannot provide the identification, or must cast a provisional ballot?

Knowing more about the “on the ground” experience of voters regarding various identification requirements will guide state and local level policy makers in their efforts to educate voters about the requirements. These experiences could also help instruct election judges on how to handle questions and possible disputes over voter identification requirements.

## **Public Policy and Administrative Considerations**

Voter Identification, often described as the critical step in protecting the integrity of the ballot, is a process which can ensure that the potential voter is eligible and, if eligible, is permitted to cast one ballot. A voting system that requires voters to produce an identification document or documents may prevent the ineligible from voting, but also may prevent the eligible from casting a ballot.

Evaluating the effect of different voter identification regimes can be most effective when based on clear legal, equitable and practical standards. The questions outlined below might point policymakers to standards that can be created around voter identification requirements.

1. Is the voter ID system designed on the basis of valid and reliable empirical studies the will address concerns regarding certain types of voting fraud?
2. Does the voter ID requirement comply with the letter and spirit of the Voting Rights Act?
3. How effective is the voter ID requirement on increasing the security of the ballot and can it be coordinated with the statewide voter registration database?
4. How feasible is the voter identification requirement? That is, are there administrative or budgetary considerations or concerns? How easy or difficult will it be for pollworkers who must administer the requirement?
5. How cost effective is the voter ID system? That is, what are the monetary and non-monetary costs to the voter and to the state for implementing the ID system?
6. If voter ID requirements are shown to reduce voter turnout (generally, or with some particular groups), what possible steps should be taken to ameliorate this problem?

## **Recommendations and Next Steps**

As the Federal agency charged with informing election officials and the public about various issues related to the administration of elections EAC believes it should, in its capacity as a supporter of elections research, undertake additional study into the topic of voter identification requirements and the implementation of them in the following ways:

- Longitudinal studies of jurisdictions that have changed voter identification requirements.

- State-by-state and precinct-level analyses that will examine the correlations between various voter identification requirements and voter registration and turnout
- Alternative forms and methods for verifying a voter's identity.
- Continuing research into the connection between various voter identification requirements and the number of ballots cast and counted
- A continuing state-by-state update on changes to voter identification requirements.
- Continued collection of state-by-state data which will help examine the impact that voter identification requirements are having on the number of voters who are casting provisional ballots because of voter identification verification issues.

Appendix A: Summary of Voter Identification Requirements by State

Appendix B: Court Decisions and Literature on Voter Identification and Related Issue  
Court Decisions

Appendix C: Annotated Bibliography on Voter Identification Issues

**006522**

**Deliberative Process  
Privilege**

**Voting Fraud and Voter Intimidation**  
**Report to the**  
**U.S. Election Assistance Commission**  
**on**  
**Preliminary Research & Recommendations**

**By**  
**Job Serebrov and Tova Wang**

006523

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## Introduction

### **Charge Under HAVA**

Under the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (“HAVA”), the United States Election Assistance Commission is charged with developing national statistics on voter fraud and developing methods of deterring and investigating voter fraud. Also, the Commission is charged with developing methods of identifying, deterring, and investigating methods of voter intimidation.

### **Scope of Project**

The Commission employed a bipartisan team of legal consultants, Tova Wang and Job Serebrov to develop a preliminary overview work product to determine the quantity and quality of vote fraud and voter intimidation that is present on a national scale. The consultants’ work is neither comprehensive nor conclusive. This first phase of an envisioned two-phase project was constrained by both time and funding. The consultants’ conclusions and recommendations for phase II will be contained in this report.

The consultants, working without the aid of a support staff, divided most of the work. However, the final work product was mutually checked and approved. They agreed upon the steps that were taken needed and the method employed. For all of the documentary sources, the consultants limited the time period under review from January 1, 2001 to January 1, 2006. The research performed by the consultants included interviews, an extensive Nexis search, a review of existing literature, and case research.

**Interviews:** The consultants chose the interviewees by first coming up with a list of the categories of types of people they wanted to interview. Then the consultants separately, equally filled those categories with a certain number of people. Due to time and resource constraints, the consultants had to pare down this list substantially – for instance, they had to rule out interviewing prosecutors altogether – but still got a good range of people to talk to. The ultimate categories were academics, advocates, elections officials, lawyers and judges. Although the consultants were able to talk to most of the people they wanted to, some were unavailable and a few were not comfortable speaking to them, particularly judges. The consultants together conducted all of the interviews, either by phone or in person. Then the consultants split up drafting the summaries. All summaries were reviewed and mutually approved. Most of the interviews were extremely informative and the consultants found the interviewees to be extremely knowledgeable and insightful for the most part.

**Nexis:** Initially, the consultants developed an enormous list of possible Nexis search terms. It soon became obvious that it would be impossible to conduct the research that way. As a result, consultant Wang performed the Nexis search by finding search term combinations that would yield virtually every article on a particular subject from the last

five years. Consultant Serebrov approved the search terms. Then Wang created an excel spreadsheet in order to break down the articles in way in which they could be effectively analyzed for patterns. Each type of fraud is broken down in a separate chart according to where it took place, the date, the type of election it occurred in, what the allegation was, the publication it came from. Where there was a follow up article, any information that that suggested there had been some further action taken or some resolution to the allegation was also included. For four very complicated and long drawn out situations – Washington State, Wisconsin, South Dakota in 2004, and the vote buying cases in a couple of particular jurisdictions over the last several years –written summaries with news citations are provided.

***Existing Literature:*** Part of the selections made by the consultants resulted from consultant Wang's long-term familiarity with the material while part was the result of a joint web search for articles and books on vote fraud and voter intimidation and suggestions from those interviewed by the consultants. The consultants reviewed a wide range of materials from government reports and investigations, to academic literature, to reports published by advocacy groups. The consultants believe that they covered the landscape of available sources.

***Cases:*** In order to properly identify all applicable cases, the consultants first developed an extensive word search term list. A WestLaw search was performed and the first one hundred cases under each word search term were then gathered in individual files. This resulted in a total of approximately 44,000 cases. Most of these cases were federal as opposed to state and appellate as opposed to trial. Consultant Serebrov analyzed the cases in each file to determine if they were on point. If he found that the first twenty cases were inapplicable, Serebrov would sample forty to fifty other file cases at random to determine applicability. If the entire file did not yield any cases, the file would be discarded. All discarded word search terms were recorded in a separate file. Likewise, if the file only yielded a few applicable cases, it would also be discarded. However, if a small but significant number of cases were on point, the file was later charted. The results of the case search were stark because relatively few applicable cases were found.

## **Working Definition of Fraud and Intimidation**

*Note: The definition provided below is for the purposes of this EAC project. Most of the acts described come within the federal criminal definition of fraud, but some may not.*

Election fraud is any intentional action, or intentional failure to act when there is a duty to do so, that corrupts the election process in a manner that can impact on election outcomes. This includes interfering in the process by which persons register to vote; the way in which ballots are obtained, marked, or tabulated; and the process by which election results are canvassed and certified.

Examples include the following:

- falsifying voter registration information pertinent to eligibility to cast a vote, (e.g. residence, criminal status, etc).;
- altering completed voter registration applications by entering false information;
- knowingly destroying completed voter registration applications (other than spoiled applications) before they can be submitted to the proper election authority;
- knowingly removing eligible voters from voter registration lists, in violation of HAVA, NVRA, or state election laws;
- intentional destruction by election officials of voter registration records or balloting records, in violation of records retention laws, to remove evidence of election fraud;
- vote buying;
- voting in the name of another;
- voting more than once;
- coercing a voter's choice on an absentee ballot;
- using a false name and/or signature on an absentee ballot;
- destroying or misappropriating an absentee ballot;
- felons, or in some states ex-felons, who vote when they know they are ineligible to do so;
- misleading an ex-felon about his or her right to vote;
- voting by non-citizens who know they are ineligible to do so;
- intimidating practices aimed at vote suppression or deterrence, including the abuse of challenge laws;
- deceiving voters with false information (e.g.; deliberately directing voters to the wrong polling place or providing false information on polling hours and dates);
- knowingly failing to accept voter registration applications, to provide ballots, or to accept and count voted ballots in accordance with the Uniformed and Overseas Citizens Absentee Voting Act;
- intentional miscounting of ballots by election officials;
- intentional misrepresentation of vote tallies by election officials;
- acting in any other manner with the intention of suppressing voter registration or voting, or interfering with vote counting and the certification of the vote.

Voting Fraud and Voter Intimidation – Preliminary Research & Recommendations

Voting fraud does not include mistakes made in the course of voter registration, balloting, or tabulating ballots and certifying results. For purposes of the EAC study, it also does not include violations of campaign finance laws.

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## Summaries of Research Conducted

### Interviews

#### *Common Themes*

- There is virtually universal agreement that absentee ballot fraud is the biggest problem, with vote buying and registration fraud coming in after that. The vote buying often comes in the form of payment for absentee ballots, although not always. Some absentee ballot fraud is part of an organized effort; some is by individuals, who sometimes are not even aware that what they are doing is illegal. Voter registration fraud seems to take the form of people signing up with false names. Registration fraud seems to be most common where people doing the registration were paid by the signature.
- There is widespread but not unanimous agreement that there is little polling place fraud, or at least much less than is claimed, including voter impersonation, “dead” voters, noncitizen voting and felon voters. Those few who believe it occurs often enough to be a concern say that it is impossible to show the extent to which it happens, but do point to instances in the press of such incidents. Most people believe that false registration forms have not resulted in polling place fraud, although it may create the perception that vote fraud is possible. Those who believe there is more polling place fraud than reported/investigated/prosecuted believe that registration fraud does lead to fraudulent votes. Jason Torchinsky from the American Center for Voting Rights is the only interviewee who believes that polling place fraud is widespread and among the most significant problems in the system.
- Abuse of challenger laws and abusive challengers seem to be the biggest intimidation/suppression concerns, and many of those interviewed assert that the new identification requirements are the modern version of voter intimidation and suppression. However there is evidence of some continued outright intimidation and suppression, especially in some Native American communities. A number of people also raise the problem of poll workers engaging in harassment of minority voters. Other activities commonly raised were the issue of polling places being moved at the last moment, unequal distribution of voting machines, videotaping of voters at the polls, and targeted misinformation campaigns.
- Several people indicate – including representatives from DOJ -- that for various reasons, the Department of Justice is bringing fewer voter intimidation and suppression cases now and is focusing on matters such as noncitizen voting, double voting and felon voting. While the civil rights section continues to focus on systemic patterns of malfeasance, the public integrity section is focusing now on individuals, on isolated instances of fraud.
- The problem of badly kept voter registration lists, with both ineligible voters remaining on the rolls and eligible voters being taken off, remains a common concern. A few people are also troubled by voters being on registration lists in two states. They said that there was no evidence that this had led to double voting, but it opens the door to the possibility. There is great hope that full

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implementation of the new requirements of HAVA – done well, a major caveat – will reduce this problem dramatically.

***Common Recommendations:***

- Many of those interviewed recommend better poll worker training as the best way to improve the process; a few also recommended longer voting times or voting on days other than election day (such as weekends) but fewer polling places so only the best poll workers would be employed
- Many interviewed support stronger criminal laws and increased enforcement of existing laws with respect to both fraud and intimidation. Advocates from across the spectrum expressed frustration with the failure of the Department of Justice to pursue complaints.
  - With respect to the civil rights section, John Tanner indicated that fewer cases are being brought because fewer are warranted – it has become increasingly difficult to know when allegations of intimidation and suppression are credible since it depends on one's definition of intimidation, and because both parties are doing it. Moreover prior enforcement of the laws has now changed the entire landscape – race based problems are rare now. Although challenges based on race and unequal implementation of identification rules would be actionable, Mr. Tanner was unaware of such situations actually occurring and the section has not pursued any such cases.
  - Craig Donsanto of the public integrity section says that while the number of election fraud related complaints have not gone up since 2002, nor has the proportion of legitimate to illegitimate claims of fraud, the number of cases the department is investigating and the number of indictments the section is pursuing are both up dramatically. Since 2002, the department has brought more cases against alien voters, felon voters and double voters than ever before. Mr. Donsanto would like more resources so it can do more and would like to have laws that make it easier for the federal government to assume jurisdiction over voter fraud cases.
- A couple of interviewees recommend a new law that would make it easier to criminally prosecute people for intimidation even when there is not racial animus.
- Almost everyone hopes that administrators will maximize the potential of statewide voter registration databases to prevent fraud. Of particular note, Sarah Ball Johnson, Executive Director of Elections for Kentucky, emphasized that having had an effective statewide voter registration database for more than thirty years has helped that state avoid most of the fraud problems that have been alleged elsewhere, such as double voting and felon voting.
- Several advocate expanded monitoring of the polls, including some associated with the Department of Justice.
- Challenge laws, both with respect to pre-election day challenges and challengers at the polls, need to be revised by all states to ensure they are not used for purposes of wrongful disenfranchisement and harassment

- Several people advocate passage of Senator Barak Obama's "deceptive practices" bill
- There is a split on whether it would be helpful to have nonpartisan election officials – some indicated they thought even if elections officials are elected nonpartisanly they will carry out their duties in biased ways nonetheless. However, most agree that elections officials pursuing partisan agendas is a problem that must be addressed in some fashion. Suggestions included moving election responsibilities out of the secretary of states' office; increasing transparency in the process; and enacting conflict of interest rules.
- A few recommend returning to allowing use of absentee ballots "for cause" only if it were politically feasible.
- A few recommend enacting a national identification card, including Pat Rogers, an attorney in New Mexico, and Jason Torchinsky from ACVR, who advocates the scheme contemplated in the Carter-Baker Commission Report.
- A couple of interviewees indicated the need for clear standards for the distribution of voting machines

## Nexis Research

### *Absentee Ballot Fraud*

According to press reports, absentee ballots are abused in a variety of ways:

- Campaign workers, candidates and others coerce the voting choices of vulnerable populations, usually elderly voters
- Workers for groups and individuals have attempted to vote absentee in the names of the deceased
- Workers for groups, campaign workers and individuals have attempted to forge the names of other voters on absentee ballot requests and absentee ballots and thus vote multiple times

It is unclear how often actual convictions result from these activities (a handful of articles indicate convictions and guilty pleas), but this is an area in which there have been a substantial number of official investigations and actual charges filed, according to news reports where such information is available. A few of the allegations became part of civil court proceedings contesting the outcome of the election.

While absentee fraud allegations turn up throughout the country, a few states have had several such cases. Especially of note are Indiana, New Jersey, South Dakota, and most particularly, Texas. Interestingly, there were no articles regarding Oregon, where the entire system is vote by mail.

### *Voter Registration Fraud*

According to press reports, the following types of allegations of voter registration fraud are most common:

- Registering in the name of dead people
- Fake names and other information on voter registration forms
- Illegitimate addresses used on voter registration forms
- Voters being tricked into registering for a particular party under false pretenses
- Destruction of voter registration forms depending on the party the voter registered with

There was only one self evident instance of a noncitizen registering to vote. Many of the instances reported on included official investigations and charges filed, but few actual convictions, at least from the news reporting. There have been multiple reports of registration fraud in California, Colorado, Florida, Missouri, New York, North Carolina, Ohio, South Dakota and Wisconsin.

### ***Voter Intimidation and Suppression***

This is the area which had the most articles in part because there were so many allegations of intimidation and suppression during the 2004 election. Most of these remained allegations and no criminal investigation or prosecution ensued. Some of the cases did end up in civil litigation.

This is not to say that these alleged activities were confined to 2004 – there were several allegations made during every year studied. Most notable were the high number of allegations of voter intimidation and harassment reported during the 2003 Philadelphia mayoral race.

A very high number of the articles were about the issue of challenges to voters' registration status and challengers at the polling places. There were many allegations that planned challenge activities were targeted at minority communities. Some of the challenges were concentrated in immigrant communities.

However, the tactics alleged varied greatly. The types of activities discussed also include the following:

- Photographing or videotaping voters coming out of polling places.
- Improper demands for identification
- Poll watchers harassing voters
- Poll workers being hostile to or aggressively challenging voters
- Disproportionate police presence
- Poll watchers wearing clothes with messages that seemed intended to intimidate
- Insufficient voting machines and unmanageably long lines

Although the incidents reported on occurred everywhere, not surprisingly, many came from “battleground” states. There were several such reports out of Florida, Ohio and Pennsylvania.

### *“Dead Voters and Multiple Voting”*

There were a high number of articles about people voting in the names of the dead and voting more than once. Many of these articles were marked by allegations of big numbers of people committing these frauds, and relatively few of these allegations turning out to be accurate according to investigations by the newspapers themselves, elections officials and criminal investigators. Often the problem turned out to be a result of administrative error, poll workers mis-marking of voter lists, a flawed registration list and/or errors made in the attempt to match names of voters on the list with the names of the people who voted. In a good number of cases, there were allegations that charges of double voting by political leaders were an effort to scare people away from the voting process.

Nonetheless there were a few cases of people actually being charged and/or convicted for these kinds of activities. Most of the cases involved a person voting both by absentee ballot and in person. A few instances involved people voting both during early voting and on Election Day, which calls into question the proper marking and maintenance of the voting lists. In many instances, the person charged claimed not to have voted twice on purpose. A very small handful of cases involved a voter voting in more than one county and there was one substantiated case involving a person voting in more than one state. Other instances in which such efforts were alleged were disproved by officials.

In the case of voting in the name of a dead person, the problem lay in the voter registration list not being properly maintained, i.e. the person was still on the registration list as eligible to vote, and a person taking criminal advantage of that. In total, the San Francisco Chronicle found 5 such cases in March 2004; the AP cited a newspaper analysis of five such persons in an Indiana primary in May 2004; and a senate committee found two people to have voted in the names of the dead in 2005.

As usual, there were a disproportionate number of such articles coming out of Florida. Notably, there were three articles out of Oregon, which has one hundred percent vote-by-mail.

### *Vote Buying*

There were a surprising number of articles about vote buying cases. A few of these instances involved long-time investigations in three particular jurisdictions as detailed in the vote buying summary. There were more official investigations, indictments and convictions/pleas in this area. All of these cases are concentrated in the Midwest and South.

### *Deceptive Practices*

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In 2004 there were numerous reports of intentional disinformation about voting eligibility and the voting process meant to confuse voters about their rights and when and where to vote. Misinformation came in the form of flyers, phone calls, letters, and even people going door to door. Many of the efforts were reportedly targeted at minority communities. A disproportionate number of them came from key battleground states, particularly Florida, Ohio, and Pennsylvania. From the news reports found, only one of these instances was officially investigated, the case in Oregon involving the destruction of voter registration forms. There were no reports of prosecutions or any other legal proceeding.

### ***Non-citizen Voting***

There were surprisingly few articles regarding noncitizen registration and voting – just seven all together, in seven different states across the country. They were also evenly split between allegations of noncitizens registering and noncitizens voting. In one case charges were filed against ten individuals. In one case a judge in a civil suit found there was illegal noncitizen voting. Three instances prompted official investigations. Two cases, from this nexis search, remained just allegations of noncitizen voting.

### ***Felon Voting***

Although there were only thirteen cases of felon voting, some of them involved large numbers of voters. Most notably, of course, are the cases that came to light in the Washington gubernatorial election contest (see Washington summary) and in Wisconsin (see Wisconsin summary). In several states, the main problem has been the large number of ineligible felons that remained on the voting list.

### ***Election Official Fraud***

In most of the cases in which fraud by elections officials is suspected or alleged, it is difficult to determine whether it is incompetence or a crime. There are several cases of ballots gone missing, ballots unaccounted for and ballots ending up in a worker's possession. In two cases workers were said to have changed peoples' votes. The one instance in which widespread ballot box stuffing by elections workers was alleged was in Washington State. The judge in the civil trial of that election contest did not find that elections workers had committed fraud. Four of the cases are from Texas.

### **Existing Research**

There are many reports and books that describe anecdotes and draw broad conclusions from a large array of incidents. There is little research that is truly systematic or scientific. The most systematic look at fraud is the report written by Lori Minnite. The most systematic look at voter intimidation is the report by Laughlin McDonald. Books

written about this subject seem to all have a political bias and a pre-existing agenda that makes them somewhat less valuable.

Researchers agree that measuring something like the incidence of fraud and intimidation in a scientifically legitimate way is extremely difficult from a methodological perspective and would require resources beyond the means of most social and political scientists. As a result, there is much more written on this topic by advocacy groups than social scientists. It is hoped that this gap will be filled in the “second phase” of this EAC project.

Moreover, reports and books make allegations but, perhaps by their nature, have little follow up. As a result, it is difficult to know when something has remained in the stage of being an allegation and gone no further, or progressed to the point of being investigated or prosecuted or in any other way proven to be valid by an independent, neutral entity. This is true, for example, with respect to allegations of voter intimidation by civil rights organizations, and, with respect to fraud, John Fund’s frequently cited book. Again, this is something that it is hoped will be addressed in the “second phase” of this EAC project by doing follow up research on allegations made in reports, books and newspaper articles.

Other items of note:

- There is as much evidence, and as much concern, about structural forms of disenfranchisement as about intentional abuse of the system. These include felon disenfranchisement, poor maintenance of databases and identification requirements.
- There is tremendous disagreement about the extent to which polling place fraud, e.g. double voting, intentional felon voting, noncitizen voting, is a serious problem. On balance, more researchers find it to be less of a problem than is commonly described in the political debate, but some reports say it is a major problem, albeit hard to identify.
- There is substantial concern across the board about absentee balloting and the opportunity it presents for fraud.
- Federal law governing election fraud and intimidation is varied and complex and yet may nonetheless be insufficient or subject to too many limitations to be as effective as it might be.
- Deceptive practices, e.g. targeted flyers and phone calls providing misinformation, were a major problem in 2004.
- Voter intimidation continues to be focused on minority communities, although the American Center for Voting Rights uniquely alleges it is focused on Republicans.

## Cases

After reviewing over 40,000 cases, the majority of which came from appeals courts, I have found comparatively very few which are applicable to this study. Of those that are applicable, no apparent thematic pattern emerges. However, it seems that the greatest areas of fraud and intimidation have shifted from past patterns of stealing votes to present problems with voter registration, voter identification, the proper delivery and counting of absentee and overseas ballots, provisional voting, vote buying, and challenges to felon eligibility. But because so few cases provided a picture of these current problems, I suggest that case research for the second phase of this project concentrate on state trial-level decisions.

## Methodology

The following is a summary of interviews conducted with a number of political scientists and experts in the field as to how one might undertake a comprehensive examination of voter fraud and intimidation. A list of the individuals interviewed and their ideas are available, and all of the individuals welcome any further questions or explanations of their recommended procedures.

- In analyzing instances of alleged fraud and intimidation, we should look to criminology as a model. In criminology, experts use two sources: the Uniform Crime Reports, which are all reports made to the police, and the Victimization Survey, which asks the general public whether a particular incident has happened to them. After surveying what the most common allegations are, we should conduct a survey of the general public that ask whether they have committed certain acts or been subjected to any incidents of fraud or intimidation. This would require using a very large sample, and we would need to employ the services of an expert in survey data collection. (Stephen Ansolobehere, MIT)
- Several political scientists with expertise in these types of studies recommended a methodology that includes interviews, focus groups, and a limited survey. In determining who to interview and where the focus groups should be drawn from, they recommend the following procedure:
  - Pick a number of places that have historically had many reports of fraud and/or intimidation; from that pool pick 10 that are geographically and demographically diverse, and have had a diversity of problems
  - Pick a number of places that have not had many reports of fraud and/or intimidation; from that pool pick 10 places that match the geographic and demographic make-up of the previous ten above (and, if possible, have comparable elections practices)

- Assess the resulting overall reports and impressions resulting from these interviews and focus groups, and examine comparisons and differences among the states and what may give rise to them.

In conducting a survey of elections officials, district attorneys, district election officers, they recommend that:

- The survey sample be large in order to be able to get the necessary subsets
- The survey must include a random set of counties where there have and have not been a large number of allegations

(Allan Lichtman, American University; Thad Hall, University of Utah; Bernard Grofman, UC – Irvine)

- Another political scientist recommended employing a methodology that relies on qualitative data drawn from in-depth interviews with key critics and experts on all sides of the debate on fraud; quantitative data collected through a survey of state and local elections and law enforcement officials; and case studies. Case studies should focus on the five or ten states, regions or cities where there has been a history of election fraud to examine past and present problems. The survey should be mailed to each state's attorney general and secretary of state, each county district attorney's office and each county board of elections in the 50 states. (Lorraine Minnite, Barnard College)
- The research should be a two-step process. Using LexisNexis and other research tools, a search should be conducted of news media accounts over the past decade. Second, interviews with a systematic sample of election officials nationwide and in selected states should be conducted. (Chandler Davidson, Rice University)
- One expert in the field posits that we can never come up with a number that accurately represents either the incidence of fraud or the incidence of voter intimidation. Therefore, the better approach is to do an assessment of what is most likely to happen, what election violations are most likely to be committed – in other words, a risk analysis. This would include an analysis of what it would actually take to commit various acts, e.g. the cost/benefit of each kind of violation. From there we could rank the likely prevalence of each type of activity and examine what measures are or could be effective in combating them. (Wendy Weiser, Brennan Center of New York University)
- Replicate a study in the United States done abroad by Susan Hyde of the University of California- San Diego examining the impact of impartial poll site observers on the incidence of election fraud. Doing this retrospectively would require the following steps:
  - Find out where there were federal observers
  - Get precinct level voting information for those places

- Analyze whether there was any difference in election outcomes in those places with and without observers, and whether any of these results seem anomalous.

Despite the tremendous differences in the political landscapes of the countries examined by Hyde in previous studies and the U.S., Hyde believes this study could be effectively replicated in this country by sending observers to a random sample of precincts. Rather than compare the incumbent's vote share, such factors such as voter complaints, voter turnout, number of provisional ballots used, composition of the electorate, as well as any anomalous voting results could be compared between sites with and without monitors.

For example, if intimidation is occurring, and if reputable monitors make intimidation less likely or voters more confident, then turnout should be higher on average in monitored precincts than in unmonitored precincts. If polling station officials are intentionally refusing to issue provisional ballots, and the polling station officials are more likely to adhere to regulations while being monitored, the average number of provisional ballots should be higher in monitored precincts than in unmonitored precincts. If monitors cause polling station officials to adhere more closely to regulations, then there should be fewer complaints (in general) about monitored than unmonitored precincts (this could also be reversed if monitors made voters more likely to complain).

Again, random assignment controls for all of the other factors that otherwise influence these variables.

One of the downsides of this approach is it does not get at some forms of fraud, e.g. absentee ballot fraud; those would have to be analyzed separately.

- Another political scientist recommends conducting an analysis of vote fraud claims and purging of registration rolls by list matching. Allegations of illegal voting often are based on matching of names and birth dates. Alleged instances of double voting are based on matching the names and birth dates of persons found on voting records. Allegations of ineligible felon (depending on state law), deceased, and of non-citizen voting are based on matching lists of names, birth dates, and sometimes addresses of such people against a voting records. Anyone with basic relational database skills can perform such matching in a matter of minutes.

However, there are a number of pitfalls for the unwary that can lead to grossly over-estimating the number of fraudulent votes, such as missing or ignored middle names and suffixes or matching on missing birth dates. Furthermore, there is a surprising statistical fact that a group of about three hundred people with the same first and last name are almost assured to share the exact same birth date, including year. In a large state, it is not uncommon for hundreds of Robert Smiths (and other common names) to have voted. Thus, allegations of vote fraud

or purging of voter registration rolls by list matching almost assuredly will find a large proportion of false positives: people who voted legally or are registered to vote legally.

Statistics can be rigorously applied to determine how many names would be expected to be matched by chance. A simulation approach is best applied here: randomly assign a birth date to an arbitrary number of people and observe how many match within the list or across lists. The simulation is repeated many times to average out the variation due to chance. The results can then be matched back to actual voting records and purge lists, for example, in the hotly contested states of Ohio or Florida, or in states with Election Day registration where there are concerns that easy access to voting permits double voting. This analysis will rigorously identify the magnitude alleged voter fraud, and may very well find instances of alleged fraud that exceed what might have otherwise happened by chance.

This same political scientist also recommends another way to examine the problem: look at statistics on provisional voting: the number cast might provide indications of intimidation (people being challenged at the polls) and the number of those not counted would be indications of "vote fraud." One could look at those jurisdictions in the Election Day Survey with a disproportionate number of provisional ballots cast and cross reference it with demographics and number of provisional ballots discarded. (Michael McDonald, George Mason University)

- Spencer Overton, in a forthcoming law review article entitled *Voter Identification*, suggests a methodology that employs three approaches—investigations of voter fraud, random surveys of voters who purported to vote, and an examination of death rolls provide a better understanding of the frequency of fraud. He says all three approaches have strengths and weaknesses, and thus the best studies would employ all three to assess the extent of voter fraud. An excerpt follows:

*1. Investigations and Prosecutions of Voter Fraud*

Policymakers should develop databases that record all investigations, allegations, charges, trials, convictions, acquittals, and plea bargains regarding voter fraud. Existing studies are incomplete but provide some insight. For example, a statewide survey of each of Ohio's 88 county boards of elections found only four instances of ineligible persons attempting to vote out of a total of 9,078,728 votes cast in the state's 2002 and 2004 general elections. This is a fraud rate of 0.00000045 percent. The Carter-Baker Commission's Report noted that since October 2002, federal officials had charged 89 individuals with casting multiple votes, providing false information about their felon status, buying votes, submitting false voter registration information, and voting improperly as a non-citizen. Examined in the context of the 196,139,871 ballots cast between October 2002 and

August 2005, this represents a fraud rate of 0.0000005 percent (note also that not all of the activities charged would have been prevented by a photo identification requirement).

A more comprehensive study should distinguish voter fraud that could be prevented by a photo identification requirement from other types of fraud — such as absentee voting and stuffing ballot boxes — and obtain statistics on the factors that led law enforcement to prosecute fraud. The study would demand significant resources because it would require that researchers interview and pour over the records of local district attorneys and election boards.

Hard data on investigations, allegations, charges, pleas, and prosecutions is important because it quantifies the amount of fraud officials detect. Even if prosecutors vigorously pursue voter fraud, however, the number of fraud cases charged probably does not capture the total amount of voter fraud. Information on official investigations, charges, and prosecutions should be supplemented by surveys of voters and a comparison of voting rolls to death rolls.

## 2. *Random Surveys of Voters*

Random surveys could give insight about the percentage of votes cast fraudulently. For example, political scientists could contact a statistically representative sampling of 1,000 people who purportedly voted at the polls in the last election, ask them if they actually voted, and confirm the percentage who are valid voters. Researchers should conduct the survey soon after an election to locate as many legitimate voters as possible with fresh memories.

Because many respondents would perceive voting as a social good, some who did not vote might claim that they did, which may underestimate the extent of fraud. A surveyor might mitigate this skew through the framing of the question (“I’ve got a record that you voted. Is that true?”).

Further, some voters will not be located by researchers and others will refuse to talk to researchers. Photo identification proponents might construe these non-respondents as improper registrations that were used to commit voter fraud.

Instead of surveying all voters to determine the amount of fraud, researchers might reduce the margin of error by focusing on a random sampling of voters who signed affidavits in the three states that request photo identification but also allow voters to establish their identity through affidavit—Florida, Louisiana, and South Dakota. In

South Dakota, for example, only two percent of voters signed affidavits to establish their identity. If the survey indicates that 95 percent of those who signed affidavits are legitimate voters (and the other 5 percent were shown to be either fraudulent or were non-responsive), this suggests that voter fraud accounts for, at the maximum, 0.1 percent of ballots cast.

The affidavit study, however, is limited to three states, and it is unclear whether this sample is representative of other states (the difficulty may be magnified in Louisiana in the aftermath of Hurricane Katrina's displacement of hundreds of thousands of voters). Further, the affidavit study reveals information about the amount of fraud in a photo identification state with an affidavit exception—more voter fraud may exist in a state that does not request photo identification.

### 3. *Examining Death Rolls*

A comparison of death rolls to voting rolls might also provide an estimate of fraud.

Imagine that one million people live in state A, which has no documentary identification requirement. Death records show that 20,000 people passed away in state A in 2003. A cross-referencing of this list to the voter rolls shows that 10,000 of those who died were registered voters, and these names remained on the voter rolls during the November 2004 election. Researchers would look at what percentage of the 10,000 dead-but-registered people who "voted" in the November 2004 election. A researcher should distinguish the votes cast in the name of the dead at the polls from those cast absentee (which a photo identification requirement would not prevent). This number would be extrapolated to the electorate as a whole.

This methodology also has its strengths and weaknesses. If fraudulent voters target the dead, the study might overestimate the fraud that exists among living voters (although a low incidence of fraud among deceased voters might suggest that fraud among all voters is low). The appearance of fraud also might be inflated by false positives produced by a computer match of different people with the same name. Photo identification advocates would likely assert that the rate of voter fraud could be higher among fictitious names registered, and that the death record survey would not capture that type of fraud because fictitious names registered would not show up in the death records. Nevertheless, this study, combined with the other two, would provide important insight into the magnitude of fraud likely to exist in the absence of a photo identification requirement.

**Recommendations for Further EAC Activity  
on Voting Fraud and Voter Intimidation**

**Consultants' Recommendations**

***Recommendation 1: Conduct More Interviews***

Time and resource constraints prevented the consultants from interviewing the full range of participants in the process. As a result, we recommend that any future activity in this area include conducting further interviews.

In particular, we recommend that more election officials from all levels of government, parts of the country, and parties be interviewed. These individuals have the most direct inside information on how the system works -- and at times does not work. They are often the first people voters go to when something goes wrong and are often responsible for fixing it. They are the ones who must carry out the measures that are designed to both prevent fraud and voter intimidation and suppression. They will most likely know what, therefore, is and is not working.

It would also be especially beneficial to talk to people in law enforcement, specifically federal District Election Officers ("DEOs") and local district attorneys, as well as civil and criminal defense attorneys.

The Public Integrity Section of the Criminal Division of the Department of Justice has all of the 93 U.S. Attorneys appoint Assistant U.S. Attorneys to serve as DEOs for two years. DEOs are required to

- screen and conduct preliminary investigations of complaints, in conjunction with the FBI and PIN, to determine whether they constitute potential election crimes and should become matters for investigation;
- oversee the investigation and prosecution of election fraud and other election crimes in their districts;
- coordinate their district's (investigative and prosecutorial) efforts with DOJ headquarters prosecutors;
- coordinate election matters with state and local election and law enforcement officials and make them aware of their availability to assist with election-related matters;
- issue press releases to the public announcing the names and telephone numbers of DOJ and FBI officials to contact on election day with complaints about voting or election irregularities and answer telephones on election day to receive these complaints; and
- supervise a team of Assistant U.S. Attorneys and FBI special agents who are appointed to handle election-related allegations while the polls are open on election day.<sup>i</sup>

Given the great responsibilities of the DEOs, and the breadth of issues they must deal with, they undoubtedly are great resources for information and insight as to what types of fraud and intimidation/suppression are occurring in their districts.

In many situations, however, it is the local district attorneys who will investigate election fraud and suppression tactics, especially in local elections. They will be able to provide information on what has gone on in their jurisdictions, as well as which matters get pursued and why.

Finally, those who defend people accused of election related crimes would also be useful to speak to. They may have a different perspective on how well the system is working to detect, prevent, and prosecute election fraud.

***Recommendation 2: Follow Up on Nexis Research***

The Nexis search conducted for this phase of the research was based on a list of search terms agreed upon by both consultants. Thousands of articles were reviewed and hundreds analyzed. Many of the articles contain allegations of fraud or intimidation. Similarly, many of the articles contain information about investigations into such activities or even charges brought. However, without being able to go beyond the agreed search terms, it could not be determined whether there was any later determination regarding the allegations, investigation or charges brought. This leaves a gaping hole: it is impossible to know if the article is just reporting on “talk” or what turns out to be a serious affront to the system.

As a result, we recommend that follow up Nexis research be conducted to determine what, if any, resolutions or further activity there was in each case. This would provide a much more accurate picture of what types of activities are actually taking place.

***Recommendation 3: Follow Up on Allegations Found in Literature Review***

Similarly, many allegations are made in the reports and books that we analyzed and summarized. Those allegations are often not substantiated in any way and are inherently time limited by the date of the writing. Despite this, such reports and books are frequently cited by various interested parties as evidence of fraud or intimidation.

Therefore, we recommend follow up to the literature review: for those reports and books that make or cite specific instances of fraud or intimidation, a research effort should be made to follow up on those references to see if and how they were resolved.

***Recommendation 4: Review Complaints File With MyVote1 Project Voter Hotline***

During the 2004 election and the statewide elections of 2005, the University of Pennsylvania led a consortium of groups and researchers in conducting the MyVote1 Project. This project involved using a 1-800 voter hotline where voters could call for poll location, be transferred to a local hotline, or leave a recorded message with a complaint.

In 2004, this resulted in over 200,000 calls received and over 56,000 recorded complaints.<sup>ii</sup> The researchers in charge of this project have done a great deal of work to parse and analyze the data collected through this process, including going through the audio messages and categorizing them by the nature of the complaint. These categories include registration, absentee ballot, poll access, ballot/screen, coercion/intimidation, identification, mechanical, provisional (ballot).

We recommend that further research include making full use of this data with the cooperation of the project leaders. While perhaps not a fully scientific survey given the self-selection of the callers, the information regarding 200,000 complaints should provide a good deal of insight into the problems voters experienced, especially those in the nature of intimidation or suppression.

***Recommendation 5: Further Review of Complaints Filed With U.S. Department of Justice***

Although according to a recent GAO report the Voting Section of the Civil Rights Division of the Department of Justice has a variety in ways it tracks complaints of voter intimidation,<sup>iii</sup> the Section was extremely reluctant to provide the consultants with useful information. Further attempts should be made to obtain relevant data. This includes the telephone logs of complaints the Section keeps and information from the database – the Interactive Case Management (ICM) system – the Section maintains on complaints received and the corresponding action taken. We also recommend that further research include a review and analysis of the observer and monitor field reports from Election Day that must be filed with the Section.

***Recommendation 6: Review Reports Filed By District Election Officers***

Similarly, the consultants believe it would be useful for any further research to include a review of the reports that must be filed by every District Election Officer to the Public Integrity Section of the Criminal Division of the Department of Justice. As noted above, the DEOs play a central role in receiving reports of voter fraud and investigating and pursuing them. Their reports back to the Department would likely provide tremendous insight into what actually transpired during the last several elections. Where necessary, information could be redacted or made confidential.

***Recommendation 7: Attend Ballot Access and Voting Integrity Symposium***

The consultants also believe it would be useful for any further activity in this area to include attendance at the next Ballot Access and Voting Integrity Symposium. According to the Department,<sup>iv</sup>

Prosecutors serving as District Election Officers in the 94 U.S. Attorneys' Offices are required to attend annual training conferences on fighting election fraud and voting rights abuses... These conferences are sponsored by the Voting Section of the Civil Rights Division and the Public Integrity

Section of the Criminal Division, and feature presentations by Civil Rights officials and senior prosecutors from the Public Integrity Section and the U.S. Attorneys' Offices. As a result of these conferences, there is a nationwide increase in Department expertise relating to the prosecution of election crimes and the enforcement of voting rights.

By attending the symposium researchers could learn more about the following:

- How District Election Officers are trained, e.g. what they are taught to focus their resources on, how they are instructed to respond to various types of complaints
- How information about previous election and voting issues is presented
- How the Voting Rights Act, the criminal laws governing election fraud and intimidation, the National Voter Registration Act, and the Help America Vote Act are described and explained to participants

***Recommendation 8: Employ Academic or Individual to Conduct Statistical Research***

Included in this report is a summary of various methodologies political scientists and others suggested to measure voter fraud and intimidation. While we note the skepticism of the Working Group in this regard, we nonetheless recommend that in order to further the mission of providing unbiased data, further activity in this area include an academic institution and/or individual that focuses on sound, statistical methods for political science research.

***Recommendation 9: Explore Improvements to Federal Law***

Finally, consultant Tova Wang recommends that future researchers review federal law to explore ways to make it easier to impose either civil or criminal penalties for acts of intimidation that do not necessarily involve racial animus and/or a physical or economic threat.

According to Craig Donsanto, long-time Director of the Election Crimes Branch, Public Integrity Section, Criminal Division of the U.S. Department of Justice:

As with other statutes addressing voter intimidation, in the absence of any jurisprudence to the contrary, it is the Criminal Division's position that section 1973gg-10(1) applies only to intimidation which is accomplished through the use of threats of physical or economic duress. Voter "intimidation" accomplished through less drastic means may present violations of the Voting Rights Act, 42 U.S.C. § 1973i(b), which are enforced by the Civil Rights Division through noncriminal remedies.<sup>v</sup>

Mr. Donsanto reiterated these points to us on several occasions, including at the working group meeting.

As a result, researchers should examine if there is some way in which current law might be revised or new laws passed that would reach voter intimidation that does not threaten the voter physically or financially, but rather threatens the voter's right to vote as a tangible value in itself. Such an amendment or law would reach all forms of voter intimidation, no matter if it is motivated by race, party, ethnicity or any other criteria. The law would then *potentially* cover, for example, letters and postcards with language meant to deter voters from voting and both pre-election and Election Day challengers that are clearly mounting challenges solely on illegitimate bases.

In the alternative to finding a way to criminalize such behavior, researchers might examine ways to invigorate measures to deter and punish voter intimidation under the civil law. For example, there might be a private right of action created for voters or groups who have been subjected to intimidation tactics in the voting process. Such an action could be brought against individual offenders; any state or local actor where there is a pattern of repeated abuse in the jurisdiction that such officials did not take sufficient action against; and organizations that intentionally engage in intimidating practices. As a penalty upon finding liability, civil damages could be available plus perhaps attorney's fees.

Another, more modest measure would be, as has been suggested by Ana Henderson and Christopher Edley,<sup>vi</sup> to bring parity to fines for violations under the Voting Rights Act. Currently the penalty for fraud is \$10,000 while the penalty for acts to deprive the right to vote is \$5,000.

### **Working Group Recommendations**

#### ***Recommendation 1: Employ Observers To Collect Data in the 2006 and/or 2008 Elections***

At the working group meeting, there was much discussion about using observers to collect data regarding fraud and intimidation at the polls in the upcoming elections. Mr. Ginsberg recommended using representatives of both parties for the task. Mr. Bauer and others objected to this, believing that using partisans as observers would be unworkable and would not be credible to the public.

There was even greater concern about the difficulties in getting access to poll sites for the purposes of observation. Most states strictly limit who can be in the polling place. In addition, there are already so many groups doing observation and monitoring at the polls, administrators might object. There was further concern that observers would introduce a variable into the process that would impact the outcome. The very fact that observers were present would influence behavior and skew the results.

Moreover, it was pointed out, many of the problems we see now with respect to fraud and intimidation does not take place at the polling place, e.g. absentee ballot fraud and deceptive practices. Poll site monitoring would not capture this activity. Moreover, with

increased use of early voting, poll site monitoring might have to go on for weeks to be effective, which would require tremendous resources.

Mr. Weinberg suggested using observers in the way they are utilized in international elections. Such observers come into a jurisdiction prior to the election, and use standardized forms at the polling sites to collect data.

***Recommendation 2: Do a Study on Absentee Ballot Fraud***

The working group agreed that since absentee ballot fraud is the main form of fraud occurring, and is a practice that is great expanding throughout the country, it would make sense to do a stand-alone study of absentee ballot fraud. Such a study would be facilitated by the fact that there already is a great deal of information on how, when, where and why such practices are carried out based on cases successfully prosecuted. Researchers could look at actual cases to see how absentee ballot fraud schemes are conducted in an effort to provide recommendations on more effective measures for preventing them.

***Recommendation 3: Use Risk Analysis Methodology to Study Fraud<sup>1</sup>***

Working group members were supportive of one of the methodologies recommended for studying this issue, risk analysis. As Mr. Bauer put it, based on the assumption that people act rationally, do an examination of what types of fraud people are most likely to commit, given the relative costs and benefits. In that way, researchers can rank the types of fraud that are the easiest to commit at the least cost with the greatest effect, from most to least likely to occur. This might prove a more practical way of measuring the problems than trying to actually get a number of acts of fraud and/or intimidation occurring. Mr. Greenbaum added that one would want to examine what conditions surrounding an election would be most likely to lead to an increase in fraud. Mr. Rokita objected based on his belief that the passions of partisanship lead people to not act rationally in an election.

***Recommendation 4: Conduct Research Using Database Comparisons***

Picking up on a suggestion made by Spencer Overton and explained in the suggested methodology section, Mr. Hearne recommended studying the issue using statistical database matching. Researchers should compare the voter roll and the list of people who actually voted to see if there are “dead” and felon voters. Because of the inconsistent quality of the databases, however, a political scientist would need to work in an appropriate margin of error when using such a methodology.

***Recommendation 5: Conduct a Study of Deceptive Practices***

The working group discussed the increasing use of deceptive practices, such as flyers with false and/or intimidating information, to suppress voter participation. A number of

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<sup>1</sup> See Appendix C, and section on methodology

groups, including the Department of Justice, the EAC, and organizations such as the Lawyers Committee for Civil Rights, keep phone logs regarding complaints of such practices, which may be available for review and analysis. This is also an area in which there is often tangible evidence, such as copies of the flyers and postcards themselves. All of this information should be reviewed and analyzed to see how such practices are being conducted and what can be done about them.

***Recommendation 6: Study Use of HAVA Administrative Complaint Procedure As Vehicle for Measuring Fraud and Intimidation***

The EAC should study the extent to which states are actually utilizing the administrative complaint procedure mandated by HAVA. In addition, the EAC should study whether data collected through the administrative complaint procedure can be used as another source of information for measuring fraud and intimidation.

***Recommendation 7: Examine the Use of Special Election Courts***

Given that many state and local judges are elected, it may be worth exploring whether special election courts that are running before, during and after election day would be an effective means of disposing with complaints and violations in an expeditious manner. Pennsylvania employs such a system, and the EAC should consider investigating how well it is working to deal with fraud and intimidation problems.

## Key Working Group Observations and Concerns

### Working Group Observations

1. ***The main problems today are structural barriers to voting and administrative error.*** Mr. Perez observed that, in accordance with the research, the biggest issues today are structural barriers to voting, not stealing votes. Election administrators share this view. Election fraud is negligible, and to the extent it occurs, it needs to be prosecuted with stronger criminal laws. The biggest problem is properly preparing people, which is the responsibility of election administrators.
2. ***Most fraud and intimidation is happening outside of the polling place.*** Mr. Greenbaum observed that with respect to both voter fraud and voter suppression, such as deceptive practices and tearing up voter registration forms, most of that is taking place outside of the polling place.
3. ***This issue cannot be addressed through one study or one methodology alone.*** Mr. Weinberg observed that since there is such a variety in types of fraud and intimidation, one solution will not fit all. It will be impossible to obtain data or resolve any of these problems through a single method.
4. ***The preliminary research conducted for this project is extremely valuable.*** Several of the working group members complimented the quality of the research done and although it is only preliminary, thought it would be useful and informative in the immediate future.
5. ***The Department of Justice is exploring expanding its reach over voter suppression activities.*** In the context of the conversation about defining voter intimidation, Mr. Donsanto pointed out that while voter intimidation was strictly defined by the criminal law, his section is beginning to explore the slightly different concept of vote suppression, and how to pursue it. He mentioned the phone-jamming case in New Hampshire as an initial success in this effort. He noted that he believes that vote suppression in the form of deceptive practices ought to be a crime and the section is exploring ways to go after it within the existing statutory construct. Mr. Bauer raised the example of a party sending people dressed in paramilitary outfits to yell at people as they go to the polls, telling them they have to show identification. Mr. Donsanto said that under the laws he has to work with today, such activity is not considered corrupt. He said that his lawyers are trying to “bend” the current laws to address aggravated cases of vote suppression, and the phone-jamming case is an example of that. Mr. Donsanto said that within the Department, the term vote “suppression” and translating it into a crime is a “work in progress.”

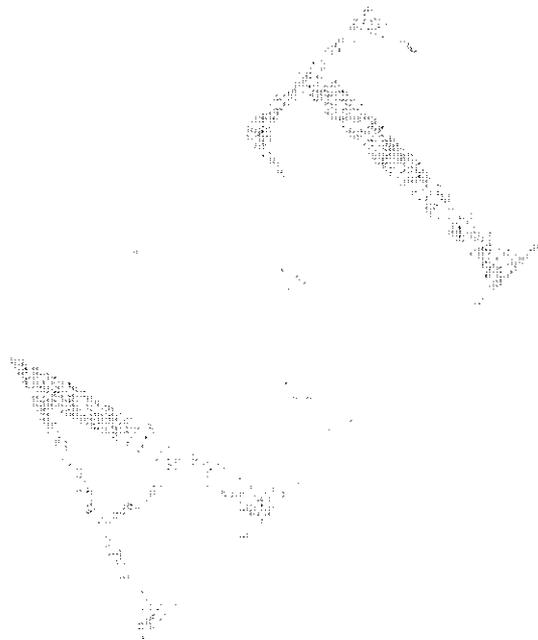
6. **Registration fraud does not translate into vote fraud.** Ms. Rogers, Mr. Donsanto and others stated that although phony voter registration applications turned in by people being paid by the form was a problem, it has not been found in their experience to lead to fraudulent voters at the polls. Ms. Rogers said such people were motivated by money, not defrauding the election.
7. **Handling of voter fraud and intimidation complaints varies widely across states and localities.** Ms. Rogers and others observed that every state has its own process for intake and review of complaints of fraud and intimidation, and that procedures often vary within states. The amount of authority secretaries of state have to address such problems also is different in every state. Mr. Weinberg stated he believed that most secretaries of state did not have authority to do anything about these matters. Participants discussed whether secretaries ought to be given greater authority so as to centralize the process, as HAVA has mandated in other areas.

### Working Group Concerns

1. Mr. Rokita questioned whether the purpose of the present project ought to be on assessing the level of fraud and where it is, rather than on developing methods for making such measurements. He believed that methodology should be the focus, “rather than opinions of interviewees.” He was concerned that the EAC would be in a position of “adding to the universe of opinions.”
2. Mr. Rokita questioned whether the “opinions” accumulated in the research “is a fair sampling of what’s out there.” Ms. Wang responded that one of the purposes of the research was to explore whether there is a method available to actually quantify in some way how much fraud there is and where it is occurring in the electoral process. Mr. Rokita replied that “Maybe at the end of the day we stop spending taxpayer money or it’s going to be too much to spend to find that kind of data. Otherwise, we will stop it here and recognize there is a huge difference of opinion on that issue of fraud, when it occurs is obtainable, and that would possibly be a conclusion of the EAC.” Ms. Sims responded that she thought it would be possible to get better statistics on fraud and there might be a way of “identifying at this point certain parts in the election process that are more vulnerable, that we should be addressing.”
3. Mr. Rokita stated that, “We’re not sure that fraud at the polling place doesn’t exist. We can’t conclude that.”
4. Mr. Rokita expressed concern about working with a political scientist. He believes that the “EAC needs to be very careful in who they select, because all the time and effort and money that’s been spent up to date and would be spent in the future could be invalidated by a wrong selection in the eyes of some group.”

**NEXIS Charts**

**Case Charts**



**Appendix 1**  
**List of Individuals Interviewed**

Wade Henderson, Executive Director, Leadership Conference for Civil Rights

Wendy Weiser, Deputy Director, Democracy Program, The Brennan Center

William Groth, attorney for the plaintiffs in the Indiana voter identification litigation

Lori Minnite, Barnard College, Columbia University

Neil Bradley, ACLU Voting Rights Project

Nina Perales, Counsel, Mexican American Legal Defense and Education Fund

Pat Rogers, attorney, New Mexico

Rebecca Vigil-Giron, Secretary of State, New Mexico

Sarah Ball Johnson, Executive Director of the State Board of Elections, Kentucky

Stephen Ansolobhere, Massachusetts Institute of Technology

Chandler Davidson, Rice University

Tracey Campbell, author, *Deliver the Vote*

Douglas Webber, Assistant Attorney General, Indiana, (defendant in the Indiana voter identification litigation)

Heather Dawn Thompson, Director of Government Relations, National Congress of American Indians

Jason Torchinsky, Assistant General Counsel, American Center for Voting Rights

Robin DeJarnette, Executive Director, American Center for Voting Rights

Joseph Rich, former Director of the Voting Section, Civil Rights Division, U.S. Department of Justice

Joseph Sandler, Counsel to the Democratic National Committee

John Ravitz, Executive Director, New York City Board of Elections

John Tanner, Director, Voting Section, Civil Rights Division, U.S. Department of Justice

Kevin Kennedy, Executive Director of the State Board of Elections, Wisconsin  
Evelyn Stratton, Justice, Supreme Court of Ohio

Tony Sirvello, Executive Director, International Association of  
Clerks, Records, Election Officials and Treasurers

Harry Van Sickle, Commissioner of Elections, Pennsylvania

Craig Donsanto, Director, Public Integrity Section, U.S. Department of Justice

Sharon Priest, former Secretary of State, Arkansas

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**Appendix 2**  
**List of Literature Reviewed**

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People for the American Way and the NAACP, "The Long Shadow of Jim Crow," December 6, 2004.

Laughlin McDonald, "The New Poll Tax," *The American Prospect* vol. 13 no. 23, December 30, 2002.

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Milwaukee Police Department, Milwaukee County District Attorney's Office, Federal Bureau of Investigation, United States Attorney's Office "Preliminary Findings of Joint Task Force Investigating Possible Election Fraud," May 10, 2005.

National Commission on Federal Election Reform, "Building Confidence in U.S. Elections," Center for Democracy and Election Management, American University, September 2005.

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Chandler Davidson, Tanya Dunlap, Gale Kenny, and Benjamin Wise, "Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both?" A Report to the Center for Voting Rights & Protection, September, 2004.

Alec Ewald, "A Crazy Quilt of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law," The Sentencing Project, November 2005.

American Center for Voting Rights "Vote Fraud, Intimidation and Suppression in the 2004 Presidential Election," August 2, 2005.

The Advancement Project, "America's Modern Poll Tax: How Structural Disenfranchisement Erodes Democracy" November 7, 2001

The Brennan Center and Professor Michael McDonald "Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General," The Brennan Center for Justice at NYU School of Law, December 2005.

Democratic National Committee, "Democracy at Risk: The November 2004 Election in Ohio," DNC Services Corporation, 2005

Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2002."

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Craig Donsanto, "The Federal Crime of Election Fraud," Public Integrity Section, Department of Justice, prepared for Democracy.Ru, n.d., at [http://www.democracy.ru/english/library/international/eng\\_1999-11.html](http://www.democracy.ru/english/library/international/eng_1999-11.html)

People for the American Way, Election Protection 2004, Election Protection Coalition, at <http://www.electionprotection2004.org/edaynews.htm>

Craig Donsanto, "Prosecution of Electoral Fraud Under United State Federal Law," *IFES Political Finance White Paper Series*, IFES, 2006.

General Accounting Office, "Elections: Views of Selected Local Election Officials on Managing Voter Registration and Ensuring Eligible Citizens Can Vote," Report to Congressional Requesters, September 2005.

Lori Minnite and David Callahan, "Securing the Vote: An Analysis of Election Fraud," Demos: A Network of Ideas and Action, 2003.

People for the American Way, NAACP, Lawyers Committee for Civil Rights, "Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections," December 2004.

#### **Books**

John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy*, Encounter Books, 2004.

Andrew Gumbel, *Steal this Vote: Dirty Elections and the Rotten History of Democracy in American*, Nation Books, 2005.

Tracy Campbell, *Deliver the Vote: A History of Election Fraud, An American Political Tradition – 1742-2004*, Carroll & Graf Publishers, 2005.

David E. Johnson and Jonny R. Johnson, *A Funny Thing Happened on the Way to the White House: Foolhardiness, Folly, and Fraud in the Presidential Elections, from Andrew Jackson to George W. Bush*, Taylor Trade Publishing, 2004.

Mark Crispin Miller, *Fooled Again*, Basic Books, 2005.

**Legal**

*Indiana Democratic Party vs. Rokita*, U.S. District Court Southern District of Indiana (Indianapolis) 1:05-cv-00634, U.S. Court of Appeals, 7<sup>th</sup> Circuit 06-2218

*Common Cause of Georgia vs. Billups*, U.S. District Court, Northern District of Georgia (Rome) 4:05-cv-00201-HLM U.S. Court of Appeals, 11<sup>th</sup> Circuit 05-15784

U.S. Department of Justice Section 5 Recommendation Memorandum (regarding HB 244), August 25, 2005 at

<http://www.votingrights.org/news/downloads/Section%205%20Recommendation%20Memorandum.pdf>

### Appendix 3

## Excerpt from “Machinery of Democracy,” a Brennan Center Report

### APPENDIX C

#### BRENNAN CENTER TASK FORCE ON VOTING SYSTEM SECURITY, LAWRENCE NORDEN, CHAIR

Excerpted from pp. 8-19

### METHODOLOGY

The Task Force concluded, and the peer review team at NIST agreed, that the best approach for comprehensively evaluating voting system threats was to: (1) identify and categorize the potential threats against voting systems, (2) prioritize these threats based upon an agreed upon metric (which would tell us how difficult each threat is to accomplish from the attacker's point of view), and (3) determine, utilizing the same metric employed to prioritize threats, how much more difficult each of the catalogued attacks would become after various sets of countermeasures are implemented.

This model allows us to identify the attacks we should be most concerned about (*i.e.*, the most practical and least difficult attacks). Furthermore, it allows us to quantify the potential effectiveness of various sets of countermeasures (*i.e.*, how difficult the least difficult attack is after the countermeasure has been implemented). Other potential models considered, but ultimately rejected by the Task Force, are detailed in Appendix B.

### IDENTIFICATION OF THREATS

The first step in creating a threat model for voting systems was to identify as many potential attacks as possible. To that end, the Task Force, together with the participating election officials, spent several months identifying voting system vulnerabilities. Following this work, NIST held a Voting Systems Threat Analysis Workshop on October 7, 2005. Members of the public were invited to write up and post additional potential attacks. Taken together, this work produced over 120 potential attacks on the three voting systems. They are detailed in the catalogs annexed.<sup>20</sup> Many of the attacks are described in more detail at <http://vote.nist.gov/threats/papers.htm>.

The types of threats detailed in the catalogs can be broken down into nine categories: (1) the insertion of corrupt software into machines prior to Election Day; (2) wireless and other remote control attacks on voting machines on Election Day; (3) attacks on tally servers; (4) miscalibration of voting machines; (5) shut off of voting machine features intended to assist voters; (6) denial of service attacks; (7) actions by corrupt poll workers or others at the polling place to affect votes cast; (8) vote buying schemes; (9) attacks on ballots or VVPT. Often, the actual attacks

involve some combination of these categories. We provide a discussion of each type of attack in “Categories of Attacks,” *infra* at pp. 24–27.

### **PRIORITIZING THREATS: NUMBER OF INFORMED PARTICIPANTS AS METRIC**

Without some form of prioritization, a compilation of the threats is of limited value. Only by prioritizing these various threats could we help election officials identify which attacks they should be most concerned about, and what steps could be taken to make such attacks as difficult as possible. As discussed below, we have determined the level of difficulty for each attack where the attacker is attempting to affect the outcome of a close statewide election.<sup>21</sup>

There is no perfect way to determine which attacks are the least difficult, because each attack requires a different mix of resources – well-placed insiders, money, programming skills, security expertise, *etc.* Different attackers would find certain resources easier to acquire than others. For example, election fraud committed by local election officials would always involve well-placed insiders and a thorough understanding of election procedures; at the same time, there is no reason to expect such officials to have highly skilled hackers or first-rate programmers working with them. By contrast, election fraud carried out by a foreign government would likely start with plenty of money and technically skilled attackers, but probably without many conveniently placed insiders or detailed knowledge of election procedures.

Ultimately, we decided to use the “number of informed participants” as the metric for determining attack difficulty. An attack which uses fewer participants is deemed the easier attack.

We have defined “informed participant” as someone whose participation is needed to make the attack work, and who knows enough about the attack to foil or expose it. This is to be distinguished from a participant who unknowingly assists the attack by performing a task that is integral to the attack’s successful execution without understanding that the task is part of an attack on voting systems.

The reason for using the security metric “number of informed participants” is relatively straightforward: the larger a conspiracy is, the more difficult it would be to keep it secret. Where an attacker can carry out an attack by herself, she need only trust herself. On the other hand, a conspiracy that requires thousands of people to take part (like a vote-buying scheme) also requires thousands of people to keep quiet. The larger the number of people involved, the greater the likelihood that one of them (or one who was approached, but declined to take part) would either inform the public or authorities about the attack, or commit some kind of error that causes the attack to fail or become known.

Moreover, recruiting a large number of people who are willing to undermine the integrity of a statewide election is also presumably difficult. It is not hard to imagine two or three people agreeing to work to change the outcome of an election. It seems far less likely that an attacker could identify and employ hundreds or thousands of similarly corrupt people without being discovered.

We can get an idea of how this metric works by looking at one of the threats listed in our catalogs: the vote-buying threat, where an attacker or attackers pay individuals to vote for a particular candidate. This is Attack Number 26 in the PCOS Attack Catalog<sup>22</sup> (though this attack would not be substantially different against DREs or DREs w/ VVPT).<sup>23</sup> In order to work under our current types of voting systems, this attack requires (1) at least one person to purchase votes, (2) many people to agree to sell their votes, and (3) some way for the purchaser to confirm that the voters she pays actually voted for the candidate she supported. Ultimately, we determined that, while practical in smaller contests, a vote-buying attack would be an exceptionally difficult way to affect the outcome of a statewide election. This is because, even in a typically close statewide election, an attacker would need to involve thousands of voters to ensure that she could affect the outcome of a statewide race.<sup>24</sup>

For a discussion of other metrics we considered, but ultimately rejected, see Appendix C.

## **DETERMINING NUMBER OF INFORMED PARTICIPANTS**

### **DETERMINING THE STEPS AND VALUES FOR EACH ATTACK**

The Task Force members broke down each of the catalogued attacks into its necessary steps. For instance, Attack 12 in the PCOS Attack Catalog is “Stuffing Ballot Box with Additional Marked Ballots.”<sup>25</sup> We determined that, at a minimum, there were three component parts to this attack: (1) stealing or creating the ballots and then marking them, (2) scanning marked ballots through the PCOS scanners, probably before the polls opened, and (3) modifying the poll books in each location to ensure that the total number of votes in the ballot boxes was not greater than the number of voters who signed in at the polling place.

Task Force members then assigned a value representing the minimum number of persons they believed would be necessary to accomplish each goal. For PCOS Attack 12, the following values were assigned:<sup>26</sup>

**Minimum number required to steal or create ballots: 5 persons total.<sup>27</sup>**

**Minimum number required to scan marked ballots: 1 per polling place attacked.**

**Minimum number required to modify poll books: 1 per polling place attacked.<sup>28</sup>**

After these values were assigned, the Brennan Center interviewed several election officials to see whether they agreed with the steps and values assigned to each attack.<sup>29</sup> When necessary, the values and steps were modified. The new catalogs, including attack steps and values, were then reviewed by Task Force members. The purpose of this review was to ensure, among other things, that the steps and values were sound.

These steps and values tell us how difficult it would be to accomplish a *single attack in a single polling place*. They do not tell us how many people it would take to change the outcome of an election successfully – that depends, of course, on specific facts about the jurisdiction: how many votes are generally recorded in each polling

006560

place, how many polling places are there in the jurisdiction, and how close is the race? For this reason, we determined that it was necessary to construct a hypothetical jurisdiction, to which we now turn.

**NUMBER OF INFORMED PARTICIPANTS NEEDED TO CHANGE STATEWIDE ELECTION**

We have decided to examine the difficulty of each attack in the context of changing the outcome of a reasonably close statewide election. While we are concerned by potential attacks on voting systems in any type of election, we are most troubled by attacks that have the potential to affect large numbers of votes. These are the attacks that could actually change the outcome of a statewide election with just a handful of attack participants.

We are less troubled by attacks on voting systems that can only affect a small number of votes (and might therefore be more useful in local elections). This is because there are many non-system attacks that can also affect a small number of votes (*i.e.*, sending out misleading information about polling places, physically intimidating voters, submitting multiple absentee ballots, *etc.*). Given the fact that these non-system attacks are likely to be less difficult in terms of number of participants, financial cost, risk of detection, and time commitment, we are uncertain that an attacker would target *voting machines* to alter a small number of votes.

In order to evaluate how difficult it would be for an attacker to change the outcome of a statewide election, we created a composite jurisdiction. The composite jurisdiction was created to be representative of a relatively close statewide election. We did not want to examine a statewide election where results were so skewed toward one candidate (for instance, the re-election of Senator Edward M. Kennedy in 2000, where he won 73% of the vote<sup>30</sup>), that reversing the election results would be impossible without causing extreme public suspicion. Nor did we want to look at races where changing only a relative handful of votes (for instance, the Governor's race in Washington State in 2004, which was decided by a mere 129 votes<sup>31</sup>) could affect the outcome of an election; under this scenario, many of the potential attacks would involve few people, and therefore look equally difficult.

We have named our composite jurisdiction "the State of Pennasota." The State of Pennasota is a composite of ten states: Colorado, Florida, Iowa, Ohio, New Mexico, Pennsylvania, Michigan, Nevada, Wisconsin and Minnesota. These states were chosen because they were the ten "battleground" states that Zogby International consistently polled in the spring, summer, and fall 2004.<sup>32</sup> These are statewide elections that an attacker would have expected, ahead of time, to be fairly close.

We have also created a composite election, which we label the "Governor's Race" in Pennasota. The results of this election are a composite of the actual results in the same ten states in the 2004 Presidential Election.

We have used these composites as the framework by which to evaluate the difficulty of the various catalogued attacks.<sup>33</sup> For instance, we know a ballot-box stuffing attack would require roughly five people to create and mark fake ballots, as

well as one person per polling place to stuff the boxes, and one person per polling place to modify the poll books. But, in order to determine how many informed participants would be needed to affect a statewide race, we need to know how many polling places would need to be attacked.

The composite jurisdiction and composite election provide us with information needed to answer these questions: *i.e.*, how many extra votes our attackers would need to add to their favored candidate's total for him to win, how many ballots our attackers can stuff into a particular polling place's ballot box without arousing suspicion (and related to this, how many votes are generally cast in the average polling place), how many polling places are there in the state, *etc.* We provide details about both the composite jurisdiction and election in the section entitled "Governor's Race, State of Pennasota, 2007," *infra* at pp 20–27.

#### LIMITS OF INFORMED PARTICIPANTS AS METRIC

Of the possible metrics we considered, we believe that measuring the number of people who know they are involved in an attack (and thus could provide evidence of the attack to the authorities and/or the media), is the best single measure of attack difficulty; as already discussed, we have concluded that the more people an attacker is forced to involve in his attack, the more likely it is that one of the participants would reveal the attack's existence and foil the attack, perhaps sending attackers to jail. However, we are aware of a number of places where the methodology could provide us with questionable results.

By deciding to concentrate on size of attack team, we mostly ignore the need for other resources when planning an attack. Thus, a software attack on DREs which makes use of steganography<sup>34</sup> to hide attack instruction files (*see* "DRE w/ VVPT Attack No.1a" discussed in greater detail, *infra* at pp. 62–65) is considered easier than an attack program delivered over a wireless network at the polling place (*see* discussion of wireless networks, *infra* at pp. 85–91). However, the former attack probably requires a much more technologically sophisticated attacker.

Another imperfection with this metric is that we do not have an easy way to represent how much choice the attacker has in finding members of his attack team. Thus, with PCOS voting, we conclude that the cost of subverting a routine audit of ballots is roughly equal to the cost of intercepting ballot boxes in transit and substituting altered ballots (*see* discussion of PCOS attacks, *infra* at pp. 77–83). However, subverting the audit team requires getting a specific set of trusted people to cooperate with the attacker. By contrast, the attacker may be able to decide which precincts to tamper with based on which people he has already recruited for his attack.

In an attempt to address this concern, we considered looking at the number of "insiders" necessary to take part in each attack. Under this theory, getting five people to take part in a conspiracy to attack a voting system might not be particularly difficult. But getting five well-placed county election officials to take part in the attack would be (and should be labeled) the more difficult of the two attacks. Because, for the most part, the low-cost attacks we have identified do not necessarily involve well placed insiders (but could, for instance, involve one of many people with access to commercial off the shelf software ("COTS") during development

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or at the vendor), we do not believe that using this metric would have substantially changed our analysis.<sup>35</sup>

Finally, these attack team sizes do not always capture the logistical complexity of an attack. For example, an attack on VVPT machines involving tampering with the voting machine software and also replacing the paper records in transit requires the attacker to determine what votes were falsely produced by the voting machine and print replacement records in time to substitute them. While this is clearly possible, it raises a lot of operational difficulties – a single failed substitution leaves the possibility that the attack would be detected during the audit of ballots.

We have tried to keep these imperfections in mind when analyzing and discussing our least difficult attacks.

We suspect that much of the disagreement between voting officials and computer security experts in the last several years stems from a difference of opinion in prioritizing the difficulty of attacks. Election officials, with extensive experience in the logistics of handling tons of paper ballots, have little faith in paper and understand the kind of breakdowns in procedures that lead to traditional attacks like ballot box stuffing; in contrast, sophisticated attacks on computer voting systems appear very difficult to many of them. Computer security experts understand sophisticated attacks on computer systems, and recognize the availability of tools and expertise that makes these attacks practical to launch, but have no clear idea how they would manage the logistics of attacking a paper-based system. Looking at attack team size is one way to bridge this difference in perspective.

## EFFECTS OF IMPLEMENTING COUNTERMEASURE SETS

The final step of our threat analysis is to measure the effect of certain countermeasures against the catalogued attacks. How much more difficult would the attacks become once the countermeasures are put into effect? How many more informed participants (if any) would be needed to counter or defeat these countermeasures?

Our process for examining the effectiveness of a countermeasure mirrors the process for determining the difficulty of an attack: we first asked whether the countermeasure would allow us to detect an attack with near certainty. If we agreed that the countermeasure would expose the attack, we identified the steps that would be necessary to circumvent or defeat the countermeasure. For each step to defeat the countermeasure, we determined the number of additional informed participants (if any) that an attacker would need to add to his team. As with the process for determining attack difficulty, the Brennan Center interviewed numerous election officials to see whether they agreed with the steps and values assigned. When necessary, the values and steps for defeating the countermeasures were altered to reflect the input of election officials.

## COUNTERMEASURES EXAMINED

### BASIC SET OF COUNTERMEASURES

The first set of countermeasures we looked at is the “Basic Set” of countermeasures. This Basic Set was derived from security survey responses<sup>36</sup> we received

from county election officials around the country, as well as additional interviews with more than a dozen current and former election officials. Within the Basic Set of countermeasures are the following procedures:

### **Inspection**

The jurisdiction is not knowingly using any uncertified software that is subject to inspection by the Independent Testing Authority (often referred to as the “ITA”).<sup>37</sup>

### **Physical Security for Machines**

- Ballot boxes (to the extent they exist) are examined (to ensure they are empty) and locked by poll workers immediately before the polls are opened.
- Before and after being brought to the polls for Election Day, voting systems for each county are locked in a single room in a county warehouse.
- The warehouse has perimeter alarms, secure locks, video surveillance and regular visits by security guards.
- Access to the warehouse is controlled by sign-in, possibly with card keys or similar automatic logging of entry and exit for regular staff.
- Some form of “tamper evident” seals are placed on machines before and after each election.
- The machines are transported to polling locations five to fifteen days before Election Day.

### **Chain of Custody/Physical Security of Election Day Records**

- At close of the polls, vote tallies for each machine are totaled and compared with number of persons that have signed the poll books.
- A copy of totals for each machine is posted at each polling place on Election Night and taken home by poll workers to check against what is posted publicly at election headquarters, on the web, in the papers, or elsewhere.<sup>38</sup>
- All audit information (*i.e.*, Event Logs, VVPT records, paper ballots, machine printouts of totals) that is not electronically transmitted as part of the unofficial upload to the central election office, is delivered in official, sealed and hand-delivered information packets or boxes. All seals are numbered and tamper-evident.
- Transportation of information packets is completed by two election officials representing opposing parties who have been instructed to remain in joint custody of the information packets or boxes from the moment it leaves the precinct to the moment it arrives at the county election center.