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REMARKS TO THE ELECTION ASSISTANCE COMMISSION DOUGLAS A. KELLNER Co-Chair, New York State Board of Elections* December 8, 2008

Section 202 of the Help America Vote Act, 42 U.S.C. § 15322, is very clear in defining the mandate of the Election Assistance Commission:

The Commission shall serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections by—

- (1) carrying out the duties described in part 3 (relating to the adoption of voluntary voting system guidelines), including the maintenance of a clearinghouse of information of the experiences of State and local governments in implementing the guidelines and in operating voting systems in general; . . .

Section 241 of HAVA, 42 U.S.C. § 15381, authorizes the EAC to conduct studies on a wide range of election administration issues and to make those studies available to the public.

The time has come for the EAC to rise to its mandate and to implement a meaningful and useful clearinghouse that will help all of us in election administration to learn from the mistakes and mishaps that we all encounter as part of the complex functions in running elections. We should not hide from the difficulties of election administration. Indeed, complete transparency is the best way to avoid continually repeating the same mistakes.

I applaud the EAC's recent commitment to make the process of voting system certification more transparent, more thorough and more meaningful. The result of the heightened scrutiny, however, is a message that cannot be repeated enough—no voting system on the market today has been able to demonstrate that it complies with all of the Voluntary Voting System Guidelines that the EAC has adopted. We must highlight these discrepancies so that vendors are

motivated to remedy the shortcomings in their equipment and so state and local governments that purchase voting equipment can be knowledgeable consumers in making their procurement decisions.

There is nothing in the Help America Vote Act that restricts the EAC from collecting information and issuing reports on voting equipment certified by the National Association of State Election Directors. By now most election administrators are well aware of the significant shortcomings of the NASED certification system. The reviews by state election authorities in California, New York, Ohio, Colorado, Florida, Maryland, and others, as well as numerous academic studies and many public reports, have demonstrated that vendors obtained NASED certification even though their equipment did not meet all of the standards—even the very modest standards that existed before the adoption of the 2005 VVSG. The EAC should not ignore these shortcomings, but like those states that have invested the resources to undertake their own studies, the EAC should become the leader in noting the deficiencies and recommend the best practices to ameliorate the shortcomings of each type of voting equipment until vendors are able to offer fully compliant systems.

There are several models in the federal government where agencies catalog, investigate and report on mishaps that occur within their areas of expertise. The Food and Drug Administration is perhaps the agency with the longest history of collecting and cataloging problems that become a basis for further investigation, and public reports.

Another example is the National Transportation Safety Board, which receives reports of all aviation and railroad accidents and collects as much data as it can regarding all other forms of transportation. Its *Most Wanted List of Transportation Safety Improvements* is a particularly helpful guide that seeks voluntary action by federal agencies and state governments to improve transportation safety.¹ The NTSB has not been afraid to speak out when it finds that sister agencies and states have not taken satisfactory action to address the safety problems NTSB has identified.

The Consumer Product Safety Commission is another good example of how a federal agency can catalog incidents through its National Electronic Injury Surveillance System, and its consumer hotline. The CPSC collects data, organizes it by consumer product and uses that data to determine which issues are most significant for investigation. The CPSC's work to ensure the safety of consumer products - such as toys, cribs, power tools, cigarette lighters, and household chemicals - contributed significantly to the 30 percent decline in the rate of deaths and injuries associated with consumer products over the past 30 years. The CPSC has accomplished this not by running away from problems, but by identifying and investigating them, issuing warnings and by seeking mainly voluntary compliance from manufacturers and retailers.

¹ See http://www.nts.gov/Recs/brochures/MostWanted_2008.pdf

The EAC should look at the operation of these agencies as models for how to collect and organize data and how to report it to election administrators. The EAC should not be bashful about offering constructive criticism where it is warranted.

For twelve years I served as a commissioner of the New York City Board of Elections. When I first started in 1993, I was very frustrated to see that the same types of problems would recur election after election without significant remedial action. We began cataloguing every election day trouble call and categorized the problems. While we certainly could have done more, we were able to identify specific issues that became the subject of preventive maintenance and additional poll worker training. Furthermore, identifying the problems gave substance to our requests for additional funding to address these problems. Transparent identification of our shortcomings helped us to learn and to improve the overall administration of elections.

A meaningful and useful clearinghouse function is particularly appropriate as a federal responsibility. It is much more cost effective for a single federal agency to have primary responsibility for identifying voting system problems and to recommend remedial action. Certification is just one example of the efficiency of a single federal entity rather than separate, duplicative programs in each of the states. New York State has already spent more than \$5 million in testing voting systems under our state certification program. The cost is far more than can be realistically passed on to vendors, particularly if there is no commitment that the vendor would ever sell any equipment in the state. New York State has chosen to use its HAVA funding to subsidize its testing program. We believe that our program, which is designed to test for all of the standards set forth in the VVSG is a model. We felt that we had no choice but to pursue our own exhaustive testing because of the deficiencies in the existing equipment testing regimens at the national level. I certainly support the call for the federal government to assume a far greater part of the cost of testing. It would make no sense for the individual states to engage in duplicative efforts if we had a national system that we could trust. Even worse, there are too many states that do not have the financial resources to do any meaningful testing, even though today there is no meaningful guidance from the EAC on how to procure reliable, accurate, transparent voting systems that comply with the established standards. Indeed, it would be a major advance if the EAC would identify each of the ways that existing systems fall short of the VVSG.

Certification testing is only one small aspect of the clearinghouse function. Many others have provided anecdotes on how election administrators would benefit from learning about problems with voting equipment. I will add one of my own. In 2003, election attorneys were complaining that the Sequoia central scanners used by New York City for counting paper ballots never produced the same count when ballots were re-run through the scanners. The totals from the scanners were always less than the amounts determined after repeated hand counts. The New York City Board of Elections conducted a thorough technical study of the problem and produced a detailed report on the need for more careful calibration of the scanners before each election. Although Sequoia

participated in the study and was well aware of the technical report, it never advised any of the other jurisdictions using the same model scanners. The avoidable result—Napa County, California had precisely the same problem during the 2004 recall election. The EAC, like the FDA, the NTSB or CPSC should actively provide advisories to all jurisdictions using a particular model of voting equipment when it learns about a problem, particularly when the solution is a relatively simple maintenance issue.

The EAC can also look to models established in the non-profit sector on how to get started in performing a meaningful clearinghouse function. The ACM Committee on Computers and Public Policy, under the tutelage of Peter G. Neumann, has been reporting on incidents involving voting equipment since 1985.² VotersUnite.Org has also started to collect data on each model of each voting system and has posted the reports on their web site.³ Even with very limited funding and personnel, the EAC could begin to collect this data and make it available to election administrators and to the public. In particular, the EAC should affirmatively report known problems to every jurisdiction that uses that particular model of voting equipment.⁴

The EAC, like most election agencies throughout our nation, has extremely limited resources for carrying out its broad mandate. The statutory authority already exists for the EAC to provide meaningful assistance to election administrators throughout the country by acting as a real clearinghouse for information. It is far more efficient for a single national agency to take the lead in gathering this data and reporting it to everyone concerned. We need to learn what the problems are; we need to identify how to avoid or ameliorate them. The EAC needs to take the lead in promoting transparency in election administration by highlighting where and how improvements can be made.

* Commissioner Kellner also serves as a member of the Board of Advisors of the ACCURATE Voting Foundation and as a member of the Board of Advisors of the Verified Voting Foundation. Commissioner Kellner's remarks are his own and do not necessarily reflect the views of the New York State Board of Elections, ACCURATE or Verified Voting

² <http://www.csl.sri.com/users/neumann/insiderisks.html>

³ <http://www.votersunite.org/info/failuresbystate.asp>

⁴ VerifiedVoting.Org has already assembled a compressive list of each model of voting equipment used in each jurisdiction.