

United States Election Assistance Commission

Meeting Minutes – July 28, 2005

Minutes of the meeting of the United States Election Assistance Commission (EAC) held on Thursday, July 28, 2005 at 10:00 a.m. in Pasadena, California at the California Institute of Technology.

Call to Order: Chair Hillman called the meeting to order at 10:00 a.m.

Pledge of Allegiance: Chair Hillman led all present in the Pledge of Allegiance.

Roll Call: Chair Hillman recognized Juliet Thompson, EAC General Counsel, who called the roll and in addition to the Chair, found present Vice Chairman Paul DeGregorio, and Commissioner Ray Martinez, III.

Adoption of Agenda: Chair Hillman recognized Commissioner DeGregorio, who moved to adopt the agenda for the meeting of July 28, 2005. The motion was seconded by Commissioner Martinez and carried unanimously.

Adoption of Minutes: Chair Hillman recognized Commissioner Martinez who moved that EAC adopt the minutes of the commission meeting held on June 30, 2005. The motion was seconded by Vice Chairman DeGregorio and carried unanimously.

Updates and Reports: Chair Hillman thanked CalTech's Mike Alvarez, Professor of Political Science; Richard Morris, Office of Government and Community Relations; and Jody Lee, Audio Visual Services.

Vice Chairman DeGregorio provided an update on the Help America Vote Act (HAVA) Title II requirements payments. The Vice Chairman reported that \$2.243 billion has been disbursed to the states, and that \$76 million remains left to be dispersed hopefully by the end of the Federal fiscal year on September 30, 2005. Since the last meeting the EAC has dispersed the final payment of \$28 million to Texas and \$7.4 million to Alaska. Delaware, Hawaii, Montana, Oregon, and Michigan are the only States left who do not have all of their funds.

General Counsel Thompson gave an update on the EAC's search for an Inspector General (IG), reporting that the EAC was in negotiations with another governmental agency to detail an IG to the EAC for the remainder of fiscal year 2005 and for the entirety of fiscal year 2006.

Chair Hillman introduced the report on Statewide Voter Registration List (SVRL) guidance, EAC's first guidance.

General Counsel Thompson provided the following information regarding the SVRL guidance. HAVA Section 311 requires the EAC to develop guidance on the implementation of HAVA, including the provisions of Title III and Section 303(a) which require each state and territory, with a few exceptions, to adopt a SVRL. The EAC began the process of developing guidance in December of 2004 with a public meeting where representatives from states that had SVRL prior to the implementation of HAVA provided testimony regarding their experiences in developing and implementing a statewide voter registration database.

The EAC also empanelled a working group of 15 persons, consisting of state and local election official and federal partners. The working group met for a two-day intense session in Washington D.C. in which they contemplated issues related to establishing and implementing a SVRL. The product of the meeting was a guidance document that focused on the architecture of the systems and defining terms and concepts required of a statewide voter registration database.

On April 18, 2005, the EAC published the proposed guidance document in the Federal Register; starting a 30-day public comment period which ended on May 25, 2005. The EAC received more than 300 comments from members of the public, state and local election administrators, and public-interest groups. Seventy-five comments were not on topic or were so general that it did not address a specific provision. Two hundred twenty-one comments focused on what the commenters believed were missing from the guidance. Last, 14 comments focused on the architectural structure and security of the databases.

The final guidance document presented is reorganized to improve readability. EAC added information based on the comments, clarified information regarding the creation of stricter standards by states, and added information on election officials' responsibility to track voter registration and voting history. The proposed final guidance covers security requirements and access protocols established to determine to whom and to what degree access to the database is given. The document recommends that state and local election jurisdictions create public access portals where voters can check the status of their voter registration and identify their polling precinct. It also covers voter registration coordination with

agencies such as the department of motor vehicles, vital statistics, and agencies that provide other information relative to voter eligibility.

EAC General Counsel Thompson recommended that the commission vote to adopt the document as its final guidance regarding SVRL and following the adoption publish it in the Federal Register and distribute to the states and local election officials and voter registration boards.

Chair Hillman thanked the members of the working group, those who testified at EAC meeting on the SVRL, and the people who took the time to provide written public comments.

Commissioner Martinez for the purposes of discussion moved to adopt proposed guidance put forward by counsel in final form, and then send it to the state and local official and other interested voters. Vice Chairman DeGregorio seconded the motion.

Vice Chairman DeGregorio thanked the EAC staff and others who participated in the process. He commented that the document presented is a tremendous first step that will be helpful to those that have the process in place and those that are in the middle. He then asked if the EAC anticipates enhancing the guidance in the future.

General Counsel Thompson answered that the EAC continues to work with the National Academy to explore issues relating to the maintenance and later enhancement of statewide voter registration databases.

Vice Chairman DeGregorio said he is very comfortable in supporting the guidance because it represents an important first step, and the EAC did a good job this summer of gathering input from the public after it issued the first draft.

Commissioner Martinez thanked the people who helped with the document. The EAC successfully engaged stakeholders and anyone interested to give advice on the guidance. He thanked EAC's general counsel and her associate counsel who led the EAC down a very successful path. Commissioner Martinez asked if the EAC Standards Board and Board of Advisors had been involved in the process of developing the proposed final guidance.

General Counsel Thompson stated that the members of the working group consisted largely of members of the Board of

Advisors and Standards Board. She stated that in addition to the boards' presence on the working group, documents were distributed to those members and that the EAC has received many comments from them.

Commissioner Martinez then asked if the EAC gathered meetings of different public-interest organizations to discuss the draft guidance.

General Counsel Thompson responded that the EAC held a meeting with a coalition of community interest groups whose members provided comments on the proposed guidance.

Commissioner Martinez asked about tracking voter information. The EAC uses the term to mean tracking voter history to ensure that voters are not disenfranchised.

General Counsel Thompson responded giving two examples of how tracking voter registration and voter history information is necessary to meet the list maintenance. The examples are the verification and identification requirements of HAVA and NVRA.

Commissioner Martinez said he is prepared to support the proposal as presented.

Chair Hillman asked if the EAC got any feedback from both election officials and the various interest groups about the format and if it is easy to follow.

General Counsel Thompson answered that the EAC did receive some information about readability that impacted the decision to reorganize the guidance. The new structure is outline format.

Chair Hillman said a main purpose of issuing the guidance is to assist states in their efforts to develop and implement the interactive SVRL, but the document will also prove useful to the various interest groups who follow election administration and voter-registration procedures. The chair then asked about the interchangeability of the terms database and list.

General Counsel Thompson answered that those terms are somewhat interchangeable. The easiest explanation is that the database is the structure that holds the data and the list is the product of that database.

Executive Director Wilkey commented that he appreciates the efforts by the state and local elections administrators and that the processes used is something the EAC wants to do in the future with similar projects and guidance. Overall, it is an excellent document, and will be well-received by the states.

The motion passed unanimously.

Chair Hillman recognized Mr. Tom O'Neill and Professor Dan Tokaji who presented a progress report on the EAC voter identification and provisional voting study which is being conducted by the Eagleton Institute of Politics at Rutgers University in New Jersey, and the Moritz College of Law in Columbus.

Mr. O'Neill presented a slide show on the research. The study assesses how provisional voting worked in 2004 to help the Commission make voluntary guidelines for the States. Researchers are looking at six questions to help assess provisional voting:

1. How did the states prepare for the onset of the HAVA provisional balloting plan? (To answer this question, the Moritz College of Law staff is doing an exhaustive review of the statutes and regulations state adopted post-HAVA)
2. How did preparation for the 2004 election vary between states that previously had some form of provisional ballot and those that did not? (To answer this question, researchers are surveying 400 elected county level election officials.)
3. How does litigation affect implementation? (To answer this question, Moritz will look at regulations and statutes, survey of case law and regulations, and compare it with the state narrative, to give a state by state report on how litigation affected implementation.)
4. How effective was provisional voting in enfranchising qualified voters? (The survey of litigation, the state narratives, and the survey of local election officials will help answer this question.)
5. Did state and local processes provide for consistent counting of provisional ballots? (To answer this question, researchers will collect sample data from states.)
6. Did local election officials have a clear understanding of how to implement provisional voting? (The answer should come from the survey of local election officials and state narratives.)

The researchers are appointing a peer review group of scholars in several disciplines who will review and critique the work to make

sure there are no obvious methodological holes and questions are fully answered. They will also reach out to stakeholder groups. The key deliverables will be a draft guidance document on provisional balloting reviewed by EAC advisory boards, including a summary of the case law of provisional voting; a compendium of state legislation, regulations, and litigation; an analysis of how provisional voting was implemented around the country; a description of alternatives to existing practices and procedures; voter identification; and on voter ID requirements major articles; a summary of case law; a compendium of state legislation procedures and litigation; and analysis of voter participation.

For provisional voting the initial legal regulatory and case law research for 44 states is complete. Completion from all states is expected by next week, as well as the narrative descriptions for each state. The survey of the 400 county election officials will be complete by mid-August.

For voter identification the initial research is complete with statutes compiled for 45 states. Question and answers should be completed in mid-September on who is required to present an ID, types of ID required, and consequences of having no ID. Researchers are collecting information on the voter ID debate in the states to suggest alternative approaches, and expect to be complete the state narratives next week. Expected in late August is a statistical analysis to gauge the effect state's voter ID requirements on turn-out, specifically by minorities.

Professor Tokaji situated the research in the broader context both in terms of federal law since the Voting Rights Act (VRA) and several issues arising in the states. The findings he presented are tentative. HAVA has requirements pertaining both to provisional voting and identification requirements. On identification it requires first-time voters who registered by mail on or after January 1, 2003, to show photo identification or some other kind of document with an address when they go to vote unless they provided identifying information at the time of registration. A number of states have imposed more stringent ID requirements. The provisional voting requirements of HAVA and federal identification requirements are interrelated. Those not on the registration list or who do not have proper identification are entitled to receive provisional ballots which must be counted if determined to be eligible to vote.

Part of what the research is trying to measure through analysis of statutes and regulations is to what extent the states have adopted

rules. There needs to be clear rules promulgated by the states for determining both the procedure for casting and counting provisional ballots. The research will review to what extent states have promulgated clear rules. In the absence of clear rules, there is a real possibility of exposure to equal protection claims. From the research, it appears that 21 states are not explicit in terms of what types of records to check if there is a dispute over voter eligibility.

A higher percentage of provisional ballots were counted in the old provisional ballot states as opposed to the new provisional ballot states. Possible explanations include that some states have clean registration lists so provisional ballots are only issued in rare circumstances; or people who are entitled to receive provisional ballots are not receiving them. Professor Tokaji believes it is the latter that explains the disparity.

The impact of stricter voter identification provisions is being gathered right now. Georgia, Indiana, and Arizona have enacted some very stringent voter identification requirements. There is litigation in two separate cases in Indiana which challenge the requirements both on constitutional grounds and on the basis of the VRA. Georgia, a state covered under Section 5 of the VRA, will have to obtain preclearance of its provision by the Department of Justice.

Professor Tokaji also brought to the EAC's attention a report recently released by the Century Foundation on how the states can better implement HAVA and elections. He also recently wrote a paper on the litigation surrounding HAVA and election administration issues that he is willing to share with the EAC.

Chair Hillman thanked the panelists. She stated that at the conclusion of the study, the EAC will issue guidance on provisional voting and voter-identification requirements, and the products from the study will inform the decisions made in developing the guidance.

Commissioner Martinez thanked the panelists. He asked Professor Tokaji for a copy of his paper. Commissioner Martinez asked if the EAC has a role in deciding how provisional ballots should be counted or if it is an issue for the Courts.

Professor Tokaji answered the Courts because the EAC only has authority to issue voluntary guidance.

Commissioner Martinez asked if the research shows if there are any signs in provisional voting that there is a disparity of implementation with regard to geographic regions of the country or precincts that are predominantly Hispanic or African-American.

Professor Tokaji answered that they have not researched the regional disparity question, i.e. comparing the South to the Midwest, but it is something they can do; but there are profound differences in terms of the percentage of provisional ballots counted from state to state, and the difference between old and new states.

Mr. O'Neill said regions could be misleading because one or two states in the region could account for the vast majority of ballots. Looking down at the precinct level and at the ratio of the number of provisional ballots they had of the total votes cast, and the majority of minority precincts would be extremely useful. The data is hard to find but they may be able to do some study clusters as opposed to what happened across the whole country.

Commissioner Martinez asked if from the data being gathered if the researchers can tell election officials or workers are being trained with regard to the implementation of provisional voting procedures within their respective jurisdictions.

Mr. O'Neill answered that from the survey of local election officials they will get the officials self-report on the adequacy of the information they received from the state and on the training they provided the precinct-level workers.

Commissioner Martinez asked Professor Tokaji if there are any conclusive studies that will show if voter ID helps to ensure integrity or disenfranchises.

Professor Tokaji answered there are no reports. The evidence on voting fraud is largely anecdotal, but suggests that the place where there is a problem, ID is not going to address.

Commissioner Martinez then discussed a University of Wisconsin study that shows 80 percent of the males have a state driver's license; 81 percent of females have a state driver's license. Broken down, 45 percent of African-American males have a state-issued driver's license; 51 percent of African-American females have a state-issued driver's license. In the Hispanic community, 4 percent of the males have a state-issued driver's license, and only 41 percent of females have a state-issued driver's license.

Vice Chairman DeGregorio asked if a voter cast a provisional ballot at a polling place but did not have an ID, and that the state requires an ID, how that affects the provisional votes being counted.

Mr. O'Neill answered there are a number of difficulties with registered, eligible, and the new word qualified. If the provisional ballot is counted, the presumption is the voter was qualified. The research is looking at reports of dissatisfaction of provisional voters who went back to the phone number or the Web site to see if their vote was counted, and some statement about my vote was not counted, but I'm eligible. The researcher will look at some cases around the country, not what happens every time.

Vice Chairman DeGregorio commented that some states require voters to send registrations into the election office within a certain period of time after the voter got the form; others do not have a deadline, people just have to be registered by a certain date. He asked if the difference in the approaches impacts provisional voting.

Mr. O'Neill answered that the difference in approaches certainly impacts provisional voting. There has been some talk of providing a date by which if you are registered the presumption that your vote should count should be higher than if you are registered after that date. This is something that the research will explore.

Professor Tokaji answered that the Century Foundation was also interested in providing incentives for early registration.

Vice Chairman DeGregorio asked about how in some states the rules for counting provisional ballots are different among the counties within the state, for example DuPage and Cook counties Illinois; and the need for clarity.

Professor Tokaji answered that he agrees. There has been a lot of talk about that margin of litigation and how close does an election have to be to bring litigation. The existence of unclear rules for determining whether or not those provisional ballots count increases the risk of litigation.

Chair Hillman asked how the SVRL guidance looks.

Mr. O'Neill answered that he would like to look at the guidance before answering.

Professor Tokaji answered that he looked at an earlier draft. Having good registration will have more people casting regular ballots rather than provisional, decreasing the likelihood of a contested election because of provisional ballots.

Chair Hillman said that each state is supposed to have in place an administrative complaint procedure, and have on record the complaint filed and the resolution of those complaints; there are specific time frames within which people are supposed to have their complaint addressed, and a reply is issued. It would be useful to know if people are using the administrative complaint procedure, and whether or not there were a preponderance of complaints filed on provisional voting.

Mr. O'Neill answered that they would look at the complaints.

Chair Hillman asked if there are one or two things that are different than the assumptions held before the start of the study.

Mr. O'Neill answered that he was surprised by the distribution of provisional votes across country in which a very few states account for the vast majority of all the provisional ballots cast; the enormous differences in the number of ballots that were used and counted in state old provisional balloting and state new provisional balloting. He suggested that the EAC's attention be focused on giving guidance so that a voter in Iowa would receive the same chance to have a provisional ballot as a voter from California.

Mr. Tokaji answered there is less guidance being provided by statute or regulation as to the procedure to count provisional ballots. There is a need for more detail in the area of federal ID laws. As the rules get more complicated it is hard to imagine a poll worker who had an hour of training understanding all these things.

Mr. O'Neill added that the voter ID is similar in very different states around the country. It is not a result of HAVA, but inspired by local legislation. He suggested that the EAC give some attention to it because of things going on in many states.

Executive Director Wilkey said he is concerned that a number of NVRA requirements have gone to the wayside with provisional voting. On the issue of voter ID he asked about new citizens.

Mr. O'Neill answered they would like to take a look at it but it will be tough.

Professor Tokaji answered that neutral rules whether intentionally or unintentionally are not always applied in equal ways. He agrees new citizens and voter ID is an important thing to study. The researchers will be looking at when the states' provisional voting laws were enacted, and if it had preexisting provisional voting laws that were tied to the various fail-safe provisions.

Chair Hillman introduced Mr. Thompson, coordinator of elections from Tennessee, to discuss the interplay of his state's pre-HAVA voter identification requirement with the implementation of provisional voting.

Tennessee has always had an ID provision that matches the signature of the voter with the signature on some other form of ID. The requirement can be met with an affidavit of identity completed in the polling place. Tennessee always required new registrants to vote in person the first time. Neither of these requirements has changed due to the provisional voting or HAVA ID requirements.

Tennessee law specifies that provisional voters provide a verification of residential address which includes but is not limited to driver's license, lease agreement, utility bill, or other documents that have applicant's present address. Tennessee law has three ID requirements: standard signature requirements, the provisional-voting requirement, and the HAVA ID requirement for first-time voters to provide ID. They had few problems on Election Day, but confusion did exist prior to Election Day.

Tennessee has a state voter registration database that has been modified because of the various types of ID requirements. The database provides quick access for counties to check the permanent status of provisional voters on Election Day.

Tennessee is one of the states that requires full social security numbers to register; which is verified. The process allows the vast majority of voter registrants to skip the HAVA requirement and focus solely on the Tennessee signature requirement.

Provisional voting is new in Tennessee, adopted because of HAVA. It worked well in the 2004 election. Out of 2.4 million votes cast, only 8,700 provisional ballots were cast, 3,300 counted. Tennessee does not give or count losers or fail-safe voter's provisional ballots. The relatively low number of provisional

ballots in Tennessee is due in large part to the successful, early voting program which accounted for about 40 percent of the votes cast in 2004. Tennessee puts a great emphasis on education of voters to vote early if they think they might have a problem with their registration. Early voting affords a 15-day window to vote early in person.

The HAVA requirements for provisional voting and ID for first-time voters was a challenge in Tennessee.

Chair Hillman thanked Mr. Thompson and asked him to clarify his statements on provisional ballots given to challenged voters.

Mr. Thompson answered that prior to HAVA being implemented, Tennessee fail-safe voters would go through certain steps, but are not given provisional ballots as a matter of course as they are in several other states. Tennessee does not treat fail-safe voters as provisional voters.

Chair Hillman asked what happens to a fail-safe voter that's different from a provisional?

Mr. Thompson answered the process for fail-safe voters in Tennessee are a voter comes in; they would be a properly registered voter in the county, not necessarily in the precinct in which they are in. They can sign an affidavit. Typically, they go to their old location where they are on the list and an affidavit is given to them. They proceed to their new location with their affidavit. It is possible to be a fail-safe voter and cast a provisional ballot. If you show up at your precinct and it can be confirmed you have not voted at your own precinct, then you would cast a provisional ballot, and your vote would be counted. Movers and fail-safe voters do not automatically get a provisional vote. Tennessee law, even before HAVA required fail-safe voters be guided to their new precinct, so they sign the affidavit and their old precinct will verify that they are on the rolls, and they go to the new precinct, and there they cast the ballot on the machine as opposed to casting a provisional.

Chair Hillman asked what Tennessee does to educate voters so they know what the processes and procedures are prior to voting.

Mr. Thompson answered Tennessee does all it can through due course, press releases, and information to counties to make sure that everybody is aware of the ID requirements for HAVA of leading up to the election. There are lawsuits on whether or not

provisional ballots had to be cast in the correct precinct in order to be counted. Tennessee is in discussion with the Department of Justice about exactly what would constitute valid ID for final coverage.

Chair Hillman asked for summary of why one county had about 5,400 provisional ballots.

Mr. Thompson answered that the vast majority of provisional ballots that had been cast and not counted in Tennessee were people who had not registered. There was a lot of misinformation before the 2004 election about what provisional ballots entailed. People thought they could cast a provisional ballot in Canada. Voters were getting bad advice such as do not worry if you are not registered go cast a provisional ballot just in case.

Vice Chairman DeGregorio asked for clarification on the three types of ID requirements; the standard signature requirement, does not have to list the address or picture; the HAVA ID requirement for first-time voters that does not require a photo; and the provisional-voting requirement that requires an address on the ID. If a voters name is not on the rolls at the polling place but says they registered two months ago and asks for a provisional ballot they would have to show an ID with an address on it in order to cast a provisional vote, or are they turned away if they do not have an ID with the address on it?

Mr. Thompson answered the guidance to the counties is always provide a provisional ballot.

Vice Chairman DeGregorio asked if the voter had to show an ID with an address on it to be counted. Even if the voter showed an ID without an address on it, but the office finds the registration, because of the fact they did not show an address, the officials are not going to count that ballot?

Mr. Thompson answered that ID must be presented for the ballot to be counted.

Vice Chairman DeGregorio asked if there was a mechanism to ask the provisional voter for that ID during the counting process.

Mr. Thompson answered that some states do allow the voter after Election Day to show evidence of identification. Tennessee law does not.

Vice Chairman DeGregorio commented that HAVA has injected more complexity in the polling places of America, there are worries about the impact on the polls, hopefully professors of law can recruit law students to serve as poll workers around the country. Tennessee has had fail-safe voting for a long time, which is an advantage because other states are used to trying to resolve issues with problematic voters at the polling place. He thanked Mr. Thompson for all of his hard work.

Mr. Thompson responded that most of Tennessee's needs with ID came from the HAVA first-time voter. He is hopeful, that checking social security numbers through the department of safety, Tennessee will rid itself of the necessity of asking for a HAVA ID.

Commissioner Martinez thanked Mr. Thompson for his leadership the great job he is doing in Tennessee. Commissioner Martinez then commented on whether a provisional vote can even be cast without the showing of proper identification. Tennessee handles it by instructing poll workers and election officials to give provisional ballots, and the counting is determined by state law. Section 302A of HAVA is read to allow for a provisional ballot to be offered to a voter when voters presents himself or herself and is willing to sign an affidavit that is required by federal law saying that he/she is registered for this election cycle. There is a real distinction between states that are offering in passing, voter-identification laws that require picture ID to cast a ballot versus the states that allow a broader use of various documents to satisfy that ID requirement.

Commissioner Martinez commented that those states that have been able to think through and codify their policies and procedures with regard to the counting of the provisional votes are in better shape in terms of how to deal with those issues. How has Tennessee handled it?

Mr. Thompson answered that Tennessee's original provisional law, passed prior to HAVA, says the voter has to cast it in the correct precinct. The state has tried to give the counties guidance with respect to processes and counting provisional ballots created by HAVA. Codifying those kinds of rules is very difficult. The legislature in Tennessee wants to do the right thing but the proper way for Tennessee to deal with it is to promulgate rules.

Mr. Wilkey asked if Tennessee's signature requirement has been litigated.

Mr. Thompson said it has been around for a long time and to his knowledge, it is has never been litigated. It has not been an issue in all.

Mr. Wilkey asked if any of counties are utilizing the electronic voting booth.

Mr. Thompson answered that Tennessee is not using electronic voting booths.

Chair Hillman thanked Mr. Thompson. She then thanked the EAC staff for the work done to convene and arrange the field meetings and hearings. She acknowledged the presence Administrator Vargas; California Assistant Secretary of State Brad Clark; representatives from Los Angeles County election's office; from the U.S. Department of Justice, Brian Heffernen, and Maryanne Pedrozian; Linda Lamone, director for the Maryland State Board of Elections and president of the National Association of State Election Directors; Texas Director of Elections Ann McGeehan; Donna Holloway, chair of the Accessibility and Disability Commission for the City of Pasadena.

Vice Chairman DeGregorio motioned to adjourn, Commissioner Martinez seconded the motion.