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Reinforcing the Formidable Arsenal: Restoration of Purposeful Discrimination as a Basis for Denial of Section 5 Preclearance Under the Fannie Lou Hamer, Rosa Parks, and Corretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006

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THE HELP AMERICA VOTE ACT: UNMET EXPECTATIONS?

*Herbert E. Cihak**

I. STEPS TOWARD ELECTION LAW REFORM

Federal involvement in state election law matters did not begin with an infamous 2000 Florida case.¹ Congress and our courts have been entangled in the political thicket of election law issues since at least the early 1960s, as evidenced by congressional legislation that supports fair voting practices and equal access to voting processes,² as well as United States Supreme Court cases that have rearranged the United States electoral landscape.³ Without the aftermath of the 2000 Presidential election, however, there would have been no urgency in passing the Help America Vote Act 2002 (HAVA).⁴

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1. *Bush v. Gore*, 531 U.S. 98, 110 (2000) (finding that standards and procedures for counting a vote must be resolved to comport with equal protection and due process requirements).

2. See Voting Rights Act of 1965, 42 U.S.C. §§ 1971–1973bb-1 (1965); Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. §§ 1973ee–1973ee6 (1984); Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (codified in scattered sections of 18 U.S.C., 39 U.S.C., and 42 U.S.C.); National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified in scattered sections of 39 U.S.C. and 42 U.S.C.); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C. and 47 U.S.C.); Rehabilitation Act of 1993, Pub. L. No. 93-112, 87 Stat. 355 (codified in scattered sections of 29 U.S.C.).

3. See *Colegrove v. Green*, 328 U.S. 549 (1946) (Frankfurter, J., plurality opinion) (providing comments regarding the political thicket). See also *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (establishing that state legislatures must be apportioned on an equal one person, one vote standard); *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964) (requiring congressional districts to be drawn on an equal population basis); and *Baker v. Carr*, 369 U.S. 186, 209–10 (1962) (holding that challenges to malapportioned districts under the Equal Protection Clause were justiciable). *Reynolds*, *Wesberry*, and *Baker* all set the stage for an eight-fold increase in the number of election law cases that wound their way to the United States Supreme Court between 1910 and 1980. See generally RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003) for a detailed analysis of this trend.

4. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.).

II. FLORIDA AS A CATALYST

The State of Florida became ground zero on November 2, 2000 as initial ballot tallies began to be reported. It quickly became obvious that whoever won Florida's twenty five electoral votes—Vice President Al Gore or Texas Governor George W. Bush—would become the nation's forty-third president. National attention shifted to Palm Beach County's bizarre butterfly ballots, Miami-Dade County's 10,000 undervotes, Volusia County's machine-related problems, and the use of punch card voting machines in Broward County. Then truckloads of political operatives and lawyers flocked to the Sunshine State.⁵ For nearly a month, the American public witnessed the spectacle of election workers with magnifying glasses trying to decipher voter intent by examining hanging, dimpled, and pregnant voting card chads. This national debacle was called to a halt on December 12, 2000, when the United States Supreme Court intervened.⁶ The 2000 Florida election fiasco, however, left many United States citizens seething, and a general public outcry for some kind of election law reform was sounded.⁷ Congress was left with no recourse but to act on election law reform legislation.⁸

III. CONGRESSIONAL REACTION

Election law reform measures were quickly introduced in both the United States House of Representatives and in the United States Senate during the opening of the 107th Congressional legislative session that began in January 2001.⁹ A bipartisan reform measure, H.R. 3295, was passed in the

5. For background information on aspects of this election see ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY (2001).

6. *Bush v. Gore*, 531 U.S. 98, 98 (2000).

7. Many private organizations conducted election reform research and proposed suggestions for election law reform. Probably no group was more influential than the National Commission on Federal Election Reform. This group was organized by the Miller Center of Public Affairs at the University of Virginia and the Century Foundation. Several foundations provided this organization with funding. Former Presidents Jimmy Carter and Gerald Ford served as honorary co-chairs, and politicians Robert Michel and Lloyd Cutler served as co-chairs. Recommendations from this report were used as a foundation for much of the specific HAVA legislation. See THE NAT'L COMM. ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (2001).

8. For a general overview of the HAVA provisions and the State of Arkansas's response, see Herbert E. Cihak & Jason Springman, *HAVA and Arkansas Election Law Reform: Compliance and Promise*, 2006 ARK. L. NOTES 1.

9. In the words of one proponent, congressional reform would address three "fundamental principles: One, that every eligible citizen shall have the right to vote. Two, that no legal vote will be canceled by an illegal vote. Three, that every vote will be counted equally and fairly, according to the law." See 148 CONG. REC. H20315 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

House in December of 2001.¹⁰ After lengthy deliberations, the Senate passed S. 565 on April 11, 2002.¹¹ One of HAVA's Senate co-sponsors, Senator Christopher Dodd of Connecticut, commented on the significance of the historic state-federal election reform partnership that had been forged:

We, by no means, intend to supplant the traditional role that [s]tate and local governments have played administering elections for Federal office. But, for the first time, with this legislation, the Congress—[t]he Federal Government—will set basic minimum requirements and provide critical resources for Federal elections For the very first time, the Federal Government will become a real partner with [s]tate and local governments in the administration of Federal elections For the very first time, again, the Congress and the Federal Government will start paying their fair share of the cost of administering elections for Federal office.¹²

The final version of the election law reform package was passed by the House on October 10, 2002,¹³ and in the Senate on October 16, 2002.¹⁴ President George W. Bush signed the Help America Vote Act of 2002 (HAVA) into law on October 29, 2002.¹⁵ But it would take well over a year for provisions of this act to be transformed into an organized governmental entity with staff and funding.¹⁶

The crux of the problem that Democrats and Republicans had in getting together on the HAVA election law reform was identified in early 2001 legislative skirmishes and has continued to be emphasized in succeeding developments: the issue of potential voting fraud. Democrats (and their liberal supporters) have taken the position that voting fraud does not exist, or if it does exist its impact and consequences are of little effect and usually the

10. 147 CONG. REC. S13764–13771 (daily ed. Dec. 19, 2001). HAVA was originally supported by a wide ranging group of political and social organizations including the following: the National Commission on Federal Election Reform (Ford-Carter Commission); National Conference of State Legislatures; National Association of Secretaries of State; National Association of Counties; The Election Center; National Federation of the Blind; Common Cause; National Association of State Election Directors; United Auto Workers; AFL-CIO; NAACP; American Foundation for the Blind; National Association of Protection Advocacy Systems; and United Cerebral Palsy Association. See 148 CONG. REC. H20317 (daily ed. 2002).

11. 148 CONG. REC. S4410 (daily ed. Apr. 11, 2002).

12. 148 CONG. REC. S709-03 (daily ed. Feb. 13, 2002) (statement of Sen. Dodd).

13. 148 CONG. REC. H1204–05 (daily ed. Feb. 13, 2002) (statement of Sen. Dodd).

14. 148 CONG. REC. S20860 (daily ed. Oct. 16, 2002).

15. Help America Vote Act of 2002, Pub. L. No. 107-252, 1666 Stat. 116 (codified in scattered sections of 42 U.S.C.).

16. See UNITED STATES ELECTION ASSISTANCE COMMISSION, ANN. REP. FISCAL YEAR 2003.

result of inadvertent election worker mistakes and administrator errors.¹⁷ Consequently, they believe that there is no need to enact photo identification measures or to create additional security devices which could act as voting accessibility impediments and which could impose disproportionate burdens and costs on minority and elderly voters.¹⁸ On the other hand, Republicans (and their conservative base) have continued to brandish the election fraud or corruption saber.¹⁹ As a consequence, they generally have supported legislation which would impose stricter voting identification and voting security requirements.²⁰ For them, the issue of safeguarding election law integrity is essential to the viability of this democracy. The difference between the

17. See LORI MINNITE & DAVID CALLAHAN, *SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD*, (2003). The authors of this report state that "there have been no major studies of election fraud in the United States," and that "[t]oo often, hearsay and anecdotal stories are put forth as fact during critical policy deliberations." *Id.* at 9. In a March 2007 introduction to a publication sponsored by Project Vote, Lorraine C. Minnite wrote further that: "The claim that voter fraud threatens the integrity of American elections is itself a fraud. It is being used to persuade the public that deceitful and criminal voters are manipulating the electoral system. No available evidence suggests that voters are intentionally corrupting the electoral process With renewed partisan vigor fantasies of fraud are being spun again to undo some of the progress America has made lowering the barriers to vote." LORRAINE C. MINNITE, *THE POLITICS OF VOTER FRAUD* 5 (2007).

18. While Democratic constituencies have attacked constrictive photo ID requirements for voting, they also have sought to expand the electoral franchise in a number of ways. In February 2007, the New York Coalition to Expand Voting Rights called on New York City Mayor Michael R. Bloomberg to allow legal immigrants, but who are not citizens, to vote in local elections. This coalition represented more than sixty diverse organizations including the Asian American Legal Defense and Education Fund, the Center for Constitutional Rights, the Community Service Society, and the Puerto Rican Legal Defense and Education Fund. See Sewell Chan, *Alliance Backs Voting Rights for Noncitizens*, N.Y. TIMES, Feb. 20, 2007.

19. The United States Senate Republican Policy Committee issued a report in February 2005 which stated that "[v]oter fraud continues to plague our nation's federal elections." United States Senate Republican Policy Committee, *Putting an End to Voter Fraud* (Feb. 15, 2005), available at http://rpc.senate.gov/_files/Feb1504VoterFraudSD.pdf. This report urged Congress to address the problem of voter fraud that had been identified in the HAVA legislation, and outlined three steps that should be taken in order to "protect the election process from those who would undermine our democracy." *Id.* These steps included the following: "First, Congress should require that voters at the polls show photo identification. Second, Congress should examine the integrity of the voter registration process Third, Congress should examine the extent to which early and absentee voting increases the likelihood of fraudulent votes being cast." *Id.* (emphasis omitted). To reinforce the Republican position on voter fraud, Senator Mitch McConnell introduced S. 414 on February 17, 2005, entitled "Voter Protection Act of 2005." Provisions of this bill amended the Help America Vote Act 2002 by incorporating the anti-fraud steps from the United States Senate Republican Policy Committee Report. See 148 CONG. REC. S1625 (daily ed. 2005).

20. Republican photo identification legislation in Georgia, Indiana, Missouri, Ohio, and Florida has touched off a firestorm of protests and an abundance of lawsuits as these enactments have wound their way through the judicial system. Several other states, including Texas, stand poised to pass photo identification measures.

philosophies that the two parties have towards elections and election law reform, however, is more than just a difference in the perception of what constitutes voting fraud. While voter fraud is the buzz word at the center of this disagreement, what the clash really boils down to is a matter of voting ballot access versus voting ballot security, and this ideological divide does not seem to be narrowing with the passage of time. For both parties the political stakes are too high to concede much ground.

IV. HAVA—PURPOSE AND PROMISE

There is little doubt that congressional action was an attempt to fix the problems spotlighted by the 2000 election debacle in Florida. The 2002 House Conference Report described HAVA's purpose in this way:

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 programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes²¹

HAVA created a four member advisory commission—the Election Assistance Commission (EAC)—and members were to be appointed by the President to a four year term.²² As written into Section 209 of HAVA, “[t]he Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of government, except to the extent permitted under section 1973gg–7a of this title.”²³ This “advisory” only role for the EAC would soon make it apparent that the EAC was doomed to living the life of a paper tiger, for no state would voluntarily surrender its election law sovereignty to this animal species.

Since 2004, the EAC has advised the states as to “best practices”²⁴ for carrying out HAVA provisions and doled out over three billion dollars in federal appropriations.²⁵ Under HAVA Title I, the EAC has been responsible

21. H. R. REP. NO. 107-730, pt. 1, at 1 (2002) (Conf. Rep.).

22. 42 U.S.C. § 15323 (Supp. II 2002).

23. 42 U.S.C. § 15329 (Supp. II 2002).

24. UNITED STATES ELECTION ASSISTANCE COMMISSION, *Best Practices Tool Kit*, available at <http://www.eac.gov/bp/docs/BestPracticesToolKit.doc>, was revised in January 2006.

25. While most of this money did go to the states for the replacement of dated voting machinery, HAVA under-funding has been a chronic problem. Speaking of these EAC funding woes, DeForest Soaries, the first EAC Chairman, said, “We really had to put together a federal agency with spit, when that agency was supposed to bring about reforms in voting for federal elections.” See Tim Dickinson, *The Voice of Voting Reform*, ROLLING STONE:

for distributing money to states for improvements in the administration of elections and to replace punch card and lever voting equipment.²⁶ Title III requirements have dealt with voting systems standards, provisional voting, the creation of statewide voter registration lists, and the rights of disabled, military, and overseas voters.²⁷

V. KEY HAVA PROVISIONS UNDER SCRUTINY

It is not apparent that the EAC, or Congress for that matter, fully understood the nation-wide ramifications of replacing punch card voting machines, lever voting machines, and paper ballots with electronic touch screen voting equipment. As early as 1969, studies had surfaced which indicated that computerized voting presented a whole host of security issues.²⁸ Coupled with electronic voting machine security is the issue of electronic machine malfunctions. A substantial number of voting machine failures were unveiled during the 2006 primary election season.²⁹ Finally, there is the issue of electronic voting maintenance costs. These maintenance expenses have added significant financial burdens to already stretched state budgets.³⁰ As a result of these increased election expenditures, the State of

NATIONAL AFFAIRS DAILY, June 6, 2006,
<http://www.rollingstone.com/nationalaffairs/?p=176>.

26. 42 U.S.C. §§ 15301–15302 (Supp. II 2002).

27. 42 U.S.C. § 15481 (Supp. II 2002).

28. See ROY SALTMAN, INDEPENDENT VERIFICATION: ESSENTIAL ACTION TO ASSURE INTEGRITY IN THE VOTING PROCESS 4 (2006). *Independent Verification*, a report submitted to the National Institute of Standards and Technology, contains a description of how fraudulent voting software was used in a 1968 Los Angeles County, California experiment. For additional comments about security and reliability vulnerabilities see BRENNAN CENTER FOR JUSTICE at N.Y. U. SCH. OF LAW, *The Machinery of Democracy: Protecting Elections In An Electronic World*, June 2006, available at <http://www.verifythevote.org/Docs/BrennanMachFullReport.pdf>.

29. During installation, poll workers in Pender County, North Carolina, broke off voting machine legs. In New Hanover County, North Carolina, touch-screen machines froze-up while being assembled. See Veronica Gonzalez, *Touch Screens Struggle to Get a Leg up Over Paper Ballots*, WILMINGTON STAR (Wilmington, N.C.), May 3, 2006, at B1. Dan Bewley, *Glich Hits Barry County Voting Machines*, Wood TV8, <http://www.woodtv.com>. Bewley describes the situation in Barry County, Michigan, where all of the ballots had to be counted by hand because of a computer program glitch that caused the machines to scramble the results. In suburban Cook County, Illinois, election officials reported that ten optical scan and fifteen touch-screen machines experienced equipment failures, and that thirty to forty other machines needed repairs. See John McCormick & James Janega, *Voting Machine Woes Force Ballot Backup*, CHI. TRIB., Mar. 22, 2006, at C28. Randolph County, Indiana's election tabulation equipment malfunctioned, which left incomplete and possibly inaccurate vote totals. See *Voting Ran Smoothly in Wayne County*, PALLADIUM-ITEM (Richmond, Ind.), May 3, 2006, at 3A.

30. Voting equipment maintenance "sticker shock" has been felt in most states and is exemplified by the situation in the State of Utah. "I'm not sure any of us realized how much

Florida announced in February of 2007 that they would abandon touch-screen voting machines in favor of paper ballots scanned by machines.³¹ It is a small wonder that Diebold, a leading voting machine vendor, is actively considering the option of getting out of the election machine voting business altogether.³²

As the 2006 election year cycle unfolded, it became increasingly clear that in addition to problems with the installation of new electronic voting equipment,³³ there were other difficulties which plagued the implementation of two more key state HAVA provisions: procedures for the administration of elections³⁴ and issues dealing with voting accessibility for several popula-

it is going to cost to own and operate this system," said Michael Cragun, elections director for the Utah Lieutenant Governor's Office. Salt Lake County Clerk Sherrie Swensen now spends \$12,000 a month to store electronic voting machines and this past year spent an extra \$138,000 to pay for memory cards, batteries and other essential machine accessories. See Matt Canham, *E-vote Tab Adds up to Big Trouble*, SALT LAKE TRIB., Dec. 17, 2006.

31. Abby Goodnough & Christopher Drew, *Florida to Shift Voting System With Paper Trail*, N.Y. TIMES, Feb. 2, 2007, at A17 (providing an account of Florida's shift to equipment which will allow for a verified paper audit trail, but at a cost of \$32.5 million). Maryland, California, New Jersey, and Connecticut are at the forefront of a growing number of states that may well join the bandwagon to ditch all touch-screen machines due to cost and security concerns. Other states will have to figure out fixes that will allow for new audit capacity demands.

32. M.R. Kropko, *Diebold Weighs Strategy for Voting Unit*, U.S.A. TODAY, Apr. 18, 2007. Diebold is one of the major players in the electronic voting machine world, but election business only makes up about 8% of the revenue for this company noted for its focus on safes and automated teller machines. The negative publicity surrounding electronic voting machine security issues has had an adverse impact on sales to financial institutions and to the government. As a result, Diebold has attempted to sell its voting technology business.

33. Getting machines purchased and deployed in time for the Spring 2006 elections was a monumental project for the states. Once the machines were installed and the election software programmed, electronic voting machine malfunctions, which occurred throughout much of the country, made determining winners for the 2006 primary elections chaotic. Typical of the experience encountered is the comment of one southern Indiana county clerk who said, "It's the first time we've ever experienced a problem of this significance. It was a complete failure of a new programming system." See Lesley Stedman Weidenbener, *Primary Election 2006: State to Probe Computer Problems*, THE COURIER-JOURNAL (Louisville, KY), May 4, 2006, at 1B. Although there were less incidents of machine malfunctions during the November 2006 general election, national newspapers still reported problems in a number of states including: Colorado, Indiana, Michigan, New Jersey, Pennsylvania, and Ohio. See Alan Cooperman and Amy Goldstein, *Computer Glitches Frustrating Voters*, WASH. POST, Nov. 7, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/07>.

34. Well into the 2006 election cycle, nearly a dozen states still were not in compliance with the HAVA Title II, § 303 requirement that a computerized statewide voter registration list be created. See December 21, 2005 Survey, National Association of Secretaries of State (NASS) (on file with author). The accuracy and confidentiality of the databases already in place also was challenged in a July 2006 NASS resolution which urged that "steps to improve the accuracy of state voter registration databases" be taken. NAT'L ASSOC. OF SEC'Y OF STATE, NASS RESOLUTION ON VOTER REGISTRATION DATABASE MAINTENANCE, <http://www.nass.org/resolutions/NASS%20Resolution%20->

tion groups.³⁵ These problems have been magnified to such an extent that the viability of the HAVA itself is called into question.³⁶ How effective the new 110th Democratic Congress will be in the enactment of meaningful changes to HAVA and other substantive election law reform is still an unanswered question.³⁷ There is general cause for optimism,³⁸ however, despite

%20Final%20July%202006%20Voter%20Registration%20Database%20Maintenance.pdf (2006).

35. HAVA Title III, § 301 requires voting be accessible for individuals with disabilities and those citizens requiring alternative language assistance. Voter complaints are directed to the Justice Department's Civil Rights Department hotline. Calls during the November 2006 election were a fraction of the calls made during the November 2004 balloting. See Terry Frieden, *Number of Civil Rights Voting Complaints "Low,"* CNN.com, Apr. 18, 2007, <http://www.cnn.com/2006/POLITICS/11/07/voting.doj/index.html> (quoting one Justice Department official as saying: "Nearly all of the civil rights and access problems dealt with minority language voting issues.").

36. Richard Wolf, *Election Glitches "Could Get Ugly,"* USA TODAY, Sept. 14, 2006, at 1A (focusing national attention on the fact that 30% of the population would be using new voting equipment in November 2006, and that inadequately trained poll workers (with an average age of seventy-two) posed a technologically perilous situation).

37. Whether changes are made or not, Democrats appear to be talking about HAVA reform talk. The spring 2007 kick off to the 2008 presidential campaign cycle has produced a plethora of HAVA reform bills in Congress. Democratic Senator Hillary Clinton has submitted the same substantive bill that she introduced in 2005: Count Every Vote Act of 2007, S. 804, 110th Cong. (2007). Illinois Senator Barack Obama introduced his Voter Advocate and Democracy Index Act of 2007, S. 737, 110th Cong. (2007). Another reform bill, Voting Opportunity and Technology Enhancement Rights Act of 2007, S. 730, 110th Cong. (2007), has been submitted by Senator Christopher Dodd, and Senator Bill Nelson has offered the Vote Integrity and Verification Act of 2007. In the House of Representatives, New Jersey congressman Rush Holt has enlisted an army of co-sponsors to sign onto his bill, Voter Confidence and Increased Accessibility Act of 2007, H.R. 811, 110th Cong. (2007). In addition, Senator Diane Feinstein, Chairman of the Senate Rules and Administration Committee, has chanted the election law reform mantra. Her February 14, 2007 letter to David Walker, Comptroller General of the United States, focused on electronic voting system problems by asking the GAO to investigate "models of Direct Recording Electronic voting systems that are used in federal elections, but do not produce voter-verified paper ballots." Press Release, Sen. Dianne Feinstein, Senator Feinstein Asks Government Accountability Office to Investigate Sarasota County Electronic Voting Systems (Feb. 14, 2007), available at <http://feinstein.senate.gov/07releases/r-e-voting-fl.htm>. Also, in a press release dated March 9, 2007, Senator Feinstein called on the Department of Veteran Affairs to provide veterans being treated in VA facilities with assistance in registering to vote. Press Release, Sen. Dianne Feinstein, Chairman Feinstein Calls on Department of Veterans Affairs to Provide Voter Registration Assistance (Mar. 9, 2007), available at http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=6b5c5ae4-98e3-4c67-37fb-407f92e4032e&Region_id=&Issue_id=. Finally, on May 24, 2007, Senator Feinstein introduced the Ballot Integrity Act of 2007. This legislation provides, in part, safeguards to prevent errors at the polls by requiring states to use voting systems with voter-verified paper records by the federal 2010 elections. Press Release, Sen. Dianne Feinstein, Senator Feinstein Introduces Comprehensive Reform Legislation to ensure Accurate Counts in Federal Elections (May 25, 2007) available at

the fact that two new EAC commissioners were confirmed by the newly installed Congress in February 2007 without even the formality of a public hearing.³⁹

VI. HAVA'S IMPERFECT FUTURE?

Although the EAC allocated the last of its state funds—over \$58 million—to five states in 2006,⁴⁰ most of the federal money to acquire new voting equipment already had been paid out by the end of December 2005.⁴¹ So, what does a governmental agency do when most of the money that it once controlled has been distributed?⁴² The EAC's answer to this question in 2006 was to shift its attention and turn its focus to several secondary changes. Future EAC efforts will now concentrate on improving voting system technology, developing research and study initiatives in order to serve as a national clearinghouse of election administration information, and managing the federal funds distributed to the states for the replacement of dated voting equipment and the implementation of computerized statewide voter registration lists. In seeking to carry-out these responsibilities, the EAC understands the importance of keeping the general public informed about elec-

http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=C36F5F83-FBBF-A66A-2AE3-9D278D0F4E3C.

38. Memorandum from Ralph G. Neas, People for the American Way (Apr. 18, 2006), *available at* <http://www.pfaw.org/pfaw/general/default.aspx?oid=17890&print=yes&units=all>. Mr. Neas's memo indicated the probability of congressional action to remedy voting technology problems, to strengthen measures that eliminate intimidation and deceptive voting tactics, and to eliminate burdensome voter identification requirements.

39. 153 CONG. REC. S2115 (daily ed. Feb. 15, 2007). These new commissioners are Rosemary Rodriguez and Caroline Hunter. *Id.*

40. See 2006 U.S. ELECTION ASSISTANCE COMM. ANN. REP. 22, *available at* <http://www.eac.gov/docs/EAC%20AR2006.pdf> (hereinafter EAC 2006 ANNUAL REPORT).

41. *Id.*

42. It is possible that the short answer from some HAVA opponents would be to just go away. Since initial funding for the EAC was established for a three year period only, it is possible that this agency could be disbanded. Although an early supporter of HAVA, the National Association of Secretaries of State (NASS) began to see the EAC as a turf infringer. In a February 2005 letter to members of Congress, NASS wrote that "[t]he secretaries believe that allowing the EAC to evolve into a regulatory body is contrary to the spirit of HAVA, and that by 2006 the EAC will have served its purpose. Congress should preserve the states' ability to serve as independent laboratories of change through successful experiments and innovation in election reform." Letter from NASS to Congress (Feb. 6, 2005), *available at* <http://www.nass.org/releases/EAC%20Position%20Cover%20Ltr.pdf>. On April 24, 2007, H.R. REP. NO. 110-107 (2007), was submitted. Although this conference report dealt with the Iraq Accountability Act of 2007, (H.R. 1591, 110th Cong. (2007), Chapter 3, Section 4301 amended HAVA Section 102(a)(3)(B) to extend the expiration date of the EAC from January 1, 2006 to March 1, 2008.

tion law issues and engaged in election law processes.⁴³ A few observations about these current and future EAC initiatives seem appropriate, for how successful the EAC will be in meeting their renewed and invigorated charge may well determine the future success of election law reform in the United States.

A. Improvement of Voting Systems

Since the replacement of outdated voting equipment was a major thrust of HAVA, and since most states did in fact replace their antiquated voting equipment, the EAC has stepped forward to provide voting system guidelines and voting testing standards.⁴⁴ These guidelines and standards were promulgated in order to address the specific provisions of HAVA Section 301 which required voting systems to perform several functions, including the following: allowing voters to review privately their selections; allowing voters to correct their selections before casting a "final" vote; notifying voters when they had over-voted; providing for a verified permanent paper audit trail; and providing individuals with disabilities or language accessibility problems with the ability to vote independently and in private.⁴⁵ It was important to have voting system guidelines and standards in place so that voting system security issues and voter-verified paper audit trail concerns could be addressed, although the adoption of these guidelines and standards has not necessarily allayed the fears of many in the election law world who are unwilling to sign-off on either the reliability or security features of electronic touch-screen voting machines.

Volume I of the *2005 Voluntary Voting System Guidelines* (VVSG) deals with *voting system performance guidelines*,⁴⁶ and the content of this volume is described in the EAC Fiscal Year 2006 Annual Report, as including: "new requirements for accessibility, usability, voting system software distribution, system setup validation, and wireless communications. It provides an overview of the requirements for independent verification systems, including requirements for a voter-verified paper audit trail for States that require this feature for their voting systems."⁴⁷

43. EAC 2006 ANNUAL REPORT, *supra* note 40, at 7.

44. On December 13, 2005, one of the HAVA goals was attained when the two volume 2005 Voluntary Voting System Guidelines (VVSG) were adopted. UNITED STATES ELECTION ASSISTANCE COMM'N, 2005 VOLUNTARY VOTING SYSTEM GUIDELINES, Dec. 13, 2005, *available at* <http://www.eac.gov/VVSG%20> (hereinafter VVSG).

45. 42 U.S.C. § 15481 (Supp. II 2002).

46. See UNITED STATES ELECTION ASSISTANCE COMM'N, *supra* note 44.

47. See EAC 2006 ANNUAL REPORT, *supra* note 40, at 13.

Volume II of the VVSG, entitled “National Certification Testing Guidelines,”⁴⁸ “describes the components of the national certification testing process for voting systems, which will be performed by independent voting system test labs accredited by EAC.”⁴⁹ In July 2006, the EAC commissioners adopted the Voting System Testing and Certification Program,⁵⁰ which provides the information and procedures that manufacturers need in order to test and certify HAVA voting requirements under § 231(a)(1).⁵¹ In February 2007, the EAC accredited the first two voting system test labs: iBeta Quality Assurance and Sys Test Labs. EAC Chair Donetta Davidson stated that “[f]or the very first time, the federal government is in the business of testing and certifying voting equipment and software.” She added, “With these two voting system test labs on board, we will begin the process of testing voting equipment to ensure that these systems meet all of the requirements to ensure accurate and reliable elections.”⁵²

B. Assistance to States—Election Day Preparation

Anyone who voted during the past year undoubtedly experienced some frustration in dealing with untrained poll workers, aggravation in using malfunctioning voting equipment, or genuine disgust while waiting in line to get a chance to cast an election ballot. Even though most states selected, procured, and set-up new voting equipment, that was no guarantee that the 2006 primary or general election would be conducted in a “hassle free” environment or run in a “professional manner.”

Did the EAC attempt to come to the aid of those states which had implemented new voting systems? The short answer is yes, but observing primary elections in ten states and sharing these observations along the way

48. VVSG, *supra* note 44.

49. EAC 2006 Annual Report, *supra* note 40, at 13.

50. *Id.* at 14.

51. 42 U.S.C. § 15371 (Supp. II 2002).

52. Press Release, United States Election Assistance Comm’n, Commission Accredits Voting System Test Labs (Feb. 21, 2007), *available at* http://www.eac.gov/news_022107.asp. The EAC worked closely with the Technical Guidelines Development Committee and the National Institute of Standards and Technology to develop these standards. In fiscal year 2007, these three groups “will revise sections of the VVSG dealing with software, functional requirements and independent verification, and security and will develop a comprehensive set of test suites or methods that can be used by testing laboratories to review any piece of voting equipment on the market.” See United States Election Assistance Commission Testimony before the United States House Appropriations Subcommittee on Transportation, Treasury, the Judiciary, Housing and Urban Development, and Related Agencies, Apr. 14, 2006, *available at* <http://www.eac.gov/docs/House%20Appropriations%20Testimony%20FY07%20-%20FINAL.pdf>.

hardly qualifies for a good conduct medal.⁵³ What kind of assistance for election day preparation was provided? First, a series of *Quick Start Management Guides*,⁵⁴ which provided an overview about how to effectively manage and administer an election, were sent to election officials throughout the nation.⁵⁵ These guides included: "Quick Start Guide for New Voting Systems," "Quick Start Guide for Ballot Preparation/Printing and Pre-Election Testing," "Quick Start Guide for Voting System Security," and "Quick Start Guide for Poll Workers."

Second, the EAC attempted to assist the states in recruiting the next generation of poll workers. Title V of HAVA requires the EAC to establish the Help America Vote College Program.⁵⁶ Basically, this program encourages college students to serve as nonpartisan poll workers. In fiscal year 2006, the EAC awarded a total of \$300,000 in grants to various state colleges and universities and other governmental entities.⁵⁷ The colleges, universities, and governmental bodies that received these grants were charged with the responsibility to train college students as poll workers or poll assistants. Typical of the grant recipients are Illinois Central College, which planned to recruit and train fifty college students to be poll workers in Peoria County, Illinois,⁵⁸ and Project Vote in Saginaw, Michigan, which planned to recruit and train forty to fifty college student poll workers for the city of Saginaw.⁵⁹

53. EAC 2006 Annual Report, *supra* note 40, at 16.

54. Actually these pamphlets are quite informative. It is too bad that the EAC was not able to figure out a way to insure that this material was actually imparted to individual poll workers. Perhaps the trickle-down theory does not work in the field of election law. But then maybe it is not particularly beneficial to take the time to remind yourself or share the information with others that you need to "keep it simple"—one of the points emphasized in the "Quick Start Management Guide for Poll Workers." The pamphlets are available at <http://www.eac.gov/docs/EAC%20Security.pdf>; <http://www.eac.gov/docs/EAC%20Poll%20Workers.pdf>; <http://www.eac.gov/docs/EAC%20Ballot.pdf>; <http://www.eac.gov/docs/EAC%20booklet.pdf>.

55. These guides were probably sent out in September 2006, but the letter which was sent to state and local election officials was dated October 19, 2006. This letter expressed the sentiment that election officials might not be able to review the guides thoroughly, so nine of the recommendations (out of the four guides provided) were specifically highlighted. This letter is available at <http://www.eac.gov/docs/revised%20letter%20to%20election%20officials%20-%20Final.pdf>.

56. 42 U.S.C. § 15521 (Supp. II 2002).

57. EAC 2006 Annual Report, *supra* note 40, at 18.

58. *Id.* at 19.

59. *Id.* at 20.

C. Assistance to States—Clearinghouse Activities: Research and Study Initiatives

The duties and responsibilities of the EAC are very broad. The charge given in § 202 of HAVA is that “[t]he Commission shall serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections.”⁶⁰ In its role as a “national clearinghouse” the EAC has begun to quicken its pace in gathering information, compiling data, and in publishing reports and studies. There are few areas of election processes, procedures, or activities where the EAC has not already been involved or where the EAC does not plan to get involved or engaged in the future. Generally, the EAC contracts with consultants to engage in research that is then reported and published by the EAC. This EAC involvement is represented in the following HAVA section mandates and the EAC responses as illustrated by corresponding activities:

■ Section 206 requires that reports be published via the Internet.⁶¹ Although the current EAC web site received more than two million hits in fiscal year 2006,⁶² the site is being improved to include an election administration database containing statutes, regulations, rules, and court decisions.⁶³ In early 2007, a collection of recommendations is to be forwarded to local election officials about how to set up and maintain effective voter information web sites.⁶⁴

■ Section 241 mandates that election administration issues be studied and information be made available to the public.⁶⁵ Encompassed within this section is a charge to study or make information available about: methods and mechanisms of election technology and voting systems; ballot designs; methods of voter registration and provisional voting; methods of accessibility to voting; nationwide statistics about voting fraud; identifying, determining and investigating methods of voter intimidation; methods of recruiting, training, and improving the performance of poll workers; best practice reports; and assisting states and local authorities to improve the administration of elections. In fiscal year 2004 the EAC inaugurated an election day survey, and currently data is being gathered to assemble the same report from the November 2006 election.⁶⁶ Currently research is being conducted to de-

60. 42 U.S.C. § 15322 (Supp. II 2002).

61. 42 U.S.C. § 15326 (Supp. II 2002).

62. EAC 2006 ANNUAL REPORT, *supra* note 40, at 11–12. This site averaged more than 10,000 hits per day; the top page destinations included Register to Vote, the Election Day Survey, and Voluntary Voting System Guidelines.

63. *Id.* at 34.

64. *Id.*

65. 42 U.S.C. § 15381 (Supp. II 2002).

66. EAC 2006 ANNUAL REPORT, *supra* note 40, at 33–35.

velop best practices for vote count and recount procedures.⁶⁷ Study projects also are underway to research the current state of information on the topic of voting fraud and voter intimidation.⁶⁸ In fiscal year 2007, the results of a study dealing with provisional voting and voter identification requirements will be disseminated.⁶⁹ In fiscal year 2006, the EAC awarded a contract for

67. *Id.* at 35.

68. *Id.* The EAC voting fraud and voter intimidation research caused an uproar in April 2007 when *The New York Times* published a series of articles on the subject. See Ian Urbina, *U.S. Panel Is Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007, at A1; Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1. Although the EAC has not publicly issued the consultant report on voting fraud and voter intimidation, *The New York Times* leaked a draft "predecisional-not for distribution" report on April 11, 2007. A copy of the draft report is available at http://graphics8.nytimes.com/packages/pdf/national/20070411voters_draft_report.pdf. While Democrats have questioned whether the consultant's report was altered and complained about the delay in getting this report distributed, the EAC earlier issued their own public version of the voting fraud and voter intimidation report. See UNITED STATES ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATION FOR FUTURE STUDY, (2006) *available at* <http://www.eac.gov/docs/Voter%20Fraud%20&%20Intimidation%20Report%20-POSTED.pdf>. The official EAC report on voting fraud and voter intimidation appears to be a fairly accurate summary of the consultant report, and the report provides the rationale as to why only some of the consultant report recommendations were embraced. Of this report controversy, Commissioner Gracia Hillman, a Democratic member of the commission, stated that "[w]e were confronted with the dilemma of a report that had too little research for the consultants' recommendations. The consensus we reached was to produce our own report but to include all of the consultants' background research, summaries of interviews, and summaries of cases reviewed." Press Release, United States Election Assistance Comm'n, Statement by Commissioner Gracia Hillman United States Election Assistance Commission (EAC) Regarding Release of Voter Fraud Consultant Report (Apr. 16, 2007) *available at* http://www.eac.gov/docs/04-16-07%20STATEMENT_BY_COMMISSIONER_GRACIA_HILLMAN.pdf.

69. EAC 2006 ANNUAL REPORT, *supra* note 40, at 35. In fact, the EAC delay in distributing the voter identification requirements report was the catalyst that brought Congressional investigators in the fray. EAC Chair Donetta Davidson appeared before the House Appropriations Subcommittee on Financial Services in March 2007 and was directed to release a June 28, 2006 consultant report entitled *Report to the United States Election Assistance Commission on Best Practices to Improve Voter Identification Requirements*. When the EAC issued this report from the Eagleton Institute of Politics at Rutgers University on March 30, 2007, Chairman Davidson stated that "[a]fter careful consideration of the initial research, the Commission decided this important issue deserves a more in-depth research approach, and that it should be examined beyond only one election cycle The Commission and our contractor agree that the research conducted for EAC raises more questions than provides answers." Press Release, United States Election Assistance Comm'n, EAC to Launch Comprehensive Study of Voter ID Laws (Mar. 30, 2007), *available at* http://www.eac.gov/news_033007.asp. Senators Dianne Feinstein and Richard Durbin sent a letter to Chairman Davidson on April 13, 2007 and requested a response to "very troubling news reports that included allegations that the Commission may have altered or delayed release of two tax-payer funded studies of election issues for political purposes." Press Release, Sens. Dianne Feinstein & Richard Durbin, Senators Feinstein and Durbin Seek Re-

the development of effective ballot designs and polling place signage. Ballot designs and polling place signage were piloted during the November 2006 election, and a best practices for ballot design and polling place signage will be unveiled by mid-2007.⁷⁰ Additionally, effective administration of federal elections means that the EAC assists states in making voting materials available in eight or more languages for voters with limited English proficiency.⁷¹

■ Section 242 requires that the EAC conduct a study on the best practices for facilitating voting by absent uniformed services voters and overseas voters⁷² in compliance with the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986.⁷³ The EAC is engaged in collecting comprehensive state data on all ballots sent and received by UOCAVA voters, and survey instruments were developed in 2004 and 2006 for this purpose.⁷⁴ Education instruction about HAVA requirements and the UOCAVA are being directed at state and local election authorities on a continual basis.⁷⁵

■ Section 244 directs the EAC to study and report on voters who register by mail and the effect of the use of social security information in the electoral process.⁷⁶ Congress wanted an analysis made of the impact that election administration changes would have on voter registration and the accuracy of verification procedures and voter rolls. The feasibility of using social security identification numbers to establish voter registration requirements also was to be studied.⁷⁷ The 2006 EAC Administration and Voting Survey utilized an online web survey instrument to collect data about

sponse from EAC Regarding Allegations of Altered or Delayed Studies (Apr. 13, 2007), *available at* http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=eca91bbc-022f-ab2a-cc0d-f7cfd0db8501. Senator Feinstein also scheduled a June 13, 2007 Senate Committee on Rules and Administration Committee oversight hearing on the EAC. *Id.* Chairman Davidson responded to the controversy surrounding EAC research studies by issuing a formal request to the Commissions inspector general "to conduct a review of the commission's contracting procedures, including a review of two recent projects focusing on voter identification and vote fraud and voter intimidation." Press Release, United States Election Assistance Commission, EAC Requests Review of Voter ID, Vote Fraud, and Voter Intimidation Research Projects (Apr. 16, 2007), *available at* [http://www.eac.gov/docs/2007-%2013%20\(204-16-07%20\)%20EAC%20Requests%20Review%20of%20Voter%20ID,%20Fraud%20&%20Intimidation%20Research%20Projects.pdf](http://www.eac.gov/docs/2007-%2013%20(204-16-07%20)%20EAC%20Requests%20Review%20of%20Voter%20ID,%20Fraud%20&%20Intimidation%20Research%20Projects.pdf).

70. *Id.*

71. EAC 2006 Annual Report, *supra* note 40, at 36.

72. 42 U.S.C. § 15382 (Supp. II 2002).

73. 42 U.S.C. § 1973ff (Supp. II 2002).

74. EAC 2006 Annual Report, *supra* note 40, at 31.

75. *Id.*

76. 42 U.S.C. § 15384 (Supp. II 2002).

77. *Id.*

voter registration, identification procedures, and voter turnout sources for the November 2006 election.⁷⁸

■ Section 245 provides that the EAC is to conduct a study of the issues and challenges related to electronic voting and election processes.⁷⁹ While Congress seemed interested in the benefits of Internet technology to improve voter participation rates and voter education, the potential for election fraud in the federal, state, and local election process also was to be examined.⁸⁰ The EAC will soon receive a best practices report regarding voter information web sites. Recommendations will then be made to election officials about how to set up and maintain effective voter information web sites.⁸¹ A tie-in to election fraud issues is already underway.

■ Section 246 charges the EAC with the responsibility to study the establishment of a free absentee ballot postage program.⁸² This initiative would have the EAC and the Postal Service conduct a study on the feasibility and advisability of establishing a program to waive or reduce the amount of postage applicable with respect to absentee ballots submitted by voters for general federal elections. The EAC is currently gathering information to be included in an absentee ballot survey, but it is not clear whether the issue of free absentee ballot postage will be addressed.⁸³

D. HAVA Funds—Distribution and Management

Although the distribution of HAVA funds to the states has been previously discussed,⁸⁴ the bottom-line is that the EAC paid out all of the required funds in fiscal years 2004, 2005, and 2006.⁸⁵ The EAC has now turned its focus to answering questions by election administrators about the use of HAVA funds. A list of frequently asked questions about reporting requirements and rules regarding the proper use of HAVA funds also has been prepared. This document is available on-line and “covers topics such as accounting procedures, rules regarding equipment, [and] income from HAVA funds.”⁸⁶

The EAC oversees three sources of HAVA funding as set out in §§ 101, 102, and 251. Section 101 funds can be used to comply with the Title

78. EAC 2006 Annual Report, *supra* note 40, at 33.

79. 42 U.S.C. § 15385 (Supp. II 2002).

80. *Id.*

81. EAC 2006 ANNUAL REPORT, *supra* note 40, at 34.

82. 42 U.S.C. § 15386 (Supp. II 2002).

83. UNITED STATES ELECTION ASSISTANCE COMM'N, *Absentee Ballots Report*, available at http://www.eac.gov/absentee_survey.asp?format=none.

84. See *supra* notes 25–27 and accompanying text.

85. The requirement payment mandate is found in § 251 of HAVA and at 42 U.S.C. § 15401 (Supp. II 2002).

86. EAC 2006 Annual Report, *supra* note 40, at 22.

III requirements to improve the administration of elections by educating voters, training poll workers, developing state plans, and improving the accessibility of polling places.⁸⁷ Section 102 funds were to be used to replace punch card and lever voting systems.⁸⁸ Section 251 funds were used to procure or upgrade voting systems, to implement provisional voting, to post required voting information at the polling place, and to create a state-wide voter registration list.⁸⁹ All states are required to report annually to the EAC on the use of HAVA Title I, § 101, and Title II, § 251 funds. The thirty states that received Title II, § 102 funds to replace voting equipment also must report on the use of those funds.⁹⁰

As part of its HAVA management responsibility, the EAC is embarking on a plan to recoup HAVA § 102 funds from those states that took funding to replace punch card and lever voting machines but failed to use the funds to replace these machines by the January 1, 2006 deadline.⁹¹ States are now engaged in a process to certify which precincts did in fact replace all punch card or lever machines by the applicable date. This certification process is expected to be completed by early summer 2007, and then the EAC will redistribute returned funds as requirements payments to other states.⁹²

In addition to the EAC's role in allocating and managing HAVA funds, the commission also is responsible for monitoring the use of funds by the states as stipulated in § 902.⁹³ In 2005, the EAC adopted a general policy for conducting special audits that applied to all states.⁹⁴ These audits are conducted under the direction of the EAC's Office of Inspector General.⁹⁵ Based upon audit results, states will be required to repay funds disbursed and be given added reporting chores.⁹⁶

So, what does a governmental agency do when most of the money that it once controlled has been distributed? Plenty. And it appears that the EAC has been engaged in plenty of meaningful activities: improving voting systems; assisting states with election day preparations; engaging in research and study "clearinghouse" functions; and in managing and auditing HAVA funds. Are there improvements that could be made to HAVA, the EAC, and

87. *Id.* at 25.

88. *Id.*

89. *Id.* at 25–26.

90. *Id.* at 26.

91. *Id.* The EAC has little discretion regarding this issue since HAVA § 102(d) requires states that have not met the deadline to "repay a portion of the § 102 funds equal to a percentage of the noncompliant precincts." *Id.*

92. EAC 2006 Annual Report, *supra* note 40, at 25.

93. 42 U.S.C. § 15542 (Supp. II 2002).

94. EAC 2006 ANNUAL REPORT, *supra* note 40, at 29.

95. *Id.*

96. *Id.* at 30.

to our national electoral administration process? Sure, and that is the topic for the next part of this essay.

VII. THOUGHTS ON ELECTION LAW REFORM

If there are any topics that United States citizens think often about and exhibit great passion for, election law reform is not generally among those topics. Even law students do not usually flock to election law courses, preferring instead to take bar exam offerings in anticipation of their eventual rendezvous with destiny—that time in the summer when the world stands still while a state bar exam is administered. But election law professors are a different story. They do think about election law processes and election law reform—often developing a deep and an abiding passion for the subject.

Perhaps I have always had an interest in American politics and government (I doubt that anyone could obtain a masters degree in political science without at least feigning such interest), so surveying the election law landscape the past several years has been like reminiscing with old friends. Indeed, I have been reminded of the importance of the Voting Rights Act, amazed at the intricacies of districting criteria, intrigued by the concept of minority vote dilution, fascinated by the ingenuity of those who have created racial and partisan gerrymanders, surprised by the impediments that are placed in the way of those who would be third-party contenders, disgusted with the conduct of those who have drunk too deeply from the public trough, and perplexed by the complexity of campaign finance law.

This is not my first attempt to set out some suggestions for election law reform,⁹⁷ but each time that words are strung together and put down on paper, I have become more firmly convinced that election law and election law reform ought to be in the thoughts and hearts of each and every citizen. This conclusion must be reached, for election law processes undergird the foundation of our republic, and there is much in the processes themselves that is worth reforming.

VIII. SUGGESTED REFORMS

The following election law reform suggestions are offered by one who was involved in the nuts and bolts of political party activity for nearly three decades, but who now has the luxury of thinking about elections rather than “doing” elections. While these suggestions may have general nation-wide applicability, some reform proposals may be better instituted within particular states or local jurisdictions. What is proffered as commentary on reform is not directed solely at reforming HAVA, because the EAC already seems

97. See Cihak & Springman, *supra* note 8.

well aware of what can be done to improve their own backyard, but the measures suggested here only serve to illustrate the wide expanse of issues that now cover the election law terrain.⁹⁸

A. Enact Legislation Granting One State Entity the Power to Oversee Election Laws

As earlier described in this writing, United States election law is constructed with a tripartite mold. The federal government has a role to play in the electoral process, as do the states and the judiciary. While allowing federal and judiciary participation may raise cautionary flags for those who feel that our democracy is being compromised by building this partnership, the reality is that states can no longer effectively manage the electoral process by flying solo. The costs are too great, and the stakes are too high. Continuing to allow states to do their own election law thing, with no real federal oversight, would insure that exercising the right to vote remains only a dream for many.

It was inevitable that some organization had to be created to pull the election law players together. So HAVA was the legislation that attempted to strike a balance between reserving traditional authority over election law mechanics for the states, and delegating administrative powers to a federal agency. This federal agency would attempt to keep the United States election law train moving in one direction and away from major train wrecks. That no detailed map was provided makes sense. HAVA provides paint and paint brushes, but state election officials must do the actual painting.

Most states have scores of counties and in most states the power and authority to run elections defaults to the lowest common denominator—the counties. It is no wonder that ballot designs and election law signage is not consistent between counties and more often not even consistent within counties. Partisan politics also needs to be removed from the state election law equation, so a non-partisan or a reformed partisan should be appointed as a state “Election Law Czar.” Then the job becomes one of getting the various counties, towns, and cities to embrace a new way of election law living. So this suggestion is for state legislators—enact legislation that grants one state entity the power to oversee state election laws.

98. Just as there is no end to the number of election reforms that could be proposed, there is no end to the number of groups and organizations that offer election reform proposals. For one report that has been published recently see a March 7, 2007 Brennan Center For Justice at NYU School of Law and Lawyers' Committee For Civil Rights Under Law publication entitled, *An Agenda For Election Reform*. WENDY R. WEISER & JONAH GOLDMAN, AN AGENDA FOR ELECTION REFORM (2007), http://www.brennancenter.org/dynamic/subpages/download_file_48124.pdf.

B. Get More Citizens Involved in the Election Process

For several months I have thought about a request that a representative of our Black Law Student Association (BLSA) made. I was asked to speak to BLSA a couple of months before the November 2006 election, and the topic given to me was "Why Should I Vote?" I was taken back a bit by being asked to address this particular topic. If any group should know the value of voting should not a group of black law students know? Then I realized that a new generation had been born that had not heard the old stories from hundreds of years ago, or that had not experienced first hand more recent events from the 1960s. So I spoke and my one word theme was: HERITAGE!

It is good practice to market our system of government to citizens at an early age—and the earlier the better. Years ago, I was involved with Kids Voting Kentucky. As part of a law library group, I helped staff two precincts during the election day. Youngsters would accompany their parents to these voting precincts and then cast their mock ballots. They would walk away with a piece of candy in their hands and a smile on their faces. Perhaps older students could be registered to vote at the time of high school graduation, or the voting age itself could be lowered to sixteen and new drivers could be registered when they applied for a driver's license.

Also, the enthusiasm of college students needs to be tapped into. Campus events, social activities, and a myriad of workshops all provide fertile ground for waving "the register to vote" flag. HAVA has already established a "Help America Vote College Program," which is worthy of replication and continued funding.⁹⁹ In my estimation, unless we hook these future citizen leaders, our nation's social fabric will continue to unravel.

There is one other citizen group that needs to get more involved in the electoral process—ex-felons who may still be disenfranchised. Senator Hillary Clinton has introduced the Count Every Vote Act of 2007.¹⁰⁰ While this bill focuses on several election administration issues, civic participation in the political process by ex-offenders is a key provision, since well over five million individuals currently cannot vote due to felony convictions. Senator Clinton's bill would restore voting rights to those who are no longer on parole or probation—those who have fully served their sentences. In the language of the bill:

99. Help America Vote Act of 2002, §§ 501, 502, 42 U.S.C. §§ 15521, 15522 (Supp. II 2002).

100. S. 804, 110th Cong. (2007), available at <<http://www.govtrack.us/congress/bill?bill=s110-804>> (amending the Help America Vote Act of 2002 to improve the administration of elections for Federal office, and for other purposes).

The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless, at the time of the election, such individual (1) is serving a felony sentence in a correctional institution or facility; or (2) is on parole or probation for a felony offense.¹⁰¹

There are few good reasons, and no sound public policy arguments, for keeping those who have repaid their debt to society away from election polling sites. State laws need to be changed in order to allow ex-offenders to once again participate in the political process.

C. Provide More Poll Worker Training

There is little doubt that recent election law changes have stretched to the limit the ability of an election administration process to deal effectively with technological change. The president of a California voter foundation has remarked, “[W]e’re reaching the limit of reasonable expectations of what poll workers can do. County registrars have to grab who they can, and they’re reluctant to be critical since that could result in even fewer workers.”¹⁰² The problem is really one of too few poll workers and too little poll worker training.

Senator Clinton’s 2007 election reform legislation provides a laundry list of required training topics for poll workers,¹⁰³ and a bill introduced by Senator Christopher Dodd establishes minimum standards for the number of poll workers.¹⁰⁴ Yet the issue is not really what training should occur or the number of poll workers that should be trained. The real problem is the quality of the training itself. Any poll worker training that I have been associated with is worse than inadequate—it is abysmal. Yes, mandatory annual training for election officials and poll workers should be instituted. But some kind of certification process also needs to be put in place to help insure that all election workers know, understand, can interpret, and will implement state and federal election laws.

101. *Id.* at Title VII § 701(d).

102. See John Wildermuth, *Touch-screen Voting’s Steep Learning Curve: Rollout in 21 Counties Brings Glitches*, S. F. CHRON., June 19, 2006, at B1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/06/19/BAG8QJGDBL1.DTL>.

103. S. 804 at 60. The training topics to be covered include: accommodating individuals with disabilities, requirements for the identification of voters, the appropriate use of provisional ballots, registering voters on election day, and training on security procedures. One positive note regarding the training to be offered is the emphasis on “hands-on” training.

104. S. 730, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-730> (last visited Mar. 14, 2007).

D. Purchase Additional Touch-Screen Voting Machines

In the present environment it is not popular to advocate the purchase of more electronic touch-screen voting machines—this is one area in which most Republicans and Democrats can agree. I believe, however, that at least one touch-screen voting machine should be available at each and every polling site in this country. Why? Because touch-screen equipment is already familiar to most Americans in one form or another—just stop by any ATM or self check-out line at a supermarket and see for yourself—and these machines are easy to use. The bottom-line, however, is that touch-screen voting provides the type of private access to the electoral process needed for those individuals with disabilities.

Security issues are the main drawback now in using touch-screen voting. I am convinced that fixes could be designed to repair any real or imagined technological glitches. Nevertheless, we do need to make certain that equipment and software is not tampered with. Some kind of certification process also should be required. Verified voter paper audit trails need to be employed, and mandatory audit provisions must be put in place.¹⁰⁵ I have voted on lever machines, paper ballots, scanned paper ballots, and touch-screen voting machines. I will take the touch-screen voting alternative anytime. And yes, I even look forward to voting via the Internet someday. Election law technology deserves a fair chance to work before we throw the baby out with the bath water.

E. Implement Ballot Reform Measures

There are a couple of ballot reform measures that should be enacted. Instant runoff voting (IRV) is one of the best options. This measure would negate the need to hold costly and time-consuming runoff elections. Instant runoff voting (or ranked choice voting as it is often referred to) allows voters to rank candidates on the ballot in order of their preference. Candidates can then be eliminated without the need of a runoff election. IRV is already used in Arkansas and a number of other states for military and overseas voters.¹⁰⁶ Instant runoff voting is in general use in several jurisdictions in Mich-

105. Audit provisions are major components of bills introduced in the 110th Congress. S.559, 110th Cong. (2007), available at <<http://www.govtrack.us/congress/bill.xpd?bill=s110-559>>. For similar legislation introduced in the House by Congressman Rush Holt see H.R. 811, 110th Cong. (2007), available at <<http://www.govtrack.us/congress/bill.xpd?bill=h110-811>>.

106. See ARK. CODE ANN. § 7-5-406 (2005). Instant runoff voting (IRV) is described in this section of the code. The instructions explain that a voter indicates “his or her order of preference for each candidate for each office.” Voters “put the number one next to the name of the candidate who is the voter’s first choice, and the number two for the voter’s second choice, and so forth . . .” *Id.* IRV for military voters is also used in South Carolina and Loui-

igan, California, Vermont, Maryland and North Carolina.¹⁰⁷ In 2007, IRV legislation was introduced in Colorado, Minnesota, Washington, Maine, Arizona, Arkansas, Oregon, Hawaii, and New York.¹⁰⁸ There are no real minuses involved in supporting IRV legislation.

Voting-by-mail is another great ballot reform proposal. Mail-in voting offers several advantages including: a reduction in cost, increased voter participation, easier election administration, and it gives voters a longer opportunity to study the ballot. One down-side to this device is that the integrity and secrecy of the ballot process could be called into question should some coercive or manipulative pressures be brought to bear on a voter. The other potential minus is the fact that voters may learn new revelations about candidates after ballots have been mailed, but this criticism could be leveled at an early voting measure.¹⁰⁹ Voting-by-mail has now been adopted in a number of states.¹¹⁰ Oregon moved exclusively to this method of voting in 2000.¹¹¹ The following passage sums up the advantages for supporting mail-in voting:

No poll workers includes: no recruitment; no notices to be sent; no classes to conduct; no distribution and retrieval of election day supplies; no last-minute cancellations from workers who had agreed to serve; no paychecks to cut and mail; no W-2's to send; no pre-dawn election-day hours to line up replacement workers. No polling places includes no polling place leases, telephones, utilities; no searching for or preparation of accessible locations; no frantic phone calls about locked doors; no preparation, set-up, tear-down, or emergency repairs of voting machines or devices; no confusion about where people must go to vote.¹¹²

F. Solicit Customer Service Feedback

Election officials ought to solicit voter "customer service" feedback regarding a voter's experience at polling sites during election day.¹¹³ Election

siana. See The Center for Voting and Democracy, *FairVote*, <http://fairvote.org/?page=27&pressmode=showspecific&showarticle=151> [hereinafter Center for Voting and Democracy, *FairVote*].

107. Center for Voting and Democracy, *FairVote*.

108. See *id.*

109. See *id.*

110. *Id.* States allowing mail-in voting at one level or another include: Colorado, Florida, Kansas, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, and Washington.

111. Michael Hanmer & Michael Traugott, *The Impact of Voting By Mail On Voter Behavior*, 32 AM. POL. RES. 375 (2004) (discussing the Oregon experience).

112. See The Center for Voting and Democracy, *FairVote*, <http://www.fairvote.org/turnout/mail.htm>.

113. See Cihak & Springman *supra* note 8, at 41.

officials should welcome this feedback just like other customer service organizations welcome negative or positive feedback. So give voters a customer satisfaction survey to fill out. Ask voters to rate how they were treated, what their experience felt like, and whether the process of voting at their poll site met their expectations. Perceptions really do matter. Use the feedback garnered as a springboard for improving the voting experience at each polling site. There really is no other way that voting experiences can be improved without voter input.

Senator Barack Obama has gained some positive press by introducing legislation entitled, Voter Advocate and Democracy Index Act of 2007.¹¹⁴ Obama's legislation creates an "Office of the Voter Advocate" within the EAC and requires that certain voting data be gathered including how long voters wait in line to vote, the numbers of voters who appeared at the wrong polling place, the rate of voter ballots discarded, the number of election day complaints, and the rate of voting system malfunctions.¹¹⁵ Mr. Obama's legislation goes a step further by creating a "democracy index." His democracy index would compile the information gathered from the states and then compare and rank the states across all categories of voter data.¹¹⁶ An interesting twist is the fact that Senator Hillary Clinton has now called for a "democracy index" in her 2007 version of the Count Every Vote Act. Senator Clinton's 2005 bill, by a similar name, did not include this provision.

IX. CONCLUSION

The title of this essay is "The Help America Vote Act: Unmet Expectations?" I suppose the argument could be made that HAVA has not lived up to all of the expectations touted by the proponents of this legislation. The

114. S. 737, 110th Cong. (2007), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s110-737>.

115. *Id.* at Part 4, § 223(c).

116. *Id.* at § 224. Senator Obama's call for a "democracy index" is probably borrowed from Professor Heather Gerken of Yale Law School. I heard Professor Gerken call for the utilization of a "democracy index" at the Annual Meeting of the Association of American Law Schools in Washington, D.C. in January 2007. My own call for soliciting customer service feedback is based on my years of working in law school libraries and emphasizing the need to treat library patrons liked valued customers. While I believe that a "democracy index" should be mandated, I also would like to hand out to voters a customer service satisfaction survey and see how they really felt about their voting experience. For the November 2006 general election, I did distribute to some law students and the local League of Women Voters a limited number of voter checklists or surveys. These surveys dealt with HAVA and Arkansas polling place signage requirements and compliance with accessibility provisions for individuals with disabilities. The final question in these surveys asked voters to rate their voting experience—fair, good or, excellent—and included space for more detailed feedback. A trip to the polls to vote needs to be a lot better experience than a trip to the dentist for a root canal.

issue as to whether the EAC has been able to achieve everything on its agenda also could be raised. HAVA and the EAC are not without warts, but any blemishes that may exist have been open to public view, consideration, and scrutiny. The EAC has been operational only since 2004, and three years is a very short time in which to determine whether any organization, and especially any government agency, has fulfilled its charge and met the expectations of its clients.

Although the role that HAVA and the EAC plays in assisting states to improve voting systems and in making elections more reflective of the will of a majority of our citizens was defined by Congress in 2003, this is really not a new election law role. The fact remains that many of the functions and responsibilities now performed by the EAC were performed earlier by the Office of Election Assistance, then a department of the Federal Election Commission. It is apparent that there remains a continued need for some federal agency to step up to the plate and oversee the election process in this country. Has the EAC done this—moved up to the plate and banged out some hits? Time will tell.

The future success of HAVA and of the EAC will be largely dependent upon the progress made to amend the original HAVA legislation and to strengthen the mandate given to the EAC to fulfill its mission. Reforms need to be made in the design and implementation of voting systems and in the administration of election procedures and processes. Fail-safe voting must be assured and carried out in a secure environment. Measures ought to be taken to expand the voting franchise so that it reaches out to all citizens. Voters are the heart and soul of the electoral process. Let's treat them as such. State governments have had long enough to reform their own electoral processes. It is time for them to get on the HAVA/EAC bandwagon.

Regardless of what reform measures are enacted or what governmental entity carries out these reforms, the bottom-line is that our individual citizens need to get more involved in the workings of our government. As stakeholders, citizens must vote in each and every election. I am still haunted by the implications of one statistic that was reported by Desha County, Arkansas after the November 2006 general election. Only 9.76% of the voters in Desha County voted in November 2006, even though there was a competitive gubernatorial race. The fact that this county has a large African-American population also is troubling. Legislators, administrators, and election officials must figure out how to capture the attention of the next generation of voters. For unless they do so, our nation's future could be put at risk.

