

ANALYSIS OF HR672 BY ELECTIONS LEGISLATIVE COMMITTEE

**GEORGE GILBERT (GUILFORD COUNTY, NC) AND
SUSAN GILL (CITRUS COUNTY, FL) CO-CHAIRS**

The essential elements:

1. Termination of the Election Assistance Commission (EAC)
2. Transfer of the EAC's function to the Federal Election Commission (FEC), including the functions of the "Office of Voting Systems Testing and Certification"
3. Authorizes the FEC to contract with "private entities" to carry out any of these functions
4. Replacement of the "Standards Board" and "Board of Advisors" of a newly constituted "Guidelines Review Board" (82 members)
5. Preservation of the makeup and role of the "Technical Guidelines Development Committee" (TGDC) and the National Institute of Standards and Technology (NIST)

Analysis:

[This is an amalgamation of the viewpoints expressed by members of the Legislative Committee and other members over a period of months. The viewpoints expressed here are those of the Committee and its members and are not intended as policy views of the Election Center. Election Center policy has always been to have its members express their own viewpoints directly to policy makers.]

1. The EAC provides a conduit for oversight of the administration of federal elections. It also represents federal support for the ongoing improvement of the administration of elections in the United States.

The Election Assistance Commission was created by the Help America Vote Act (HAVA) of 2002. It was, in large measure, a response to the conviction, following the 2000 presidential election, that there was a compelling need for systematically upgrading the voting systems being used by the nation's election administration jurisdictions.

There was also a widely perceived need to improve the collection, coordination, analysis and dissemination of election related data. State and local jurisdictions were, in large measure, islands of inbred information. Assessments of what was working or not working were largely focused on the local context. In effect, there was nowhere to go to answer the questions of "what are we doing" and "what are the effects of what we are doing" in a comparative sense or in an historical context.

The very small Office of Election Administration, housed in the FEC at that time, was the only federal office whose mission included the study, analysis and improvement of election administration. Among other activities, its “Innovations in Election Administration” series provided local and state election officials with a wealth of knowledge that would never have been generated at the state or local level. This office was transferred to the EAC, upon its formation, since its election administration focus represented the core mission of the new agency. The concept of “voting system certification” was, in most cases, a perfunctory role of the chief election office of each state. While a few states, early on, initiated certification programs of increasing rigor, there were no standards by which such programs could be measured. This led to the initiation of a “voluntary” voting systems standards and certification program under the direction of the National Association of State Election Directors (NASED) in 1990. It was this program that was largely incorporated into the functions of the EAC as the “Voluntary Voting Systems Guidelines” (VVSG) and the testing, certification, decertification, and recertification process established by subtitle B of title II of HAVA.

Additionally, the FEC is entirely the wrong place for election administration issues. By the very nature of intense partisanship that follows the campaign finance issues, laws and regulations, we need to separate the administration of elections from that hyper partisanship. More often than not, most of the issues related to conducting elections do not and should not have a partisan approach.

These fundamental roles of the EAC represent a significant contribution to the consolidation and sharing of vital knowledge about our voting systems and processes. The election administration community strongly supports the preservation of these functions at the Election Assistance Commission.

It appears from all sessions with the professional administrators of elections that the overwhelming majority want to continue the US Election Assistance Commission.

The reasoning has been that a separate agency that has its focus solely on voter registration and election administration issues is desirable for democracy in America. The value of the programs and publications of the EAC, the development of full-time staff to understand the issues related to elections, the ability to serve as a bi-partisan commission to advise Congress, the Federal administration, the courts, the media and the public is a worthwhile expenditure of the Federal government.

2. Transfer of the EAC’s function to the Federal Election Commission (FEC), including the functions of the “Office of Voting Systems Testing and Certification”

The Congress created the Federal Election Commission (FEC) in 1975, to administer and enforce the Federal Election Campaign Act (FECA) – the statute that governs the financing of federal elections. The duties of the FEC, which is an independent regulatory agency, are to disclose campaign finance information,

to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee public funding of Presidential elections.

Additionally, the Act transferred from the GAO to the FEC, the function of serving as a national clearing house for information on the administration of elections. Given the clear mission, of campaign finance oversight and regulation, of the FEC, the apparent reason for the inclusion of the Office of Election Administration is that it also had “Election” in its name.

“Election administration” and “campaign finance regulation” are very different functions. In fact, many states substantially separate local election administration from campaign finance regulation in an effort to insulate the local administrative unit from the partisan pressures that inevitably arise in campaign finance regulation

We believe the separation of the functions of campaign regulation and election administration is critical to preserving the bipartisan objective of fair and open administration of elections. In addition, the “stepchild” role to which election administration was relegated under the FEC prior to the formation of the EAC was inadequate then and would inevitably recur.

Historically, when the election administration functions were handled by other federal agencies, first at GAO and then at the FEC, election administration issues always were of minor importance and with almost no support. This is the reason that the EAC’s functions are better off in a separate agency than in any other agency that has something else as its primary mission.

3. Authorizes the FEC to contract with “private entities” to carry out any of these functions

The breadth and ambiguity of this provision is a cause for concern. Clearly “private entities,” such as universities and other research oriented institutions, have made and, hopefully, will continue to make substantial contributions to our knowledge of the problems and possibilities associated with both tried and untried technologies and processes in election’s administration. To authorize private entities to “carry out” the statutory functions directed by the Act, however, creates the specter of such functions being “captured” by private interests to the detriment of the public interest.

Of particular concern is the prospect of “private entities” being delegated substantial authority over the development of the voting system guidelines and the certification process. Limitations on such contracts should be clarified explicitly in the bill.

4. Replacement of the “Standards Board” and “Board of Advisors” of a newly constituted “Guidelines Review Board” (GRB)

We have two recommendations for this area: In general Election Center members feel there is merit in consolidating and reducing the size of the advisory boards to this process. The “Standards Board” is made up of 110 members, one-half state election officials and on-half local election officials. The “Board of Advisors” is comprised of 37 members covering a broad range of public officials and private interest groups.

- a. Either keep the same boards with the same makeup, e.g., Standards Board at 110 members and Advisory Board at 37 members OR
- b. Create a new board no larger than 40 to 45 members that has better balance between state and local government input.

The proposed “Guidelines Review Board” as proposed in HR672 would be comprised of 82 members. Its makeup is similar to that of the “Board of Advisors” with increased representation subject to appointment by election associations largely representing state and local election officials.

The chief concern expressed by members of the Election Center is that there is no requirement that any of the members of the “Guidelines Review Board” actually be local election officials. The bill heavily weights the GRB with state appointees, not local election officials. While nothing prevents states from appointing local election officials to the GRB, it is unlikely that a balanced representation would result from the design of the GRB rather than preserving the balance between state and local officials that existed on the “Standards Board.”

Strong participation by local election officials is crucial to preserving the relevance of the actions of the EAC to the reality of election administration. Any restructuring of the advisory boards should assure this participation by local election officials. The proposed makeup of the “Guidelines Review Board” does not appear to insure this.

5. Preservation of the makeup and role of the “Technical Guidelines Development Committee” (TGDC)

Preserving the role of the TGDC is greatly preferred to the earlier proposal to terminate it and transfer the voting systems guidelines development task to NIST. While the participation of NIST and other technical experts is crucial in this process, equally important is the role of practitioners and consumers.

The voting system guidelines certainly must be technically sound, however, they must also be affordable and user friendly. Furthermore, the guidelines must be developed and applied in an historical context. Wholesale redesign of systems is not a practical approach without the input of substantial federal resources to assist local governments in paying for the new systems they demand. Even with such resources, radically new systems introduce new risks into the voting process.

Preserving election officials' input into the Voluntary Voting Systems Guidelines (VVSG) and certification processes is critical to the success of the "guidelines." Such input will help stimulate an incremental and flexible approach that will enable the implementation of minor improvements to base systems over time. Such an approach is both more cost effective and more user friendly for administrators and voters. It must always be kept in mind that the successful use of any voting system is ultimately dependent on the cadre of volunteer precinct officials whose training on and use these systems is episodic and infrequent.