



2005 Market Street, Suite 1700      215.575.9050 Phone  
Philadelphia, PA 19103-7077      215.575.4939 Fax

1025 F Street NW, 9th Floor      202.552.2000 Phone  
Washington, DC 20004-1409      202.552.2299 Fax  
[www.pewtrusts.org](http://www.pewtrusts.org)

**TESTIMONY OF RAY MARTINEZ III**  
**SENATE COMMITTEE ON RULES AND ADMINISTRATION**  
**July 25, 2007**

Good morning Chairman Feinstein, Ranking Member Bennett and Members of the Committee. My name is Ray Martinez III and I am a former commissioner and vice chair of the U.S. Election Assistance Commission. I currently reside in Austin, Texas where I am an attorney and owner of the Martinez Policy Group, a government relations and policy development firm. Concurrent to my private practice, I teach election law as an adjunct professor at the University of Houston Law Center and at the LBJ School of Public Affairs in Austin.

Additionally, I also serve as a policy advisor on election issues to the Pew Center on the States, a division of The Pew Charitable Trusts. The Pew Center on the States conducts credible and rigorous research and pilot programs on various public policy issues facing state and local governments. The Pew Center on the States is currently implementing a national election reform initiative called “Make Voting Work.” The mandate of MVW is to foster an election system that achieves the highest standards of accuracy, convenience, efficiency and security. To do this, MVW will promote policies, practices and technologies that address the key challenges facing the election process. And, we will do so by working collaboratively with all stakeholders in the election field, including state and local election administrators, academics and public interest advocates.

**Overview**

Given the well-established history of state and local governments administering elections, the passage of the Help America Vote Act of 2002 (HAVA) represented an unprecedented and truly historic decision by the United States Congress to impose uniform election technology and administrative requirements to improve the conduct of elections for Federal offices. Never before in the great history of our country had Congress so directly intervened in setting minimal standards regarding the *process* of administering Federal elections.

In exchange for Federal funding, HAVA requires states to implement several election technology and administrative requirements.<sup>1</sup> These requirements are contained in Title III of HAVA, and include, at least in part, the following: statutory standards for voting systems to allow a voter to correct mistakes and verify votes selected before the ballot is cast and counted; a requirement that voting systems alert a voter to any overvote and/or undervote; a requirement that all polling places have at least one accessible voting system allowing a voter with disabilities to cast his or her ballot “privately and independently;” a requirement to ensure that any voter whose name is left off the voter rolls or whose eligibility is challenged at the polling place be allowed to cast a provisional ballot; and a requirement to implement a single, uniform, official, centralized, interactive computerized statewide voter registration database that is defined, maintained and administered by the chief election official in each State. Clearly, HAVA represents a fundamental shift in the administration of elections, from one dominated by local decision-making, to one in which the presence of local, state *and* federal entities co-exist in full partnership.

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<sup>1</sup> While HAVA’s reach is only to elections for Federal office, many States bootstrapped the HAVA requirements and made them mandatory for state and local elections as well. Thus, HAVA’s reach is felt at every level of election administration.

What is important to remember about the historical context regarding the passage of HAVA is the consensus that is reflected in its overwhelming bipartisan passage: rather than operate in a vacuum, Congress sought a broad and informed perspective from all election stakeholders – administrators, advocates and academics alike – and moved forward with policy choices that, while not universally embraced, nevertheless, reflected a broad consensus of the community. And, while HAVA mandated certain specific improvements to the process of election administration, it did so by embracing important principles – namely, greater accessibility, accountability and accuracy in the process – which, if adhered to, could ultimately lead to improved voter confidence in the way our elections are administered.

Although I will not go into much detail, the “Ballot Integrity Act of 2007” embraces similar core principles. I will briefly touch upon a few of those principles in the remainder of my testimony.

### **Verification of Votes Cast**

The Ballot Integrity Act of 2007 places appropriate importance upon the need for verification of votes cast.

As an EAC commissioner – along with my former EAC colleagues – I supported greater use of logic and accuracy testing, parallel monitoring and acceptance testing by state and local jurisdictions to ensure the overall integrity of electronic voting systems. Moreover, in a 2005 commentary published in *Roll Call*, I called for voting system vendors to be required to submit their proprietary software to the National Software Reference Library as a means of providing local election administrators with an additional tool to verify that the software operating in their voting systems is identical to that certified by a Federal testing lab. And, as a commissioner, I fully supported efforts by the EAC to develop overall management guidelines, including universal practices for security of electronic voting systems.

And yet, while it is fair to say that greater testing, more stringent access controls and enhanced physical security to election procedures and voting systems are prudent practices for jurisdictions to implement – and a great many of them have – many have gone even farther. At last count, some 17 States which use electronic voting systems also require additional means of verification of ballots cast through voter verifiable paper audit trails. Even more use optical scan paper ballots.

While I am not here today to endorse a specific method of achieving verification of ballots cast, I *am* here to emphasize the importance of verification as a necessary requirement for any post-HAVA election reform bill.

In December 2005, the EAC approved a revised set of voting system standards called the “2005 Voluntary Voting System Guidelines” (2005 VVSG). With an emphasis upon usability, accessibility and security of all voting systems, the 2005 VVSG included “independent verification” as an informative signal to the election community of the importance placed by the EAC on the need for future voting systems to produce multiple – and verifiable – cast ballot records. In November 2006, shortly after leaving the EAC, I co-authored a commentary with Professor Avi Rubin in which we called upon the EAC to condition Federal certification of voting systems upon a requirement that all systems produce independent verification of ballots cast and counted. More recently and perhaps most significantly, the Technical Guidelines Development Committee (TGDC) – which has concurrent oversight with the EAC over Federal voting systems standards – unanimously passed a resolution directing the National Institute for Standards and Technology (NIST) to develop requirements for the next generation of voting systems to be “software independent.”<sup>2</sup>

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<sup>2</sup> See “On the notion of “software independence” in voting systems,” by Ronald I. Rivest and John P. Wack. “A voting system is ‘software independent’ if an undetected change or error in its software cannot cause an undetectable change or error in an election outcome.”

As the experts at NIST and the TGDC have explained, voting systems that have a voter-verifiable paper audit trail are “software independent,” given that the paper record allows the possibility of both detecting and correcting errors due to software in the system.<sup>3</sup> Other current examples of software independent systems include ballot marking and optical scan systems. However, while achieving verification, these systems also have their drawbacks: for election officials, added complexity through use of VVPAT systems; for Americans with disabilities, a retreat from the significant gains made in HAVA requiring “privacy and independence” in the *entire* voting process. We can do better. Election officials and voting system vendors deserve credit for taking appropriate steps to respond to the increased complexity of voting systems. And yet, across the country, a majority of states have addressed concerns about the integrity of election outcomes by implementing systems with verification.

In my view, a new consensus has emerged that verification of ballots cast is essential in our voting systems. What is still in debate is how best to achieve software independence in electronic voting systems in a manner that addresses the legitimate concerns of all election stakeholders, particularly voters with disabilities and language minority voters. The efforts currently underway at NIST – with the guidance of the EAC – to develop additional methods of achieving software independence should be fully supported. And, the Ballot Integrity Act of 2007 provides additional support to the EAC efforts by mandating the testing and development of best practices to enhance the accessibility of vote verification mechanisms. Admittedly, it may take a number of years to develop, certify and implement, but the voting system of the future should be required to fully embrace the notion of verification while giving election officials and voters greater choice – and added confidence – in the accuracy of election outcomes.

### **Post-Election Audits**

Likewise, the Ballot Integrity Act of 2007 places important emphasis upon mandatory election audits. Since the passage of HAVA nearly five years ago, sweeping changes in voting system technology and election administration procedures have occurred throughout the country. With so much change and added complexity to the voting landscape, it is certainly no surprise that an increasing number of states have codified requirements for additional scrutiny to be placed on machine totals from electronic voting machines or optically scanned ballots. The purpose of post election audits should be comprehensive: not only to ensure accuracy of vote totals, but to ensure compliance by election officials and poll workers with proper procedural requirements.

A March 2007 study by *electionline.org* found that while a growing number of states are considering post election audits, there is wide variation in the requirements for such audits. Nevertheless, a new consensus appears to have emerged calling for greater transparency via post election audits. Influential election stakeholders have spoken publicly on the importance of such safeguards. For example, the Brennan Center for Justice conducted an important study which effectively articulates the need for comprehensive, post-election audits. And, influential members of the election administration community – such as my good friend and co-panelist, Doug Lewis – have also spoken publicly about the benefits of greater transparency through post-election audits.

Like other areas of election reform, however, a careful balance must be maintained with regard to the expectations imposed upon election administrators. The creation of an “Audit Guidelines Development Task Force” by the EAC, as called for in the Ballot Integrity Act of 2007, is a prudent step toward ensuring that experts – including election officials – are appropriately consulted. However, as currently written, the Ballot Integrity Act of 2007 requires jurisdictions to conduct these mandatory audits “...at the same time as the official canvass of each Federal election.” In my personal view, this specific requirement for the timing of such audits places unreasonable complexity, expectation and burden upon local election officials and should be reconsidered.

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<sup>3</sup> *Id* at 5.

## **Importance of Data Collection in Election Administration**

I would also like to take this opportunity to briefly discuss the importance of data collection in the field of election administration. While various stakeholders strive to bring more research and pilot project collaborations to assess innovations and other potential improvements, critical data on the core elements of election administration are severely lacking. Despite the efforts of the EAC and many state and local election jurisdictions to comply with survey instruments, lack of adequate personnel and funding at the local level impede data collection efforts.

Every two years, states are required to collect and report data to the federal government on voter registration as required by the National Voter Registration Act of 1993 (NVRA) and on uniformed military and overseas civilian voters as required by HAVA. However, states *are not* required to report basic election data such as the number of ballots counted and polling places operated, the types of machines used, the number of poll workers hired, and the method of voting (absentee, in-person, etc.).

Pursuant to the “national clearinghouse” authority granted under HAVA,<sup>4</sup> the EAC instituted a survey in 2004 called the “EAC Election Day Survey” which asks state and local governments to voluntarily report data on election policies, practices and performance. In 2006, the EAC combined the mandated NVRA and military and civilian overseas surveys together with the voluntary Election Day Survey. (The 2006 survey is expected to be published soon by the EAC.)

Unfortunately, data collected through the 2004 EAC Election Day Survey is incomplete, with low compliance rates and poor quality data because of various difficulties with the survey instrument (such as differing definitions of key terminology). As stated by the EAC report of the 2004 Election Day Survey:

- “It contains holes and mistakes—errors that might even be such that conclusions point in the wrong direction.”
- “State and local election administrators do not share common terminology for some survey items, such as what constitutes an absentee ballot or poll worker.”

Results are not yet public, but the 2006 survey is not expected to show major improvements.

Rather than spotty and unreliable data collection, I believe it is imperative that all stakeholders work with the EAC to ensure 100 percent compliance with the upcoming 2008 EAC Election Day Survey. This can be achieved by bringing stakeholders together to assist the EAC in creating a survey instrument that is both user-friendly and compatible across multi-jurisdictions. Additionally, it is imperative for Congress to seriously consider providing a dedicated stream of federal funds to state and local jurisdictions to ensure full compliance with EAC data collection efforts. Better quality data will ultimately contribute to the improvement of elections, offering a clear snapshot every two years of how well our elections systems are functioning.

## **U.S. Election Assistance Commission**

The role of the EAC in assisting state and local jurisdictions to comply with the various requirements of HAVA remains vitally important to all election stakeholders. The actions and decisions of the EAC can – and do – have a direct impact upon the very confidence that voters have in the integrity of the elections process. As such, the EAC has an especially important obligation to conduct its affairs in a transparent, deliberative and, to the greatest extent possible, consensus-driven manner.

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<sup>4</sup> Under HAVA, the EAC is authorized to “serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections” and “conduct and make available to the public studies” regarding election administration issues.

The responsibilities given to the EAC under HAVA can be categorized generally as the following: distribution of HAVA funds (which the EAC completed by calendar year 2005); promulgation of voluntary guidance regarding the various Title III administrative requirements (the EAC has issued voluntary guidance regarding implementation of statewide voter registration databases); the commissioning of research and gathering of data to fulfill its role as a “national clearinghouse” of best practices in election administration; and, most importantly in my view, the development of voting system standards and concurrently, implementation of a Federal voting system certification program that has the confidence of both the election community and the general public. To varying degrees, the EAC has completed and/or is implementing these various functions.

While my characterization above of the various EAC functions does not nearly capture the totality of the Agency’s many obligations, in my view, the most important functions of the EAC revolve around the following: (1) serving as a “national clearinghouse” of election administration best practices; (2) developing objective and testable voting system standards that ensure the accuracy and reliability of all voting systems; and (3) implementation of a rigorous, thorough and transparent Federal certification program for voting systems. In short, throughout my nearly three years as an EAC commissioner, what I consistently heard from both election officials and public interest organizations – among the most important stakeholders in this field – was that the EAC ought to focus on building the “gold standard” in those three areas. And, in so doing, election officials, advocacy organizations, academics and, even the media, would see tangible improvements which would ultimately improve the overall confidence in the entire process.

To build this “gold standard” – particularly in the area of Federal voting system certification – will require that Congress seriously contemplate the current adequacy of EAC staffing needs and budget resources, as well as other statutory constraints that at times delay, or worse, prevent the EAC from fulfilling its many important obligations.

While I can no longer speak as an EAC commissioner, I believe two particular provisions contained in the Ballot Integrity Act of 2007 will help the EAC to carry-out its important obligations and ultimately, be a more effective agency. First, is the need for the EAC to have budget-pass-through authority. Currently, the Commission is required to work with the Office of Management and Budget (OMB) to develop the agency’s budget prior to its submission to the United States Congress. Yet, other independent agencies currently have the ability to present their agency’s budget directly to their House and Senate appropriation committees. It seems to me that an agency like the EAC – with its important nonpartisan mandate – should be given similar discretion. Second, as to the EAC’s role to serve as a “national clearinghouse of information,” it is important that the EAC conduct its data collection free from additional administrative constraints such as the Paperwork Reduction Act, which requires a significant amount of bureaucratic paperwork by Federal agencies prior to requesting information from state and/or local jurisdictions. Relieving the EAC of this requirement – as is the FEC – will make the EAC more effective and relevant in the election administration field.

### **Conclusion**

Several additional requirements contained in the Ballot Integrity Act of 2007 deserve mention.

*Expedited Review of Voting System Requirements.* The EAC, TGDC and NIST continue to develop more rigorous and well-defined voting system standards which are used by Federal testing labs to ensure the overall usability and security of all voting systems. However, while most states require voting system hardware and software to achieve Federal certification prior to use of such systems, there are instances, particularly as an election approaches, in which last-minute updates or changes in voting system software must be accomplished. The Ballot Integrity Act of 2007 provides an appropriate means by which a last minute “software patch” can achieve expedited Federal certification review by directing the EAC to implement an “emergency software certification,” thereby allowing

election officials to use only fully-tested software and the general public to have greater confidence in the accuracy of elections.

*Maintenance and Review of Voting System Code.* The 2005 VVSG mandate that as a condition of achieving Federal voting system certification, a voting system vendor must deposit the proprietary source code for that voting system with the National Software Reference Library (NSRL) or other entity designated by the EAC. The Ballot Integrity Act of 2007 enhances this important requirement by striking an appropriate balance between the need for greater access to voting system code under certain, specified conditions, while also preserving the right of voting system vendors to confidentiality of proprietary trade secrets.

*Prohibition on Campaign Activities by Chief State Election Officials.* In a commentary published last summer by the *Election Law Journal*, I called for the adoption, on a state-by-state basis, of a strong, conflict-of-interest requirement for all state chief election officials.

In the current environment of close public and media scrutiny over election administration, clearly, the momentum is building for such a development. Last year, two statewide chief election officials – former California Secretary of State Bruce McPherson, a Republican, and Oregon Secretary of State Bill Bradbury, a Democrat, issued a joint pledge to carry out their duties in an “independent and non-partisan manner that is beyond question” and to not “serve in any ongoing official capacity on a campaign supporting any candidate.”

To be sure, I do not believe that when a state’s chief election official chooses to engage in a partisan contest, such political involvement necessarily leads to any partisan advantage. Every statewide chief election official takes an oath pledging to implement the laws of that jurisdiction in a fair and impartial manner. And yet, I am in agreement with those who have concluded that the issue of public *perception* when such a conflict-of-interest is present is simply too compelling to ignore.

Removing the perception of partisanship by requiring a state’s chief election official to refrain from participation in a political campaign is a significant step toward assuring the public’s continued trust in the underlying fairness of our election system. While I continue to prefer that such political conflict-of-interest requirements be implemented on a state-by-state basis, I applaud the Ballot Integrity Act of 2007 for its emphasis upon this important issue.

Thank you, Chairman Feinstein and Ranking Member Bennett for the opportunity to offer my testimony. I would be happy to answer any questions.