

EAC Authority if the Commission Falls Below Three Members

Federal law establishes an approval floor for action by the U.S. Election Assistance Commission (EAC).¹ The Help America Vote Act (HAVA) provides that “any action which the Commission is authorized to carry out under this chapter may be carried out only with the approval of at least three of its members.” 52 U.S.C. § 20928. Although the section heading references “majority approval,” the operative statutory language requires three affirmative votes regardless of how many seats are filled. Section 20928 thus operates as a substantive approval requirement rather than a traditional quorum rule. As a result, the Commission may act with either three or four commissioners seated but cannot lawfully take any Commission action if fewer than three commissioners are available.

Seated Commissioners	Possible Votes	§ 20928 Satisfied?
4 seated	3 approve	Yes
3 seated	3 approve	Yes
2 seated	Max = 2	No
1 seated	Max = 1	No
0 seated	Max = 0	No

When the Commission falls below three members, its *policymaking* authority stops. In that posture, the EAC lacks legal authority to adopt or amend the Voluntary Voting System Guidelines (VVSG), accredit or revoke Voting System Test Laboratories (VSTLs), establish or modify certification programs, or take any discretionary action reserved to the Commission under HAVA. See 52 U.S.C. §§ 20922, 20962, 20971(a)–(b). This constraint applies regardless of whether vacancies arise from resignation, removal, or term expiration.

At the same time, HAVA does not dissolve the agency when commissioner seats are vacant. The statute expressly provides for an Executive Director and staff and contains no requirement that the EAC cease operations absent three commissioners. 52 U.S.C. § 20924. Read together, these provisions contemplate continuity of operations even when the Commission itself cannot act. Rather, the agency enters a caretaker posture, in which staff may continue administering existing programs and executing previously authorized delegations but may not engage in policymaking or program expansion. In 2008, the Commission adopted *The Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission*, which expressly distinguished between policy decisions reserved to a vote of at least three commissioners and day-to-day execution delegated to the Executive Director, including responsibility to “provide for the testing and certification of voting systems to Federal

¹ A “quorum” the minimum number of members of a deliberative body who must be *present* at a meeting to legally transact business or make actions valid. Whereas an “approval floor” is the minimum number of affirmative votes required for a specific motion or action to pass.

standards consistent with EAC manuals and policies.”² This distinction explains why voting system certifications continued during the 2011–2014 period, when the EAC had fewer than three commissioners and, for a time, no commissioners at all. For example, in 2012 and 2013, EAC issued certifications for updated voting system versions—such as the ES&S EVS 5.0.0.0 (certified May 16, 2013) and Dominion Democracy Suite 4.0 (certified May 10, 2012)—despite having no commissioners at those times.

In *Kobach v. U.S. Election Assistance Commission*, the Tenth Circuit upheld the EAC Executive Director’s actions taken during the quorum-less period where those actions fell within a lawful subdelegation the Commission adopted when it had a quorum. The court explained that such a delegation does not lapse in the Commission’s absence, likening it to a “faithful servant who continues to follow his master’s orders even while his master is absent.” 772 F.3d 1183, 1194–95 (10th Cir. 2014).

Moreover, no court invalidated voting system certifications issued during this period, and the Commission, once reconstituted in 2015, neither rescinded nor repudiated those certifications. There was also no formal, affirmative ratification vote by the reconstituted Commission expressly approving or retroactively validating staff-issued certifications from the 2011–2014 period. Nevertheless, after the full Commission was appointed in 2015, the EAC adopted the *Organizational Management Policy Statement*, which superseded prior role statements and expressly addressed continuity, succession, and ongoing operations in the event of vacancies.³ That policy formalized an order of succession and clarified that delegated operational authority including voting system certification continues to be exercised by the Executive Director or successor officials during periods of commissioner vacancy, while reaffirming that policymaking authority remains exclusively with the Commission acting by the statutorily required vote. The adoption of this policy by a fully constituted Commission reinforces that staff-executed certification was viewed as operational execution rather than ultra vires policymaking.

When the Commission lacks three members, staff authority is frozen at the outer limit of the last valid Commission approval. Staff may execute existing certification programs but may not expand their scope, change standards, or create new regimes absent renewed three-member approval. For voting system certifications, this means certifications may continue only under previously adopted VVSG and program rules. For newer initiatives, such as the Election Supporting Technology Evaluation Program (ESTEP), continued operation in any future loss-of-floor scenario depends entirely on the scope and delegations approved by a three-member Commission vote.

In conclusion, the loss of three or more commissioners does not shut the EAC down. Operations continue via staff and existing certifications remain legally defensible, but policymaking authority remains suspended until at least three commissioners are seated and concur.

² https://www.eac.gov/sites/default/files/document_library/files/eac_20roles_20and_20responsibilities_20december_2027_202010.pdf.pdf.

³ https://www.eac.gov/sites/default/files/eac_assets/1/28/EAC%20Organizational%20Management%20Policy%20Statement%20%20Adopted%20-24-15.pdf.