

Senator Feinstein's Election Reform Bill Takes Elections Out of the Hands of the People

Senator Dianne Feinstein's bill S. 1487, "The Ballot Integrity Act of 2007,"¹ was introduced on May 24, 2007. Some were expecting it to be a companion to, and improvement on, Representative Holt's bill, H.R. 811. Far from an improvement, S. 1487 introduces surprising – and disturbing – new provisions.

The bill systematically dismantles government by the people, and it provides a legal excuse for expanding the disenfranchisement of "distinct communities" such as racial minorities.

What follows is a discussion of these disturbing provisions.

1. S. 1487 systematically dismantles government by the people.

Overview. The bill takes elections away from citizens, candidates, political parties, and States, and it places them under the control of the United States Election Assistance Commission (EAC) and corporations.

Elections are the way "we, the people" exercise our rightful control over our government, which was established to be subject to the consent of the governed. However, provisions throughout this bill orchestrate what would be a perilous situation in which the election system, start to finish, is under the control of the EAC, in collaboration with voting system manufacturers, with a nod to the State and local governments.

In 2002, the Help America Vote Act (HAVA) established the EAC as a temporary agency whose purpose was to assist the States in complying with new requirements spelled out in that legislation. Before HAVA, local governments made decisions about the administration of elections, thus allowing the people the greatest opportunity for control. HAVA took much of that decision making out of the hands of local government and placed it in the hands of State governments, where citizen control is remote and diluted, but still present.

S. 1487 places control of elections in the hands of four Presidential appointees, who have no direct accountability to the citizens and virtually no oversight. Under this bill, the EAC, in collaboration with corporations, would decide which voting systems would be allowed to record and count votes. The EAC would establish guidelines for how many such systems should be available at each poll site and for where early voting poll sites should be located. Corporations approved by the EAC would own and operate the proprietary (secret) software that records and counts our votes. The EAC, in collaboration with those corporations, would determine how to enforce that proprietary ownership. The EAC would determine who is accredited to observe at poll sites.

The EAC would also establish "model" procedures for the States to "consider" when conducting federally mandated audits. And, the EAC would review results of each audit and determine when election results could be certified.

¹ <http://www.govtrack.us/congress/billtext.xpd?bill=s110-1487>

The EAC would even decide the maximum undervote rate (no vote counted for a specific contest on a ballot) allowed for each jurisdiction, and it would rule on which jurisdictions would be allowed to report excessively high numbers of ballots with no votes for one or more federal offices.

The bottom line: S. 1487 would give the unelected members of the EAC ultimate control over elections.

Not even a nod to citizens.

More details about the dismantling are discussed below, divided into the following four sections:

- 1A. Every jurisdiction in the United States may have to upgrade its election equipment before 2010, and the EAC alone will decide which voting systems may be used.
- 1B. The “disclosure” provisions declare unequivocally that corporations, in league with the EAC, rightfully own and operate the secret counting of the votes in all states.
- 1C. The bill makes the EAC permanent, expands its authority into both enforcement and law-making, and gives these four Presidential appointees discretion that could impact the smooth conduct of elections and/or the outcomes of federal elections.
- 1D. S. 1487 usurps the roles of local and State election officials.

Or go directly to:

2. S. 1487 provides a legal excuse for expanding the disenfranchisement of “distinct communities” such as racial minorities.
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1A. Every jurisdiction in the United States may have to upgrade its election equipment before 2010, and the EAC alone will decide which voting systems may be used.

As of January 1, 2010, all voting systems may only contain software certified by the Election Assistance Commission. Not only are States limited to using systems that meet the guidelines established by the EAC, but they are also prohibited from using systems that have not been certified for use by the EAC.

Since no system currently in use has been certified by the EAC, all systems in all jurisdictions may have to be upgraded or replaced by that date. Only \$600 M is provided for this requirement.

In the past, States have always been fully responsible for certifying the voting equipment they used. But under S. 1487 States would be **prohibited** from taking full responsibility for their certification process. They could use **ONLY** equipment that the EAC has certified. This means that the EAC alone would decide the pool of equipment from which the states could choose.

Done well, the EAC process will be expensive, time-consuming, and burdensome. Done badly, voting systems could be certified based more on cronyism than on objective standards. The result could be anything, including a pool of nothing but DREs. And, the EAC could grant “emergency certification” to last-minute software changes just before a federal election.

Furthermore, if the EAC decertified a voting system already in use across the country, all jurisdictions using it would be forced to immediately switch to a certified system. The potential for corporate profit is unlimited.

1B. The “disclosure” provisions declare unequivocally that corporations, in league with the EAC, rightfully own and operate the secret counting of the votes in all states.

The section entitled “Disclosure” describes the terms and conditions by which public disclosure of voting system software is **prohibited**. S. 1487 closes the H.R. 811 loophole on “disclosure” that would allow determined States to pass laws to allow or require public disclosure. S. 1487 makes it clear that a voting system’s software is the trade secret and intellectual property of the corporation that manufactures it.

Going even further, the bill allows those corporations to assist in deciding how to enforce the trade secrecy of their software.

Since the bill also requires that all voting systems in use after 2010 be certified by the EAC, those four Presidential appointees will decide which corporations and which of their products will be in charge of the secret vote-counting process in every State.

As Teresa Hommel of WheresThePaper.org says: **“These paragraphs explicitly sell out American democracy to corporate commercial interests. The EAC and vendors, without other stakeholders such as states, parties, and citizens, will develop a process to protect private interests from public knowledge of how our elections are conducted.”**²

1C. The bill makes the EAC permanent, expands its authority into both enforcement and law-making, and gives these four Presidential appointees discretion that could impact the smooth conduct of elections and/or the outcomes of federal elections.

Reports from the Government Accountability Office reveal that the Election Assistance Commission is incompetent, behind schedule by years, and derelict in their duties. Recent news articles regarding their suppression and subsequent altering of a voter fraud report, along with their undisclosed disapproval of CIBER voting system test labs, has shown that the EAC is partisan and secretive. The process by which the 2005 federal voting systems standards were developed show that the agency is unduly influenced by the interests of voting system manufacturers. Nevertheless, S. 1487 makes this dysfunctional agency permanent and gives it unlimited funding by authorizing, “such sums as are necessary for the Commission to carry out this title.”

Not only does the bill give the EAC authority to determine how elections are to be administered at the State and local levels, but by making the EAC guidelines and certification process mandatory, this bill would also give the EAC power to override State and local preferences. The guidelines and certification process – established by these four Presidential appointees unaccountable to the public – would carry the same power as federal law.

Here are some of the expanded powers of the EAC under S. 1487:

- A. Authority to set the accuracy standard for voting equipment. HAVA set the standard in stone – 1 error in 500,000 votes. But S. 1487 changes that to whatever standard is adopted by the Commission.
- B. As of 2010, sole authority to determine the pool of voting systems available to states for use in holding elections for federal office (see #1A above).

² <http://www.wheresthepaper.org/S1487withCmt.htm>

- C. Authority to determine the “distinct communities” whose votes may be legally lost at a higher than normal rate (see #2 below).
 - D. Authority to grant “emergency certification” to voting systems whether they meet federal standards or not.
 - E. Authority to determine which software must be or must not be disclosed to State election officials.
 - F. Authority to determine the individuals to whom software will be disclosed for research purposes.
 - G. Authority to determine whether or not a State is in compliance with the security (chain of custody) requirements.
 - H. Authority to determine whether an “independent” testing lab is “sufficiently independent” from other interests.
 - I. Authority to determine which, if any, “experts” may observe the certification testing.
 - J. Authority to determine the “model audit” for States to “consider” when establishing their own audit process.
 - K. Authority to delay certification of an election until a State submits all the paperwork the Commission requests, at its discretion, regarding the audit.
 - L. Authority to determine the method by which voters will be notified that they are about to be removed from the voter rolls.
 - M. Authority to establish standards to govern the accreditation of the people authorized to observe election and which activities must be open to their observation.
 - N. Authority to establish rules governing administration of early voting (newly required in this bill), including geographic locations of poll sites.
 - O. Authority to determine what information is and is not essential on an overseas or military absentee ballot application and ballot, and what information is and is not necessary to prevent fraud.
- ... and more.

1D. S. 1487 usurps the roles of State and local election officials.

Election administration in the United States has always been local, with some oversight at the State level. This arrangement is one of the checks and balances in our governmental structure--it helps keep citizens in charge because we can have greatest control at the local level.

S. 1487 would take much decision-making out of local and State hands and move it to the federal level where citizens and local governments have the least power to be heard. One way S. 1487 does this is by making the EAC’s guidelines and certification process mandatory. The EAC consists of four Presidential appointees who are not accountable to citizens, local jurisdictions, or States. Yet under S. 1487, the EAC could force States and local jurisdictions to dramatically change how they conduct elections and what equipment they use. Under S. 1487, States and local jurisdictions would lose much of their local decision-making power.

S. 1487 also removes election administration from local control in other ways. The phrase, “The State shall” is used 30 times in the bill. For example, the State shall:

- ◆ Violate its own laws, if necessary to comply with the requirements of S. 1487.
- ◆ After 2010, use only voting systems certified by the EAC – all at the State’s expense.
- ◆ Institute no-excuse absentee voting – all at the State’s expense.
- ◆ Provide early voting – all at the State’s expense.
- ◆ Establish a poll worker training program and implement it – all at the State’s expense.
- ◆ Establish an audit procedure that meets the bill’s requirements and carry it out after each federal election – all at the State’s expense.
- ◆ NOT certify an election until the EAC has approved the State’s election audit report.
- ◆ Certify to the EAC its compliance with various mandates of the bill.

Under S. 1487, States will become administrative assistants to the EAC in the conduct of elections.

2. **S. 1487 provides a legal excuse for expanding the disenfranchisement of “distinct communities” such as racial minorities.**

Historically, racial minorities have been prevented from voting by violence, poll taxes, highly subjective literacy tests, police dogs, and so on. The Voting Rights Act of 1965 was landmark legislation to remove such obstacles and clear the path for all voters to have a voice in elections.

A shameful provision in S. 1487 functions as a Voting Rights Act in reverse. “They” (historically disenfranchised communities) would get to vote, but the bill allows for the future massive loss of “their” voices through machine malfunction or other means, while limiting the vote loss that would be acceptable in jurisdictions where “they” aren’t as predominant.

The bill would give the Election Assistance Commission the authority and discretion to review the historical disenfranchisement of “distinct communities” (such as racial minorities) in some jurisdictions and expand that disenfranchisement to all jurisdictions where those communities have a “substantial presence.”

A Brief Background on Undervoting. To understand how the bill provides a legal excuse for expanding the disenfranchisement of racial minorities and other “distinct communities,” some background information is necessary. An “undervote” for a particular contest occurs when a vote for that contest is not counted on a ballot. In a secret ballot system, such as we have in the U.S., it is impossible for anyone other than the voter to know whether an undervote is the voter’s choice or caused by a mis-tabulation of some kind.

Election administrators and others who study election returns agree that many voters intentionally undervote in down-ticket contests, such as “Judge” or “Proposition 2.” However, these experts also agree that the percentage of intentional undervotes in federal contests is very low, so researchers routinely study Presidential undervote rates to compare the accuracy of the tabulation process in various jurisdictions.

A Presidential undervote rate of 0.5% (1 undervote out of every 200 ballots) is generally thought to indicate that virtually all votes were tabulated. A rate of 2% (1 out of 50) or more is generally thought to suggest a possible breakdown in the tabulation process, such as an equipment malfunction or even deliberate disenfranchisement.

Results have surfaced in many minority precincts around the country where, for example, 8% of the ballots fail to record a vote for President, compared to 2% of ballots in majority white precincts. Attempts have been made to attribute this discrepancy to “indecision” or “lack of interest” of the minority voters, despite those voters’ claims to the contrary. Research confirms the voter’s claims,³ pointing instead to possibly flawed machines or outright election fraud.

What S. 1487 Would Do. The bill would give the EAC sole authority to establish a national maximum undervote percentage, called a “benchmark.” The purpose of undervote studies has always been to detect the loss of valid votes and attempt to identify and eliminate the causes. Such a benchmark could be valuable as a red flag to States to investigate potential tabulation problems in areas that exceeded the benchmark.

However, under S. 1487, the benchmark would not be used to spur investigation into potential tabulation problems. Instead, the bill would require the impossible. The benchmark would establish an undervote rate “that States may not exceed.” How does Congress expect States to control the undervote rate?

This and other questions the mandate raises suggest potential confusion and even danger as the details of enforcement would be worked out in the courts. What is the consequence if a State exceeded the benchmark? Would a State be required to adjust the vote count (after the canvass) to meet the benchmark? Would the election be void, would the State have to hold a new election, or would the State be penalized in some other way? The bill answers none of these questions.

But this bill is shameful as well as dangerous.

The bill states: “Congress finds that there are certain distinct communities in certain geographic areas that have historically high rates of intentional undervoting in elections for Federal office, relative to the rest of the Nation.”

This “finding” is a deceit. Remember, there is no way to determine the rate of **intentional** undervoting in a secret ballot system.

But the bill goes on to declare that the EAC may determine which “distinct communities” have a historically high **intentional** undervote rate and may either set a different benchmark for “local jurisdictions in which that distinct community has a substantial presence” or exempt those jurisdictions from compliance with the national benchmark. So, the exemption wouldn’t just apply to the jurisdictions that had the high undervote rate; it could apply to all jurisdictions across the country that have a “substantial presence” of that “distinct community.”

So, for example, the EAC might use the 2002 election fiasco in Florida’s Miami-Dade County to conclude that African American communities intentionally undervote at rates as high as 28% in federal contests.⁴ Then they could declare that all precincts across the

³ http://www.votersunite.org/info/NM_UVbyBallotTypeandEthnicity.pdf

⁴ http://www.aclufl.org/news_events/archive/2002/racialimpactrelease.cfm.

country with a “substantial presence” of African Americans will be allowed a higher Presidential undervote rate than other precincts.

Or, the EAC could use the scandalous 2004 election in New Mexico to conclude that precincts with predominantly Native American voters have three to four times as many lost votes for President as the national average.⁵ Then they could provide legal cover for the expanded disenfranchisement of Native American voters at that same rate, **in whatever jurisdictions across the country have a “substantial presence” of Native Americans.**

After the Civil War, one of the provisions aimed at excluding African Americans from voting allowed a person to vote only if his grandfather had the right to vote. S. 1487 follows that tradition by “grandfathering in” disenfranchisement in a new way.

Proposing to legitimize such a scheme in federal law is a disgrace.

Potential Consequences for Other “Distinct Communities.” Definitions are missing for two important terms in this provision – “distinct communities” and “substantial presence.” Instead, their interpretations are left to the discretion of the EAC, giving that agency the authority to “find” high intentional undervoting patterns nearly anywhere and extend that level of disenfranchisement to nearly anywhere.

Let's see how the recent Sarasota example could play out if this legislation became law.

In 2006, over 18,000 Sarasota County, Florida ballots showed undervotes in the 13th Congressional district contest -- a 13% undervote rate. Neighboring counties voting for the same contest had undervote rates ranging from 2% to 5%.

If the EAC looked at the demographics of Sarasota County, they'd find a "substantial presence" of elderly. The 65-and-over population of Sarasota County is 31.5%, which is the sixth highest among counties across the U.S. Would the EAC then conclude that a high undervote rate is acceptable in any U.S. county with 30% or more elderly voters? Or, since Florida has the highest 65+ population of any state in the country (17.6%), would the EAC declare that high undervotes across the entire state of Florida are permissible?

A Remarkable Perversion of Undervote Studies. The purpose of undervote rate studies is to detect the loss of valid votes and attempt to identify and eliminate the causes. However, in a remarkable perversion of that purpose, this bill grants the EAC authority to use such studies to expand the disenfranchisement of historically disenfranchised communities in some jurisdictions to other jurisdictions in which “they” are predominant.

Furthermore, this provision would deter investigation into the causes of high undervote rates where they are most needed. Instead, without evidence, it falsely asserts that the causes are already known, that this bill supplies sufficient remedies, and that the issue of undervoting needs no more investigation. High undervote rates reported in future elections could be used as justification for adjusting the benchmark for those and other jurisdictions – expanding the disenfranchisement even more.

⁵ http://www.votersunite.org/info/NM_UVbyMachineandEthnicity.pdf

3. Examples of Other Problems in the Bill

While the following problems pale in comparison to those discussed above, they are worth mentioning.

- ◆ Like H.R. 811, this bill fails to enforce the first requirement of HAVA, which requires that voting systems permit the voter to verify the ballot before the ballot is cast and counted. S. 1487 continues to allow the use of unverifiable, invisible, electrical charges inside a computer to count as ballots for the all-important initial count.
- ◆ The bill has flaws similar to H.R. 811 in the “ban” on wireless communications and Internet connections. S. 1487 bans only a few kinds of communications and allows enough other kinds that an election could easily be tampered with by remote communications.

And, an odd remark seems to prop a door open for future experiments with voting by the Internet – a concept dropped by the federal government several years ago after a task force the Department of Defense hired to study the idea reported that the structure of the Internet rendered it impossible to make Internet voting secure.⁶

Yet, S. 1487 states: “Nothing in this section shall be construed to prohibit any study on Internet voting required under this Act or any other provision of law.”

Since S. 1487 does not mention any study on Internet voting, is this comment in anticipation of an amendment to this bill or in anticipation of another bill to be introduced to study or require Internet voting?

- ◆ In contrast to H.R. 811, this bill does not require hand recounts of the voter-verified paper records it mandates.
- ◆ Recent elections have demonstrated that electronic voting equipment is extremely unreliable and vulnerable to tampering, and many people who support federal election reform are relying on audits of the paper records to ensure confidence in the results. Yet the expensive “audits” S. 1487 requires are mere spot checks, with nothing to prevent tamperers from knowing which precincts are to be audited well in advance of the start of the audit.

Please don't think that this paper exhausts the list of the problems with this bill. Read it for yourself at <http://www.govtrack.us/congress/billtext.xpd?bill=s110-1487>. Then call your Senators and **tell them that you oppose S. 1487**. Let them know that the bill reflects a poor understanding of the electronic voting machine industry, the use of electronic voting to disenfranchise minorities, and the past problems citizens and States have had with the EAC.

Tell them, also, that the bill's provisions are not supportive of the spirit of the Declaration of Independence and the United States Constitution, both of which express a conviction that the people – not the federal government – should have the ultimate authority.

Note: This report was originally entitled “A Constitutional Heresy.” The name was changed in order to describe the violation more precisely.

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⁶ A Security Analysis of the Secure Electronic Registration and Voting Experiment (SERVE), January 20, 2004, <http://www.servesecurityreport.org/>