

OVERSIGHT HEARING ON THE ELECTION ASSISTANCE COMMISSION

HEARING BEFORE THE SUBCOMMITTEE ON ELECTIONS COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES ONE HUNDRED TENTH CONGRESS FIRST SESSION

MEETING HELD IN WASHINGTON, DC, AUGUST 2, 2007

Printed for the use of the Committee on House Administration



Available on the Internet:
<http://www.gpoaccess.gov/congress/house/administration/index.html>

U.S. GOVERNMENT PRINTING OFFICE

37-738

WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON HOUSE ADMINISTRATION

ROBERT A. BRADY, Pennsylvania, *Chairman*

ZOE LOFGREN, California,

Vice-Chairwoman

MICHAEL E. CAPUANO, Massachusetts

CHARLES A. GONZALEZ, Texas

SUSAN DAVIS, California

ARTUR DAVIS, Alabama

VERNON J. EHLERS, Michigan,

Ranking Minority Member

DANIEL E. LUNGREN, California

KEVIN MCCARTHY, California

SUBCOMMITTEE ON ELECTIONS

ZOE LOFGREN, California, *Chairwoman*

CHARLES A. GONZALEZ, Texas

SUSAN DAVIS, California

ARTUR DAVIS, Alabama

KEVIN MCCARTHY, California

VERNON J. EHLERS, Michigan

STATEMENT OF DAVID SUPER

Mr. SUPER. Thank you very much, Chairman Lofgren, Representative McCarthy, and members of the subcommittee. As you noted, I teach administrative law, and that will be the focus of my comments.

As an administrative law professor, I study many administrative agencies, and as a new agency I think the EAC can learn a great deal from other agencies' experience, in particular as an agency that is new, that does not have an established record or reputation, and one that is dealing with some of the most sensitive and partisan, as well as most important issues before the country; that the EAC would do well to follow those agencies that have made a priority, perhaps even an obsession, about transparency and openness. And there are a number of specific things that I would urge that the EAC do.

First, the research activities, because they are such an important part of what the EAC does, should be wholly transparent. The statute in this regard I think is very helpful. Section 207(2) of HAVA specifically directs that any report that is commissioned by EAC be provided to Congress and the President. It does not provide any authority for editing that. Naturally the EAC is free to comment on those reports, to criticize them. If they wish to itemize the portions of those reports that they think are weak, that is entirely appropriate, indeed consistent with the mission of promoting a full dialogue. But the statute I think is very clear that that is not something that can be done. When agencies in administrations of either party in the past have attempted to edit research that they have received, the consequences have often been very severe. The research itself becomes devalued, as it is regarded as being tainted by partisan influence and other studies completely unconnected with that incident become suspect because the suspicion is that the agency wouldn't have let it through had it not met the agency's political litmus test. And again I am not referring to administrations of either party. Alas, administrations of both parties have made that mistake.

The sensible thing to do when you get a bad report, I lack the expertise to know whether the ones we are discussing here are good or bad, but if you do get a report you think is bad, you should release it and release your own statement as to what you want done. The EAC has authority and resources to contract for follow-up reports and research that perhaps can get at some of the things that they might be concerned about.

Secondly, the agency's research contracting needs to be beyond reproach. One possibility is to hire researchers who have long records and are regarded as nonpartisan; another possibility is to pursue bipartisan teams. My understanding is the EAC at times has gone in either of those directions. What clearly should not be appropriate is to allow officials that are connected with any partisan organization, be it this Congress in either side of the aisle or an administration, which inevitably is of one party or the other, to have an influence in or criticism of the selection of researchers or the product that they issue.

I think it is unfortunate that political officials of the Department of Justice were serving on the board. As I read the statute, it

names a number of sorts of officials that are partisan, such as State legislators or Governors. And in each of those areas it calls for two of them, the obvious intent being one be a Democrat and one be a Republican. There are only three officials listed in that statute that are not identified by partisan status, and those are all career officials of the Federal Government who were thought to be nonpartisan. It is unfortunate that one or more of those slots may have been assumed by a partisan appointee, and the commission should have endeavored to prevent that and certainly should have endeavored to keep such persons from influencing its research. Those boards have important roles to play, but screening the agency's research does not appear from my reading of the statute to be one of them.

Finally, it is very important to follow the statutory procedures for decisions. Among groups of friends consensus is obviously better than voting. But in public agencies the statute is emphatically clear that there must be three votes for all actions of the agency, and that there must be public meetings at which those votes take place. If anything happened of any consequence in the name of the agency, there should be a record of a public meeting and at least three votes to support it.

Thank you very much.

[The statement of Mr. Super follows:]



UNIVERSITY OF MARYLAND SCHOOL OF LAW
500 West Baltimore Street
Baltimore, MD 21201-1786

David A. Super
Professor of Law

TESTIMONY OF DAVID A. SUPER
Before the SUBCOMMITTEE ON ELECTIONS
of the COMMITTEE ON HOUSE ADMINISTRATION

August 2, 2007

Good afternoon Chairwoman Lofgren, Representative McCarthy, and Members of the Subcommittee. My name is David Super, I am a professor of law at the University of Maryland, and I am grateful for the opportunity to testify before you on the important subject of this hearing. My specialty at Maryland is administrative law; accordingly, I will focus on the issues the Election Assistance Commission (EAC) faces as a new administrative agency in developing the capacity to carry out its mission. I am not an expert in election law specifically: my concerns here are with process.

Reliance on specialized administrative agencies with substantial independence goes back to the earliest days of this country. President Jefferson established a series of administrative tribunals to enforce the embargo during the crisis that preceded the War of 1812. The push westward from the original coastal colonies was overseen by government land offices operating with broad autonomy. Many trace the modern administrative state to the organization of major

economic regulatory bodies such as the Interstate Commerce Commission in the late 19th and early 20th centuries. Surges in the creation of independent federal regulatory agencies occurred during the New Deal and again during the late 1960s and 1970s. States, too, rely heavily on independent regulatory agencies; some even accord those agencies special constitutional status.

Federal and state governments establish independent regulatory agencies for a variety of reasons. Some agencies are established to amass and bring to bear specialized expertise. Others are seen as more efficient ways of maximizing public participation in important decisions than a general-purpose legislative body. Still others are expected to respond more rapidly to fast-changing economic, social, or technological developments than Congress or a state legislature could. Conversely, administrative agencies can be seen as repositories for institutional memory, insuring more continuity of policy than a legislative body or executive could produce through rapid personnel changes and switches in partisan control. Often agencies are chartered to remove volatile issues from partisan politics in the hope that reason and compromise can better prevail when removed from the pressures weighing on elected officials and their close aides.

Identifying which of these general types of functions an agency is expected to perform is crucial to determining how an agency should conduct itself. The Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1678 (2002), gives EAC a mission combining several of these functions. Section 206 makes clear that Congress expects to look to EAC for expertise and intends that state and local elections officials will be able to do the same. On the one hand, EAC must keep pace with changing technology and with new threats to the integrity and accessibility of the electoral process. On the other hand, however, EAC's research and clearinghouse function should help public officials at all levels avoid repeating mistakes their peers or forebears have made. Above all, EAC must remove the most quintessentially partisan

issue from partisan politics and the unavoidable conflict of interest that Members of Congress and other elected officials have on these matters. The law's painstaking provisions for ensuring partisan balance on the commission and barring any action without bipartisan consent testify to this. Because section 209 severely limits EAC's rule-making authority, Congress expected it to perform these vital functions almost entirely through its public information function under section 207(2) and otherwise. EAC's credibility thus is absolutely paramount; unlike most other agencies, it has no fallback source of authority should its moral authority be compromised.

The choices an agency makes in its first years are particularly crucial to setting a tone for its future activities. These will determine what kinds of people seek and obtain employment at the agency, the extent of the trust that other agencies and private sector entities place in the agency's work, the inclination of appropriators to fund its activities and that of authorizers to entrust it with new responsibilities, and the courts' willingness to defer to its substantive judgments. Once an agency develops a particular kind of institutional culture, even the most determined political leaders and the ablest managers will be hard-pressed to achieve meaningful change. Like a bicycle wheel, once bent it is almost impossible to set right.

A couple of examples will illustrate the point. The National Labor Relations Board's (NLRB's) mission is to deal with intensely controversial issues that, for much of its life, have tended to divide the two major parties. On a number of important issues, its rulings were predictably partisan: when Republican appointees held a majority, it would resolve an issue in favor of management; shortly after its majority switched, it would reverse itself to favor unions, only to reverse itself again when Republicans regained control. This pattern was widely recognized by all concerned. Parties were disinclined to accept defeats as representing an impartial view of justice in their cases. Presidents faced strong pressure to nominate board

members whose votes would be highly predictable. Courts, although lacking the Board's expertise in labor-management relations, felt obliged to undertake searching inquiries into the merits of the Board's decisions at times when other agencies were receiving broad deference. Courts also periodically berated the Board for failing to honor applicable case law in its decisions.

This brief account obviously sweeps very broadly, perhaps too much so. The Board has done a great deal of excellent work, and both Board members and staff have endeavored to pursue sound, responsible public policy that could be defended in any political environment. Nonetheless, the perception of partisanship, once attached to the Board in even a handful of actions, has proven difficult to dislodge and has undermined its credibility and effectiveness at crucial junctures.

A marked contrast is the Food and Nutrition Service (FNS) of the U.S. Department of Agriculture. Reflecting the strong, thoroughly bipartisan support food assistance programs had achieved, the Ford Administration stocked the fledgling agency with skilled professionals devoted to public service, regardless of political beliefs. From their earliest days in the agency, these officials set strong institutional norms that the staff would faithfully assist the Department's political leadership of either party pursue their agendas, that it would evenhandedly implement whatever directions it received from Congress, and that it would dissemble to no one. Because successive administrations had no need to clean house or to stack the agency with political operatives, the agency has avoided paralysis during transitions between administrations and preserved an institutional memory that has helped both successive administrations and Congresses avoid repeating past mistakes. As one would expect of an agency dispensing tens of billions of dollars of benefits and administrative funds, FNS has had its conflicts

with states, service providers, advocates for recipients, and others. Debates on the merits of these matters occasionally have grown heated, yet virtually no one has questioned the agency's good faith – or had any reason to believe they would be taken seriously if they did. Not surprisingly, the agency has an enviable record of success defending its decisions in court. On those rare occasions when political appointees from either party sought to use their power for partisan ends – editing research findings or diverting the agency's research budget – Members of Congress from both parties indignantly demanded that FNS's integrity be preserved. Even though most of the pivotal figures in the agency's formative years have now retired or will be doing so soon, the culture of service and loyalty they established has remained in full force.

It is worth noting that FNS lacks the structural guarantees of independence that NLRB – and EAC – enjoy. Unlike them, it lacks a multi-member board with members serving fixed terms; its top leadership is composed entirely of political appointees of the sitting President's party. FNS's success is a monument to what a carefully cultivated institutional culture of integrity and public service can accomplish, the highest calling of our much-maligned federal bureaucrats. Political appointees of successive administrations and both parties have recognized that FNS's staff's loyalty to the process, and universal credibility, are priceless assets, facilitating accomplishment of their respective policy agendas far more than an ideological staff, even one with similar persuasions, ever could.

EAC would do well to learn from these examples. Although NLRB's course was not unlawful or even particularly unusual, the perception of partisanship has proven extremely costly to the agency over the years. Conversely, although no statute, regulation, judicial decision, or even written guidelines dictated FNS's exceptionally demanding conception of integrity, the agency has been richly rewarded for pursuing it. As leaders of an agency that is still very new,

EAC's commissioners should endeavor to inculcate the same culture of professionalism, independence, and integrity that has served FNS so well over the years.

In practice, this has several implications. First, EAC's research activities should be wholly transparent. In such a politically-charged atmosphere, transparency is even more vital than quality. Should EAC withhold reports, even bad reports, from public scrutiny, however, it will invite doubts about what criteria it applied to withhold the report. Because Members of Congress, journalists, and the research community will be unable to examine the withheld report, they can only speculate as to the agency's motives. The corrosive effect of this speculation for a new agency in a hypersensitive field is difficult to overstate. Statistical analysis depends on having unbiased access to data; otherwise valid statistical methods lose their reliability if applied to a data set known in advance to have the characteristic the researcher is seeking. Even if all reports EAC releases are methodologically flawless within their own terms, any suspicion that their release depended on their findings will rob them of much of their value. Except in the rarest of cases where a report divulges matters protected from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b), such as military secrets or individuals' medical records, withholding reports is not a legitimate option and is not routine practice among federal agencies.

Nor is editing these reports, or directing the authors to do so, the correct answer. When an agency makes policy, it must of course take full responsibility for its pronouncements. EAC, however, is charged with making research available to Congress, state and local elections officials, and the general public for the purpose of stimulating informed debate and policy-making. It therefore need not, and indeed cannot, guarantee the accuracy of every aspect of every report it commissions. Correcting any flaws in such reports is the function ensuing public debate. To be sure, agencies commissioning research occasionally do ask their contractors to

perform additional work if the contractors' initial product is unclear in some respect or failed to cover all topics on which research was required. They might, for example, require a methodological appendix or performance of additional statistical tests. Making or requiring changes in the content of what the contractor has provided, however, destroys the credibility and value of the entire report. On the rare occasions when this has occurred, administrations of both parties have faced severe, bipartisan criticism from Congress and the research community.

The only proper course for EAC to follow with a commissioned report it believes is flawed would be to release that report together with a statement of what it believes the flaws to be. If these criticisms are persuasive, surely they, and not the flawed report, will carry the day. EAC might face minor criticism of its procurement policies should it appear the commission hired a contractor who turned out to lack the skills to accomplish its assigned tasks successfully. That criticism, however, would not go to the core of EAC's mission.

In fact, this is precisely what Congress has directed. Section 207(2) requires the EAC, without exception, to release reports submitted to it. Several sections of the Act specifying particular subjects for the commission's research specify a two-part process: EAC is to release the report and, separately, makes its own recommendations. Compare, for example, sections 241(a) and 242(a), which require submission of the reports EAC has received, with sections 241(c) and 242(b), which call for EAC's recommendations. Thus, although Congress has by no means obliged EAC to remain passive in the face of reports the commission finds troubling, it has denied the commission the option to withhold the reports.

Second, EAC's methods of selecting research contractors must be scrupulously guarded against even the appearance of partisan bias. To be clear, the issue here is *not* that the selections must be free of *actual* partisanship; here, the mere *appearance* of bias will be devastating. Con-

sider the different standards of professionalism we apply to lawyers and to judges. For the most part, lawyers must avoid only actual conflicts of interest and circumstances where actual conflicts are likely but difficult to detect. A similar standard – prohibiting actual improprieties – would suffice to ensure substantively proper judicial decisions. Judges’ responsibilities, however, go beyond merely issuing correct decisions: they also have a duty to maintain the public’s confidence in our justice system. We therefore require them to avoid even the *appearance* of impropriety.

For much the same reason, EAC should not satisfy itself merely with selecting researchers whom it believes are non-partisan. It should ensure that they will appear non-partisan to members of both political parties and to the public at large. In practice, this may require hiring teams containing at least one member who has established credibility with each political party or hiring veteran researchers with a sufficiently extensive record of non-partisanship to inspire wide confidence on both sides of the partisan divide.

The difficulty of securing unbiased expertise is a common one for independent agencies: by the time an individual has developed sufficient expertise to help the agency, she or he typically has spoken out on some of those issues, often as an employee of one or another interested party. In weighing allegations of officials’ bias, courts have distinguished between an unalterably closed mind on the specific matter before the agency – which is impermissible – and a natural commitment to the purposes of the agency’s statutory mandate – which is not only acceptable but actually desirable. A researcher who wants to expand access or one who wants to reduce fraud should not be regarded as biased: indeed, someone holding the opposite viewpoint on either of those questions would be the one meriting suspicion. The appearance of bias toward a particular political party, however, should not be acceptable unless that researcher is paired

with a colleague with an equally apparent bias toward the opposite party. Courts have been reluctant to compel recusal of unique senior officials appointed by the President and confirmed by the Senate. EAC labors under no similar difficulty: it can and should apply a very strict test for screening out partisan bias in the research contractors it engages.

Even more important than these substantive considerations is that EAC scrupulously follow competitive bidding procedures for merit-based selection of contractors. This includes limiting access to the bidding and decision-making process while it is under way to officials whose participation is essential. Moreover, on such sensitive matters, participation in contracting decisions should be limited to persons who are wholly independent of partisan affiliation or to pairs of persons with opposite affiliations. EAC should have strict rules prohibiting any discussion of bids with officials of the incumbent administration as those officials obviously owe their positions to the incumbent President's party; if for some reason EAC needed to consult with such officials, it should simultaneously hold identical consultations with the congressional opposition.

Above all, however, no policy for awarding public contracts will have credibility if its final decisions are subject to re-opening on the same grounds on which the decision was originally made. When a government agency awards a contract to General Motors, Ford is not permitted to argue that the bidding should be reopened because it makes a better car. EAC cannot stop interested parties from complaining about its awards of contracts, but it should make unmistakably clear that those awards are final. If, as has been publicly alleged, EAC has withheld reports received from contractors whom political appointees in the Justice Department criticized, it has at the very least created a strong appearance of impropriety: the fact that it was under partisan pressure to drop those contractors should prompt the commission to make especially sure

that those contractors' reports are *not* suppressed. Withholding particular reports in the face of partisan pressure would cast a pall over all research performed for the commission, suggesting that any reports that are released must have passed a partisan screen and hence that the body of work released is systematically unbalanced. Surely the commission cannot intend this devastating result.

Third, EAC should exercise particular caution in areas where its jurisdiction overlaps with that of the U.S. Department of Justice. Overlapping jurisdiction of independent agencies and cabinet departments is not particularly unusual. For example, both the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) share responsibility with the Justice Department over some kinds of anti-competitive practices. In these instances, where the congressional delegations are clear, the agencies should presume that Congress intended the overlap and sought to have each agency's expertise brought to bear on the problem. It would frustrate this statutory arrangement and undermine the justification for the independent agency to defer to the cabinet agency rather than exercising its own independent judgment. Thus, the FCC has questioned some telecommunications mergers that the Justice Department had accepted.

Caution is particularly appropriate in the case of EAC's responsibilities overlapping with the Justice Department. Because Congress created EAC so recently, we can be quite certain that it was aware of the Justice Department's work interpreting election laws and saw the need to supplement that activity by directing EAC to issue voluntary guidance under section 311. This should not be surprising given then politically sensitive nature of EAC's charge: at any given time, the Justice Department will be under the control of one or the other major political party. Although we can hope that the Justice Department in any administration will limit partisan appointees' involvement with these issues, Congress recognized that this might not always be the

case when it established EAC as an independent entity rather than as an arm of the Department. Coordination and inter-agency comity are generally desirable qualities, but an agency established as an impartial watchdog cannot perform its role if it coordinates its policy with a department whose work it may need to call into question.

Finally, EAC must take great care to abide by its statutory mandates that all of its actions be approved by a vote of at least three commissioners and that all votes be recorded in its annual reports. These reports will be the primary means by which Congress, journalists, and members of the public assess EAC's performance and identify any changes that may be required in its operation or in HAVA itself. Should the commission permit its staff to issue interpretations of the statute or make other policy statements without a majority vote of the commission, it will both be disregarding Congress's clear direction and opening itself unnecessarily to accusations of partisanship. HAVA provides for selecting and compensating EAC's staff, but unlike the statutes authorizing some other administrative agencies, it does not provide any independent authority for staff to act on behalf in any substantive respect.

In a small agency such as EAC, commissioners and staff may feel drawn towards informality. Once casual consultations around the water cooler make clear that the commissioners unanimously support a particular course of action, holding a formal meeting and vote may seem superfluous. To be sure, the effectiveness of a bipartisan agency such as EAC depends on its ability to engender consensus. That, however, does not justify dispensing with formal actions. First, doing so violates HAVA: section 208 allows EAC's authority to be exercised only by the vote of at least three commissioners. Second, acting without formal meetings violates the Sunshine Act, 5 U.S.C. § 552b(b), which declares that "[m]embers shall not conduct or dispose of agency business other than in accordance with this section," which requires public notice and

an opportunity to attend any meetings of the commission. Finally, such informality on matters as sensitive as elections administration will inevitably lead to miscommunications that undermine public confidence and intra-agency trust. Informal consensus processes leave room for misunderstandings about what is being decided. And without a recorded vote, blame will be cast widely for decisions that in retrospect prove infelicitous. EAC, more than almost any other agency, should scrupulously comply with statutory requirements for decision-making.

As to the particular issue of construing voting statutes, Congress clearly did not empower EAC to issue interpretations with the force of law. On all legal matters before the Board other than mail voter applications, Congress was careful to characterize the Board's actions as "voluntary," as "recommendations," or the like. In section 209, it expressly denied the commission other rule-making authority. Thus, under *United States v. Mead Corp.*, 533 U.S. 218 (2001), any interpretations EAC offers would not be entitled to the strong deference of *Chevron, U.S.A. v. N.R.D.C.*, 467 U.S. 837 (1984). Its influence on the courts would be limited to its "power to persuade" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Factors that would increase the persuasiveness of such interpretations include limiting the opinion to the statutes EAC is charged with interpreting under section 312, having EAC approve the interpretation by majority vote as section 208 requires, and clearly analyzing the relevant legal materials. Once an agency develops a reputation with the courts of opining casually, it may have great difficulty securing judicial deference in the future, even on matters central to its responsibilities. This prudential consideration – husbanding the commission's credibility – counsels careful compliance with the limits of its statutory interpretive jurisdiction.

This concludes my prepared testimony. I would be pleased to answer any questions that Members of the Subcommittee may have.

Ms. LOFGREN. Thank you. I will turn now to our ranking member, Mr. McCarthy, for his questions.

Mr. MCCARTHY. Well, in the spirit of bipartisanship, I think you can go first.

Ms. LOFGREN. I will then. Let me ask Professor Super, we received—as you know, we received a great volume of information from the EAC and it has now been made publicly available. I don't know if you have had a chance to look at the letter from the EAC's General Counsel to the Kentucky State Board of Elections regarding the National Voter Registration Act?

Mr. SUPER. I have.

Ms. LOFGREN. The General Counsel concluded that the NVRA allows voters to be removed from the statewide voter registration databases based upon electronic information that the voter registered to vote in another jurisdiction without any further documentation or confirmation. This response letter, as I understand it from the record, was written the very same day the EAC received the inquiry from the Kentucky Board of Elections. But there wasn't any indication that the EAC officially adopted the General Counsel's interpretation of the NVRA. Considering the very limited rule-making authority given to the EAC, do you think the EAC exceeded its statutory authority in this case?

Mr. SUPER. Well, I have seen the letter you mention and I found it very disturbing because the statute very clearly in Section 208 requires three votes for any action. The Sunshine Act requires notice of public meetings. So I can't imagine how they could possibly respond in an authorized manner the same day they get a request.

The letter is ambiguous as to whether she is writing for herself or for the commission. At the beginning she speaks about "I" and at the bottom she says "we conclude," which implies she is speaking for the commission. She obviously has no authority to speak for the commission under the statute without a proper meeting and three votes.

Also, it is not clear to me from reading the statute whether the subject matter of that letter is something that the commission is supposed to be opining on or not. But this is certainly not the appropriate manner for doing so.

Ms. LOFGREN. Let me ask Mr. Greenbaum, you were involved in the report in question. And we have heard the testimony of Professor Montjoy about the process and his recommendation, and we appreciate his testimony. But you were a participant. Do you have any—what do you think about what he said here?

Mr. GREENBAUM. Well, the thing that is interesting in terms of what happened with this report was, and you know I work with experts all the time. It would be very unusual for me to take a report from an expert, change it how I deem to see fit, never consult back with that expert and then file it with the court. And that is sort of what happened here, is that you had consultants who were picked that came back, researched, did significant research, and submitted their conclusions. And you had EAC staff changing the report without talking to the consultants at all.

Ms. LOFGREN. I am going to stop because we have been here a long time and we have got votes. And if we go promptly we might be able to let these gentlemen leave and not have to wait for our

hour of voting. I am going to yield back my time and allow you to question.

Mr. MCCARTHY. So you want to go right now? You want me to yield to you? I yield to Mr. Ehlers.

Mr. EHLERS. I thank the gentleman for yielding. The next bill up is a bill that I have to speak on and be on the floor to manage, so I appreciate you yielding.

This just sounds like a bit of a mess to me. I think some of the witnesses are making more of it than they should. This is a new agency. It appears the procedures weren't fully in place. It sounds to me like a very poor work product.

I totally agree with the comments about transparency. There should be transparency. I agree with following proper procedures. That should be done. But if you have a poor report there is no sense even trying to manipulate it. Throw it out, start over, use what you can of it.

On the dais here we have a number of experts on law, business, science. We do a lot of studies. We know when we get a good study. And if we do, we take it, run with it and maybe expand it if necessary. We know if we get a bad study, toss it out and start over. And I don't see a sense to quibble on it.

I particularly appreciate Mr. Montjoy's comments. He has a great deal of academic experience. And I think he has the ability to judge fairly quickly whether a study is good or not.

I would also like to give a quote from Mr. Chris Thomas of Michigan, as I said earlier, one of the most experienced election officials. His quote was, after reviewing the material I have concluded that the EAC was acting responsibly by not releasing portions of the contractor's conclusions that were not supported by the documentation and that were beyond the scope of the contract. In no case should a contractor be forced to allow an agency to publish a conclusion or position that lacks adequate documentation and that is beyond the scope of the contract.

And I agree with that statement. I know what good research is in my field when I see it. I have seen an awful lot of bad research, I have seen an awful lot of good research. We can make judgments about whether it was done right or not. I don't see any sense quibbling about what procedures were used after finding out something was inadequate. The important thing is to do it right. And I have confidence in the EAC to do it right, after perhaps having a false start in this one.

It is clear to me from 40 years of experience in election-related things that there is fraud. What we don't know is how much and what type. And what particularly concerns me is some of the modern manifestations of it. Since I know a lot about electronics I also can personally dream up a lot of ways to defraud people in systems. So that is what we should be looking forward to and stop trying to nitpick what fraud is taking place where, who knows what, who is doing what. Let us try to get the broad picture here. And the goal is not just to find out if there is fraud or how much. The goal is to stop the fraud. And that should be the emphasis of the studies.

We all have ideas of how we would do it because we have different districts, we have different situations throughout the United

States. And again, it has to be a comprehensive, thoughtful, careful study that really looks at all aspects of it and gives the EAC and us guidance on how to deal with real and potential fraud, particularly the anticipatory nature of stopping fraud and the geniuses that are out there dreaming up new ways to defraud.

End of sermon. Thank you for letting me go. I appreciate it.

Ms. LOFGREN. Thank you. The gentleman yields back. And I would like to out of deference to the minority let Mr. McCarthy ask his 5 minutes and then Mr. Davis.

Mr. MCCARTHY. I will be very fast. Professor Super, you said it should be three people there and it should be a public meeting, is that correct?

Mr. SUPER. Yes.

Mr. MCCARTHY. So the December meeting where it was a partisan vote for a final report with two Democrats voting yes and two Republicans voting yes unanimously, that would meet your criteria, would it not?

Mr. SUPER. If it was a properly noticed meeting and the vote was as you described, then that is a perfectly legitimate action, sure.

Mr. MCCARTHY. To Professor Montjoy, do you believe that if you get 24 interviews and use LexisNexis, is that an effective and accurate research method for determining voter fraud?

Mr. MONTJOY. Of course not. I think the interviews are very effective in determining ways to go about studying voter fraud and raising issues to be studied, which I thought was the subject of the report. I would have difficulty using opinion to determine voter fraud, period, whether it is 24 or 50.

Mr. MCCARTHY. Professor Super, would you agree that 24 is an insufficient number of interviews or do you think it is?

Mr. SUPER. I am not a social science researcher. I will say that it depends entirely on what you are trying to do. If you are trying to get a sense of what people feel, that can be very helpful. I have seen numerous Federal agencies act on the basis of literature reviews where there were many fewer than 24 examples given. If you are trying to get data on the ground, that wouldn't be a useful approach. But of course people aren't very good at responding to questionnaires about whether they have committed felonies. So that kind of review of literature or interview of experts is a very common way of getting at it.

Mr. MCCARTHY. Now, Mr. Greenbaum, you are an attorney by trade, right?

Mr. GREENBAUM. I am.

Mr. MCCARTHY. Tell me if this is correct. In your opinion the social scientist at the Eagleton study was not in any way flawed, is that correct, that you didn't believe it was flawed.

Mr. GREENBAUM. I am not offering any opinion as to whether there were any mistakes at all or whether the report was perfect. I simply pointed out the point that I—I simply made the point that they went through a vetting process, they chose this consultant, they spent half a million dollars on this consultant and at the end of the day—and I am assuming, because I know for the voter intimidation fraud study that the EAC research director was involved with the consultants. If that was true for the voter identification

study as well, it is a real shame that you put all those resources into it and at the end of the day you decide not to adopt the report.

Mr. MCCARTHY. I don't want to put words in your mouth, but if you spend a lot of money, I ask for data, data comes back, but if someone points out it is flawed it is not your opinion we would still be forced to use it, would it, just because I spent money and I worked with them and the data was flawed?

Mr. GREENBAUM. Well, once again I am not here to offer an opinion as to whether that report was perfect or not. But I mean you are talking about taxpayer money here. And the thing that calls into question all this is what we have been talking about in a more general context of where people are coming to opinions that the administration, the Justice Department don't like, and that those opinions are then rejected out of hand.

Mr. MCCARTHY. Could I just follow up with one question? Are you familiar at all with the one-tailed hypothesis test and the two-tailed hypothesis test?

Mr. GREENBAUM. I am not.

Mr. MCCARTHY. I would just argue from a sense tax dollars were used, but I would hate from a concept, one, tax dollars to be used and wasted in using the wrong data and putting it out to the American people. Just for your own information the commonly used one is a two-tailed hypothesis test. The data came back was one tail. And if you talk to others, even the PhDs in Caltech and MIT studying this, and the early results back are they think it is flawed.

I yield back my time.

Ms. LOFGREN. The gentleman yields back. The gentleman from Alabama is recognized.

Mr. DAVIS of Alabama. Do any of you have any knowledge that the EAC contacted the individuals who did the survey and told them their work was deficient? You all are shaking your heads no. Mr. Greenbaum.

Mr. GREENBAUM. My understanding is no.

Mr. DAVIS of Alabama. All right. None of you have any knowledge that the EAC made any contacts suggesting the poll was deficient, is that correct?

Mr. SUPER. No information.

Mr. DAVIS of Alabama. Do any of you have any knowledge that legal counsel for the EAC sent any communication to the entities suggesting that they had not performed the contract successfully?

Mr. SUPER. I have no such information.

Mr. DAVIS of Alabama. And you are all nodding your heads no. Do any of you have any knowledge that the EAC in any way attempted to void the contract at issue here?

Mr. GREENBAUM. No.

Mr. DAVIS of Alabama. The reason I make those points is I have a different perspective. Mr. Ehlers I think is a very able Member of Congress, but I have a different perspective on this matter and I will state it briefly. If the EAC had problems with the performance of this contract, if the EAC thought that the study that was produced was incompetent, there were several steps that were available to it. One of them was trying to void the contract, one of them was raising some legal claim suggesting that the contract

need not be followed. There were steps that were available to the EAC other than editing the report.

As I understand the EAC, and I learned more about it in these last 30 minutes than I knew before, but it is frankly not meant to be a judgmental body, it is not meant to be a policy maker, it is meant to have almost no rulemaking authority. That frankly makes it a more or less, Professor Super, administrative entity without a lot of capacity for independent judgment.

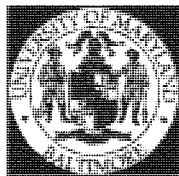
As I understand it, this was the body that was meant to make the judgments in terms of future legislation. Perhaps the executive branch may have a role as well. Obviously secretaries of state have a substantial role. But what is troublesome to me is that the EAC seems to have taken on the burden of making a judgment. What is of concern is that the judgment was shaped and influenced by one very assertive individual within the Department of Justice. That is problematic, and this is the last point that I will make.

This again has a very familiar sound to those of us who constantly hear about an administration that suppresses scientific reports that it doesn't like, to those of us who hear constant reports about an administration that suppresses and demotes scientists who take the wrong perspective. For that matter those of us who hear about an administration that demotes generals who give advice that it doesn't like. All of those things add together and they paint a cumulative picture that is all too familiar to those of us who have sat on a number of these panels in the last several months.

Ms. LOFGREN. The gentleman yields back. I thank all of the witnesses for your testimony today. We may have additional questions which we will direct to you. And we ask if possible that you respond to them promptly. And we will adjourn this hearing now, with tremendous thanks for the participation of all of the witnesses.

Thank you very much.

[The statement of the chairman follows:]



UNIVERSITY OF MARYLAND SCHOOL OF LAW
500 West Baltimore Street
Baltimore, MD 21201-1786

David A. Super
Professor of Law

RESPONSES TO QUESTIONS FOR THE RECORD
from the HOUSE ADMINISTRATION COMMITTEE
September 14, 2007

1. Process for Addressing to Reports Subject to Criticism. First and foremost, section 207(2) of HAVA requires the EAC, without exception, to release reports submitted to it. No matter how firmly the Commission may believe a report is flawed, Congress has prohibited it from either withholding or editing that report. The Commission has no authority to overrule Congress. In point of fact, however, this is good policy: a truly deficient report will fall of its own weight, but in areas of genuine controversy, a free exchange of ideas, including both those of the report's authors and those of its critics, on or off the Commission, is the best way to reach a consensus about difficult and controversial issues.

Second, the Commission may not act in this or any other manner except through an open meeting with at least three affirmative votes for whatever course of action it selects. Section 208 of HAVA allows EAC's authority to be exercised only by the vote of at least three commissioners. The Sunshine Act, 5 U.S.C. § 552b(b), which declares that "[m]embers shall not conduct or dispose of agency business other than in accordance with this section," which requires public notice and an opportunity to attend any meetings of the commission. Here again, even if some or all commissioners believe informal approaches are superior to public meetings and votes, they have no authority to overrule Congress. And again, even if the Commission was not subject to these legal constraints, the required practices also are important for maintaining the public trust and confidence necessary for EAC to perform its important work.

Finally, discussing any perceived problems in received reports with the authors is standard practice among agencies with serious research agendas. Sometimes such inquiries can allow correction of inadvertent errors. On other occasions, they can enable the researchers to provide additional information that resolves any confusion. On still other occasions, the dispute may remain. The inquiry may nonetheless help sharpen the dispute meaningfully to allow further scholarly debate to proceed in a more focused and informed manner. In any complex research project, the authors are, by definition, the leading experts on the data analyzed, the models posited, and the methodology selected. Failing to make maximum advantage of that expertise,

even when their work has gone badly astray, is wasteful and is likely to exacerbate any uncertainty resulting from the report in question.

2. One- and Two-Tailed Probability Measures. All statistical modeling depends on the judgment and integrity of the researcher. The determination of whether to apply a one- or two-tailed test of statistical significance is no exception. The one-tailed test is not a gimmick researchers use “to double their chances of finding statistically significant results.” It is the correct measure of the strength of the evidence of the importance of a variable when that variable’s likely effect, if any, is in a known direction. The two-tailed test, by contrast, is appropriate when a variable plausibly may have either a positive or a negative impact. Thus, when measuring the impact of increased cheese consumption on human health, most researchers likely would use a two-tailed test, accounting for the possibility that the increase in protein consumption could have a positive effect or that the increase in fat intake could have a negative one. On the other hand, when measuring the impact of increased police patrols on crime rates, only a one-tailed test would be appropriate because we have no plausible reason to believe that having more officers on the beat could increase crime: its effect on crime is either negative or null.

The researchers for the voter identification study determined that requiring voter identification could either reduce voter participation or have no effect. Consistent with that determination, they therefore applied a single-tailed test of statistical probability. The Heritage Foundation proposes an inventive theory that voter identification laws will increase stay-at-home voters’ confidence in the electoral process and draw them to the polls. Thus, according to the Heritage Foundation, voter identification laws’ impact on voter turn-out could be either positive or negative (or null) and a two-tailed test for statistical significance is appropriate.

Which of these two approaches is appropriate depends on one’s views of the plausibility of the hypothesis that voter identification laws might increase voter turn-out. The Heritage Foundation offers no meaningful data to support its behavioral theory. Knowing that the public approves of voter identification laws tells us little about whether meaningful numbers of eligible voters who do not vote at present will be aware of these laws and be sufficiently impressed by them to change their behavior. Even if one found the Heritage Foundation’s sparse, anecdotal evidence of voter fraud persuasive, it has little to do with this point. A voter’s chances of influencing the outcome of a particular race is no more affected by fraud than it is by any other factor – a charismatic candidate, an effective get-out-the-vote organization, favorable media coverage, a catchy slogan – that might affect other voters in that race. My chances of influencing the outcome in a race depend on there being equal numbers of other votes for and against my preferred candidate, however those votes go there. Thus, even if the Heritage Foundation is correct in its speculations that fraudulent voting is common and that changes in the likelihood of deciding an election drive voter behavior, it would not follow that voter identification laws would increase turn-out.

A responsible researcher disregards wildly implausible, unsupported hypotheses in constructing a model. Someone might speculate that criminals like a challenge, but that would hardly justify a criminologist in testing whether a greater police presence might raise the crime rate in the area being patrolled. That study properly should be conducted with a one-tailed test of statistical significance. Absent any more plausible reason to suspect that voter identification laws increase

voter turn-out than the Heritage Foundation supplies, the voter identification study was properly conducted with a one-tailed test as well.

3. Priorities in Advance of the 2008 Election. I would defer to those with greater expertise in election management for a more nuanced sense of what EAC's priorities should be leading up to the elections. I offer only a few general observations.

First, major research takes time. So does implementing major changes in election operations. It likely is too late for any *major* studies EAC might commission now to produce results that could affect the conduct of the 2008 election.

Second, some research may depend on intensive, simultaneous observations to be effective. EAC should seek to identify any important questions whose answers could aid election administrators in subsequent elections that require this sort of research. Assembling a research team, drawing an appropriate sample of sites, obtaining necessary permissions, hiring and training field observers, and testing study instruments also take time. Any studies seeking to take advantage of the live conditions of the 2008 election therefore need to be commissioned without delay.

Third, most state legislatures will pass the budgets that fund the 2008 election in the first few months of next year. Many governors are already hard at work on their budget submissions. For any best practices standards to affect spending on that election, they must be promulgated in the next few months. For example, media reports in the last few elections have suggested multi-hour waits to vote primarily have afflicted low-income urban areas. A clear standard about the minimum number of voting machines per thousand voters, and the maximum site-to-site variation in that number consistent with equal access, could prompt purchases of additional equipment if publicized over the next few months.

Finally, although major studies likely take too much time to be completed before the election, some data already available, or readily compiled, about states' resources and practices, could nonetheless help inform the funding and policies for the upcoming elections. Thus, for example, a fifty-state listing of the average number of voting machines per voter, the intra-state variance in those numbers, or the median distance to polling places in urban and rural areas, might spur modest but important policy changes.