



"Tova Wang" <wang@tcf.org>

09/27/2006 03:51 PM

To twilkey@eac.gov
cc tomwilkey@comcast.net
bcc

Subject Board status report

History

 This message has been replied to.

Hi Tom,

Got your message. Thanks. Job and I actually did not do the presentation, Peg did. Attached is what she sent to us at the time as what she was presenting, but I was not actually in attendance <<...>> .

Tova

Tova Andrea Wang, Democracy Fellow
The Century Foundation
1333 H Street, NW, Washington, D.C. 20005

Visit our Web site, www.tcf.org, for the latest news, analysis, opinions, and events.



PS EAC Board Status Report.doc

008548

INTRODUCTION

LEGAL AUTHORITY

Section 241 of the Help America Vote Act of 2002 (HAVA) requires EAC to conduct research on election administration issues. Among the tasks listed in the statute is the development of:

- nationwide statistics and methods of identifying, deterring, and investigating voting fraud in elections for Federal office [section 241(b)(6)]; and
- ways of identifying, deterring, and investigating methods of voter intimidation [section 241(b)(7)].

IMPETUS FOR AND FOCUS OF CURRENT RESEARCH

EAC's Board of Advisors recommended that the agency make research on these matters a high priority. In September 2005, the Commission hired two consultants with expertise on these subject matters (Job Serebrov and Tova Wang) to:

- develop a comprehensive description of what constitutes voting fraud and voter intimidation in the context of Federal elections;
- perform background research (including Federal and State administrative and case law review), identify current activities of key government agencies, civic and advocacy organizations regarding these topics, and deliver a summary of this research and all source documentation;
- establish a project working group, in consultation with EAC, composed of key individuals and representatives of organizations knowledgeable about the topics of voting fraud and voter intimidation;
- provide the description of what constitutes voting fraud and voter intimidation and the results of the preliminary research to the working group, and convene the working group to discuss potential avenues for future EAC research on this topic; and
- produce a report to EAC summarizing the findings of the preliminary research effort and working group deliberations that includes recommendations for future research, if any;

PROJECT WORKING GROUP

Consultants and EAC worked together to select members for the Voting Fraud-Voter Intimidation Working Group that included election officials and representatives of advocacy groups and the legal community who have an interest and expertise in the subject matter. (See Attachment A for a list of members.)

The Working Group is scheduled to meet at EAC offices on May 18, 2006 to consider the results of the preliminary research and to offer ideas for future EAC activities concerning this subject.

DEFINITION OF ELECTION FRAUD

The consultants drafted a definition of election fraud that includes numerous aspects of voting fraud (including voter intimidation, which is considered a subset of voting fraud), but excluding campaign finance violations and election administration mistakes. This draft will be discussed by the Working Group and probably refined.

LITERATURE REVIEW

The consultants found many reports and books that describe anecdotes and draw broad conclusions from a large array of incidents. They found little research that is truly systematic or scientific. The most systematic look at **fraud** appears to be the report written by Lori Minnite, entitled "Securing the Vote: An Analysis of Election Fraud". The most systematic look at voter intimidation appears to be the report by Laughlin McDonald, entitled "The New Poll Tax". Books written about this subject seem to all have a political bias and a pre-existing agenda that makes them somewhat less valuable.

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, "Stealing Elections". 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.

Consultants found that 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. Consultants suggest that this gap will be filled in the "second phase" of this EAC project.

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.

INTERVIEWS

The consultants jointly selected experts from ???

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 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.
- Several advocate expanded monitoring of the polls, including some associated with the Department of Justice.
- Almost everyone hopes that administrators will maximize the potential of statewide voter registration databases to prevent fraud.
- 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

NEWS ARTICLES

Consultants conducted a search of related Nexis articles published between ? and ? The search terms used were jointly agreed upon, and are available upon request. A systematic, numerical analysis of the data collected during this review is currently being prepared. What follows is an overview provided by the consultants.

Overview of the Articles

???

Absentee Ballots

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; and
- 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 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; and
- 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 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 took 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 (attached). 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

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 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.

Recommendation

Phase 2 should include a Nexis search that specifically attempts to follow up on the cases for which no resolution is evident from this particular initial search.

CASE LAW RESEARCH

After reviewing over 40,000 cases from 2000 to the present, the majority of which came from appeals courts, consultants found comparatively 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.

Recommendation

Because so few cases provided a picture of these current problems, consultants suggest that case law research for the second phase of this project concentrate on state trial-level decisions.

FINAL REPORT

Attachment A

Voting Fraud-Voter Intimidation Project Working Group

The Honorable Todd Rokita

Indiana Secretary of State

Member, EAC Standards Board and the Executive Board of the Standards Board

Kathy Rogers

Georgia Director of Elections, Office of the Secretary of State

Member, EAC Standards Board

J.R. Perez

Guadalupe County Elections Administrator, TX

Barbara Arnwine

Executive Director, Lawyers Committee for Civil Rights Under Law

Leader of Election Protection Coalition

(To be represented at May 18, 2006 meeting by Jon M. Greenbaum, Director of the Voting Rights Project for the Lawyers Committee for Civil Rights Under Law)

Robert Bauer

Chair of the Political Law Practice at the law firm of Perkins Coie, DC

National Counsel for Voter Protection, Democratic National Committee

Benjamin L. Ginsberg

Partner, Patton Boggs LLP

Counsel to national Republican campaign committees and Republican candidates

Mark (Thor) Hearne II

Partner-Member, Lathrop & Gage, St Louis, MO

National Counsel to the American Center for Voting Rights

Barry Weinberg

Former Deputy Chief and Acting Chief, Voting Section, Civil Rights Division, U.S.

Department of Justice

EAC Invited Technical Advisor:

Craig Donsanto

Director, Election Crimes Branch, U.S. Department of Justice

Attachment B

Rough Summary of Department of Justice

Public Integrity Section Activities

October 2002-January 2006¹

Prosecutions and Convictions-- Individuals

Noncitizen voting: 20
Vote buying: 49
Double voting: 12
Registration fraud: 13
Civil Rights: 4
Voter Intimidation: 2
Unclear: 1

Open Investigations (note: a few cases overlap with prosecutions and convictions)

Noncitizen voting: 3
Vote buying: 25
Double voting: 15
Registration fraud: 29
Absentee ballot fraud: 9
Official: 8
Ineligibles: 4
Deceptive Practices: 1
Civil Rights: 14
Intimidation: 6
Other: 2

Cases and Investigations Closed for Lack of Evidence

Civil Rights: 8
Official: 12
Registration Fraud: 12
Absentee Ballot Fraud: 14
Ineligible Voting: 3
Intimidation: 8
Double Voting: 5

¹ Based upon information available as of January 2006

Ballot Box Stuffing: 1

Vote Buying: 14

Ballot/machine tampering: 2

Other: 8

Unclear: 3

Attachment C

MAJOR VOTE BUYING CASES SUMMARY

Between 2001 and 2006, allegations and convictions for vote buying and conspiracies to buy votes were concentrated in three states: Illinois, West Virginia and Kentucky.

In East St. Louis, Illinois, nine individuals, including a former city council member and the head of the local Democratic Party, Charles Powell, Jr., were convicted or pled guilty to vote buying and conspiracy to commit election fraud during the 2004 general election. The government's conspiracy case was almost entirely based on taped conversations in which the defendants discussed buying votes for \$5 and whether this would be adequate. Federal prosecutors alleged that the vote buying was financed with \$79,000 transferred from the County Democratic Party shortly before the election, although county officials have not been charged. Four defendants were convicted of purchasing or offering to purchase at least one vote directly, while Democratic Party chairman was only convicted of conspiracy.² Earlier, three precinct officials and one precinct worker pled guilty to buying votes for \$5 or \$10 in that same election.³

Eastern Kentucky has witnessed a series of vote buying cases over the last several years. The most recent revolved around Ross Harris, a Pike County political fundraiser and coal executive, and his associate Loren Glenn Turner. Harris and Turner were convicted in September 2004 of vote buying, mail fraud, and several other counts.⁴ Prosecutors alleged Harris and Turner conspired to buy votes and provided the necessary funds in an unsuccessful 2002 bid for Pike County district judge by former State Senator Doug Hays. Harris supplied nearly \$40,000, Turner laundered the money through straw contributors, and the cash was then disbursed in the form of \$50 checks ostensibly for 'vote hauling', the legal practice of paying campaign workers to get voters to the polls which is notorious as a cover for buying votes.⁵ Harris attempted to influence the race on behalf of Hays in order to get revenge on Hays' opponent for a personal matter.⁶

² "Five convicted in federal vote-fraud trial" Associated Press, June 30, 2005; "Powell gets 21 months" Belleville News-Democrat, March 1, 2006.

³ "Four Plead Guilty To Vote-Buying Cash Was Allegedly Supplied By St. Clair Democratic Machine" Belleville News-Democrat, March 23, 2005.

⁴ "2 found guilty in pike county vote-fraud case; Two-year sentences possible," Lexington Herald Leader, September 17, 2004.

⁵ "Jury weighing vote-fraud case," Lexington Herald Leader, September 16, 2004.

⁶ "Pike Election Trial Goes To Jury" Lexington Herald Leader, January 1, 2006.

A grand jury initially indicted 10 individuals in connection with the Harris and Turner case, including Hays and his wife, and six campaign workers. Of the remaining defendants, only one, Tom Varney, also a witness in the Hays case, pled guilty. The others were either acquitted of vote buying charges or had vote buying charges dropped.⁷ Prosecutors have announced that their investigation continues into others tied to Harris and may produce further indictments.

The Harris case follows a series of trials related to the 1998 Knott County Democratic primary. Between 2003 and 2004, 10 individuals were indicted on vote buying charges, including a winning candidate in those primaries, Knott County judge-executive Donnie Newsome, who was reelected in 2002. In 2004 Newsome and a supporter were sent to jail and fined. Five other defendants pled guilty to vote buying charges, and three were acquitted. The primary means of vote buying entailed purchasing absentee votes from elderly, infirm, illiterate or poor voters, usually for between \$50 and \$100. This resulted in an abnormally high number of absentee ballots in the primary.⁸ Indictments relating to that same 1998 primary were also brought in 1999, when 6 individuals were indicted for buying the votes of students at a small local college. Five of those indicted were convicted or pled guilty.⁹

Absentee vote buying was also an issue in 2002, when federal prosecutors opened an investigation in Kentucky's Clay County after an abnormal number of absentee ballots were filed in the primary and the sheriff halted absentee voting twice over concerns.¹⁰ Officials received hundreds of complaints of vote-buying during the 2002 primary, and state investigators performed follow up investigations in a number of counties, including Knott, Bell, Floyd, Pike, and Maginoff.¹¹ No indictments have been produced so far.

So far, relatively few incidents of vote-buying have been substantially identified or investigated in the 2004 election. Two instances of vote buying in local 2004 elections have been brought before a grand jury. In one, a Casey County man was indicted for purchasing votes in a local school board race with cash and whiskey.¹² In the second, the grand jury chose not to indict an

⁷ "Former state senator acquitted of vote buying," Lexington Herald Leader, November 2, 2004.

⁸ "Knott County, KY., Judge Executive sentenced on vote-buying conspiracy charges," Department of Justice, March 16, 2004.

⁹ "6 men accused of vote fraud in '98 Knott primary; Charges include vote buying and lying to FBI"

¹⁰ "Election 2002: ABSENTEE BALLOTING; State attorney general's office investigates voting records in some counties" The Courier-Journal, November 7, 2002.

¹¹ "Election 2002: Kentucky; VOTE FRAUD; Investigators monitor 17 counties across state" The Courier-Journal, November 6, 2002.

¹² "Jury finds man guilty on vote-buying charges" Associated Press, November 11, 2005.

individual accused of offering to purchase a teenager's vote on a local proposal with beer.¹³

An extensive vote buying conspiracy has also been uncovered in southern West Virginia. The federal probe, which handed down its first indictment in 2003, has yielded more than a dozen guilty pleas to charges of vote buying and conspiracy in elections since the late 1980s. As this area is almost exclusively dominated by the Democratic Party, vote-buying occurred largely during primary contests.

The first phase of the probe focused on Logan County residents, where vote buying charges were brought in relation to elections in 1996, 2000, 2002 and 2004. In an extraordinary tactic, the FBI planted the former mayor of Logan City, Tom Esposito, as a candidate in a state legislative race. Esposito's cooperation led to guilty pleas from the Logan County Clerk, who pled guilty to selling his vote to Esposito in 1996,¹⁴ and another man who took money from Esposito for the purpose of vote buying in 2004.¹⁵

Guilty pleas were also obtained in connection with former county sheriff Johnny Mendez, who pled guilty to buying votes in two primary elections in order to elect candidates including himself. In 2000, with a large amount of funding from a prominent local lawyer seeking to influence a state delegate election for his wife, Mendez distributed around \$10,000 in payments to voters of \$10 to \$100. Then, in the 2004 primary, Mendez distributed around \$2,000 before his arrest.¹⁶ A deputy of Mendez', the former Logan police chief, also pled guilty to a count of vote buying in 2002.¹⁷

Prosecutors focusing on neighboring Lincoln County have alleged a long-standing vote-buying conspiracy extending back to the late 1980s. The probe identified Lincoln County Circuit Clerk Greg Stowers as head of a Democratic Party faction which routinely bought votes in order to maintain office. Stowers pled guilty in December 2005 to distributing around \$7,000 to buy votes in the 2004 primary. The Lincoln County Assessor, and Stowers' longtime political ally, Jerry Allen Weaver, also pled guilty to conspiracy to buy votes.¹⁸ These were accompanied by four other guilty pleas from party workers for vote buying in primaries. While most specific charges focused on

¹³ "Man in beer vote case files suit" The Cincinnati Enquirer, March 17, 2005.

¹⁴ "Two plead to vote fraud; Logan clerk sold vote; politician tried to buy votes" Charleston Gazette, December 14, 2005.

¹⁵ "Logan man gets probation in vote-fraud scandal" Charleston Gazette, March 1, 2006.

¹⁶ "Mendez confined to home for year Ex-Logan sheriff was convicted of buying votes" Charleston Gazette, January 22, 2005.

¹⁷ "Ex-Logan police sentenced for buying votes" Associated Press, February 15, 2005.

¹⁸ "Clerk says he engaged in vote buying" Charleston Gazette, December 30, 2005.

vote buying in the 2004 primary, defendants also admitted buying votes as far back as the 1988, 1990, and 1992 primaries.

The leading conspirators would give party workers candidate slates and cash, which workers would then take to the polling place and use to purchase votes for amounts between \$10 and \$40 and in one instance, for liquor. Voters would be handed the slate of chosen candidates, and would then be paid upon exiting the polling place. In other cases, the elected officials in question purchased votes in exchange for non-cash rewards, including patronage positions, fixed tickets, favorable tax assessments, and home improvements.¹⁹

The West Virginia probe is ongoing, as prosecutors are scrutinizing others implicated during the proceedings so far, including a sitting state delegate, who may be under scrutiny for vote buying in a 1990 election, and one of the Lincoln county defendants who previously had vote buying charges against him dropped.²⁰

¹⁹ "Lincoln clerk, two others plead guilty to election fraud" Charleston Daily Mail, December 30, 2005.

²⁰ "Next phase pondered in federal vote-buying probe" Associated Press, January 1, 2006.

Attachment D

SUMMARY OF RECENT IRREGULARITIES IN SOUTH DAKOTA, WASHINGTON STATE, AND WISCONSIN

Summary of South Dakota Election Irregularities in 2002 and 2004

2002

In fall 2002, one of South Dakota's Senators, Democrat Tim Johnson, was up for re-election, and was engaged in a very close race with his Republican challenger, John Thune. Both parties were engaged in a massive voter registration effort, and registered over 24,000 new voters in the five months between the June primary and the November election, increasing the number of registered voters in the state from around 452,000 to 476,000.²¹

A month before the election, several counties reported irregularities in some of the voter registration documents they'd received. In response to these reports, South Dakota Attorney General, Mark Barnett, with the state US Attorney and the FBI, launched an investigation.²² Because of the importance of the race in determining the partisan balance of power in the Senate, the voter registration discrepancies got a good deal of national press, including a number of editorials accusing American Indians of stuffing ballot boxes.²³ The following allegations were also picked up by out-of-state newssources, including Fox News and the Wall Street Journal:

- Supporters of Thune, who lost the election by 524 votes, collected 47 affidavits from poll watchers claiming voting irregularities.
- Allegations were made that three individuals were offered money by Johnson supporters to vote.

Barnett, who was alerted to the affidavits when he read an early media report that referred to them, stated that these allegations were either false or didn't warrant concern. "Most of the stuff that's in those other 47 affidavits are the kind of problems that we see in every election. People parking too close to the polling place with a sign in their window, people shooting their

²¹ Kafka, Joe. "More people registered to vote." *Associated Press State and Local Wire*. October 29, 2002.

²² Kafka, Joe. "Voter registration fraud being investigated." *Associated Press State and Local Wire*. October 11, 2002.

²³ "Barnett: No evidence that fraud affected vote." *Associated Press State and Local Wire*. Sioux Falls, South Dakota. November 21, 2002.

mouths off at the polling place. The kind of things that local election officials generally do a pretty good job of policing.”²⁴ The allegations of voter bribery were false.

Though most of the allegations of fraud that were filed turned out to be false, Attorney General Barnett’s investigation did uncover two cases of voter registration fraud:

- The most high-profile case was that of Becky Red Earth-Villeda. Ms. Red Earth-Villeda was hired by the state Democratic party to register voters on the American Indian reservations. She was charged with 19 counts of forgery. No fraudulent voting was associated with Ms. Red Earth-Villeda, nor was there any evidence that fraudulent voting occurred in the state.²⁵ All charges were dropped in January 2004, when, in court, it was determined by the state handwriting specialist that Ms. Red Earth-Villeda had not forged the signatures.²⁶
- Lyle Nichols. Mr. Nichols was arrested for submitting five forged voter registration cards to his county office. He was working for an organization called the Native American Voter Registration Project, and was paid \$3 for each registration. The five charges were dropped after Mr. Nichols pleaded guilty to possession of a forgery, and was sentenced with 54 days in jail, which is how much time he’d already spent there because of the charges.²⁷

2004

In October 2004, just before the general election, eight people working for a campus GOP Get-out-the-Vote organization resigned their positions after they were accused of submitting absentee ballot requests that had not been notarized properly. Because many of these ballot requests had already been processed and the ballots themselves had been cast, county auditors decided not to pursue the issue.²⁸

Besides this incident, there were no reports of voter registration or voting irregularities in the run-up to the November 2004 election, as there were in

²⁴ Kafka, Joe. “Woman charged in voter-fraud case, other claims false.” *Associated Press State and Local Wire*. Pierre, South Dakota. December 14, 2002.

²⁵ Kafka, Joe. “Woman charged in voter-fraud case, other claims false.” *Associated Press State and Local Wire*. Pierre, South Dakota. December 14, 2002.

²⁶ Walker, Carson. “Charges dropped against woman accused of voter fraud.” *Associated Press State and Local Wire*. Sioux Falls, South Dakota. January 28, 2004.

²⁷ “Rapid City man arrested for voter fraud.” *Associated Press State and Local Wire*. Rapid City, South Dakota. October 18, 2002.

²⁸ Melmer, David. “Voting problems resurface in South Dakota.” *Indian Country Today*. October 27, 2004.

2002.²⁹ However, as with the primary and special elections in June 2004, there were complaints about voter intimidation from American Indians attempting to vote, as well as difficulties with the adoption of the state's new photo identification regulations (after the 2002 election, the state legislature passed more stringent requirements about the kind of identification voters would need to provide at the polls.)

Incidents:

Voter Intimidation: The Four Directions Committee, an organization dedicated to helping American Indians register to vote and get to the polls, got a temporary restraining order on several Republican supporters who, they alleged, had been setting up video equipment outside of polling places on American Indian reservations and following around American Indians who voted early and recording their license plates. ³⁰

Vote Buying: A Republican election monitor from Virginia, Paul Brenner, claimed that Senator Tom Daschle's campaign was paying people to vote. Local county auditors believe Brenner started the rumor himself. As there was no evidence for either side, the claims were not taken seriously. ³¹

Summary of Election Irregularities in Washington State 2004

The 2004 Washington state gubernatorial election was decided by one of the narrowest margins in American electoral history; 261 votes – less than a millionth of the 2.8 million votes cast statewide - separated the leading candidate, Republican Dino Rossi, from his competitor, Democrat Christine Gregoire. The state law-mandated recount that followed brought the margin down to 42 votes, and the subsequent hand recount ordered by the state Democratic Party gave Gregoire the lead, with 129 more votes than Rossi.

The race was so close that the parties decided to go to court to dispute the tally – the Republicans wanted the election results set aside and to have a revote; the Democrats sought a court-legitimated win. Each side set out into the field to find a way to swing the election in their favor. The trial and accompanying investigation, which lasted through the spring of 2005, revealed a litany of problems with the state's election system:

²⁹ Melmer, David. "Election Day goes smoothly on Pine Ridge, S.D., reservation." *Indian Country Today*. November 10, 2004.

³⁰ Walker, Carson. "Observer alleges vote buying; worker says he never went to Pine Ridge." *Associated Press State and Local Wire*. October 31, 2004.

³¹ Walker, Carson. "Some problems and oddities reported on Election Day." *Associated Press State and Local Wire*. November 2, 2004.

- The process by which absentee ballots are matched to the voters who requested them led to discrepancies between the number of absentee ballots received and the number of votes counted.³²
- After the final certification of the election results, King County discovered 96 uncounted absentee ballots, Pierce county found 64, and Spokane County found eight; all had been misplaced following the election, but there was no mechanism for reconciling the number of absentee ballots received with the number counted.³³
- Hundreds of felons who were ineligible to vote were able to cast ballots because they were not aware that they needed to apply to have their voting rights re-instated.³⁴
- The system for verifying the eligibility of voters who had cast provisional ballots was found to be questionable.³⁵
- Due to poll worker error, about 100 provisional ballots were improperly cast, and a hundred more were counted, though they were not verified as having been cast by eligible voters.³⁶

The trial also revealed that most of these problems were the result of understaffing and human error.³⁷ In total, 1,678 ballots were proven to have been cast illegally, but none of these votes was subtracted from the candidates' totals because no evidence was produced in court as to how each individual voted.³⁸ Further, despite the scrutiny that the election returns revealed, and the extensive discussion of voter fraud throughout the investigation, just eight cases of voter fraud were discovered:

- 4 people were accused of casting absentee ballots for their deceased spouses.³⁹
- A mother and daughter were charged with the absentee ballot of the mother's husband who had died earlier in the year
- 1 man cast the ballot of the deceased prior resident of his home.

³² Ervin, Keith. "County elections official demoted; 2004 balloting fallout – Chief predicts 'series of changes'." *The Seattle Times*. June 15, 2005. See also Postman, David. "Judge left to mull vote-fraud claim." *The Seattle Times*. June 5, 2005.

³³ Ervin, Keith. "Voters irked by uncounted ballots." *The Seattle Times*. June 17, 2005.

³⁴ Postman, David. "Judge left to mull vote-fraud claim." *The Seattle Times*. June 5, 2005.

³⁵ Roberts, Gregory. "GOP contrasts elections offices; Chelan County's work better than King's, judge in gubernatorial case told." *The Seattle Post-Intelligencer*. May 25, 2005.

³⁶ Ervin, Keith. "Prosecutors to challenge 110 voters; They are said to be felons – 2 counties discover uncounted ballots." *The Seattle Times*. April 29, 2005.

³⁷ Ervin, Keith. "King County ballot numbers don't add up; 4000 discrepancies – Review of records finds flaws at each stage of the election; voting, processing, counting." *The Seattle Times*. May 25, 2005.

³⁸ Borders v. King County. Court's Oral Decision. 6. June. 2005.

³⁹ Johnson, Gene. "Two plead guilty to voting twice in 2004 general election." *Associated Press*. June 2, 2005.

- A homeless resident of Seattle cast two ballots, one in the name of Dustin Ocoilain.⁴⁰

Summary of Wisconsin Voting Irregularities November 2004

Instances of Illegal Voting, Milwaukee:

A probe led by U.S. Attorney Steve Biskupic and Milwaukee County District Attorney Michael McCann found about 200 cases of illegal felon voting and at least 100 cases of other forms of illegal voting in the city of Milwaukee. Of these, 14 were prosecuted:

- 10 were instances of felons voting while on probation or parole:
- 5 are awaiting trial. (one of them is DeShawn Brooks)⁴¹
- 1 has been acquitted⁴²
- 1 has been found guilty in trial (Kimberly Prude)²
- 3 have reached plea agreements (Milo Ocasio⁴³)
- [names: Ethel M. Anderson, Correan F. Edwards, Jiyto L. Cox, Joseph J. Gooden⁴⁴]

- 4 were instances of double voting:
- 1 produced a hung jury (Enrique Sanders)²
- 1 was found incompetent to stand trial and his case was dismissed
- 1 initially pleaded guilty but now wants a trial.⁴⁵
- 1 is awaiting trial.

Two of those accused of double voting were driven to multiple polling places in a van, but the identity of the driver of the vehicle is not known, and the DA does not suspect conspiracy.⁴⁶

In addition to these, four people were charged with felonies in the Milwaukee County Circuit Court; two cases were filed against people accused of sending in false registration cards under the auspices of the Association of

⁴⁰ Ervin, Keith. "6 accused of casting multiple votes; King County voters face criminal charges - Jail time, fines possible." *Seattle Times*. June 22, 2005.

⁴¹ Barton, Gina. "Man acquitted in voter fraud trial; Felon had been under supervision at time." *Milwaukee Journal-Sentinel*. October 6, 2005.

⁴² Schultze, Steve. "No vote fraud plot found. Inquiry leads to isolated cases, Biskupic says." *Milwaukee Journal-Sentinel*. December 5, 2005.

⁴³ "Felon says he voted illegally." *Milwaukee Journal-Sentinel*. September 17, 2005.

⁴⁴ Barton, Gina. "4 charged with voting illegally in November." *Milwaukee Journal-Sentinel*. August 17, 2005.

⁴⁵ Milwaukee J-S. December 5, 2005.

⁴⁶ Milwaukee J-S. December 5, 2005.

Community Organizations for Reform Now; the other two were felons who voted illegally.⁴⁷

Instances of Illegal Voting, Statewide:

The Legislative Audit Bureau, a nonpartisan research agency, released its analysis of state-wide 2004 election results in September 2005. The agency reviewed the names, addresses, and birthdates of over 348,000 individuals credited with having voted in November 2004, from the electronic voter registration records of 6 cooperating municipalities, and compared them to lists from the Department of Corrections of felons serving sentences on election day, and to lists from the municipalities (to check up on double-voting) and to lists from the US Social Security Administration. LAB's search revealed 105 "questionable" votes:

- 98 ballots cast by ineligible felons, 57 of which were in Madison, 2 in Waukesha, 15 in Eau Claire, 16 in Appleton, 1 in the Village of Ashwaubenon
- 2 instances of double-voting (one in Madison, one in Waukesha).
- 4 votes counted despite the voter's having died two weeks or less before the election.
- 1 case in which a 17-year-old voted in Madison.⁴⁸

The LAB referred the names of these people to the appropriate District Attorney for prosecution, and several cases are awaiting trial.

It should be noted that this study is not a complete survey of election returns state-wide in Wisconsin; the LAB's analysis is based on the voting records of the six municipalities that provided the LAB with sufficient information to conduct this study.

It should also be noted that the LAB discovered significant error in the data provided them by these municipalities, including:

- 91 records in which the individual's birthdate was incorrectly recorded as later than November 2, 1986;
- 97 cases in which a person was mistakenly recorded as having voted twice; and
- More than 15,000 records were missing birthdates, making it more difficult to determine voter eligibility by comparing these records to lists of felons and deceased persons.⁴⁹

⁴⁷ Milwaukee J-S. December 5, 2005.

⁴⁸ Borowski, Greg J. "State audit digs up wider vote problems; Thousands of voters on rolls more than once." *Milwaukee Journal-Sentinel*. September 17, 2005

General Findings

Both reports (the Legislative Audit Bureau's and the report of the Joint Task Force on Election Reform convened in Milwaukee) that did in-depth studies of the Wisconsin election returns in 2004 found that there was no evidence of systematic, wide-spread fraud.⁵⁰ As the above statistics indicate, there are very few cases in which an individual intentionally voted illegally, and the majority of the discovered instances of fraudulent voting involved felons who were unaware that they were committing a crime. Certainly the number of fraudulent votes, intentional and unintentional, is dwarfed by the amount of administrative error – and the amount of potential there was for fraud.

Registration Irregularities

Duplicate Registrations: In the data from the six participating municipalities, LAB found 3116 records for individuals who appear to be registered more than once in the same municipality (0.9% of the records they reviewed). These duplications were primarily the result of name changes, in which the registrar neglected to remove the old name from the registration list, previous addresses that were not deleted, and misspellings and other typographical errors.

Deceased Voters: The LAB study found 783 persons who were deceased, but whose records had not been eliminated from the registration lists. Most of the municipalities participating in the survey rely on obituaries and notifications from family members to purge their voter registration lists of deceased voters.

Felons: Comparing a list of felons from the Department of Corrections to their voter registration data lists, LAB found 453 felons who were registered to vote. This is largely because, although municipal clerks are informed of federal felony convictions, they have no way of obtaining records on state felony convictions.⁵¹

⁴⁹ "An Evaluation: Voter Registration." *Legislative Audit Bureau*. Madison, Wisconsin. September 2005. Pg. 50-52.

⁵⁰ Brinkman, Phil. "Voting fraud in November not a problem in Madison; Nearly all suspect voters turn out to be people who moved or made innocent mistakes." *Wisconsin State Journal*. May 11, 2005.

⁵¹ Legislative Audit Bureau Report: pg 43-47.



U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

OFFICE OF THE CHAIRMAN

October 19, 2006

Ralph G. Neas
President, People for the American Way Foundation
2000 M Street, NW
Suite 400
Washington, DC 20036

Via Facsimile Transmission ONLY
202-293-2672

RE: October 18, 2006 Letter

Dear Mr. Neas:

Your letter of October 18, 2006 requests the release of EAC's Voter Fraud and Intimidation Report. I would like to take this opportunity to clarify the purpose and status of this study.

In late 2005, EAC hired two consultants for the purpose of assisting EAC with two things: 1) developing a uniform definition of the phrase voter fraud, and 2) making recommendations on how to further study the existence, prosecution, and means of deterring such voter fraud. In May 2006, a status report on this study was given to the EAC Standards Board and EAC Board of Advisors during their public meetings. During the same week, a working group convened to react to and provide comment on the progress and potential conclusions that could be reached from the work of the two consultants.

The conversation at the working group meeting was lively on the very points that we were trying to accomplish as a part of this study, namely what is voter fraud and how do we pursue studying it. Many of the proposed conclusions that were suggested by the consultants were challenged by the working group members. As such, the consultants were tasked with reviewing the concerns expressed at the working group meeting, conducting additional research as necessary, and providing a draft report to EAC that took into account the working group's concerns and issues.

That draft report is currently being vetted by EAC staff. EAC will release a final report from this study after it has conducted a review of the draft provided by the consultants. However, it is important to remember the purpose of this study -- finding a uniform definition of voter fraud and making recommendations on how to study the existence, prosecution and deterrence of voter fraud -- as it will serve as the basis of the EAC report on this study.

Thank you for your letter. You can be assured that as soon as a final report on the fraud and intimidation study is available, a copy will be made available to the public.

Sincerely,

Paul S. DeGregorio
Chairman

Margaret Sims/EAC/GOV
10/25/2006 11:59 AM

To Thomas R. Wilkey/EAC/GOV@EAC
cc ecartes@eac.gov
bcc
Subject Re: Question-Voting Fraud-Voter Intimidation Report 

Tom:

I sent the consolidated draft of the report last week (minus the Nexis and case law charts) to the lawyers (with a cc: to you), along with the following comments:

- As you know, references to DOJ actions/responses have caused some concern at DOJ. But both consultants are adamantly opposed to EAC making substantive changes to their report. Perhaps using footnotes clearly labeled as EAC footnotes would be a method of addressing this issue?
- There are some recommendations regarding DOJ that we (the consultants and I) were told would not be supported by DOJ, and other references to DOJ, none of which have been reviewed by the department. I think we ought to give Craig Donsanto and John Tanner a chance to provide feedback on each of these sections.
- I am a little concerned about the naming of names, particularly in the section that addresses working group concerns. If we publish it as is, it might end up as fodder for some very negative newspaper articles.
- The report currently uses three different voices: third person, first person singular, first person plural. I think this looks really clumsy. If we are not actually making substantive changes, perhaps we could get away with making the presentation consistent in this regard.
- Because the consultants submitted the report in pieces, they did not include proper segues. I don't know if we should leave it as is, or insert them where needed.

The only comments I've received so far were from Gavin, who said, "I would put forth one point at the outset... if we are creating an EAC report, let create an EAC report. Tova and Job contract employees... I do not see why we can't use all, some or none of their work without footnote or comment."

The series of supporting charts can be found in the shared drawer under **T:\RESEARCH IN PROGRESS\VOTING FRAUD-VOTER INTIMIDATION\Report\Consolidated Copy** in the subfolders marked **Case Charts** and **Nexis Charts**. I continue to work on the formatting of these charts, but at least you and Edgardo can access them. (I would have attached copies to this message, but it would involve too many files.)

We may want to schedule a teleconference on this with the attorneys and Jeannie.

I hope you are feeling better. --- Peggy

Thomas R. Wilkey/EAC/GOV

Thomas R. Wilkey/EAC/GOV
10/25/2006 10:46 AM

To Margaret Sims/EAC/GOV@EAC
cc
Subject Question

**Deliberative Process
Privilege 008575**

Hi Peggy;

Sorry I missed you yesterday when you were here and hope you are beginning to feel better.

As you know the Voter Fraud and Intimidation Report is causing quite a stir.

Can you give me some ball park timeframe for how long it may take to wrap up our review and get a report to the Commissioners

Is there anything I can do to assist with getting you some help on this.

I know you have other things on your mind but I need to find a way to wrap this up soon.

Also I believe that there were some charts of some sort that were not included in the report we got from Tova and Job, are they available for Edgardo to find so that I may take a look at this.

Thanks so much and hope things are getting better for you.

Tom

Thomas R. Wilkey
Executive Director
US Election Assistance Commission
1225 New York Ave, NW - Suite 1100
Washington, DC 20005
(202) 566-3109 phone
TWilkey@eac.gov

008576



EAGLETON INSTITUTE OF POLITICS

Thomas Wilkey, Executive Director
U.S. Election Assistance Commission
1225 New York Avenue, NW, Suite 1100
Washington, D.C. 20005
Mailed and Faxed to (202) 566-3128

October 27, 2006

Dear Tom:

Thank you for faxing me a copy of your October 17th response to Wendy Weiser of the Brennan Center. We are pleased that you have made public the report on Provisional Voting but disappointed that you are not ready to do the same with our report on Voter Identification. We would appreciate knowing approximately when you expect to complete the review and consideration of advisory board concerns you mention to Ms. Weiser.

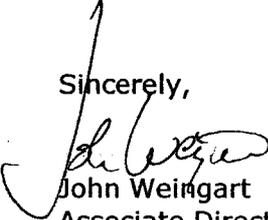
In the meantime, both Eagleton and Moritz plan to place the report on Provisional Voting on our websites along with a paper based on the data compiled for the Voter Identification report. Consistent with your letter faxed to us on August 31st, we plan to include approximately the following language:

"This report on *Best Practices To Improve Provisional Voting* was prepared by the Eagleton Institute of Politics at Rutgers University (Eagleton) and the Moritz College of Law at Ohio State University (Moritz) under contract to the U.S. Election Assistance Commission (EAC). It was submitted to the Commission on June 28th, 2006. Please note that the EAC has not yet made final determinations on the release of any future documents based on this report and its supporting data.

A separate report on *Best Practices To Improve Voter Identification Requirements* was prepared by Eagleton and Moritz under the same contract and also submitted to the EAC on June 28th, 2006. The Commission is currently reviewing this report and has asked that it not be made public until their review is complete. Timothy Vercellotti and David Anderson of Rutgers University's Eagleton Institute of Politics and Political Science Department respectively presented a paper based on the data compiled for this report at the 2006 meeting of the American Political Science Association. The paper, *Protecting The Franchise, or Restricting It? The Effects of Voter Identification Requirements on Turnout*, can be viewed by clicking here."

We look forward to your response concerning the release of the Voter Identification report. As always, please let us know if need additional information or if there are other ways in which we can be of assistance with your important and difficult work.

Sincerely,


John Weingart
Associate Director

191 RYDERS LANE, NEW BRUNSWICK, NJ 08901-8557

008577

Tel: (732) 932-9384 ext. 290
Fax: (732) 932-6778

THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS

E-mail: john.weingart@rutgers.edu
Web: www.eagleton.rutgers.edu

November 8, 2006

Mr. Tom Wilkey
Executive Director
U.S. Election Assistance Commission
1225 New York Ave., N.W., Suite 1100
Washington, DC 20005

Re: Request for Records Pursuant to the Freedom of Information Act

Dear Mr. Wilkey:

I write to follow up on the Freedom of Information Act ("FOIA") request I made to the Election Assistance Commission ("EAC") on October 11, 2006 for: (1) the report on voter identification prepared by the Eagleton Institute of Politics and the Moritz College of Law ("the voter ID report"), and (2) the report on voting fraud and voter intimidation prepared by Tova Wang and Job Serebrov, in consultation with a bipartisan work group ("the voting fraud report").¹ Both reports were prepared using federal funds distributed by the EAC and both were finalized and submitted to the EAC several months ago. I received your October 17, 2006 letter and the accompanying EAC status report, EAC board resolutions, and the report on provisional voting prepared by the Eagleton Institute of Politics and the Moritz College of Law. I thank you for the report on provisional voting and the other information, but unfortunately, the material you provided is only partially responsive to my request because it failed to include a copy of the voter ID report and the voting fraud report.

Under FOIA, any federal agency, including the EAC, is required to make records "promptly available to any person" who properly requests them. 5 U.S.C. § 552(a)(3)(A) (2006). If an agency decides to withhold the requested records, it must "immediately notify" the person making the request of the "reasons" for the agency's decision and of the person's right to appeal that decision. *Id.* § 552(a)(6)(A)(i). Your October 17 response, in addition to excluding the requested reports, provided no explanation as to why they were being withheld, as required by federal law. Since there is no basis for the EAC to withhold the voter ID and voting fraud reports, proffered or otherwise, I respectfully appeal your decision to deny access to those reports and also request expedited review.² Immediate disclosure of those reports is both in the public interest and within the EAC's statutory mandate to serve as a national clearinghouse on election-related information and to make studies available to the public.

¹ Unlike the usage adopted by the EAC in its October 26, 2006 public meeting, the term "report" in this letter does not refer to a report authored by the EAC or officially approved by the EAC and containing EAC recommendations. Rather, the term should be construed in its ordinary English meaning.

² Expedited review of our FOIA request is warranted under 5 U.S.C. § 552(a)(6)(E)(v)(II) (2006).

008578

Immediate Disclosure of the Requested Reports is in the Public Interest

The information and research contained in the voter ID and voting fraud reports are urgently needed to assist citizens, policymakers, and courts in their ongoing deliberations on issues of the highest public concern. As you are no doubt aware, the issues of voter ID and voting fraud are currently being considered in the courts, in Congress, and in the state legislatures.

Indeed, on October 20, 2006, three days after the EAC denied my request for the voter ID and voting fraud reports, a unanimous United States Supreme Court underscored the need for more research on voting fraud and the effects of voter ID requirements in the context of a case challenging Arizona's new voter ID law.³ Justice Stevens explained in his concurrence that factual information is needed to determine "the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements." The two factual issues identified by the Court are precisely the subjects of the voter ID and voting fraud reports being withheld by the EAC.

Public disclosure of the voter ID and voting fraud reports is important not only to assist the courts in examining the constitutionality of recently-enacted voter ID laws, but also to assist Congress and state legislatures in their deliberations over proposed voter ID legislation. For example, this summer, the U.S. House of Representatives passed a voter ID bill, H.R. 4844, which is currently being considered by the United States Senate. Given the dearth of studies and research on voter ID and voting fraud, the Senate's deliberations would be greatly enhanced by disclosure of the voter ID and voting fraud reports.

Given how quickly the issues of voter ID and voting fraud are being raised in the courts and in the legislatures, the public simply cannot afford any further delay in the release of the highly-anticipated voter ID and voting fraud reports. Scholars, advocates, and policy makers have long awaited the release of these reports, and many have refrained from undertaking similar studies in the interim. Because the data and other research in those reports were gathered over the course of many months, it would be impossible for others to collect similar information in time to inform the public debate.

The requested reports will provide an invaluable contribution to the national discussion on voter ID and voting fraud. Both reports were prepared by nationally-known experts on election administration. The voting fraud study was also prepared in consultation with a bipartisan working group that held a full-day meeting with the EAC and the researchers on May 18, 2006 to discuss the research results.⁴ Both reports consumed substantial time and resources: the EAC granted scholars from the Moritz College of Law and the Eagleton Institute of Politics the voter ID research contract in late 2004, and Tova Wang and Job Serebrov the voting fraud contract in September 2005. Both reports contain substantial data collected over many months of research. And, in both cases, the authors prepared and submitted final reports of their research

³ *Purcell v. Gonzalez*, 549 U.S. ___, 2006 WL 2988365, at *3 (2006) (noting that facts are "hotly contested").

⁴ U.S. Election Assistance Commission, *Status Report on the Voting Fraud-Voter Intimidation Research Project*, at 11 (May 17, 2006).

008579

to the EAC several months ago.⁵ The EAC is doing the public a disservice by refusing to release these important reports, at least one of which is within its exclusive control, in a timely manner.

Moreover, the EAC's decision to withhold these reports starkly contrasts with the express policies of other federal agencies that distribute public funds for studies. For example, policy of both the National Institutes of Health and National Science Foundation is to disclose as much information as possible so that the public, including other researchers, can examine and benefit from federally-funded research.⁶

The Brennan Center publishes and disseminates reports, publications, and other informational materials to educate individuals, institutions, the press, legislators, and other policymakers on a variety of issues, including issues related to voting and elections. As an organization primarily engaged in disseminating information, the Brennan Center is well-situated to make the information in the voter ID and voting fraud reports available to the public. The Center also intends to make use of the research in those reports to assist in our own research and proposals on issues of national concern.

Disclosure of the Requested Reports Is Within the EAC's Mandate

As you know, the Election Assistance Commission was established by Congress in the Help America Vote Act of 2002 ("HAVA") to "serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections."⁷ In other words, the EAC's primary function is to make information available to the public. It is inconsistent with this mission for the EAC to delay the release of valuable research, to suppress research with which some or even all Commissioners disagree, or to withhold research while the EAC determines its own position on the issues addressed by the requested reports.

The requested voter ID and voting fraud reports were prepared at the request of the EAC pursuant to the Commission's statutory duty to "conduct and *make available to the public* studies regarding . . . election administration issues."⁸ HAVA specifically mandated the EAC to make available studies concerning "nationwide statistics and methods of identifying, deterring, and investigating voting fraud in elections for Federal office," and "identifying deterring, and investigating methods of voter intimidation," among other things.⁹ It was in light of these statutory provisions that the EAC provided federal funding to well-respected experts to conduct research and prepare the voter ID and voting fraud reports. Those same provisions require the EAC to make those reports "available to the public."

⁵ Cf. *id.* ("After convening the project working group, the consultants will draft a final report summarizing the results of their research and the working group deliberations.")

⁶ See Nat'l Insts. of Health, NIH Grants Policy Statement: Availability of Research Results: Publications, Intellectual Property Rights, and Sharing Research Resources (2003), available at http://grants1.nih.gov/grants/policy/nihgps_2003/NIHGPs_Part7.htm#_Availability_of_Research; Nat'l Science Found., Policies & Important Links, available at <http://www.nsf.gov/policies/foia.jsp>.

⁷ 42 U.S.C.S. § 15322 (2006).

⁸ 42 U.S.C.S. § 15381(a) (2006) (emphasis added).

⁹ *Id.* § 15381(b)(6) - (7).

008580

In short, by withholding the requested reports, not only does the EAC violate the broad disclosure provisions of FOIA, discussed more fully below, but it also shirks its statutory responsibility to be a source of public information regarding election administration.

There is No Basis in Law for the EAC to Withhold the Requested Reports

Under FOIA, the EAC is required to disclose all requested documents within its control unless they fall into one of the enumerated statutory exemptions.¹⁰ These exemptions are very narrowly construed, because “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”¹¹ Moreover, to qualify for an exemption, the EAC is required to explain its reasons for withholding a document with specificity.¹² The EAC has simply not satisfied its burden of showing that the voter ID and voting fraud reports qualify for an exemption. Indeed, it cannot.

The Withheld Reports Do Not Qualify for a FOIA Exemption

Despite the fact that you gave no reason for the EAC’s decision to withhold the requested documents, based on your counsel’s statement at the Commission’s public meeting held on October 26, 2006,¹³ we assume that you intend to assert the deliberative process privilege under Exemption 5 of FOIA. That exemption, however, applies only to: (a) intra-agency memoranda that are both (b) predecisional, and (c) deliberative.¹⁴ The voter ID and voting fraud reports meet none of these criteria. Neither report can be said to reveal the decision-making or thought processes of the Commission in any way—which is the essence of the deliberative process privilege. That privilege does not apply here for three independent reasons.

First, although the requested reports are within the EAC’s exclusive control, they cannot be withheld as “intra-agency” memoranda because they were independently prepared by experts outside of the EAC. The mere receipt of federal funds to perform research does not transform an outsider into an arm of the agency.¹⁵ We do not dispute that, under certain circumstances, persons outside an agency can so actively participate in an agency’s policymaking process that they are appropriately considered part of the agency. But in this case, the report authors were essentially grantees whose work product lacked the “extensive, detailed, and virtually day-to-day supervision” that “convert[s] the acts of the [fund] recipient from private acts to governmental acts.”¹⁶

¹⁰ 5 U.S.C. § 552(a)-(b); *U. S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989) (documents over which agency obtains control are covered by FOIA).

¹¹ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); see also *Klamath*, 532 U.S. at 8; *id.* at 9 (purpose of exemptions “is not to protect Government secrecy pure and simple”).

¹² 5 U.S.C. § 552(a); see also *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 6 (6th Cir. 1980) (holding that “specificity and detail” are required in support of an Exemption 5 claim).

¹³ See http://www.eac.gov/public_meeting_102606.asp.

¹⁴ *Nat’l Council of La Raza v. U.S. Dep’t of Justice*, 411 F.3d 350, 356 (2d Cir. 2005).

¹⁵ *Forsham v. Harris*, 445 U.S. 169, 180 (1980); see also *Missouri v. U.S. Dep’t of Interior*, 297 F.3d 745, 750 (8th Cir. 2002).

¹⁶ *Forsham*, 445 U.S. at 180.

Second, the withheld reports are not “predecisional” because they were not prepared to assist the EAC in making a policy decision, but rather were commissioned pursuant to the agency’s statutory obligations under HAVA to disseminate studies.¹⁷ Predecisional documents are those “prepared in order to assist an agency decisionmaker in arriving at his decision.”¹⁸ They are typically drafts or “suggestions or recommendations as to what agency policy should be,” or “advice to a superior,” or “suggested dispositions of a case.”¹⁹ A document is only predecisional if the agency can demonstrate that the document is related to a specific decision confronting the agency. Here, however, “[n]o ‘decision’ is being made or ‘policy’ being considered”²⁰ in connection with the voter ID and voting fraud reports. The EAC did not fund those reports with the expectation that the reports would effectuate policies with the force of law or complete an adjudicatory process. Instead, the reports are “resource opinion[s]” about a state of facts completely unrelated to a tangential policy decision that the EAC may make.²¹ As a result, they are not predecisional. To the extent that the EAC claims that the reports relate to “a decision that possibly may be made at some undisclosed time in the future,” that is an insufficient basis to withhold them under Exemption 5.²²

Third, the withheld reports are not “deliberative” because they do not “reflect[] the give-and-take of the [agency’s] consultative process.”²³ The requested reports cannot become exempted from disclosure merely because the EAC is reviewing them.²⁴ A document is deliberative if its disclosure is likely “to stifle honest and frank communication within the agency.”²⁵ There is no danger that disclosure of the voter ID and voting fraud reports would stifle the agency’s communications, since they were prepared independently of the EAC and thus cannot reveal anything about any deliberations or candid communications within the EAC.

The Preparation of an EAC Report is no Justification for Withholding the Requested Reports

The EAC is obligated under FOIA and HAVA to disclose the requested reports regardless of whether it intends to write its own report on voter identification, as your letter suggests.²⁶

¹⁷ See 42 U.S.C.S. § 15381.

¹⁸ *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); see also *Nat’l Council of La Raza*, 411 F.3d at 356; *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002); *Carter v. U.S. Dep’t of Corr.*, 307 F.3d 1084, 1089 (9th Cir. 2002); *Ethyl Corp. v. U.S. Env’tl. Prot. Agency*, 25 F.3d 1241, 1248 (4th Cir. 1994); *Fl. House of Representatives v. U. S. Dep’t of Commerce*, 961 F.2d 941, 945 (11th Cir. 1992).

¹⁹ *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

²⁰ *Id.*

²¹ *Id.*

²² *Assembly of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992).

²³ *Coastal States*, 617 F.2d at 866.

²⁴ The DC Circuit has also rejected an interpretation of predecisional that “would result in a huge mass of material being forever screened from public view,” because “[t]he public has an interest in decisions deferred, avoided, or simply not taken for whatever reason, equal to its interest in decisions made, which from their very nature may more easily come to public attention than those never made.” *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975).

²⁵ *Coastal States*, 617 F.2d at 866.

²⁶ It is unclear as to why the EAC’s intent to write a report on voter identification would have any bearing on the EAC’s decision to withholding of the fraud report. Likewise, the inaccuracies in the provisional voting report alleged in your October 17 letter are wholly immaterial to the issue of whether the reports on voter ID and voting fraud should be disclosed. In any event, while inaccuracies may explain why the EAC would choose not to adopt a particular report, it is insufficient to support withholding the documents under FOIA. See *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1437 n.10 (D.C. Cir. 1992) (holding risk of public confusion “does not

Neither the voting fraud report nor the voter ID report could “inaccurately reflect or prematurely disclose the views of the agency,”²⁷ because both reports were written and reviewed by scholars outside the EAC and submitted to the EAC in final form. Factual material that does not reveal an agency’s deliberative process is not protected under Exemption 5,²⁸ nor are expert opinions that do not reflect the agency’s own deliberations concerning its own decision- or policy-making.²⁹ Moreover, the mere fact that the EAC might rely on information in the voter ID or voting fraud reports to issue its own report does not transform those reports into deliberative agency materials. As the United States Court of Appeals for the D.C. Circuit explained,

[A]nyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.³⁰

Any Segregable Information Must Be Released

Irrespective of any claimed exemptions, the EAC is under an obligation to release any “reasonably segregable” nonexempt information to requestors.³¹ Both the voter ID and voting fraud reports are unlikely to reveal anything about the deliberative process of the EAC, and to the extent that either does, those limited portions can be excised and the balance of the reports released.

Additional FOIA Request

In the event that the EAC denies my renewed request for the voter ID and voting fraud reports or delays another week in providing those materials, we respectfully request copies of (1) all requests for proposals and contracts relating to the voter ID and voting fraud reports; and (2) all written and electronic communications concerning the voter ID and voting fraud reports between the EAC and (a) the Eagleton Institute of Politics, (b) the Moritz College of Law, (c) Tova Wang, (d) Job Serebrov, and (e) any other individuals or entities, including but not limited

support a blanket exemption for information marred by errors”); *Assembly of Cal.*, 968 F.2d at 923 (“[I]t is not among FOIA’s functions to control the use of disclosed information.”); *Carter v. U.S. Dep’t of Commerce*, 186 F. Supp. 2d 1147, 1154 (D. Or. 2001) (“the determination of whether the rejected data is predecisional does not turn on the articulated reasons for its rejection) (internal quotation and citation omitted), *aff’d*, 307 F.3d 1084 (9th Cir. 2002); *Assembly of California v. U.S. Dep’t of Commerce*, 797 F. Supp. 1554, 1565-67 (D. Cal. 1992) (holding that information expressly prepared for public disclosure cannot be withheld under FOIA because it was ultimately rejected), *aff’d*, 968 F.2d 916 (9th Cir. 1992).; *see also* *Burka v. U.S. Dep’t of Health & Human Servs.*, 87 F.3d 508, 521 (D.C. Cir. 1996) (future publication of agency report is an insufficient justification for asserting an Exemption 5 privilege under FOIA).

²⁷ *Coastal States*, 617 F.2d at 866.

²⁸ *Local 3, Int’l Bhd. of Electrical Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988).

²⁹ *Parke, Davis & Co.*, 623 F.2d at 6.

³⁰ *Playboy Enters., Inc. v. U. S. Dep’t of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (remanding for the lower court to order disclosed investigative facts within a report the government wanted to withhold in its entirety).

³¹ 5 U.S.C. § 552(b).

008583

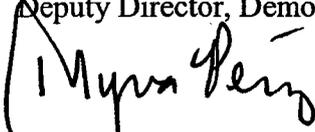
to outside reviewers. The public undoubtedly has a right to know under FOIA what the EAC is "up to."³²

Thank you for your attention to this matter. Because the country is making decisions concerning voter ID and voting fraud today, we trust that you will respond as soon as possible, and no later than in two weeks.

Sincerely,



Wendy R. Weiser
Deputy Director, Democracy Program



Myrna Pérez
Counsel

cc.

Hon. William H. Frist, United States Senate Majority Leader
Hon. Harry Reid, United States Senate Minority Leader
Hon. Dennis J. Hastert, Speaker of the House
Hon. Nancy Pelosi, Minority Leader, United States House of Representatives
Hon. Trent Lott, Chair, Senate Rules Committee
Hon. Christopher Dodd, Ranking Member, Senate Rules Committee
Hon. Vernon Ehlers, Chair, House Administration Committee
Hon. Juanita Millender-McDonald, Ranking Member, House Administration Committee
Chair Paul DeGregorio, U.S. Election Assistance Commission
Commissioner Gracia Hillman, U.S. Election Assistance Commission
Commissioner Donetta Davidson, U.S. Election Assistance Commission
Lloyd Leonard, League of Women Voters of the United States

³² *Assembly of Cal.*, 968 F.2d at 923 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

008584

To: Members of the United States Election Assistance Commission
Cc: Thomas Wilkey, Executive Director, and Julie Thompson Hodgkins, General Counsel, Election Assistance Commission
From: Tova Andrea Wang
Re: Project on Voter Fraud and Intimidation
Date: December 7, 2006

As one of the consultants and authors of the report on voter fraud and intimidation released by the Election Assistance Commission today, I am writing to request that the EAC restore the information that has been altered and removed from the research report we submitted to the EAC in July, 2006.

Job Serebrov and I spent over a year and hundreds of hours working on the report on voter fraud and voter intimidation in a bipartisan and highly effective manner. The report we wrote was a reflection of the detailed and laborious research we did over these many months. Unfortunately, the report the EAC released today does not fully reflect our research and the report of our findings submitted to the EAC in July, 2006.

After being unable to get any action taken on the report for months, I learned very recently that the General Counsel of the EAC would be taking responsibility for "revising" the report. On November 15 of this year I requested that Job Serebrov and I be permitted to review any revisions or changes made by EAC staff to the draft we submitted. We both offered to work collaboratively and cooperatively with EAC staff to ensure that the document produced was the most informative and useful product possible. This request was denied. Again, on November 29, 2006, upon learning that the report was to become public at an upcoming EAC meeting, I requested in writing that Job Serebrov and I be at least allowed to see embargoed copies of the report to be released before that December 7, 2006 meeting. That request was denied. On December 4, 2006 I offered to sign a confidentiality agreement whereby I would agree not to discuss the report before its public release. That request was also denied.

It is my understanding that with other research reports for which the EAC has contracted consultants there has been a process of give and take between the consultants and the EAC staff and commissioners prior to public release of the report. The consultants in this instance were repeatedly denied that opportunity, leading to today's result.

The issues around voter fraud and intimidation are controversial, making it all the more necessary that the research around it be as free from politics as possible. That is why the EAC made this project a bipartisan effort, with a bipartisan team of consultants and a bipartisan working group to inform and advise us on our work.

The EAC has a statutory obligation to provide the Congress and the American public the best research, data and guidance it can. Knowledge about the extent and nature of voter fraud and intimidation is fundamental to ensuring the right of every eligible American to vote and that every legitimate vote is counted.

008585

**Deliberative Process
Privilege**

I hope the EAC will reconsider its actions of today and release the report that was written by the consultants so that the Congress and the voters can engage in an informed and honest discussion about one of the most serious issues confronting our democracy today.

Please respond to this request by Monday, December 11. Thank you for your timely consideration.

CCS
GH
RR
@H
JT
GG
JL
TW
KLD



Committee on Rules and
Administration
United States Senate
Washington, DC 20510
202-224-6352
Fax (Main) 202-224-5400
Fax (Minority) 202-224-3036
Fax (Audit) 202-224-1912

Date: April 13, 2007
To: Donetta Davidson, EAC Chairman
From: Howard Gantman, Staff Director
Subj: Letter to Commission
Phone Number Called: (202) 566-3127
No. of Pages including Cover: 6

Comments:

Please find attached a letter from Senators Feinstein and Durbin.

United States Senate
WASHINGTON, DC 20510

April 12, 2007

The Honorable Donetta Davidson
Chairman
U.S. Election Assistance Commission
1225 New York Avenue, N.W.
Suite 1100
Washington, DC 20005

Dear Commissioner Davidson:

We are writing to seek a response to very troubling news reports that included allegations that the Commission may have altered or delayed release of two taxpayer-funded studies of election issues for political purposes.

While the Commission is within its rights to decide what guidance it issues to election officials, it is critical that its actions are not perceived as politically motivated and it is imperative that you provide full documentation about the Commission's proceedings on these matters.

On Wednesday, the *New York Times* reported that a bipartisan team of election law experts hired by the Commission to research voter fraud in federal elections found that there was little such fraud around the nation, but the Commission revised the report to say that the pervasiveness of voter fraud was still open to debate.

On Monday, *Roll Call* reported that the Commission two weeks ago rejected the findings of a report, prepared as part of a \$560,000 contract with Rutgers University's Eagleton Institute and Ohio State University's Moritz College of Law. That report found that voter identification laws may reduce election turnout, especially by minorities.

008588

Commissioner Davidson

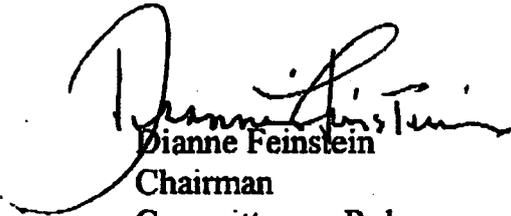
- 2 -

April 12, 2007

It is imperative that the Commission's actions and deliberations are unbiased, free from political influence and transparent. While the Commission does not have to agree with the experts who perform its research, it should make the research available unfettered and unfiltered.

Attached are a series of questions, we would like the Commission to address. We look forward to your timely response.

Sincerely,



Dianne Feinstein
Chairman
Committee on Rules
and Administration



Richard J. Durbin
Chairman
Subcommittee on Financial
Services and General
Government
Committee on Appropriations

We request information and documentation from the Commission that answer the following questions:

COMMISSION'S OVERSIGHT ON EAGLETON CONTRACT TO PERFORM A STUDY ON VOTER IDENTIFICATION

1. Did the Commissioners or Commission senior staff receive any outside communication or pressure to change or not release the entire draft report or portions of the draft language on the voter fraud report? If so, who made those requests?
2. Would you please provide a copy of the approved Request For Proposals, as well as any contract modifications that were agreed to between the Commission and Eagleton Institute and subcontractors?
3. Can you provide the names and qualifications of Election Assistance Commission staff that worked on the Eagleton Institute project?
4. Please indicate how many project meetings occurred during the term of the Eagleton contract, including in-person meetings, conference calls regarding the status of the report, and any meeting where Commissioners were present for at least part of the meeting. Please provide copies of any minutes from those meetings.
5. Please identify the names and affiliations of members of the Peer Review group or groups that examined the Eagleton Institute drafts. Please also indicate the dates upon which any such review of the Eagleton research was conducted, and the specific concerns or complaints that were raised by members of the Peer Review group as to either the analysis or statistical methodology, if any. Please provide copies of any minutes from those meetings.
6. If certain members of the Peer Review groups had concerns with the data or methodology of the Eagleton study, was that information communicated to Eagleton, and were any changes made to the study based on Peer Review group concerns with methodology or data?
7. Who were the individuals (and what were their academic qualifications) that advised the Commission that the data, methodology, or the results of the Eagleton Contract were so flawed that the Commission should reject the report? At what point did the Commission receive input from those individuals?

8. The Commission previewed its research on the Eagleton Institute's study on Provisional Voting at its May 2006 Advisory Board meetings—why was the Voter Identification Draft Study not discussed at that time? What is the status of the Provisional Voting report?
9. In rejecting the Eagleton report, the Commission indicated concerns that there was only one year's worth of data. Given that this was the first year that Commission had studied the results, isn't "one year" what was originally contemplated in the Eagleton contract? Isn't the reason for having a major research institute conduct this study is so they can draw initial assessments from that data—even though that data can be augmented in future years? Because of the rejected report, will the Commission start anew for research in the 2008 elections?
10. What was the final, total cost of the Eagleton contract, and what was produced or released by that Commission as a result of that contract?

COMMISSION'S OVERSIGHT OVER VOTER FRAUD/INTIMIDATION STUDY

1. Did the Commissioners or Commission senior staff receive any outside communication or pressure to change or not release the entire draft report or portions of the draft language on the voter fraud report? If so, who made those requests?
2. Given the bipartisan nature of the Working Group that guided the Voter Fraud/Intimidation report, and the bipartisan nature of the contracted experts who uniformly support the results of this report, what concerns lead the Commission to determine the report should not be released?
3. If there were points in the report that the Commission objected to, were there attempts to work with the contractors to deal with specific concerns? If there were such attempts, please describe them.

008591

4. Who drafted the Commission summary (released in December, 2006) of the Voter Fraud/Intimidation report, and what were their credentials and involvement in the original research process? Were there instructions or guidance given from Commissioners or senior staff as to what portions of the research should be emphasized? Who at the Commission reviewed the summarized report? Since the contracted experts are referred to in the Commission's released report, were the contractors allowed a chance to review or edit that Commission's final report that was released in December, 2006?
5. Please provide copies of any electronic or written communications between Commission employees that relate to the editing of the Voter Fraud/Intimidation report.
6. Please explain what Mr. Job Serebrov was referring to in his email referenced in the *New York Times* article of April 11, 2007. Please provide any documents in the Commission's possession where employees or contracted experts discussed pressure, political sensitivities, or the failure of the Commission to adopt the Voter Fraud/Intimidation report from March 1, 2006 to present.
7. While we realize that the Commission voted to release its summary report in December 2006, was there a public vote taken to reject the Draft Voter Fraud/Intimidation report? Such a monumental decision to reject the contract experts' work is a policy decision, and one that should be done in public. When was the decision made to reject the original report, and what notice was provided to the public that the Commission would reject that report?
8. Prior to the Draft Voter Fraud/Intimidation report's release, had other organizations requested a copy of that original report? Please include copies of your responses to those organizations, if any.
9. Had any States requested that the Commission or staff provide guidance related to voter identification requirements in the Help America Vote Act, or identification requirements generally? Please provide those requests, and any responses from the Commission.
10. Please indicate what steps the Commission is taking to ensure that political considerations do not impact the agency's research and that decisions are handled in a public and transparent manner.



EAGLETON INSTITUTE OF POLITICS

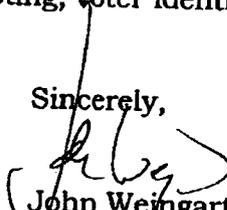
April 19, 2007

Donetta Davidson, Chair
U.S. Election Assistance Commission
1225 New York Avenue, NW
Suite 1100
Washington, D.C. 20005

Dear Chair Davidson:

I am attaching a copy of a memo I am sending to Adam Abroggi, Counsel for the Senate Committee on Rules and Administration, responding to his request for information about the Eagleton Institute of Politics' contract with the EAC. If you or your staff notice any errors or significant omissions in my summary of our work and coordination with you, please let me know. Also, please don't hesitate to contact us if there are any other ways in which we can help you to advance informed public consideration of provisional voting, voter identification and the other important issues within your purview.

Sincerely,



John Weingart
Associate Director

Cc: Tom Wilkey, Executive Director
U.S. EAC

191 RYDERS LANE, NEW BRUNSWICK, NJ 08901-8557

Tel: (732) 932-9384 ext. 290
Fax: (732) 932-6778

THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS

E-mail: john.weingart@rutgers.edu
Web: www.eagleton.rutgers.edu

008593



EAGLETON INSTITUTE OF POLITICS

To: Adam Ambrogi, Counsel
Senate Committee on Rules and Administration

From: John Weingart, Associate Director
Eagleton Institute of Politics

April 19, 2007

Adam

In response to your April 10th request, I have pulled together some information about the Eagleton Institute of Politics' contract with the U.S. Election Assistance Commission. Although I did not have a chance to do the thorough review, including comparing notes with all the members of our research team, that would be necessary to compile a full chronology of our work, I hope the following will be useful to you. I will be giving a copy of this memo to EAC Chair Donetta Davidson and Executive Director Tom Wilkey for any assistance it may offer them in responding to Senators Feinstein and Durbin's April 12th letter.

By way of background, Rutgers University's Eagleton Institute of Politics submitted a proposal to the EAC on March 25, 2005 to provide "research assistance to the Election Assistance Commission for the development of voluntary guidance on provisional voting and voter identification procedures." The proposal was submitted after extensive discussions with EAC Commissioners and staff that had begun on Election Day, 2004 when Eagleton had received a phone call from the EAC's then-Executive Director asking if the Institute would be interested in undertaking this work.

The proposal was prepared and submitted in partnership with the Moritz College of Law at Ohio State University. At the EAC's request, we proposed to handle the two research topics in sequence, first submitting a report on Provisional Voting and then preparing and submitting the report on Voter Identification. In describing the Voter Identification portion of the study, the proposal stated:

"We propose to test the hypothesis that more stringent voter ID requirements depress voter participation in general or for the poor, minorities and older voters in particular."

The proposal also included a plan to form a peer review group composed of scholars and practitioners in the areas of elections and voting to examine and comment on the research

The following pages provide a preliminary summary of our major contacts with the EAC during the course of the contract, with a focus on our work on Voter Identification. More extensive review of our files, including the monthly progress reports we submitted to the EAC, may find other relevant discussions, but this list at a minimum should provide a good overview.

191 RYDERS LANE, NEW BRUNSWICK, NJ 08901-8557

Tel: (732) 932-9384 ext. 290
Fax: (732) 932-6778

THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS

E-mail: john.weingart@rutgers.edu
Web: www.eagleton.rutgers.edu

008594

May 25, 2005 - Contract awarded

May 26, 2005 - First meeting of Eagleton-Moritz team with EAC Commissioners and staff in Washington. After general discussion of EAC interest in both topics, Commissioner DiGregorio expresses concern that the composition of the project's peer review group was politically unbalanced. Eagleton had proposed including the following five individuals: R. Michael Alvarez, Professor of Political Science at California Institute of Technology; Martha E. Kropf, Assistant Professor of Political Science at the University of Missouri-Kansas City; Daniel H. Lowenstein, Professor of Law at UCLA; Tim Storey, Program Principal at the National Conference of State Legislatures; and Peter G. Verniero, former New Jersey Attorney General and Supreme Court Justice and current Counsel to Sills, Cummis, Epstein and Gross.

Commissioner DiGregorio subsequently suggests other names for our consideration. We are impressed by the list of people he provides and add three of them to the Peer Review Group: John C. Harrison, Professor of Law at the University of Virginia; Timothy G. O'Rourke, Dean of the Fulton School of Liberal Arts at Salisbury University; and Bradley Smith, Professor of Law at Capital University Law School. The Project Peer Review Group then had eight participants.

July 28, 2005 - Brief EAC Commissioners at a public meeting at Cal Tech on progress on the research. Briefing includes this status report on the Voter ID phase of the work: "statistical analysis to gauge the effect of a state's voter ID regime on turnout, especially turnout by minority and elderly voters will be complete in late August."

August 9, 2005 - First telephone conference with Peer Review Group. Focus is draft Provisional Voting report.

September 6, 2005 - Meet with the EAC in Washington. Brief the Commission on the status of the research on provisional voting.

September 21, 2005 - Second telephone meeting of Project Peer Review Group.

September 30, 2005 - Conference call with EAC Commissioner Martinez and three members of the staff. Commissioner Martinez indicates EAC is generally more comfortable playing the role of a national clearinghouse and therefore prefers to issue reports as "Best Practices" than as "Provisional Guidance." Staff says Eagleton emphasis should be on what states should do as opposed to suggesting how they would do it. Commissioner Martinez concludes meeting saying, "We have been very well served by all the work you and Moritz have done."

008595

Feb. 22, 2006 - Conference call with Project Peer Review Group members after they have reviewed first draft of Voter Identification report. The Peer Reviewers suggest the statistical analysis: (1) Look at whether voter identification requirements are related to voter registration rates, as well as turnout; (2) Describe in further detail the basis for the aggregate and individual-level data analyses; (3) Clarify whether the report is examining turnout among citizens eligible to vote, or all individuals of voting age; (4) Stress in a footnote that Hispanics in the individual-level analysis are Hispanics who describe themselves as citizens who are eligible to vote; (5) Discuss in the Appendix the reasons why turnout rates appear to be higher in the Current Population Survey data than in other sources of data; and (6) Use predicted probabilities as opposed to odds ratios to describe the relationship between voter identification requirements and turnout.

Eagleton subsequently revises draft of the statistical analysis to address all these issues.

March 28, 2006 - Conference call with EAC staff and Eagleton-Moritz research team in advance of team's scheduled briefings of EAC Commissioners in Washington, D.C. on Provisional Voting and Voter Identification reports.

April 3, 2006 - Eagleton-Moritz morning meeting in Washington with EAC Commissioners Davidson and Hillman and staff members. Series of questions and responses on Voter ID methodology.

Commissioners ask whether respondents to the Current Population Survey might be non-citizens who said they were registered and voted. In a subsequent follow-up e-mail, Tim Vercellotti of Eagleton writes that the design of the CPS questionnaire skips non-citizens past questions about registration and voting. Commissioner Davidson asks if the team could examine the relationship between identification requirements and turnout over time. Team members respond that the information on state identification requirements for previous election cycles would require additional extensive research. Commissioner Hillman asks if the report could break out the relationship between voter identification and turnout for African-Americans with education levels of a high school diploma or less, or African-Americans below the poverty line.

Subsequent analyses examined these subgroups as suggested.

Eagleton-Moritz afternoon meeting with Commissioners DiGregorio and Martinez and EAC staff. Series of questions and answers. Commissioner Digregorio concludes he is "disappointed" with the report. Commissioner Martinez says he "appreciates" it.

April 13, 2006 - Conference call between Eagleton and EAC staff. EAC requests that Eagleton convene a conference call of the Project Peer Review Group with EAC staff and/or Commissioners to discuss the statistical analysis of the effects of various Voter Identification requirements on turnout.

EAC staff also reports that the EAC is going to convene its own second peer review group to seek feedback on review by the Project Peer Review Group.

008596

(April 13, 2006 continued)

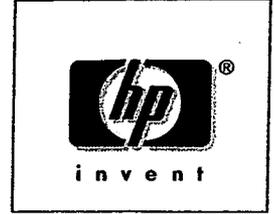
EAC staff also reports that Eagleton is on the preliminary schedule to present Voter ID findings to the EAC's Advisory Board May meeting but that the date and location have not yet been set. EAC staff say they are "unsure where Voter ID project is going. We're going to have to see. We saw lines really drawn politically over Voter ID piece. We'll have to see what statements the agency chooses to make over this topic. It is the topic - It has nothing to do with you. The timing is such that Voter ID is a hot topic."

April 28, 2006 -Eagleton informs EAC by email of the

008597

HP LaserJet 3390

Fax Call Report



HP LASERJET FAX

Apr-19-2007 4:06PM

Job	Date	Time	Type	Identification	Duration	Pages	Result
339	4/19/2007	4:02:05PM	Receive	7329326778	4:08	6	Comm Error 232

7329326778

09:33:08 a.m 04-19-2007

1/8



EAGLETON INSTITUTE OF POLITICS

FAX COVER SHEET

Date: 4/19/07

To: Tom Wilkey

Fax Number: 202-566-3127

Phone Number: _____

Total Number of Pages (including cover sheet): 8

Comments:

From: John Wengert

191 RYDERS LANE, NEW BRUNSWICK, NJ 08901-8557

Tel: 732/932-9384
Fax: 732/932-6778



E-mail: eagleton@rci.rutgers.edu
Web: www.eagleton.rutgers.edu

008598



EAGLETON INSTITUTE OF POLITICS

FAX COVER SHEET

Date: 4/19/07

To: Tom Wilkey

Fax Number: 202-566-3127

Phone Number: _____

Total Number of Pages (including cover sheet): 8

Comments:

From: John Wengert

191 RYDERS LANE, NEW BRUNSWICK, NJ 08901-8557

Tel: 732/932-9384
Fax: 732/932-6778



E-mail: eagleton@rci.rutgers.edu
Web: www.eagleton.rutgers.edu

008599



bbenavides@eac.gov
04/26/2007 09:57 AM

To
cc
bcc Thomas R. Wilkey/EAC/GOV
Subject Fw: fraud and intimidation project

This is one of the two e-mails I have.

----- Forwarded by Bert A. Benavides/EAC/GOV on 04/26/2007 09:56 AM -----

Thomas R.
Wilkey/EAC/GOV

03/13/2006 04:37
PM

Bert A. Benavides/EAC/GOV@EAC

To

cc

Subject
Fw: fraud and intimidation project

FYI

Thomas R. Wilkey
Executive Director
US Election Assistance Commission
1225 New York Ave, NW - Suite 1100
Washington, DC 20005
(202) 566-3109 phone
TWilkey@eac.gov

----- Forwarded by Thomas R. Wilkey/EAC/GOV on 03/13/2006 03:38 PM -----

Thomas R.
Wilkey/EAC/GOV

03/13/2006 03:36
PM

"Tova Wang"
<wang@tcf.org>@GSAEXTERNAL

To

cc

Subject
Re: fraud and intimidation project
(Document link: Thomas R. Wilkey)

008600

Howq about after 3 tomorrow until 5 9-10 on Wednesday or 3-5 on Wednesday.
If you call my assistant Bert she will find you a good time frame.
Sorry that"s my life these days.
Tom

Thomas R. Wilkey
Executive Director
US Election Assistance Commission
1225 New York Ave, NW - Suite 1100
Washington, DC 20005
(202) 566-3109 phone
TWilkey@eac.gov

"Tova Wang"
<wang@tcf.org>

03/13/2006 12:13
PM

twilkey@eac.gov

To

cc

Subject
fraud and intimidation project

Hey Tom,

How are you? I hope you're doing well.

I'd like to talk to you about some issues we are having with respect to the
project when you have a free moment. Is there a good time to call?
Thanks. Tova

Tova Andrea Wang
Senior Program Officer and Democracy Fellow
The Century Foundation
41 East 70th Street - New York, NY 10021
phone: 212-452-7704 fax: 212-535-7534

Visit our Web site, www.tcf.org, for the latest news, analysis, opinions,
and events. Click here to receive our weekly e-mail updates.

008601



bbenavides@eac.gov
04/26/2007 09:58 AM

To
cc
bcc Thomas R. Wilkey/EAC/GOV
Subject Fw: fraud and intimidation project

This is the other e-mail I have for you.

----- Forwarded by Bert A. Benavides/EAC/GOV on 04/26/2007 09:57 AM -----

Thomas R.
Wilkey/EAC/GOV

03/13/2006 04:37
PM

Bert A. Benavides/EAC/GOV@EAC

To
cc

Subject
Fw: fraud and intimidation project

FYI

Thomas R. Wilkey
Executive Director
US Election Assistance Commission
1225 New York Ave, NW - Suite 1100
Washington, DC 20005
(202) 566-3109 phone
TWilkey@eac.gov

----- Forwarded by Thomas R. Wilkey/EAC/GOV on 03/13/2006 03:38 PM -----

Thomas R.
Wilkey/EAC/GOV

03/13/2006 03:36
PM

"Tova Wang"
<wang@tcf.org>@GSAEXTERNAL

To
cc

Subject
Re: fraud and intimidation project
(Document link: Thomas R. Wilkey)

008602

Howq about after 3 tomorrow until 5 9-10 on Wednesday or 3-5 on Wednesday.
If you call my assistant Bert she will find you a good time frame.
Sorry that"s my life these days.
Tom

Thomas R. Wilkey
Executive Director
US Election Assistance Commission
1225 New York Ave, NW - Suite 1100
Washington, DC 20005
(202) 566-3109 phone
TWilkey@eac.gov

"Tova Wang"
<wang@tcf.org>

03/13/2006 12:13
PM

twilkey@eac.gov

To

cc

Subject
fraud and intimidation project

Hey Tom,

How are you? I hope you're doing well.

I'd like to talk to you about some issues we are having with respect to the
project when you have a free moment. Is there a good time to call?
Thanks. Tova

Tova Andrea Wang
Senior Program Officer and Democracy Fellow
The Century Foundation
41 East 70th Street - New York, NY 10021
phone: 212-452-7704 fax: 212-535-7534

Visit our Web site, www.tcf.org, for the latest news, analysis, opinions,
and events. Click here to receive our weekly e-mail updates.

008603

Defining Election Fraud

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;

008604

- 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 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.

Existing Literature Reviewed

Reports

The Long Shadow of Jim Crow, People for the American Way and the NAACP

The New Poll Tax, Laughlin McDonald

Wisconsin Audit Report, Voter Registration Elections Board

Preliminary Findings, Milwaukee Joint Task Force Investigating Possible Election Fraud

Building Confidence in U.S. Elections, National Commission on Federal Election Reform (Carter/Baker Report)

Response to the Report of the 2005 Commission on Federal Election Reform (Carter/Baker Report), The Brennan Center and Professor Spencer Overton

Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both?, Chandler Davidson

A Crazy Quilt of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law, Alec Ewald

Vote Fraud, Intimidation and Suppression in the 2004 Presidential Election, American Center for Voting Rights

America's Modern Poll Tax, The Advancement Project

Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General, The Brennan Center and Professor Michael McDonald

Democracy at Risk: The November 2004 Election in Ohio, Democratic National Committee

Department of Justice Public Integrity Reports 2002, 2003, 2004

Prosecution of Election Fraud under United States Federal Law, Craig Donsanto

Election Protection 2004, Election Protection Coalition

The Federal Crime of Election Fraud, Craig Donsanto

Views of Selected Local Election Officials on Managing Voter Registration and Ensuring Eligible Citizens Can Vote, General Accounting Office

Securing the Vote: An Analysis of Election Fraud, Lori Minnite

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

Books

Stealing Elections, John Fund

Steal this Vote: Dirty Elections and the Rotten History of Democracy in American, Andrew Gumbel

Deliver the Vote: A History of Election Fraud, An American Political Tradition – 1742-2004, Tracey Campbell

A Funny Thing Happened on the Way to the White House, David E. Johnson and Jonny R. Johnson

Fooled Again, Mark Crispin Miller

Legal

Indiana Democratic Party vs. Rokita

Common Cause of Georgia vs. Billup

U.S. Department of Justice Section 5 Recommendation Memorandum (Georgia voter identification)

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 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.
- Several advocate expanded monitoring of the polls, including some associated with the Department of Justice.
- Almost everyone hopes that administrators will maximize the potential of statewide voter registration databases to prevent fraud
- 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

List of Experts 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, Recorders, 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

Nexis Articles Analysis

Note: The search terms used were ones agreed upon by both Job Serebrov and Tova Wang and are available upon request. A more systematic, numerical analysis of the data contained in the Nexis charts is currently being undertaken. What follows is an overview.

Recommendation: In phase 2, consultants should conduct a Nexis search that specifically attempts to follow up on the cases for which no resolution is evident from this particular initial search.

Overview of the Articles

Absentee Ballots

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

1. Campaign workers, candidates and others coerce the voting choices of vulnerable populations, usually elderly voters
2. Workers for groups and individuals have attempted to vote absentee in the names of the deceased
3. 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:

1. Registering in the name of dead people
2. Fake names and other information on voter registration forms
3. Illegitimate addresses used on voter registration forms
4. Voters being tricked into registering for a particular party under false pretenses

5. 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

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 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.

**Rough Summary of Department of Justice, Public Integrity Section Activities,
October 2002-January 2006***

Prosecutions and Convictions-- Individuals

Noncitizen voting: 20
Vote buying: 49
Double voting: 12
Registration fraud: 13
Civil Rights: 4
Voter Intimidation: 2
Unclear: 1

Open Investigations (note: a few cases overlap with prosecutions and convictions)

Noncitizen voting: 3
Vote buying: 25
Double voting: 15
Registration fraud: 29
Absentee ballot fraud: 9
Official: 8
Ineligibles: 4
Deceptive Practices: 1
Civil Rights: 14
Intimidation: 6
Other: 2

Cases and Investigations Closed for Lack of Evidence

Civil Rights: 8
Official: 12
Registration Fraud: 12
Absentee Ballot Fraud: 14
Ineligible Voting: 3
Intimidation: 8
Double Voting: 5
Ballot Box Stuffing: 1
Vote Buying: 14
Ballot/machine tampering: 2
Other: 8
Unclear: 3

*Based upon information available as of January 2006

Case Summaries

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.

Job Serebrov
May 2006

**Determining a Methodology for Measuring Voter Fraud and Intimidation:
Recommendations of Political Scientists**

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.

- 1) 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 Ansolobhere, MIT)
- 2) 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)

- 3) 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)
- 4) 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)
- 5) 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)
- 6) 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

7) 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)

- 8) 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.



**U.S. ELECTION ASSISTANCE COMMISSION
1225 New York Ave. NW - Suite 1100
Washington, DC 20005**

October 17, 2006

Ms. Wendy R. Weiser
Deputy Director, Democracy Program
Brennan Center for Justice at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013

Dear Ms. Weiser:

Thank you for your request for information regarding U.S. Election Assistance Commission (EAC) research projects on voter fraud and voter intimidation, provisional ballots and voter identification.

The status report on voter fraud and voter intimidation, prepared by EAC staff, and the draft report on provisional voting, prepared by the Eagleton Institute of Politics and the Moritz College of Law, are enclosed. EAC personnel are in the process of drafting a report about voter identification. The report will be made available upon completion.

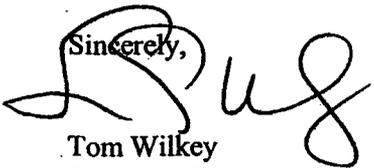
Status documents about voter fraud and voter intimidation and provisional voting were presented to the EAC's Standards Board and Board of Advisors at a public meeting held in May 2006. Neither of these documents were final EAC reports. Per the Help America Vote Act (HAVA), the EAC works with its advisory boards to gather input on activities, including research projects. After discussing the provisional voting research with our advisory boards, they requested further research and clarification and noted that some of information was inaccurate or incomplete. Please see the attached resolutions passed by both entities outlining their concerns. As such, EAC is currently reviewing the draft report on provisional voting to address the concerns of the agency's advisory boards.

As a small agency of only 23 employees, including four commissioners, it is necessary for EAC to contract with third parties and experts to conduct research. The information provided by third parties is used by staff to develop EAC final policy or reports. No documents, drafts or third party recommendations submitted to EAC constitute official EAC policy or opinion and should not be identified or referred to as such.

Please note that our Standards Board and Advisory Board meetings are open to the public and are publicized on the EAC website at www.eac.gov and posted in the Federal Register.

Thank you for your interest, and let us know if we can be of further assistance.

Sincerely,


Tom Wilkey
Executive Director

008625



US ELECTION ASSISTANCE COMMISSION

FACSIMILE TRANSMITTAL SHEET

TO:

JOHN WEINGARTEN

FROM:

Bert A. Benavides (for Tom Wilkey)

COMPANY:

EAGLETON

DATE:

10/18/2006

FAX NUMBER:

732-932-6778

TOTAL NO. OF PAGES, INCLUDING COVER:

2

SENDER'S PHONE NUMBER:

202-566-3114 (Asst.: Bert Benavides)

SENDER'S FAX NUMBER:

202-566-3128

RE:

RESPONSE TO BRENNAN CENTER
FOR JUSTICE, NYU SCHOOL OF
LAW

URGENT

FOR REVIEW

PLEASE COMMENT

PLEASE REPLY

PLEASE RECYCLE

NOTES/COMMENTS:

Attached is sent to you at the request of Executive Director, Thomas R. Wilkey.

008626

MESSAGE CONFIRMATION

OCT-18-2006 08:17 AM WED

FAX NUMBER : 2025663128
NAME : EAC

NAME/NUMBER : 917329326778
PAGE : 2
START TIME : OCT-18-2006 08:16AM WED
ELAPSED TIME : 00'26"
MODE : STD ECM
RESULTS : [O.K]

008627

1

2

3

4

U.S. ELECTION ASSISTANCE COMMISSION
VOTING FRAUD-VOTER INTIMIDATION MEETING

6

7

Taken on the date of:

8

THURSDAY, MAY 18, 2006

9

10

Taken at the office of the EAC

11

1225 NEW YORK AVENUE, NORTHWEST

12

WASHINGTON, D.C.

13

14

15

16

17

18

19

20

21 Start time: 1:00 o'clock, p.m.

22 Taken before: Jackie Smith, a court reporter

□

2

1 PARTICIPANTS:

2

Tom Wilkey, EAC Director

3

Juliet Thompson, EAC Legal Counsel

4

Paul Decretorial, Chairman, EAC

5

Peggy Sims, EAC Staff

6

Job Serebrov

7 Tova Wang
8 Todd Rokita
9 Robert Bauer
10 Mark Hearne
11 Jon Greenbaum
12 Benjamin Ginsberg
13 Kathy Rogers
14 Barry Weinberg
15 J.R. Perez
16 Gavin Gilmour
17 Edgardo Cortez
18 Craig Donsanto

19 - 0 -
20
21
22

3

1 P-R-O-C-E-E-D-I-N-G-S

2 MS. SIMS: We're still missing one.

3 Our chairman and vice-chairman will be coming by
4 and participating for part of the program.

5 Right now, they are trying to finish up their
6 own meeting, a little discussion.

7 My name is Peggy Sims. I have been
8 with the EAC since April, 2004. Prior to that
9 time, I worked for 18 years with the FEC
10 national clearinghouse in election
11 administration, and I am the contracting officer
12 on this project, so that's how I got involved.

13 I would like to just quickly -- this
14 is really our consultants' meeting, but before

15 we get into that, I just wanted to review,
16 review our authority in this area. Obviously,
17 we have no enforcement authority when it comes
18 to voting fraud, but under HAVA, we're charged
19 with developing national statistics on voter
20 fraud, and methods of deterring and
21 investigating vote fraud, which we obviously
22 have to do in consultation with the folks who

4

1 actually do the enforcement.

2 we also are charged with developing
3 ways of identifying, deterring, and
4 investigating methods of voter intimidation, as
5 many of us feel is really a subset of voting
6 fraud, but it may be something when we get to
7 the definition phrase, we may want to talk a
8 little bit more about what we mean by
9 intimidation because it seems to mean different
10 things to different people.

11 The focus of this project was to do
12 some preliminary research just to get us
13 started. We selected a bipartisan team of
14 consultants to develop a comprehensive drafted
15 description of what constitutes voting fraud and
16 voter intimidation, and to perform some
17 background research, which they will review, to
18 establish a project working group, convene the
19 working group, and basically we're looking for
20 your ideas as we go along.

21 Once the working group is completed,
22 we're going to keep a transcript of this

5

1 session. We will also keep lots of notes. They
2 are going to take your recommendations and fold
3 those into a final report that goes to our
4 Commissioners. Ultimately, that report, if we
5 have any clarifications or corrections, we will
6 deal with our consultants first, and then it
7 will go to our Standards Board and Board of
8 Advisors for review and comment as well. That's
9 something that we're required to do with all of
10 our research under HAVA.

11 The purpose of the working group is
12 to collect experts in this area. We have
13 election officials, state and local, we have
14 applicants, and some serve more than one
15 function. And given the preliminary research,
16 and your expertise and EAC authority under HAVA,
17 we would like you to provide ideas as to where
18 is EAC supposed to go from here, and what should
19 we follow up with additional research, other
20 additional efforts that we can mount, given our
21 authority in this area.

22 we aren't here to debate what other

□

6

1 agencies are supposed to do, or what
2 organizations should or should not be doing.
3 We're focusing on what EAC can do. And one of
4 the things EAC can do is offer help to other
5 election officials, states, and other agencies
6 perhaps, but we don't have any enforcement
7 authority and we don't have any authority to

Transcript 051806

8 tell other agencies what to do.

9 Okay. What I'd like to do is just
10 start going around the table and have everybody
11 say a little bit about themselves. Most of you
12 know each other, but I also want to have the
13 ladies back here introduce themselves as well.
14 May I start here?

15 MR. SEREBROV: I don't exist.

16 MS. SIMS: You don't exist?

17 MR. SEREBROV: I'm just here for fun.

18 MS. SIMS: Then we'll have them pick
19 it up from here.

20 MR. SEREBROV: I am Job Serebrov from
21 Arkansas. I have practiced election law for
22 approximately 15 years, both in Arkansas and

7

1 other southern states, and internationally.
2 I helped review and draft changes to the
3 election code in Libya. I served as an Election
4 Commissioner in Arkansas for six years. I have
5 drafted some election statutes in Arkansas
6 itself, and I was general counsel for the
7 election ballot fraud committee for the
8 Republican Party in Arkansas, appointed by
9 Hutchinson. I had an Arkansas organization
10 called Our Kansas For Fair Elections, which
11 operated for about seven years.

12 How much more do you want?

13 MS. SIMS: If you're comfortable with
14 that, that's fine.

15 MR. SEREBROV: Any other questions
Page 5

008632

16 can be referred to my secretary -- no.

17 MS. WANG: I am Tova Wang. I am a
18 fellow with the Century Foundation, which is a
19 nonpartisan think tank, based both in New York
20 and here in D.C.. I have been involved in
21 politics since adulthood, but I have been
22 working on these issues since the 2000 election.

8

1 I have been working on the issues since then and
2 a career was born. With the problems we
3 continue to have, the career will be maintained.
4 I am also a lawyer by training.

5 MR. ROKITA: I am Todd Rokita,
6 Secretary of State of the State of Indiana. I
7 also do a lot of election administration,
8 election reform, and I think I can represent all
9 of the secretaries of states in the nation with
10 this sentence; it has become more and more our
11 career as well, although this secretary will
12 tell you that I don't want it to be.

13 I look for these reforms to be
14 finite, to a certain extent in length, to be
15 read as problem solved. I have other divisions
16 in my office that I would like to put some more
17 attention to, quite honestly, but we definitely
18 see the need for these reforms, at least some of
19 them.

20 MR. BAUER: My name is Bob Bauer, one
21 the partners of a law firm. I have been
22 practicing election law since 1977, and I have

9

1 experience, largely through political parties,
2 with this issue but also in other ways through
3 other conferences or professional discoveries
4 related to my area of practice.

5 MS. SIMS: Thank you.

6 MR. GREENBAUM: I am Jon Greenbaum,
7 Director of the Voting Rights Project. I am
8 actually here for my executive director. After
9 the 2000 election and problems that occurred,
10 the civil rights community saw the need for a
11 nonpartisan organization or coalition of groups
12 to deal with the problems that were apparent
13 from that election, and so Election Protection
14 was formed. The lawyers committee has
15 essentially been the legal lead of the Election
16 Protection Coalition since it's inception. In
17 2004, we had roughly 8,000 legal volunteers who
18 staffed a hot line that received 110,000 calls
19 on Election Day and 200,000 calls during the
20 election process that had attorneys out in the
21 field, legal volunteers out at the field, at the
22 polls, at legal coordinating committees, and as

10

1 mobile field units.

2 we plan on, in sort of going forward
3 since the 2004 election, we work on both
4 election protection and electoral reform issues.
5 We see those as kind of being interconnected.
6 And as one, we created something within my
7 project called the National Campaign for Fair

8 Elections, which is specifically designed to
9 work on those issues. And I want to thank the
10 EAC for inviting us to take part in this. Oh,
11 and prior to that, I worked at the Department of
12 Justice in the civil rights division in the
13 voting section with Barry, during my time there
14 for seven years, and I enforced basically all
15 the voting rights laws, all the federal voting
16 rights laws there.

17 MR. GINSBERG: I am Ben Ginsberg. I
18 a partner at Patton, Boggs, here in Washington.
19 I have been practicing election law since 1982.

20 MS. ROGERS: My name is Kathy Rogers.
21 I am Director of Elections for the State of
22 Georgia. I am one of the people who did not

11

1 intend to grow up being an election official. I
2 started my career almost three decades ago as a
3 poll worker many, many years ago, and I am very
4 pleased now to be able to, in the position I am
5 in right now, appreciate the opportunity to work
6 on this groups.

7 Those of us who are election
8 officials often enjoy reading things that
9 analysts and esteemed attorneys have put
10 together. And frequently we're the ones who are
11 trying to implement the election while taking
12 everything into account. So I think this group
13 has a great focus.

14 MR. WEINBERG: My name is Barry
15 Weinberg. I was the acting chief and deputy

16 chief of the civil rights division voting
17 section of the U. S. Department of Justice,
18 there for 25 years. I supervised the Justice
19 Department and the Federal Reserve Program, as
20 well as all kind of law enforcement, including
21 national voter registration. I retired in
22 January, 2000. Since then, I have kept some

12

1 contact going. My wife and I have an article in
2 the Temple Law Review called, Problems in
3 America's Polling Places, how They Can Be
4 Stopped," and doing some work internationally,
5 election monitoring, lecturing, seminars,
6 traveling. Before that, we were in Liberia
7 doing seminars on election dispute resolution,
8 and that has formed the basis for a book I have
9 written coming out next month called,
10 "Resolution of Election Disputes." That will be
11 the principles that can be used in election
12 challenges.

13 MR. PEREZ: I am J.R. Perez,
14 Elections Administration for a county in
15 Guadelupe, Texas. Let me give you a little
16 information about an election administrator. I
17 am neutral because the position is hired by
18 three out of five commissioners, and fired four
19 out of five. I have got a lot of autonomy and
20 it makes it easy for me to be independent and
21 implement policy that is not necessarily
22 political and going with the current flow, but

13

Transcript 051806

1 it has allowed me a lot of durability in the
2 trenches. I have been doing it for about four
3 years in the front line. If anybody has been
4 around election like you all have, you know on
5 the front line there's casualties coming and
6 going on a regular basis.

7 I am hoping that I can bring any type
8 of insight to you, in terms of how we handle
9 those incidences of those telephone calls, and
10 how we can hopefully explain the difference
11 between the theoretical concept of election and
12 the actual practicality of election, because
13 there is a great distinction in a lot of
14 people's minds. They don't necessarily
15 understand what we're trying to accomplish, and
16 they have a lot of confusion in terms of how
17 we're doing it, why we're doing it, why it's not
18 living up to the mythical dream that a lot of
19 people put it into.

20 MR. CORTES: Edgardo Cortes. I am an
21 election research specialist here at the EAC. I
22 have been here since July of last year. Prior

14

1 to that, I did some campaign work and also ran a
2 national voter registration campaign focused on
3 the Latino community.

4 MR. DON SANTO: I am Craig Donsanto,
5 with the election branch of the U. S. Department
6 of Justice. I have been practicing election law
7 since 1972. I am responsible for overseeing all
8 investigations and prosecutions brought in the

9 United States at the federal level involving
10 voting and the financing of political campaign.
11 I have a member of the EAC's Board of Advisors,
12 and I have also, as Barry alluded to, done quite
13 a bit of work internationally, both with him and
14 occasionally without him, helping emerging
15 democracies write election laws.

16 MS. SIMS: Thank you.

17 I just want to introduce the woman behind me
18 because they really helped us pull this meeting
19 together. Without their support, we wouldn't be
20 where we are right now.

21 we have got Elle Culver, who is a
22 special assistant to Commissioner Davidson. we 15

1 have got Devon Rome, missing who is an intern
2 working on her masters degree in social science,
3 sociology. Thank you.

4 Laiza, I forget where you are.

5 LAIZA: Soon to begin the masters in
6 political science, which I work in the research
7 department, and I'm going to get to know some of
8 the election officials because I will be
9 conducting a 2006 election survey. So you will
10 get to see plenty of e-mails from myself.

11 MR. ROKITA: Surveys, love them.

12 MS. SIMS: I would like you to tell
13 me, I notice you have served as a legal intern.
14 Tell us where you are in that process.

15 TAMAR: I just finished my second
16 year of law school at George Mason, and I have
Page 11

17 been at the EAC for a year.

18 MS. SIMS: Now, I know on our agenda
19 it mentions we would talk about other EAC
20 projects but it dawned on me that might be more
21 appropriate later on, just before we get to
22 ideas for future EAC action, because then I can

16

1 review things that we're already doing. So we
2 won't spend a lot of time and go on to what we
3 still need to do.

4 MS. WANG: I'm going to try and
5 briefly over go over the work we have already
6 done. You got sent tons of material, and I'm
7 not sure if anybody looked at it, but hopefully,
8 you looked at at least the paper summaries of
9 things.

10 The first thing I really want to
11 emphasize about the work that we did, although
12 we split up some of the work, everything that we
13 produced was signed off on by the other person.
14 Everything that you're seeing here is a product
15 in that sense. We agreed on the steps that we
16 would take to produce these materials.

17 And the second point you should bear
18 in mind is, Job and I pretty much worked on this
19 entirely alone, without any support staff. So
20 if you see typos on things, I apologize for
21 that.

22 Generally, the time period that we

17

1 covered in the research we were doing was
2 January 1 of 2001 to January 1 of 2006, all
3 those, Job's cases, went before that a little
4 bit, the reason being, it would be too unwieldy
5 to try and sort through all the materials that
6 came out of the 2000 election because there is
7 just so much, and there's been so much since
8 then that it seems sort of a natural place to
9 begin. And also the Help America Vote Act had
10 been passed subsequently, so it seems like maybe
11 improvements had been made and we should take it
12 from there.

13 The first thing I think on the
14 agenda, that we should talk about the literature
15 and the reports that we went over. We tried to
16 do a review of all the existing research we
17 could find on this topic. I think you have a
18 list of all the pieces that we looked at. On
19 the CD is the summaries we looked at. We looked
20 at a range of things; Government documents,
21 academic studies, reports from advocacy groups.

22 As to how we chose the pieces that we
18

1 reviewed, to some extent, I already had a lot of
2 them and knew about a lot of them because I had
3 been working on this for a while. Other people
4 suggested them and we did searches for anything
5 that we might have missed after that.

6 So just to maybe go over some of the
7 highlights, I don't want to go into the details
8 of the existing literature too much because they

9 are really sort of all over the place. There
10 are a couple things that I will say about them
11 generally that I talk about in the summary,
12 which is, that they are mostly anecdotal. This
13 is no surprise to any of us sitting here. There
14 is really little research that is scientific or
15 systematic, which is part of the reason this
16 project was undertaken. I saw McDonald work as
17 the most systematic, but those probably don't go
18 far enough. And I talked to a number of
19 researchers about this, and I think one thing --
20 and I will get more into this when we talk about
21 the methodologies that I suggested -- this is a
22 very difficult undertaking, I think we all

19

1 realize this. To do it right in any kind of
2 scientific way would require tremendous
3 researches, mother than any academic or advocacy
4 group, that is. It is my personal believe, and
5 I have been told, there probably will be a
6 second phase to this that will maybe commit the
7 resources that are necessary to do it right.

8 The one other thing that I will say
9 about the existing research that we looked at is
10 that I think, by the nature of them, there is
11 very little follow-up. So you have books and
12 reports that make a number of allegations of
13 things that happened in a particular election,
14 but then you don't have the benefit of then
15 hindsight, to see what actually ended up
16 happening in the case. So you have

17 investigations of acts of something happened,
18 but you don't know if that ended up being an
19 administrative error or it ended up being
20 someone just crying wolf. While literature is
21 helpful, it really only takes you so far.

22 Are there any questions about that or
20

1 anything you want to comment about the
2 literature review that we've done?

3 MR. ROKITA: What's our current
4 budget for this project, and why do we think
5 there is going to be a Phase 2?

6 MS. SIMS: Well, Phase 2 would be
7 subsequent to the fiscal year, after we have
8 gone through the final report, that would
9 include the recommendations for future action.

10 MR. ROKITA: So that would be a vote
11 from the standards board?

12 MS. SIMS: I would have to ask the
13 commissioners that are actually handling the
14 details of that. I'm not sure it actually takes
15 a vote, but generally, it requires some comment
16 by the boards. The boards absolutely have to
17 have input on that.

18 MR. ROKITA: So if I understand, part
19 of our charge here is to give some direction for
20 this phase?

21 MS. SIMS: What we're looking for
22 from the working group is to brainstorm ideas

21

1 for possible future research. We may combine
Page 15

2 them into one or we may have different stages,
3 depending on what ideas come up and what the
4 Commissioners think that we can do, and our
5 Boards of Advisors and our Standards Board.

6 MR. ROKITA: So we're supposed to
7 think of these ideas, unbridled by any fiscal
8 constraints?

9 MS. SIMS: Yes. We'll have to worry
10 about the fiscal aspect when we get to that
11 point.

12 MR. GINSBERG: And our commission is
13 all about research.

14 MS. SIMS: We can provide
15 information. A lot of that is done through
16 research. We do research and provide the
17 results of that research to state legislatures
18 and anybody else who is interested. Now, you
19 have to realize, I came from the FEC where we
20 were hidden away. The office, six of us, that
21 was the whole office. Now, we have much more
22 visibility. So it is easier to get the word

22

1 out, get information out, but a lot of times
2 that information is based on research. We do
3 have to have some kind of research before we can
4 pass the information along, in terms of best
5 practices. It could be things -- well, we may
6 want -- I am jumping ahead of myself, but when
7 we get to the ideas on subsequent research, we
8 can talk about some of the findings that these
9 folks came up with, just in this limited

Transcript 051806

10 preliminary research, and what we might be able
11 to do with that, or what we might be able to
12 build on that already exists, but yes, we're
13 focusing on research, and that research does end
14 up being distributed via our website or in
15 response to individual inquiries.

16 MS. WANG: Ultimately, it could
17 result in something like guidelines or
18 recommendations or best practices.

19 MS. SIMS: And that all goes up on
20 our website.

21 MR. SEREBROV: We all introduced
22 ourselves. You've got the floor.

23

1 MR. HEARNE: I am Thor Hearne. I am
2 an attorney. I have practiced in the election
3 law area for a number of years now. I have been
4 involved in a number of different litigations,
5 as well as efforts on that front, counsel to the
6 American Center For Voting Rights.

7 MS. WANG: The only thing of
8 substance we have gone over, I was just
9 reviewing the literature that we had reviewed
10 and summarized what you have in your own
11 materials. Also in your materials, you have a
12 list of the people that we interviewed, and on
13 the CD, you have summaries of the interviews
14 themselves. Most of these interviews were
15 extremely informative and very helpful,
16 insightful. We chose the interviewees by coming
17 up with the categories of types of people we

18 wanted to talk to, and filled those categories
19 with equal numbers from each of us.

20 MR. SEREBROV: Unfortunately, not all
21 the people we wanted to talk to talked to us.

22 MS. WANG: Right. But also due to 24

1 time and resource constraints, we came up with
2 an original list, ten miles long, people we
3 would love to talk to.

4 There were certain categories that we
5 had to eliminate. For example, we don't have
6 any local DAS, again which is something for
7 later on that I would definitely advocate that
8 the next phase do. The ultimate category the
9 people we were able to talk to included
10 academics, election officials, lawyers, and
11 judges.

12 There were a few people who didn't
13 want to talk to us, mostly judges.

14 MR. SEREBROV: Although one did.

15 MS. WANG: We got one judge. Again,
16 all the interviews were conducted by both of us.
17 We split up the drafting of the summaries, but
18 they were reviewed and approved by the other
19 person, so they represent our impressions of the
20 interviews, both of us.

21 Just to go over quickly some of the
22 highlights from those interviews that I have in 25

1 the summary that you have of the interviews, we

2 did find pretty much, overwhelmingly, that
3 absentee fraud is the biggest problem, and vote
4 fraud would come in behind that. There was
5 widespread polling place fraud. Dead voting,
6 impersonation voting, there were a couple people
7 who thought that was a problem. Most people did
8 not.

9 In terms of intimidation, the whole
10 issue of challengers pre election and election
11 day challengers, decidedly most often as the
12 current concern in terms of intimidation.
13 However, at some of the more what we think of as
14 classic examples were brought up with us,
15 particularly very starkly in Native American
16 communities.

17 There was also the usual poll worker
18 harassing people, people taking pictures of
19 voting, and that kind of thing. With all due
20 respect to the people from the Department of
21 Justice here, the people we interviewed told us
22 that for various reasons, the Department of

26

1 Justice is bringing fewer cases now and is
2 focusing much more on non-citizen voting, felon
3 voting, and double voting, while the civil
4 rights public integrity section is focusing on
5 individuals and isolated instances of fraud
6 issues. And I know you don't agree with that,
7 but that's what across the board, people from
8 all sides of this said to us. That's the
9 perception. As usual, the voting lists were a

10 major concern, although, hopefully, that is
11 being taken care of by the state registration
12 databases.

13 Among the common recommendations,
14 getting back to the point we were just talking
15 about, many of the people we interviewed
16 supported stronger criminal laws, increased
17 enforcement of existing laws. Advocates from
18 across the spectrum expressed frustration with
19 the failure of the Department of Justice to
20 pursue more complaints. Mr. Donsanto told us
21 they were bringing fewer section 2 cases, but
22 fewer were warranted, a lot had been achieved

27

1 and it wasn't as much as problem. Mr. Donsanto
2 told us election fraud cases had not gone up
3 since 2002, but the number of cases the
4 department is investigating and pursuing has
5 gone up dramatically, and that since 2002, the
6 department has brought more cases against alien
7 voters, double voters, than ever before.

8 In terms of more recommendations, a
9 couple of people suggested some kind of new law
10 that would make it easier to criminally
11 prosecute people for intimidation, even when
12 there is not racial interments involved. People
13 were hopeful about the statewide voter
14 registration databases. People advocated for
15 expanded monitoring of the polls, hopefully, by
16 the department or maybe others.

17 There were a number of people who