



**Whitewashing the Facts:  
EAC Report Ignores Key Data**

***Report Misses Opportunities for Election Reform***

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On December 7, 2006, the Election Assistance Commission (EAC) released its much-anticipated report on voter fraud and voter intimidation, entitled “Election Crimes: An Initial Review and Recommendations for Future Study.” While it was thought that the EAC’s study of voter fraud and vote suppression might be a useful tool in advancing positive election policies in the future, the results of this “initial review” were disappointing, if not downright confusing and troubling. Rather than providing a tool that might drive productive election reform, the EAC has instead chosen to punt, creating a document that cannot be used to justify any legislation whatsoever, and most certainly cannot form the basis for the enactment of any further legislation, such as restrictive voter ID laws, which unreasonably restrict the rights of eligible voters to participate in the democratic process.

The EAC's failure to lead on this issue is particularly troubling, given the fact that the consultants hired to perform this study apparently reached radically different conclusions than those the EAC now espouses. While the EAC now claims that there is "no consensus" on the existence or pervasiveness of voter fraud, in a leaked earlier draft of this report, the bipartisan consultants concluded that "there is widespread but not unanimous agreement that there is little polling place fraud, or at least much less than claimed." The EAC has thus far refused to explain this contradiction, refuses to release reports produced by the consultants, and appears to be preventing the consultants the opportunity to explain their findings publicly.

As evidence of the EAC's dysfunction on this issue, the final report released by the EAC creates an awkward, vague and unworkable definition for “election crimes,” unnecessarily excluding many fraudulent or disenfranchising acts from the definition. Furthermore, the report gratuitously excludes key data from its analysis, while recommending wasting needless time on areas of analysis that have already been completed, or have been demonstrated to be of questionable empirical value. Finally, the timing and circumstances surrounding the release of this report raise serious questions about the EAC’s motives in this study, and whether the EAC has left its tradition of bipartisan review of election procedures behind to become just another cog in Washington’s environment of virulent partisanship.

The EAC takes over five pages to attempt to define the term “election crimes,” and the result is a completely incomprehensible and contradictory mess. First, the EAC limits the scope of future studies only to “*crimes* related to the voter registration and voting processes and excludes civil wrongs and non-election related crimes.” By this definition, many verified instances of vote suppression and intentional disenfranchisement might escape the EAC’s analysis, simply because those instances were not considered “crimes” as the law existed at the time.

Examples of such unprosecuted suppression or intimidation include:

- In 2004, the Waller County, TX district attorney threatened predominantly African-American students at Prairie View A&M with prosecution if they registered as county residents for the purpose of voting. A civil lawsuit forced him to back down from this illegal activity. *Prairie View Chapter of NAACP v. Kitzman*, (S.D. Tex., Case No. 04-cv-459, 2004)

- In 2004, a voter registration group operating in Nevada, Oregon, West Virginia, and other states was confirmed to have destroyed voter registration forms for those who listed themselves as Democrats (thus disenfranchising those voters), and misled voters regarding voting and registration. To date, nobody associated with this fraud has been prosecuted. See “Nevada Investigates Voter Registration: Probe Also Under Way In Oregon On Fraud Allegations”, <http://edition.cnn.com/2004/ALLPOLITICS/10/14/nevada.registration/index.html>.
- In the last several election cycles, it was documented that thousands of voters, predominantly Latinos, in places such as North Carolina and Georgia were subjected to discriminatory voter challenges. Though advocates were generally successful in fighting these improper challenges, it appears none of the challengers has been prosecuted criminally. See *United States v. Long County, Georgia* (S.D. Ga., Case No. CV206-040, 2006); “Final Report, 2004 Election Protection, North Carolina,” University of North Carolina School of Law, UNC Center for Civil Rights, March 31, 2005.
- Thousands of voters during the 2006 elections received fraudulent flyers (i.e., in Maryland, falsely implying that Michael Steele and Robert Ehrlich were Democrats, and that they were supported by Democrat Kweisi Mfume), fraudulent and intimidating phone calls (i.e., in Virginia, calls were received by voters threatening them with criminal prosecution if they voted, or misinforming them of their correct polling location), and harassing “robocalls” that were intended to deceive and annoy voters. The Justice Department has refused to investigate the flyers, and to date has not indicated whether an investigation of any of these incidents will be forthcoming. See Ovetta Wiggins and Avis Thomas-Lester, “Misleading GOP Handouts Called a Political ‘Low Point’,” *Washington Post*, Nov. 8, 2006, at A29; Zinie Chen Sampson, “FBI Investigating Reports Of Misleading Calls To Virginia Voters Claiming Precinct Changes,” Associated Press, Nov. 7, 2006.

These are but a small handful of the hundreds of incidents of voter intimidation and suppression that have occurred in just the last few elections. Nevertheless, the EAC apparently does not deem these incidents worthy of further study.

If the EAC would have opened its eyes to other cases of fraudulent and disenfranchising behavior, it would have discovered some remarkable and dispositive evidence. For instance, regarding the existence of voter fraud in states where it was used as the justification for requiring restrictive voter ID, and the impact of those voter ID laws, the *supporters* of voter ID have made the following admissions:

- The State of Indiana, in defending the voter ID law in court documents, admitted that it could not find one single instance of voter impersonation fraud in the history of the state. *Indiana Democratic Party v. Rokita*, 2006 U.S. Dist. LEXIS 20321 (S.D. Ind. 2006).
- The Governor of Missouri, who had formerly been the Secretary of State (and run Missouri’s elections), admitted that elections in Missouri were “fraud-free,” before unsuccessfully defending the restrictive voter ID laws in court. *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006).
- The Director of the Missouri Department of Revenue, a supporter of the voter ID law, admitted that around 170,000 eligible Missouri voters did not possess the ID necessary under the now-invalidated law to exercise their constitutional right to vote (others estimated that number being as high as 240,000). Mo. Dept. of Rev., Fiscal Note. 4947-01, Bill No. SB1014.

Thus, well-funded state defendants in high profile litigation to defend legislation predicated on the existence of fraud have been unable to find *any* evidence of systemic fraud, and often cannot even demonstrate isolated anecdotal instances of such fraud. Indeed, these state defendants have the most incentive to demonstrate the existence of fraud – far more than the supposedly nonpartisan EAC – and yet have been completely unable to do so in multiple pieces of litigation. Nevertheless, the EAC report would seemingly ignore this evidence.

To further add to the confusion, the EAC refuses to prioritize different types of voter fraud, intimidation or suppression, and instead appears to believe all forms of such deception are equally invidious. For instance, the EAC appears to equate disenfranchising activity such as intimidating an eligible voter to prevent them from voting, with violations of purely bureaucratic regulations that do not result in disenfranchisement, such as folding a ballot or removing a campaign sign. The EAC could have made a significant contribution to the discussion about voter fraud and disenfranchisement by prioritizing those violations that cut to the very heart of our democracy, and those that are more administrative in nature. For instance, consider the following types of election wrongs, in order of their importance:

1. Any activity that seeks to prevent or impede an eligible voter from casting a ballot of their choice and having it counted, or seeks to have counted a ballot cast by an ineligible voter. Examples include: voter intimidation, voter suppression, voter deception, destruction of voter registration forms, improper demands for voter documentation, vote buying, ballots cast by ineligible voters with the intent to commit fraud, etc.
2. Any activity that, regardless of intent, results in preventing or impeding an eligible voter from casting a ballot of their choice and having it counted, or results in the counting of a ballot cast by an ineligible voter. Examples include: burdensome bureaucratic restrictions on the right to vote or register to vote, ballots cast by ineligible voters without the intent to commit fraud, etc.
3. Voter registration fraud. Since the Help America Vote Act requires all first time registrants (by mail) to show some form of ID, registration of ineligible or nonexistent voters has not resulted in illegal ballots being cast, but if such fraud exists it nevertheless constitutes an administrative burden on those seeking to run elections.
4. Activities which may implicate ballot secrecy, political campaigning or electioneering, or access to the petition or initiative process. While these activities are very worthy of regulation, they may not rise, in most instances, to the level of actually disenfranchising eligible voters in elections, and therefore it would be problematic to equate an instance of removing a campaign sign, for instance, to an instance of voter intimidation.

The EAC's failure to prioritize these various voting rights violations constitutes a missed opportunity, and a failure of leadership on its part.

In addition, the EAC inexplicably excludes relevant data from its analysis. For instance, though it recommends reviewing complaints filed with the "MyVote1" voter hotline, and with the Department of Justice, it excludes other large databases of election complaints, such as the 1-866-OUR-VOTE Hotline staffed by the Election Protection Coalition (of which People For the American Way Foundation is a founding partner and includes over 150 organizations such as the NAACP, the Lawyers' Committee for Civil Rights Under Law, and others). Failing to include these other databases is inexplicable, particularly considering that the Election Protection Hotline received over 200,000 requests for assistance, including over 39,000 specific complaints in 2004, and over 21,000 calls, with more than 8,500 specific complaints in 2006, from almost every state in the union (compared to the only 1,200 complaints in 2004 and 200 complaints in 2006 received by the Department of Justice). Notably, many of the calls and complaints received by the

Election Protection Hotline were actually from poll workers, which speaks to the reliability and confidence the public has in the Election Protection Coalition's program.

Why does the EAC, the agency charged by Congress with studying "ways of identifying, deterring, and investigating methods of intimidation" so limit its investigation? The EAC states that it "adopted this definition because it better represents the spectrum of activities that we are able to and *desire to* study." Why the EAC would "desire" to so restrict its own investigation goes unexplained. In defense of this odd position, the EAC states that while "[c]riminal behavior is readily defined through state and federal statutes," "such is not the case with civil matters ... [which are] far less defined, subject to change, and can vary from case to case." As should be obvious to anyone with an even rudimentary knowledge of the law, criminal laws are just as likely to change as civil laws. Particularly in the area of election law, criminal statutes are changing all the time, with a variety of election-related crimes currently being considered throughout the states, and in Congress. Furthermore, merely because something is criminally regulated, as opposed to civilly regulated, has no bearing on whether the regulated behavior is capable of being measured or studied. Governmental entities routinely conduct civil investigations and litigation, and keep records on those activities. Similarly, numerous non-profits, such as People For the American Way Foundation and other members of the Election Protection Coalition, also are involved in investigation and litigation, and compile data and produce reports with empirical analysis. Thus, the EAC's stated reasons for limiting its review and its definition of "election crimes" fails the laugh test.

If the stated reasons are pretextual, it leaves one to question whether the EAC's odd behavior might be a matter of partisan bias. The circumstances and the timing of the EAC report tend to support this conclusion. In May 2006, the EAC approved a "status report" on the voter fraud and voter intimidation research project compiled by the bipartisan consultants hired by the EAC. This status report – on EAC letterhead but apparently drafted by the consultants, and not intended for public distribution – reached markedly different conclusions than the report issued last week. While the EAC claimed last week that there is "no consensus on the regularity of voting fraud and voting intimidation found," and that there is merely "a great deal of debate on the pervasiveness of fraud," the status report came to different conclusions, noting that:

- "There is widespread but not unanimous agreement that there is little polling place fraud, or at least much less than claimed, including voter impersonation, "dead" voters, noncitizen voting and felon voters."
- "Most people believe that false registration forms have not resulted in polling place fraud...."
- "On balance, more researchers find [polling place fraud] to be less of a problem than is commonly described in the political debate...."
- "There is as much evidence, and as much concern, about structural forms of disenfranchisement as about intentional abuse of the system."
- "Deceptive practices, e.g. targeted flyers and phone calls providing misinformation, were a major problem in 2004."
- "Voter intimidation continues to be focused on minority communities...."
- "There was only one self evident instance of a noncitizen registering to vote."

Furthermore, while the latest EAC report puts much stock in the Justice Department's database of complaints and record of investigations, the May status report noted that:

- “Advocates from across the spectrum expressed frustration with the failure of the Department of Justice to pursue complaints.”

The May status report was leaked to the media in October, and it was further reported that the bipartisan consultants had completed their final draft of their analysis and presented it to the EAC in July. Since then, the EAC has inexplicably delayed the release of this final report, and continues to refuse to release it, despite numerous FOIA requests, to this day. The EAC’s failure to act in a timely fashion led one of the commissioners, Gracia Hillman, to publicly apologize for the “embarrassing” delay.

The EAC has made no attempt to reconcile the contradictions inherent in the earlier report drafted by the bipartisan consultants, and the draft officially adopted by the EAC last week. Neither of the consultants was permitted to testify at the public hearing on December 7, 2006, nor has the EAC apparently allowed them to publicly comment on the report. Instead, the report was presented to the commission by the EAC’s General Counsel, Republican Julie Thompson-Hodgkins.

It is particularly troubling that given the incongruous conclusions reached in the two reports (and perhaps in the July report as well, though that has not been made public yet), the EAC repeatedly imputes a level of authorship of the latest report upon the two consultants, Tova Wang and Job Serebrov. Though we do not know what the July report says, it is extremely unlikely that those experienced consultants did a complete reversal since May, reaching dramatically different conclusions than they had earlier. Ms. Wang wrote just last week, in an article entitled “Where’s the Voter Fraud,” that:

“[T]here has not been one confirmed report of any [voter fraud] in the 2006 election. Not one. Even the Republican National Committee’s vote fraud watch operation in their list of complaints from the 2006 election could not come up with one such case....”

I won’t go into the recitation of all of the previous research that has been done on what a nonexistent problem polling place fraud is and the fraudulent disenfranchisement narrow voter identification requirements cause among perfectly eligible voters – disproportionately minorities, the poor, the elderly, and voters with disabilities....”

Given the consultants’ earlier conclusions, the EAC’s attempt to attribute the conclusions reached in their latest report to these consultants, and to rely upon the credibility and bipartisanship of the consultants to inflate the integrity of this latest report, is undeniably improper, and possibly a violation of professional ethics.

Given the EAC’s behavior relating to this report, the agency is rapidly losing any credibility it had established as an impartial voice in the area of election administration. The EAC is already operating with a partisan imbalance (with two Republican commissioners to one Democrat, with the General Counsel, as noted above, also a Republican). Furthermore, the President appears to be poised to nominate (and recess-appoint, if necessary) a GOP political operative with no election administration experience to the commission. It is no wonder that nonpartisan election experts such as Professor Rick Hasen at Loyola Law School has recently stated on his Election Law Blog that:

“Politics appears to be creeping in to decisions of the EAC's advisory board, and there's real concern about the EAC's vote fraud report. Note what's missing compared to the earlier version leaked to the USA Today newspaper. Tova Wang, who authored the draft

report for the EAC, issued the following statement to me: "My co-consultant and I provided the EAC with a tremendous amount of research and analysis for this project. The EAC released what is their report yesterday." The EAC has also lost two commissioners, one Republican and one Democrat, who appeared to be tough-minded and fair. I am very worried about the fairness and non-partisanship of the new rumored nominees."

Notwithstanding the EAC's failings, some important conclusions can be reached, even from this watered-down report. The evidence suggests that there is a strong consensus that voter impersonation fraud does not exist in any systemic way, if at all. However, the EAC now appears to allege that there is "no consensus" regarding the existence of such fraud. Given that conclusion, just as the EAC has urged caution in enacting reform with regard to election technology, pending complete review of the problems, it is only prudent to resist enacting any laws, such as restrictive voter ID laws, which pose additional burdens on voters until there is proof that such laws are absolutely necessary to maintain the integrity of our democratic process. Therefore, we call on the EAC to urge a moratorium on all legislation predicated on the existence of voter fraud pending what they term as their "comprehensive, nationwide look" at such fraud.