Implementing the Help America Vote Act

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DURING NOVEMBER AND DECEMBER OF 2000, most of the world was bewildered by our struggle to end the election for President. Images of people holding punch cards up to the light to evaluate the position of chad did not instill confidence in anyone about the method of determining who won. Few of us had previously considered what happened to a ballot once we dropped it in a collection box. Stories emerged of voters showing up at the polls only to be told they were not on the register of eligible voters, yet we were ignorant of the way that those registration lists were compiled or maintained. Americans never really considered how poll workers were recruited or trained, only that voters were grumpy when poll workers did not seem to know what they were doing.

In the aftermath of the election, many commissions and task forces were created to identify the problems and institute remedies. States initiated legislative reforms. At the national level, the Congress began to consider legislation in earnest and, after intense negotiation, passed the Help America Vote Act (“HAVA”) in October 2002. States are now in the process of making improvements to meet their HAVA obligations by the January 1, 2006 deadline.

This paper describes the central events leading to the passage of HAVA, explains HAVA, and examines the pattern of state plans to implement HAVA. The paper closes with a discussion of (1) issues that impede HAVA implementation by the deadline, (2) issues that were not addressed in the legislation, and (3) reasons why it is difficult to emulate the more efficient and non-partisan election regimes of both Canada and Mexico.

THE NATURE OF AMERICAN ELECTION ADMINISTRATION

The 2000 election made us all dimly aware of the intricacies of our elections. We learned about the high degree of decentralization merely from watching television reports of the court actions in more than six Florida counties, all seemingly independent from each other and from any significant state control. We also learned about the massive number of people involved in a recount as we watched the lines of observers line up day after day at the Emergency Operations Centers of Broward and Palm Beach counties. These institutional arrangements were not peculiar to Florida. As we have learned since 2000, U.S. elections are very complex undertakings:

When one looks at America’s election system, one cannot help but be impressed with how well it works, given the enormous complexity, the lack of resources, and the extremely high expectations. To illustrate, the 2000 election produced a turnout of approximately one hundred million (100,000,000) voters and ended in a statistical tie. . . . Ballots were counted using five different technologies and dozens of different products. Voting was conducted at approximately two hundred thousand (200,000) polling precincts, staffed by approximately one point four million.

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(1,400,000) poll workers who were recruited from the local citizenry to work one day in performing America’s most important public function. The vast majority of these poll workers received little training, worked 14 or more hours on the job and were paid minimum wage or less. While the dedication and commitment of these citizens is unquestionable, the reality is that they are plucked from their daily lives and jobs to perform a task a few times a year for which they have little expertise. The election process was supervised by approximately twenty thousand (20,000) election administrators.¹

At the same time, the costs of elections and voter registration have been borne, for the most part, not by the state or federal governments, but by local governments and by them only reluctantly:

The federal government bears no cost for the election of federal offices. Generally, state governments bear no cost for the election of legislatures, governors, state officers and judges. When local public policy makers are confronted with decisions such as buying new fire trucks, disposing of garbage, adding police officers or building and paving roads, etc., or to buy new voting equipment, pay election workers adequately or fund additional training, the decision usually does not favor the election improvements.²

This institutional arrangement could not bear the strain of such a close national election. The result in 2000, unlike the prior election crises of 1800, 1824 and 1876, was that:

Every aspect of the election process was put under a microscope and viewed by an anxious nation that saw controversial ballot design; antiquated and error-prone voting machines; subjective and capricious processes for counting votes; rolls that let unqualified voters vote in some counties and turned away qualified voters in others; confusion in the treatment of overseas military ballots; and a political process subjected to protracted litigation.³

THE BUSH v. GORE PRINCIPLES

Whatever one thinks of the Supreme Court’s handling of the Florida recount, the Court’s ultimate decision in Bush v. Gore⁴ highlighted a number of very important points about America’s election administration. Most importantly, the Court pointed out that the machinery, for a variety of reasons, does not count all the votes that are cast:

The closeness of this election, and the multitude of legal challenges . . . have brought into sharp focus a common, if heretofore unnoticed phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot.⁵

Further, the various voting system types in use (paper ballot, lever, punch card, optical scan or touch screen equipment) can have markedly different levels of effectiveness. Finally, the standards for determining when to accept a ballot not conforming to the norm for each system vary widely (if not wildly). Responding to what was initially a last minute argument by the lawyers for George Bush, the Court agreed that there was a significant equal

² Election Center at 3, 30. The Ford/Carter Commission noted that election administration gets so little funding nationally that we do not know in fact how much is spent. Ford/Carter at 68.
³ Ford/Carter at 37.
⁵ Id. at 103.
protection problem about the handling of the Florida recount and inferentially a significant equal protection problem nationally:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.6

Discussing the various specific inequalities in a dissenting opinion, Justice Souter stated that:

Petitioners have raised an equal protection claim . . . in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters’ intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence . . . here suggests that a different order of disparity obtains under rules for determining a voter’s intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as “hanging” or “dimpled” chads). . . . I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters’ fundamental rights. The differences appear wholly arbitrary.7

Justice Breyer made similar observations in his dissenting opinion:

The manual recount would itself redress a problem of unequal treatment of ballots. As Justice Souter points out, . . . the ballots of voters in counties that use punch card systems are more likely to be disqualified than those in counties using optical-scanning systems. . . . Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties’ selection of different voting machines rather than a court order makes the outcome any more fair.8

Whatever the precedential strength of the Court’s opinion in Bush v. Gore, the disparate voting systems, disparate error rates and disparate counting standards have resulted in searching probes into how we run our elections.

POST-2000 STUDIES AND CONGRESSIONAL ACTIVITY

In the immediate aftermath of the election and the Supreme Court decision, a host of studies were launched to investigate what went wrong in the 2000 election and what improvements could be made. The most well known was that by a private commission headed by former Presidents Ford and Carter.9 Other notable reports affecting the debate included a series by the United States General Accounting

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6 Id. at 104–05. The Court did try to limit its opinion to the case before it:

The recount process, in its feature here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each vote in the special instance of a statewide recount under the authority of a single judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. (Id. at 109)

But while the Court’s ruling contained these limiting statements, the general principles of what was wrong with U.S. elections clearly was not limited to Florida. 7 Id. at 134 (Souter, J., dissenting).

7 Id. at 147 (Breyer, J., dissenting).

8 See n.1 supra.
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Offices as well as ones by the Constitution Project, the National Association of Counties (NACo) and the National Association of County Recorders, Election Officials, and Clerks (NACRC), the Election Center, the CalTech/MIT Voting Technology Project, and the United States Commission on Civil Rights.


On May 10, 2001, Rep. Bob Ney (the Republican Chairman of the Committee on House Administration) and Rep. Hoyer (the ranking minority Member) announced their intention to develop and introduce a bipartisan election reform bill. That bill, H.R. 3295, was introduced on November 14, 2001. The Committee reported the bill out the next day (with only an amendment regarding voting on military bases) by a vote of 8 to 0. By December 3rd, the bill had 142 co-sponsors. When the full House considered the bill under a closed (no amendment) rule on December 12, 2001, the floor managers defeated a motion to recommit 197–226 (Republicans: 1 Y, 214 N; Democrats: 195 Y, 11 N). In the Senate, shortly after the introduction of S. 953, Sen. Jeffords announced his shift to independent status, and control of the Senate shifted to the Democrats, making Sen. Dodd the Chairman of the Senate Rules and Administration Committee and Sen. McConnell the ranking minority Member. By now the Dodd bill had the support of all 50 Senate Democrats. On August 2, 2001, the Senate Rules Committee’s Democrats reported S. 565 out of Committee without any amendments, after refusing to allow S. 953 to be considered by the Committee as a competing measure. The Committee’s Republican members boycotted the markup.

On December 13, 2001, the day after the House passed H.R. 3295, Sen. Dodd and McConnell announced they had reached an agreement in principle on a compromise between their two bills. The actual text, taking the form of an amendment (SA 2688) to S. 565 was introduced by Sen. Dodd on December 19, 2001.

When the bill was first considered on the Senate floor on February 13, 2002, Sen. Dodd called up and passed his amendment. The bill was then further amended. A number of the adopted amendments were significant and affected the subsequent House-Senate conference by including positions to be defended or removed. Other amendments were defeated, affecting the Conference by removing certain possible initiatives. On April 10th, a final compromise was reached. S. 565 passed the Senate 99–1 on April 11, 2002.
For several months thereafter, there was no meaningful action to get the conference underway. By the end of July there were public bursts of exasperation (from both the Democrats and Republicans through press conferences and counter press releases) over the lack of progress toward a final House-Senate compromise, with the substantive struggles focused on (1) the number of federal requirements to be imposed upon the states, (2) the specific requirement for first-time voters who register by mail to show identification ("ID") at the polling place, (3) the requirement for registration applicants to include in their applications their full Social Security numbers ("SSN"), (4) how much power the Justice Department would have to enforce the new requirements, and (5) a private right of action for enforcement of the states' new obligations. As described by Rep. Hoyer:

"'Everyone agrees that we should make it easier to vote . . . and we should make it hard to cheat. . . . You can do things that make it easier to vote, but also make it easier to cheat. Or you can do things that make it harder to cheat, but can also impede voting.'\(^25\)

By September, many involved in the conference process were describing the prospects for agreement as "bleak.\(^26\) Yet on October 4, 2002, the conferees announced that they had reached agreement. It was generally recognized that the agreement occurred because of the intensive personal involvement of Rep. Ney, Rep. Hoyer and Sen. Dodd. The Conference Report was filed on October 8, 2002,\(^27\) and the bill overwhelmingly passed the House on October 10th, the Senate on October 16th, and was signed into law on October 29, 2002.\(^28\)


Title I grant program

HAVA Title I authorized a $650 million General Services Administration ("GSA") program of payments to the states. Section 101 payments (half of the money) could, under Section 101(b), be used for eight enumerated general election administration purposes, including compliance with HAVA Title III and the acquisition of voting systems. The funds were to be distributed based on a minimum payment plus an additional sum derived from the states' respective voting age populations. Section 102 authorized payments (the other half of the $650 million) to states for the replacement of punch card or lever voting machines in those precincts that used such machines in the November 2000 election. If a state chose to receive such a payment, it had to commit to replacing all such machines in such precincts in time for the November 2004 election, extendible for good cause until the first general election (including a primary) held after January 1, 2006. The authorized amount was at best $4,000 per qualifying precinct.

Title II election assistance commission and requirements grants

Title II established the Election Assistance Commission ("EAC") to serve as an information clearing house, oversee the testing, certification, decertification and recertification of voting system hardware and software, provide election assistance and adopt voluntary guidance (Section 202). The EAC was designed to have as little regulatory power as possible. It has an even number of Members (four), any Commission action requires the approval of three Members (not a majority of sitting Members) (Sections 203 and 208), and for the most part it cannot "issue any rule, promulgate any regulation, or take any other action" imposing a requirement on any state or unit of local government (Section 209).

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Requirements for voting systems. Under HAVA Section 301, effective on or after January 1, 2006, voting systems are to: (1) Permit the voter to verify the votes selected before the ballot is cast; (2) Provide the voter the opportunity to change or correct the ballot before it is cast; (3) If the voter overvotes for a particular race, the system must: (a) Notify the voter that the voter had overvoted; (b) Notify the voter of the effect of overvoting; and (c) Provide the voter an opportunity to correct (Section 301(a)(1)(A)). The provision does not compel these requirements for voting systems that are based on paper ballots provided the jurisdiction establishes a voter education program with instructions to the voter on how to correct the ballot before it is cast (Section 301(a)(1)(B)). All the systems also are required to: (4) Produce a permanent paper record with a manual audit capacity (Section 301(a)(2)); (5) Be accessible for individuals with disabilities, with the same opportunity for access and participation, including privacy and independence, as for other voters (Section 301(a)(3)); (6) Meet the preexisting alternative language requirements of the Voting Rights Act\(^2\) (Section 301(a)(4)); and (7) Meet the laboratory (“out of the box”) error rate requirements of the existing Federal Election Commission’s existing Voting System Standards (“VSS”) (Section 301(a)(5)). Finally, each state is to adopt a uniform standard for what constitutes a vote for each category of voting system used in the state (Section 301(a)(6)).

Title III requirements

Title III contains minimum requirements (Section 304) for voting systems (Section 301), provisional voting and required information for voters (Section 302), computerized statewide voter registration lists (Section 303(a)) and requirements for first-time voters who register by mail (Section 303(b)).

Requirements for provisional balloting and voter information. HAVA Section 302(a) provides that, effective January 1, 2004, if an individual declares, through a written affirmation, that he or she is (1) a registered voter in the jurisdiction in which he or she wishes to vote and (2) eligible to vote in that election, then the individual is entitled to...
individual has an automatic right to file a provisional ballot if the individual’s name does not appear on the official list of eligible voters for that polling place or an election official asserts that the person is not eligible to vote. HAVA Section 302(b), also effective January 1, 2004, requires the public posting of the following information at each polling place on the day of election: (1) A sample version of the ballot; (2) Information about the hours in which the polling place will be open; (3) Instructions on how to vote, including how to cast a provisional ballot; (4) Instructions for mail-in registrants and first-time voters (relevant to the ID requirements); (5) General information on voting rights including how to contact the appropriate officials in the event of a violation of those rights; and (6) General information on federal and state law prohibitions against fraud and misrepresentation.

Computerized statewide voter registration lists. HAVA Section 303(a), effective January 1, 2004 but extendable for good cause to January 1, 2006, is designed to force states to create: “[A] single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level.” The list is to be the official list of registered voters throughout the state and is to contain a unique identifier for each voter. The list is to be “coordinated” with other state agency databases (in particular, records on felons and on deaths) and immediately accessible electronically by “any election official” in the state. The list is to be maintained in accordance with the requirements of the National Voter Registration Act of 1993 (“NVRA”).30 For new registration applicants, the application is not to be “accepted or processed” unless the application contains the applicant’s driver’s license number or, lacking one, the last four digits of the applicant’s Social Security number. If the applicant has neither a driver’s license nor Social Security number, the state is to assign a unique identifying number to the applicant. The official in charge of the State Motor Vehicle Authority additionally is to enter into an agreement with the Social Security Commissioner for the Commissioner to verify certain of the applicant’s information (name, date of birth, Social Security number and whether or not shown in Social Security records as deceased) for persons submitting the last four digits of their Social Security number instead of a driver’s license number.

Identification requirements for voters who register by mail. HAVA Section 303(b), effective January 1, 2004, requires a voter who registers in a jurisdiction by mail, who has not previously voted in the state in an election for federal office or who has previously not voted in the jurisdiction and the jurisdiction is in a state not having a Section 303(a) statewide voter list, to present a photo ID or one of a number of documentary identifications when voting for the first time in person (or photocopies of such documents when voting for the first time by mail). If the person does not present such identification, the person’s ballot will be treated as a provisional ballot. However, if the person at the time of the mail registration provides his or her driver’s license number or SSN last four digits, and the state can match the information with an existing state identification record, then the person need not bring the identification document to the polls or submit a photocopy at the time of an absentee vote. Because of the “has not previously” language, this ID requirement applies only once to a new registrant, and should not apply at all to preexisting registrants.

Title IV enforcement

HAVA Title IV establishes two forms of remedy if the requirements of HAVA are not met. Under HAVA Section 401, the Department of Justice can seek declaratory or injunctive relief to carry out the HAVA Sections 301, 302 and 303 requirements. In addition, under HAVA

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Section 402(a), the states are to establish administrative complaint procedures under which: (1) Any person believing that there has been a Title III violation can file a sworn, notarized written complaint; (2) The complainant can insist on a hearing regarding the complaint; and (3) If the state determines that there has been a violation, the state “shall provide the appropriate remedy.” The state is to reach its determination within 90 days of the filing of the complaint unless the complainant agrees to an extension. If the state fails to meet the 90-day deadline, there is to be a 60-day alternative dispute resolution procedure. There is no federal requirement for an opportunity to go to court for a dissatisfied complainant.

THE STATE PLANS FOR IMPLEMENTATION

HAVA has the effect of moving from an environment of local control with loose state and limited federal oversight to an environment of strong state control and loose federal oversight. Many states before HAVA had very few state employees to address the issues addressed by HAVA. Thus, the requirement for submitting state plans, with explicit topics to be included, was essential for galvanizing the state governments. In addition, mandating procedures for public participation and public comment was meant to mitigate political opposition to subsequent state action.

The eligible 50 states, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands all filed their plans with the FEC’s Office of Election Administration (“OEA”) (as proxy for the EAC before its creation). My review of the plans of the 50 states, the District of Columbia and Puerto Rico shows them mostly following the HAVA mandated structure. The vast bulk of the texts give little indication of how the states actually intend to fulfill the HAVA requirements. This is not surprising inasmuch as congressional staff urged the states to file their plans as soon as possible so that they could receive their funds from the EAC quickly. Clearly, the 10.5 month delay in creating the Commission has made the haste unnecessary. Nonetheless, many contain initiatives that other states can profitably copy.

Funding

Because of the federal funding uncertainty at the time the plans were filed, many states premised their plans on only the level of appropriated federal funds enacted or announced. Other states assumed full funding but with misgivings. The funding uncertainty had additional negative effects. For instance, one state saw virtue in delaying its decision on a new voting system pending better information about future federal funding levels.

As for the distribution of the funds within a state, one state chose not to distribute any to local governments in order to cut down on cumulative overhead:

If the state uses the . . . payments for election administration infrastructure rather than distributing funds, local government does not have to expend additional resources monitoring compliance to ensure the integrity of the use of the funds. If the state makes the infrastructure investment . . . it avoids using limited federal funds to monitor the performance of local government.
Other states were willing to make distributions, but a number included in their plans a maintenance of effort requirement on the counties analogous to the HAVA requirement on the states.50 Several are using their buying power to save money on voting system purchases, buying on behalf of their counties and, in some cases, possibly in combination with other states.51 Other states are trying to economize by inducements or pressure upon the counties (instance, to reduce the number of precincts or polling places).52

**Before election day**

**Statewide registration lists.** Most states are aggressively working to create HAVA compliant centrally-run registries. Several states identified additional incentives for promptly building their lists: To define the subset of mail-in registrants, thereby reducing the number of voters required to produce identification (in turn reducing the number of November 2004 provisional ballots)53 and to identify at the time of registration voters with accessibility or alternative language needs.54 Nine states, believing they have HAVA-compliant lists, chose not to invoke their right to a waiver until 2006.55 Some states face difficulty in moving their largest population counties onto their lists because of differences between the computer architecture of the state and local county lists and resistance by the counties to any such move. Certain localities believe their individual systems are better than their state’s.56

For the HAVA registration form questions regarding citizenship and age, Florida has concluded that it need not alter its existing forms which ask similar but not identical questions:57 The forms do not discourage voters by telling them to stop with the application if they must answer “No” to either question. The [state] is complying with the substance of HAVA if not with the exact form of the question.58

(As part of its registration database, Puerto Rico innovatively has collected digitized signatures and digitized photographs of all voters. Beginning in 2004 the voter lists at the polling places will also contain those photo images.)59

As for first-time mail registrants, several states are planning multiple mailings to registrants asking for any missing information. For one, the goal is to minimize the need for special procedures for such individuals at the polls, thereby reducing the perception that some voters are being treated differently than others.60

**Voting systems (machines).** The plans reflect a wide variety of responses to the HAVA requirements. Some states are aggressively moving to purchase one Direct Read Electronic (“DRE”) (i.e., touch screen, ATM-type machine) system for the whole state.61 Some are delaying their choices because of (1) the federal funding uncertainty, (2) uncertainty over what the EAC will ultimately decide constitutes HAVA Title III compliance, (3) hoped-for technological improvements or price declines62 or (4) the controversy over DRE security. Many are concerned about their need to retain a non-DRE system for absentee ballots even if they switch to a DRE system for in-person voting. Some are leaving the choice to local governments.63 Several states are focusing on reduc-

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50 Alabama at 12, 19; Connecticut at 15; Colorado at 36; Indiana at 16, 33; Mississippi at 19; Missouri at 16; Montana at 15; Nevada at 7; New York at 16; North Dakota at 7; Pennsylvania at 29–30; Tennessee at 16; Texas at 8; Utah at 5–7; Virginia at 18.
51 See Maine §1.A; Montana at 9; Washington State at 5, 12, 25; Wyoming at 16. C.F. Arkansas at 9; Virginia at 12.
52 See Nebraska at 15; North Dakota at 6–7; Pennsylvania at 10–12; Rhode Island at 19–20; Utah at 9.
53 Alabama at 10–11.
54 D.C. at 33.
55 They are Alaska, Arizona, Georgia, Hawaii, Kentucky, Minnesota, South Carolina, South Dakota, and West Virginia as well as Guam. February 24, 2004 discussion with Penelope Bonsall (EAC). See HAVA Section 303(c)(1)(B).
56 For the controversy over DRE security. Many are concerned about their need to retain a non-DRE system for absentee ballots even if they switch to a DRE system for in-person voting. Some are leaving the choice to local governments. Several states are focusing on reduc-
57 See, e.g., North Carolina at 15–19.
58 Florida at 29–30.
59 Puerto Rico at 9–10.
60 SHAMBON at 20.
61 See Mississippi at 5; South Carolina at 11, 30.
62 See Connecticut at 4, 24; Nebraska at 13; Vermont at 12–13.
63 E.g. Massachusetts at 11.
ing the number of DRE's to purchase by reex-
amining their number of precincts. Some are
striving to retain their current systems, includ-
ing paper balloting, for reasons of economy or tradition.

A number of states are structuring their RFP's so that, for system purchases before the EAC announces what is HAVA Title III com-
pliance, the vendor will bear the burden of retroactive improvements should the system not meet the eventual compliance standard. Most state plans do not discuss (1) requiring upgradability, (2) state ownership of the vendor’s software source code, or (3) the state’s in-
dependently testing the source code. Several plans touch upon the DRE ballot voter verifi-
cation controversy without necessarily taking a position.

As for certification, decertification and error rates, some states already have decertification mechanisms, while others plan on establishing them. The error rate issue remains a signifi-
cant problem. Most plans emphasize that their existing systems already meet or will meet the VSS “out of the box” error rate for new ma-
chines. States do plan to collect residual vote data in anticipation of any future federally es-
tablished “in the field” operational error rate.

With regard to ballot uniformity and layout, several states already have requirements for uniform ballots throughout their state and, to maintain uniformity, the Secretary of State ap-
proves all ballot content and layout.

Accessible polling places. A starting point issue for polling place accessibility is deter-
mining what the standard for “accessible” should be. One state considers a polling place accessible if the entrance was level or had a nonskid ramp of not more than 8 percent gra-
dient; doors have to be a minimum of 32-inches wide. Another adopts the federal accessible-
ity standards found in the Voting Accessibility for the Elderly and Handicapped Act, but that law merely sends the definition back to the in-
dividual states. Others require conformity with the Americans with Disabilities Act of 1990 (“ADA”). Many announced that the states would survey all polling places for ac-
cessibility, with some ensuring that people with disabilities will be included on the survey teams.

Accessible voting systems. To ensure sys-
tems’ accessibility, a few states contemplate formal recommendations from their disabilities communities. Others plan on vendor fairs to enable citizens with disabilities to give vendors direct feedback before systems are submitted for certification. One state is planning to tie system accessibility to polling place accessibility, requiring counties receiving HAVA money for new systems to certify (1) cooperation with the polling place accessibility survey, (2) com-
pliance with the state polling place accessibility standards, and (3) establishment of, and co-
operation with, a local advisory council to choose accessible polling places.

As for meeting the requirement with DRE’s, one state is planning to buy two DRE’s per polling place, making them available to all voters with priority for the elderly and the disabled. Another plans to make DRE’s available during the in-person absentee vot-
ing period.

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52 See Indiana at 32; Mississippi at 5; Oklahoma at 8.
53 Vermont at 1–2.
54 See Massachusetts at 10.
55 See the Independent Test Authorities (“ITA”) do hold the software source code in escrow. See Washington at 15.
56 See Pennsylvania at 10–11; Washington at 16–17. For counties using only DRE systems, Washington State will require polling places to have optical scan paper ballots available for voters selecting not to vote on a DRE. See Washington at 7.
58 See, e.g., Colorado at 31; Louisiana at 9, 26; Ohio at 29; Iowa at 27; Montana at 10; Nebraska at 15–16; Texas at 13.
59 See, e.g. Mississippi at 15.
60 New Mexico at 3; Vermont at 1. Cf. Louisiana at 4.
61 Ohio at 28.
62 Indiana at 22; see 42 U.S.C. § 12101 et seq.
63 D.C. at 34; Florida at 35; Montana at 10; Virginia at 5. See 42 U.S.C. § 12101 et seq.
64 Colorado at 16; Indiana at 22; Tennessee at 13; Wis-
cconsin at 3.
65 Indiana at 19; Kentucky at 4.
66 See Ohio at 27–28; Wisconsin at 14.
68 Rhode Island at 7.
69 D.C. at 9.
Training for election officials, poll workers, and voters

Election officials. Several states plan to offer their election officials’ training program to state political party officials, candidates, their workers, and lawyers.70 Two states have training programs for voting machine technicians, and one plans greater emphasis on such training “to assure that counties do not rely on vendors for the operation and programming of their voting systems.”71 Many states are planning new training methods and partnering with specific colleges or universities in their states to develop their training programs.72

Poll workers. Many states have plans for more aggressive and innovative training of poll workers, with some emphasizing (1) basic customer servicing techniques (“No other government function has this level of contact with citizens in such a short time span.”), (2) sensitivity training, (3) services to voters with disabilities and special needs (“Only a fraction of our poll workers have been exposed to training at any level that teaches how to service this ballooning population.”), (4) civil rights (“Often voters who encounter a problem with voting are treated as having done something wrong.”) and (5) accounting/ballot security.73 States plan on using training delivery methods that are easily accessible, reusable by the trainees, flexible to accommodate updates and effective in trainee retention.74 The methods include the use of professional trainers and role playing.75

Some plans also discuss increasing the number of poll workers. A number of states will try to use more students, possibly through part-time or paid uniform within the state or comparable to stipends.76 Some want to make the poll worker pay uniform within the state or comparable to others similarly situated jurisdictions in the nation. At least one is planning on hiring a professional recruiter.77

Voters. For educating voters, most plans discuss increased use of broadcast and cable (both public and commercial) or publication media.78 Some will target specialty (e.g., minority) media79 or will target first-time voters.80 Many describe increased use of the Internet, including video clips about specific types of voting systems, software to access the state’s voting machine simulators via the Internet, candidate background and issue videos, ballot previews, disabled voter web site access through TTY (i.e., teletypewriter, also referred to as text telephones or as TDD, telecommunication device for the deaf) or TTY relay service, instant messaging, voice recognition software or audio capability for the hearing impaired.81 One plans to make sure that other state agencies provide on their web sites prominent links to the State Board of Elections.82 The plans identify other forms of voter outreach, including:

1. Surveying the state’s counties to compile a list of best practices
2. Providing information to statewide organizations and political parties for inclusion in their newsletters and for handouts at their conventions
3. Making education modules for voter advocacy groups to educate election volunteers and candidates

70 See Indiana at 38; Iowa at 26; Mississippi at 13–14; South Carolina at 35.
71 New Mexico at 8; see Connecticut at 10.
72 See, e.g., Georgia at 10–12, 19, 23–24; Kansas at 14; North Carolina at 4, 6, 25, North Dakota at 8, Texas at 11, Wisconsin at 13.
73 See Florida at 43; Indiana at 17; Missouri at 21; Oregon at 32.
74 Maryland at 28.
75 See D.C. at 30; Maryland at 29; Missouri at 21; New Mexico at 8.
76 See Missouri at 20; Rhode Island at 18, Utah at 7.
77 See D.C. at 30; Utah at 7. South Carolina, like many states, uses its voter registration list for jury selection. See South Carolina at 5. There is the (albeit contentious) policy question of whether to make poll worker service a general obligation of citizenship like that of jury duty.
78 See, e.g., Indiana at 18; New Hampshire at 28; New Jersey at 19; Ohio at 34; Pennsylvania at 32.
79 Florida at 38; Rhode Island at 18.
80 Minnesota at 22.
81 See Michigan at 21; Minnesota at 20, 21; Missouri at 20; Ohio at 29; Oregon at 12; Puerto Rico at 18, Virginia at 13; West Virginia at 9–10; Wisconsin at 13.
82 Virginia at 13.
IMPLEMENTING THE HELP AMERICA VOTE ACT

4. Having design professionals review voting instructions to ensure ease of reading.
5. Having offices at public locations, including booths at county fairs, public/farmers markets, and street fairs.
6. Providing voter education funds to various community interest groups.
7. Showing DRE machines in assisted-living facilities as well as producing video or PowerPoint presentations for advocacy groups to use at meetings.
8. Inserting voter information in utility bills and registration forms in phone books.
9. Using public service announcements on public buses and at grocery stores.
10. Providing grants to voter registration organizations.
12. Making alternative language voter education materials pervasively available even though not required by the VRA.
13. Sending E-mails to disabled voter distribution lists.
15. Providing information in alternate formats (Braille, large print, audio tape, or electronic computer disk) to visually impaired voters identified at the time of registration.
16. Instituting programs to recognize voters with perfect voting records over an extended period of time.

To increase student participation, states are planning:

1. Voter registration/education programs at least once each year in each public high school.
2. Contests among school children to develop slogans and logos promoting increased voter turnout.
3. To send birthday cards to persons when they become 18 with a voter registration invitation.
4. To use driver’s license data and other ways to encourage disabled teens to vote.

All of this increased voter education will pay off. Certainly, it did for Georgia when rolling out its new DRE voting systems statewide:

The undervote rate for the 2002 U.S. Senate Election was a historically low 0.86% (a dramatic reduction, compared to the 2000 Presidential Election undervote rate of 3.5% and the 1998 U.S. Senate Election undervote rate of 4.8%).

Election day

A central accomplishment of HAVA is to require offering all voters provisional ballots if there are any questions about their qualification to vote. The HAVA requirement is in response to common circumstances arising on election day:

[The voter’s name could not be found on the printed list at the polls because of a spelling variation, name change, hyphenation (used or missing), or the inversion of parts of the voter’s name. Conditional ballots [functionally similar to provisional ballots] have also been counted when the voter successfully appealed his removal from the list, a completed and timely application was found, or it was determined that the voter’s name was removed in error. Conditional ballots are usually not counted because no record could be found of the person’s registration, the voter was in the wrong precinct, or the voter had applied after the registration deadline for that election.]

All states should now have provisional ballot regimes in place, complying with the HAVA requirements.
requirement’s effective date of January 1, 2004. As for the posting of voter information in the polls (also effective January 1, 2004), most states are following the HAVA list of required topics, but some are considering a more extensive list of rights.87

The first-time voter ID requirement likely will be a significant problem in the short run. States are taking different approaches. Some are liberally construing what constitutes satisfactory ID, planning to monitor the provision’s application (giving voters instructions on how to report allegations of illegal application), or in order to diminish the number of persons required to show ID at the polls, providing registration applicants a second chance to submit such ID before election day.88 Others have taken a stricter approach, in some instances requiring all voters to show ID:

Since the vast majority of our voters register by mail, the secretary of state’s office did not want to further burden our elections officials by having them identify first-time voters and ask them for identification. We feel our “everyone” provision will further meet the HAVA goals of providing a uniform and nondiscriminatory voting process. Our first time and transfer voters will not be treated differently.89

Anticipating a surge in provisional ballots (either through their general availability or through the ID requirement), some states are going to: Hire additional poll workers (“so that provisional voters will not be discouraged by long waits to cast their ballots’’); experiment with multiple work shifts for certain poll worker positions in order to reduce the time commitment necessary to serve as a poll worker; provide special help to voters filling out provisional ballots and program DRE’s to segregate provisional ballots so that persons with disabilities can cast such ballots on accessible machines. However, at least the District of Columbia also apparently plans to continue its policy that a provisional ballot can only be cast in the precinct to which the voter is assigned.90 For the court ordered poll hour extension provisional ballots, some states plan to uniquely mark such ballots to ease any necessary retrieval.91

Finally, some states want to better understand the election process “through the eyes of the consumer.” To receive voters’ feedback on the new equipment and procedures, those states plan to conduct exit polling of a sample of voters.92

After election day

Some states plan on obtaining enough information when giving out a provisional ballot to register the person for future elections should the person not be eligible in the election at issue.93 An additional problem involves limiting the information on ultimate disposition to only the voter concerned. At least the District of Columbia plans to reduce the wider access it currently provides down to only the voter.94

Many states in describing their required complaint procedure merely parrot the HAVA requirements. One emphasizes principles for the process, including that it not be complicated for the aggrieved party, be easily accessible for the disabled and be easily tracked by all interested parties.95 Another plans to have a committee that includes outsiders (such as representatives of the parties and of advocacy groups) review all complaints.96 A number of states declare that the complainant will have a general right to judicial review of the administrative decision.97 Other states discuss limited judicial review98 or no judicial review,99 for instance, on the ground that:

This complaint procedure is intended to be less formal than most administrative procedures, with potential violations be—

87 California at 12.
88 See California at 16; Massachusetts at 20; New York at 9; Ohio at 36; Pennsylvania at 24–25.
89 Montana at 11.
90 See D.C. at 13; cf. Delaware at 41–43.
91 See New Hampshire at 13–14, A 57; Wisconsin at 8.
92 Ohio at 32, Idaho at 14.
93 See California at 11.
94 See D.C. at 13.
95 Colorado at 40.
96 Utah at 12.
97 Alabama at 21, Indiana at 50, Louisiana at 33, Minnesota at 35, Mississippi at 22, Montana at 27.
98 Missouri at 36.
99 New Mexico at 12.
implementing more likely to represent system-wide problems than individual voting rights. Thus, the possible remedies will be less personal in nature.  

Focusing on the remedies, states are prohibiting monetary damages or punitive orders:

A remedy . . . will not include financial payments to complainants or civil penalties for election officials, even if it is determined that a violation of Title III has occurred. Remedies may include written findings that a violation of Title III has occurred, strategies for insuring that that violation does not occur again and, if it appears that the complaint involves a systemic problem, possible actions by the Elections Division to provide better instructions, training, or procedures for all election officials to avoid future violations.  

One explains that its “relief may not include any order affecting the right of any person to hold an elective office or affecting the canvass of an election on or after the date of that election.”

Performance measures

Finally, most states promised detailed performance measures to determine if they are meeting the goals of their plans. The measurement tools fall within two groups, process measurements (Did the state do what it said it would do?) and impact measurements (Did those activities make a difference in the conduct and participation in elections?). In one state’s view, the improvements must be measured in terms of “how well they increase participation in elections and improve the ability of voters to exercise their right to vote.” Only a few of the plans set out detailed measures.

Concluding recommendations—what else is to be done

The enactment of HAVA was a remarkable achievement given that the Congress was so evenly split (Senators: 50 Democratic, 49 Republican, 1 Independent; Congressmen: 220 Republican, 210 Democratic, 5 Independent). If Sen. Jeffords had not changed parties, there easily might not have been any law enacted. Additionally in retrospect, the window of opportunity was also very short given the Republican Party’s regaining control of the Senate a few weeks after the passage of HAVA. During the window, each party controlled one House of Congress, and neither wished to be blamed for the demise of the bill. Therefore, they both had to compromise. The dynamics would have been far different in the current Congress of complete Republican control. Any Republican bill would have had weaker federal regulation, and the Democrats might have chosen to block a bill rather than pass a weaker one.

But HAVA was enacted and while it addresses many issues, certain important election reform issues remain.

HAVA implementation issues

Funding and the HAVA deadlines. There are two immediate funding issues: (1) The level of funding to the states and (2) the funding of the EAC’s operations and NIST’s support of the EAC. For the first, all of the authorized Title I money ($650 million) was fully appropriated and distributed to the states by the GSA in the spring of 2003. Of the authorized Title II FY 2003 money ($1.4 billion), only $833 million was appropriated (thereby creating a funding deficit of $567 million). Of the authorized FY 2004 money ($1 billion), the Bush Administration’s budget proposed appropriating $850 million, but the Congress ultimately enacted a $1.5 billion appropriation. Therefore, the first two of the three years of federal aid have been approximately fully funded. However, the

100 Oregon at 35.
101 Id. at 36. See also Hawaii at 18; Michigan at 61; Wyoming at 22.
102 Wisconsin at 24.
103 Rhode Island at 22; see also Virginia at 20.
104 See Indiana at 41–48. See also Arizona at 23–31; D.C. at 44–49; Michigan at 37–44; Missouri at 29–34; Montana at 23–26; New Hampshire at 32–37.
President’s FY 2005 budget contains only $40 million in Title III money in contrast to the authorized $600 million. It remains to be seen whether full funding for FY 2005 occurs.

As for the EAC operational funds, the Congress appropriated only about $1.8 million for FY 2004107 even though HAVA had authorized an annual budget of $10 million. The shortfall has made it extremely difficult for the EAC to function in the short run.108 The President’s FY 2005 budget proposal restores the $10 million figure, but assuming its adoption by the Congress, it will not provide an effective operational budget until October 2004. The salaries of the Commissioners and their immediate staffs will consume much of the money until the new fiscal year.109 The lack of operational funding also inhibits the EAC, in conjunction with NST, from expeditiously addressing the DRE security issues or the underlying Title III voting systems compliance standards.

The delay in creating the EAC and the consequent delay in distributing the Title III funds also is inhibiting state decision making. Given the states’ severe financial difficulties, they are loath to make expenditure commitments without being certain about their financial resources. The delayed appropriations and distribution, along with issues like DRE security and the lack of Title III systems standards, are causing delays in the states’ awarding contracts both for the state voter registration systems and for new voting systems. All this threatens the ability of the states to meet the HAVA deadline of January 1, 2006 for the statewide lists and HAVA compliant voting systems. At the same time, continued use of the old lists and systems will cause political unrest, particularly if the 2004 elections are close. If there are close elections and loud voter complaints, the Congress may be politically unwilling to extend the 2006 deadline.

DRE security and audit trail. Questions about the inherent security of DRE systems, and the consequent interest in voter verification of paper versions of their ballots before they are cast (so-called “voter verifiable ballots”), are contributing to the states’ delay in purchasing new voting systems. When the various Commissions undertook their studies in 2001, these questions had not yet arisen. The security of Internet voting had been identified as a problem, and all the Commissions did recommend against quickly shifting to Internet voting.110

The debate over DRE security began in earnest with the July 2003 release of a study by four professors, three of them at Johns Hopkins University. The study identified security problems in the software source code attributed to a voting system purchased by Maryland and Georgia.111 In response, Maryland commissioned a study by Science Applications International Corporation (“SAIC”) of the new system. SAIC concluded that the Johns Hopkins paper had highlighted legitimate concerns but had not taken into account the state’s procedural protections offsetting some of those concerns.112 This has generated even more studies of the Maryland voting system.113

107 The Congress appropriated $1.2 million directly for the EAC and appropriated $800,000 to the FEC’s continuing operations of OEA. That latter money transfers to the EAC but the actual funds available for transfer are closer to $500,000.


109 The Commission apparently solved its problem of how to pay the estimated $600,000 for publishing the State plans in the Federal Register (a requirement under 42 U.S.C. §§ 15403(a), (d), 15405) before paying out the appropriated $2.3 billion out to the states. See Washington Post at A17 (February 17, 2004).


Meanwhile, the Ohio Secretary of State commissioned assessments of the DRE systems to be used in Ohio. Other states and local governments are mandating voter-verifiable ballots, and the calls for delaying procurements of new systems pending resolution of the DRE security issues are proliferating.

The debate is very active and has created uncertainty among election administrators. They are unwilling to make significant procurement decisions until they get some comfort about the security of DRE machines. The 2001 Election Center Task Force was opposed to individual voter paper receipts showing voters their votes. Such receipts, if the voters took them out of the polling place, would be a threat to the secrecy of the ballot and would promote vote bribery, intimidation and vote manipulation. Another worry of administrators is that adding a printer increases the overall complexity of the voting system, the possibility of breakdowns that poll workers are not equipped to repair, and even if they were, the likelihood of partial or total shutdown of the polling place for some portion of election day. Also, it is unclear what would be the official basis of the count, the electronic record or the paper record. Manual recounts of paper ballots are conceivable in small jurisdictions and for small samples of large jurisdictions and for small samples of large jurisdictions. Florida has shifted toward. But the states need to go even further. There should be an illustrative list of possible ballot marking variations for each voting system used in a state and rules for accepting or rejecting those individual variants as legitimate votes. The more objective the voter verified DRE ballots. The four principal sponsors of HAVA (Rep. Ney, Rep. Hoyer, Sen. Dodd and Sen. McConnell) issued a joint Dear Colleague letter on March 3, 2004 calling legislation mandating voter verifiable ballots (December 16, 2003); news release of Washington State Secretary of State Sam Reed introducing legislation to require voter-verifiable ballots (December 16, 2003); news release of California Secretary of State Kevin Shelley mandating voter verifiable ballots (November 21, 2003).

What constitutes a vote. The next most pressing issue is how to count votes in the event of a recount or contest. The Ford/Carter decision, but it is now coming into existence and will take several months to become active. In addition, NIST has been given no additional funds for undertaking its work. NIST did conduct a two-day introductory conference in December 2003 to address the issue. It is imperative that state election administrators receive some guidance very soon if they are to have any realistic prospect of meeting the January 1, 2006 deadline for having HAVA Title III compliant voting systems in place.


Despite the HAVA 2006 deadline and given the predictions of a close 2004 presidential election, it is imperative that the states move more quickly to adopt the kind of standard that Florida has shifted toward. But the states need to go even further. There should be an illustrative list of possible ballot marking variations for each voting system used in a state and rules for accepting or rejecting those individual variants as legitimate votes. The more objective the
standard can be, the less room for argument during any possible recount. Ideally, the standards would be uniform across states.

Bush v. Gore issues not addressed by HAVA

Electoral College timing. Most post-2000 studies and the Congress took a hands-off approach to changing the Electoral College mechanism. However, the driving force in the post-election Florida drama was the perceived December 12th statutory deadline for completing Florida’s choice of its presidential electors. Both the Florida Supreme Court119 and the U.S. Supreme Court120 believed that date was immutable. Two of the Florida Supreme Court justices, opposing continuation of the recount, analogized the Gore camp’s predicament to a quote from Vince Lombardi: “‘We didn’t lose the game, we just ran out of time.’”121 The relevant statutory provisions are 3 U.S.C. § 7 (setting the date for the presidential electors’ meeting in the individual states) and 3 U.S.C. § 5 (the so-called “safe harbor” provision with a deadline six days before the electors’ meeting, December 12th in 2000).

Whatever the binding nature of those statutory dates, they are arbitrary and should be extended. The Constitution authorizes the Congress to set the time for choosing the electors and the day of their vote.122 Congress’ statutory regime has always consisted of redundant transmittal routes and backup procedures to ensure that the lists of the electors’ votes are timely received by the President of the Senate. The Congress would meet on the second Wednesday in February to count the votes, and the President’s term would begin on March 4th.123

Since then, Congress has altered four times the period from the election to the electors’ meeting. In 1845, Congress set the date for the states’ appointing (electing) the electors as the Tuesday after the first Monday in November (still in U.S. law as 3 U.S.C. § 1), 29 days before the electors’ meeting.124 In 1887, Congress moved the electors’ meeting to the second Monday in January (increasing the period to 69 days, or 62 depending on the year) and created the conclusive safe harbor for a state’s choice of electors if chosen at least 6 days before the electors’ meeting (still in U.S. law as 3 U.S.C. § 5).125 In 1928, Congress moved the electors’ meeting to the first Wednesday in January (shortening the period to 54 days, depending on the year).126 The House had adopted an even shorter period, but the Senate moved the meeting day into January “to allow more time for the determination of any contest which may arise.”127

In 1934, Congress moved dates in response to the Twentieth Amendment’s shifting the inauguration from March 4th to January 20th (earlier by 43 days). In proposing implementing legislation, the lead agency (the State Department) analyzed the time available from election day to January 20th (73 to 79 days, depending on the year) and then consciously but without explanation chose for the electors’ meeting date the first Monday after the second Wednesday in December in order to set a constant 41-day interval from the date of election.128 The bill also would have eliminated the

119 See Gore v. Harris, 772 So. 2d 1243, 1260, 1261, 1269, 1272, 1273 (Fla. 2000). See also Palm Beach Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000).
120 531 U.S. at 117, 121.
121 772 So. 2d at 1273 (Harding & Shaw, J., dissenting).
122 See U.S. Const. art. II, § 1, cl. 3 & 4. See also U.S. Const. amend. XII.
123 2 Statute I, Ch. 8 §§ 1–5, 12, 2d Cong., Sess. I, 1 Stat. 239 (1792).
125 19th Cong., 2d Sess., Ch. 96, §§ 1–4, 24 Stat. 373 (1877).
126 The Congress also replaced special messenger certificate deliveries with registered mail deliveries. See Pub. L. No. 569, 70th Cong., 1st Sess., Ch. 859, §§ 1–6, 45 Stat. 945 (1928). The House and Senate reports on the bill emphasized that the then-existing method of delivering the certificates by special messenger was “unnecessarily expensive, unsafe, and ridiculous in view of modern facilities, and modern methods in general use.” See H. Rep. No. 750 at 1, 70th Cong., 1st Sess. (1928); S. Rep. No. 986 at 1–2, 70th Cong., 1st Sess. (1928).
128 March 15, 1934 letter from U.S. Secretary of State Cordell Hull to Hon. Hatton W. Sumners, Chairman, House Judiciary Committee, Attachment ("Changes of Date made by the Draft Bill").
safe harbor's six-day cutoff because "the time available between the popular election and the meeting of the electors is quite limited and should all be available for canvass of votes and subsequent judicial or other decision, if necessary."129

The law enacted moved the congressional counting date to January 6th (still in U.S. law as 3 U.S.C. § 15), the electors' meeting to the State Department's proposed date (still in U.S. law as 3 U.S.C. § 7), and kept the six-day cutoff.130 There was virtually no legislative history,131 but the Judiciary Committee Chairman Hatton Sumners (the introducer of the Administration bill) declared during the House debate that:

"There is not enough time . . . between the election of the electors and the time when they are to meet. . . . The time for the general election should be moved up to . . . October . . . to allow a reasonable time for settling contests over the election of Presidential electors."132

In subsequent years, he repeatedly introduced bills to move election day to October. Introducing the 1935 bill, Mr. Sumners stated that:

41 days . . . is clearly too short a time to canvass the returns and to have any opportunity properly to settle any election contest with regard to the electors. . . . It cannot be done in 41 days under the laws of any of the States.133

In 1939, he argued:

"We ought to [move the election into October] . . . very quickly, because a serious situation might develop. . . . It requires no great imagination to visualize what might develop in a close election when feeling was running high with a belief that wholesale fraud had been perpetrated in one or more pivotal States with no possibility of a final judicial determination prior to the time for the inauguration of the President."134

Sumners' "serious situation" arose in 2000 and easily may again this year. Congress before this fall's election should lengthen the period. In an era of electronic communication and overnight couriers, (1) the elections' meeting should occur as few days as possible before the January 5th congressional counting, (2) the safe harbor six-day cutoff should be eliminated and

129 March 15, 1934 letter from U.S. Secretary of State Cordell Hull to Hon. Hatton W. Sumners, Chairman, House Judiciary Committee, Attachment ("Comparison of the Draft Bill with Existing Law") at 1.


132 78 Cong. Rec. 9900 (May 29, 1934).

133 79 Cong. Rec. 35 (Jan. 3, 1935) (re H.R. 2067). Curiously, the Attorney General reviewed the bill and, while not expressing his definite opinion, emphasized that the bill's time between the election and the electors' meeting was longer than under the pre-1934 law (57 or 64 days). He skipped over the 1934 legislation's reducing that interval to 41 days. March 6, 1935 letter from Attorney General Homer Cummings to Hon. Brooks Fletcher, Chairman, House Committee on Election of President, Vice President, and Representatives in Congress, Re H.R. 2067. See also May 8, 1939 letter from Attorney General Frank Murphy to Hon. Caroline O'Day, Chairman, House Committee on Election of President, Vice President, and Representatives in Congress, Re H.R. 110. By contrast, the internal memo accompanying Attorney General Cummings' letter on the 1935 bill did point out the 1934 legislation's shortening the time between election day and the electors' meetings from eight to nine weeks down to 40 (really 41) days, and moving election day to October would restore an interval of nine weeks, five days to ten weeks, five days. February 27, 1935 memorandum by A.R. Cozier Re Bill to Change the Time of the Appointment of Presidential Electors. 134 84 Cong. Rec. 182–83 (Jan. 10, 1939) (re. H.R. 110). Sumners also apparently argued for gaining an additional 7 days by reverting back from registered mail delivery to messenger delivery:

I drew the bill which changed the method of bringing up the returns from the old method of bringing them up by messenger to the existing method of bringing those returns up by registered mail. It was more or less an experiment. Well, I can hardly say that, but there were some experimental features about it. . . . I believe that law can be redrafted preserving the safeguards, and we can gain about a week by revamping that bill.

84 Cong. Rec. 183 (Jan. 10, 1939).
(3) delivery should be by any rapid secure method (e.g., electronic or courier), not by registered mail. We should not be hamstrung by a redundant and slow transmission scheme built for an earlier time. The states should have the maximum time, within the framework of the existing election and congressional counting days, to resolve any contested elections.

Uniformity. Clearly, the issue of equal protection uniformity is not limited to merely the standard for recounting ballots. As Justice Stevens pointed out dissenting in *Bush v. Gore:*

Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. . . . Of course, . . . “[w]e must remember that the machinery of government would not work if it were not allowed a little play in its joints.” . . . If it were otherwise, Florida’s decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy—might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.135

This issue can go even further, e.g., into the areas of registration and of identification at the time of registration and at the polls.

For voting systems, all the studies concluded that it would ill serve us to adopt one uniform system for the whole country. We would be betting too heavily on that one system’s success. A diversity of systems in active use encourages experimentation with new technologies and thereby improvements over time. That argument is weaker if we move only to each state using one uniform system. If individual states choose different systems (even if some choose the same one), there probably will be enough diversity for the encouragement of new technology. Currently, states seem reluctant to move to a single system because of cost, local sensibilities, and inertia for continuing with existing systems or methods (e.g., paper ballots).

The cost factor of replacing all of a state’s machines at one time is a real constraint. The justification of supporting local desires for the status quo probably should not be allowed to survive.

For registration lists, HAVA did not insist on a national uniform system because of (1) variations in state government organization and states’ relationships with their localities, (2) the initial hurdles of consolidating from local lists to a centralized state list without the complication and delay of awaiting the development of a national system, and (3) civil liberties groups’ strong resistance to creating any form of national registry that could evolve into a “Big Brother” database. At the same time, those working on HAVA were aware of the various State Motor Vehicle Authorities’ efforts to develop ties between the states for confirming moves of drivers between states. They also knew that State Motor Vehicle Authorities were confirming some Social Security number information for purposes of finding illegal immigrants.136 Therefore, the consensus was not to establish a new national mechanism for cross-state corroboration of voter registration data or for direct confirmation of voters’ Social Security numbers. Even requiring states to collect full Social Security numbers independently of each other was politically impossible.

For uniform identification requirements, the photo ID requirement for first-time voters, let alone for all voters, almost ended the possibility of passing any federal legislation. While a uniform, universally available voter identity card (such as a citizenship card) has been suggested and might be advantageous, the only

135 531 U.S. at 125–26 (Stevens, J., dissenting) (fn omitted).
way Congress will adopt such a card is as part of a homeland security initiative. Absent that extreme need, the fears of Big Brother will not permit a national voter identity card.

National level centralization

Finally, there is the question of whether we should strive to adopt institutional arrangements and procedures like those of our neighbors, Canada and Mexico. The short answer is that, while goals like a nonpartisan national election agency are laudable, they are unattainable at least in the short run. Mexico was able to create such institutions only through a 1946 post-revolution consolidation of power and then 1996 reforms stemming from the mandate President Zedillo received in the clean and transparent presidential election in 1994. In Canada, the creation in 1920 of the independent and nonpartisan position of Chief Electoral Officer for the country resulted from the disastrous 1917 general election; arguably the worst since 1841. Those conditions did not exist in the United States in the wake of 2000. Political power remains equally split between Republicans and Democrats despite Republicans’ nominal control of both houses of Congress. The outcry after the 2000 election focused on machines, registration lists and voter access, the adequacy of funding, and the activities of one state’s administrators, not a wholesale condemnation of state and local administrators generally. The political response addressed those issues, and until there is a crisis of confidence comparable to those leading to the more fundamental reforms undertaken by Mexico and Canada, we will not move toward true central government control. Our governmental structure, designed to inhibit rapid radical change, has done so again in passing and now implementing HAVA.

In summary, there is plenty of work to be done in fulfilling the requirements of HAVA. More sweeping change will occur only if a more trying time than the 2000 election arises in the future.

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