Testimony of William M. Gardner

Regarding H.R. 672 to terminate the Election Assistance Commission
April 14, 2011

For the record Mr. Chairman and members of the Committee, I am Bill Gardner and am appearing before you in support of H.R. 672. For the last 35 years I have served as New Hampshire's secretary of state. I have been elected to the position 18 times for a 2-year term by secret ballot of the 400 members of the New Hampshire House of Representatives and the 24 members of the State Senate meeting in joint convention for that purpose. I am the Chief Election Officer. New Hampshire elects its governor and entire legislature every two years on a ballot that includes a dozen different offices for national, state and county positions. We have 223 towns and 13 cities and all state primary and general election ballots are printed by the secretary of state and distributed to each of those cities and towns for each state primary and general election. After each primary and general election, many, and sometimes all of those ballots are returned to the state capitol where recounts are conducted. I have personally conducted 380 recounts since 1976 including several statewide and congressional recounts over those years. After the 2010 mid-term state primary and election we conducted 28 recounts.

The EAC has continuously reached beyond the power granted in HAVA, despite ongoing resistance resulting in a statement and several resolutions approved by the National Association of Secretaries of State from 2004 to 2010**.** Given current trends, the nation is at risk of losing the states as laboratories of democracy. States with sound election practices are in danger of being forced to abide by the lowest common denominator in election administration.

As an historical example, when the Federal Election Commission was established by Congress in 1974, it had minimal authority over the states. But it quickly gained rulemaking authority and "occupied the field" entirely eliminating the ability of states to determine the rules for how federal candidates funded their campaigns and the reporting requirements that had previously been the purview of the states. In doing so, Congress established a pattern of federal takeover of territory previously covered by state election law.

On February 16, 2004, the four newly appointed members of the Election Assistance Commission made their first public debut at the winter meeting of the secretaries of state in Washington. At that meeting the EAC told the secretaries of state that it had a speedy plan to distribute funds to states for voting technology upgrades. At that time, the thorny issue of the safety and security of voting on electronic devices became the center of attention and was elevated in the minds of the voters. A controversy was brewing over whether states should be using DREs and those who wanted a paper trail. The states needed the EAC to hit the ground running and heal this open divide.

Simultaneously, Congressman Rush Holt (D-NJ) and Congressman Steve King (R-IA) were circulating separate legislation to require a paper trail for vote counting devices. Senators from both parties were engaged in introducing similar legislation.

Camps were separated between those who wanted paper trails and paper ballots and those who preferred DREs . The newly chosen EAC chair, DeForest "Buster" Soaries introduced the EAC by saying "We are a very diverse commission. We have an Hispanic lawyer, an Italian administrator, an African American executive and a Baptist preacher." He did not mention anything about their qualifications, as if the diversity of the members was all that mattered.

Out of the gate, before their first official meeting, Chairman Soaries stated, "We have some flaws, but the truth is that the error rates are very small with all technologies," He went on to say "Legislators are proposing solutions to a problem that doesn't exist. They're talking about 'What if?' scenarios." This was unfortunate, because the EAC had the opportunity to help move the country forward on a very

important election issue. It would have been helpful if the EAC had tried to bridge the divide between those who supported some sort of voting technology with paper and those who did not.

The first meeting of the EAC was on March 23, 2004. On April 19, 2004 and June 25, 2004, the newly elected EAC chair, sent letters to Condoleezza Rice, Assistant to the President for National Security Affairs, and Tom Ridge, Secretary of Homeland Security.

In his June 25, 2004 letters, EAC Chairman Soaries stated that "the federal government has no agency that has the statutory authority to cancel and reschedule a federal election." He appeared to be hinting that Mr. Ridge or Ms. Rice should seek emergency legislation empowering the Election Assistance Commission to make such a call in the event of a terrorist attack or other disaster.

EAC Chairman Soaries' letters set off a storm of outrage, and he responded by saying he had been misinterpreted. Articles appeared in Newsweek, Washington Post, and USA Today. In the State of New Hampshire, newspaper editorials quickly denounced this usurpation of power.

As NASS members were traveling across the country to the 2004 Summer Conference in New Orleans, the 100th anniversary of the association, much was being written and said about this issue in newspapers, magazines and on the national news reminding us that this country conducted elections in the middle of the Civil War and World Ward II, and asking questions about this upstart federal agency that was inserting itself where the states had always been. At that conference, the Secretaries crafted a letter to the EAC addressing EAC Chairman Soaries' comments on the possibility of cancelling elections in the event of a terrorist attack. NASS voted to send the following letter, dated July 20, 2004, to the EAC Commissioners:

"We write to you in response to recent statements attributed to the Election Assistance Commission (EAC) regarding the administering of elections in the event of a terrorist attack. As election officials, we acknowledge our responsibility to conduct elections fairly, encourage voters to participate, and continue to safeguard our polling places. Although we welcome the EAC's recommendations for implementing the election reforms mandated by the Help America Vote Act of 2002, we recognize that the EAC does not have rulemaking authority in this or any area of election reform. We need and encourage the EAC to focus on the duties for which it has responsibility…...

At that conference, NASS also adopted a "Statement on Administration of Elections" which included a list of duties of the states' chief election officials and a list of duties of the EAC under HAVA, as a reminder of what is each office's "respective election administration responsibilities".

The letter stated: "The administration and conduct of elections in the United States is chiefly the responsibility of state and county election officials."

Congress responded to this controversy on July 22, 2004 by voting 419-2 in support of a Congressional resolution that "No federal agency or individual should be given the authority to postpone the date of a national election..." This ended the first chapter of the EACs attempt to grasp for more authority.

During 2005, likely presidential contenders and a recent party nominee for president introduced legislation that would give the EAC a role in rulemaking authority over heretofore state run elections. Bills were introduced in both the House and the Senate which would strengthen the EAC and remove or alter the prohibition against rulemaking authority in HAVA.

- Senators Hillary Clinton (for Senators John Kerry, Barbara Boxer, Frank Lautenberg, and Barbara Mikulski) introduced S. 450: The Count Every Vote Act of 2005. Among other things, it called for "Strengthening the Election Assistance Commission" and Striking Section 09, the Section of HAVA that prohibits rulemaking by the EAC.

- John Conyers (D-Mich) introduced H.R. 533, The Voting Opportunity and Technology Enhancement Rights Act of 2005, which would have expanded EAC rulemaking over certain areas of state administration of elections.

On February 6, 2005, NASS, at its Winter Conference, adopted the following **resolution**:

"Recognizing the U.S. Election Assistance Commission (EAC) task as a limited one, Congress, in the Help America Vote Act of 2002 (HAVA) wisely authorized the EAC for only three years. Any duties assigned to the EAC can be completed by the National Institute of Standards and Technology or by the state and local election officials who make up the HAVA Standards Board and its Executive Committee. The National Association of Secretaries of State encourages Congress not to reauthorize or fund the EAC after the conclusion of the 2006 federal general election, and not to give rulemaking authority to the EAC.

"The secretaries believe that allowing the EAC to evolve into a regulatory body is contrary to the spirit of HAVA, and that by 2006 the EAC will have served its purpose. Congress should preserve the states' ability to serve as independent laboratories of change through successful experiments and innovation in election reform."

In light of the EAC's efforts to wrest power from the states by imposing regulations – against the explicit provisions of HAVA, Section 209, the following **resolution** was adopted on **February 11, 2007 at the NASS Winter Conference,** under the title of "NASS Approach to Federal Legislation":

"Members of Congress should respect our country's legal and historical distinctions in federal and state sovereignty and avoid preemptions of state authority when drafting federal legislation."

"Federal legislation should not curtail state innovation and authority solely for the sake of creating uniform methods among the states."

During the **2008 NASS Summer Conference, NASS** adopted a **resolution** reminding the EAC of the language in the Help America Vote Act of 2002, as follows: "Whereas, the Help America Vote Act of 2002 includes the following language:

"42 USC 15329 (PL 107-252, Section 209)"The (Election Assistance) Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-7(a))."

"42 U.S.C. 15403. (P.L. 107-252, Section 253(c)). "(c) The specific choices on the methods of complying with the elements of a State plan shall be left to the discretion of the states."

"42 U.S.C. 15485.(P.L. 107-252, Section 305): "The specific choices on the methods of complying with the requirements of this title (HAVA, Title III) shall be left to the discretion of the states."

Notwithstanding the above laws, the EAC asserted its right to apply OMB circulars, which are regulations (see Code of Federal Regulations number for each) to the administration of HAVA requirements "payments". In doing so, the EAC elected to conflate "payments" with "grants."

In its **2009 Summer Conference,** NASS passed a more explicit resolution, reminding the EAC that a "payment" is a "payment" and a "grant" is a "grant" and that EAC regulations are restricted to the administration of the NVRA under HAVA Section 209. The **2009 NASS resolution** states:

"Be it Resolved that the National Association of Secretaries of State finds that:

"1. Under HAVA, a "payment" is not a "grant" and a "grant" is not a "payment;" and

"2. In effectuating its duties under HAVA, the EAC should create an accurate administrative record by using the term "payment" when the federal law means "payment", and it should use the term "grant" when the federal law means "grant."

Since NASS issued its 2009 resolution, the states have to sign extensive documents acknowledging that they are subject to grant regulations before the EAC will send them HAVA requirements payments. This policy is clearly contrary to the plain language in Section 209 of HAVA, the 2009 NASS resolution and the 2008 and 2010 Government Accountability Office decisions below.

The Government Accountability Office has issued two decisions that relate to these EAC actions. The GAO had previously determined that the EAC must disburse requirements payments to a state if the state's chief election officer signs the certification set forth in HAVA. GAO Decision B-316915, issued September 25, 2008, states as follows:

"EAC has no evaluative role. States must simply file a statement that the governor, or chief executive officer of the state, "hereby certifies that it is in compliance with the requirements" under HAVA. 42 U.S.C. § 15403(a). Whether a state will so certify is the only uncertainty and only affects EAC payment and the state's receipt of its formula amount."

"An obligation serves as the basis for the scheme of funds control that Congress envisioned in the various fiscal laws, including the Anti-deficiency Act. *See* B-300480, Apr. 9, 2003. For that reason, the eventual payment is not determinative of when an agency should record an obligation. Here, by operation of law, the state may fulfill the preconditions and be entitled to receipt of the funds through no actions on the part of the agency. Thus EAC has an obligation by operation of law and should record the obligation in its funds control system."

On April 28, 2010, the GAO took issue with the EAC policy of conflating grants with payments in its Decision # B-318831. In it, the GAO generally refuted EAC efforts to conflate "grants" with "payments," notwithstanding the following:

> (a) Tom Wilkey's letter to the New Hampshire Department of State dated March 18, 2009 stating that the GAO had already, in Decision B-303927, "affirmed the EAC's determination that HAVA' Section 251 payments are grants."
>
> (b) Testimony by the EAC Grants Director on September 2, 2009 before the EAC Commissioners, in which the Grants Director argued that legislative history should be the basis for interpretation of HAVA on the subject of "grants" and "payments."

GAO Decision B-318831 states, "To determine the purpose of an appropriation, the starting point is the plain meaning of the statute. If the statutory language provides an unambiguous expression of the intent of Congress, then the inquiry ends there. … While views expressed in legislative history may be relevant in statutory interpretation, those views are not a substitute for the statue itself where the statute is clear on its face."

These examples show that the EAC unnecessarily makes work for itself to justify its existence. By the date of the February, 2005 NASS Conference, NASS members were told the EAC had eight full-time staff members. Some of the secretaries were concerned that the EAC would just continue to expand and there would be a continual reach for more programs and rule-making. In 2010 we were told that the EAC had 50 full-time staff.

The NASS resolution in 2005 was an attempt to prevent a likely outcome that the secretaries foresaw. By 2010, what we anticipated the EAC might do had transpired. After the EAC had failed to respond to the secretaries' repeated resolutions, NASS, at its **2010 Summer Conference** in Rhode Island, adopted a **resolution** renewing the 2005 call to terminate the EAC. In both of its NASS 2005 and 2010 resolutions,

NASS indicated that "any duties assigned to the EAC can be completed by the National Institute of Standards and Technology or by the state and local election officials who make up the HAVA Standards Board and its Executive Committee. I agree that the Standards Board should continue in some form.

H.R. 672 would eliminate the Technical Guidelines Development Committee (TGDC). I think the TGDC added value when it met. However, the EAC has only convened the TGDC once since 2007. The EAC has failed to continue this important work. There is an obvious need to assist the states and local jurisdictions, the voting systems industry, and the general public to plan for new generations of voting systems, to replace the states' aging inventories. A transition to an agency that can provide practical direction under H.R. 672 could provide an opportunity for the TGDC to continue its important task.

I also want to offer reasons why certain EAC responsibilities could be transferred to NIST. NIST has an international reputation for credibility that U.S. manufacturing and particularly exporters depend on. If NIST loses its credibility, U.S. industry and jobs will pay the price. This represents a natural built-in credibility check that NIST cannot afford to compromise.

Traditionally, NIST has worked with industry and trade groups to establish reasonable standards that will foster domestic and international trade. It regularly convenes industry groups that come from widely divergent positions on technical matters, and helps them to cooperate in setting credible uniform standards. For over 100 years, NIST has been doing in other industries what the states still need in the voting systems industry.

It is my impression that NIST has done the work delegated by HAVA, including developing testing criteria and testing protocols, and advising and chairing the TGDC. Relying on its existing National Voluntary Laboratory Accreditation Program (NVLAP), NIST has established a new regime for selecting independent labs to assess voting systems. It did not have to reinvent the wheel to do so, because it already had many of these protocols in place. NIST has insisted in ensuring that Voluntary Voting System Standards are written to correspond to practical testing protocols, so that Voting System Test Laboratories can conduct tests to clear standards.

A decision to give authority to NIST in H.R. 672 would be a decision to opt for more credibility and more action in this important arena.

The EAC's role in producing best practices and its Quick Start Brochures is not something I would consider as being of value to my state. What would be a best practice in my state, as I have mentioned earlier, might not be an option in other states because of differences in our customs and law in administering elections. When I have asked local election officials if they felt any of the Quick Start Brochures were helpful, there was no enthusiasm. I would add that the Quick Start Brochures on recounts were too elementary to be useful. There are some bigger issues, like provisional balloting and voter ID that the EAC has been directed to study. But these studies have been so controversial that few states have been inclined to follow them.

I want to give you an example of how faith in universally applied election solutions can be misplaced. National voter turnout statistics reveal that far reaching and intrusive federal election laws do not necessarily have the anticipated or promised effect.

The National Voter Registration Act was adopted to improve voter participation, which is, on its face, a measure of the legitimacy of government. We have relied on figures from Dr. Michael P. McDonald of George Mason University and the Federal Election Commission. We have started with Voting Eligible Population (VEP) since 1980, when Dr. McDonald began using this statistic, and Voting Age Population (VAP), since 1974, when 18 year-olds became eligible to vote, with voter turnout numbers based on highest office rates (the only numbers consistently available from all states).

When we look at each mid-term election, starting in 1982 through 1995 when the NVRA took effect in most states - 1982, 1986, 1990 and 1994 – national voter turnout based on VEP averaged 39.9%. After the NVRA - 1998, 2002, 2006, and 2010 - national voter turnout based on VEP averaged 39.7%. If you rely on VAP since 1972, when 18 year-olds were first allowed to vote, national voter turnout averaged 37.8 % through 1995, when the NVRA was adopted. After 1995, national voter turnout based on VAP declined to 36.7%.

For presidential elections, our numbers indicate that starting in 1980, when Dr. McDonald first began tracking the VEP statistic, through 1995, when the NVRA took effect in most states – 1980, 1984, 1988, and 1992 - national voter turnout in presidential election years based on VEP averaged 55.1%. After the NVRA became effective - 1996, 2000, 2004, and 2008 - national voter turnout based on VEP was 56.9%. If you rely on VAP since 1972, when 18 year-olds were first allowed to vote, national voter turnout in presidential election years averaged 53.3% through 1995. After the NVRA was adopted, national voter turnout based on VAP declined to 52.6%.

One can argue that VEP is a better measure than VAP because of immigration or prison populations, although VEP was not tracked as long as VAP**.** Still, the NVRA effect on turnout in midterm elections, if it had one, seems to be a decline, while the NVRA effect on turnout in presidential election years may be a small increase.

It is my experience that the States, through experimentation and experience, can be more effective at achieving high turnout without risking voter fraud or undermining the credibility of elections. Note that New Hampshire, while exempt from the NVRA, has consistently achieved among the highest voter participation rates in the country.

Had New Hampshire been obligated to comply with the NVRA, I doubt that our state's participation rates would have matched what they are today. I believe States should continue to serve as independent laboratories of change with less intervention by the federal government.

I strongly believe we can and should learn a lot from our past experiences, such as the evolution of regulatory power at the FEC, the aggressive efforts of the EAC to expand their authority beyond HAVA, the quiet effectiveness of NIST, and the lack of the NVRA in achieving higher turnout. These are things we should bear in mind as we proceed and as H.R. 672 evolves. Thank you for this opportunity to speak in favor of this bill.