
FREE SPEECH AND ELECTION LAW

THE HELP AMERICA VOTE ACT OF 2002 - A STATUTORY PRIMER

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The Help America Vote Act of 2002 (HAVA) was signed into law by President Bush on October 29, 2002.¹ HAVA was the end result of two years of studies and reports by numerous task forces that were formed after the 2000 presidential election to correct perceived problems with the election administration process in the United States. American elections are administered through a very decentralized system run almost entirely by the country's more than 3,000 county governments. HAVA's provisions were the result of compromises and negotiations on issues that were very controversial and that threatened to kill the bill on more than one occasion as it worked its way through Congress. As a result, while some of its provisions are clear, many others are not and seem to have been left deliberately ambiguous or vague because the parties involved in the negotiations could not agree on their exact meaning.

Many of HAVA's requirements became effective in 2004 but others will not come into effect until 2006. HAVA covers all 50 states, the District of Columbia, Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands (collectively "the States").² Congress also appropriated funding for the States to help them comply with HAVA,³ from buying new voting equipment to creating statewide computerized voter registration databases. HAVA also established a new federal election administration agency, the Election Assistance Commission (EAC).⁴

It is important to understand that HAVA only applies to federal elections. Congress stated in the preamble to HAVA that it was intended:

To establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and program, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.⁵

While HAVA only applies to federal elections, the practical and cost-related difficulties of maintaining two separate voter registration and election systems, one for state elections and one for federal elections, make it virtually certain that these mandates will also be applied to local elections by almost all of the States.

Title I and II – Funding

Title I and II of HAVA contain various provisions requiring payments to States for improving the administration of elections for Federal office and for meeting the federal mandates imposed by Title III. The funding provided under Title I can be used to replace punch card and lever voting machines, although the use of either type of voting machine is not prohibited by HAVA. To be eligible for funding to meet the requirements of Title III, the States were required to draft state plans that outlined how the funding would be used to improve election administration and the voting process.⁶ These plans were published by the EAC in the Federal Register, and HAVA contains a safe harbor prohibiting any lawsuit from being brought against a State based on information contained in a plan (except for criminal acts).⁷

United States Election Assistance Commission

Title II establishes the new EAC governed by four commissioners, two Democrats and two Republicans, appointed by the President and approved by the Senate.⁸ Any actions taken by the EAC must have the approval of at least three commissioners⁹ and Section 209 specifically limits the regulatory power of the EAC. It has no authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State" except to the extent permitted under Section 9(a) of the National Voter Registration Act of 1993 (NVRA), which establishes a federal mail voter registration form.¹⁰ HAVA also established two advisory boards to make recommendations to the EAC.¹¹ States are represented on the EAC Standards Board by two members from each State, a state election official chosen by the chief state election official and a local election official chosen by local election officials. The EAC Board of Advisors is made up of members from various national associations of state officials, federal government agencies, and appointments by Congress.¹²

The EAC has two main duties. The first is to administer funding to the States. As of February 9, 2005, the EAC reported that it had given out \$2.2 billion in grants to the States under HAVA.¹³ The second is to act as a national clearinghouse and facilitator for research on election administration, including developing best practices and voluntary guidance for the states on compliance with the requirements of Title III.¹⁴ The EAC is also developing national "voting system guidelines" for voting equipment and the testing and certification of voting equipment.¹⁵ However, unlike the voting system standards outlined in Title III, discussed later in this paper, these voting system guidelines are voluntary.¹⁶ It will be entirely optional for the States to use voting equipment that is designed, built and tested to meet these new voting system guidelines. There are already such voluntary standards in place, developed in

1990 by the Office of Election Administration of the Federal Election Commission in conjunction with the National Association of State Election Directors.¹⁷ These guidelines were revised in 2002¹⁸ and have always been voluntary, although almost all manufacturers of voting equipment have designed their voting machines to meet these standards, and have had their equipment tested by the laboratories certified to conduct such testing by NASED. The OEA was transferred to the EAC by Section 801 of HAVA.¹⁹

The only other regulatory power of the EAC is the ability to conduct an audit of any State that receives grant funds.²⁰ At least one mandatory audit has to be conducted by the Comptroller General during the life of the grant program; such funding can be recouped from the State if the State is out of compliance, i.e., it has not used the funding for the purposes for which it was intended.²¹ The EAC has already voted to conduct one special audit of the State of California because of allegations of the misuse of HAVA funds by the former secretary of state.²²

Title III – Uniform and Nondiscriminatory Election Technology and Administration Requirements

Title III imposes new uniform election technology and election administration mandates on the States, including provisional balloting and voter identification requirements for first-time voters who register by mail. However, section 304 provides that these requirements are “minimum standards” and that nothing prevents a State from establishing standards which are “more strict” so long as such requirements are not inconsistent with federal law.²³ Section 305 provides that the specific choices on the methods of complying with the requirements of Title III are left to the discretion of the State.²⁴ Both of these provisions were obviously intended to allow States to maintain their traditional role in the administration of elections, particularly in making decisions on the eligibility of individuals to vote.

Voting Machines

Section 301 of Title III sets forth mandatory standards for voting systems used in federal elections.²⁵ It applies to all States as of January 1, 2006, when voting equipment must:

- allow a voter to verify his choices on the ballot before the ballot is cast
- allow a voter to change the ballot or correct any error
- notify the voter if he has selected more than one candidate for a single office (overvoted)
- produce a permanent paper record with a manual audit capacity
- be accessible for disabled voters such that they can cast a vote independently and in private in the same manner as other voters
- provide alternative language capabilities as required by section 203 of the Voting Rights Act

- have an error rate in counting ballots that complies with the error rate standards in effect on the date of enactment of HAVA (the 2002 FEC standards), an error rate that is only attributable to the voting system itself and not mistakes made by voters

The accessibility requirement for disabled voters can be satisfied by having one direct recording electronic voting machine in each polling place.²⁶ For jurisdictions using paper ballots, punch cards, and central count systems (including mail-in ballots), the overvote notification requirement can be met through a voter education program that notifies each voter of the effect of casting multiple votes for an office and explains how to correct the ballot.²⁷ HAVA does not, therefore, outlaw the use of punch-card voting machines or central count optical scan voting systems that do not notify a voter when he has selected too many candidates in a particular race.

A controversy has arisen over the use of direct recording electronic voting machines (DRE’s).²⁸ Critics of DRE’s question the security of the software and the ability of bugs, viruses, or trojan horses inserted into the software to alter an individual’s vote without the voter or election officials knowing it. They are calling for all DRE’s to have voter verified paper audit trails or VVPAT’s—this would require all DRE’s to print out a paper receipt or ballot reflecting all of the voter’s electronic choices that can be checked by the voter before the electronic ballot is actually cast.²⁹ The HAVA manual audit standard merely requires that DRE’s print out a paper receipt showing the total number of ballots cast on each machine at the end of election day when voting stops. Therefore, HAVA does not require VVPAT’s and all of the current DRE’s on the market can satisfy this HAVA requirement.

Finally, all States are required to adopt a uniform and nondiscriminatory standard that defines what constitutes a vote and what will be counted as a vote for each category of voting systems.³⁰ This provision was clearly intended to prevent the problems that occurred in Florida in 2000 when election officials in different counties were applying different standards and rules for determining which punch card ballots constituted a vote.

Provisional Ballots and Voter Information

Effective January 1, 2004, section 302(a) requires States to allow provisional voting in federal elections. Voters who assert they are registered and eligible in the applicable jurisdiction where they are attempting to vote but whose names do not appear in the “official list of eligible voters for the polling place,” or voters whose eligibility to vote is challenged by an election official, must be provided a provisional ballot.³¹ Voters who do not provide the identification documentation required by HAVA also must be given a provisional ballot.³² The ballot must be transmitted to appropriate State or local officials so the individual’s eligibility can be “promptly” verified under applicable State

law. It is left up to the State to determine whether the ballot should be counted. States have to establish a website or toll-free telephone number that the provisional voter can access to determine if the vote was counted and, if not, the reason it was not counted. Under Section 302(a)(5), this requirement applies to all States, but States that are exempt from the NVRA³³ may comply by using voter registration procedures established under state law. Section 302(c) also requires provisional ballots for individuals who vote after the usual time set for a poll to close under State law because of a court order extending polling hours. These provisional ballots must be kept segregated and apart from other provisional ballots.³⁴

Section 302(b) requires certain information for voters to be posted at each polling place on election day during every federal election, including sample ballots, poll hours, instructions on how to vote regular and provisional ballots, rules for mail-in registrants subject to HAVA's identification requirements, and general information on voting rights and prohibitions on fraud and misrepresentation under state and federal law. The Department of Justice has developed a suggested summary of the federal statutes on voting rights and election crimes for the States to use in providing this voter information in each polling place.³⁵

Statewide Voter Registration List

Section 303(a)(1) requires States to create a single, uniform, centralized, and interactive computerized statewide voter registration list for use in federal elections. This list must contain registration information and a unique identifier for every registered voter in the state.³⁶ All election officials in the State must be able to obtain immediate electronic access to the information in the database. Under Section 303(a)(1)(B), the computerized list requirement applies to all States, except any state which does not presently require voter registration for federal elections (which exempts North Dakota³⁷).

Section 303(a)(2) requires states to do list maintenance on the statewide computerized list according to specific standards. For example, any removals from the statewide list must be done "in accordance with" the NVRA and the statewide list must be coordinated with "other agency databases within the State," including state felony and death records, to remove ineligible voters. Under Section 303(a)(2)(A)(iii), these list maintenance requirements apply to all States, except those half-dozen States which are exempt from the NVRA which "shall remove the names of ineligible voters from the computerized list in accordance with State law."

Section 303(a)(5) provides that States may not accept or process any type of application for voter registration for federal elections unless the application includes the applicant's driver's license number (if the applicant has such number) or the last four digits of the applicant's social security number (if the applicant has no driver's license number). If the applicant has neither number, then the State must assign an identifying number. The State must also verify the accuracy of this information by matching it against the State

driver's license database and the federal social security number database. Under Section 303(a)(5)(D), these verification requirements apply to all States, except that they are "optional" for those handful of States that are "permitted" under the grandfather clause of the federal Privacy Act of 1974³⁸ to require registrants to provide a complete social security number.

The effective date of all of the statewide registration list requirements of Section 303(a) was January 1, 2004, except that the effective date could be delayed until January 1, 2006, by those States that certified to the EAC by December 31, 2003 that they could not meet the original deadline for good cause. Forty-four states requested such a waiver from the EAC—only Alaska, Arizona, Georgia, Guam, Hawaii, Kentucky, Minnesota, South Carolina, South Dakota, and West Virginia did not.

Voter Identification

Under Section 303(b), individuals who register to vote by mail who have not previously voted in a federal election in the State must provide specific identification documentation either at the time of registration or the first time they vote.³⁹ These identification requirements survived a very contentious fight in Congress as they were being debated. The Department of Justice issued an opinion at the time stating that they did not violate the Voting Rights Act. A copy of this February 26, 2002, letter to Senator Christopher Bond, as well as other information about HAVA, is available on the Department's website.⁴⁰

There are a number of exemptions to this identification requirement. For example, if an individual provides his driver's licence number or the last four digits of his social security number on the application form and the State is able to match the same number, name and date of birth with an existing State identification record, then the identification requirement does not apply. It also does not apply to individuals who are entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),⁴¹ the Voting Accessibility for the Elderly and Handicapped Act,⁴² or any other federal law.

Section 303(b) also requires that changes be made in the content of the national NVRA mail-in registration form by adding a citizenship and voting age question.⁴³ The States are specifically directed that if an applicant fails to answer the question of whether he is a citizen, the registrar must notify the applicant of the failure and give him an opportunity to complete the form in a timely manner to allow for the completion of the form prior to the next federal election (subject to State law). The effective date for Section 303(b) was bifurcated. Individuals who registered to vote by mail for federal elections after January 1, 2003 are covered by the identification requirement. States also had to be prepared to receive identification materials submitted by individuals in conformity with the new Section 303(b) requirements after January 1, 2003. States had to start requiring identification

from first-time voters in the first federal election conducted after January 1, 2004.

Miscellaneous Provisions

HAVA contains a number of other miscellaneous provisions taking various actions such as establishing a “Help America Vote College Program”⁴⁴ and the “Help America Vote Foundation,”⁴⁵ amending UOCAVA,⁴⁶ and directing the Attorney General to conduct a review of the adequacy of existing criminal statutes concerning the use of the Internet for elections.⁴⁷ HAVA also includes a provision stating that the granting of funds by the EAC has no effect on the preclearance requirements of Section 5 of the Voting Rights Act that apply to certain States and jurisdictions.⁴⁸

Enforcement

Enforcement authority for the requirements of Title III is given to the Attorney General under Section 401.⁴⁹ The Attorney General may bring a civil action against any State or jurisdiction in federal court for declaratory and injunctive relief. The Department of Justice has already brought two such enforcement actions, both settled by consent decrees, against San Benito County, California, and Westchester County, New York.⁵⁰ HAVA did not explicitly create a private right of action for individuals to sue States over violations of the law, as for example, it did in the NVRA.⁵¹ Although the legislative record clearly shows that Congress did not intend to create a private right of action, several federal courts have already recognized such a right under §1983 in litigation commenced prior to the 2004 general election and discussed below.⁵²

For States to receive any funding under HAVA, they had to establish an administrative complaint procedure that is uniform and nondiscriminatory, allows for a hearing upon request, and makes final determinations within a set period of time.⁵³

Litigation

A number of court decisions have already been issued construing certain provisions of HAVA. Just prior to the November 2004 election, various state Democratic Party organizations, along with the NAACP, ACORN, People for the American Way, Common Cause and certain labor organizations, filed lawsuits in Michigan, Missouri, Ohio, Florida and Colorado claiming violations of HAVA’s provisional balloting requirements as well as the handling of the citizenship question on voter registration forms. Although the defendant state governments and the Department of Justice, which filed amicus briefs in a number of these cases, argued that HAVA did not create a private right of action, all of the courts recognized such a right under 42 U.S.C. §1983, at least with regard to the provisional balloting issue.

The provisional balloting lawsuits revolved around the definition of “jurisdiction” in Section 302(a), which requires a provisional ballot be provided to a voter who declares he is a registered voter in the “jurisdiction” and eligible to vote. The plaintiffs argued that the use of the word “jurisdiction”

meant that the state had to provide (and count) a provisional ballot for an eligible voter as long as he was registered within the jurisdiction of the local election authority, be it a town, city or county, no matter what precinct he appeared in. All of the states that were named as defendants in the litigation had implemented rules either allowing provisional ballots to only be given to individuals who were in the correct precinct according to their voter registration address or providing that provisional ballots would be counted only if they were cast in the voter’s assigned precinct. The States of Missouri and Florida won these suits at the federal district court level, with the courts ruling that the plaintiffs could assert a private right of action and that, although election officials had to provide provisional ballots to voters who were not in the correct precinct, they did not have to count them.⁵⁴ Colorado won a similar decision in state court.⁵⁵

The plaintiffs in Michigan and Ohio won at the district court level,⁵⁶ but only days before the election, the Sixth Circuit Court of Appeals overturned those decisions.⁵⁷ The Sixth Circuit held that plaintiffs could assert a private HAVA right of action under §1983; that election officials had to provide provisional ballots to a voter who was in the wrong precinct; but that States were not required by HAVA to count the provisional ballots of voters who were not in their assigned precincts. The court explained that HAVA’s provisional balloting requirement was not intended to preempt traditional precinct voting and Congress left to the States the decision of whether to count such ballots.⁵⁸ The States have split on this issue, with 28 only counting provisional ballots cast in a voter’s precinct, and 17 states counting provisional ballots cast outside the precinct.⁵⁹

Florida was also sued because it would not allow individuals to register who failed to answer the new HAVA citizenship question on the voter registration form. The plaintiffs claimed this violated the Voting Rights Act. However, the case was dismissed after the court ruled that the defendants complied with state law and the plaintiffs lacked standing to assert any claims under the Voting Rights Act.⁶⁰

Summary

The Help America Vote Act was the first federal legislation affecting voter registration and the election process since the National Voter Registration Act of 1993. It also was the first time Congress ever appropriated federal funds for the States to help pay for the administration of federal elections. Both federal and state election officials and legislators are still evaluating the effects of this statute, which has some provisions that are not yet effective. There is also certain to be more litigation similar to what was filed last November as all of HAVA’s requirements are implemented by the States, particularly the new statewide voter registration lists with the statute’s maintenance and information verification standards. With a new federal election agency in place that is collecting data on election administration and providing grants for new research on election issues, there is also bound to be more attempts in the future to pass new

federal statutes or to amend HAVA based on analysis of the effects of the statute on our entire voter registration and election process.

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Footnotes

¹ Public Law 107-252, 42 U.S.C. §§15301-15545.

² Section 901, 42 U.S.C. §15541.

³ See for example, Consolidated Appropriations Resolution, Public Law 108-7 (included \$1.515 billion in funding for HAVA).

⁴ Information about the EAC is available at its website at www.eac.gov.

⁵ Public Law 107-252 (emphasis added).

⁶ Section 253 and 254, 42 U.S.C. §§15403, 15404.

⁷ Section 254(c), 42 U.S.C. §15404(c).

⁸ Section 203, 42 U.S.C. §15323.

⁹ Section 208, 42 U.S.C. §15328. This rule prevents two commissioners of the same party from overruling the third commissioner if the fourth seat is vacant. It also removes any incentive a president or the Senate might have to delay the seating of a fourth commissioner, thereby allowing two commissioners to dominate the EAC.

¹⁰ 42 U.S.C. §15329.

¹¹ Section 211, 42 U.S.C. §15341.

¹² Section 214, 42 U.S.C. §15344.

¹³ Press Release, U.S. Election Assistance Comm'n, U.S. Election Assistance Commission Reports to Congress on Election Reform Progress in 2004 (February 9, 2005), available at http://www.eac.gov/news_020905.asp.

¹⁴ The EAC has already issued "Best Practices for Facilitating Voting by U.S. Citizens Covered by the Uniformed and Overseas Citizens Absentee Voting Act" and "Best Practices in Administration, Management and Security in Voting Systems and Provisional Voting," available at www.eac.gov.

¹⁵ Section 202, 42 U.S.C. §15322.

¹⁶ Section 221, 42 U.S.C. §15361.

¹⁷ Performance and Test Standards for Punchcard, Marksense and Direct Recording Electronic Voting Systems (Approved January 1990).

¹⁸ FEDERAL ELECTION COMMISSION, VOTING SYSTEM STANDARDS, VOLUMES I AND II, May 2002.

¹⁹ 42 U.S.C. §15531.

²⁰ Section 902, 42 U.S.C. §15542.

²¹ *Id.*

²² Press Release, U.S. Election Assistance Commission, U.S. Election Assistance Comm'n to Conduct Special Audit of California's HAVA Funding, (January 27, 2005), available at http://www.eac.gov/news_012705.asp.

²³ 42 U.S.C. §15484.

²⁴ 42 U.S.C. §15484.

²⁵ 42 U.S.C. §15481.

²⁶ 42 U.S.C. §15481(a)(3)(B).

²⁷ 42 U.S.C. §15481(a)(1)(B). A central count voting system is one where the ballots, whether they are punchcard or optiscan paper ballots, are transported to a central location for counting or scanning. Precinct-based systems allow the ballots to be counted or scanned at the polling place.

²⁸ DRE's have a computer screen on which the voter views the ballot. Choices are made by either touching the screen, pushing a button, or turning a dial, and the votes are recorded on a computer memory chip. Most new DRE's also have an audio feature that allows a voter to listen to the ballot choices through the use of headphones.

²⁹ See e.g., <http://www.verifiedvoting.org/>.

³⁰ 42 U.S.C. §15481(a)(6).

³¹ 42 U.S.C. §15482(a).

³² 42 U.S.C. §15483(b)(2)(B).

³³ Six states are exempt from the NVRA because they allow election day registration—Minnesota, New Hampshire, Wisconsin, Wyoming, and Idaho—or no registration—North Dakota.

³⁴ This allows ballots that are cast under a court order that is later overturned by a higher court to be separated from valid ballots, which cannot be done if such ballots disappear into the anonymity of the ballot box.

³⁵ See <http://www.usdoj.gov/crt/voting/misc/poster.12.23.03.html>.

³⁶ 42 U.S.C. §15483.

³⁷ Electionline.org, *Election Preview 2004: What's Changed, What Hasn't and Why* (page 47), available at <http://www.electionline.org/index.jsp?page=Publications>.

³⁸ Section 7, 5 U.S.C. §532a note. There are seven states that require full social security numbers to register to vote: Georgia, Hawaii, Kentucky, New Mexico, South Carolina, Tennessee, and Virginia. However, Georgia's right to this exemption to the Privacy Act is being litigated in *Schwier v. Cox*, Civil No. 1:00-CV-2820 (N.D. Ga. January

31, 2005), with the district court ruling that Georgia is not eligible for the exemption. The case is currently on appeal.

³⁹ 42 U.S.C. §15483(b). Acceptable documentation includes “a current and valid photo identification; or . . . a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” *Id.*

⁴⁰ See www.usdoj.gov/crt/voting/hava/hava.html.

⁴¹ 42 U.S.C. §1973ff-1 *et seq.*

⁴² 42 U.S.C. §1973ee-1(b)(2)(B)(ii).

⁴³ The form must include the question: “Are you a citizen of the United States of America?” with a box for the applicant to check yes or no. 42 U.S.C. §15484(b)(4)(A)(i).

⁴⁴ 42 U.S.C. §15521.

⁴⁵ 36 U.S.C. §152601.

⁴⁶ See Title VII, Sections 701-707.

⁴⁷ 42 U.S.C. §15543.

⁴⁸ 42 U.S.C. §15545(b).

⁴⁹ 42 U.S.C. §15511. The Attorney General has assigned responsibility for HAVA to the Civil Rights Division.

⁵⁰ See <http://www.usdoj.gov/crt/voting/litigation/caselist.htm#hava>.

⁵¹ See 42 U.S.C. §1973gg-9(b).

⁵² In fact, Senator Dodd (Ct.), a Senate conferee and sponsor of HAVA, complained about HAVA’s limited enforcement provisions: “While I would have preferred that we extend [a] private right of action. . . , the House simply would not entertain such an enforcement provision.” 148 CONG. REC. S10488-02, S10512 (daily ed. Oct. 16, 2002).

⁵³ 42 U.S.C. §15512. It is interesting to note that in none of the HAVA lawsuits filed over the 2004 election did any of the plaintiffs take advantage of these administrative procedures by filing a complaint with the States.

⁵⁴ Florida Democratic Party v. Hood, 342 F. Supp. 2d 1073 (N.D. Fla. 2004); Hawkins v. Blunt, No. 04-4177 (W.D. Mo. October 12, 2004).

⁵⁵ Colorado Common Cause v. Davidson, No. 04-7709 (D.C.Co. Oct. 18, 2004).

⁵⁶ Bay County Democratic Party v. Land, 347 F. Supp. 2d 404 (E.D. Mich. 2004); Sandusky County Democratic Party v. Blackwell, 339 F. Supp. 2d 975 (N.D. Ohio 2004).

⁵⁷ Sandusky County Democratic Party v. Blackwell, 386 F.3d 815 (6th Cir. 2004); Sandusky County Democratic Party v. Blackwell, 387 F.3d 565 (6th Cir. 2004).

⁵⁸ 387 F.3d at 578.

⁵⁹ Electionline.org, *The 2004 Election* (page 5), available at <http://www.electionline.org/index.jsp?page=Publications>.

⁶⁰ Diaz v. Hood, 342 F. Supp. 2d 1111 (S.D. Fla 2004).