**BRENNAN
CENTER
FOR JUSTICE**

**United States House of Representatives
Committee on House Administration**

**Statement of
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"The 2010 Election: A Look Back At What Went Right and Wrong"

The Brennan Center for Justice thanks the Committee on House Administration for holding this hearing. We appreciate the opportunity to share with you the results of our extensive studies of the nation's election infrastructure, and to provide an overview of the 2010 Elections.

The Brennan Center for Justice is a nonpartisan public policy and law institute that focuses on issues of democracy and justice. We work to ensure accurate and fair voting and voter registration, and to promote policies that maximize participation of eligible citizens in elections. We have done extensive work on the subjects of voter registration, the maintenance of voter registration lists, and ensuring the accessibility, security and accuracy of voting systems. This work has included conducting studies, publishing reports, providing assistance to federal and state administrative and legislative bodies with responsibility over elections, and, when necessary, litigating to compel states to comply with their obligations under federal law and the Constitution.

WHAT WENT RIGHT AND WRONG IN THE 2010 ELECTIONS

The way we conduct national elections in this country has changed radically in the last few years: new statewide registration databases and voting machines, early voting and expansion of vote by mail programs represent some of the biggest changes in election administration in decades. The Brennan Center and other invited guests have been asked by this committee "what went right and wrong" in 2010? Given the pace of change in the last few years, the answer to this question must be that a lot went remarkably well. This is particularly true if one considers how drastically state and local election administration budgets have been cut across the nation. It is because of the hard work and dedication of state and local election officials and their staffs that the vast majority of Americans who

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chose to vote in 2010[1] were able to do so, and regardless of the method by which they voted, were confident that their votes were accurately counted.[2]

Unfortunately, in some important ways, our national election infrastructure has not kept pace with modern society. And that failure to adapt has been the cause of some of the greatest Election Day problems. In particular, the 2010 elections showed the continuing and critical need for (1) modernization of our country's voter registration system, including the adoption of automated and online registration systems for consenting eligible citizens, and (2) the creation of a national database, accessible by election officials and others, that identifies voting system malfunctions that are reported by voting system vendors or election officials.

While we have made important progress in both of these areas in the last two years, much remains to be done.

A.   Modernizing the Nation's Antiquated Registration System

The 2010 election demonstrated, yet again, that our voter registration system urgently needs an upgrade. Developed in the early 19th century and still based largely on paper, the current system in most of the country is costly, inefficient and unreliable. The system overwhelms election officials with burdensome and needless paperwork, and prevents many American citizens from exercising their right to vote. This outdated system is the single greatest cause of election problems for voters and election officials alike.

The good news is that, as a result of the Help America Vote Act of 2002, every state now has (or soon will have) a statewide voter registration database that can be leveraged to modernize our antiquated registration system. Building on these lists, several states have been working to automate the registration process, and provide adequate safeguards to correct errors or omissions on the voter rolls through online tools. Ultimately, these improvements will save state and local governments significant money, ease burdens on election officials, make our voting system less susceptible to fraud, and greatly increase the ability of eligible citizens to register and vote.

1. Voter Registration Problems in 2010

At least three data points from the 2010 election point to the continuing need to modernize the country's voter registration system:

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[1] The estimated 2010 voter turnout among the voting eligible population was only 40.9%. MICHAEL P. MCDONALD, UNITED STATES ELECTION PROJECT, 2010 GENERAL ELECTION TUNOUT RATES (2010), http://elections.gmu.edu/Turnout_2010G.html.

[2] *Voters Show Confidence in Tuesday's Election Process*, RASMUSSEN REPORTS, Nov. 8, 2010, http://www.rasmussenreports.com/public_content/politics/general_politics/november_2010/voters_show_confidence_in_tuesday_s_election_process.

Election Protection Data Reveals Voter Registration Still a Major Problem

The 2010 Election revealed that voters still face many of the problems they have experienced in previous years. In 2008, the biggest obstacle to the ballot box was problems with the voter registration system. Voter registration was the number one most reported problem to Election Protection, the nation's largest non-partisan voter protection effort.[3] In 2010, Election Protection received over 21,000 calls to its voter hotline, of which registration problems were 24% of the call volume, making it the second most reported problem.[4] It is significant that in a midterm election with significantly lower turnout and fewer registrants than in 2008, issues with our nation's outdated registration system would persist at such a high rate.

Election Officials Report Persisting Issues with Outdated Registration System

Election officials, too, voiced commonly heard frustrations. In the coming months, the Brennan Center will release an analysis of post-Election reports from election officials from across the United States. Our preliminary research reveals that officials experienced the same yearly headaches with the current paper-based voter registration system, from inaccurate registrations to a last minute flood of registration forms.

Voter Registration Rates Were Lower in 2010

The 2010 election also saw dramatically lower voter registration rates as compared to the last midterm election. Almost every jurisdiction with available data showed dramatic drops in new voter registrations.[5]

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[3] ELECTION PROTECTION, ELECTION PROTECTION 2008: HELPING VOTERS TODAY, MODERNIZING THE SYSTEM FOR TOMORROW (2008), *available at* http://www.866ourvote.org/tools/documents/files/0077.pdf. Polling place problems were the number one reported problem.

[4] ELECTION PROTECTION, ELECTION PROTECTION 2010 REPORT, (forthcoming 2011).

[5] Florida: From January through August 2006, 370,190 Florida citizens registered to vote, compared to 267,933 in the same period in 2010, a 27.6% decline. Source: Florida Division of Elections, *Voter Registration Statistics*, http://election.dos.state.fl.us/NVRA/reports.shtml (last visited Feb. 2011); Illinois: From November 2004 through November 2006, 823,988 Illinois citizens registered to vote, compared to 687,462 from November 2008 through November 2010, a 16.6% decline. Source: Email from Illinois State Board of Elections Official (Jan. 24, 2010) (on file at the Brennan Center); Indiana: From January through October 19, 2006, 175,235 Indiana citizens registered to vote, compared to 113,893 for the same period in 2010, a 35% decline. Source: Email from Indiana Elections Division Official (Oct. 19, 2010) (on file with Brennan Center); Louisiana: In 2006, 132,573 Louisiana citizens registered to vote, compared to only 126,310 in 2010, a 4.7% decrease. Source: Email from Office of Louisiana Secretary of State (Jan. 21, 2010) (on file at the Brennan Center); Maryland: From January through September 2006, 155,114 Maryland citizens registered to vote, compared to 121,814 in the same period this year, for a decline of 21.5%. Source: Maryland State Board of Elections, *Voter Registration Statistics*, http://www.elections.state.md.us/voter_registration/statistics.html (last visited Feb. 2011); North Carolina: In 2006, 311,127 North Carolina citizens registered to vote, compared to 222,696 through the end of

2. The Solution: Voter Registration Modernization

The current, paper-based voter registration system creates a range of problems for election officials and voters alike. Each election year, millions of Americans must submit new or updated voter registration forms, generating a mountain of paperwork that must be processed by an army of election clerks. A substantial portion of voters submit their paperwork at the last minute before an election, and so election offices are typically inundated with paper to process at the eleventh hour of the election cycle — the very time their attention should be focused on ensuring that Election Day operations run smoothly. Such a labor-intensive system in such a compressed time frame is costly and inefficient. It also multiplies the possibilities for error. Inaccuracies on the voter rolls result from difficulties deciphering voter handwriting, typographical and data entry errors, voters' failure to update their registration information, lost or incomplete registrations, and inability to process registrations on time, among other things. Inaccurate voter rolls create a range of election administration and voter list maintenance headaches, including increased numbers of provisional ballots to process and confusion at the polls.

Fortunately, modernizing the voter registration system offers incredible opportunities to make voting registration easier, faster, and more reliable for voters, all while saving time, money, and resources for election officials and making the voting system more secure. The Brennan Center applauds Representative Zoe Lofgren's efforts to modernize the voter registration system through the Internet with H.R. 1719, introduced in the last Congress, and hope the Committee will consider opportunities to build upon her online registration bill.

Experts, election officials, and policymakers across the country are recognizing the need to modernize our outdated, paper-based voter registration systems. Those

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August this year, a 28.4% decline. Source: Email from North Carolina State Board of Elections Official (Oct. 19, 2010) (on file with Brennan Center); Ohio: In 2006, 530,873 Ohio citizens registered to vote, compared to only 457,171 in 2010, a 13.9% decline. Source: Email from Office of Ohio Secretary of State Election (Jan. 20, 2010) (on file with the Brennan Center); Tennessee: From January 2006 through June 2006, 111,417 Tennessee citizens registered, compared to 92,611 registrants during the same period in 2010, a 16.9% decline. Source: Tennessee Department of State Elections Division, *Election Statistics*, http://www.tn.gov/sos/election/data/index.htm (last visited Feb. 2011); Utah: In 2006, 70,466 Utah citizens registered to vote, compared to only 55,491 registrations in 2010, a 21.3% decline. Source: Email from Office of Utah Lieutenant Governor (Jan. 25, 2010) (on file at the Brennan Center); Wisconsin: From January through October 19, 2006, 181,977 Wisconsin citizens registered to vote, compared to 103,258 during the same period for 2010, a 43.3% decline. Source: Telephone interview with Wisconsin Government Accountability Board Official (Oct. 18, 2010) (on file with Brennan Center); Clark County, Nevada showed a smaller drop than other jurisdictions, dropping from 89,401 registrations from January through October 2006 to 86,863 for the same period in 2010, a 2.8% decline. Source: Email from Clark County, Nevada Election Official (Oct. 11, 2010) (on file with Brennan Center). The county might have experienced greater drops had the state not introduced online registration, known to boost registration rates, in September 2010. Before that, in August 2010, the county's registration figures were lagging more than 5% behind the 2006 figures.

systems are overly costly, inefficient, error-prone, and can unnecessarily exclude eligible voters at the polls. Fortunately, new technologies point the way to an improved Twenty-First Century voter registration system. As more and more states are discovering, a modern voter registration system boosts registration rates, increases the accuracy of the voter rolls, and reduces the opportunity for fraud, while saving millions of dollars a year.

The key components of a fully modernized voter registration system are:

- *Automated Registration.* Under an automated registration system, states automatically register eligible, consenting citizens, including newly eligible citizens, when they interact with other government agencies. Election officials retain their traditional authority to determine voter eligibility.

- *Permanent or Portable Registration.* Under permanent registration, once a voter is on a state's voter rolls, she will remain registered and able to vote at the polling place associated with her address so long as she continues to reside in that state. Permanent registration can be accomplished by automatic registration record updates and procedures allowing voters to update their records before and on Election Day.

- *Election Day Correction.* Under an Election Day correction process, citizens can correct errors and omissions on the voter rolls before and on Election Day.

- *Online Registration.* Online registration provides another critical safeguard to ensure accurate voter rolls.

This reform leads to many benefits. A Brennan Center report, *Voter Registration in a Digital Age*, provides detailed information about the steps states across the country have taken toward a more modern voter registration system. [6] The report finds three main benefits of modernization:

- *Increased Registration Rates.* Registration rates at DMVs doubled in Washington and Kansas, increased even more in Rhode Island, and increased seven-fold in South Dakota after the states automated the voter registration system at DMVs. After Arizona introduced online and automated registration, registration rates for 18-24 year-old citizens rose from 28 to 53 percent.

- *More Accurate and Secure Rolls.* A 2009 survey of incomplete and incorrect registrations in Maricopa County, Arizona found that electronic voter registrations are as much as five times less error-prone than their paper-based counterparts.

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[6] CHRISTOPHER PONOROFF, BRENNAN CTR. FOR JUST., VOTER REGISTRATION IN A DIGITAL AGE (Wendy Weiser, ed.) (2010), *available at* http://www.brennancenter.org/content/resource/voter_registration_in_a_digital_age/.

- *Substantial Savings for States.* Upgrades to the voter registration system are surprisingly inexpensive to implement, ranging from no additional cost to several hundred thousand dollars. This is immediately offset by enormous savings.It cost Arizona less than $130,000 and Washington just $279,000 to implement both online voter registration and automated voter registration at DMVs. Online and automated DMV registrations saved Maricopa County, Arizona over $450,000 in 2008. The county spends 33¢ to manually process an electronic application, and an average of 3¢ using a partially automated review process, compared to 83¢ for a paper registration form. Delaware's paperless voter registration at DMVs saves election officials more than $200,000 annually on personnel costs, above the savings they reaped by partially automating the process in the mid-1990s. Officials anticipate further savings. Washington saved over $120,000 in 2008 in Secretary of State's office alone, and far more in each of its counties.

3. Progress In The States

States that have modernized their registration systems have saved hundreds of thousands of dollars on election administration, with savings likely to run into the millions after just a few years of implementation. Because of this, there is incredible momentum in the states towards modernization:[7]

- *Automated Registration.* At least seventeen states—Arizona, Arkansas, California, Delaware, Florida, Georgia, Kansas, Kentucky, Michigan, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas and Washington—have fully or substantially automated the voter registration process at DMVs.

- *Permanent or Portable Registration.* Eight states—Colorado, Delaware, Florida, Maryland, Ohio, Oregon, South Dakota, and Washington—have systems of permanent registration that allow registered voters who move to cast valid ballots even if they do not update their registrations before Election Day.

- *Election Day Correction.* Eights states—Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming—offer Election Day registration, allowing eligible citizens to register or update their records on Election Day. A number of other states offer same day registration in some circumstances or allow voters to correct registration errors on Election Day.

- *Online Registration.* Eleven states—Arizona, California, Colorado, Delaware, Indiana, Kansas, Louisiana, Nevada, Oregon, Utah, and Washington—currently

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[7] BRENNAN CTR. FOR JUST. *Voter Registration Modernization in the States*,
http://www.brennancenter.org/content/pages/voter_registration_modernization_states (last visited Mar. 28, 2011).

or will soon offer online voter registration. North Carolina is considering implementing online registration.

Current voter registration modernization bills are pending in Nevada and Massachusetts,[8] and Maryland has recently stated it will automate at motor vehicle agencies.[9] Beyond automation at motor vehicle agencies, Delaware is set to automate at public service agencies. Georgia, too, has taken steps to do the same. We believe this Committee should take notice of these successes in the states and work to bring the benefits of modernization across the country.

B. Creating A National Database To Reduce Voting System Malfunctions

Much of the news relating to the use of voting technology in the United States is surprisingly positive: nearly 10 years after Congress passed the Help America Vote Act,[10] states and counties have successfully replaced outdated and often unreliable systems that have dramatically reduced the kinds of errors we saw in earlier elections,[11] and many disabled voters have been able to vote privately and independently for the first time in their lives. Moreover, as election officials, poll workers and voters have become familiar with these systems, we are avoiding many of the problems that came with the initial transition to new technology: localities have developed better logic and accuracy testing regimes, so that they have been able to catch system problems before Election Day;[12] more states require redundancies like independent voter verified paper records,[13] which has made it easier for them to institute post-election audit[14] and reconciliation

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[8] Nevada AB 108, 76th Reg. Sess. (2011), *available at* http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=246; Massachusetts S 306, 187th Gen. Ct. (2011), *available at* http://www.malegislature.gov/Bills/187/Senate/S00306.

[9] Annie Linskey, "MVA to overhaul voter registration process," *The Baltimore Sun,* Mar. 20, 2011, *available at* http://articles.baltimoresun.com/2011-03-20/news/bs-md-motor-voter-20110320_1_voter-registration-mva-office-voter-rolls.

[10] Pub. Law 107-252.

[11] *See* Michael Traugott, et. al., *The Impact of Voting Systems on Residual Votes, Incomplete Ballots, and Other Measures of Voting Behavior* (conference paper presented at the Midwest Political Science Association, Chicago, IL, Apr. 7-10, 2005), Charles Stewart III, *Residual Vote in the 2004 Election* (Caltech/MIT Voting Technology Project, VTP Working Paper No. 2.3, 2005).

[12] *See* Joan Mazzolini, *10 percent of Cuyahoga County's voting machines fail pre-election tests,* THE PLAIN DEALER, Apr. 14, 2010, *available at* http://blog.cleveland.com/metro/2010/04/some_cuyahoga_countys_voting_m.html.

[13] In 2004, only 10 states provided a voter-verifiable paper record (VVPR) for every vote cast (ROBERT KIBRIK, VOTER-VERIFIED PAPER RECORD LEGISLATION, VERIFIEDVOTING.ORG, June 18, 2009, http://www.verifiedvoting.org/article.php?list=type&type=13); as of 2010, 40 states have moved towards requiring VVPR. However 7 states did not fully implement their VVPR requirements until some time after the 2010 election (VERIFIEDVOTING.ORG, AMERICA'S VOTING SYSTEMS IN 2010, (2010) http://www.verifiedvotingfoundation.org/downloads/VV_BackgrounderNov2010.pdf).

[14] Prior to 2005, only five states had enacted legislation with provisions requiring manual audit requirements. As of 2010, 25 states and the District of Columbia have enacted legislation with provisions requiring manual audit requirements (VerifiedVoting.org, Manual Audit Requirements (2010), http://www.verifiedvoting.org/downloads/State%20Manual%20Audit%20Provisions-05-24-10.pdf.).

regimes, and to catch failures that might otherwise have resulted in lost votes,[15] and; as election officials have become more comfortable with their new systems, they have had more time to focus on critical issues like system usability, utilizing the EAC's guidelines for ballot design,[16] and working with organizations like the Brennan Center, Design for Democracy, and the Usability Professionals Association to create ballots that are as user-friendly as possible, within the constraints of state law and the limitations imposed by current voting technology.[17]

Still, as in past elections, the 2010 election saw some serious voting system related problems.[18] That should not be surprising. The voting systems used in the United States today are complicated machines; each runs on tens of thousands of lines of software code. As with automobiles and airplanes, automatic garage door openers and lawnmowers, occasional malfunctions are inevitable – even after rigorous product testing.

When it comes to system failures, however, voting machines *are different* from automobiles and airplanes, and other products, in at least one important respect: for the vast majority of voting systems in use today, (1) manufacturers are not required to report malfunctions to any government agency, and (2) there is no agency that either investigates such alleged failures or alerts election officials and the general public to possible problems (let alone requires voting system manufacturers to fix such problems).

1. Recurring Voting System Problems

The failure to require manufacturer reporting of problems, or to require independent investigation and notification of such failures has had unsurprising consequences. As documented in the Brennan Center in *Voting System Failures: A Database Solution*, a study issued in September 2010, too often in the past this has meant that voting systems fail in a particular county in one election, and then again later under

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[15] For examples of a lag in vendor acknowledgement of voting system problems, see the case studies in LAWRENCE NORDEN, VOTING SYSTEM FAILURES: A DATABASE SOLUTION, BRENNAN CTR. FOR JUST. (2010), from Butler County, Ohio (at 10 - 11) and Humboldt County, California (at 12 - 13), *available at* http://www.brennancenter.org/content/resource/voting_system_failures_a_database_solution/ [hereinafter VOTING SYSTEM FAILURES].

[16] U.S. ELECTION ASSISTANCE COMMISSION, EFFECTIVE DESIGNS FOR THE ADMINISTRATION OF FEDERAL ELECTIONS (2007), http://www.eac.gov/assets/1/workflow_staging/Page/68.PDF.

[17] These three organizations have worked directly with election officials to improve ballot design in California, Florida, Kansas, New Hampshire, Nevada, New York, Oregon, Texas, and Washington State, among other locations.

[18] *See* Joan Mazzolini, *10 percent of Cuyahoga County's voting machines fail pre-election tests,* THE PLAIN DEALER, Apr. 14, 2010, http://blog.cleveland.com/metro/2010/04/some_cuyahoga_countys_voting_m.html. (noting problems with the voting systems in Cuyahoga County, Ohio); Election Protection estimates that 11% of the calls to its voter hotline were for voting system problems, ELECTION PROTECTION, ELECTION PROTECTION 2010 REPORT, (forthcoming 2011).

similar circumstances, in another locale and election.[19] These repeated failures disenfranchise voters and damage public confidence in the electoral system.

Because there is no central database of voting system failures, to conduct its study, the Brennan Center combed through hundreds of cases reported in the media. News items about voting system troubles tend not to include many details; this makes it difficult to identify from the reports the precise nature of the particular problem. Whatever the causes of a particular problem, it is fair to assume that their occurrence in one jurisdiction will often eventually be repeated in another unless election officials throughout the country are made aware of both the causes of the problem and how to avoid them.

Of the hundreds of reports of voting system malfunctions and vulnerabilities, the Brennan Center closely studied fourteen. Most of the election officials we interviewed in connection with these case studies claimed to have had no prior warning of the problems eventually identified. By contrast, in most cases, the vendors were (or should have been) aware of the problems – often because the same problem had been reported to them earlier by another election official.

Three fundamental findings result from the Brennan Center's study of past reported problems, review of current law and contracts for the use and regulation of voting systems, and interviews with election officials:

> **There is no central location where most election officials can find comprehensive information about problems discovered with their systems before each election.**
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> State and local election officials we interviewed tell us that they must rely almost exclusively on the voting system vendors for information about malfunctions, defects, vulnerabilities and other problems that the vendors have discovered, or that have occurred with their voting systems in other states. These problems are compounded by the fact that a change in election administrators can sometimes mean a loss of knowledge about all of the potential problems with a voting system as well as procedural safeguards necessary to prevent those problems.
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> **Vendors are frequently under no legal obligation to notify election officials or the public about problems with their systems.**
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> While purchase or service contracts sometimes bind election officials to inform vendors of malfunctions, vendors are not always similarly obligated to inform officials of problems reported to them. At the same time voting system vendors are under no legal obligation to notify any federal agency of problems they

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[19] VOTING SYSTEM FAILURES, *supra* note 15 at 1.

discover with the vast majority of their systems in use in the United States today, despite the fact that hundreds of millions of federal dollars have been spent to purchase such equipment.

The same failures occur with the same machines, in one jurisdiction or another, election after election.

Most of the election officials we interviewed in connection with our review of reported problems claimed to have had no prior warning of the issues we discuss. By contrast, in most cases, the vendors were (or should have been) aware of the problems – often because the same problem had been reported to them earlier by another election official. Frequently, these malfunctions – and their consequence, disenfranchisement – could have been avoided had election officials and/or public advocates known about earlier problems and had an opportunity to fix them.

2. Recent EAC Progress

Prior to the 2010 election, the Election Assistance Commission (the "EAC") took some important steps toward addressing these problems, and making information about voting system issues more readily available to election officials and the general public. In particular, the EAC adopted a number of important reporting requirements for both voting system manufacturers and testing labs that participate in its newly established Voting System Testing and Certification Program.[20] Pursuant to the Quality Monitoring Program established in the Voting System Testing and Certification Program Manual (the "VSTCPM") the EAC now posts on its website "test reports" for all systems tested for EAC certification, regardless of whether or not they are ultimately certified. These test reports include a list of "discrepancies" identified during the testing.[21] It also posts information related to site audits that it conducts on manufacturers who participate in its program.[22] All of this is potentially valuable information for the public and election officials as they consider purchasing new machines.

Under the VSTCPM, election officials and the public get more data about certain voting system failures in EAC *certified* systems. Vendors must report to the EAC "malfunctions" of *EAC* certified systems. The VSTCPM defines "malfunction" as "a failure of a voting system, not caused solely by operator or administrative error, which causes the system to cease operation during a Federal election or otherwise results in data loss."[23] The EAC posts this information on its website.

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[20] U.S. ELECTION ASSISTANCE COMMISSION, TESTING AND CERTIFICATION PROGRAM MANUAL VERSION 1.0 (2007) [hereinafter VSTCPM].

[21] E-mail from Jeannie Layson, Director of Communications and Congressional Affairs, U.S. Election Assistance Commission, to Lawrence Norden, Senior Counsel, Brennan Center for Justice (May 14, 2010, 17:09 EST) (on file with the Brennan Center).

[22] *Id.*

[23] VSTCPM, *supra* note 20 at 2.3.2.7.

As a result of this new system, election officials and the public learned of two important voting system problems ahead of the 2010 election.[24] The discovery and publicity of these failures provided election officials with valuable information and allowed them to ensure that their voters' choices were accurately recorded on Election Day.

3. Limits of the EAC'S VSTCPM Reporting Process

While the recent steps by the EAC are unquestionably valuable, there are a number of factors which limit the usefulness of this reporting system. They are discussed in greater detail in the Brennan Center report *Voting System Failures*. The EAC is in the process of addressing some of these limitations,[25] but others remain. Among them:

- Because the VSTCPM reporting rules only apply to EAC certified systems, most machines in use today are not covered by these reporting rules, or any federal reporting requirements for that matter.[26]

- Reporting under this system is limited to vendors and election officials for a very specific type of problem. For instance, it is not clear that manufacturers would have to report potential flaws they discover before they result in actual loss of votes on Election Day, or "merely" because they cause delay and long lines rather than a loss of data.

- Independent investigators and voters with credible reports, no matter how numerous or serious, are not entitled to report problems.

- Some election officials have complained that neither the EAC nor the vendors are required to notify election officials immediately upon learning of a malfunction. Douglas A. Kellner, co-chair of the New York State Board of Elections, in a letter to the EAC praising them for issuing their first Voting System Technical Advisory last June, noted that it came two months after the EAC was first notified of the problem and urged "the EAC to put in place a system that would allow an immediate preliminary notice to be distributed to all jurisdictions using the equipment involved as soon as EAC staff has been able to verify a report."[27]

For these and other reasons, most state and local election officials we interviewed tell us that they must still rely almost exclusively on the voting system vendors for

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[24] *See* VOTING SYSTEM FAILURES *supra* note 15 at 8-9 for a discussion of these problems and the notices that were sent.
[25] *See generally* U.S. ELECTION ASSISTANCE COMMISSION, TESTING AND CERTIFICATION PROGRAM MANUAL VERSION 2.0 (forthcoming 2011) (Draft for Public Comment, on file with the Brennan Center).
[26] U.S. ELECTION ASSISTANCE COMMISSION, CERTIFIED VOTING SYSTEMS, http://www.eac.gov/testing_and_certification/certified_voting_systems.aspx (last visited Mar. 28, 2011).
[27] VSTCPM, *supra* note 20 at 8.7.4.

information about malfunctions, defects, vulnerabilities and other problems that the vendors have discovered, or that have occurred with their voting systems in other states.[28] As Jane Platten, Director of the Cuyahoga County Board of Elections put it, "One of the more frustrating aspects of encountering problems [with voting systems], often while preparing and testing for elections as well as on election day or during tabulation, is that the vendors themselves often know about the problems and never disclose any details whatsoever prior to the moment of crisis."[29]

Of course, vendors do frequently notify election officials of problems when they occur, and often provide software patches or other procedural safeguards to ensure that such problems do not occur in the future. Unfortunately, in at least some instances, vendors have appeared slow to acknowledge such problems.[30]

More to the point, there is no centralized location where election officials can find information about anomalies, malfunctions, usability concerns,[31] and other problems discovered with systems they are currently using before each election. A change in election administrators can sometimes mean a loss of knowledge about all of the potential problems with a voting system as well as procedural safeguards necessary to prevent those problems.[32]

The result, as *Voting System Failures* demonstrates, is that all too frequently the same failures in the same voting systems occur in one jurisdiction or another, election after election. Often, these malfunctions – and their consequence, disenfranchisement – would have been avoided had election officials and the public known about previously encountered problems and had an opportunity to fix them.

4. The Solution: A National Database of Voting System Problems

Given the nature and importance of voting systems to our democracy, we need a new national system to ensure that voting system defects are caught early, disclosed immediately, and corrected quickly and comprehensively. We conclude that this new

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[28] *Compare* County of San Diego Registrar of Voters Contract No. 46619 between County of San Diego and Diebold Election Systems, Inc. and Diebold Incorporated at 20-21 (2003), *available at* http://accurate-voting.org/contracts/CA/San_Diego/CA_sandiego_2003.pdf (demonstrating a contractual obligation for the county to inform the vendor of defects in the voting system with no similar obligation on the part of the vendor), *with* Contract No. 08455, Voting Equipment Agreement between Election Systems and Software, Inc. and Kansas Secretary of State at 7 (Nov. 16, 2005) (stating that the contractor will notify the customer of any defects or problems that arise.

[29] *See* VOTING SYSTEM FAILURES *supra* note 15 at 9.

[30] For examples of a lag in vendor acknowledgement of voting system problems, see the case studies in., VOTING SYSTEM FAILURES *supra* note 15, from Butler County, Ohio (at 10 - 11) and Humboldt County, California (at 12 - 13).

[31] By usability concerns we mean flaws in the machine's programming, software or hardware that make poll worker or voter error significantly more likely, and which lead to significant disenfranchisement.

[32] This appears to be precisely what occurred in Humboldt County, California in 2008. This case is detailed VOTING SYSTEM FAILURES *supra* note 15 at 12-13.

system must center around a mandatory national clearinghouse, administered by a federal agency empowered to investigate violations and enforce the law.

Based upon our interviews with election officials and regulatory experts, and our review of analogous regulatory structures in other important industries, we conclude that the clearinghouse must include four key elements to work effectively:

1. **A Publicly Available, Searchable Centralized Database.** Election officials, in particular, would benefit from a publicly available, searchable online database that includes official (i.e., election official-reported or vendor-reported) and unofficial (i.e., voter-reported) data regarding voting system failures, and vulnerabilities, and other reported problems and establishes criteria for the database's contents and organization.

2. **Vendor Reporting Requirements.** Vendors must be required to notify the appropriate government agency of any known and suspected voting system failures and vulnerabilities, and other reported problems, including customer (i.e., election official) complaints, warranty claims, legal actions and/or actions taken by the vendor to satisfy a warranty or investigate a reported problem.

3. **A Federal Agency with Investigatory Powers.** The best way to ensure that vendors address potential problems in a timely manner is to empower the appropriate government agency to investigate all voting system failures and vulnerabilities listed on the database, grant the agency subpoena power to facilitate its investigations, and require vendors to, among other things, maintain records that may help the agency determine whether there are indeed voting system failures or vulnerabilities, and whether the vendor has taken appropriate action to address the failures or vulnerabilities.

4. **Enforcement Mechanisms.** The appropriate government agency must have the power to levy civil penalties on vendors who fail to meet the reporting requirement or to remedy failures or vulnerabilities with their voting systems.

CONCLUSION

Election officials and staffs should be applauded for their successful efforts in 2010. Under serious budget constraints and vast changes, they oversaw another successful national election. The recommendations offered in this testimony – to modernize our antiquated registration system and establish a national database of voting machine problems – would significantly ease the burden we place on them, allowing them to focus on election management, and make it easier to ensure that all eligible voters are able to vote and have their votes accurately counted.