



STATEMENT OF JON GREENBAUM, DIRECTOR, VOTING RIGHTS PROJECT,
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, BEFORE THE
HOUSE ADMINISTRATION COMMITTEE.

August 2, 2007

Thank you Madame Chairman. I want to thank you and the other members of the committee for having me here to share the experience that I and my colleagues at the Lawyers' Committee for Civil Rights Under Law have had working with the United States Election Assistance Commission ("EAC"). The Lawyers' Committee was founded in 1963 by President John F. Kennedy and his brother Attorney General Robert Kennedy to involve the private bar in protecting our nation's civil rights. For over 40 years, the cornerstone of this commitment has been ensuring that all eligible Americans have a meaningful opportunity to participate in our democratic process. For more than four decades, the Lawyers' Committee has committed itself to protecting the most fundamental right – the right to vote.

The Lawyers' Committee has been intimately involved with the EAC since its formation shortly before the 2004 election. Barbara R. Arnwine, the Lawyers' Committee's Executive Director, sits on the Commission's Board of Advisors and I served on the working group for the EAC's study on voter fraud and voter intimidation. Moreover, in our position as a leader on policy, litigation and coalition building concerning the administration of elections, the Lawyers' Committee has closely tracked the successes and failures of the EAC. Unfortunately, since its uncertain start, the EAC has, in large measure, failed to fulfill its core mission to protect voters' rights. When the Help America Vote Act was passed, we applauded the creation of the EAC and we still believe in its core purpose and its ability to fulfill the vision that Congress intended. By building transparency and oversight into the EAC process and by requiring the EAC to be more open in its conduct, the EAC can fulfill its essential duty to the American Electorate. I thank this committee for beginning that process through the oversight you have already conducted and through this hearing. We are committed to working with Congress and the EAC to get the Commission back on track.

HISTORY OF THE ELECTION ASSISTANCE COMMISSION

After the election process imploded in 2000 and the outcome of the election was taken out of the hands of the electorate, the Congress attempted to address the problems that forced the country to the brink of a constitutional crisis. It soon became clear that the conditions that caused the Florida election debacle was decades of neglect, inadequate

resources and unproductive decentralization in our nation's election system. What was more disturbing was that Florida was just the state with the perfect storm, but the elements for a repeat disaster were present across the country. The system of elections was not breaking, it was broken.

Advocates across the country heralded the bi-partisan efforts to address the problems that prevent countless eligible Americans from effectively exercising their right to vote. For years, efforts at real, substantive election reform were frustrated by the partisan interests of legislators. The 2000 election was shocking enough to demand action. While the final version of the Help America Vote Act suffered from the relative youth of election reform as a substantive policy issue, the unintended consequences of which we are beginning to identify through the bill's gradual implementation, one bright spot was the establishment of the Election Assistance Commission.

Through the Lawyers' Committee's role as lead legal partner of Election Protection, administrator of the coalition's non-partisan voter services hotline – 1-866-OUR-VOTE, and our historic commitment to overcoming the barriers to the polling place, we have identified three primary sources of election problems that have the potential to cause the meltdowns that have become a part of the political lexicon in recent elections: (1) the decentralization and inconsistency of election administration resulting in grossly inadequate and unequal experiences for voters; (2) persistent insufficient resources for the infrastructure of our elections; and (3) deliberate attempts to remove eligible voters from the process to accomplish either cynically partisan or shamefully discriminatory ends. The establishment of the EAC was critical because, by design, it would continue to identify the systemic issues confronting election administration and respond by providing appropriate apolitical, uniform guidance to the states and tens of thousands of local election officials. Furthermore, it would administer an historic federal financial commitment to the wellness of our elections. Finally, the Commission would investigate and report on the malfeasance, systemic challenges, and deliberate manipulation of the election process. Most fundamental, however, it would do these essential tasks without regard to partisan affiliation.

Unfortunately, the EAC lost its footing right out of the gate. Despite a presidential election on the horizon, the Commission was not funded by Congress until just a few months before ballots began to be counted in 2004. Instead of setting up transparent, professional procedures for conducting business, the EAC embarked on a haphazard course of unaccountability. Those of us who have tracked the EAC's performance since its inception cannot discern any reliable or professional process for making decisions.

The lack of transparency and professionalism in the EAC has given rise to legitimate questions about its independence, non-partisanship, and competence to serve its role in protecting the franchise. The most glaring example of the continuing problems is the recent scandals regarding the EAC's research and reporting. One of the EAC's statutory charges that most excited voting rights advocates was the development of unbiased, honest research and analysis of election administration and the obstacles voters face as they head to the polls.

VOTER FRAUD/VOTER INTIMIDATION AND VOTER IDENTIFICATION REPORTS

Section 241 of HAVA requires that the EAC “[o]n such periodic basis as the Commission may determine, the Commission shall conduct and *make available to the public* studies regarding . . . election administration issues. . . .” (emphasis added). The statute goes on to enumerate more than a dozen specific studies with which the EAC is tasked. While many of these studies have yet to be completed, two – the voter fraud/voter intimidation study and the study on the impact of voter identification – illustrate how, and the reasons why, the EAC has failed to live up to its statutory promise.

As I mentioned, I served on the working group for the EAC’s research on the impact that voter fraud and voter intimidation play in the electoral process. I was honored to be asked to serve and excited by the opportunity to help inform the conclusions of the expert researchers as they endeavored to uncover the role that these insidious realities play in our election system. While I was exposed to much of the laudable work of the consultants engaged by the EAC, the country was not.

While HAVA requires that the EAC undertake a series of reports related to elections, this report and another on the impact of voter identification on voter turnout stand out because voter fraud has been the primary rationale for the partisan-driven national campaign to impose unnecessary and discriminatory voter identification in jurisdictions across the country. Opponents of identification provisions have pointed to their disproportionate impact on traditionally disenfranchised voters. The research submitted by the consultants on both reports found that there was no evidence for the thesis that rampant voter impersonation or other voter fraud at the polls is corrupting our electoral process and that voter identification had a negative impact on voter turnout, particularly among minority voters. The EAC, however, refused to release these reports during a critical period in the ongoing debate over the efficacy of voter identification requirements.

As a result of this committee’s oversight, Freedom of Information Act Requests made by advocates such as the Brennan Center for Justice and scrutiny by the media, thousands of pages of documents have been released and begin to uncover who was responsible for the suppression of these reports. Unfortunately, some of the players in the unfolding national scandal at the Department of Justice – where our nation’s law enforcement priorities were placed on the back burner while partisan pursuits were prioritized – seemed to have weighed in on this process as well. The e-mails released by the EAC demonstrate that DOJ officials tried to influence who worked on the reports and the substance of Voter Fraud and Intimidation Report.

Hans von Spakovsky, who has come under fire for playing politics with voters’ rights while a political appointee in the Justice Department and is currently seeking a seat on the Federal Election Commission, tried to influence who worked on both reports. While at DOJ, von Spakovsky inserted himself as the liaison between the Department and the EAC, despite the HAVA provision reserving that position for the chief of the Voting

Section. In that role he attempted to influence who worked on these reports. Mr. von Spakovsky sent emails attempting to remove Tova Wang of the Century Foundation from the voter intimidation/voter fraud report and Dan Tokaji of Moritz College of Law from the voter identification report. Additional e-mails show that the EAC agreed to provide other DOJ officials, including Mr. von Spakovsky's successor, drafts of the voter intimidation/voter fraud report for their review and comment, including drafts rewritten by EAC staff that were not shared with the consultants who had contracted to draft the report.

The EAC retained Tova Wang, a fellow at the Century Foundation and Job Serebrov, an attorney from Arkansas, to prepare the voter intimidation/voter fraud study. The Commission picked these two consultants because they represented the political spectrum of thinking on this issue with Wang traditionally taking a more liberal position on election issues and Serebrov more often coming down on the conservative side. In mid-July 2006 the consultants submitted their report to the EAC, which took no immediate action. In mid-October, amidst questions from advocacy groups and a demand from Barbara Arnwine, in her capacity as a member of the EAC Board of Advisors, that the Commission release the report, *USA Today* published a story relying on a leaked interim report which suggested that the consultants came to the conclusion that there is little polling place fraud, but there continues to be legitimate concerns that structural barriers and voter intimidation play a significant role in the election process.

The article led to increased demands that the report be released, especially considering the country was once again on the heels of a federal election where voter fraud was being used as the rationale to fight an injunction against the photo identification and proof of citizenship law in Arizona, develop voter challenge programs in various states (some which happened and some which were just threatened) and legitimize other behavior that had the potential to disenfranchise voters before election day. The EAC, however, refused to release anything regarding the report until December 7, 2006. During the intervening 5 months, the consultants were told that the EAC was revising their report, but they were not consulted on how the report would be changed, nor were they provided with an advance copy of the EAC's final draft, nor were the Board of Advisors kept in the loop, despite the mandate of Section 247 of HAVA that they be involved in the reporting process. Instead of releasing the report prepared by the consultants, the EAC released a report authored by the Commission's staff that often contradicted the conclusions reached by the consultants. The report, called *Election Crimes: an Initial Review and Recommendations for Future Study*, did not acknowledge any of the conclusions of the report submitted by the consultants.¹ While HAVA requires the EAC to study both voter fraud and voter intimidation, Congress did not consider "election crimes" a critical area of study. Moreover, the EAC mischaracterized the evidence collected by the consultants by suggesting that the debate over the prevalence of voter fraud and its impact on elections was weighed evenly on both sides. The released report

¹ For more detail on the differences between the report as released and the report as submitted, see, *Panel Said to Alter Finding on Voter Fraud*, Ian Urbina, New York Times, April 11, 2007, A01. The report as submitted is available at http://lccr.3cdn.net/dc4d9842828c28586e_t6m62ikb3.pdf and the final report is available at <http://eac.gov/docs/Voter%20Fraud%20&%20Intimidation%20Report%20-POSTED.pdf>.

also played down the impact that structural disenfranchisement and continued voter intimidation have on election outcomes. Additionally, the submitted report made a number of recommendations for future study based on the input from accomplished social scientists, but these recommendations were omitted in the released report.

To me, this was quite surprising. As a member of the working group, I expected the EAC's report to reflect what I was provided before the working group convened in May 2006. The working group was made up of leaders and thinkers on election issues – from academics, to activists, to attorneys, to elected officials – from across the ideological and political spectrum. Prior to our meeting, we received a draft of the report. When we met, there was vigorous discussion exposing the ideological and political diversity in the room, but for the most part, we agreed that the report's essential conclusions were accurate. We then developed near unanimous recommendations on how the course of research in this field should proceed. There was a single dissent over the usefulness of this study by Indiana Secretary of State Todd Rokita. Apart from the rest of us, he developed a separate set of recommendations for study that concentrated on election fraud. It was disappointing, then, to see that Mr. Rokita's ideas wound up as a dominant theme in the final report released by the Election Assistance Commission. It seems troubling that the recommendations of a single elected official – who was concurrently leading the defense of one of the most restrictive voter identification regimes in the nation -- trumped the collective wisdom of the rest of the group. Equally insulting was that I was not given an opportunity to comment on the changes to the report. In fact, the first time I saw what was done to the report was when it was publicly released.

Again, groups demanded that the original report be released. During the EAC's Board of Advisors meeting in January, Ms. Arnwine proposed a resolution, which failed, demanding release of the original report. The consultants have been asked repeatedly to describe their findings and experience by the media; however, until Congressional and media pressure was too much to bear, the EAC contractually gagged them from discussing any of the conclusions of their research.

The report on voter ID was recently released as well after calls from Representatives Maurice Hinchey and Jose Serrano. Since the ID consultants' contract did not have the same confidentiality agreement, the consultants have spoken a bit more candidly about its contents. According to testimony delivered to the EAC on February 8, 2007, the ID report acknowledges that there is evidence that identification requirements have a negative impact on voter turnout and that they have a disproportionate impact on certain minority voters. Like the fraud/intimidation report, the EAC refused to endorse the findings of the ID report claiming methodological flaws. According to the consultants however: "The statistical analysis suggests that stricter voter ID requirements can be associated with lower turnout Without a better understanding of the incidence of vote fraud and its relationship to voter ID, for now best practice for the states may be to limit requirements for voter identification to the minimum needed to prevent duplicate registration and ensure eligibility."²

² *Presentation to the U.S. Election Assistance Commission: Summarizing a Report on Best Practices to Improve Voter Identification Requirement HELP AMERICA VOTE ACT OF 2002 Public Law 107-252*

During the time when the EAC refused to release the reports, Congress was debating a number of proposals to impose an ID and proof of citizenship requirement on voters across the country. The rhetorical foundation that propelled one of these proposals to passage on the House floor (and in many state legislatures) was the prevalence of voter fraud.

It took threats of subpoenas from Congress and exposure on the front page of the *New York Times* for the story of these reports to come out. These reports, paid for with taxpayer dollars and designed to improve the electoral process for all Americans, regardless of partisan affiliation or ideological commitment, should have been done through a much more transparent process.

RECOMMENDATIONS

To improve the reporting process in the future the EAC should:

- Make all research it commissions available without unreasonable delay;
- Serve its statutory clearinghouse role by releasing the research it commissions without censoring the conclusions;
- Select consultants on their ability to accomplish the task, as opposed to their political or ideological views;
- Allow researchers to conduct their research unencumbered by the EAC's bureaucracy. While the EAC must oversee the contracting process, it should not place unreasonable restrictions on researchers or prevent them from drawing conclusions;
- Not contractually prevent researchers from publicly discussing their research;
- Encourage sound social science research practices, such as peer review and academic independence;
- Publish uniform rules and policies for selecting research contracts and adhere to those standards;
- Seek public input on its research agenda. If it disagrees with the conclusions or the methodology of a research project, the EAC should be required to detail the reasons why it finds the research flawed and it should only refuse to adopt research after a properly noticed public hearing and a formal vote.
- Regularly keep the Board of Advisors updated on the progress of research as required by Section 247 of HAVA. The Board of Advisors should be permitted to audit the progress of any research assignment.

The EAC's need for transparency and professionalism is not confined to the research it conducts. When the Commission recently released emails concerning a host of questionable decisions by the EAC, they revealed a course of ostensibly public business

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conducted in a very private way. From small decisions to large decisions, it seems that EAC policy is often set either through unrecorded tally votes or by staff fiat. Instead:

- The EAC should be required to conduct substantive decision making in public, unless it can establish a reasonable and convincing reason for private deliberations.
- While staff should have the ability to keep the Commission running through modest and perfunctory executive decisions, substantive EAC business should be done in the open, through recorded votes and public dialogue.
- The Commission should encourage citizen input and should make decisions through open dialogue and recorded votes.

Finally, increased transparency and professionalism should quell what seems to be increased politicization at the EAC. As I discussed above, partisan policy positions – over emphasizing the degree of polling place voter fraud while under playing the degree of voter intimidation and discounting evidence of the discriminatory impact of identification procedures – trumped social science research in the conclusions reached by the Commission on critical research assignments. Moreover, the recent appointment to the EAC of a partisan election attorney with no election administration experience further call into question the EAC’s commitment to non-partisanship. Though partisans recommend appointments to the EAC and the appointments are made by the President with the advice and consent of the Senate, for the short history of the EAC most of the Commissioners had been professional election administrators or had worked on nonpartisan election efforts. That tradition should continue.

Despite the failure to live up to the promise that Congress envisioned for the EAC, there is time to turn the EAC around and put it to work on behalf of all eligible American voters. I do, however, caution this committee from looking elsewhere for the solutions that the EAC was designed to accomplish. While the EAC needs to professionalize in order to be effective as an agency, it is a worthwhile experiment that, with some key reforms, can be an integral part of improving election administration across the country. After these necessary reforms are implemented, either by the Commission itself or by the Congress, the EAC should receive vigorous support. I have attached several materials to this statement that are relevant to these issues. Thank you for the opportunity to come before you and I look forward to answering your questions.