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Senate Committee on Rules
Hearing on Voter Verification in the Federal Elections Process
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I am the Associate Director of the Electronic Privacy Information Center (EPIC) located in Washington, DC. EPIC is a public interest research center established in 1994 to focus public attention on emerging civil liberties issues as they related to information technology and to protect privacy, the First Amendment, and constitutional values. EPIC would like to thank the Committee for the opportunity to contribute to your examination of voter verification and the Federal elections process.

I also coordinate the work of the National Committee for Voting Integrity, an EPIC project, which promotes dialogues on voter-verified balloting with the intent of preserving privacy protections for elections in the United States. The Committee brings together experts on voting issues from across the country. Electronic Voting is a very important technology issue that requires a coordinated effort to address the ultimate goal of insuring that each person's vote regardless of physical condition, language of origin, race, ethnicity, or creed is accurately recorded, retained, and counted after each election.

EPIC would like to communicate to policy makers and the public the need to create an end-to-end election system that is transparent, private, and secure. A healthy vibrant democracy rests on these principles because they ensure the democratic rights of those who choose to register and vote in public elections.

In 2000, the focus was on Florida, but the problems in that state were repeated in many others.¹ That presidential election was like any other except for one fact: the deciding margin of victory came down to one state with only 537 votes separating the top two candidates for the Presidency of the United States.² According to the Caltech-MIT Voting Technology Project report "Voting: What Is What Could Be,"³ this number is dwarfed by the 4 to 6 million votes lost, because of problems with voter registration, polling place practices, and problems with ballots.⁴ Voters received a rude introduction to the reality of elections in the United States: not every vote cast was counted.

In reply to the problems identified by the Presidential Election of 2000, the federal government attempted to clarify and codify voting rights in the United States for the 2004 election through the enactment and implementation of the Help America Vote

¹ See Caltech-MIT Voting Technology Project, *Voting: What Is, What Could Be* (July 2001), http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf.

² John Kelso, *Nothin' Fuzzy nor Fantastic About Margin*, THE AUSTIN AMERICAN STATESMAN, Nov. 28, 2000, at B1.

³ Caltech-MIT Voting Technology Project, *supra* note 9.

⁴ Caltech-MIT Voting Technology Project, *supra* note 9, at 3.

Act (HAVA) Law.⁵ However, this law was in many ways too little too late.⁶ HAVA, for the first time in the nation's history, established a local role for the federal government in federal elections. The establishment of the U.S. Election Assistance Commission (EAC) in statute did not translate into expedited action on the part of policymakers to appoint the EAC leadership. The four Commissioners, two Democrats Gracia Hillman and Ray Martinez and two Republicans, DeForest B. Soaries and Paul DeGregorio who were selected to serve as the first EAC Commission were not sworn into office until December 12, 2003.⁷ The EAC Commissioners received only \$1.2 million in funding for Fiscal year 2004 and did not move into their own offices until April 1, 2004 seven months prior to the election.⁸ The new law included a directive to states to create statewide voter registration databases, identification, and new requirements for first time-registered voters.⁹ To accomplish these objectives the law provided over \$3 billion in federal funds to be allocated to states under the guidance of the EAC.¹⁰ However, the EAC lacked the time and funding recourses needed to improved voter registration lists and voting technology as outlined in HAVA.¹¹

The Secret Ballot

"The first principle of republicanism is that the lex majoris partis is the fundamental law of every society of individuals of equal rights; to consider the will of the society enounced by the majority of a single vote as sacred as if unanimous is the first of all lessons in importance, yet the last which is thoroughly learnt." Thomas Jefferson to Alexander von Humboldt, 1817

Federal and state courts and legislatures have historically taken measures to protect the right of voters to vote their conscience without fear of retaliation. United States law requires that "All votes for Representatives in Congress must be by written or printed ballot, or voting machine, the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect."¹² The statute defines "ballot" in election provisions to mean a "method which will insure, so far as possible, secrecy and integrity of popular vote," and interprets the Congressional requirement that elections be conducted by written or printed ballots or by machine to include the notion that ballots must be secret.

As further support for the requirement of secret ballots, the statute cites *Johnson v. Clark*, 25 F. Supp. 285 (DC Tex. 1938). In *Johnson*, the District Court for the Northern District of Texas emphasized the "secrecy and integrity" of votes. "The word 'ballot,' in

⁵ Help America Vote Act of 2002, 42 U.S.C. § 15301 (2005).

⁶ See U.S. Election Assistance Commission, *Fiscal Year 2004 Report*, (Jan. 2005), <http://www.eac.gov/docs/EAC%20Annual%20Report%20FY04.pdf>.

⁷ U.S. Election Assistance Commission, *Fiscal Year 2003 Report*, http://www.eac.gov/annualreport_2003.htm

⁸ U.S. Election Assistance Commission, *supra* note 13, at 7.

⁹ Help Americans Vote Act of 2002, § 1666 U.S.C. H.R. 3295, 107th Cong. (2002) (enacted).

¹⁰ *Id.* at 4.

¹¹ *Id.* at 3.

¹² 2 USCS § 9 (2003), "Voting for Representatives"

an election provision, means a method which will insure, so far as is possible, the secrecy and integrity of the popular vote.” *Id.* at 286. Other courts have also found that the concept of secrecy and privacy is inherent in the meaning of ballots. Other courts have ruled that this case clearly refers to ballot secrecy. In *Brisbin v. Cleary*, the Supreme Court of Minnesota interpreted voting by ballot to mean:

a mode of designating an elector’s choice of a person for an office by the deposit of a ticket, bearing the name of such person, in a receptacle provided for the purpose, in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the person voted for. This privilege of secrecy may properly be regarded as the distinguishing feature of ballot voting, as compared with open voting, as, for instance, voting *viva voce*. The object of the privilege is the independence of the voter.

26 Minn. 107, 108-09 (1879).

The U.S. Supreme Court has also recognized in dicta that the right to vote privately via secret ballots is an essential component of meaningful participation in the democratic process. In *Buckley v. Valeo*, the Court argued that, “Secrecy, like privacy, is not per se criminal. On the contrary, secrecy and privacy as to political preferences and convictions are fundamental in a free society. For example, one of the great political reforms was the advent of the secret ballot as a universal practice.” 424 U.S. 1, 237 (1976) (Burger, C.J., dissenting). In *Burson v. Freeman*, the Court found that “the very purpose of the secret ballot is to protect the individual’s right to cast a vote without explaining to anyone for whom, or for what reason, the vote is cast.” 504 U.S. 191, 206 (1992), quoting *Rogers v. Lodge*, 458 U.S. 613, 647 n.30 (1982) (Stevens, J., dissenting).

In *McIntyre v. Ohio*, the U.S. Supreme Court outlined the importance of the development of the secret ballot as a means of ensuring the integrity of elections.

In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

Thus, the concept of voting cannot be separated from the concept of privacy, for the latter gives meaning to the former. Any legislation that would affect the voting process must always honor this marriage of privacy and integrity as central components of voting ballots. If steps are taken to undermine the secret ballot, *i.e.*, by linking a voter’s identity to his vote, then by extension the integrity of the election itself is

compromised, because this opens the door to the potential for coercive tactics to influence how individuals vote.¹³

Electronic Voting Technology and Privacy

All voting technology used for the purpose of selecting elected officials or deciding public referendum should be reliable in their ability to accurately record voter choices, retain those choices, and make them available for tabulation and/or recount purposes. These goals must be reached in an election environment that supports universal voter privacy and ballot secrecy. The standards that govern the adoption of voting technology should also measure how well it provides access to voters with disabilities or language minorities to facilitate an independent voting and ballot verification experience.

The notion of equal opportunity disenfranchisement does not set well with voters.¹⁴ The aftermath of the Florida 2000 Presidential election, which is the reasoning behind the push to change technology, revealed that those most likely to not have their votes counted were low-income, non-native English speakers, physically disabled, or elderly voters.¹⁵ The use of E-voting technology in California's 2004 Primary Elections introduced a level of randomness in potential disenfranchisement that negatively affected voters in Napa Valley and Orange County.¹⁶ However, the initial reports that appeared the day after the California primary election offered positive comment on the performance of voting technology and minimized problems.¹⁷

The November 2004 general election left 4,438 voters in one precinct in Carteret County North Carolina disenfranchised when none of their votes were counted. County election officials believed that their Unilect Patriot voting system could store more electronic ballots than it could.¹⁸ They were told that each voting machine was capable of storing 10,500 votes, but the limit was set to record only 3,005 votes.¹⁹ Anticipating the larger capacity, which would be sufficient for the election officials, only used one unit.²⁰ This problem left state agriculture commissioner's race in limbo.²¹

Unfortunately, there is no uniform mechanism for collecting the voters' feedback on their Election Day experiences. The body of evidence is growing that voting on DRE un-auditable paperless voting technology presents hazards for votes being counted as cast by voters, it is important to address these concerns. However, we must not ignore the

5 McIntyre v. Ohio, U.S. Supreme Court, 514 U.S. 334, 343 (1995).

¹⁴ "Suffrage Suffers in the Land of Rights" by Jamin Raskin, Los Angeles Times <http://www.latimes.com/news/printedition/opinion/la-oe-raskin15mar15,1,2952907.story> March 15, 2004

¹⁵ Kim North, NAACP Freedom Fund Dinner Voting Rights, pg 1C Detroit Free Press, April 30, 2001

¹⁶ "Lost E-Votes Could Flip Napa Race" By Kim Zetter, Wired News <http://www.wired.com/news/politics/0,1283,62655,00.html> March 12, 2004 PT, USA Today Posted 3/12/2004 5:41 AM Updated 3/14/2004 11:11 PM

"Calif. senators want decertification of e-vote systems" by Anna Oberthur, Associated Press http://www.usatoday.com/tech/news/techpolicy/2004-03-12-calif-vs-evote_x.htm

¹⁷ "E-voting smooth on Super Tuesday," by Declan McCullagh, CNET News.com http://news.com.com/2100-1028_3-5168670.html?tag=nefd_top, March 2, 2004, 5:05 PM PST

¹⁸ Associated Press, Voting problems delay results in some North Carolina races, pg. 2A, The Courier-Journal, November 5, 2004.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

potential threats to privacy while investigating the benefits or deterrents presented. Application of DRE paperless voting technology in US public elections address some issues of voter privacy while potentially creating others.²² Voters with disabilities and language minorities can and must be afforded the right to a secret ballot that is voter verified. The irrefutable security of paper ballots is that it has achieved a write once use, which cannot be undetectably altered. This is a difficult challenge for other voting technology to match. If paperless voting systems are to succeed, they must meet the test of paper. Paper ballots must also meet the additional challenge of preventing undetected destruction or disposal of ballots, while maintaining ballot secrecy and voter privacy. Until a suitable paperless system is developed, tested and sustained by tough voting technology standards any intermittent voting technology should use designs that allow universal voter access to verify that the vote recorded is the vote cast and ultimately counted.

Democracy and Transparency

Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. -- James Madison

Transparency is a key component of a functioning healthy democracy. It can be translated into policy decisions that allow citizens, policymakers, and the media to assure themselves that a local, state or federal government agency is functioning as intended. The process of providing transparency is referred to as "open government," which is accomplished in a number of ways, that may include but is not limited to: open meetings, publishing rule making notices, allowing public comment, access to rulemaking proceeding, and open records laws. Each component of transparency should be maintained by each local, state, and federal agency engaged in election related work because it is a means for assuring democracy and public confidence in the administration of elections.

The federal Freedom of Information Act (FOIA), codified under 5 U.S.C. § 552, provides that all federal agency records are accessible to the public unless specifically exempt from this requirement. FOIA is a means of controlling executive secrecy by substituting legislative judgment for administrative discretion as to what should or should not be secret. The requirements for disclosure by publication in the Federal Register; availability for public inspection and copying or release pursuant to a request for access from "any person," effectively address unnecessary secrecy in government agencies.

E-voting and Transparency

In addition, to tougher voting technology standards and a excellent certification process to test the validity of voting systems being offered for use in public elections, it is

²² <http://www.epic.org/privacy/voting/crsreport.pdf>

also important that the depended relationship between vendors and Election Administrators be severed. Fair and impartial judges, umpires, referees are essential to settling matters under contention. It should not be necessary to remind election administrators that to fulfill there public trust requires that they refrain from active public partisan participation in contest that they in their official capacity will conduct.

The adoption of better e-voting security and standards must begin with transparency and accountability. Transparency is needed in a process that uses propriety products to conduct public elections. Transparency is needed at this time because of the questions raised by voting rights activist regarding the security and reliability of voting technology.

Recommendations

- Open the election system process to public view from testing to tabulation of results
- Public access to operations manuals and pre-testing and certification of voting equipment
- Open observation of testing, preparation and tabulation to directly viewing screens and processes
- Access to all log files and internal operations of e-voting technology
- National Statistical Election Day Reporting System to record problems and statistical data on election participation rates and results from the polling location to county and state

Develop Tough National E-Voting Standards and Security Protocols

The need to greatly improve the standards for voting technology and a reliable certification process to assure voters, policymakers, and the media that the standards are being enforced is imperative. The certification process for approving voting technology for use in public elections should not exclude non-profits, government laboratories, or those run by academic institutions.

Recommendations

- Universal Voter-Verifiable Audit Capacity
- Registration of all voting software, and firmware in NIST's reference library
- Establishment of a national system for reporting voting technology problems
- Require Background Checks of key voting technology vendor staff
- Security Clearance for development and technical staff
- Certification and training of support and technical staff

Simplify Ballots and Support Professionalism Election Administration

Unlike other democracies, the citizens of this country select a wide array of public offices through direct popular election. For this reason, the challenge of fitting multiple races onto the ballot format provided has lead to complications and confusion for voters. Many items are added to the ballot during presidential election years, which will only affect the state or a locality within the state.

Recommendation

- Federal election only ballots

Safeguard Voter Privacy

The idea of secret ballot assured by the rules that conduct the process of counting all ballots, whether they are cast as absentee, early voting or on Election Day. Further, the idea of secrecy must extend to voter registration records as well. Too often this election year, public access to voter registration information has led to challenges to the right of voters to cast an absentee ballot or a ballot on Election Day.

Recommendations

- Remove the responsibility for conducting uniform voting for military and civilians living abroad from the
- Create a process that is streamline and efficient for equal access to voting that is on a par with domestic voters.
- Reform absentee ballot rules to create greater secrecy of ballots cast.

Conclusion

The goals of organizations like the Electronic Privacy Information Center will be to work toward the resolution of ongoing concerns about voter privacy, voting technology, and to promote the right of universal voter participation. It is important that groups, organizations, policy makers, and activist continue to collaborate with traditional voting rights leaders in the civil rights community and the technical experts familiar with the specific problems with electronic voting systems, database management security challenges, and privacy to achieve success in the effort to reform our nation's election system.