

# ESSAY

## Carrot & Stick: Reorganizing and Empowering the Election Assistance Commission

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### ABSTRACT

*The U.S. Election Assistance Commission (“EAC” or “Commission”) is failing in its duties to shepherd and assist in the betterment of our federal elections. In the wake of the highly controversial 2016 and 2020 presidential elections and related claims of election interference, the EAC has received increased public scrutiny and demands for action. Prior and ongoing attempts to reform the EAC have gone nowhere, leaving the Commission mired in partisan gridlock at a time when its leadership is perhaps more needed than ever.*

*Originally formed in 2002 as a result of the 2000 presidential election scandals, the EAC was tasked with serving as a national clearinghouse and resource for federal election administration improvements. Since then, however, the EAC has consistently been underfunded, suffered from political gridlock, and lacked authority to enforce or make any substantive rules or policies. These problems are largely the result of a flawed administrative structure and restrictive statutory language, which have prevented the Commission from being able to effectuate necessary change.*

*This Essay proposes several revisions to the EAC’s administrative and regulatory structure that could finally empower the EAC to act with necessary*

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*authority. Part I proposes three fundamental alterations to the EAC’s enabling statute: (1) restructuring the EAC as modeled after the Consumer Product Safety Commission to add a Chair, amongst other administrative revisions, (2) providing for permanent authorizations for the EAC, and (3) endowing the EAC with enforcement and rulemaking authority, largely modeled on the Federal Election Commission. Part II then details a brief overview of critical areas of election and voting reform that could be addressed by a newly empowered EAC, including automatic voter registration, absentee and vote by mail ballots, early voting, and poll worker training and recruitment. Ultimately, it is the purpose of this Essay to envision a new framework for the EAC that would balance the often-conflicting goals of ballot access and election integrity while ensuring the Commission has the necessary power to overcome partisan gridlock and serve its intended purpose.*

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INTRODUCTION

American faith in the election process is in crisis. Less than sixty percent of Americans polled in the immediate wake of the controversial 2020 presidential election said they trusted their election system.<sup>1</sup> This statistic becomes even more problematic when broken down along partisan lines. When polled in January 2021, less than a third of

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<sup>1</sup> Nick Laughlin & Peyton Shelburne, *How Voters’ Trust in Elections Shifted in Response to Biden’s Victory*, MORNING CONSULT (Jan. 27, 2021), <https://morningconsult.com/form/tracking-voter-trust-in-elections/> [<https://perma.cc/A3ZX-ZWLW>] (summarizing results of a poll conducted between January 22–25, 2021).

Republicans expressed trust in the system as opposed to eighty percent of Democrats.<sup>2</sup>

This is not the first time that Americans have experienced a crisis of faith in their elections—one could argue that it has even become a semi-regular occurrence.<sup>3</sup> Despite this, the federal government is often slow to act on election reform, with many viewing the issue as one better subject to state regulation.<sup>4</sup> One notable exception to this usual intransigence ensued from the controversial 2000 presidential election. Then candidates George W. Bush and Al Gore became embroiled in one of the closest election races in U.S. history, with the result ultimately coming down to a few hundred votes in Florida.<sup>5</sup> Issues with Florida's recount procedures led to the infamous case of *Bush v. Gore*,<sup>6</sup> which decided the election in Bush's favor.<sup>7</sup> The public outrage that followed was severe enough to warrant bipartisan Congressional action on election administration reform.<sup>8</sup> The result was the Help America Vote Act (“HAVA”).<sup>9</sup>

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2 *Id.* (Forty-four percent of Independent voters indicated trust in the system).

3 See RJ Reinhart, *Faith in Elections in Relatively Short Supply in U.S.*, GALLUP (Feb. 13, 2020), <https://news.gallup.com/poll/285608/faith-elections-relatively-short-supply.aspx> [<https://perma.cc/K7AF-NQWG>]; see also *Public Trust in Government: 1958–2022*, PEW RSCH. CTR. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/> [<https://perma.cc/X2M4-UF48>].

4 Although the Constitution grants the states the power to determine the “Times, Places, and Manner” of elections, it importantly still reserves to Congress to “make or alter such Regulations.” U.S. CONST. art. I, § 4. Although Congress has rarely invoked this power, it has done so in the National Voter Registration Act of 1993 and the Help America Vote Act of 2002. See Campbell Streater & Harold Ekeh, *As Federal Pro-Voter Reform Stalls, Advocates Should Prepare for State-Level Action*, ROLL CALL (June 18, 2021, 10:00 AM), <https://www.rollcall.com/2021/06/18/as-federal-pro-voter-reform-stalls-advocates-should-prepare-for-state-level-action/> [<https://perma.cc/GPK7-AAF4>]; see also Suman Malempati, *The Elections Clause Obligates Congress to Enact a Federal Plan to Secure U.S. Elections Against Foreign Cyberattacks*, 70 EMORY L. J. 417 (2020) (challenging notion that Congress must defer to states to regulate federal elections and instead suggesting that Congress has a responsibility to exercise its power under the Elections Clause to take stronger federal action when it comes to ensuring election security).

5 See *On This Day, Bush v. Gore Settles 2000 Presidential Race*, NAT'L CONST. CTR. (Dec. 12, 2019), <https://constitutioncenter.org/blog/on-this-day-bush-v-gore-anniversary> [<https://perma.cc/MJR4-R9WU>].

6 531 U.S. 98 (2000).

7 See *On This Day, Bush v. Gore Settles 2000 Presidential Race*, *supra* note 5.

8 See Robert Pear, *The 2002 Campaign: Ballot Overhaul; Congress Passes Bill to Clean Up Election System*, N.Y. TIMES (Oct. 17, 2002), <https://www.nytimes.com/2002/10/17/us/2002-campaign-ballot-overhaul-congress-passes-bill-clean-up-election-system.html?searchResultPosition=7> [<https://perma.cc/PN82-C6ST>].

9 Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified in scattered sections of 52 U.S.C.).

HAVA's purpose was to address problems in voting systems and technologies identified following the 2000 election and to establish minimum election administration standards for states and localities.<sup>10</sup> Election administration can be difficult to precisely define, but for purposes of this Essay, the Oxford Handbook definition is informative in explaining both the technical meaning and deeper significance of election administration:

“[Election administration] is a complex, multistage process involving registration, structuring the voting process (which may include both in-person and remote voting), and then tabulating and auditing the results. Failures during this process can result in maladministration or claims of electoral mismanagement and fraud. Although such problems are typically associated with authoritarian states, experiences in established democracies illustrate that election administration failures can result in claims of voting fraud. Understanding the failure points in election administration is critical, given the role that elections play in the democratic process and the loss of public confidence in elections that can occur when elections are not implemented successfully. . . . Through effective election management, administrators can maintain public confidence in democracy.”<sup>11</sup>

To carry out this task of election administration reform, HAVA established the Election Assistance Commission (“EAC” or “Commission”), an independent, bipartisan federal agency to serve as a national clearing house and funding source for state reforms and technology updates.<sup>12</sup> Specific duties of the EAC included creating voluntary voting system guidelines, operating a voting system certification program, and distributing federal grants for technology updates.<sup>13</sup>

Per HAVA, the EAC is meant to have four commissioners, subject to a political parity requirement, who are nominated by the President and confirmed by the Senate.<sup>14</sup> This has almost never been the case, though. A 2018 analysis by the Bipartisan Policy Center found

<sup>10</sup> *Id.*

<sup>11</sup> Thad E. Hall, *Election Administration*, OXFORD HANDBOOKS ONLINE (Aug. 2017), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190258658.001.0001/oxfordhb-9780190258658-e-9> [<https://perma.cc/XJ8Y-9VEP>].

<sup>12</sup> See *Help America Vote Act*, U.S. ELECTION ASSISTANCE COMM'N, [https://www.eac.gov/about\\_the\\_eac/help\\_america\\_vote\\_act.aspx](https://www.eac.gov/about_the_eac/help_america_vote_act.aspx) [<https://perma.cc/PE69-R638>].

<sup>13</sup> See *id.*

<sup>14</sup> Political parity refers to the requirement that no more than two members of the Commission may be affiliated with the same political party. See 52 U.S.C. § 20923(2).

that since the first four commissioners were confirmed on December 9, 2003, the EAC had enough commissioners for quorum (three) only sixty-eight percent of the time.<sup>15</sup> The EAC was fully staffed with four commissioners for just twenty-eight percent of the Commission's existence.<sup>16</sup>

Despite these staffing issues, in its early days the EAC was widely considered a successful enterprise, distributing billions of dollars to the states and publishing its first Voluntary Voting System Guideline by 2005.<sup>17</sup> However, by 2006 the EAC had distributed almost all of its original HAVA funds and its appropriations authorization was set to expire. This left it subject to Congressional whim and goodwill, the latter of which was in increasingly short supply.<sup>18</sup> It was at this point that the EAC appears to have lost traction and its sense of purpose.

Today, EAC efficacy is hamstrung by political gridlock, underfunding, understaffing, and a lack of any true enforcement or rulemaking authority.<sup>19</sup> Those who oppose the EAC have presented a variety of arguments, ranging from accusations of poor financial and managerial decision-making to cost-cutting purposes.<sup>20</sup> The predominant argument in recent years, however, has been that the EAC is ineffective and unnecessary, whether because of political gridlock or simply because EAC has run its course.<sup>21</sup>

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15 Matthew Weil, *Improve Elections, Fully Confirm Election Assistance Commission Before 2020*, BIPARTISAN POL'Y CTR. (Dec. 4, 2018), <https://bipartisanpolicy.org/blog/improve-elections-fully-confirm-election-assistance-commission-before-2020/> [<https://perma.cc/M2KL-GGFC>].

16 *Id.*

17 See U.S. ELECTION ASSISTANCE COMM'N, FISCAL YEAR 2005 ANNUAL REPORT 1–2 (2006), [https://www.eac.gov/sites/default/files/document\\_library/files/FY\\_2005\\_Annual\\_Report.pdf](https://www.eac.gov/sites/default/files/document_library/files/FY_2005_Annual_Report.pdf) [<https://perma.cc/3TB2-26RR>].

18 See U.S. ELECTION ASSISTANCE COMM'N, ANNUAL REPORT FISCAL YEAR 2003, at 1–2 (2004), [https://www.eac.gov/sites/default/files/document\\_library/files/FY\\_2003\\_Annual\\_Report.pdf](https://www.eac.gov/sites/default/files/document_library/files/FY_2003_Annual_Report.pdf) [<https://perma.cc/H2NQ-G625>]; U.S. ELECTION ASSISTANCE COMM'N, FISCAL YEAR 2004 ANNUAL REPORT 3–5 (2005), [https://www.eac.gov/sites/default/files/document\\_library/files/FY\\_2004\\_Annual\\_Report.pdf](https://www.eac.gov/sites/default/files/document_library/files/FY_2004_Annual_Report.pdf) [<https://perma.cc/82B5-3P2D>]; U.S. ELECTION ASSISTANCE COMM'N, *supra* note 17 at 1, 15–18 [https://www.eac.gov/sites/default/files/document\\_library/files/FY\\_2005\\_Annual\\_Report.pdf](https://www.eac.gov/sites/default/files/document_library/files/FY_2005_Annual_Report.pdf) [<https://perma.cc/R7NJ-MHND>].

19 Bill Theobald, *Gutted Federal Election Watchdog Struggles to Recover*, FULCRUM (Feb. 3, 2020), <https://thefulcrum.us/voting/eac-gutted-over-decade> [<https://perma.cc/8SQL-TBTU>].

20 See Pete Kasperowicz, *House Votes to End Election Assistance Commission*, HILL (Dec. 20, 2011, 2:55 PM), <https://thehill.com/blogs/floor-action/house/94333-house-to-vote-on-election-commission/> [<https://perma.cc/W3S3-SB4A>]; Alex Knott, *Election Assistance Commission May Be Closing*, ROLL CALL (Apr. 13, 2011, 6:38 PM), <https://www.rollcall.com/2011/04/13/election-assistance-commission-may-be-closing/> [<https://perma.cc/C28F-DMHD>].

21 See H.R. REP. NO. 114-361, at 1–2 (2015), available at <https://www.congress.gov/114/crpt/hrpt361/CRPT-114hrpt361.pdf> [<https://perma.cc/FR6G-GTFR>].

And these critics are not entirely wrong. The political parity requirement has severely crippled the Commission's ability to take charge, particularly as political polarization on the issue of voting reform has increased.<sup>22</sup> Inconsistent funding has hindered the Commission's ability to make long-term plans or to induce states to make necessary changes.<sup>23</sup> Perhaps most damningly, though, the Commission's lack of enforcement or rulemaking power has often rendered it a straw man.<sup>24</sup> Given these realities, it is not hard to understand the argument that the EAC as currently structured is, as one Congressional report put it, little more than "a bureaucracy in search of a mission."<sup>25</sup>

Given the current political crisis surrounding voting rights, it is more critical than ever to empower a centralized authority to set and govern the nation's best practices for voting administration and reform. The EAC, though by no means a perfect solution, is better situated than individual legislators to make reasoned judgements and to carry out and refine election policy in the long term. This Essay argues that this "bureaucracy in search of a mission"<sup>26</sup> is not without hope but can be revived through statutory revisions that would reorganize and re-empower the EAC to effectuate its intended purpose.

Part I of this Essay proposes three fundamental reforms to reinvigorate the EAC and endow it with the substantive powers necessary to carry out its mission: (1) adding a fifth commissioner and Chair position to break political gridlock, (2) permanently authorizing the EAC (i.e., the "carrot"), and (3) granting the EAC enforcement and rulemaking authority (i.e., the "stick"). Part II then briefly lays out a roadmap for specific areas of reform that the newly empowered EAC could address. Suggestions include automatic voter registration, absentee ballots and vote by mail, early voting, and poll worker training and recruitment.

The current hyper-partisan political climate in the U.S. unfortunately renders many of the proposals in this Essay unlikely to happen, at least at present. Prior election reforms, such as HAVA, were possible only because of their overwhelming bipartisan support.<sup>27</sup> By com-

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<sup>22</sup> See Hannah Leibson, *A Vision for a Federal Election Agency*, REGUL. REV. (Feb. 4, 2021), <https://www.theregreview.org/2021/02/04/leibson-vision-federal-election-agency/> [<https://perma.cc/SH5L-ZP6F>].

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> H.R. REP. NO. 114-361, *supra* note 21, at 2.

<sup>26</sup> *Id.*

<sup>27</sup> The final vote in the House passed 362-63 with 196 Republicans in support and only

parison, recent congressional attempts at voting reform with the For the People Act<sup>28</sup> and the John Lewis Voting Rights Advancement Act<sup>29</sup> were highly politicized and thus failed.<sup>30</sup> Despite broad public support for these bills, President Trump and other members of the Republican Party crafted a successful party-line narrative that such reform was “unnecessary.”<sup>31</sup> Thus, while the suggestions in this Essay are unlikely to move forward under the current Congress, they do represent important solutions to an ongoing and ever worsening problem. It is the author’s hope that this Essay will serve as a blueprint for a future more cooperative Congress willing to act for the ultimate benefit of society and democracy itself.

## I. ENVISIONING A NEW EAC

This Essay envisions an effective EAC as one which has (1) a five-member Commission structure with centralized tie-breaking power vested in a single Chair, (2) predictable and steady funding in the form of permanent authorizations, and (3) enforcement and rulemaking authority. Realistically, this type of reorganization will require Congress to pass a statutory amendment to HAVA.<sup>32</sup> Although

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twenty Republicans opposed. HAVA passed unanimously in the Senate. *Final Vote Results for Roll Call 489*, HOUSE.GOV (Dec. 12, 2001, 3:39 PM), <https://clerk.house.gov/evs/2001/roll489.xml> [<https://perma.cc/X9JR-7CQK>].

<sup>28</sup> For the People Act of 2021, H.R. 1, 117th Cong. (2021).

<sup>29</sup> John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. (2020).

<sup>30</sup> See Nate Cohn, *A Bill Destined to Fail May Now Spawn More Plausible Options*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/06/23/us/politics/voting-rights-bill.html> [<https://perma.cc/7QUK-BH6N>]; Erin B. Logan, *John Lewis Voting Rights Bill Fails in U.S. Senate amid Rise of GOP-Led State Restrictions*, L.A. TIMES (Nov. 3, 2021, 3:11 PM), <https://www.latimes.com/politics/story/2021-11-03/john-lewis-voting-rights-bill-fails-in-senate-amid-cascade-of-gop-led-state-restrictions> [<https://perma.cc/6F3H-C2ZV>].

<sup>31</sup> Polling data suggested around eighty-nine percent of Democrats and fifty-six percent of Republicans supported the For the People Act. Alex Samuels, *Why Republicans Won’t Support Sweeping Voting Rights Legislation Now . . . or Anytime Soon*, FIVETHIRTYEIGHT (June 22, 2021, 4:54 PM), <https://fivethirtyeight.com/features/why-republicans-wont-support-sweeping-voting-rights-legislation-now-or-anytime-soon/> [<https://perma.cc/A6KV-DW8P>].

<sup>32</sup> The inherent implication of this Essay is that current political realities and tensions between political parties have rendered the members of the EAC and to wit the government at large, not only unable but *unwilling* to work together. Furthermore, the implication is that existing statutory structures for commissions such as the EAC are largely premised on an assumption that parties want to achieve consensus. Recent examples have proven otherwise and commissions like the EAC increasingly find themselves populated with members who hold not just different views, but often diametrically opposed ones, leaving them with no incentive to work together and every reason to obstruct and obfuscate. The goal of the reforms proposed in this Essay are to draft revised statutory language that takes into account these new realities and to hopefully create an EAC that is able to function while still remaining accountable and equitable towards differing political views.

bipartisan support for such action is presently unlikely, if framed properly these changes have the potential to invoke the same bipartisan spirit—grounded in a desire to preserve democracy itself—that helped enact HAVA.<sup>33</sup>

As a general framing tactic, the changes proposed herein should be offered as ones necessary to ensure both the accessibility *and* integrity of the ballot. Historically, Republican sentiment has supported voting changes that address integrity and security, whereas Democrat sentiment has sided with accessibility issues.<sup>34</sup> By aligning these aspects rather than treating them as mutually exclusive, there is a greater chance of bipartisan support.

### A. *Commission Structure*

The political parity requirement, although well-intentioned, has in practice rendered the EAC virtually useless.<sup>35</sup> Per HAVA, the EAC is to be headed by four commissioners.<sup>36</sup> Yet the EAC has had four commissioners in only nine years out of its nearly two decades of existence.<sup>37</sup> In fact, there was a three-year period between 2011 and 2014 during which no commissioners were appointed.<sup>38</sup> This was largely the result of purposeful congressional intransigence, with the Republican majority in both chambers refusing to hear or confirm either of Obama's nominees—both of whom were Democrats.<sup>39</sup> Moreover, even when the Commission is fully staffed, it suffers from partisan gridlock, with the two-two political parity requirement often preventing any definitive decision making.<sup>40</sup>

Debate over restructuring the EAC often comes down to a trade-off in independence versus efficiency.<sup>41</sup> For many, doing away with the

<sup>33</sup> Pear, *supra* note 8.

<sup>34</sup> See Philip Ewing, *Voting and Elections Divide Republicans and Democrats Like Little Else. Here's Why*, NPR (June 12, 2020, 5:03 AM), <https://www.npr.org/2020/06/12/873878423/voting-and-elections-divide-republicans-and-democrats-like-little-else-heres-why> [https://perma.cc/4DWV-9HTC].

<sup>35</sup> See, e.g., Jessica Huseman, *How Voter-Fraud Hysteria and Partisan Bickering Ate American Election Oversight*, PROPUBLICA (July 22, 2020, 5:00 AM), <https://www.propublica.org/article/how-voter-fraud-hysteria-and-partisan-bickering-ate-american-election-oversight> [https://perma.cc/U9WF-A5LQ].

<sup>36</sup> 52 U.S.C. § 20923(a)(1).

<sup>37</sup> See Elizabeth Hudler & Rob Richie, *Not Helping America Vote: The Plight of the Un-Filled Election Assistance Commission*, FAIRVOTE (Feb. 26, 2013), <https://archive3.fairvote.org/research-and-analysis/blog/eac/> [https://perma.cc/Y58J-Y4QV].

<sup>38</sup> See *id.*

<sup>39</sup> *Id.*

<sup>40</sup> Huseman, *supra* note 35.

<sup>41</sup> See KAREN L. SHANTON, CONG. RSCH. SERV., R45770, THE U.S. ELECTION ASSISTANCE



political parity requirement is tantamount to sacrilege as it would leave the agency more vulnerable to political machinations by the controlling party in Congress and the White House.<sup>42</sup> Agency independence is thought to help ensure stable and unbiased agency management that will remain consistent despite administrative changeover.<sup>43</sup>

However, an expectation of non-partisanship in the EAC is unrealistic. The EAC has been and likely always will be a political football given its nature and duties. Rather than ignore this reality, this Essay openly acknowledges the problem and strives to establish the ever-elusive balance between independence and functionality.

In working towards this balance, one can only hope that Congress will keep in mind the ultimate goal of the EAC: the preservation and protection of our democracy. Asking legislators to set aside partisan differences is a difficult task in any arena. But when democracy itself is at stake, it is both a necessary and vital task. Luckily, this Essay does not ask Congress to reinvent the wheel. Instead, it suggests looking toward a long-functioning, pre-existing bipartisan model that could serve as a basis for reforming the EAC: the Consumer Product Safety Commission (“CPSC”).<sup>44</sup>

Unlike the EAC, the CPSC has largely avoided political gridlock despite having a similar political parity requirement.<sup>45</sup> CPSC has done so by utilizing an all-important tiebreaker—a Chairperson.<sup>46</sup> The enabling statute for the CPSC, 15 U.S.C. § 2053, provides that the com-

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COMMISSION: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 21–25 (2019), <https://sgp.fas.org/crs/misc/R45770.pdf> [<https://perma.cc/QM8B-TSST>].

42 STAFF OF S. COMM. ON GOV'T OPERATIONS, 95TH CONG., STUDY ON FEDERAL REGULATION: THE REGULATORY APPOINTMENTS PROCESS 31 (Comm. Print 1977) (referring to the bipartisan membership requirement as “an important restraint on the President”); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103 (2000) (opining that partisan membership requirements in independent regulatory commissions may reduce an agency’s tendency toward political polarization).

43 Michael Wolfe, *The Advantages of Independent Executive Agencies*, CHRON, <https://smallbusiness.chron.com/advantages-independent-executive-agencies-22575.html> [<https://perma.cc/D2PS-G6HX>].

44 “The Consumer Product Safety Commission (CPSC) protects the public from unreasonable risks of serious injury or death from thousands of types of consumer products under its jurisdiction, including products that pose a fire, electrical, chemical, or mechanical hazard or can injure children.” *Consumer Product Safety Commission*, USA.GOV, <https://www.usa.gov/federal-agencies/consumer-product-safety-commission> [<https://perma.cc/544L-3B7W>].

45 See *infra* Table 1; 15 U.S.C. § 2053(c).

46 See 15 U.S.C. § 2053; see also Erin Bosman & Julie Park, *New Nomination Could Mean Partisan Tiebreaker for CPSC*, JDSUPRA (June 8, 2018), <https://www.jdsupra.com/legalnews/new-nomination-could-mean-partisan-91946/> [<https://perma.cc/B6LA-4FJ5>].

mission shall consist of “five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate.”<sup>47</sup> This section also provides that the President shall appoint a Chairman from among the members of the Commission, by and with the advice of the Senate.<sup>48</sup> The CPSC Chair has the power to break any potential partisan gridlock from the four other commissioners. Based on recent recorded votes by the CPSC, though, it appears the tiebreaking power is infrequently utilized, and most votes pass with unanimous or crossover support.<sup>49</sup> The CPSC model, as highlighted in further detail in Appendix Table 1, illustrates that crossover and even unanimous voting can be achieved amongst a multipartisan commission, even without a strict one-to-one political parity requirement.<sup>50</sup> It seems likely, therefore, that the CPSC model could be applied to the EAC without fundamentally compromising the Commission’s functionality or integrity while simultaneously preserving a necessary degree of partisan balance.

The CPSC structure also importantly avoids the *Seila Law* problem. In 2020 the Supreme Court held in *Seila Law LLC v. Consumer Financial Protection Bureau*<sup>51</sup> that the Consumer Financial Protection Bureau’s (“CFPB”) removal provision providing that the CFPB Director could only be removed for inefficiency, neglect, or malfeasance violated the separation of powers principle.<sup>52</sup> Importantly, *Seila Law* was not broadly applicable to all agency structures, but rather was limited to independent agencies headed by a single director who exercises substantial executive power.<sup>53</sup> Thus, *Seila Law*’s invalidation of the CFPB’s removal provision did not extend to the CPSC or other similarly situated multi-member commissions. Under 15 U.S.C. § 2053, CPSC’s commissioners are removable by the President only for “neglect of duty or malfeasance in office.”<sup>54</sup> A 2001 Department of Justice (“DOJ”) memorandum—written at the request of then-President Bush—determined that the CPSC Chair, unlike the regular com-

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<sup>47</sup> 15 U.S.C. § 2053(a).

<sup>48</sup> *Id.*

<sup>49</sup> Of twenty-eight randomly selected petition, accreditation, administrative, and other various commission votes between 2018–2021, the CPSC voted unanimously on twelve votes and received crossover support on nine others. Of those twenty-eight total votes, then, only seven were voted along strict partisan lines. See *infra* Table 1 for further detail.

<sup>50</sup> See *infra* Table 1.

<sup>51</sup> 140 S. Ct. 2183 (2020).

<sup>52</sup> *Id.* at 2191–92.

<sup>53</sup> *Id.* at 2191.

<sup>54</sup> 15 U.S.C. § 2053(a).

missioners, must be removable at will using similar reasoning to that in *Seila Law*.<sup>55</sup>

In adopting the CPSC model, the EAC would retain independence via the political parity requirement while simultaneously gaining a more effective leadership structure. A substantial restructuring of this sort would require amending Sections 201 and 203 of HAVA, codified at 52 U.S.C. §§ 20921 and 20923, respectively. Because the existing statutory language for the CPSC<sup>56</sup> can serve as a model and has proven to be a workable structure, it is also less likely that Congress would find this too radical a change to enact.

In addition to adding a fifth commissioner and Chair position, other proposed changes modeled on the CPSC structure would include the following:

- (1) Requiring nominees to have at least ten years of experience working in local or state election administration.
- (2) Creating a staggered seven-year term for all commissioners. This would require current commissioners to either resign or serve out their term, with the President then assigning new commissioners to staggered terms. Upon completion of these original shortened terms, subsequent commissioners would serve staggered seven-year terms. This structure is largely based on the CPSC's structure outlined in 15 U.S.C. § 2053(b)(1).
- (3) To make up for staffing shortages, adding a section empowering the Chair to appoint specific officers with the approval of the Commission.<sup>57</sup> Based on the enforcement and rulemaking authority covered in Section I.C of this Essay, the EAC would also be well advised to create three new associate general counsel positions for: (1) enforcement, (2) litigation, and (3) policy and rulemaking.
- (4) Adding language to allow the EAC to establish regional and state offices. This would help the EAC to better understand state and local administration problems. Proposed language is largely modeled on 15 U.S.C. § 633, establishing the Small Business Administration.
- (5) Striking 52 U.S.C. § 20928, which provides that “[a]ny action which the Commission is authorized to carry out under this chapter may be carried out only with the ap-

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<sup>55</sup> Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Dep’t. of Just., to Counsel to the President (July 31, 2001), [https://www.justice.gov/sites/default/files/olc/opinions/2001/07/31/op-olc-v025-p0171\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2001/07/31/op-olc-v025-p0171_0.pdf) [<https://perma.cc/27VG-KHCZ>].

<sup>56</sup> 15 U.S.C. § 2053.

<sup>57</sup> See *infra* Image 2 for the EAC’s current organizational structure chart.

proval of at least three of its members.”<sup>58</sup> Replacement language would be added under 52 U.S.C. § 20923 providing instead for a proportional quorum, thus allowing the Commission to function even where there are appointment gaps and disincentivizing Congressional delay.

- (6) Requiring Congress to fill vacancies within 120 days, thus precluding delayed-appointment tactics.

Proposed draft language is provided below with italicized portions indicating new text.<sup>59</sup> Formal amendatory legislative language in bill form is included in the Appendix.<sup>60</sup>

### **52 U.S.C. § 20921. Establishment**

There is hereby established as an independent entity the Election Assistance Commission (hereafter in this subchapter referred to as the “Commission”), consisting of the members appointed under this subpart. Additionally, there is established the Election Assistance Commission Standards Board (including the Executive Board of such Board) and the Election Assistance Commission Board of Advisors under subpart 2 of this part (hereafter in this subpart referred to as the “Standards Board” and the “Board of Advisors”, respectively) and the Technical Guidelines Development Committee under subpart 3 of this part. *The principal office of the Commission shall be located in the District of Columbia. The Commission may establish such branch and regional offices in other places in the United States as may be determined by the Chair of the Commission. As used in this chapter, the term “United States” includes the several States, the Territories and possessions of the United States, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia.*

### **52 U.S.C. § 20923. Membership and appointment**

#### **(a) Membership**

##### **(1) In general**

The Commission shall have ~~four members appointed by the President, by and with the advice and consent of the Senate~~ consist of *five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. In*

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<sup>58</sup> 52 U.S.C. § 20928.

<sup>59</sup> Jessica Ojeda, *Proposed Bill*, GEO. WASH. L. REV., (Sept. 19, 2022, 4:37 PM) <https://www.gwlr.org/wp-content/uploads/2022/09/Jessica-Ojeda-Proposed-Bill.pdf> [<https://perma.cc/48J7-RGDM>].

<sup>60</sup> *See id.*

*making such appointments, the President shall consider individuals who, by reason of their background and expertise in areas related to state, local, and federal election law and administration, are qualified to serve as members of the Commission. The Chair shall be appointed by the President, by and with the advice and consent of the Senate, from among the members of the Commission. An individual may be appointed as a member of the Commission and as Chair at the same time. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause. The President may remove the Chair alone at will.*<sup>61</sup>

**(2) Recommendations**

[Unchanged.]

**(3) Qualifications**

Each member of the Commission shall have experience with or expertise in election administration or the study of elections *and will have worked in local or state election administration in some capacity for at least ten years.*

**(4) Date of appointment**

[unchanged]

**(b) Term of service; Vacancies**

**(1) In general**

(1) Except as provided in paragraphs (2) and (3), ~~members shall serve for a term of seven years and may be reappointed for not more than one additional term.~~ *the Commissioners first appointed under this revised section shall be appointed for terms ending three, four, five, six, and seven years, respectively, after [anticipated date of confirmations], the term of each to be designated by the President at the time of nomination; and each of their successors shall be appointed for a term of seven years from the date of the expiration of the term for which their predecessor was appointed.*

(2) *Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which their predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of this term until*

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<sup>61</sup> See Yoo, *supra* note 55 and accompanying text (concluding that the CPSC Chair must be removable at will in order to comply with the President's duties under the Take Care Clause, U.S. Const. art. II, § 3, whereas "inferior" officers such as the regular commissioners can be subject to for-cause removal provisions).

*their successor has taken office, except that they may not so continue to serve more than one year after the date on which their term would otherwise expire under this subsection.*

- (3) *A vacancy on the Commission shall not affect its powers and shall be filled in the manner in which the original appointment was made. The appointment of the replacement member shall be made not later than 120 days after the date on which the vacancy occurs.*

***Striking in their entirety paragraphs (2) Terms of Initial Appointees and (3) Vacancies. Striking subsections (c) Chair and Vice Chair and (d) Compensation, and replacing with the following:***

**(c) *Restrictions on Commissioners' outside activities***

*Not more than three of the Commissioners shall be affiliated with the same political party. No member appointed to the Commission under subsection (a) of this section may engage in any other business, vocation, or employment while serving as a member of the Commission and shall terminate or liquidate such business, vocation, or employment before sitting as a member of the Commission.*

**(d) *Quorum; seal; Vice Chair***

*No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission, but three members of the Commission shall constitute a quorum for the transaction of business, except that if there are only three members serving on the Commission because of vacancies in the Commission, two members of the Commission shall constitute a quorum for the transaction of business, and if there are only two members serving on the Commission because of vacancies in the Commission, two members shall constitute a quorum for the six month period beginning on the date of the vacancy which caused the number of Commission members to decline to two. The Commission shall have an official seal of which judicial notice shall be taken. The Commission shall annually elect a Vice Chair to act in the absence or disability of the Chair or in case of a vacancy in the office of the Chair.*

**(e) *Compensation***

- (1) ~~In general.~~ Each member of the Commission shall be compensated at the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

- (2) ~~**Other activities.** No member appointed to the Commission under subsection (a) of this section may engage in any other business, vocation, or employment while serving as a member of the Commission and shall terminate or liquidate such business, vocation, or employment before sitting as a member of the Commission.~~

**(f) Functions of Chair; request for appropriations**

- (1) *The Chair of the Commission shall be the principal executive officer of the Commission, and shall exercise all of the executive and administrative functions of the Commission, including functions of the Commission with respect to the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of commissioners other than the Chair) as outlined in subsection (g)(1); the distribution of business among personnel appointed and supervised by the Chair and among administrative units of the Commission; and the use and expenditure of funds.*
- (2) *In carrying out any of their functions under the provisions of this subsection the Chair shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.*

**(g) Executive Director; officers and employees**

(1) **Appointments.** *The Chair, subject to the approval of the Commission, shall appoint as officers of the Commission an Executive Director, a General Counsel, a Chief Operating Officer, a Chief Financial Officer, a Staff Director, a Communications and Clearinghouse Director, a Voting Systems Certifications Director, an Election Administration Research and Programs Director, and a Grants Administrator. Any other individual appointed to a position designated as an Associate Executive Director shall be appointed by the Chair, subject to the approval of the Commission.*

(2) **Term of Appointments.**

- (A) *No individual may be appointed to such a position on an acting basis for a period longer than 90 days unless such appointment is approved by the Commission.*
- (B) *The Chair, with the approval of the Commission, may remove any individual serving in a position appointed under paragraph (1).*

- (3) Paragraph (1) shall not be construed to prohibit appropriate reorganizations or changes in classification.
- (4) The Chair, subject to subsection (f)(2), may employ such other officers and employees (including attorneys) as are necessary in the execution of the Commission's functions.
- (5) The appointment of any officer (other than a Commissioner) or employee of the Commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.

**52 U.S. Code § 20928. Requiring majority approval for actions**

*Striking in its entirety and replacing with 52 U.S.C. § 20923(d) Quorum; seal; and Vice Chair.*

*B. Permanent Authorization*

HAVA only expressly authorized and appropriated funds to the EAC for a limited three-year period between fiscal year (“FY”) 2003 and FY 2005, meaning the program’s operations are currently funded on an annual basis.<sup>62</sup> The appropriation process requires the EAC to annually justify its requested budget and leaves the Commission in the tenuous position of never knowing what funding it will receive, if any.<sup>63</sup> This situation has been made even more perilous in recent years by an increasingly polarized Congress unwilling to act even on broadly popular federal election reform and a surge of state efforts aimed at curbing any federal intervention in election administration.<sup>64</sup>

Although Congress continued to appropriate perfunctory sums to the EAC after the initial express authorization lapsed in FY 2006, funding stagnated and then declined for a ten-year period between 2009 and 2019.<sup>65</sup> Within those ten years, the EAC experienced a

<sup>62</sup> 52 U.S.C. § 20930.

<sup>63</sup> See *Budget and Finance*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/about-eac/budget-and-finance> [<https://perma.cc/C58B-BBM7>] (compiling annual EAC Congressional Budget Justifications from FY 2009 through present).

<sup>64</sup> See Memorandum from States United Democracy Ctr., Protect Democracy & L. Forward to Interested Parties (June 10, 2021), [https://statesuniteddemocracy.org/wp-content/uploads/2021/06/Democracy-Crisis-Part-II\\_June-10\\_Final\\_v7.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2021/06/Democracy-Crisis-Part-II_June-10_Final_v7.pdf) [<https://perma.cc/A5HT-56EW>]; *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/YM66-V5AB>]; Richard Cowan & Moira Warburton, *U.S. Senate Democrats Fail in Bid to Pass Voting Rights Bill*, REUTERS (Jan. 20, 2022, 12:44 PM), <https://www.reuters.com/world/us/voting-rights-brawl-takes-center-stage-us-senate-2022-01-19/> [<https://perma.cc/R3W5-SRP9>].

<sup>65</sup> Matthew Weil, *Now Is the Time to Fully Fund Election Assistance Commission*, BIPARTISAN POL’Y CTR. (Oct. 21, 2019), <https://bipartisanpolicy.org/blog/now-is-the-time-to-fully-fund-election-assistance-commission/> [<https://perma.cc/SZP6-ZR89>]; U.S. ELECTION ASSISTANCE



nearly fifty percent decline in annual appropriations, dropping from a high of \$17.9 million in 2009 to a historic low of \$9.2 million in 2019.<sup>66</sup>

In recent years, claims of election interference in both the 2016 and 2020 elections, as well as emergency funding from the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act<sup>67</sup> to address voting changes induced by the COVID-19 pandemic, resulted in small boosts to EAC funding.<sup>68</sup> Funding has still not returned to pre-2009 levels, however, and civil rights organizations routinely have to lobby Congress to fully fund the agency.<sup>69</sup> Likewise, although President Biden’s most recent budget proposal would allocate almost twenty-three million dollars to the EAC, there is no guarantee this amount will be able to pass through the current Congress. Without a permanent appropriation, future funding remains uncertain and contingent upon congressional good will, which increasingly appears in short supply when it comes to election reform. In fact, several bills have been introduced in the two decades since HAVA’s enactment that would permanently terminate the EAC.<sup>70</sup>

Part of the difficulty in funding the EAC is the difficulty in calculating the true cost of election administration. Few studies exist on this issue, but reported state expenditures on staffing, office spaces, administrative costs, and other election administration expenses are often in the six digits and can vary enormously by locality and year.<sup>71</sup>

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COMM’N, REPORT TO CONGRESS ON STATE GOVERNMENTS’ EXPENDITURES OF HELP AMERICA VOTE ACT FUNDS (2007), [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/EAC%20Report%20to%20Congress%20on%20State%20Expenditures%20of%20HAVA%20Funds%202003-2006.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/EAC%20Report%20to%20Congress%20on%20State%20Expenditures%20of%20HAVA%20Funds%202003-2006.pdf) [<https://perma.cc/DUK3-LTG8>].

<sup>66</sup> Weil, *supra* note 65.

<sup>67</sup> 15 U.S.C. § 9001–9111.

<sup>68</sup> See U.S. Gov’t Accountability Off., GAO-22-104313, Election Assistance Commission: Assessment of Lessons Learned Could Improve Grants Administration 1 (2021), available at <https://www.gao.gov/assets/gao-22-104313.pdf> [<https://perma.cc/VU6A-MBHC>]; *Election Security Funds*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/payments-and-grants/election-security-funds> [<https://perma.cc/UX2A-YKXH>].

<sup>69</sup> See, e.g., Letter from Wade Henderson, President & CEO, & Nancy Zirkin, Exec. Vice President, Leadership Conf. on Civ. & Hum. Rts, to Hon. John Boozman, Chair, & Hon. Christopher Coons, Ranking Member, Subcomm. on Fin. Servs. & Gen. Gov’t (July 21, 2015), <http://civilrightsdocs.info/pdf/policy/letters/2015/2015-07-21-EAC-Senate-Letter.pdf> [<https://perma.cc/B7HF-SAS7>]; Weil, *supra* note 65; Letter from Am. C.L. Union et al. to Hon. Richard Shelby, Chairman, S. Comm. on Appropriations, et al. (Dec. 10, 2020), <https://www.lwv.org/league-petitions-senate-election-assistance-appropriations> [<https://perma.cc/BDG4-RQJG>].

<sup>70</sup> See, e.g., H.R. 672, 112th Cong. (2011); H.R. 195, 114th Cong. (2015).

<sup>71</sup> ZACHARY MOHR, MARTHA KROPF, JOELLEN POPE, MARY JO SHEPHERD & MADISON ESTERLE, ELECTION ADMINISTRATION SPENDING IN LOCAL ELECTION JURISDICTIONS: RESULTS FROM A NATIONWIDE DATA COLLECTION PROJECT 21 (2018), <https://esra.wisc.edu/wp-content/uploads/sites/1556/2020/11/mohr.pdf> [<https://perma.cc/U59X-QB27>].

One recent 2018 study by the University of Wisconsin-Madison calculated the average cost of election administration at just over eight dollars per voter.<sup>72</sup> When multiplied by the current voting age population, this would suggest a necessary budget of more than two billion dollars (\$2,066,618,496) per election.<sup>73</sup> It is extremely unlikely for Congress to appropriate such a large sum to the EAC, and states are generally expected to assume at least part of the financial responsibility of election administration, but these numbers indicate an obvious need for increased federal funding of election administration if we are to ensure the safety and efficiency of our voting systems.

The current underfunding and uncertainty inherent in annually appropriating the EAC means that it is often unable to plan properly for the future, nor can it rely on guaranteed funding to induce states to make necessary changes. Years of budget cuts have also left the EAC understaffed and under-resourced, meaning that it is both unable to effectively carry out already developed plans and unable to conduct new research on existing and emerging areas of concern.<sup>74</sup> Ongoing election issues over the last two decades have highlighted uneven and confused application of widely disparate election administration laws and the need for a more uniform process.<sup>75</sup> The current annual appropriations process, however, constrains the EAC's ability to address these issues.

To induce necessary changes in election administration, punishment alone is insufficient; the EAC must be able to also *incentivize* states to change. This type of incentive is generally provided through direct funding—what this Essay refers to as the “carrot.” Entrusting the EAC with permanent authorizations is one way to acquire necessary funding for this effort.

In addition to providing discretionary funds for state re-distribution, permanent authorization would also ensure that the EAC can maintain basic operating costs and expand its staff to keep up with its new rulemaking and enforcement duties. Part II details some of the

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<sup>72</sup> *Id.* at 1.

<sup>73</sup> See Estimates of the Voting Age Population for 2021, 87 FED. REG. 18,354 (Mar. 30, 2022).

<sup>74</sup> Courtney Bubl , *Distrust, Staffing and Funding Shortages Imperil Election Security*, GOV'T EXEC. (Sept. 5, 2019), <https://www.govexec.com/management/2019/09/distrust-staffing-and-funding-shortages-imperil-election-security/159647/> [<https://perma.cc/EX3V-U7S8>]; Theobald, *supra* note 19; see also *infra* Table 2.

<sup>75</sup> *Election Administration at State and Local Levels*, NAT'L CONF. STATE LEGISLATURES (Feb. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> [<https://perma.cc/W6DG-FDAJ>].

specific ways in which the EAC could use this funding capacity as a “carrot” to induce the states to make recommended changes and help bring about more uniform election administration policies.

This Essay suggests a slightly higher but still politically feasible permanent annual appropriation of twenty million dollars. This number accounts for both inflation and increased costs associated with new enforcement and rulemaking powers discussed *supra* at Section I.C. This authorization level would also be automatically adjusted for future inflation and would be revisable to provide additional funds as necessary. The following proposed draft language would amend HAVA section 257, codified at 52 U.S.C. § 21007. This language is modeled on similar provisions in the Social Security Act,<sup>76</sup> H.R. 4296, 103rd Cong. (1994),<sup>77</sup> 26 U.S.C. § 179D,<sup>78</sup> and 26 U.S.C. § 1.<sup>79</sup>

This authorization level would also be subject to a sunset provision requiring Congress to reconsider the appropriate funding level after ten years. Although sunset provisions are common in Congress, most do not last longer than two or three years and are utilized as short-term compromises.<sup>80</sup> A ten-year term, however, would span over several congressional cycles and thus could be considered excessively long and undesirable by members of Congress, many of whom would rather do away with EAC funding entirely.

Although they are rare, there is important precedent for longer sunset provisions in pieces of legislation that require multi-year analysis and planning. They are also common in the voting rights context, notably the 2006 amendments to the Voting Rights Act, which provided for a twenty-five-year extension of the coverage formula.<sup>81</sup> The

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<sup>76</sup> 42 U.S.C. § 1381 (“[T]here are authorized to be appropriated sums sufficient to carry out this subchapter.”).

<sup>77</sup> Section 6 serves as a model for the sunset provision.

<sup>78</sup> Subsection (g) serves as a model for inflation adjustment.

<sup>79</sup> Subsection (f)(3) serves as a reference for cost-of-living adjustment language.

<sup>80</sup> Chris Mooney, *A Short History of Sunsets*, LEGALAFFAIRS (Feb. 2004), [https://www.legalaffairs.org/issues/January-February-2004/story\\_mooney\\_janfeb04.msp](https://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp) [<https://perma.cc/6ZW9-6V4E>].

<sup>81</sup> See *Voting Rights Act: What Expires and What Does Not*, ACLU (Mar. 4, 2005), <https://www.aclu.org/press-releases/voting-rights-act-what-expires-and-what-does-not> [<https://perma.cc/Y5NR-DQ5W>]; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006). The “coverage formula” refers to a procedure laid out in Section 4(b) of the Voting Rights Act used to determine which jurisdictions would be subject to special provisions of the act, primarily the preclearance requirement. Application of the coverage formula was generally limited to states that had engaged in the most egregious discriminatory voting practices. See, e.g., *Section 4 of the Voting Rights Act*, U.S. DEP’T JUST. (May 5, 2020), <https://www.justice.gov/crt/section-4-voting-rights-act> [<https://perma.cc/ZTT8-VD7Y>].

ten-year provision thus seeks to strike a balance between political palatability and endowing the EAC with essential funding for long-term planning, research, and development.

## **SEC. 257. AUTHORIZATION OF APPROPRIATIONS.**

- (a) ~~IN GENERAL. In addition to amounts transferred under section 104(c), there are authorized to be appropriated for requirements payments under this part the following amounts:~~
- ~~(1) For fiscal year 2003, \$1,400,000,000.~~
  - ~~(2) For fiscal year 2004, \$1,000,000,000.~~
  - ~~(3) For fiscal year 2005, \$600,000,000.~~

*There are authorized to be appropriated such sums as may be necessary to carry out this section:*

- (1) \$20,000,000.00 for fiscal year 20(xx); and*
  - (2) Such sums as may be necessary for each succeeding fiscal year.*
- (b) *INFLATION ADJUSTMENT AND ROUNDING. In the case of any calendar year after 20(xx), the \$20,000,000 amount in subsection (a)(1) shall be increased by an amount equal to—*
- (1) such dollar amount, multiplied by—*
  - (2) the cost-of-living adjustment determined under subsection (c) for such calendar year with any increase determined under this clause being rounded to the nearest multiple of \$100,000.*
- (c) *COST OF LIVING ADJUSTMENT.—*
- (1) *IN GENERAL.—For purposes of this section, the cost-of-living adjustment for any calendar year is the percentage (if any) by which—*
    - (i) the C-CPI-U for the preceding calendar year, exceeds*
    - (ii) the CPI for calendar year 20(xx), multiplied by the amount determined under paragraph (2).*
  - (2) *AMOUNT DETERMINED.—The amount determined under this clause is the amount obtained by dividing—*
    - (i) the C-CPI-U for calendar year 20(xx), by*
    - (ii) the CPI for calendar year 20(xx).*
  - (3) *CPI FOR ANY CALENDAR YEAR.—For purposes of paragraph (2), the CPI for any calendar year is the average of the Consumer Price Index as of the close*

*of the 12-month period ending on August 31 of such calendar year.*

- (4) *CONSUMER PRICE INDEX.*—*For purposes of paragraph (3), the term “Consumer Price Index” means the last Consumer Price Index for all-urban consumers published by the Department of Labor. For purposes of the preceding sentence, the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1986 shall be used.*
- (5) *C-CPI-U.*—
- (i) *IN GENERAL.*—*The term “C-CPI-U” means the Chained Consumer Price Index for All Urban Consumers (as published by the Bureau of Labor Statistics of the Department of Labor). The values of the Chained Consumer Price Index for All Urban Consumers taken into account for purposes of determining the cost-of-living adjustment for any calendar year under this subsection shall be the latest values so published as of the date on which such Bureau publishes the initial value of the Chained Consumer Price Index for All Urban Consumers for the month of August for the preceding calendar year.*
- (ii) *DETERMINATION FOR CALENDAR YEAR.*—*The C-CPI-U for any calendar year is the average of the C-CPI-U as of the close of the 12-month period ending on August 31 of such calendar year.*
- (d) *AVAILABILITY.* *Any amounts appropriated pursuant to the authority of subsection (a) or as adjusted by subsection (b) shall remain available without fiscal year limitation until expended.*
- (e) *EFFECTIVE DATE.* *This Act and the amendments made by this Act—*
- (1) *shall take effect on the date of the enactment of this Act; and*
- (2) *are repealed effective as of the date that is 10 years after that date.*

### *C. Enforcement and Rulemaking Authority*

With the EAC consistently underfunded and its original purpose of distributing technology grants having run its course, the EAC has

been confined to mostly advisory duties.<sup>82</sup> Granting the EAC enforcement and rulemaking authority could provide a renewed sense of purpose. Unfortunately, HAVA specifically precluded these powers.<sup>83</sup> Recent attempts to empower the EAC have thus been mostly restricted to expanding the EAC’s funding and research capacity.<sup>84</sup>

Under this Essay’s proposal, the EAC would be granted substantive enforcement and rulemaking authority—i.e., the “stick.” These powers would overcome the existing statutory preclusion under HAVA and enable the EAC to assist the Department of Justice in enforcing relevant federal law, including the Voting Rights Act (“VRA”)<sup>85</sup> and the National Voter Registration Act (“NVRA”).<sup>86</sup> It would also allow the EAC to develop *enforceable*—as opposed to voluntary—policies and practices for clearer, more uniform federal election administration.<sup>87</sup>

Importantly, the EAC’s authority to regulate and enforce would remain constrained to federal elections pursuant to Article I, Section 4, Clause 1—otherwise known as the Elections Clause. The Elections Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.”<sup>88</sup> In statutorily granting the EAC rulemaking and enforcement authority, Congress would delegate the powers reserved to it by the Elections Clause to the EAC to “make or alter such [r]egulations.”<sup>89</sup>

The Constitution and a large subset of the American people still largely contemplate the states as the proper vehicle for most election reform.<sup>90</sup> Therefore, the EAC must continue to strike a balance be-

<sup>82</sup> See H.R. REP. NO. 114-361, at 2, 7 (2015), <https://www.congress.gov/114/crpt/hrpt361/CRPT-114hrpt361.pdf> [<https://perma.cc/997S-AV5G>].

<sup>83</sup> 52 U.S.C. §§ 20925, 20929.

<sup>84</sup> See, e.g., Automatic Voter Registration Act of 2016, S. 3252, 114th Cong. § 8 (2016); For the People Act of 2021, S. 1, 117th Cong. §§ 1051, 1505, 1921–1925 (2021); Freedom to Vote Act, S. 2747, 117th Cong. §§ 1107, 1611–1613, 3905 (2021).

<sup>85</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (codified as amended in scattered sections of 52 U.S.C.).

<sup>86</sup> National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511.

<sup>87</sup> See *Election Administration at the State and Local Levels*, *supra* note 75 (stating there are currently more than 10,000 unique election jurisdictions in the United States, each of which is subject to various, and often divergent, election rules and procedures).

<sup>88</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>89</sup> *Id.*

<sup>90</sup> See Hans A. von Spakovsky, *The Left’s Fight Against Election Reforms Is a Trojan Horse*, HERITAGE FOUND. (Aug. 4, 2021), <https://www.heritage.org/election-integrity/commentary>.

tween federally necessary reforms and those decisions that can be encouraged or discouraged but ultimately left to the states to decide. This Essay argues that the federal government has for too long been precluded from making necessary interventions in election administration, and that the changes proposed herein strike a balance that will allow the EAC and the states to function in harmony, rather than in opposition.

### 1. *Federal Election Commission Model*

The enforcement and rulemaking powers of the EAC as envisioned by this Essay are largely modeled on those of the Federal Election Commission (“FEC”), codified at 52 U.S.C § 30109. Although often confused with the EAC, the FEC is a distinct elections agency responsible primarily for campaign finance law enforcement.<sup>91</sup> The FEC originally had some jurisdiction over election administration pursuant to the NVRA, but HAVA transferred this authority to the EAC.<sup>92</sup> Thus, the EAC is now the sole authority for all election administration issues.

The FEC has generally been a more effective agency than the EAC, largely because it is able to promulgate necessary rules and limitations and to enforce these regulations through a range of judicial and administrative means, including injunctions, hearings, fines, and civil and criminal penalties.<sup>93</sup> Admittedly, the FEC also suffers similar problems of quorum and gridlock induced by its own political parity requirement.<sup>94</sup> Even so, when able to overcome such problems, it has

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tary/the-lefts-fight-against-election-reforms-trojan-horse [https://perma.cc/E8UJ-LQ2G]; U.S. CONST. art. I, § 4, cl. 1.

<sup>91</sup> *Mission and History*, FED. ELECTION COMM’N, <https://www.fec.gov/about/mission-and-history/> [https://perma.cc/9NE4-77SD].

<sup>92</sup> *Final Rules on Reorganization of National Voter Registration Act Regulations*, FED. ELECTION COMM’N (Sept. 1, 2009), <https://www.fec.gov/updates/final-rules-on-reorganization-of-national-voter-registration-act-regulations/> [https://perma.cc/WEP2-WHP4].

<sup>93</sup> FED. ELECTION COMM’N, *THE FIRST 10 YEARS 2* (1985), <https://www.fec.gov/resources/cms-content/documents/firsttenyearsreport.pdf> [https://perma.cc/GA4M-NKP5]; FED. ELECTION COMM’N, *TWENTY YEAR REPORT 8* (1995), <https://www.fec.gov/resources/cms-content/documents/20yearreport.pdf> [https://perma.cc/MGN9-JWPJ]; FED. ELECTION COMM’N, *THIRTY YEAR REPORT 1* (2005), <https://www.fec.gov/resources/cms-content/documents/30year.pdf> [https://perma.cc/6EM6-VXGB]; *40th Anniversary Timeline*, FED. ELECTION COMM’N, [https://transition.fec.gov/pages/40th\\_anniversary/40th\\_anniversary.shtml](https://transition.fec.gov/pages/40th_anniversary/40th_anniversary.shtml) [https://perma.cc/T5MW-MST2].

<sup>94</sup> Brian Naylor, *The Federal Election Commission Can Finally Meet Again. And it Has a Big Backlog*, NPR (Dec. 24, 2020, 5:00 AM), <https://www.npr.org/2020/12/24/949672803/the-federal-election-commission-can-finally-meet-again-and-it-has-a-big-backlog> [https://perma.cc/WM4G-FHUF].

a more effective route for regulation and enforcement of its rules and policies.<sup>95</sup> Given their similar election-based contexts, it is logical to look to the FEC's statutory language as a model for EAC enforcement and regulation powers.

One important benefit of the FEC enforcement language is its adaptability. 52 U.S.C § 30106(b) provides for the FEC's enforcement powers as follows:

**(b) Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office**

- (1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.
- (2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.<sup>96</sup>

To adopt this structure, two changes would be made to HAVA. First, 52 U.S.C. § 20929 would be stricken in its entirety to remove the limitation on rulemaking authority. Second, language under 52 U.S.C. § 20925 would be replaced and amended to provide express enforcement authority as follows:

**(a) Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office.—**

- (1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and Chapter 20 of Title 42, and Subtitles I and II of Title 52. The Commission shall have concurrent jurisdiction with the Department of Justice with respect to the civil enforcement of such provisions.
- (2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the

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<sup>95</sup> See *40th Anniversary Timeline*, *supra* note 93.

<sup>96</sup> 52 U.S.C. § 30106(b).



Congress or any committee of the Congress with respect to elections for Federal office.

**(b) Specific Powers.—The specific powers of the Commission as in accordance with subsection (a) include, but are not limited to:**

- (1) *HEARINGS AND SESSIONS.*—The Commission may hold such hearings for the purpose of carrying out this chapter, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable to carry out this chapter. The Commission may administer oaths and affirmations to witnesses appearing before the Commission.
- (2) *INFORMATION FROM FEDERAL AGENCIES.*—The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to carry out this chapter. Upon request of the Commission, the head of such department or agency shall furnish such information to the Commission.
- (3) *POSTAL SERVICES.*—The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government
- (4) *ADMINISTRATIVE SUPPORT SERVICES.*—Upon the request of the Commission, the Administrator of General Services shall provide to the Commission, on a reimbursable basis, the administrative support services that are necessary to enable the Commission to carry out its duties under this chapter.
- (5) *CONTRACTS.*—The Commission may contract with and compensate persons and Federal agencies for supplies and services without regard to section 6101 of title 41.

## 2. *Enforcement Scope and Guidelines*

Under this new enforcement framework, the EAC should issue (1) a general enforcement policy akin to the Environmental Protection Agency's (EPA) policy and (2) a new set of voting system guidelines. On the first point, the EPA was established by presidential directive,<sup>97</sup> meaning its administrative structure and enforcement pow-

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<sup>97</sup> See Creation and Authority, 40 C.F.R. § 1.1 (2022) (stating “Reorganization Plan 3 of 1970, established the U.S. Environmental Protection Agency”); *EPA Order 1110.2, Initial Organization of the EPA*, EPA (June 24, 2022) <https://www.epa.gov/archive/epa/aboutepa/epa-order-11102-initial-organization-epa.html> [<https://perma.cc/QZ7P-CS7B>].

ers were largely developed through internal policymaking.<sup>98</sup> Because of this, it has published a highly detailed General Civil Enforcement Penalty Policy (“GCEPP”) that could serve as a useful model for the EAC in defining the scope and specifics of its new enforcement intentions.<sup>99</sup>

*a. General Enforcement Policy*

One specific area of the EPA’s GCEPP that could be useful for the EAC is its policy on civil penalty enforcement and evaluation, which provides for flexible analysis and regulation according to the circumstances of the violation.<sup>100</sup> There are three core areas to the EPA GCEPP for civil penalties: (1) Deterrence, (2) Fair and Equitable Treatment of the Regulated Community, and (3) Swift Resolution.<sup>101</sup> Under the first, the EPA emphasizes two types of deterrence: “persuade the violator to take precautions against falling into non-compliance again (specific deterrence) and dissuade others from violating the law (general deterrence).”<sup>102</sup>

In pursuing a deterrence policy, the goal should be to create penalties that “place[] the violator in a worse position than those who have complied in a timely fashion.”<sup>103</sup> The EPA’s GCEPP does not provide for a specific civil penalty amount or scale, but rather suggests a calculation based on case specific “benefit” and “gravity” components.<sup>104</sup> The “benefit” component is based on the idea that a penalty should, “at a minimum, remove any significant economic benefits resulting from failure to comply with the law . . . [and should] require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law.”<sup>105</sup> The “gravity” component, on the other hand, depends on the seriousness

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<sup>98</sup> See Off. of Inspector Gen., EPA, Rep. No. 2006-P-0029, Studies Addressing EPA’s Organizational Structure 1–4 (2006), <https://www.epa.gov/sites/default/files/2015-11/documents/20060816-2006-p-00029.pdf> [<https://perma.cc/ES7J-EZ9D>].

<sup>99</sup> EPA, GEN. ENFORCEMENT POL’Y NO. GM-21, POLICY ON CIVIL PENALTIES 1 (Feb. 16, 1984), <https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf> [<https://perma.cc/2PAM-KPJA>].

<sup>100</sup> See *generally id.* (establishing a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions based on three primary goals: (1) deterrence, (2) fair and equitable treatment of the regulated community, and (3) swift resolution of environmental problems).

<sup>101</sup> *Id.* at 3–6.

<sup>102</sup> *Id.* at 3–4.

<sup>103</sup> *Id.* at 1.

<sup>104</sup> *Id.* at 2–3.

<sup>105</sup> *Id.* at 3.

of the noncompliance at issue and whether “normal penalty assessments had not been achieving general deterrence.”<sup>106</sup>

The GCEPP’s section on Fair and Equitable Treatment of the Regulated Community is particularly important in the election administration context given the vastitudes of jurisdictions and preexisting rules. This GCEPP section provides additional factors in determining preliminary deterrence penalties, specifically: (1) degree of willfulness and/or negligence, (2) history of noncompliance, (3) ability to pay, (4) degree of cooperation/noncooperation, and (4) other unique factors specific to the violator of the case.<sup>107</sup>

Interestingly, several of these factors echo those considered in the voting rights context for Section 2 violations of the VRA.<sup>108</sup> Specifically, in their 1982 amendments to the VRA, the Senate created a list of factors—now collectively referred to as the Senate Report Factors—to be examined when analyzing a potential Section 2 violation, including

- (1) the history of official voting-related discrimination in the state or political subdivision;
- (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
- (3) the extent to which the state of political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
- (4) the exclusion of members of the minority group from candidate slating processes;
- (5) the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
- (6) the use of overt or subtle racial appeals in political campaigns; and
- (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.<sup>109</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 5.

<sup>108</sup> See *Section 2 of the Voting Rights Act*, U.S. DEP’T JUST., <https://www.justice.gov/crt/section-2-voting-rights-act> [<https://perma.cc/LT69-2DRG>].

<sup>109</sup> S. Rep. No. 97-417, at 28–29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, at 206–07.

Given that election administration is so intertwined with the voting process itself and that many issues stem from VRA violations, combining the GCEPP and Senate Report factors in the EAC's own policy guidance would be both appropriate and useful to extending the life of the constitutional democracy.

Lastly, the GCEPP states that swift compliance is an “important goal of any enforcement action . . . [and helps] conserve[] Agency personnel and resources.”<sup>110</sup> In furtherance of this goal, the EPA GCEPP provides for two approaches: (1) provide incentives to settle and institute prompt remedial action, and (2) provide disincentives to delaying compliance.<sup>111</sup> Translating this aspect of the GCEPP to the EAC is of critical importance and the primary reason why a greater enforcement power is necessary.

History has shown that the power to entice is often insufficient to induce states to change—and that is when the power to punish becomes necessary. Issues of voting rights in particular have long been plagued by a harmful reticence to change and discriminatory application, making this careful balance of incentive and disincentive even more necessary.<sup>112</sup> By entrusting the EAC with a powerful but still limited enforcement and rulemaking power, the EAC gains a necessary ability to create change. In utilizing these powers, the EAC may want to take a lighter-handed approach in disincentivizing behavior, remembering the adage that you “catch more flies with honey than with vinegar.” Examples of specific incentives and disincentives that could be adopted are discussed in more detail in Part III.

### *b. Voting System Guidelines*

In issuing new Voluntary Voting System Guidelines (“VVSG”) under the above proposed changes, the EAC could continue to utilize an incentivized funding approach, but it would now also have the option to make *mandatory* guidelines. The EAC is responsible for issuing VVSG under HAVA.<sup>113</sup> Unfortunately, stalled appointments and a

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<sup>110</sup> EPA *supra* note 99, at 5.

<sup>111</sup> *Id.* at 6.

<sup>112</sup> See *Voting Rights and Election Administration in America: Hearing Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 116th Cong., 67, 101–02, 114, 116, 120–21, 216 (2019), <https://www.govinfo.gov/content/pkg/CHRG-116hrg38145/pdf/CHRG-116hrg38145.pdf> [<https://perma.cc/WU37-PYGG>].

<sup>113</sup> *Voluntary Voting System Guidelines*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines> [<https://perma.cc/LBV4-3Y2Z>].

lack of quorum have prevented regular updates and only two VVSGs have been developed since the EAC was first formed in 2002.<sup>114</sup>

In fact, there was a gap of more than *sixteen years* between the first VVSG published in December 2005 and the second, which is still undergoing final public comment before official publication.<sup>115</sup> The first VVSG was broad and encompassed many HAVA recommended changes, but the second VVSG appears to be limited to problems induced by claims of election fraud, cybersecurity updates, and COVID-19-related voting system changes.<sup>116</sup> Although such guidelines were made voluntary per HAVA, many states were quick to comply so as to accept accompanied funding.<sup>117</sup>

It may then be best for the EAC to apply a mixture of both voluntary and mandatory VVSGs. Whereas voluntary VVSGs could be more frequently issued for long-term research and best practices, mandatory VVSGs might be better limited to time sensitive or disputed issues where uniformity is necessary. For instance, a mandatory VVSG on absentee and vote-by-mail procedures could help resolve ongoing conflicts between the states on what procedures and methods are the most reliable and effective in ensuring both access to and the integrity of the ballot.

## II. NEW AREAS OF AUTHORITY

If the suggested changes to the EAC as proposed in Part I are adopted, the Commission will be empowered to act in a variety of new election administration areas. This section provides a brief, nonexhaustive subset of some of the riper areas of concern for a newly empowered EAC to address. In most cases, these proposals simply

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<sup>114</sup> When the EAC regained quorum for the first time after an eight-month gap, there were 446 pending matters and 275 staff reports that needed review. Thirty-five of those staff reports were within eighteen months of the agency's five-year statute of limitations. Courtney Bubl , *Election Commission Regains Quorum and Resumes Full Duties, Facing a Massive Backlog of Work*, GOV'T EXEC. (Dec. 10, 2020), <https://www.govexec.com/management/2020/12/election-commission-regains-quorum-and-resumes-full-duties-facing-massive-backlog-work/170680/> [<https://perma.cc/P2S4-J27E>]; see also *Voluntary Voting System Guidelines*, *supra* note 113.

<sup>115</sup> An intermediate VVSG 1.1 was released in 2015 that "clarified the [first VVSG's] guidelines to make them more testable; enabled the National Institute of Standards and Technology (NIST) to create test suites for the proposed revisions; and improved portions of the guidelines without requiring massive programmatic changes." *Voluntary Voting System Guidelines*, *supra* note 112.

<sup>116</sup> See Press Release, U.S. Election Assistance Comm'n, Major Updates of the Voluntary Voting System Guidelines 2.0 (Feb. 2021), [https://www.eac.gov/sites/default/files/TestingCertification/VVSG\\_2\\_Major\\_Updates.pdf](https://www.eac.gov/sites/default/files/TestingCertification/VVSG_2_Major_Updates.pdf) [<https://perma.cc/5ZX9-HHJ3>].

<sup>117</sup> See Kathleen Hale & Mitchell Brown, *Adopting, Adapting, and Opting Out: State Response to Federal Voting System Guidelines*, 43 PUBLIUS 428, 433 (2013).

expand on preexisting jurisdiction for the EAC and envision a more active means of regulation and enforcement by the Commission. In so acting, the EAC would be working toward a two-fold goal: (1) increasing ease and equality of access to the ballot, and (2) election security.

### A. *Automatic Voter Registration*

Automatic Voter Registration (“AVR”) is the “direct enroll[ment] of citizens onto the electoral register by public officials, without the need for pro-active action by citizens.”<sup>118</sup> In the United States, this would provide for the automatic registration of all eligible voters via interaction with relevant agency services, like state motor vehicle authorities.<sup>119</sup> AVR would thus invert the current “opt-in” system with an “opt-out” method, meaning that those who do *not* wish to register would have to act.<sup>120</sup> Improving AVR would be one means of improving ongoing problems of low voter turnout—the United States currently ranks thirtieth out of thirty-five countries polled for voter turnout.<sup>121</sup>

The EAC can be helpful in two respects regarding AVR. First, it could require that all states adopt some type of AVR program, while leaving it to the individual states to determine what program type best suits their needs. Various models have been adopted by the twenty states that already utilize AVR, providing a variety of options for other states to draw on.<sup>122</sup> Analyzing the problems and successes of these varying methods could also serve as a research project for the EAC, who could help identify and share best practices and model statutory language. Second, the EAC can help subsidize the cost of developing new AVR programs, which according to a recent study by Common Cost have an average startup cost of around five hundred million dollars.<sup>123</sup> It should also be noted that although Republican

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<sup>118</sup> TOBY S. JAMES & PAUL BERNAL, IS IT TIME FOR AUTOMATIC VOTER REGISTRATION IN THE UK? 4 (2020), <https://tobysjamesdotcom.files.wordpress.com/2020/04/is-it-time-for-automatic-voter-registration-double-sides.pdf> [<https://perma.cc/7UZK-EKBJ>].

<sup>119</sup> *Automatic Voter Registration, a Summary*, BRENNAN CTR. FOR JUST. (June 30, 2021), <https://www.brennancenter.org/our-work/research-reports/automatic-voter-registration-summary> [<https://perma.cc/B26H-X4Z2>]; see *Automatic Voter Registration*, NAT’L CONF. STATE LEGISLATURES (June 23, 2022), <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> [<https://perma.cc/2C5M-J9KS>].

<sup>120</sup> *Automatic Voter Registration, supra* note 119.

<sup>121</sup> Drew DeSilver, *In Past Elections, U.S. Trailed Most Developed Countries in Voter Turnout*, PEW RSCH. CTR. (Nov. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout/> [<https://perma.cc/XG7G-U2P7>].

<sup>122</sup> See *Automatic Voter Registration, supra* note 119.

<sup>123</sup> See COMMON CAUSE MASS., THE MINIMAL COSTS OF AUTOMATIC VOTER REGISTRA-

support for AVR has declined since 2020, a majority of voters—sixty-one percent to be precise—still support adopting AVR programs.<sup>124</sup>

### B. *Absentee Ballots and Vote-by-Mail*

Absentee ballots and vote-by-mail (“VBM”)<sup>125</sup> have become particularly contentious issues in the wake of the 2020 election, and a newly empowered EAC could go a long way in helping to resolve widening disparities in state VBM procedures.<sup>126</sup> In pursuing this issue, the EAC would ideally continue to serve in an advisory capacity while also utilizing its newly endowed permanent appropriations. Enforcement authority can also play an important role in general and specific deterrence, particularly on issues arising from discrimination. Specific areas of ongoing VBM reform that are frequently subject to allegations of discrimination and which the EAC may want to monitor for potential rulemaking include (1) ballot tracking methods,<sup>127</sup> (2) availability of remedy or cure periods,<sup>128</sup> (3) mail by and postmark

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TION IMPLEMENTATION (2018), <https://www.commoncause.org/massachusetts/wp-content/uploads/sites/3/2018/05/AVR-Cost-Report-May-2018.pdf> [<https://perma.cc/8C9X-7AY3>].

<sup>124</sup> Prior to 2020 and related claims of election fraud, Republican support for AVR was actually increasing. *Republicans and Democrats Move Further Apart in Views of Voting Access*, PEW RSCH. CTR. (Apr. 22, 2021), <https://www.pewresearch.org/politics/2021/04/22/republicans-and-democrats-move-further-apart-in-views-of-voting-access/> [<https://perma.cc/8Y97-EQMR>].

<sup>125</sup> See generally Lisa Danetz, *Mail Ballot Security Features: A Primer*, BRENNAN CTR. FOR JUST. (Oct. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/mail-ballot-security-features-primer> [<https://perma.cc/ZKU7-M5RX>] (providing a history and explanation of mail ballot systems).

<sup>126</sup> Cf. *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. STATE LEGISLATURES (Mar. 15, 2022), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/45RM-4DLC>] (detailing the various approaches that states take toward non-traditional voting and the varying levels of acceptance among states, indicating that this is a contentious issue with much disagreement). See the linked tables for state-specific comparisons of various election administration practices. *Id.*

<sup>127</sup> Geoffrey A. Fowler, *How to Track Your Ballot Like a UPS Package*, WASH. POST (Sept. 18, 2020, 8:00 AM), <https://www.washingtonpost.com/technology/2020/09/18/online-ballot-tracking/> [<https://perma.cc/S4BX-47KZ>].

<sup>128</sup> *Table 15: States with Signature Cure Processes*, NAT'L CONF. STATE LEGISLATURES (Jan. 18, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-15-states-that-permit-voters-to-correct-signature-discrepancies.aspx> [<https://perma.cc/R6CN-9B7K>].

deadlines,<sup>129</sup> (4) Dropbox availability and security,<sup>130</sup> and (5) affidavit, signature, notary, and other witness requirements.<sup>131</sup>

In the area of rulemaking, the EAC could develop critically needed uniform best practices and sample statutory language for the states. States have enacted increasingly divergent legislation on this issue, exacerbating existing confusion and potentially discriminatory application of the laws.<sup>132</sup> Although the EAC is constrained by the Elections Clause in terms of state and local elections, the EAC can determine a singular proper course of action for federal elections that would, hopefully, have a subsequent trickle-down effect on all election administration.

Given the history of reticence many states have towards VBM and increasing evidence of discriminatory administration of VBM laws, disincentive-style enforcement may also be necessary.<sup>133</sup> The EAC should be cautious in pursuing this approach, however, so as to not encroach upon the states' Election Clause authority. With this in mind, enforcement should generally be limited to cases of proven discriminatory intent or effect, something that a robust Research and Litigation department could help determine.<sup>134</sup> Once a positive

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<sup>129</sup> *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, NAT'L CONF. STATE LEGISLATURES (Mar. 15, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx> [<https://perma.cc/2LG4-F67X>].

<sup>130</sup> Lane Baker, Gabriella Garcia, Axel Hufford, Garrett Jensen & Alexandra Popke, *Ballot Drop-Off Options in All 50 States*, LAWFARE (Oct. 14, 2020, 10:38 AM), <https://www.lawfareblog.com/ballot-drop-options-all-50-states> [<https://perma.cc/9FKS-NV6N>].

<sup>131</sup> *Table 14: How States Verify Voted Absentee/Mail Ballots*, NAT'L CONF. STATE LEGISLATURES (Mar. 15, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx> [<https://perma.cc/T3CE-22NZ>].

<sup>132</sup> See *Voting Outside the Polling Place*, *supra* note 126.

<sup>133</sup> Jane C. Timm, *A White Person and a Black Person Vote by Mail in the Same State. Whose Ballot Is More Likely to Be Rejected?*, NBC NEWS (Aug. 9, 2020, 11:34 AM), <https://www.nbcnews.com/politics/2020-election/white-person-black-person-vote-mail-same-state-whose-ballot-n1234126> [<https://perma.cc/MAR6-NSWN>].

<sup>134</sup> The EAC already has an existing Research & Data department. See Image 2. Its duties and responsibilities are not laid out by statute, however, and appear to be decided internally. It is therefore difficult to determine the scope or size of the department. Additionally, because the EAC does not currently have any enforcement authority, it does not have a litigation department. 52 U.S.C. §20924(a)(4) does, however, provide for the appointment of a singular General Counsel and §20924(a)(5) for the appointment of "other staff" as deemed appropriate by the Executive Director. As of August 2022, the EAC does not have a formally appointed General Counsel—Amanda Joiner, formally an Assistant General Counsel, appears to be serving in the role of Acting General Counsel—and is hiring for the position. *Amanda Joiner*, LinkedIn (Sept. 3, 2022), <https://www.linkedin.com/in/amanda-joiner-549b0a199/> [<https://perma.cc/R546-QE2E>]. By comparison, the FEC's Office of the General Counsel is composed of five internal units each headed by a Deputy or Associate General Counsel (Administration, Law, Enforcement, Policy,



determination has been made of such, appropriate punishments based on the factors discussed *supra* in Section I.C.2.a should be applied. Injunctions of the discriminatory practice would be one such type of appropriate enforcement action. Alternatively, in those cases where noncompliance can be shown to be the result of a lack of funding or resources, other actions should be considered to not unnecessarily punish merely underfunded districts.

Agency action on these issues can also help alleviate the flood of VBM litigation that opened up in 2020.<sup>135</sup> Although courts generally dislike ruling on election administration issues, particularly changes made in close proximity to an election, they were forced to take up a more active role in deciding VBM issues because of COVID-19.<sup>136</sup> Generally speaking though, courts are often slow to act on election administration problems,<sup>137</sup> something a more active EAC could help make up for.

### C. Early Voting

Given increasing support for early voting, the EAC may also want to consider developing best practices for early voting procedures, as well as incentivizing expanded polling locations and hours. Early voting is one of the reforms with the most bipartisan support, with a 2020 Pew Research Center study showing seventy-eight percent of Americans in favor.<sup>138</sup> However, some concerns are worth noting. When Virginia adopted early voting in 2021, many expressed concerns about its cost to local taxpayers, with some estimating a total burden upwards of six figures.<sup>139</sup> The wide range of early voting periods, which are subject to local determination and availability, can also be

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and Litigation). *FEC Offices*, FED. ELECTION COMM'N, <https://www.fec.gov/about/leadership-and-structure/fec-offices/> [<https://perma.cc/WF9D-GXTP>].

<sup>135</sup> Austin Sarat, *Judges Used to Stay Out of Election Disputes, but This Year Lawsuits Could Well Decide the Presidency*, CONVERSATION (Oct. 16, 2020, 7:01 AM), <https://theconversation.com/judges-used-to-stay-out-of-election-disputes-but-this-year-lawsuits-could-well-decide-the-presidency-147830> [<https://perma.cc/8QHL-VEX2>].

<sup>136</sup> *Id.*; see also Election L. at Ohio State, *The Purcell Principle: A Presumption Against Last-Minute Changes to Election Procedures*, SCOTUSBLOG, <https://www.scotusblog.com/election-law-explainers/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures/> [<https://perma.cc/97U2-M9PD>].

<sup>137</sup> Cf. Jeffrey Kluger, *Why Is the Court System So Slow?*, TIME (June 30, 2016, 7:58 AM), <https://time.com/4389196/why-is-the-court-system-so-slow/> [<https://perma.cc/N8KP-KEJH>] (explaining and highlighting the long length of most court cases and the delay in the court system).

<sup>138</sup> *Republicans and Democrats Move Further Apart in Views of Voting Access*, *supra* note 124.

<sup>139</sup> Marie Albiges, *Democrats Are Expanding Virginians' Access to Voting, but Cities Will Likely Be Stuck with the Bill*, V.A. PILOT (Feb. 24, 2020, 1:06 PM), <https://www.pilotonline.com/>

problematic and lead to unnecessary voter confusion.<sup>140</sup> The EAC could help resolve these differences by setting clear minimum standards for early voting period lengths, weekend and hour availability, and number of polling locations. Additional funding could also be granted to ensure swift compliance and to help cover costs of expanded staff, new equipment, and extra ballots that are necessary for early voting programs.<sup>141</sup>

#### D. Poll Worker Recruitment and Training

States employ varying standards in recruiting and training their poll workers, leading to ineffective election administration in many instances.<sup>142</sup> The EAC has already conducted intensive study on this issue, but given its lack of funding and enforcement authority, it has not been able to do anything other than offer best practice recommendations.<sup>143</sup> In 2013, the now defunct Presidential Commission on Election Administration prepared a comprehensive report of identified problems in poll worker recruitment and training, which is now archived with the EAC.<sup>144</sup> Among the many issues identified by the report were

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government/elections/vp-nw-virginia-voting-rights-costs-20200224-5ckflr2a3bfylbr5nbroego5de-story.html [https://perma.cc/75S3-3UWA].

<sup>140</sup> Early voting periods can range in (1) length—anywhere from three to forty-six days before an election—(2) location—mostly in a local clerk or registrar’s office or designated satellite offices, but many counties have just one location, which can make voting in larger, more rural areas difficult—and (3) hours—most states operate during working hours with limited evening or weekend hours. *Early In-Person Voting*, NAT’L CONF. STATE LEGISLATURES (May 23, 2022), <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx> [https://perma.cc/JHD4-698K].

<sup>141</sup> See Albiges, *supra* note 139.

<sup>142</sup> See generally U.S. ELECTION ASSISTANCE COMM’N, STATE-BY-STATE COMPENDIUM: ELECTION WORKER LAWS AND STATUTES (2016), [https://www.eac.gov/sites/default/files/eac\\_assets/1/28/Compendium.2016.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/28/Compendium.2016.pdf) [https://perma.cc/L57E-JFK4]; J. MIJIN CHA & LIZ KENNEDY, MILLIONS TO THE POLLS: POLL WORKER RECRUITMENT AND TRAINING 2 (2014), <https://www.demos.org/sites/default/files/publications/Millions%20to%20the%20Polls%20%20Poll%20Worker%20Recruitment%20Training.pdf> [https://perma.cc/8FGV-BFXU].

<sup>143</sup> See, e.g., U.S. ELECTION ASSISTANCE COMM’N, ELECTION WORKER SUCCESSFUL PRACTICES: RECRUITMENT, TRAINING, AND RETENTION (2016), [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/Election\\_Worker\\_Successful\\_Practices1.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/Election_Worker_Successful_Practices1.pdf) [https://perma.cc/A4YY-84CU].

<sup>144</sup> BARRY C. BURDEN & JEFFREY MILYO, THE RECRUITMENT AND TRAINING OF POLL WORKERS: WHAT WE KNOW FROM SCHOLARLY RESEARCH 3 (2013), [https://www.eac.gov/sites/default/files/event\\_document/files/Barry-Burden-Jeff-Milyo-The-Recruitment-and-Training-of-Poll-Workers.pdf](https://www.eac.gov/sites/default/files/event_document/files/Barry-Burden-Jeff-Milyo-The-Recruitment-and-Training-of-Poll-Workers.pdf) [https://perma.cc/W6EB-4WK2] (report prepared for the Presidential Commission on Election Administration).

- (1) lack of diversity in poll workers, who are disproportionately older females in their sixties and seventies;<sup>145</sup>
- (2) uneven training protocols leading to nonuniform administration;<sup>146</sup>
- (3) lack of selection criteria for choosing poll workers;<sup>147</sup> and
- (4) low pay for poll workers.<sup>148</sup>

With better funding and new rulemaking authority, the EAC could finally put into action the best practices they have already developed. For instance, they could require states to implement diverse recruitment practices (while leaving up to the states the mechanics of such), help subsidize increased poll worker pay, and provide research on recommended training practices and procedures. While the primary focus would be incentive-based, enforcement may be utilized as necessary to ensure minimum standards are met.

#### CONCLUSION

This Essay has attempted to provide a workable framework for reforming the EAC, a task that many have dismissed as fruitless. While current political realities might render the proposed changes unlikely at present, there remains hope for a more amenable future Congress. Partisan bickering on election reform masks increasing evidence that voters want and are demanding reform. Even in the wake of the highly controversial 2020 election, a majority of voters from *both* parties still support restoring felon voting rights, expanding early in-person voting availability, and making Election Day a national holiday.<sup>149</sup>

Although several advocates have proposed starting from scratch and creating a new federal election agency,<sup>150</sup> reforming and reinvigorating the EAC is a more realistic alternative—better the devil you know. This Essay strives to create a balance that preserves states' rights but allows for federal intervention on time-sensitive and complex issues that require a deeper, national perspective to preserve con-

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 15.

<sup>147</sup> *Id.* at 16–17.

<sup>148</sup> *Id.* at 13–14.

<sup>149</sup> *Republicans and Democrats Move Further Apart in Views of Voting Access*, *supra* note 124.

<sup>150</sup> See, e.g., Hannah Leibson, *A Vision for a Federal Election Agency*, *REGUL. REV.* (Feb. 4, 2021), <https://www.theregreview.org/2021/02/04/leibson-vision-federal-election-agency> [<https://perma.cc/5NPN-C93W>]; LEE DRUTMAN & CHARLOTTE HILL, *AMERICA NEEDS A FEDERAL ELECTIONS AGENCY* (2020), [https://d1y8sb8sigg2f8e.cloudfront.net/documents/America\\_Needs\\_a\\_Federal\\_Elections\\_Agency\\_RAgoht5.pdf#page=15](https://d1y8sb8sigg2f8e.cloudfront.net/documents/America_Needs_a_Federal_Elections_Agency_RAgoht5.pdf#page=15) [<https://perma.cc/QBJ3-8738>].

stitutional democracy. Because uneven election administration by the nation's more than 10,000 election jurisdictions has resulted in massive voter confusion, disenfranchisement, and allegations of fraud, this cherished ideal has come under threat. A reformed EAC would provide a long-needed centralized authority to bring our election administration practices into the twenty-first century while maintaining constitutional ideals of both integrity and security.

The revised EAC as proposed does not, however, create a federal veto over state voting laws. Rather, if effectively implemented, the new EAC would help support state initiatives by providing robust funding and guidance on best practices grounded in empirical research. Although the EAC would be empowered to both incentivize and disincentivize—the carrot and the stick—the Commission would only be empowered to directly intervene in cases of obvious and unconstitutional discrimination. Ultimately then, the reformed EAC strives for what should be a universally supported goal: the preservation and protection of our democracy.

APPENDIX

IMAGE 1. CONSUMER PRODUCT SAFETY COMMISSION ORGANIZATIONAL CHART (CURRENT THROUGH FY 2021)<sup>151</sup>

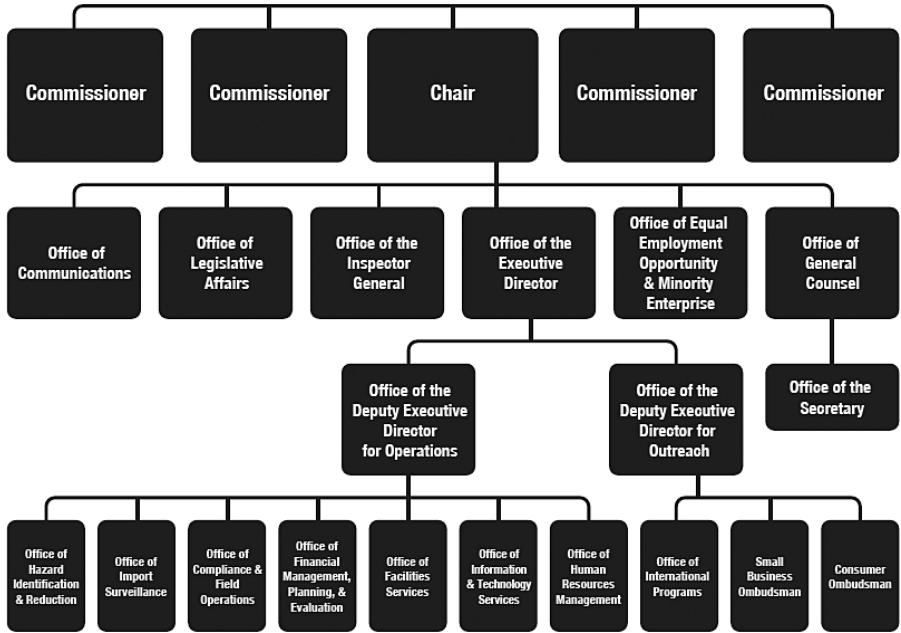
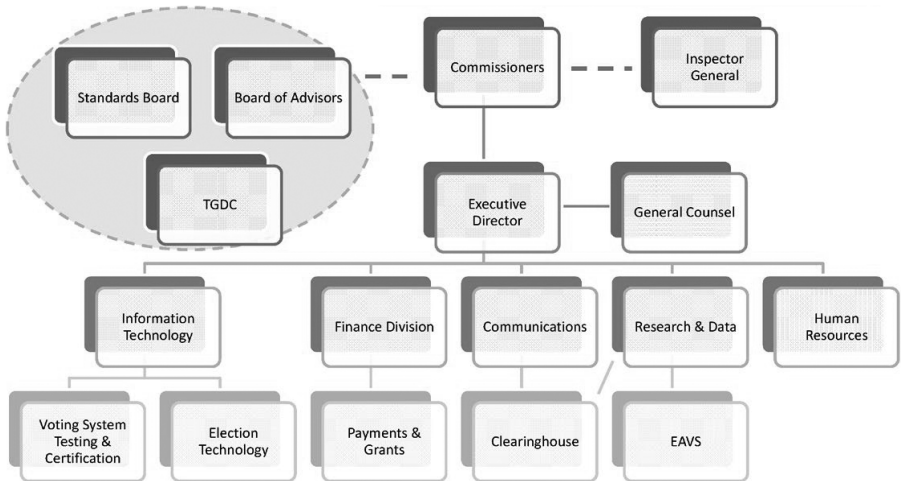


IMAGE 2. ELECTION ASSISTANCE COMMISSION ORGANIZATIONAL CHART (CURRENT THROUGH 2018)<sup>152</sup>



151 U.S. CONSUMER PROD. SAFETY COMM’N, AGENCY FINANCIAL REPORT, FISCAL YEAR 2021 2 (2021), [https://www.cpsc.gov/s3fs-public/FY-2021-US-CPSC-Agency-Financial-Report\\_1.pdf?VersionId=\\_OE75MjPtOteHnFmQ7y7lVBd1cyl\\_VY](https://www.cpsc.gov/s3fs-public/FY-2021-US-CPSC-Agency-Financial-Report_1.pdf?VersionId=_OE75MjPtOteHnFmQ7y7lVBd1cyl_VY). [https://perma.cc/67TN-6AWP].

152 U.S. ELECTION ASSISTANCE COMM’N, STRATEGIC PLAN 2018–2022, at 8 (2018), <https://>

TABLE 1. CPSC VOTES 2018–2021 (AUTHOR CREATED)<sup>153</sup>

Of twenty-eight randomly selected petition, accreditation, administrative, and other various commission votes between 2018 and 2021, the CPSC Commission voted unanimously on twelve votes and received cross-over support on nine others. Of those twenty-eight total votes, then, only seven were voted along strict partisan lines.

CPSC VOTES 2018–2021					
<i>Table is a representative sample. * denotes acting Chair</i>					
VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Unanimous	11/12/21	ALJ Ratification, In the Matter of Thyssenkrup Access Corp. <sup>154</sup>	<b>Unanimous</b>		
Unanimous	9/14/21	Regulatory Agenda and Plan for Fall 2021 <sup>155</sup>	<b>Unanimous</b>		
Split	9/8/21	Standard for the Flammability of Residential Upholstered Furniture – Termination of Rulemaking <sup>156</sup>	Baiocco and Feldman	<i>Adler*</i>	

[www.eac.gov/sites/default/files/eac\\_assets/1/6/strategicplan18\\_22.pdf](http://www.eac.gov/sites/default/files/eac_assets/1/6/strategicplan18_22.pdf) [<https://perma.cc/2J72-NWU2>].

<sup>153</sup> Data used to create Table 1 was drawn from *Newsroom – FOIA*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/Newsroom/FOIA/ReportList> [<https://perma.cc/F4SH-Q3PR>]. Votes by Democratic Commissioners are noted in italics. Votes by Republican Commissioners are noted in roman type. Bipartisan votes are noted in bold.

<sup>154</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, ALJ Ratification, In the Matter of Thyssenkrup Access Corp., CPSC Docket Number 21-1 (Nov. 12, 2021) [https://www.cpsc.gov/s3fs-public/RCA\\_ALJ\\_Ratification\\_In\\_the\\_Matter\\_of\\_ThyssenKrupp\\_Access\\_Corp\\_CPSC\\_Docket\\_No\\_21\\_1\\_In\\_the\\_Matter\\_of\\_Amazon\\_com\\_Inc\\_CPSC\\_Docket\\_No\\_21\\_2.pdf](https://www.cpsc.gov/s3fs-public/RCA_ALJ_Ratification_In_the_Matter_of_ThyssenKrupp_Access_Corp_CPSC_Docket_No_21_1_In_the_Matter_of_Amazon_com_Inc_CPSC_Docket_No_21_2.pdf) [<https://perma.cc/7K8P-8XZS>].

<sup>155</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Regulatory Agenda and Plan for Fall 2021 (Sept. 14, 2021) [https://www.cpsc.gov/s3fs-public/RCA-Regulatory-Agenda-and-Plan-for-Fall-2021.pdf?VersionId=GBGudf0i0rkFFt.dGoSoC1Y\\_pl470mER](https://www.cpsc.gov/s3fs-public/RCA-Regulatory-Agenda-and-Plan-for-Fall-2021.pdf?VersionId=GBGudf0i0rkFFt.dGoSoC1Y_pl470mER) [<https://perma.cc/U9AV-CHZ9>].

<sup>156</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Standard for the Flammability of Residential Upholstered Furniture – Termination of Rulemaking (Sept. 8, 2021) <https://www.cpsc.gov/s3fs-public/RCA-Standard-for-the-Flammability-of-Residential-Upholstered-Furniture-Termination-of-Rulemaking.pdf?VersionId=NJVY69LlK4FkaGFNB8NXuI044Xmb6T1O> [<https://perma.cc/NPY3-XTGP>].

VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Split	7/27/21	Federal Register Notice Seeking Public Comments on Petition Requesting Rulemaking on Commercially Bred Dogs Sold to Consumers <sup>157</sup>	<i>Adler*</i>	Baiocco	<b>Kaye &amp; Feldman</b>
Crossover	7/14/21	Vote to Issue Administrative Complaint Against Amazon.com <sup>158</sup>	<b>Adler*, Kaye, and Feldman</b>		
Unanimous	6/11/21	Petition Requesting Rulemaking to Establish Safety Standard for Duster Aerosol Products – Request for Comments <sup>159</sup>	<b>Unanimous</b>		
Crossover	3/25/21	FY 2021 Midyear Review [final vote on Plan as amended] <sup>160</sup>	<b>Adler*, Kaye and Baiocco</b>	Feldman	
Unanimous	12/18/20	CPSC Plan to Create an eFiling Program for Imported Consumer Products <sup>161</sup>	<b>Unanimous</b>		
Crossover	11/10/20	Fiscal Year 2021 Operating Plan <sup>162</sup>	<b>Adler*, Kaye, Baiocco</b>		Feldman

<sup>157</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Federal Register Notice Seeking Public Comments on Petition Requesting Rulemaking on Commercially Bred Dogs Sold to Consumers (July 27, 2021) <https://www.cpsc.gov/s3fs-public/RCA-FRN-Petition-Requesting-Rulemaking-on-Commercially-Bred-Dogs-Sold-to-Consumers.pdf> [<https://perma.cc/UJP3-7SL4>].

<sup>158</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Vote to Issue Administrative Complaint Against Amazon.com (July 14, 2021) <https://www.cpsc.gov/s3fs-public/RCA-Vote-to-Issue-Administrative-Complaint-Against-Amazon-com-07142021.pdf> [<https://perma.cc/58Z8-329T>].

<sup>159</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Petition Requesting Rulemaking to Establish Safety Standard for Duster Aerosol Products – Request for Comments (June 11, 2021) <https://www.cpsc.gov/s3fs-public/RCA-Petition-Requesting-Rulemaking-to-Establish-Safety-Standard-for-Duster-Aerosol-Products.pdf> [<https://perma.cc/4JUS-ZM4D>].

<sup>160</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, FY 2021 Midyear Review (Mar. 25, 2021) <https://www.cpsc.gov/s3fs-public/RCA-Comm-Mtg-Min-FY2021-Mid-Year-Review-NOA-Alt-Test-Methods-Guidance.pdf> [<https://perma.cc/GNY4-DE5L>].

<sup>161</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, CPSC Plan to Create an eFiling Program for Imported Consumer Products (Dec. 18, 2020) <https://www.cpsc.gov/s3fs-public/RCA-CPSC-Plan-to-Create-an-eFiling-Program-for-Imported-Consumer-Products.pdf> [<https://perma.cc/8B5K-TGZ7>].

<sup>162</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Fiscal Year 2021

VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Split	9/22/20	Recreational Off-Highway Vehicles (ROVs)—Termination of Rulemaking <sup>163</sup>	<i>Adler* and Kaye</i> (not to terminate)	Baiocco and Feldman (to terminate)	
Crossover	9/10/20	CPSC Fiscal Year 2022 Performance Budget Request to Congress <sup>164</sup>	<i>Adler*, Kaye, Baiocco</i>		Feldman
Unanimous	9/4/20	Regulatory Agenda and Plan for Fall 2020 <sup>165</sup>	<b>Unanimous</b>		
Unanimous	9/1/20	Accreditation of Two Conformity Assessment Bodies as “Firewalled” Third Party Laboratories and Related Delegation of Authority <sup>166</sup>	<b>Unanimous</b> (for accreditation of Verified Testing Services, LLC and Dongguan Baoxin Trading Co., Ltd. Commissioner Feldman was the lone vote against authorizing the the Deputy Executive Director for Operations, Office of the Executive Director, to grant or deny subsequent applications of either accredited entity)		
Crossover	6/1/20	Petition VGBA 19-1: Petition for Classification of Vacuum Diffusion Technology as an Anti-Entrapment System under the Virginia Graeme Baker Pool and Spa Safety Act <sup>167</sup>	<b>Adler*, Kaye and Baiocco</b>	Feldman	

Operating Plan (Nov. 10, 2020) <https://www.cpsc.gov/s3fs-public/RCA-FY-2021-Operating-Plan-2.pdf> [<https://perma.cc/YK7V-BP9C>].

<sup>163</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Recreational Off-Highway Vehicles (ROVs)—Termination of Rulemaking (Sept. 22, 2020) <https://www.cpsc.gov/s3fs-public/RCA-Recreational-Off-Highway-Vehicles-ROVs-Termination-of-Rulemaking.pdf> [<https://perma.cc/J4S6-BBX6>].

<sup>164</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, (Sept. 10, 2020) <https://www.cpsc.gov/s3fs-public/RCA-CPSC-Fiscal-Year-2022-Performance-Budget-Request.pdf> [<https://perma.cc/3SK7-V3AY>].

<sup>165</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Regulatory Agenda and Plan for Fall 2020 (Sept. 4, 2020) <https://www.cpsc.gov/s3fs-public/RCA-Regulatory-Agenda-Fall-2020.pdf> [<https://perma.cc/3HE5-MT6S>].

<sup>166</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Accreditation of Two Conformity Assessment Bodies as “Firewalled” Third Party Laboratories and Related Delegation of Authority (Sept. 1, 2021) <https://www.cpsc.gov/s3fs-public/rca-accreditation-of-two-firewalled-labs-9-1-2020.pdf> [<https://perma.cc/9SK3-CVZ2>].

<sup>167</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Petition VGBA 19-1: Petition for Classification of Vacuum Diffusion Technology as an AntiEntrapment System under the Virginia Graeme Baker Pool and Spa Safety Act (June 1, 2020) <https://www.cpsc.gov/s3fs-public/RCA%20-%20Petition%20VGBA-%2019-1%20Petition%20for%20Classification>



VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Crossover	11/1/19	Proposed ATV Action Plan of CRT Motor Inc. d/b/a/ CRT Moto <sup>168</sup>	<b>Adler*, Baiocco and Feldman</b>	<i>Kaye</i>	
Crossover	10/16/19	Fiscal Year (“FY”) 2020 Operating Plan <sup>169</sup>	<b>Adler*, Buerkle, Baiocco, Feldman</b>	<i>Kaye</i>	
Split	9/24/19	Final Rule Review Current Fireworks Regulation <sup>170</sup>	Buerkle*, Baiocco and Feldman	<i>Adler</i>	<i>Kaye</i>
Split	7/26/19	Petition CP 18-2: Labeling Requirements Regarding Slip-Resistance of Floor Coverings <sup>171</sup>	Buerkle*, Feldman, Baiocco	<i>Adler and Kaye</i>	
Unanimous	5/22/19	FY 2019 Mid-Year Review <sup>172</sup>	<b>Unanimous</b>		
Unanimous	4/2/19	Petition CP 19-1 Requesting Rulemaking to Amend Safety Standard for Walk-Behind Power Lawn Mowers <sup>173</sup>	<b>Unanimous</b>		

%20of%20Vacuum%20Diffusion%20Technology%20as%20an%20Anti-Entrapment%20System%20under%20VGBA.pdf [https://perma.cc/Y9CX-R446].

<sup>168</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, <https://perma.cc/TJT5-MW9L> (Nov. 11, 2019) <https://www.cpsc.gov/s3fs-public/RCA%20-%20Proposed%20ATV%20Action%20Plan%20of%20CRT%20Motor%20Inc.%20dba%20CRT%20Moto.pdf> [https://perma.cc/TJT5-MW9L].

<sup>169</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Fiscal Year (“FY”) 2020 Operating Plan (Oct. 16, 2019) [https://www.cpsc.gov/s3fs-public/Comm-MinFY2020OpPlan10\\_16\\_19.pdf](https://www.cpsc.gov/s3fs-public/Comm-MinFY2020OpPlan10_16_19.pdf) [https://perma.cc/MS63-D7PM].

<sup>170</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Final Rule Review Current Fireworks Regulation (Sept. 24, 2019) <https://www.cpsc.gov/s3fs-public/CommissionMeetingMinutesDecisionalMatterFinalRuletoReviewCurrentFireworksRegulation.pdf> [https://perma.cc/7FHN-UZYB].

<sup>171</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Petition CP 18-2: Labeling Requirements Regarding Slip-Resistance of Floor Coverings (July 26, 2019) <https://www.cpsc.gov/s3fs-public/RCA%20-%20Petition%20CP%2018-2%20Labeling%20Requirements%20Regarding%20Slip-Resistance%20of%20Floor%20Coverings.pdf> [https://perma.cc/8ML5-AJD6].

<sup>172</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, FY 2019 Mid-Year Review (May 22, 2019) [https://www.cpsc.gov/s3fs-public/FY2019MidYearReviewCommMtgMin5\\_22\\_19.pdf](https://www.cpsc.gov/s3fs-public/FY2019MidYearReviewCommMtgMin5_22_19.pdf) [https://perma.cc/5GEU-ESDZ].

<sup>173</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Petition CP 19-1 Requesting Rulemaking to Amend Safety Standard for Walk-Behind Power Lawn Mowers (Apr. 2, 2019) <https://www.cpsc.gov/s3fs-public/RCA-Petition-Requesting-Rulemaking-to>

VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Crossover	3/13/19	FY 2020 President's Budget <sup>174</sup>	<b>Kaye, Baiocco, Feldman</b>	<b>Buerkle* and Adler</b>	
Split	11/19/18	EKO Development, Ltd. and EKO USA, LLC - Recommendation to accept \$1 million settlement for alleged violations of the Consumer Product Safety Act <sup>175</sup>	Buerkle*, Baiocco and Feldman	<i>Adler and Kaye</i>	
Split	11/9/18	Vote Regarding Revised Proposed Settlement of In the Matter of Britax Child Safety, Inc., CPSC Docket No. 18-1 <sup>176</sup>	Buerkle*, Baiocco and Feldman	<i>Adler and Kaye</i>	
Crossover	10/10/18	Fiscal Year (“FY”) 2019 Operating Plan <sup>177</sup>	<b>Buerkle*, Adler, Baiocco, and Feldman</b>	<i>Kaye</i>	

Amend-Safety-Standard-for-Walk-Behind-Power-Lawn-Mowers-HSK.pdf [https://perma.cc/RN6R-NZ3P].

<sup>174</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, FY 2020 President’s Budget (Mar. 13, 2019) <https://www.cpsc.gov/s3fs-public/2020%20Performance%20Budget%20-%20Comm.%20Meeting%20Minutes.pdf> [https://perma.cc/G522-WCDY].

<sup>175</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, EKO Development, Ltd. and EKO USA, LLC - Recommendation to accept \$1 million settlement for alleged violations of the Consumer Product Safety Act (Nov. 19, 2018) [https://www.cpsc.gov/s3fs-public/RCA%20-%20EKO%20Settlement%20Agreement%20and%20Order%20-%2020111918\\_0.pdf](https://www.cpsc.gov/s3fs-public/RCA%20-%20EKO%20Settlement%20Agreement%20and%20Order%20-%2020111918_0.pdf) [https://perma.cc/NX8J-92W7].

<sup>176</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Vote Regarding Revised Proposed Settlement of In the Matter of Britax Child Safety, Inc., CPSC Docket No. 18-1 (Nov. 9, 2018) [https://www.cpsc.gov/s3fs-public/RCAVoteRegardingRevisedProposedSettlement-Britax-CPSCDocketNo%2018-1\\_%2020110918.pdf](https://www.cpsc.gov/s3fs-public/RCAVoteRegardingRevisedProposedSettlement-Britax-CPSCDocketNo%2018-1_%2020110918.pdf) [https://perma.cc/K4DH-ZJRV].

<sup>177</sup> Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Fiscal Year (“FY”) 2019 Operating Plan (Oct. 10, 2018) <https://www.cpsc.gov/s3fs-public/MinutesofCommissionMeetingFY2019OperatingPlanDecisionalOctober102018.pdf> [https://perma.cc/G9NJ-KNFN].

VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Unanimous	10/2/18	Costco Wholesale Corporation - Recommendation to accept proposed \$3.85 million settlement for alleged violations of the Consumer Product Safety Act <sup>178</sup>	Unanimous		
Unanimous	5/30/18	Resubmission of Petition to Mandate a Uniform Labeling Method for Traction of Floor Coverings, Floor Coverings with Coatings, and Treated Floor Coverings (CP 18-2) <sup>179</sup>	Unanimous		
Unanimous	5/17/18	Fiscal Year (“FY”) 2018 Midyear Review and Proposed Operating Plan Adjustments <sup>180</sup>	Unanimous		
Unanimous	3/2/18	Petition CP 18-1 Requesting Rulemaking to Exempt Certain Head Protection Devices from the Safety Standard for Bicycle Helmets <sup>181</sup>	Unanimous		

178 Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Costco Wholesale Corporation - Recommendation to accept proposed \$3.85 million settlement for alleged violations of the Consumer Product Safety Act (July 27, 2021) <https://www.cpsc.gov/s3fs-public/RCA%20-%20-%20Costco%20Wholesale%20Corporation%20-%20Proposed%20Settlement%20Agreement%20and%20Order%20100218.pdf> [<https://perma.cc/2YRN-HDLQ>].

179 Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Resubmission of Petition to Mandate a Uniform Labeling Method for Traction of Floor Coverings, Floor Coverings with Coatings, and Treated Floor Coverings (CP 18-2) (May 30, 2018) <https://www.cpsc.gov/s3fs-public/RCA%20-%20Petition%20CP%2018-2%20Requesting%20Labeling%20Method%20for%20Traction%20of%20Floor%20Coverings%20053018.pdf> [<https://perma.cc/CLP8-9KY5>].

180 Minutes of Commission Meeting, U.S. Consumer Prod. Safety Comm’n, Fiscal Year (“FY”) 2018 Midyear Review and Proposed Operating Plan Adjustments (May 17, 2018) <https://www.cpsc.gov/s3fs-public/Minutes%20of%20Commission%20Meeting%20-%20Decisional%20FY%202018%20Midyear%20Review%20and%20Proposed%20Operating%20Plan%20Adjustments%20051718.pdf> [<https://perma.cc/ABA4-ZRS4>].

181 Record of Commission Action, U.S. Consumer Prod. Safety Comm’n, Petition CP 18-1 Requesting Rulemaking to Exempt Certain Head Protection Devices from the Safety Standard for Bicycle Helmets (Mar. 2, 2018) <https://www.cpsc.gov/s3fs-public/RCA-Petition-CP-18-1-Requesting-Rulemaking-to-Exempt-Head-Protection-Devices-from-Bicycle-Helmet-Standard-030218.pdf?P.h6pu5x1zCp63YHa8igxSYYmL5T1wyg> [<https://perma.cc/YS4P-LCHV>].

TABLE 2. OPERATING BUDGET & STAFFING FOR THE EAC BETWEEN FY 2004–2021 (AUTHOR CREATED)<sup>182</sup>

FISCAL YEAR	FULL TIME STAFF	OPERATING BUDGET
2004*	18	\$1.7 million**
2005	22	\$10.8 million
2006	23	\$11.4 million
2007***	24	\$16.2 million
2008	34	\$16.5 million
2009	43	\$17.9 million
2010	50	\$17.9 million
2011	48	\$16.2 million
2012	38	\$11.5 million
2013	26	\$10.8 million
2014	22	\$10 million
2015	25	\$10 million
2016	31	\$9.6 million
2017	26	\$9.6 million
2018	29	\$10.1 million
2019	26	\$9.2 million
2020	37	\$15.1 million
2021	49	\$17 million
2022	65	\$22.8 million

\* First year of full EAC operations.

\*\* HAVA authorized up to \$10 million but Congress appropriated less in the first year as the EAC was still organizing itself.

\*\*\* In FY 2007, the full-time equivalent staffing ceiling of 23 was lifted.

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<sup>182</sup> SHANTON, *supra* note 41, at 13, 16. Additional data sourced from reports available at *Annual Reports*, U.S. ELECTION ASSISTANCE COMM'N, [https://www.eac.gov/about\\_the\\_eac/annual\\_reports.aspx](https://www.eac.gov/about_the_eac/annual_reports.aspx) [<https://perma.cc/6N4H-JPKD>], and from financial reports available at *Budget and Finance*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/about-eac/budget-and-finance> [<https://perma.cc/6AVY-KPUE>].

