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Senators:

Thank you for the opportunity to talk about continuing election reform in general and the Bi-Partisan Electronic Voting Reform Act of 2008 specifically.

First let me commend Senator Feinstein as chair for reaching out to Senator Bennett to fashion bi-partisan legislation. If election legislation is to be truly effective, it must be legislation that is supported by both parties. America is better served when both the Democrats and the Republicans agree on a direction for election practices and policies. All too often, the term election reform has come to mean that one party wants to assure that only its constituencies and its supporters prevail – and whenever that happens, democracy loses.

I commend both Senator Feinstein and Senator Bennett for working in America's interest rather that simply responding to the partisan proposals offered by many groups looking for advantages for their own party.

If I have learned anything about Congress over the last 40 years of public policy work, it is that governing is far more difficult than campaigning. Governing is hard. Governing requires responsibility. Governing requires, more often that not, standing up to supporters rather than the easier choice of standing with supporters – especially when those supporters are wrong about what should be done. Governing well takes both wisdom and courage to do what is best. What we should know by now is that election administration is a very complex process in the United States. It does not lend itself well to a "one size fits all" concept that so many "would be" election experts try to get Congress to foist on the process.

What I like about the approaches in S.3212 is that there is thought and consideration for what might work best, for what is implementable, for what is accomplishable, and what is balanced in favor of the process itself rather than what may favor one party's voters. Senators Feinstein and Bennett, you should have pride that each of you has staff that has been willing to learn over a period of years how this process works. Because your staff is more experienced at working with elections issues, they have been able to sift through the ideas and proposals that have come from every quarter about how elections should operate. You, and they, have been called upon by many who would dramatically alter the process, often with partisan proposals of folly and foolishness. And yet, you and your staff have responded with astuteness and advisability by looking for a bi-partisan pathway to continuing election improvements.

The passage of the Help America Vote Act was a truly bi-partisan effort that is still having a major impact on American elections. HAVA was the most far reaching legislation affecting American democracy since the Civil Rights Act and the Voting Rights acts of the 1960's. Like those acts, which were truly important to the growth and health of our democracy, HAVA's impact will be felt for 50 years or more.

HAVA was also important in that it is a unique law in American election history. It is the first Federal election law that actually took the states and local governments as partners in achieving objectives. Rather than attempting to dictate from the Federal level each and every phase of implementation, HAVA established Federal objectives to be met and then turned to the states and local governments to figure out how best to achieve those objectives within each state.

The sum of my introductory remarks is to offer dual praise for intentions and appreciation for the hard work of governing responsibly. In an era of intense partisanship, in an era when fact is all too often overwhelmed by fiction, it is encouraging to see that rational, intelligent approaches to legislation are still possible.

As I address the specifics of the legislation, keep in mind that the elections community is always willing to look at and seek ways to improve the voting experience for voters. This is significantly different from saying that we agree with proposals that purport to serve voters but truly are designed to have partisan impact. As managers of voter registration or election administration our election professionals in America continuously look at practices, procedures and policies to see how they are affecting voters. We have to be the "referees" of the system to assure that it is fair to all, that voters have a positive experience, that the process remains neutral as to outcome, that each and every election is an accurate reflection of the public's will through the votes cast and counted.

In many elections we see misunderstanding and conflicts arise from the partisans and the special interests. Whenever we interpret or enforce state or Federal laws with respect to voting, we inevitably encounter those who disagree and who want an interpretation of rules, regulations and laws that suit their own interests. As election professionals, our duty and our responsibility is to assure voters of a fair election under the laws, to count votes that have been correctly cast and to report those votes accurately. Our oath is to the citizens and the Constitution and the state laws to assure an equitable process – and it is not to appease partisans nor special interests who think <u>their</u> interpretations are the correct ones.

The final foundation that I want to establish before commenting on the specifics of BEVRA, is that our comments and thoughts and practices and approaches to ALL legislation that comes before Congress is this: We approach all bills with the basic guiding principle that elections in America are best handled, best managed, and best serve voters when they are left in the hands of state and local governments. The continuing push to have Federal election laws or Federal administration overtake much of the process is, in our view, the wrong approach. There are indeed times when the Congress needs to act to right egregious wrongs as it has done historically. But the siren

song of "needed" Federal legislation only serves to fuel the flames of political partisanship and the attempts to manipulate the process for partisan gain.

The elections community will always welcome real bi-partisan efforts to improve democracy. When we know that both Democrats and Republicans are working with us to fashion programs and practices that benefit all voters, then we know that the effort is sincere. So when bi-partisan legislation like BEVRA is offered, we will do what we can to help achieve legitimate goals.

It is in this spirit that we offer our commitment to you to share our experience with you as how best to accomplish your goals. When we believe that another approach will better serve the voters and democracy, we will indicate that to you. When we recommend changes in parts of legislation it is with the knowledge of what is likely to work best.

Working our way through the bill as proposed is perhaps the best way to focus our comments on the legislation.

The method of independent verification as developed in pages 2 and 3 of the legislation is commendable. You have found a way to focus on what is important without restricting the solution to one method.

One of the unintended consequences, however, may be that no additional electronic voting equipment (other than paper based systems) may truly comply for a period of years. Since the bill establishes January 1, 2009 as that demarcation date, must we be prepared to do without any new electronic devices until 2012 or 2014?

And, does that demarcation date also preclude buying spare machines, replacing defective machines, or additional devices needed for increased numbers of voters if they are electronic machines? My guess is that you had not intended such a consequence and we will be glad to advise on language that allows flexibility.

Page 5. Sec. 3 Audits.

If at all possible, I will try to do my best to talk you out of the additional audits of elections. I hope to be able to show you that even as this concept is well intended, its impact affects government and stakeholders less effectively than doing a recount process.

The concept of an "audit" is a difficult one to oppose if you don't think through what it truly to means to governments and the public. The concept took off early among some groups who simply have not understood the election process and offered something that sounds good. Who can be opposed to an audit? We audit our financial records, we audit our programs, the GAO does regular performance audits, so who can be against it? But a detailed review of what audits do to the electoral process reveals that they become a long term, expensive burden for local governments -- with little results.

First, elections are already audited through the canvassing process that occurs after an election. Because many did not know that we already do a canvass of the votes to assure that winners are winners and losers are losers, the concept of "audits" was floated and then pursued as a well intentioned concept.

No election official in America will tell you that they oppose spot audits or occasional samples of their efforts or methodologies. But that is not what is being proposed. What is proposed is an audit of every Federal election for perpetuity. And it will be an on-going cost for local governments that ill-serves public policy.

If an election is not close, then you can be assured that voters and taxpayers won't want us spending their money and their local resources on an audit of the election. Senator Feinstein you were a local mayor; you know firsthand the limitations of local government budgets. You know that local governments rarely have all the personnel they need to appropriately serve the public. Audits will be a huge on-going process with an expense that will ultimately be borne by the local jurisdictions in both actual expense and in personnel commitment, which may delay the certification of an election – and to accomplish what?

If we were talking about a periodic audit every so many years then we might learn something useful – or we may not. If we were talking about an occasional random audit of elections, we would not have objection to those but a mandated election audit for every Federal election does little for the public and costs in both money and personnel escalate.

What we seek are real live examples of where the audits actually do something other than just create work. What is done with them after they are completed? Is anyone reviewing them to determine what they actually say? Given the experience with audits, what has been found? Are there any serious accuracy problems?

We know that the calls for election audits are offered with the best intentions but election audits appear to be a solution in search of problem.

I personally am on record as saying that we can do it if that is the price of believability – but the voters have repeatedly and clearly told us they have confidence in the way their votes are counted. Since I had publicly endorsed the concept of audits – before I thought through all of its implications and costs -- I had to go back and examine my own position in this regard and that is when it became apparent that recounts are a far better solution to confidence in vote counting.

If an election is close, then recounts are a far superior way to assure the public, the media, the candidates (winning and losing), the parties and the Congress that the vote totals were accurately counted. In the minds of many, a recount is the most effective audit of all. It is done only when there is a sufficient reason to do so. Therefore it is not an ongoing cost of conducting elections for the jurisdictions when there is no close election. Likewise, a contested election might also be required in a judicial process to recount ballots.

For the sake of clarity about the value of recounts over audits, I have inserted my testimony to you last year:

> Recounts Rather than Audits. However, I would suggest that you go to a Federally triggered recount as a better solution. Establish a percentage of difference between the candidates whereby a recount becomes automatic. Whether that is 1%, or ½ of a percent or ¼ of a percent is a matter than can be chosen. But certainly it should not be higher than a 1 percent difference for a federal race.
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> By providing an automatic recount, candidates do not have to allege fraud or mismanagement (which is always damaging to the process in the mind of the public and rarely gets proven). State and local jurisdictions then serve the public and the candidates and the parties and the partisans (and the lawyers) by re-examining the election in detail. My suggestion to you is that the recount be ordered to be done first with voting equipment and recount the ballots by equipment first. Any ballots unable to be read by the machines would then be counted by hand.
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> If, in the opinion of the losing candidate, that is not sufficient evidence, then hand recounts of randomly selected precincts, could be done where every ballot is counted by hand. If that is still not convincing evidence, then the losing candidate could request a full blown hand recount of all ballots. The federal government then picks up the full costs of each level of recounts since this is for federal elections only. [Many states require candidates who want a recount to pay for them or justify them in order to have a recount. If Congress orders automatic recounts in certain situations, then having it federally funded makes sense and serves a useful purpose to the federal government.] Such a provision then serves everyone's interests including the candidates, the parties, the public, the media, the election officials, and especially the Congress, while costing far less than federally mandated audits that have little meaning except in the case of close elections. A provision has to be made in such a process that the losing candidate has a right to terminate the recount process at any stage where the candidate is willing to concede the results.
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> This still leaves the ability of candidates to pursue a contested election if they so desire without having had to expend vast resources first on obtaining and funding a recount.

Good governance is deciding when something sounds good but does not hold up under examination. There are far better public policy choices here. The stakeholders at every level are far better served by administrative recounts automatically triggered by a close election. Whether that is a 1% difference or a ½ of 1 percent, or 1/4th of 1 percent difference is for you folks to decide. The key here is to make it happen automatically as an administrative recount so the contestants don't have to go to court to first allege or

attempt to prove fraud. You also want to eliminate the need to have the candidates pay for automatically triggered recounts so that lack of funds does not enter into the picture. Obviously, if a candidate loses by a percentage larger than 1% and still wants to engage a recount then states and local jurisdictions should be able to recover their costs.

I strongly encourage you to re-examine the concept of post election audits and to resist the temptation to sign on for post election audits. Despite the well intentioned motives for post election audits, this is not the best use of public funds and public employees.

If my message fails in this regard, then I encourage you to eliminate the "Task Force" (beginning on Page 7) section of the bill working on audits. Do this the way HAVA did it. Tell the states what your objectives are and then let them decide and derive the best way to do this for the voters in their state. They won't need the EAC to guide them on how best to do this. Those that believe the EAC has ideas that contribute to their ability to do better audits can then voluntarily utilize the clearing house materials from the EAC for this purpose without having had a national body decide how it would best be done in all the states.

Rather than the EAC working with the Technical Guidelines Development Committee or some Task Force, wouldn't it be better to work through the two bodies established in HAVA? Why not utilize the expertise of the Standards Board which represents all the states with both state and local officials. And then utilize the Advisory Board as representative of the diversity of stakeholders and allow them to help the EAC devise voluntary guidelines for the states to consider.

What is important here is to remember that an election has to come to an end at some point. The public needs to know that we have finally declared certified winners and losers. Long delays in reaching those conclusions and publishing those results leads to the opposite of what many have proposed as the objectives of post election audits. Rather than leading to greater public credibility, long delays begin to make the public believe that something or someone is manipulating the process. That surely cannot be desirable for Congress to support.

You have done a nice job with the Chain of Custody protocols and disclosure of software. As election officials we have always supported disclosure to official government bodies of the software used for elections including source code and additional software needed to make a voting system function. That is why the states created testing laboratories and testing methodologies when the Federal government had no interest in doing so. Now that such testing is done at the Federal level is it appropriate that official government units review and escrow voting software. You have done the right thing in assuring that software is revealed to official bodies without forcing it to be opened to everyone. But one of the things that probably needs to be added is criminal penalties and substantial fines for violating the non-disclosure provisions of the bill. While we can visit with staff about some concerns for individual items or phrases in the proposed legislation, the key here is that you have handled this responsibly and in the interests of the public. Adding substantial criminal and financial penalties to the provisions will assure that the bill

doesn't leave a significant loophole open to those who would reveal proprietary information as long as it suited their purposes.

While many of us are intrigued by the bill's focus on creating grants for innovation and development of new voting systems (beginning on Page 26), we are wondering why those grants are limited to academic or research institutions? Why not also to qualified private industry organizations and businesses? If the objective is to assure innovation and the development of safe and secure voting systems, shouldn't that process be open to all qualified entities?

And one of the unintended consequences of this section, it seems to us, is that the way it is worded seems to indicate that academic and research institutions are also to be involved in testing of voting equipment? Is this intended for all voting equipment or only new items developed under the grants? Why wouldn't testing be limited to the process Congress has already developed through EAC, NIST and the other official governmental entities? This provision as written is likely to assure greater confusion in the public's confidence in the voting process.

As relates to the grants, we are somewhat confused. What is the objective here? Is it to create voting systems in the public domain? Is it to create competition for the private enterprises who are the voting systems manufacturers? I don't mean to question motives but rather to demonstrate far reaching consequences that I doubt Congress has intended. As written, it is likely to lead to a consequence of giving academic institutions an unfair competitive advantage – which may ultimately result in the death of the private companies engaged in manufacturing election equipment.

Are those academic institutions also then going to provide all the technical support needed by election officials during election cycles? Are they going to be become the support services for maintenance, for upgrades, for training and for assisting our jurisdictions on election night and after election night through the processing of complete official returns? What many people have yet to realize is that the overwhelming number of the more than 7,000 election jurisdictions are staffed with one, two or three employees. They don't have significant staff and funds to perform all these function themselves. [I saw a statement the other day that says more than 50% of the election jurisdictions in America have fewer than 50,000 voters; I haven't yet verified that data but it points to the extent of the problem.]

Despite the continuous denigration of the voting equipment manufacturers by some activists, the voting systems companies have been and are now an integral part of a successful election process in America. Do not underestimate the vital role these companies and their employees play in American democracy. It would be tragic for America if our intentions were to spur technology but then kill off the industry with the use of government funds intended to spur innovation.

On Page 34 on the prohibition of refusal to accept absentee ballot applications and Federal write-in ballots, we applaud the intent to assure that segments of our voters have

the utmost capability to cast their votes. Having said that, what essentially this clause does is a) establish Federal voter registration – which has been historically and most say Constitutionally – the purview of the states; and, b) it establishes the Department of Defense as the rule maker for this process. Election officials too want voters to have the ability to have the best opportunity to cast their votes. If this is truly a national problem that needs to be considered, then we recommend that Congress direct the states to remove the barriers for these voters. If a Federal agency needs to be involved in developing the guidelines for states then shouldn't that agency be the United States Election Assistance Commission? [The way this is worded they are not guidelines but rules with the force of law as determined by the Department of Defense.]

As always the Devil is in the details and while it seems that we have picked at specifics in the legislation, it bears repeating that the tone and tenor of this bi-partisan legislation is responsible in its approach. Again, we sincerely want to recognize the rational and conscientious efforts of Senator Feinstein and Senator Bennett in S.3212, the Bi-partisan Electronic Voting Reform Act. America is in good hands if capable leaders like these two Senators choose balanced and reasoned solutions for our democracy.