

Testimony of

WENDY R. WEISER

**Deputy Director, Democracy Program
Brennan Center for Justice at NYU School of Law**

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On behalf of the Brennan Center for Justice at NYU School of Law, I thank the Subcommittee on Financial Services and General Government for holding this hearing and for providing me the opportunity to discuss the U.S. Election Assistance Commission (the “EAC”) and election administration issues.

My name is Wendy Weiser, and I direct the Brennan Center’s work on voting rights and elections. The Brennan Center is a nonpartisan think tank and legal advocacy organization that focuses on issues of democracy and justice. Among other things, we seek to ensure fair and accurate voting procedures and systems and to promote policies that maximize citizen enfranchisement and participation in elections. We have done extensive work on a range of issues relating to election administration, including work to remove unnecessary barriers to voter registration; to make voting machines more secure, reliable, usable, and accessible; and to expand access to the franchise. Our work on these topics has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, participation in litigation to compel states to comply with their obligations under federal law and the Constitution. We have also monitored the work of the EAC on a variety of election administration topics.

My testimony today will address how Congress can help ensure that the EAC is effective this year in assisting the states to administer smooth and fair elections. I will focus in particular on the areas in which we believe this Subcommittee can provide helpful oversight of the EAC. Although we believe that such oversight is needed, we also recommend that this Committee support the EAC because its work is critical to our country’s election administration.

I. Congressional Oversight is Needed to Ensure that the EAC Operates in a Transparent Manner and Follows Regular Procedures

First and foremost, oversight is needed to ensure that the EAC functions pursuant to regular procedures in a transparent manner that facilitates public accountability. Over the past few years, the EAC has come under criticism for its failure to adopt and follow regular procedures and for the lack of transparency of its operations and decision-making processes. These failures have, unfortunately, undermined public confidence in the agency. Although the EAC has taken steps to increase the transparency of its operations this year—especially by publicizing more information about the agency’s operations on a regular basis—more can and should be done to foster public accountability and to regularize and standardize the agency’s operations.

Perhaps the most vivid illustration¹ of this problem is the way in which the EAC handled two research projects it commissioned: a report on voter identification and a report on voting fraud and voter intimidation, both of which were completed by mid-2006. Both reports were commissioned pursuant to the agency’s responsibility to conduct and make available to the public studies regarding election administration issues.² Nonetheless, the EAC refused to release those reports until mid-2007, after it came under intensive scrutiny and pressure from members of this Subcommittee and others.

The Brennan Center consistently denounced the EAC’s decision to suppress or delay the release of those reports.³ There is simply no legitimate reason for a public agency to withhold research on matters of public concern, particularly when the research was commissioned with taxpayer dollars from established experts in the field pursuant to a statutory mandate that the agency make studies on election administration issues available to public. The duty to disclose is especially strong because the EAC’s primary purpose is to serve as “a national clearinghouse and resource” on election administration information and procedures.⁴ Worse, the EAC withheld these reports at a critical time when the issues addressed in the reports were the subjects of debate and decisions at all levels of federal and state government. These debates and decisions took place without the benefit of the reports’ findings on the significant impact of voter ID laws in reducing voter turnout and the low prevalence of the kind of voter fraud targeted by ID laws.

The decisions to withhold these reports from the public, as well as the subsequent decisions to release these reports, were not made in a public vote by the Commissioners, nor were they publicly justified or explained in any way. There were no agency policies or procedures in place to guide the Commission’s actions with respect to the research. Indeed, the Commission did not even have published procedures for handling requests for public

¹ Another illustration, discussed in Part III, *infra*, is the EAC’s failure to timely publish a report criticizing CIBER, Inc., a voting system testing laboratory.

² See 42 U.S.C. § 15381.

³ The Brennan Center requested both reports in October 2006 under the Freedom of Information Act (FOIA), but the EAC denied our request and our subsequent appeal, arguing that the reports were privileged. See http://brennan.3cdn.net/83207ea295b4a3c852_w4m6idxs1.pdf (appeal letter). All documents relating to this dispute are available at http://www.brennancenter.org/content/resources/legislation_testimony/category/eac_oversight.

⁴ 42 U.S.C. § 15322.

information, as required by the Freedom of Information Act. To the best of our knowledge, no systematic and regular procedures have been put in place since that time.

In April 2007, the Brennan Center urged the EAC to adopt a number of recommendations designed to increase the transparency of the agency's research operations, to bring the EAC's practices in line with generally accepted research protocols and methods, to promote greater confidence in the EAC's processes, and to enhance its public legitimacy. I attach a copy of those recommendations as an exhibit to my testimony.⁵ To the best of our knowledge, these recommendations have not yet been adopted by the Commission. We respectfully request that this Committee consider these recommendations in its oversight of the EAC.

Also in April 2007, the EAC asked its Inspector General to review its internal procedures, including its procedures for awarding and managing research contracts. We welcome any recommendations by the Inspector General designed to achieve the above-referenced goals. Given how critical the work of the Election Assistance Commission is to the effective administration of elections, it is essential that its procedures and processes be reformed and regularized as soon as possible.

II. Congressional Oversight is Needed to Ensure That the EAC Does Not Make Recommendations That Could Risk Disenfranchising Eligible Voters This Year

The Help America Vote Act of 2002 ("HAVA") grants the EAC limited authority over voter registration in three significant respects. First, HAVA charges the EAC with adopting voluntary guidance to assist states in meeting the requirements of the statute's provisions regarding statewide voter registration databases, among other things.⁶ The EAC exercised this authority in July 2005, providing the states with some useful non-binding guidance in implementing the new computerized voter registration databases mandated by HAVA.⁷ Second, HAVA confers upon the EAC the authority previously held by the Federal Election Commission under the National Voter Registration Act of 1993 (the "NVRA" or the "Motor Voter" Act), including limited rule-making authority over the federal mail-in voter registration form.⁸ The EAC has acted under this authority on two occasions,⁹ but it has not revised or undertaken any

⁵ The Brennan Center's recommendations are also available here:

http://www.brennancenter.org/content/resource/brennan_center_calls_for_greater_transparency_and_accountability_of_us_elec/.

⁶ 42 U.S.C. § 15501(a).

⁷ See http://www.eac.gov/election/docs/statewide_registration_guidelines_072605.pdf/attachment_download/file.

The Brennan Center provided extensive commentary on this guidance. See Testimony of Wendy R. Weiser before the U.S. Election Assistance Commission Concerning Statewide Voter Registration Databases, April 26, 2005, available at http://www.brennancenter.org/page/-/d/download_file_9238.pdf; Comments by Voting Rights, Civil Rights, and Civic Organizations on the EAC's Draft Voluntary Guidance on the Implementation of Voter Registration Lists, May 25, 2005, available at http://www.brennancenter.org/page/-/d/download_file_9233.pdf. The Brennan Center's chief criticism of the guidance the EAC issued is that it did not go far enough to ensure that states protect voters' rights as they use their computerized voter lists. Specifically, the guidance does not address the problem, discussed *infra*, of certain states refusing to register new voters, contrary to HAVA, solely because election officials cannot find a computerized match for their voter registration information.

⁸ See 42 U.S.C. § 1973gg-7(a).

⁹ On both occasions, the EAC refused requests—by Florida in July 2005 and Arizona in March 2006—to add to the conditions set by Congress for accepting the federal mail-in voter registration form. See Ray Martinez III, Position

rule-making actions concerning the federal mail-in voter registration form since 2006. And third, HAVA charges the EAC with conducting and making available to the public studies regarding election administration issues, including the issue of voter registration databases and maintaining a secure and accurate voter list.¹⁰ Pursuant to this authority and possibly also its guidance authority, the EAC has recently sponsored a three-year study, beginning in 2007, on voter registration databases, with two principal goals: (i) to advise the states on how to better implement their statewide voter registration databases, and (ii) to study and make recommendations concerning interoperability among different states' voter registration databases.¹¹ An interim report focusing on the second goal is expected on April 1, 2008.¹²

For the reasons stated below, we believe that the EAC should not exercise its authority to make or recommend any further changes to the voter registration process this year. Instead, the EAC should focus on assisting the states in improving their voter registration databases.

A. The EAC Should Not Recommend Changes to the Way in Which States Use Voter Registration Databases in 2008

Although the EAC can and should play an important role in assisting the states to improve their statewide voter registration databases, we believe that the EAC should not recommend any changes that could affect how voters are registered and who is added to or removed from the voter rolls in 2008. In particular, the EAC should not adopt any recommendations concerning cross-state data matching this year. We are concerned that the EAC may be preparing to issue recommendations concerning the use of voter registration databases this year, and we hope that this Committee will urge it to refrain from doing so.

The nation's experience to date shows that changes in the way statewide voter registration databases are used often have unintended consequences or glitches that could disenfranchise eligible voters. There is simply not enough time in 2008 to properly vet such changes, to identify and correct any problems, and to make sure that there are adequate voter protections in place. In particular, there is insufficient time in 2008 to undertake any new program of cross-state data matching that could result in changes to voters' registration status without risking widespread problems that would affect the November elections.

The risk of unwarranted disenfranchisement is especially high in connection with efforts to electronically match records in a voter registration database against records in other government databases. This risk arises primarily in two contexts: (1) when matching is used as a barrier to getting on the voter rolls, and (2) when matching is used to create lists with which to purge the voter rolls of persons who have become ineligible to vote or of duplicate entries. In

Statement, July 10, 2006, available at http://www.eac.gov/News/docs/arizona-martinezpositionstatementaz.pdf/attachment_download/file (discussing both actions).

¹⁰ 42 U.S.C. § 15381(a) & (b)(3).

¹¹ See Testimony of Dr. Herbert Lin, Chief Scientist, Computer Science and Telecommunications Board, National Research Council, before the Election Assistance Commission, November 13, 2007, available at http://www.eac.gov/News/docs/2007-meetings-and-hearings-11-13-07-meeting-herb-lin.pdf/attachment_download/file (testimony by study director).

¹² *Id.*

both contexts, database matching efforts have yielded significant errors that threatened to disenfranchise eligible voters.

First, database matching has created problems when states have attempted to match the information provided by applicants for voter registration against information maintained in other government databases, including databases maintained by motor vehicle authorities and the Social Security Administration. Although such match attempts can be useful tools when used for the purposes intended by Congress in HAVA,¹³ they are unreliable when used to determine whether applicants are ineligible to vote. Nonetheless, over the past few years, a small but significant minority of states have inappropriately used database matching as a barrier to getting on the voter rolls.¹⁴ These states have refused to place eligible citizens on the rolls unless election officials could find a match between the voter's registration information and information in other government databases. Although HAVA does provide for such database matching efforts,¹⁵ the statute does not permit states to condition access to the voter rolls on successful matches. The only two federal courts to have considered the issue to date have held that "no match, no vote" procedures violate HAVA and the Voting Rights Act.¹⁶

Regardless of whether "no match, no vote" procedures are lawful, they risk blocking large numbers of eligible voters from the voter rolls for no good reason. As the Brennan Center has catalogued,¹⁷ the failure to find a computer match between a voter registration record and another government record usually does not indicate any problem with an applicant's eligibility or her voter registration information. Rather, match failures are far more frequently the result of typos, the switch from maiden names to married names, and a variety of other common database inconsistencies. When New York City conducted an audit of its 2005 effort to match the records in its voter database against those in its department of motor vehicles database, it found that almost all of the match failures resulted from typos. When states use matching as a condition to

¹³ Under HAVA, states must attempt to match the information supplied by applicants for voter registration against information in the databases maintained by motor vehicle departments and the Social Security Administration. 42 U.S.C. § 15483(a)(5)(B). The purpose of this matching procedure is to enable states to associate a unique identifying number—a driver's license number, a partial Social Security number, or a newly assigned number—with each eligible voter, to keep better track of voters moving within the state, and to ensure that a John Smith in one county would not be confused with a John Smith elsewhere. Thanks to an amendment offered by Senator Wyden, this matching procedure serves a second purpose as well—to exempt first-time voters who register by mail from HAVA's identification requirements if state officials are able to "match" the information on their registration records with other state records. 42 U.S.C. § 15483(b)(3).

¹⁴ See Justin Levitt, Wendy Weiser & Ana Munoz, *Making the List: Database Matching and Verification Processes for Voter Registration*, March 24, 2006, available at http://www.brennancenter.org/content/resource/making_the_list_database_matching_and_verification_processes_for_voter_regi/ (cataloguing state database practices based on research in late 2005 and early 2006). Currently, we are aware of only three states that still refuse to register voters based on the results of unsuccessful database matching efforts, though it is difficult to be sure since states rarely codify such practices.

¹⁵ See *supra*, note 8.

¹⁶ See *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wa. 2006); *Florida State Conference of the NAACP Branches v. Browning*, No. 07-CV-402-SPM/WCS (N.D. Fla. Dec. 18, 2007) (order granting motion for preliminary injunction), available at <http://www.brennancenter.org/page/-/Democracy/FloridaNAACPvBrowning%20-%202012-18-07%20Order%20Granting%20PI.pdf>. While the Washington decision has been made final, the Florida decision is currently on appeal.

¹⁷ See, e.g., *Making the List*, *supra*, note 14.

getting on the voter rolls, a substantial number of eligible voters are kept off the rolls because of computer and human errors.

The number of eligible voters who could be affected by “no match, no vote” policies is alarming. In several jurisdictions, match failure rates have been as high as 20-30%. According to a February 2007 report by the Social Security Administration, 46.2%—almost half—of all voter registration records submitted to the Administration for verification failed to match its records. Moreover, match failures are more common for members of minority groups, whose names may be less familiar to election officials, as well as for women, who are more likely to have changed their surnames. The Brennan Center found significant racial disparities in match failure rates in connection with lawsuits challenging a “no match, no vote” rules in Florida and Washington State.¹⁸

Second, database matching has also created problems in the purge context. Although new statewide voter registration databases, when fully developed, can facilitate better maintenance of the rolls, without adequate protections for voters, purge practices raise significant concerns. Computerized voter rolls enable states to purge voters with the push of a button. Most states are now able to develop lists of voters to be purged from the rolls by electronically matching names on voter rolls against government databases of persons ineligible to vote. Unfortunately, the matching processes used are inaccurate and may result in many eligible voters being purged from the voter rolls. Since states rarely provide effective notice of a purge, voters whose names have been removed from the rolls usually do not learn of the problem until they show up at the polls on Election Day and are denied a regular ballot. The secrecy of the process makes it easier for election officials to manipulate purges to target certain groups of citizens.

The most notorious examples of flawed purges occurred in Florida in 2000 and 2004. In 2000, thousands of legal voters were purged from Florida’s voter rolls simply because their names shared 80% of the characters of the names on a list of people with felony convictions. In 2004, the Brennan Center uncovered evidence of another erroneous purge list in Florida, containing 47,000 “suspected felons.” The flawed process used to generate the list identified only 61 voters with Hispanic surnames, notwithstanding Florida’s sizable Hispanic population.¹⁹ To compound the problem, the purge list over-represented African Americans²⁰ and mistakenly included thousands who had had their voting rights restored under Florida law. Although the Florida flawed purge lists were widely publicized, similar errors across the country typically

¹⁸ In Florida, we found that Hispanic Americans, who comprised 15% of the voter applicant population, constituted 34% of those on the failed match list; similarly, African-Americans, who comprised 13% of the voter applicant pool, constituted 22% of those on the failed match list. In contrast, whites, who comprised 66% of the applicant pool, accounted for only 29% of the un-matched applications. See Plaintiffs’ Supplemental Evidentiary Submission in Support of Motion for Preliminary Injunction, *Florida State Conference of NAACP Branches v. Browning*, No. 07 CV 402 (N.D. Fla. Nov. 14, 2007). In Washington State, we found that Asian Americans were vastly over-represented in the un-matched population.

¹⁹ Specifically, 0.1% of the people on the list were Hispanic, even though in Florida, 12% of the disenfranchised population, or one in eight citizens, is Hispanic. The contractor that compiled that list did so by matching names on the voter list against records maintained by the state department of corrections. For a match to be found, the contractor required matches in a variety of fields, including a field for race. The problem was that one database had a category for Hispanics and the other did not. The result was a list that systematically excluded Hispanics.

²⁰ African-Americans comprised 46% of the purge list but only 30% of the disenfranchised population.

escape public scrutiny. Other purges that have come to public light have been found to ensnare many eligible voters.²¹

Because the database matching techniques used by many states in the voter registration context have been inaccurate; because there are insufficient safeguards in place to guard against unwarranted disenfranchisement due to database and matching errors; and because there is insufficient time to improve these processes and provide the necessary protections for voters this year, the EAC should not recommend that states engage in additional forms of database matching this year to maintain their voter rolls.

B. The EAC Should Not Make Recommendations For Inter-State Database Matching in 2008

In particular, the EAC should not recommend that states undertake new efforts to match voter registration data across state lines to identify voters who have allegedly moved or who are otherwise ineligible to vote in a jurisdiction.²² The problems associated with database matching voters are compounded as states attempt to increase the interoperability of their systems for the purposes of pruning their voter rolls based on information gleaned from other states. In several instances in which purges based on cross-state data matching have come to public light,²³ the purge attempts were found to have been based on erroneous assumptions, such as the assumption that two records showing the same name and date of birth refer to the same person. (To the contrary, in a sufficiently large group such as a state, two different individuals will share the same name and date of birth surprisingly often.²⁴)

Given the novelty of the practice, the current technological limitations of state voter registration databases, and the lack of sufficient voter protections in place, any effort to promote purges based on cross-state database matching presents too great a risk of voter disenfranchisement this year. Indeed, the EAC should not make any recommendations on database matching without ample opportunity for study and public comment and a demonstration that the recommendations include adequate protections to prevent eligible voters from being

²¹ For example, the Brennan Center worked with political science professor Michael McDonald to analyze a New Jersey purge list prepared by a political party using “matching” techniques. We found that the list was compiled using a number of faulty assumptions and thus that it would have harmed eligible voters if used as the basis for a purge. See http://brennan.3cdn.net/9d1efbddb2c45834e0_pom6bx3bk.pdf.

²² It bears noting that nothing in HAVA or any other federal statute requires states to attempt to compare their voter registration database records with those of other states.

²³ For example, in 2006, the Secretary of State of Kentucky attempted to purge the state’s rolls based on a flawed attempt to identify voters who had moved from Kentucky to neighboring South Carolina and Tennessee. The state Attorney General learned of the purge and brought a successful lawsuit to reverse it on the grounds that the Secretary of State did not follow the voter protection procedures outlined in the state law analog to the NVRA. The lawsuit uncovered the fact that eligible voters who had not, in fact, moved out of the state of Kentucky were caught up in the purge. (Neither South Carolina nor Tennessee relied on the results of the flawed match exercise.)

²⁴ Statistics teaches that in a group of 23 people, it is more likely than not that two will share the same birthday; in a group of 180, two will probably share the same birth date, including day, month, and year. Particularly for voters with common names in a pool as large as a state, there will be several different individuals who share the same basic information. See Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 11 (July 1, 2007) (unpublished manuscript, submitted to the 2007 Conference on Empirical Legal Studies), available at

http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID997888_code698321.pdf?abstractid=997888&mirid=1.

inappropriately disenfranchised. (At the very least, HAVA requires the agency to provide notice of any such recommendations and to allow ninety days for public comment.²⁵)

C. The EAC Should Assist the States to Improve Their Voter Registration Databases

The risk of voter disenfranchisement as a result of purges based on database matching programs is unlikely to be abated until the states improve the quality of their voter registration databases. Accordingly, the Brennan Center recommends that EAC focus its efforts this year on helping states improve their voter registration databases, many of which do not function adequately, instead of on making recommendations concerning database interoperability.

D. The EAC Should Not Recommend Changes to the Federal Mail-In Voter Registration Form in 2008 Other Than Technical Corrections

Congress provided for a federal mail-in voter registration form in the NVRA to guard against a range of state barriers to voter registration and to ensure that all eligible Americans can register to vote using a single form. Most changes to this federal form require a formal vote by the EAC Commissioners after a formal rule-making process. At this point, there is insufficient time in 2008 to implement any changes to the federal mail-in voter registration form, other than technical corrections like address updates, without risking confusion and error that could prevent eligible voters from being registered. The EAC should, however, immediately update the addresses of the state election offices on the instructions to the federal form to ensure that eligible registrants are not disenfranchised due to lost voter registration forms sent to old addresses.

III. Congressional Oversight Is Needed to Ensure That the EAC Adequately Fulfills Its Necessary Functions, Especially Relating to Testing and Certification of Voting Machines

HAVA has placed the EAC in charge of many crucial federal election administration tasks. Among its many responsibilities, it is charged with acting as the lead federal agency for accrediting voting system testing laboratories and certifying voting systems, and allocating election-related federal funding to the states.²⁶ Both of these functions are essential. The EAC's performance with respect to the latter can and should be improved.

For the last several years, the testing and certification process conducted by the EAC for voting machines has been flawed in at least three ways: (1) vendors choose and pay the laboratories that evaluate their systems, (2) the process lacks transparency, and (3) the formal reporting process is too limited.

²⁵ 42 U.S.C. § 15501.

²⁶ 42 U.S.C. § 15322 (2003).

Vendors Choose and Pay the Laboratories that Reevaluate their Systems. Under the current process, vendors choose and pay for the laboratories that evaluate their systems.²⁷ This process creates an appearance of conflict of interest for the testing labs. Worse still, it creates perverse incentives for the testing laboratories to certify machines to ensure that vendors choose them in the future. The testing laboratories themselves have done little to build public confidence in their independence from voting machine vendors. In a fairly well-publicized written submission to the EAC, a testing laboratory recently stated that it “view[ed] the relationship between an independent testing laboratory and it’s [sic] clients as similar to that between lawyer and client or between doctor and client.”²⁸

Accordingly, the Brennan Center recommends taking action to ensure that voting system testing laboratories are and appear to be independent of vendors. First, we should end the process whereby the voting system testing laboratories are chosen and directly paid by the vendors whose machines they evaluate. Second, the periodic evaluations of testing laboratories conducted by the National Voluntary Laboratory Accreditation Program should be made public promptly, regardless of whether the laboratory’s accreditation is granted, denied or revoked.

Process Lacks Transparency. The EAC’s failure to timely publish a damning Assessment Report of CIBER, Inc. after it was completed in July 2006 provides a textbook case of how a lack of transparency can severely shake public confidence. The report concluded, among other things, that CIBER had not shown the resources to provide a reliable product.²⁹ As a result of the Assessment Report, the EAC determined it could not accredit CIBER under the interim accreditation process.³⁰ However, it did not publicize this decision, release the Assessment Report, or notify the State of New York, which was using CIBER to test its voting systems at the time. Only after the New York Times reported that CIBER had been barred from certifying election equipment and weeks of public pressure following that news article, did the EAC finally release the Assessment Report and other documents related to its decision.³¹

New York’s experience with CIBER is also an excellent illustration of the importance of transparency in the voting machine certification process, and in particular the need to ensure that

²⁷ See ACCURATE, *Public Comment on the Manual for Voting System Testing & Certification Program Submitted to the United States Election Assistance Commission* (Oct. 31, 2006), joined by the Brennan Center, available at http://accurate-voting.org/wp-content/uploads/2006/11/ACCURATE_VSTCP_comment.pdf (hereinafter “ACCURATE Comment on VSTCP”); U.S. Election Assistance Commission Public Meeting and Hearing, Pasadena, CA (July 28, 2005) (Testimony of David L. Dill, Professor of Computer Science, Stanford University and Founder of Verified Voting Foundation and VerifiedVoting.org) available at <http://www.eac.gov/docs/Dill.pdf> (hereinafter “Testimony of David Dill”); *Voting Machines: Will the New Standards and Guidelines Help Prevent Future Problems?: Joint Hearing Before the H. Comm. on H. Admin. and the Comm. on Science*, 109th Cong. 66-71 (2006) (Written Statement of David Wagner, Professor of Computer Science, University of California-Berkeley), available at http://www.votetrustusa.org/index.php?option=com_content&task=view&id=1554&Itemid=26 (hereinafter “Testimony of David Wagner”).

²⁸ U.S. Election Assistance Commission Public Meeting, Washington, D.C. (Oct. 26, 2006) (Written Statement of Frank Padilla, Test Supervisor, Wyle Laboratories, Inc.) available at <http://www.eac.gov/docs/Voting%20Systems%20Briefing%20-%20Frank%20Padilla%2010-18-06%20Final.pdf>.

²⁹ U.S. Election Assistance Commission, Assessment Report: CIBER & Wyle (conducted July 17-22, 2006) available at [http://www.eac.gov/docs/Ciber%20&%20Wyle%20Assessment%20\(July%202006\).pdf](http://www.eac.gov/docs/Ciber%20&%20Wyle%20Assessment%20(July%202006).pdf).

³⁰ Christopher Drew, *Citing Problems, U.S. Bars Lab From Testing Electronic Voting*, N.Y. TIMES (Jan. 4, 2007) available at <http://select.nytimes.com/search/restricted/article?res=F50811F63C540C778CDDA80894DF404482>.

³¹ These documents are available at: http://www.eac.gov/eac_vsc3_updates.htm.

all test plans, Technical Data Packages and test reports are made public. Concurrent with its hiring of CIBER to conduct its certification testing, New York also hired NYSTEC, a private, not-for-profit engineering company to conduct an independent review of CIBER's test plan. NYSTEC's review showed that the test plan lacked several security and functional testing requirements under state law and the federal Voluntary Voting System Guidelines of 2005 (to which CIBER had agreed to test). Among the items missing from the test plan were: a requirement that voting systems did not include any device potentially capable of externally transmitting or receiving data via the internet, radio waves or other wireless means; a requirement that voting system software not contain any viruses or other devices that could cause the system to cease functioning properly at a future time; a requirement for voting systems to provide a means by which the ballot definition code could be positively verified to ensure that it corresponded to the format of the ballot face and election configuration; and test methods or procedures for the majority of the state's voting system requirements.³² These problems were only discovered because CIBER's test plans were subject to independent scrutiny.

Short of mandating that jurisdictions hire independent reviewers for all certifications of voting machines, it is imperative that the EAC publish documents necessary for the public to ascertain the value of a testing laboratory's certification. This means not only publishing all testing laboratory test plans for a particular machine, but also the technical data packages submitted by the vendor to the testing laboratory, and the laboratory's reports that assess the machines. The EAC's Voting System Testing and Certification Program Manual now requires the publication of testing laboratory reports and test plans. It does not, however require the publication of all Technical Data Packages provided by the vendors for the reports; this omission will make it more difficult for the public and independent experts to judge the conclusions made in the laboratory reports.³³ This is a glaring gap in the EAC's reporting requirements and should be changed.

Accordingly, the Brennan Center recommends that the EAC make the voting machine certification process more transparent. If the public is to regain its trust in this process, it is critical that the EAC publish: (1) all test plans submitted by the testing laboratories; (2) the vendor's Technical Data Packages, which the vendor submits to the EAC to provide the specifics of a voting system; as well as (3) the test report that a testing laboratory submits to the EAC after it has tested that voting system.³⁴

Formal Reporting Process is Too Limited. Under the new Voting System Testing and Certification Program Manual, the EAC will accept reports from "[s]tate or local election officials who have experienced voting system anomalies in their jurisdiction."³⁵ This is an important step. Unfortunately, individual voters and technical experts performing usability,

³² Howard Stanislevic, *Voting System Certification: Who's Minding the Store?*, VoteTrustUSA (Jan. 9, 2007) available at http://votetrustusa.org/index.php?option=com_content&task=view&id=2173&Itemid=113.

³³ Aaron Burstein & Joseph Lorenzo Hall, *Unlike Ballots, EAC Shouldn't Be Secretive*, Roll Call (Jan. 22, 2007) available at http://www.rollcall.com/issues/52_66/guest/16640-1.html.

³⁴ ACCURATE Comment on VSTCP, *supra* note 27.

³⁵ U.S. Election Assistance Commission, Testing and Certification Program Manual section 8.7.2 (draft, Sept. 28, 2006) available at [http://www.eac.gov/docs/Voting%20System%20Testing%20and%20Certification%20Program%20Manual%20FR%20DRAFT%20\(Sept%2028\).pdf](http://www.eac.gov/docs/Voting%20System%20Testing%20and%20Certification%20Program%20Manual%20FR%20DRAFT%20(Sept%2028).pdf).

accessibility and security tests on voting machines appear to be excluded from filing such reports with the EAC.³⁶ This is problematic for two reasons. First, the EAC has no method in place to protect the anonymity of election officials filing reports. Many election integrity and security experts have argued that an election official “might be reluctant to report an irregularity in a system he was responsible for administering,” both because he may have also been responsible for purchasing that system and because he would probably need to continue to rely on technical assistance from the vendor.³⁷ Second, voters and technical experts using these machines would be an excellent source of information about problems with these machines; in many instances, they will be in a far better position than election officials to know how the machines actually perform when used.

Accordingly, the Brennan Center recommends that the reporting process be opened to include reporting information from voters and technical experts who have used the voting machines to amend voting system standards, where necessary.³⁸

IV. The EAC Should Provide Assistance to State and Local Election Officials to Avoid Basic Ballot Design Mistakes

The EAC can make a significant difference this year if it provides assistance to state and local election officials to prevent basic ballot design mistakes. The EAC recently produced a 266-page report on effective ballot design. It has been repeatedly demonstrated that ballot design is very important to smooth election administration. A poorly designed ballot in Sarasota County is thought to be responsible for 13% of voters failing to cast their vote for the House of Representatives, even though they voted for the Senate.³⁹ The “butterfly ballot” in Palm Beach was blamed for many of the 19,000 over-votes in that county which had to be discarded.⁴⁰ Even more recently, in the 2008 California Presidential Primary, as many as 49,500 votes may have been lost in Los Angeles County because voters mis-marked their ballots as a result of a confusing ballot design.⁴¹

Notwithstanding the importance of the information in the report, the dense report on ballot design produced by the EAC may not, standing alone, be sufficient to communicate the information in the report to relevant decision-makers and actors. The EAC has experience using multiple and complimentary methods of public education. For example, in July of 2007, the EAC hosted a series of briefings with respect to improving the quality and recruitment of poll workers and also published a manual on poll worker recruitment, training, and retention. By way of another example, the EAC published a glossary of common election terms in Spanish and provided a mechanism for translating its website.

³⁶ ACCURATE Comment on VSTCP, *supra* note 27, at 8

³⁷ *Id.* at 9.

³⁸ *Id.* at 8.

³⁹ See Editorial, *Fixes for Accurate Vote Counts*, CHRISTIAN SCIENCE MONITOR, Feb. 27, 2007, at 8.

⁴⁰ See Jeff Kunerth, Scott Maxwell, & Maya Bell, *Vote Never Had Chance; Ballots and Laws Were Confusing, Poll Workers Weren't Well-Trained and Voters Were Careless*, ORLANDO SENTINEL, Dec. 17, 2000, at A1.

⁴¹ Richard C. Paddock, *Some Independent Votes Won't Count in L.A. County*, L.A. TIMES, Feb. 12, 2008, at A1.

The EAC should similarly undertake further efforts to ensure that ballot design mistakes are avoided—such as providing trainings and workshops to those officials responsible for designing ballots, providing an easy to use “checklist” for ballot design, and publishing best practices. There is still enough time to disseminate this information this year to ensure that it helps avoid ballot design errors this November.

At this time, however, the EAC’s operating budget and staffing levels are insufficient for its many tasks. Accordingly, we urge Congress to provide the EAC with adequate resources to undertake this important public education effort.

V. Congress Should Provide Adequate Resources to the EAC and Fully Fund HAVA

As noted above, HAVA has placed the EAC in charge of many of the most important federal election administration tasks. In addition to its responsibilities over the accreditation of the Voting System Testing Laboratories and certification of voting systems, the EAC is also charged with distributing HAVA funding to the states, acting as a clearinghouse of information on the experiences of State and local governments in implementing the guidelines and in operating voting systems in general, conducting studies and carrying out other activities to promote the effective election administration of Federal elections, and carrying out administrative duties under the NVRA, including developing and maintaining a mail voter registration application form for elections for federal office.

In contrast to its significant responsibilities, the EAC receives very little support. In 2006, it had an operating budget of just \$15 million and employed less than 30 people. Even the best operating procedures and practices will have little effect if the EAC does not have the resources and staff to carry them out. Accordingly, the Brennan Center recommends that Congress provide the EAC with sufficient resources to carry out its responsibilities effectively.

In addition, the Brennan Center recommends that Congress fully fund HAVA. The scope and speed with which the nation has transformed the way it registers, votes, and counts votes is unprecedented. Such a transformation requires adequate funding to be successful. The funding thus far has proven insufficient, and the challenges facing election administrators are not abating. Full funding is necessary to ensure that states properly implement statewide voter registration databases, keep up with the spiraling costs of purchasing and maintaining voting equipment, and ensure proper poll worker training and voter education during a period of significant change. Sufficient resources are needed to fulfill HAVA’s promise.

Thank you very much.

Attachment to Testimony of Wendy R. Weiser

Brennan Center Calls for Greater Transparency and Accountability of
U.S. Election Assistance Commission

Last week, the U.S. Election Assistance Commission (EAC) announced that it will review its internal processes for releasing research and reports to the public and for awarding research contracts, and yesterday it asked its inspector general to review its procedures. We hope that these announcements signal the agency's willingness to embrace greater transparency and public accountability—qualities that have been lacking from many of its operations to date.

The EAC's announcements come on the heels of intense pressure from the Brennan Center and other advocates, members of Congress, and the media for the EAC to release two reports on important voting issues that the agency had commissioned from expert consultants with taxpayer dollars: a report on voter identification, and a report on voting fraud and voter intimidation. Despite the fact that both reports were completed by the summer of 2006, the EAC did not release the voter identification report until March 30, 2007, and it has never released the voting fraud and voter intimidation report (the latter report, however, was leaked to the *New York Times* last week).¹ The Brennan Center had requested both reports in October 2006 under the Freedom of Information Act (FOIA), but the EAC denied our request and our subsequent appeal.

The Brennan Center has consistently denounced the EAC's decision to suppress or delay the release of these expert reports. There is simply no legitimate reason for a public agency to withhold research on matters of public concern, particularly in this instance, when the research was commissioned with taxpayer dollars from established experts in the field pursuant to a statutory mandate that the agency make studies on election administration issues available to public. The duty to disclose is especially strong with respect to a public agency whose primary purpose is to serve as "a national clearinghouse and resource" on election administration information and procedures.

Worse yet, the EAC withheld these reports at a critical time when the issues addressed in the reports were the subjects of debate and decisions at all levels of government. During the period in which the reports were suppressed, the legislatures of more than half of the states considered and voted on bills to impose more restrictive voter ID requirements on citizens; a number of federal and state courts – including the United States Supreme Court – heard and decided lawsuits challenging restrictive voter ID laws; and the U.S. House of Representatives debated and passed a bill that would have imposed requirements on all voters. All of these debates and decisions took place without the benefit of the reports' findings on the significant impact of voter ID laws in reducing voter turnout and the low prevalence of the kind of voter fraud targeted by ID laws.

¹ The EAC did, however, produce its own report on election crimes based in part on the consultants' research.

As the EAC reconsiders its internal processes, we urge it to adopt the following recommendations designed to increase the transparency of the agency's research operations, to bring the EAC's practices in line with generally accepted research protocols and methods, to promote greater confidence in the EAC's processes, and to enhance its public legitimacy.

- The EAC should solicit and publish public input on its research agenda and priorities.
- The EAC should develop and publish uniform policies and procedures for selecting research contractors, entering into research contracts, and managing research projects. The policies and procedures should be designed to foster research on election administration issues; to ensure that such research is timely and useful for voters, election administrators, and the public; to promote research that uses sound methodology; and to ensure the greatest possible transparency, predictability, and accountability of the EAC's decision-making processes.
- The EAC should make all the research it commissions available to the public. It should do so without unreasonable delay.
- The EAC should not censor or modify outside research in any way, even if it is dissatisfied with the methodology or the findings. The EAC is free to adopt or decline to adopt, in whole or in part, the findings and conclusions of outside researchers. It should not alter those findings or conclusions when it releases the research.
- If the EAC decides to adopt or to reject the findings or conclusions of outside research, it should do so by a public vote, with advance public notice. The EAC need not specifically adopt or reject the research; it can release the research without comment or attribution to the agency.
- The EAC should not use any political litmus test for selecting the researchers with whom it contracts. The researchers should be judged on the quality of their proposals and their research, not on their actual or perceived political leanings.
- The EAC's research contracts should not in any way prohibit researchers from discussing their research or findings within a reasonable time after they complete their research.
- The EAC should oversee its outside research contracts so as to foster independent and peer-reviewed research rather than to design, plan, and manage the studies or research projects. Nor should the EAC place unreasonable restrictions on researchers or prevent them from drawing conclusions based on their research.
- The EAC should not refuse to sponsor or withdraw its support from any research project because of the potential political consequences of the research findings or conclusions. The goal of research should be increased knowledge and information about election administration issues.
- The EAC should encourage peer review of the research it commissions after the research is released. It can also seek independent review prior to initiating research.

The Brennan Center looks forward to working with the EAC to reform its practices to better realize its statutory mandate of fostering research on election administration issues and serving as an election information clearinghouse. For more information, please contact Wendy Weiser at wendy.weiser@nyu.edu or Myrna Perez at myrna.perez@nyu.edu.