

**United States Election Assistance Commission
Roundtable Discussion
Written Statement by Lawrence Norden
Brennan Center for Justice at New York University School of Law
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The Brennan Center for Justice at New York University School of Law submits this written statement to accompany its participation in the Election Assistance Commission’s March 19, 2015 Roundtable Discussion, “Priorities, Policy and Strategy: Next Steps for the EAC.” This document outlines our thoughts and suggestions on the agency’s most important priorities for the coming year, which we believe should focus on the agency’s ability to respond to both an impending crisis related to aging voting equipment and the rapidly changing context in which voting systems are designed, purchased, maintained, and used.

The Brennan Center is a non-partisan law and policy institute that seeks to improve our systems of democracy and justice. Through advocacy, research, and litigation, we work to advance reforms that will make our elections more free, fair, and accessible. As part of this effort, we work to improve registration and the design of election materials, remove unnecessary barriers to participation, and make voting machines more secure and accessible. On these topics we have published numerous studies and reports, assisted federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, litigated to compel states and localities to comply with their obligations under federal and state law. We are currently drafting a report that documents the state of voting technology in use around the country, for which we have interviewed dozens of election administrators, vendors, and usability and security experts. Our work to date on that report informs many of the suggestions in this statement.

The EAC’s mission is critical to the country’s election administration, but this particular moment is especially important for two reasons. First, the nation is facing what the bipartisan Presidential Commission on Election Administration (PCEA) identified as an “impending crisis” in voting technology. Much of the equipment purchased under the Help America Vote Act (HAVA) has reached or will soon reach the end of its intended life span, with costly implications for administrators who must maintain aging voting machines and voters who must rely on them.

Second, in a way many of us did not fully grasp at the time of its passage, HAVA dramatically and permanently changed the market for voting systems; the EAC has a critical role

to play in that changed market. Before HAVA, counties and localities were primarily responsible for purchasing and maintaining voting equipment, and many voting systems were (for better or worse) used for decades. Over the past fifteen years, voting systems have become more complicated, less static, and less durable. At the same time, voting laws and the way we vote have changed dramatically, as has the public's expectations for what voting systems should be able to do. As technology rapidly changes, the voting process shifts accordingly. That means that the EAC's work demands ongoing attention in a way that may not have been imagined just ten years ago.

Because of the impending equipment crisis and the newly dynamic voting systems market, the EAC should act in two areas:

- **Update the Voluntary Voting System Guidelines (the "VVSG"), and work to improve the certification process of the future.** New voting equipment is necessary to ensure that elections are conducted with reliable, affordable equipment. The agency has taken important steps in this direction and must continue to work to keep pace with changing technology. Once a new version of the VVSG is adopted, we hope and expect the EAC will continue the conversation on how to improve future iterations of the federal guidelines.
- **Expand the agency's role as a clearinghouse for election information.** As the pace of change increases in the voting systems market, the EAC can provide substantial value by doing more to facilitate information sharing between election administrators.

We are encouraged by the agency's first actions since the appointment of its new commissioners. The accreditation of a third voting system laboratory provides additional capacity for testing new voting equipment, which will help get such equipment to voters more quickly. The commissioners' acknowledgement of the aging state of voting machines and the need to act sends an important message about the agency's intent. We recommend the below actions as ways for the EAC to turn its intent into meaningful results.

Update the Voluntary Voting System Guidelines and Work to Improve the Certification Process of the Future

We look forward to EAC's adoption of VVSG 1.1, which were proposed in 2009. We hope and expect that after this adoption, the EAC will continue to work on the next generation of guidelines, which are already needed, given how much technology has changed in the last several years.

As the EAC updates its guidelines, it must make sure that its updates are responsive to the needs of all voters. New guidelines must embrace full accessibility measures for voters with disabilities, and the agency should recommit its efforts to encourage new solutions to accessibility challenges. The same holds true for measures to serve language minorities. Improved voting technology affords the agency an opportunity to make sure that all voters can use the nation's voting equipment, and to encourage vendors and election officials to devise new accessibility solutions—especially those established in the design process.

Expand the Agency's Role as a Clearinghouse for Election Information.

The rapidly changing voting systems market makes the EAC's clearinghouse function more important than ever before. Because technology is advancing so quickly, the agency's job requires more than setting guidelines and letting the market act. The agency should expand its clearinghouse activities so that it can better assist election officials with every aspect of voting systems management, from acquisition to maintenance to replacement.

The EAC already serves an important clearinghouse role for election administrators around the country, but is positioned to do more. The agency website currently contains information on voting system studies conducted by state and local governments as well as advisory notices related to issues with voting machines. This is an important foundation, but there is an immediate need for increased information sharing in the current environment.

Share Information to Improve the Acquisition Process

The agency can serve this need by increasing the scope of the information that it shares with election administrators at every step of a voting system's lifespan. At the point of acquisition, the EAC should share more information on contracts and requests for proposals (in our latest search we found a total of four RFPs on the website). The largest costs of voting systems are taken after they are purchased, but are locked in when an agreement is signed. These costs are embedded in contracts that election administrators may not fully understand, and are often connected to repairs and maintenance.

In particular, we would like to see the EAC do more than just post a collection of RFPs or contracts on the EAC websites. In the course of interviewing election officials and reviewing voting system contracts, we have seen a huge variance in the provisions and long term costs of voting system contracts. Many election officials, particularly from larger jurisdictions, have explained to us why they insisted on certain terms, and how those helped them avoid costs after the contract was signed; a document accompanying RFPs or contracts, written by relevant election officials explaining their reasons for insisting on key terms would be especially helpful. Smaller and poorer jurisdictions have often been saddled with the highest maintenance expenses because they did not (or were not in a bargaining position to) insist on terms that could have saved them money over the life cycle of the machine. The EAC can bolster these election officials as they purchase new machines by providing model contract terms and requests for proposals, along with an explanation from relevant election officials as to why they felt these were important.

Voting system contracts should address a number of key issues that election administrators face. As the New York State Board of Elections Co-Chair Douglas Kellner noted in a recent presentation to the Election Verification Network, language providing jurisdictions with the right to modify software without the vendor's consent can give officials the freedom to solve software problems if a vendor is unresponsive or goes out of business; contracts permitting state and local governments to provide voting system documentation to the public can improve transparency and information sharing; and all contracts should take into account changes in state

law that could require changes to the equipment, and who will be responsible for paying for such changes.¹

In providing model contract terms and examples of RFPs, the agency should also strive to serve a diversity of jurisdictions. States, counties of different sizes, and those in differing conditions will have varying needs. Information sharing efforts should keep that in mind.

Share Information to Facilitate Maintenance and Preparedness

At the point of maintenance, the EAC should do more to report on and share information regarding systems that have not been federally certified (still the majority of such systems in use in the United States today). As systems age, they are more likely to have problems; older systems are least likely to be federally certified. State and local election officials using such systems have told us that, too often, they must rely exclusively on the voting system vendors for information about malfunctions, defects, vulnerabilities and other problems that vendors or other election officials have discovered. If the EAC served as a clearinghouse for system malfunctions reported by election officials for non-certified systems, other election officials would be more likely to catch and prevent failures of their systems on Election Day.

In the last few years, the EAC has taken several positive steps to make information about voting system malfunctions publicly available, particularly for federally certified voting systems. Still, we have heard complaints from election officials that there is too much of a time lag between a reported failure to the EAC and a report of that failure by the EAC to election officials around the country using the same system. We suggest that the EAC should modify its procedures so that it informs election officials of voting system malfunctions as soon as they are reported, making clear that the report is under investigation. This would allow the EAC itself to obtain more information on the systems it investigates, as reported problems may also be experienced by multiple jurisdictions (and those jurisdictions may have developed “work arounds” that manage the problem but ultimately create other issues). More than one election official we spoke to complained that the current procedure keeps administrators uninformed about potential problems with their voting equipment until an investigation is complete.

Finally, the agency should share best practices in those areas where administrators can address problems before they happen. The first is sharing best practices for preventative maintenance, which will help systems retain their reliability. The second is providing more in the way of practices for contingency planning for disruptive events like machine failures and natural disasters. In doing so, the EAC should engage both election administrators, who can share their experiences, and vendors, who could propose ways for systems to respond to the most serious problems faced by election administrators, ranging from power outages and machine failures to natural disasters.

This information is valuable in every jurisdiction but will be especially helpful for those with fewer resources. With greater access to information on every aspect of voting systems

¹ Douglas Kellner, Co-Chair, New York State Board of Elections, at the 2015 Election Verification Network Annual Conference (Mar. 6, 2015).

management, officials will be able to make more informed decisions by building on the precedents established by their counterparts across the country.

That need for informed decisions is shared by election administrators throughout the United States, and that need is especially urgent right now. Our nation's aging voting equipment and transformed voting systems market pose a striking challenge for those who run elections—but these are precisely the sorts of issues for which the EAC exists to address. The agency has done well to take first steps that acknowledge the seriousness of these challenges and its commitment to addressing them. We urge the commissioners to maintain their focus on the voting system guidelines and the EAC's information sharing activities. Doing so will hasten a resolution to the problems brought on by aging voting machines, while also building the framework for a more dynamic and responsive EAC in the years to come.