

# **IS AMERICA READY TO VOTE?**

## **ELECTION READINESS BRIEFING PAPER**

**April 2004** *(July 2004 Update Appended)*

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**Office of Civil Rights Evaluation  
U.S. Commission on Civil Rights**

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## Is America Ready to Vote?

The vitality of America's democracy depends on the fairness and accuracy of America's election. Over two centuries our country has broadened the right to vote and sealed that right in law, making our government more accountable to the people, and more representative of the people.

When problems arise in the administration of elections we have a responsibility to fix them. Every registered voter deserves to have confidence that the system is fair and elections are honest, that every vote is recorded, and that the rules are consistently applied.

*—President George W. Bush,  
upon signing the Help America Vote Act,  
October 29, 2002*

With the 2000 presidential election, hanging, dimpled, and pregnant chads, and butterfly ballots entered the common lexicon. Election officials blamed substandard equipment, inadequate funds, and unreasonable deadlines for inaccurate registration rolls and other barriers that prevented many Americans from voting or having their vote count. In the four years since, federal and state legislatures, by statements and in some cases action, elevated elections as a public policy priority. Their efforts to do so will be put to the test in November 2004. Are voters who were disenfranchised in 2000 still vulnerable in 2004? Was there actual reform or, for the most part, talk and plans? If there was reform, will it minimize errors and correctly count ballots so that outcomes reflect the intent of the populace? Were laws passed and, more importantly, implemented to help overcome voting problems? Did local and national leaders fulfill their pledge to educate and enfranchise voters? On April 9, 2004, the U.S. Commission on Civil Rights (Commission or USCCR) will convene technical experts and others for a briefing that will offer answers to these questions.

## POLITICAL PARTICIPATION IN AMERICA

The right of voting for representatives is the primary right by which other rights are protected. To take away this right is to reduce a man to slavery, for slavery consists in being subject to the will of another, and he that has not a vote in the election of representatives is in this case.<sup>1</sup>

The 15th Amendment to the Constitution was intended to eliminate voting barriers based on race, creed, color, or previous condition of servitude. In theory, its ratification in 1870 was a monumental civil rights development; in practice, minorities would continue to face obstacles to voting for the next century. The primary reason was that states circumvented the intent of the

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<sup>1</sup> Thomas Paine, "Dissertation on First Principles of Government," in Moncure D. Conway, ed., *The Writings of Thomas Paine*, vol. 3 (1895), p. 267, originally published in 1795.

15th Amendment by passing laws and allowing local practices that guaranteed blacks would remain disenfranchised. Making matters worse, Congress and the courts remained virtually silent during the ensuing decades.

Prior to the Civil War, only six states permitted black men to vote.<sup>2</sup> After the war, passage of the 13th Amendment abolishing slavery, and the 14th Amendment providing equal protection of the laws to all citizens, did little to end discrimination. Southern and border states, determined to preserve a white electorate, began immediately to erode guarantees of the 15th Amendment and passed myriad laws to eliminate the possibility of blacks tipping the balance of power through bloc voting. By the beginning of the 20th century, the hard won suffrage rights of blacks had practically been nullified. Perhaps the most invidious barriers to the right to vote were the seemingly neutral restrictions developed by states that had debilitating and devastating results on black voter registration.<sup>3</sup>

States adopted diverse practices and techniques to disenfranchise blacks, most of which centered on two important weapons: intimidation and arbitrary powers of local voter registrars.<sup>4</sup> Law enforcement officials, sometimes no more than deputized Ku Klux Klansmen, arrested civil rights workers on baseless charges, and mistreated them while in custody. Private citizens, complicit with police, also shot into or firebombed homes, churches, and other buildings; and abducted, tortured, and assassinated civil rights workers and blacks who dared to attempt to register. They also threatened economic insecurity; store owners refused to sell to blacks, banks declined credit, and property owners vowed to evict them from their homes. Local voting registrars manipulated the registration process to favor white applicants and eliminate blacks. One strategy was submission to literacy tests.

From the multitude of available instances of discrimination, a few have been chosen as illustrative of the double standard used. Six blacks with doctorates were ruled illiterate in Alabama and five black teachers, three of whom had master's degrees, were judged too illiterate in a Mississippi city in which no whites ever failed the examination.<sup>5</sup>

Registrars helped whites to fill out applications, but not blacks, and rejected blacks' applications on trivial bases such as underlining rather than circling a designation. They also refused to allow rejected applicants to review the bases for their decisions. Other laws required interpreting the Constitution and showing good character.

Mississippi whites were often given the following section to interpret: Section 8: "All elections by the people shall be by ballot." Blacks have been confronted with sections such as the [following]: Section 182: "The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the state or any

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<sup>2</sup> Jaren D. Wilcoxson, "Miller v. Johnson: An Improper Emphasis of Form Over Substance," *Boston University Law Review*, vol. 76 (October 1996), p. 771.

<sup>3</sup> *Ibid.*, p. 774.

<sup>4</sup> Harrell R. Rodgers, Jr. and Charles S. Bullock III, *Law and Social Change: Civil Rights Laws and Their Consequences* (McGraw-Hill, Inc., 1972), p. 18 (hereafter cited as Rodgers and Bullock, *Law and Social Change*).

<sup>5</sup> U.S. Commission on Civil Rights, *Report of the U.S. Commission on Civil Rights, 1959*, p. 80.

political subdivision thereof may be a party, except that the legislature may grant exemption from taxation in the encouragement of manufacturers and other new enterprises of public utility extending for a period of not exceeding five years, the time of such exemptions to commence from date of charter if to a corporation; and if to an individual enterprise, then from the commencement of work; but when the legislature grants such exemptions for a period of five years or less, it shall be done by general laws, which shall distinctly enumerate the classes of manufactures and other new enterprises of public utility entitled to such exemptions, and shall prescribe the mode and manner in which the right to such exemptions shall be determined.”<sup>6</sup>

Some registrars accepted as a demonstration of good character signatures from registered voters, who in some counties were all white. The state of Louisiana excluded on character grounds anyone who participated in sit-ins or civil rights demonstrations. States also redrew district lines to eliminate black majorities, changed some offices from elected to appointed, required proof of property ownership, and changed seats from district to at-large so that entire counties (proportionately more whites) determined outcomes.<sup>7</sup>

The spirit of laws passed in the late 1950s and 1960s was good. The 1957 Civil Rights Act allowed the Department of Justice (DOJ) to seek injunctive relief and enabled blacks to circumvent the remiss tactics of state voting officials. It also authorized nonjury trials for violators. The 1960 Civil Rights Act allowed federal judges to register eligible blacks who had been rejected by local officials. It also gave federal prosecutors access to voting records and required that voting data be retained for 22 months following every election. Later, Title I of the Civil Rights Act of 1964 forbade rejection of applicants for insignificant errors on registration forms and presumed that anyone who had a sixth-grade education was literate. One of the last changes in law was eliminating poll taxes, which denied the ballot from poor of all races. As late as the 1960s, poll taxes still existed and were finally banished under the 24th Amendment to the Constitution. However, these laws fell short of their promises when states continued to circumvent them.

The Civil Rights Acts of 1957, 1960, and 1964 . . . were unsuccessful attempts to compel state registration officials to apply their state voting standards fairly. Progress under these Acts was painfully slow, partly because of the intransigence of state and local officials and partly because of the delays inherent in the case-by-case litigation required under these statutes.<sup>8</sup>

Black enfranchisement was further obstructed by judges who procrastinated for months before conducting hearings, badgered civil rights attorneys and witnesses, and took months to render decisions during which times discrimination continued.<sup>9</sup> Obstinate and determined local officials, aided by judges, police and private citizens, had rendered case-by-case prosecution impotent.

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<sup>6</sup> U.S. Commission on Civil Rights, *Voting in Mississippi*, 1965, p. 14.

<sup>7</sup> Rodgers and Bullock, *Law and Social Change*, p. 39.

<sup>8</sup> U.S. Commission on Civil Rights, *The Voting Rights Act*, 1965, p. 8.

<sup>9</sup> Rodgers and Bullock, *Law and Social Change*, p. 28.

Although judicial and legislative attempts were made to curtail the practices employed by the states in the 1940s and 1950s,<sup>10</sup> it was the Voting Rights Act of 1965 (VRA) that became the primary tool for equality in the voting booth.<sup>11</sup> In general, the 1965 act ensured that the same literacy standards would apply to whites and blacks and reduced acceptable suffrage requirements to age, residence, and criminal record. The Supreme Court decided that literacy tests were unfair. The VRA authorized federal voting examiners to bypass prosecution of individual complaints and, as a result, eliminate systemic discrimination. The VRA also gave DOJ authority to send poll watchers to counties that had experienced problems.

Specifically, Section 2 of the VRA prohibits minority vote dilution through intentional tactics and legislation aimed at weakening the voting strength of minorities.<sup>12</sup> Section 5 outlines the federal role in election oversight by requiring federal approval of state changes in voting procedures in areas that have a history of discrimination against racial and ethnic minorities. It is designed to prevent new forms of discrimination from taking effect that will diminish minority voting opportunities or rights. Section 5 also permits the federal government to send examiners to covered jurisdictions to ensure that registered voters are allowed to vote and that all votes are properly counted.

The VRA has been amended since its passage to broaden its coverage and strengthen its effectiveness. In 1975, an amendment permanently restricted the use of tests and devices for voter registration nationwide.<sup>13</sup> The law is applied today to prevent states and local jurisdictions from instituting at-large elections in majority-white jurisdictions, or from racial gerrymandering of electoral districts.<sup>14</sup> The 1975 amendments also stipulate rights for language minorities, mandating bilingual ballots and oral language assistance. In 1983, Congress again amended VRA to clarify that the proof of discriminatory intent is not required under Section 2 claims, and thus validated disparate impact claims.

Regardless of the terms of civil rights laws, their effects are muted in the absence of sufficient staff to enforce them.<sup>15</sup> VRA provides for federal observers to monitor procedures in polling places and at sites where ballots are counted. Observers are assigned to locations where it is *likely* that minority voters will be disenfranchised. The determination that minority voters may be

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<sup>10</sup> See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (while this case did not deal directly with voting, it did strengthen the equal protection clause of the Constitution, spurring the voting rights movement); Civil Rights Act of 1957, 42 U.S.C. §§ 1971, 1975–1975e, 1995 (1994); Civil Rights Act of 1960, 42 U.S.C. §§ 1971, 1974–1974e, 1975d (1994); and Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a–1975d, 2000a–2000h-6 (1994).

<sup>11</sup> 42 U.S.C. §§ 1971, 1973–1973bb-1 (1994). Advocates of states rights challenged the constitutionality of the VRA, but the Supreme Court upheld the legislation in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>12</sup> Section 2 has most often been applied to redistricting and at-large electoral systems, but it applies to any practice that dilutes minority voting rights.

<sup>13</sup> 89 Stat. 400, 1975 (P.L. 94-73).

<sup>14</sup> Leslie W. Gladstone, analyst, American National Government, Government Division, Congressional Research Service, “Civil Rights Protection in the United States: Brief Summaries of Constitutional Amendments, Federal Laws and Executive Orders,” 93-148 GOV, Feb. 2, 1993, p. 10.

<sup>15</sup> USCCR, *Political Participation*, p. 157.

disenfranchised is made by the Voting Rights Section of DOJ's Civil Rights Division (CRD).<sup>16</sup> In 1963, CRD employed 20 attorneys, but after the Voting Rights Act passed, the government sent 50 attorneys to patrol the South during the 1966 general elections. Altogether, some 600 federal officials were assigned to Southern states to enforce VRA provisions. During that year and the following one combined, 1,500 federal observers attended elections in the South. The federal government, cognizant of the barriers to enfranchisement, was duty-bound to apply resources to eliminating them.<sup>17</sup>

By contrast, in 2001, the Voting Rights Section employed 36 attorneys,<sup>18</sup> and in the previous year DOJ had assigned 652 federal observers to monitor elections in 24 counties in 12 states.<sup>19</sup> In November 2002, 432 federal officials, including 108 DOJ attorneys, monitored elections in 26 counties in 14 states (see table 1).<sup>20</sup> The agency has not yet announced the level of resources it will devote to election monitoring in November 2004. DOJ considers many factors in deciding how many observers it will assign and where they will monitor. However, in the 1960s, as today, commitment of resources is at least one outward expression of federal priorities.

**Table 1. Federal Election Monitors by States in 2000 and 2002**

Year	Number of Federal Observers	State
2000	652	Alabama Arizona California Georgia Louisiana Michigan Mississippi New Jersey New Mexico New York Texas Utah
2002	432	Arizona California Connecticut Florida Georgia Michigan Mississippi Missouri New Jersey New Mexico New York Pennsylvania Texas Utah

Source: U.S. Department of Justice, Civil Rights Division, Voting Section, "Federal Examiners and Federal Observers," July 2, 2003, <[http://www.usdoj.gov/crt/voting/examine/activ\\_exam.htm](http://www.usdoj.gov/crt/voting/examine/activ_exam.htm)> (last accessed Apr. 1, 2004); U.S. Department of Justice, "Fact Sheet: Protecting Voting Rights and Preventing Election Fraud," November 2002, <[http://www.usdoj.gov/opa/pr/2002/November/02\\_at\\_641.htm](http://www.usdoj.gov/opa/pr/2002/November/02_at_641.htm)> (last accessed Apr. 1, 2004).

<sup>16</sup> U.S. Department of Justice, Civil Rights Division, Voting Section, "Federal Examiners and Federal Observers," July 2, 2003, <[http://www.usdoj.gov/crt/voting/examine/activ\\_exam.htm](http://www.usdoj.gov/crt/voting/examine/activ_exam.htm)> (last accessed Apr. 1, 2004) (hereafter cited as DOJ, "Federal Examiners").

<sup>17</sup> USCCR, *Political Participation*, p. 157.

<sup>18</sup> U.S. Department of Justice, "Attorney General Ashcroft's News Conference: Voting Rights Initiative," Mar. 7, 2001, <<http://usinfo.state.gov/usa/civilrights/ashc0307.htm>> (last accessed Apr. 1, 2004).

<sup>19</sup> DOJ, "Federal Examiners."

<sup>20</sup> U.S. Department of Justice, "Fact Sheet: Protecting Voting Rights and Preventing Election Fraud," November 2002, <[http://www.usdoj.gov/opa/pr/2002/November/02\\_at\\_641.htm](http://www.usdoj.gov/opa/pr/2002/November/02_at_641.htm)> (last accessed Apr. 1, 2004); U.S. Department of Justice, "Federal Observers and Justice Department Personnel to Monitor General Election in States Across the Nation," Nov. 4, 2002, <[http://www.usdoj.gov/opa/pr/2002/November/02\\_crt\\_640.htm](http://www.usdoj.gov/opa/pr/2002/November/02_crt_640.htm)> (last accessed Apr. 1, 2004).

Some consider VRA the most effective civil rights law ever enacted and contend that the progress made, particularly as a result of redistricting efforts in the last decade, has been astonishing. Most historians agree that VRA increased the percentage of African Americans of voting age who registered to vote, and ultimately the numbers of African Americans elected to office. However, despite visible gains, other obstacles remain. In the era following its passage, civil rights groups have continued to challenge voting practices, such as at-large systems, which dilute the effect of the minority vote, and push for redistricting.<sup>21</sup> They have challenged and effectively removed old grandfather clauses and other forms of discrimination; yet, the 2000 elections proved that much remains to be done so that the rights of every eligible American are protected. For example, the disenfranchisement of Florida's voters fell most harshly on black voters who, statewide, based on county-level statistical estimates, were nearly 10 times more likely than nonblack voters to have their ballots rejected.<sup>22</sup>

Voting rights history provides a relevant basis for resolving today's election problems. Despite acknowledged technological difficulties, many of the problems in 2000, as through history, were traced to faulty registration procedures, variance in duties carried out by local election officials, and lack of local poll worker training. This paper will demonstrate that many of the problems that the Commission previously cautioned should be corrected yet prevail resonate with historical disenfranchisement, and require the focused attention of national, state, and local officials. Unless the government acts now, many of those previously disenfranchised stand to be excluded again.

## **PREVIOUS USCCR FINDINGS AND RECOMMENDATIONS ON ELECTION VULNERABILITIES**

In 2001, the Commission examined evidence from the controversial 2000 elections, as well as recommendations for change, and drew conclusions about the federal government's responsibility to ensure voting rights for all Americans. Based on reports of widespread voter disenfranchisement in Florida, the Commission conducted an extensive public investigation into allegations of voting irregularities in that state. During three days of hearings and sworn testimony from witnesses, including state officials, local election officials, county supervisors, poll workers, and registered voters, the Commission probed accounts of problematic machinery, inaccessible polling places, and inexperienced poll workers. Fact-finding included examination of subpoenaed documents from witnesses who produced more than 118,000 pages of evidence. The Commission subsequently issued a report documenting its findings, *Voting Irregularities in Florida During the 2000 Presidential Election*, and made recommendations applicable to Florida and the nation.<sup>23</sup> In testimony before the Senate Committee on Rules and Administration, the Commission urged Congress to consider its recommendations from the Florida report and to

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<sup>21</sup> Although this paper does not address the issue of redistricting, it should be recognized as a critical component of voting equality.

<sup>22</sup> U.S. Commission on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election*, June 2001, executive summary (hereafter cited as USCCR, *Voting Irregularities*).

<sup>23</sup> *Ibid.*



legislatively articulate the duties of federal and state governments to promote the exercise of the right to vote.<sup>24</sup>

After collecting additional research and consulting other organizations that also studied the election, the Commission issued a subsequent report, *Election Reform: An Analysis of Proposals and the Commission's Recommendations for Improving America's Election System*.<sup>25</sup> In it, the Commission presented a comprehensive list of 18 recommendations for federal election reform designed specifically to protect the right to vote and have that vote counted.

The recommendations centered on assuring polling place access for all voters and offered advice for holding officials more accountable and rendering systems that register voters and record their intent more procedurally sound. Key recommendations included establishing a higher level of accountability for elections, developing national equipment and procedural standards, requiring provisional ballots, providing access for individuals with disabilities and limited English proficiency, reinstating voting rights for felons, and improving poll worker training and voter education. Congress subsequently included many of the Commission's recommendations in a national reform bill that eventually became law—the Help America Vote Act of 2002.<sup>26</sup> Following is a more detailed summary of some of the Commission's recommendations.

### **Accountability and Standards**

In both its Florida and national studies, the Commission identified as a key impediment to the voting process the sometimes diffused and generally unclear delineation of authority and accountability for election problems. The fact that states manage elections allows for variable voting procedures and processes, leading to differential voter experiences and election outcomes. Moreover, accountability is often shared between state and local officials, and most states lack clear standards for the conduct of elections. In Florida, for example, the Commission found no uniformity in the Election Day responsibilities across the state's 67 counties.<sup>27</sup>

Thus, to foster uniformity, the Commission recommended that the federal government establish minimum standards for equipment, error rates, absentee ballots, list maintenance, identity requirements, vote recounting, voter education, and reinstatement of felon voting rights. It said that mandatory standards should apply to provisional ballots, ballot kick-back features in voting equipment, the collection of election statistics, language assistance, and accessibility of polling places and voting materials.<sup>28</sup> In Florida, the Commission recommended that the secretary of state

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<sup>24</sup> Mary Frances Berry, chairperson, U.S. Commission on Civil Rights, testimony before the Committee on Rules and Administration, United States Senate, June 27, 2001 (hereafter cited as Berry testimony).

<sup>25</sup> U.S. Commission on Civil Rights, *Election Reform: An Analysis of Proposals and the Commission's Recommendations for Improving America's Election System*, November 2001 (hereafter cited as USCCR, *Election Reform*).

<sup>26</sup> Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 codified at 42 U.S.C. §§ 15301–15545 (2002).

<sup>27</sup> Berry testimony, p. 3.

<sup>28</sup> USCCR, *Election Reform*, pp. 40–41.

be legislatively required to ensure that the state is ready for elections, specifically that adequate resources are available, poll workers are trained, and voters are educated on voting processes.<sup>29</sup>

### **Provisional Voting**

The 2000 elections revealed a widespread, but easily preventable, obstacle to enfranchisement: erroneous voter registration lists. Between 2 million and 3 million votes were lost in 2000 due to clerical and administrative errors on lists, despite improvements resulting from the National Voter Registration Act of 1993.<sup>30</sup> This problem could have been easily resolved with the use of provisional ballots, which would have enabled individuals claiming eligibility to cast a vote that would be counted upon verification. In 2000, only 19 states offered provisional ballots. In Florida, even though voting by affidavit was an option during the 2000 elections, it was not uniformly offered or available in every precinct, nor were poll workers or voters made aware of this provision.<sup>31</sup>

The Commission urged Congress to pass legislation requiring every state to use provisional ballots. Furthermore, the Commission said that such ballots should be verified and counted immediately after an election to ensure that they were represented in the cumulative results.<sup>32</sup> In addition, voters should have the right to an immediate appeal of a discarded ballot with resolution prior to vote tabulation.<sup>33</sup>

### **Voter Registration and Lists**

The Commission found that registration deadlines vary greatly by state. In 2000, half of states required registration a month before an election; 19 states required registration 10 to 28 days before an election; six states allowed same-day registration; and one state did not require registration.<sup>34</sup> The 44 states requiring early registration could not maintain accurate lists of eligible voters. The startling display of ineptitude caused millions of names to be erroneously purged or incorrectly entered on registration lists across the nation, and as such, prevented eligible people from voting.

In Florida specifically, many voters arrived at the polls only to be told that their names were not on the registration list or that their voter applications contained errors. They were not given any opportunity to appeal the alleged errors or to challenge their absence on the rolls. Nor were poll workers able to communicate with election officials to verify eligibility or check the accuracy of the lists.<sup>35</sup>

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<sup>29</sup> USCCR, *Voting Irregularities*, p. 107.

<sup>30</sup> National Voter Registration Act of 1993, Pub. L. No. 103-31, 42 U.S.C. § 1973gg (1993).

<sup>31</sup> *Ibid.*, pp. 114–15.

<sup>32</sup> USCCR, *Election Reform*, p. 49.

<sup>33</sup> USCCR, *Voting Irregularities*, p. 102.

<sup>34</sup> USCCR, *Election Reform*, p. 50. Adds up to 51 because it includes the District of Columbia.

<sup>35</sup> USCCR, *Voting Irregularities*, p. 102.

The Commission found that the need for advanced registration and the miscommunication between state and local lists could be eliminated with real-time, statewide registration data systems. In addition, states should establish a toll-free telephone number that would allow voters to access their registration status and polling location well ahead of Election Day.<sup>36</sup> The Commission further recommended that states with early registration deadlines should examine the procedures of states that allow Election Day registration to determine what best practices could be implemented.<sup>37</sup> Moreover, as noted above, the Commission found that the use of provisional ballots could compensate for list inaccuracies until they were resolved.

### **Voter Identification**

The Commission found that states established vastly different requirements for voter identification at the polls. Thirty states did not require identification, 14 states required some form of identification, and seven states reserved the right to require identification. Acceptable forms of identification varied and for some entailed a signature and others a state-issued photo ID, identity-bearing document, or a combination of items.<sup>38</sup>

Whether states had defined voter identification requirements or not, voters nationwide complained that specific groups, namely minority and immigrant voters, were singled out to produce identification. The Commission recommended that the federal government establish uniform national guidelines and that poll workers be adequately trained on requirements. Moreover, the Commission said that states must allow individuals who cannot produce valid identification to cast a provisional ballot.

### **Poll Worker Training and Voter Education**

Many of the election problems that occurred could have been resolved immediately, if not prevented entirely, had poll workers been sufficiently trained and voters educated. This was particularly acute in Florida, where the Commission found poll workers who were unaware of voter rights and state procedures for assisting voters, as well as training inconsistencies from one county to the next. In Florida, the Commission also found limited financial support for voter education, resulting in inconsistent outreach to first-time voters and those with special needs.<sup>39</sup>

The Commission recommended that poll workers be trained to use all measures available under state law to enable registered voters to vote, including voting by provisional ballot, affidavit, and language and special needs assistance.<sup>40</sup> It also recommended that the state provide funds to educate voters on how to cast a vote properly, using means including public service

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<sup>36</sup> Ibid., p. 103.

<sup>37</sup> USCCR, *Election Reform*, p. 50.

<sup>38</sup> Ibid., pp. 52–53.

<sup>39</sup> USCCR, *Voting Irregularities*, p. 107.

<sup>40</sup> Ibid., p. 103.

announcements and advertisements.<sup>41</sup> Nationwide, the Commission noted the need for minimum federal voter education and poll worker training standards to cultivate consistency across counties and states.

### **Reinstatement of Ex-Felon Voting Rights**

Although felon disenfranchisement figured prominently in Florida, ex-felons and individuals wrongly categorized as such were prevented from voting in other states across the country. In 2000, every state except two denied prisoners the right to vote; 29 states prohibited individuals on probation from voting; 32 states prohibited parolee voting; and 14 states prohibited some, if not all, ex-felons from voting.<sup>42</sup> The process for reinstating voting rights likewise varies by state, but is usually cumbersome, and ex-felons are seldom informed of their right to re-enfranchisement.

More than 36 percent of the total disenfranchised population is African American, and 13 percent of all African American men are disenfranchised due to a felony conviction. The Commission, concerned about the disparate impact of state disenfranchisement laws on minority voters, recommended that all states adopt legislation to restore the voting rights of former felons who have completed their sentences.<sup>43</sup>

### **Accessibility for Disabled and Limited English Proficient Voters**

Federal law establishes that polling places must be accessible to individuals who have disabilities. It also stipulates that jurisdictions with large non-English-speaking populations must provide voting materials in common languages. Nonetheless, in the 2000 elections, thousands of voters found polling places and voting materials inaccessible and were thus disenfranchised. In Florida, for example, the Commission found that many voters who use wheelchairs could not easily access polling places, and many were turned away. Others with visual impairments had to have their ballots read to them because accessible technology was not available, resulting in a loss of the right to cast a vote in private. Likewise, many non-English-speaking voters could not cast a ballot because they were not provided legally required assistance.<sup>44</sup>

The Commission recommended that the federal government establish standards for alternate language materials and adopt quality assurance procedures.<sup>45</sup> Likewise, the Commission urged the federal government to develop accessibility standards for persons who have disabilities and provide adequate funds to ensure that all polling places are accessible.<sup>46</sup> In addition, the Commission recommended that federal equipment standards include programmable technology

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<sup>41</sup> *Ibid.*, p. 107.

<sup>42</sup> USCCR, *Election Reform*, pp. 56–57.

<sup>43</sup> *Ibid.*, p. 57.

<sup>44</sup> USCCR, *Voting Irregularities*, pp. 112–13.

<sup>45</sup> USCCR, *Election Reform*, p. 54.

<sup>46</sup> *Ibid.*, p. 55.

that facilitates multiple languages and access for disabled voters. Federal law should require states to report to the Department of Justice on their policies and procedures that ensure language and physical accessibility.

At the state level, the Commission recommended that poll workers be trained on providing required assistance to voters with disabilities and limited English proficiency. States should ensure that there is uniformity across precincts and certify, at least 30 days before an election, that polling places are accessible.<sup>47</sup>

## **Enforcement**

In its examination of Florida, the Commission found that disenfranchisement most harshly affected African American voters, who were nearly 10 times more likely than nonblacks to have their ballots rejected and were often prevented from voting because their names were erroneously purged from registration lists. Moreover, poor communities with large minority populations were more likely to use voting equipment with high ballot spoilage rates.<sup>48</sup>

Despite the obvious disparities, evidence suggests that voting rights law enforcement is haphazard, and responsibility for elections is often decentralized, thus obscuring accountability. The Commission recommended that the federal government, specifically the Department of Justice, strengthen its enforcement efforts and initiate litigation against election officials:

- whose actions or inactions result in the disproportionate inability of certain groups to vote and have their votes counted;
- who engage in list maintenance activities that result in the denial of equal access to the political process;
- who fail to provide training to poll workers and the tools necessary for successful operation of polling places;
- who fail to educate voters on registration and voting processes;
- who implement practices that have adverse effects on voters with disabilities or language barriers; and
- who prevent otherwise eligible voters from participating in elections either by virtue of criminal record or by failure to offer provisional voting.<sup>49</sup>

Federal officials are not always present when voting rights violations occur, thus citizens should be able to file complaints, and be assured that their complaints will be acted upon and that no one will retaliate against the originator. The Commission found that neither state nor county entities had established procedures for monitoring and documenting voting irregularities and complaints. It found that complaints are usually referred back to the official alleged to have committed the violation. The Commission recommended that Congress delegate to U.S. attorney offices in each

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<sup>47</sup> USCCR, *Voting Irregularities*, p. 113.

<sup>48</sup> *Ibid.*, pp. 99–100.

<sup>49</sup> USCCR, *Election Reform*, pp. 3–4, 43; USCCR, *Voting Irregularities*, pp. 102, 104, 106–07, 109, 113–115.

state responsibility for complaint resolution. Additionally, the Commission said that states should develop clear strategies for responding to complaints and publicizing voter rights.<sup>50</sup>

## **Equipment**

The Commission examined the voting technology used nationally and found massive voting equipment problems throughout the United States. In Florida, different systems with varying error rates were used throughout the state. Poor communities and communities of color were more likely to use equipment with higher vote spoilage rates.<sup>51</sup> African American voters cast approximately 54 percent of the spoiled ballots, despite composing only 11 percent of all voters.<sup>52</sup> Improving voting technology has since been a focus of reform efforts, with many states searching for replacements for their old systems and the federal government grappling with minimum standards.

The Commission did not endorse any specific voting equipment brand, but it did recommend that electronic, precinct-count tabulation systems be used.<sup>53</sup> It also recommended that the Federal Election Commission (FEC) maintain the statutory authority to develop technology standards and guidelines. For example, equipment that notifies voters when ballots are invalid and provides the opportunity to make corrections should be mandatory. In addition, the Commission recommended that FEC develop standard requirements for technologies that facilitate accessibility for voters with disabilities and limited English proficiency.<sup>54</sup>

## **THE HELP AMERICA VOTE ACT OF 2002: A FEDERAL-STATE PARTNERSHIP**

The Help America Vote Act is a civil rights act for all Americans, seeking to improve voting access and fairness for all. Its technical provisions on voting equipment and election administration may be mundane compared to the groundbreaking efforts of civil rights legislation of the 1960s. The right to vote has little meaning, however, if that promise is lost to old voting machines that cannot read properly cast ballots or illtrained poll workers who incorrectly inform a citizen that he or she has not registered to vote.<sup>55</sup>

Given all the problems uncovered in Florida and nationally, and finding that regulation of the federal election process is within the scope of congressional authority, the Commission called upon Congress to establish guidelines and impose requirements on state election systems to

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<sup>50</sup> USCCR, *Election Reform*, p. 44.

<sup>51</sup> USCCR, *Voting Irregularities*, p. 115.

<sup>52</sup> Berry testimony, p. 3.

<sup>53</sup> USCCR, *Voting Irregularities*, p. 116.

<sup>54</sup> USCCR, *Election Reform*, p. 52.

<sup>55</sup> Brian Kim, "Recent Development: Help America Vote Act," *Harvard Journal on Legislation*, vol. 40 (Summer 2003), p. 579.

ensure fairness and accessibility.<sup>56</sup> The Commission urged Congress to act swiftly to set milestones and allocate sufficient funding for the development and delivery of federal election guidelines.<sup>57</sup> As the following will illustrate, Congress did not act swiftly, but took two years to pass election reform legislation, and state implementation shows signs of being equally retarded.

Nearly two years after the November 2000 elections, and after a lengthy and divisive debate, Congress passed the Help America Vote Act of 2002 (HAVA), and President Bush signed it into law on October 29, 2002.<sup>58</sup> The legislation required compromise from both parties in Congress. Despite that some of its provisions concerned civil rights advocates, the bill eventually gained bipartisan support.

HAVA is a historical measure, representing the first large-scale federal investment in state and local election administration in U.S. history. HAVA authorizes distribution of \$3.86 billion in federal aid over three fiscal years (\$2.16 billion in 2003, \$1.05 billion in 2004, and \$650 million in 2005) to states for improving elections. HAVA sets dates and standards for rendering voting equipment, registration lists, and general election administration fair, accurate, and representative of the needs of America's populace.

However, a year and a half since HAVA passed, many mandated milestones remain unmet. For example, HAVA required that, by 2004, states offer provisional ballots to voters, verify identities of first-time voters who register by mail, post voting information at polling places, and establish complaint procedures for cases in which voters experience problems at the polls.<sup>59</sup> As this paper will demonstrate, most states have passed legislation necessary for those actions, but few have built the infrastructure, made purchases, or acted to implement all of the law's requirements.

Although states are responsible for implementing election reform and ensuring compliance with HAVA, the federal government has the responsibility to provide funding and guidance to the states. HAVA thus represents a federal-state effort, requiring the two to work in tandem. The following discussion will outline federal and state responsibilities, as well as the problems federal and state governments have experienced in implementing specific provisions.

## **The Federal Role in Helping America Vote**

### ***Funding***

Reform of the magnitude prescribed by HAVA requires significant resources. Thus, Congress determined the level of funding it would grant states to enact the law's provisions. The amount that Congress eventually authorized would go to states, \$3.86 billion over three years, was the

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<sup>56</sup> For the purpose of this paper, the term "voting system" generally refers to the election process and may include voting technology, registration lists, voting procedures, and other aspects related to the administration of elections.

<sup>57</sup> USCCR, *Election Reform*, p. 41.

<sup>58</sup> Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 codified at 42 U.S.C. §§ 15301–15545 (2002).

<sup>59</sup> Election Reform Information Project, *Primary Education: Election Reform and the Presidential Race*, January 2004, <<http://www.electionline.org>> (hereafter cited as ERIP, *Primary Education*).

result of compromise. Of that amount, \$650 million was promised upfront for improving state election systems.

Title I of HAVA establishes that the General Services Administration (GSA) will administer two grant programs, outlined in Sections 101 and 102, with funding evenly split between them. Section 101 provides funding to states to improve general election administration, for examples: voter education, poll worker and election official training, improving voting technology, improving accessibility for limited English proficient (LEP) and disabled voters, and establishing state complaint centers. The law allows states to apply for grants and determine how to use the money they receive. Award amounts are based on a state's voting-age population as a proportion of the total U.S. voting-age population, but are no less than \$5 million.<sup>60</sup>

Section 102 grants specifically fund punch card and lever machine replacement. New systems installed using Section 102 funding must meet the requirements outlined later in the legislation (Section 301). HAVA authorizes \$4,000 per precinct for punch card and lever machine replacement. States that received Section 102 funds to purchase and install new equipment must do so by November 2004 or request an extension; however, the extension period may not exceed the first election after January 1, 2006. Any state not in compliance by the original or authorized extended deadline must return funds. HAVA does not require states to discontinue use of punch cards or levers, but those that choose to continue using such systems are ineligible for Section 102 funds.

In addition to the \$650 million provided under Sections 101 and 102, HAVA authorizes \$3 billion for required election improvements.<sup>61</sup> In addition to these "requirements payments," Title II of HAVA sets aside funding for specific purposes:

- HAVA provides \$50 million for FY 2003, \$25 million for 2004, and \$25 million for 2005 to ensure voting access for persons with disabilities. The Department of Health and Human Services (HHS) is responsible for making payments to eligible state and local governments to improve accessibility, establish outreach programs for persons with disabilities, and train election officials on how to best promote access and participation.<sup>62</sup>
- Congress authorized \$20 million in 2003 for technology research grants to improve quality, accuracy, reliability, and security of voting equipment and systems. State applications must include plans for accommodating LEP and disabled voters. States that receive grants must submit reports on grant expenditures and other related activities.<sup>63</sup>
- For 2003, \$10 million was authorized for equipment testing pilot programs. Tests must respond to LEP and disabled voter needs.<sup>64</sup>

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<sup>60</sup> Voting-age population is determined by the U.S. Census.

<sup>61</sup> Help America Vote Act § 257(a), 42 U.S.C. § 15301 (2002).

<sup>62</sup> *Id.* §§ 261–264(a).

<sup>63</sup> *Id.* §§ 271(a), (b)–273(a).

<sup>64</sup> *Id.* §§ 281(a), (b)(1)–283(a).



- HAVA authorizes \$10 million per year through 2006 for each state to ensure registration and voting access for persons with disabilities.<sup>65</sup> Public and private nonprofit organizations can receive funding to train election officials and evaluate systems for accessibility.

### *Congressional Appropriation*

Although HAVA authorizes significant funding for election reform, Congress has been slow to appropriate funds accordingly.<sup>66</sup> Not until February 2003, four months after HAVA became law, did Congress finally pass appropriations legislation providing \$1.5 billion for its implementation. This amount represents 30 percent less than the \$2.16 billion promised for 2003, as the White House imposed a spending cap limiting appropriations.<sup>67</sup> Title I money (for replacing equipment and improving election administration) was funded in full at \$650 million. The remaining \$850 million was earmarked for compliance with Title III (technology standards, provisional ballots, registration systems, and voter identification).

President Bush requested only \$500 million for election reform in 2004, despite that HAVA authorized more than \$1 billion. After political wrangling and vocal debate in Congress, \$1.5 billion was actually appropriated for 2004. However, the 2004 Omnibus Appropriations package was signed into law on January 26, 2004, after the deadline for meeting many of the law's requirements had passed, and the money has not yet been fully distributed to states.<sup>68</sup> For 2005, the President requested \$65 million: \$40 million for grants to states, \$10 million for federal administration, and \$15 million for accessibility grants to assist voters with disabilities.<sup>69</sup> The 2005 budget is still being negotiated in Congress.

### *Disbursement to States*

One of the keys to reform is passing the money to the states to purchase equipment and set up infrastructure to respond to mandates. This process has, by all accounts, been slow. By mid-June 2003, GSA had disbursed almost all of the \$650 million in early money to the 55 jurisdictions

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<sup>65</sup> *Id.* §§ 291(a)–292(a).

<sup>66</sup> For the purpose of this discussion, the following definitions are used:

Authorized funds: the amount of funding available to fulfill HAVA's requirements as established in the legislation. This is a maximum amount to be allocated and is dependent on the annual appropriations process.

Appropriated funds: the amount of funding Congress actually grants for a specific purpose as established by the annual omnibus appropriations resolution.

Disbursed funds: the amount actually distributed to states to implement HAVA.

<sup>67</sup> Election Reform Information Project, "Election Reform Briefing: Ready for Reform?" *electionline.org*, March 2003, p. 3 (hereafter cited as ERIP, "Ready for Reform?")

<sup>68</sup> See "Rep. Wexler Urges Florida to Use \$85 Million in New Federal Election Aid for Ballot Printers," *States News Service*, Jan. 27, 2004; Congressman Robert Wexler, "Florida to Get \$133 Million in Federal Election Aid," congressional press releases, Feb. 6, 2004.

<sup>69</sup> Amy Keller, "\$65M for Election Reform Called Inadequate," *Roll Call*, Feb. 5, 2004.

covered by HAVA.<sup>70</sup> Another \$15 million was appropriated to reimburse some states that adopted new voting technology early. HHS paid out \$13 million to states for improving voting systems for individuals with disabilities, and another \$2 million to state disability protection and advocacy systems. An additional \$830 million appropriated in 2003 for “requirements payments” has not been distributed.<sup>71</sup> Thus far, approximately 18 percent of the total \$3.86 billion authorized (for fiscal years 2003–2005) has been distributed to states.

**Table 2. Authorized, Appropriated, and Disbursed Funds**

<b>HAVA Funding 2003:</b>	
Authorized funds	\$2.16 billion
Appropriated funds	\$1.50 billion
Disbursed funds	\$680 million
<b>HAVA Funding 2004:</b>	
Authorized funds	\$1.05 billion
Appropriated funds	\$1.50 billion
Disbursed funds	N/A
<b>HAVA Funding 2005:</b>	
Authorized funds	\$650 million
Appropriated funds	N/A
Disbursed funds	N/A

Without the money transferred to state coffers yet, it will be difficult if not impossible for states to have all systems in place by November. The Election Assistance Commission (EAC), discussed in greater detail below, was supposed to be established and acting independently within 120 days of HAVA’s passage (that is, by February 26, 2003). However, it was not until December 2003—nearly 10 months behind schedule—that its members were confirmed by Congress.<sup>72</sup> EAC is responsible for reviewing and approving state grant requests.

EAC has an operating budget of only \$1.2 million for 2004.<sup>73</sup> Publishing state plans in the Federal Register alone will consume \$800,000 of that budget.<sup>74</sup> Nonetheless, in a February 2004 meeting with the National Association of Secretaries of State, the EAC chair indicated his intent to review state compliance plans by the end of February and publish them in the Federal Register shortly thereafter, so that funds could be distributed to states by mid-May.<sup>75</sup> This includes states

<sup>70</sup> Election Reform Information Project, *Election Reform 2004, What’s Changed, What Hasn’t, and Why*, January 2004, p. 22, <<http://www.electionline.org>> (hereafter cited as ERIP, *Election Reform 2004*).

<sup>71</sup> U.S. Department of Justice, “Help America Vote Act of 2002: Justice Department Implementation Activities as of December 2003,” news release, Dec. 31, 2003, <[http://www.usdoj.gov/opa/pr/2003/December/03\\_crt\\_729.htm](http://www.usdoj.gov/opa/pr/2003/December/03_crt_729.htm)> (last accessed Mar. 11, 2004) (hereafter cited as DOJ, “HAVA Activities”); Jim Abrams, “Senate Confirms Election Panel Members,” Associated Press Online, Dec. 9, 2003, <<http://www.nexis.com/research/search/submitViewTagged>> (last accessed Mar. 4, 2004).

<sup>72</sup> The four members are DeForest Soaries, Jr. (chair), Paul S. DeGregorio, Gracia Hillman, and Ray Martinez.

<sup>73</sup> Dan Keating, “Election Panel Tells States Money Will Be Coming: \$2.3 Billion to Be Disbursed for Voting Upgrades,” *Washington Post*, Feb. 17, 2004 (hereafter cited as Keating, “Election Panel Tells States Money Will Be Coming”).

<sup>74</sup> Amy Keller, “Problems Plague New Commission,” *Roll Call*, Jan. 26, 2004; “Budgeting for Another Florida,” *New York Times*, Feb. 8, 2004.

<sup>75</sup> Keating, “Election Panel Tells States Money Will Be Coming.”

that requested waivers for registration databases and equipment replacement, which also had to submit plans and are still eligible to receive funds.

The revised EAC timeline for distributing funds leaves states less than six months to prepare for the intractable deadline: Election Day. Moreover, while the funding is critical, states are also looking for federal guidance before purchasing equipment, setting up registration lists, and complying with other HAVA requirements.

### ***Guidance***

Once states are given the resources to initiate reforms, they should also receive guidance to ensure that they are in compliance with HAVA and that the election systems they select are the most appropriate. The federal government has an obligation to help states use funds productively. To do so, HAVA gave EAC authority to oversee and guide national election reform.

EAC is set up such that two of its four members at any given time are affiliated with different political parties. Members are appointed by the President with the advice and consent of Congress. The majority leader of the Senate, the minority leader of the Senate, the speaker of the House, and the minority leader of the House each submit a candidate for consideration by the President for each vacancy affiliated with his or her political party. Commissioners will generally serve for four years, but to establish staggered terms, two of the initial members (not affiliated with the same political parties) were appointed to serve two-year terms.

Under EAC are three assisting bodies: the EAC Standards Board, the EAC Board of Advisors, and the Technical Guidelines Development Committee. Their composition is as follows:

- The EAC Standards Board: 110 members, composed of one state election official and one local election official from each of the 55 states/territories. The two representatives from each state cannot be of the same political affiliation. Nine of the members will serve as an executive board.<sup>76</sup>
- The EAC Board of Advisors: 37 members appointed by government and private organizations (including the Commission), voter advocacy groups, and members of Congress.<sup>77</sup>
- The Technical Guidelines Development Committee: 15 members, chaired by the director of the National Institute of Standards and Technology (NIST).<sup>78</sup>

HAVA directs the two boards to review voluntary guidelines under consideration by EAC and to assist with the development of recommendations for procedural and technological election standards. The technical committee's charge is to develop voluntary equipment guidelines for states, including computer and other voting technology security, fraud prevention, voter privacy,

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<sup>76</sup> Help America Vote Act § 213(a), 42 U.S.C. § 15301 (2002).

<sup>77</sup> *Id.* § 214(a).

<sup>78</sup> *Id.* § 221(c).

systems to accommodate persons with disabilities, and remote access/Internet voting. The committee's first set of recommendations is due nine months after EAC members are appointed. EAC will vote on and adopt technology guidelines after consideration of comments from the two boards. EAC has not yet developed new guidelines for election equipment; existing Federal Election Commission guidelines will remain in effect until it does.

EAC guidelines, once developed, will be voluntary for states and are not a prerequisite to receiving funds, although previously mentioned Section 102 restrictions apply. However, states must submit plans to EAC explaining how they will expend grants. In addition, six months after the end of the fiscal year, states must report how funds were actually spent.<sup>79</sup> In this way, HAVA mandates federal oversight for federal expenditures.

Among other duties, HAVA assigns EAC responsibility for testing and certifying voting equipment using accredited laboratories.<sup>80</sup> States may voluntarily subject their systems to testing. Under the legislation, EAC also must study technology, ballot design, voter registration, and provisional voting and submit reports to Congress and the President.<sup>81</sup> On a periodic basis, as determined by EAC, the agency will conduct studies with the goal of promoting voting and election administration methods that are most convenient and accessible for overseas voters, individuals with disabilities, and LEP voters; and that are nondiscriminatory and afford eligible voters an "equal opportunity to vote and have that vote counted."<sup>82</sup>

Title III directs EAC to adopt voluntary guidance for voting technology standards by January 1, 2004, for provisional voting by October 1, 2003, and for voter registration lists by October 1, 2003. HAVA establishes that the recommendations must be reviewed and updated at least once every four years. As the HAVA timeline below indicates, however, EAC appointments were delayed 10 months; thus, it has not met any of the milestones so far. Nor has EAC begun a comprehensive review of the areas in which states are dependent on guidance before they act, such as equipment and registration list technology; it has offered no commitment for when it will make guidelines available. EAC met for the first time as a formal body on March 23, 2004, but it is still without office space, designated staff, or basic administrative infrastructure.<sup>83</sup>

### ***Enforcement***

The federal government has the authority, indeed the responsibility, to enforce HAVA implementation at the state level and seek redress for violations. Title IV establishes the framework for addressing state failure to comply with the law's requirements and existing voter rights laws. The attorney general of the United States may bring a civil action seeking declaratory or injunctive relief against any state not in compliance with the uniform and

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<sup>79</sup> *Id.* § 258.

<sup>80</sup> *Id.* § 231(a)(1).

<sup>81</sup> *Id.* § 241(a), (b).

<sup>82</sup> *Id.* § 241(a)(3).

<sup>83</sup> Staff of FEC's Office of Election Administration will be officially transferred to EAC and will occupy a new office in Washington, DC, beginning April 2, 2004. EAC is expected to have its own Web site sometime in April.

nondiscriminatory technology and administrative requirements.<sup>84</sup> Even states that do not use HAVA funds must certify to the attorney general that they are meeting Title III requirements by submitting a compliance plan.<sup>85</sup> Plans from nonparticipating states were due January 1, 2004.

Enforcement of HAVA's provisions poses major civil rights concerns. For instance, it is impossible to determine whether every poll worker in every precinct knows the conditions under which provisional ballots must be furnished and acts accordingly. There is evidence that even in states where provisional ballots have always been available, poll workers have not routinely provided them to voters.<sup>86</sup> The Department of Justice is charged with monitoring state compliance with HAVA, but it is unclear whether Congress has given the agency the resources necessary to conduct widespread monitoring. The Commission also has statutorily granted monitoring responsibilities and should likewise be given the resources to monitor HAVA compliance, along with the Voting Rights Act, and other federal voting legislation it has traditionally monitored.

### ***The Status of Federal Implementation***

In general, the federal government has three main responsibilities under HAVA: funding, guidance, and enforcement. Delays in implementation, however, have prevented these responsibilities from being met, and in turn have stymied state progress. Table 3 presents a timeline of HAVA's statutory requirements. It illustrates that, of the 22 target dates that have lapsed since the passage of HAVA, only five were met on time. The majority of the incomplete or tardy tasks rest with the federal government. Congress' failure to appoint EAC members in a timely fashion has repercussively affected other deadlines, specifically the dissemination of guidance on provisional voting, voter registration databases, and voting technology standards.

As the following discussion will indicate, absent these guidelines, states have been hesitant to move forward with reform. States have generally complied with the reporting requirements and the deadlines for requesting extensions. However, absent analyses of state reports, it is difficult to determine whether many HAVA-prescribed activities have actually occurred. Table 3 shows that there are five such requirements that states may or may not have successfully implemented, including, for example, the adoption of provisional voting procedures.

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<sup>84</sup> Help America Vote Act § 401, 42 U.S.C. § 15301 (2002).

<sup>85</sup> *Id.* § 402(b).

<sup>86</sup> ERIP, *Primary Education*.

**Table 3. Help America Vote Act Timeline**

<b>Days/Months After Enactment</b>	<b>Date</b>	<b>Activity</b>	<b>Deadline Met</b>
45 days	Dec. 13, 2002	Section 101: GSA establish grant program for states to improve election administration.	No
45 days	Dec. 13, 2002	Section 102: GSA establish grant program for states to replace punch cards or lever voting machines.	No
	Jan. 1, 2003	Section 303(b): States must be ready to accept materials from voters registering by mail.	?
90 days	Jan. 27, 2003	Chief state election officials must submit name of individual selected to serve on EAC Standards Board to FEC.	No
120 days	Feb. 26, 2003	Appointment of 4 EAC commissioners.	No
	Mar. 31, 2003	State NVRA reports for 2001–2001 due to FEC.	Yes
6 months	Apr. 29, 2003	Deadline for states to submit certification to GSA for election administration grants (as outlined in Section 101).	?
6 months	Apr. 29, 2003	Equipment replacement (Section 102) payments.	No
	June 30, 2003	2001–2002 NVRA report submitted to Congress.	Yes
	Oct. 1, 2003	Section 303: EAC adopts recommendations and voluntary guidance on provisions for computerized statewide voter registration list and mail registration requirements.	No
	Oct. 1, 2003	Section 302: EAC adopts recommendations and voluntary guidance on provisional voting requirements.	No
12 months	Oct. 29, 2003	Section 243: EAC submits Human Factors Report to the President and Congress.	No
12 months	Oct. 29, 2003	Section 246: EAC submits report on free absentee ballot postage to Congress.	No
	Jan. 1, 2004	Deadline for states to qualify for waiver of computerized statewide registration databases.	Yes
	Jan. 1, 2004	Last day for states to apply for a waiver of the deadline for replacing punch card or lever machines using Section 102 payments.	Yes
	Jan. 1, 2004	States not participating in grant programs must certify to EAC that they have established administrative complaint procedures (Section 402) or submitted a compliance plan to the attorney general.	Yes
	Jan. 1, 2004	Effective date for provisional voting and voting information requirements.	?
	Jan. 1, 2004	States must comply with requirements for statewide computerized voter registration lists, unless granted a waiver.	?

Days/Months After Enactment	Date	Activity	Deadline Met
	Jan. 1, 2004	EAC adopts voluntary guidance recommendations relating to voting technology standards requirements (Section 301).	No
	Jan. 1, 2004	Effective date of provision prohibiting states from refusing to accept registration and absentee ballot applications because of early submission (Section 706).	?
	Jan. 31, 2004	EAC submits first annual report to Congress.	No
18 months	Mar. 29, 2004	EAC submits to the President and Congress a report and recommendations for facilitating military and overseas voting (Section 242).	No
20 months	May 29, 2004	EAC submits to Congress a report on the issues and challenges presented by incorporating Internet and communication technology into the election process (Section 245).	N/A
	Nov. 2, 2004	All punch card and lever machines must be replaced in states accepting Section 102 payments unless a waiver was granted.	N/A
	Mar. 31, 2005	State NVRA reports for 2003–2004 due to EAC.	N/A
	June 1, 2005	EAC submits report to President and Congress on voters who register by mail (Section 244).	N/A
	June 1, 2005	EAC reports to Congress on the feasibility of using social security number or other information to establish registration or other voter eligibility and ID requirements (Section 244).	N/A
	June 30, 2005	2003–2004 NVRA report submitted to Congress.	N/A
	Jan. 1, 2006	Each state required to comply with voting technology requirements in Section 301.	N/A
	Jan. 1, 2006	Deadline for states to implement statewide voter registration database if granted a waiver.	N/A
	First federal election after Jan. 1, 2006	All punch card and lever machines must be replaced in states accepting Section 102 payments that were granted a waiver.	N/A
	Jan. 1, 2007	Voting equipment purchased with Title II payments must meet disability access standards outlined in Section 301.	N/A

No = Statutory provision was not completed on time

Yes = Deadline was met

? = Unable to determine because information is not readily available.

Source: U.S. Federal Election Commission, "Help America Vote Act Timeline," <<http://www.fecweb1.fec.gov/hava/timeline.htm>> (last accessed Mar. 3, 2004); Congressional Research Service, memorandum from Kevin J. Coleman, analyst, Government and Finance Division, re: Help America Vote Act Timeline, Dec. 4, 2002.

## The State Role in Helping America Vote

The federal government has always allowed states latitude to develop election procedures, provided they adhered to federal voting laws. HAVA preserves state autonomy to some extent, but also establishes minimum requirements for uniform and nondiscriminatory election systems. As such, states have been given new responsibilities and face new challenges to ensure that future elections are free from the irregularities of the last presidential election.

Immediately after the 2000 elections, states initiated repair of failing voting infrastructure. In the following year, 27 states formed commissions or task forces, issued election status reports, or drafted legislative reform plans.<sup>87</sup> And, according to the National Conference of State Legislatures, in 2003, 1,740 bills were introduced, 318 passed into law, and 341 carried over into 2004.<sup>88</sup> Many of these bills were attempts to achieve compliance with HAVA. As of the end of 2003, 46 states introduced bills dealing specifically with HAVA requirements, and 38 states passed new related laws. Only four states produced no HAVA-related legislation at all in 2003 (Michigan, Ohio, South Carolina, and Virginia).<sup>89</sup>

When HAVA became law, no state had a system in place that satisfied all three of its major requirements: provisional voting, statewide voter registration databases, and voter verification for first-time voters. According to one study, in March 2003, only four states and the District of Columbia believed they were in compliance with two of the three; 11 states reported meeting one of the requirements; and 35 states reported not meeting any HAVA mandates.<sup>90</sup> A majority of states also used voting technology that did not meet minimum HAVA standards. In other words, states had a long way to go—and needed ample resources—before compliance could be achieved.

Four HAVA requirements were scheduled to take effect on January 1, 2004, and should be in place for the November presidential election: provisional voting, voter information (instructions, rights, complaint procedures, etc.), identification requirements for new voters, and statewide registration lists. However, as the following discussion will illustrate, while states show signs of trying to achieve compliance, most are still in the planning stages. For example, by the 2003 deadline, 41 covered jurisdictions had requested extensions until 2006 for the implementation of the computerized statewide voter registration lists.<sup>91</sup> This raises the possibility that many voters will encounter the same obstacles as in 2000, such as being erroneously purged from registration lists, making provisional ballot use more critical.

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<sup>87</sup> The Constitution Project, “Federal Election Reform: Action and Reaction Conference Proceedings,” <<http://www.constitutionproject.org/eri/reportindex.html>> (last accessed Mar. 4, 2004) (hereafter cited as the Constitution Project, “Federal Election Reform”).

<sup>88</sup> National Conference of State Legislatures, “The States Tackle Election Reform,” Dec. 16, 2003, <<http://www.ncsl.org/programs/legman/elect/taskfc/03billsum.htm>> (last accessed Mar. 12, 2004).

<sup>89</sup> *Ibid.*

<sup>90</sup> ERIP, “Ready for Reform?” p. 2.

<sup>91</sup> ERIP, *Election Reform 2004*. Covered jurisdictions include all 50 states, the District of Columbia, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands.



States do not have to comply with voting technology requirements until 2006, although those accepting funds to replace punch card and lever systems were supposed to do so in time for the 2004 elections. To date, 24 of the 30 states (80 percent) participating in the replacement program have requested extensions until 2006.

Still, the Department of Justice, which has been monitoring state activities to ensure compliance with the provisions and timelines of HAVA, has found that all states are making “good faith efforts” to implement the law. At the end of 2003, every covered jurisdiction, except one, had drafted a state plan identifying steps it would take to implement HAVA and published the plan on the Internet.<sup>92</sup>

Although nearly every state has a plan, reform efforts vary widely from state to state. Some have made measurable changes; others are progressing more slowly, either because of the lengthy legislative process, lack of funding, or an absence of political leadership.<sup>93</sup> HAVA’s requirements of states are complex and will exact significant effort to carry out. Requirements in Title III have the broadest implications for states and voters. Title III outlines minimum technology standards and requirements for election administration, including provisional ballots and voter identification. The law permits states to establish election technology and administration standards that are more strict as long as they comport with federal law. This section generated the most controversy in Congress and threatened to unravel federal reform efforts.

### ***Minimum Technology Standards***

Section 301 establishes minimum standards for voting technology and assumes that some states will seek state-of-the-art technology. Equipment used in federal elections must:

- permit voters to verify their ballots before casting a vote (although not necessarily by paper receipt);
- provide voters the opportunity to change or correct a ballot before it is cast; and
- notify voters when a ballot is invalid, for example, if more than the designated number of candidates is selected.

States may continue to use low-tech options such as paper, punch card, or central count voting technology. However, to meet the above requirements, states using those systems must:

- establish a voter education program specific to the system used;
- notify voters of the effect of casting multiple votes for an office or other errors that might invalidate a ballot; and
- instruct voters on how to correct a ballot before it is cast, including the right to a replacement ballot if necessary.

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<sup>92</sup> DOJ, “HAVA Activities.”

<sup>93</sup> ERIP, *Election Reform 2004*, p. 7.

Section 301 specifies that in all cases, voter privacy and ballot confidentiality must be preserved. In addition, all voting technology must:

- produce records with audit capacity;
- make a paper record available in the event a recount is necessary;
- comply with Federal Election Commission (FEC) error rate standards in place at the time HAVA was enacted;
- provide alternative language accessibility pursuant to Section 203 of the Voting Rights Act of 1965; and
- be accessible to individuals with disabilities, including those with visual impairments, allowing them to cast a private ballot.

Regardless of the equipment used, states must make available at least one direct recording electronic device or other equally equipped voting machine at each polling place to accommodate voters with disabilities. States must also adopt uniform and nondiscriminatory standards for what constitutes a vote.

In short, states can use the same voting equipment that was in place prior to HAVA (and in the 2000 elections) as long as they fulfill these requirements. Money granted for equipment replacement cannot be used to purchase or maintain punch card or lever technology. States accepting funding to replace punch cards and lever systems are supposed to have new systems in place before the 2004 elections, unless they request a waiver. All other system standards under this section must be in place by January 1, 2006, with the exception of the accessibility standards for individuals with disabilities, which must be in place by January 1, 2007.

As noted, of the 30 states participating in the equipment buyout program, 24 applied for waivers to extend the deadline until January 1, 2006.<sup>94</sup> Three jurisdictions (Maryland, Georgia, and the District of Columbia) upgraded machines after the 2000 elections and will seek reimbursement from federal funds.<sup>95</sup> Others, including Florida and California, rushed to replace punch card systems after 2000, but it is unclear whether they will receive federal reimbursement. Nineteen states plan to implement uniform, statewide voting equipment by 2006.<sup>96</sup> Other states, such as Alaska and Oklahoma, had voting technology compliant with HAVA's provisions statewide before 2000.<sup>97</sup>

At least some polling places in 42 states will have new voting machines for the November 2004 elections.<sup>98</sup> However, many voters will use the same equipment in November, including the punch card systems that created so much controversy in 2000. In all, 775 counties and towns have changed voting equipment since the 2000 elections; 324 of those have done so since the

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<sup>94</sup> Ibid., p. 12.

<sup>95</sup> ERIP, "Ready for Reform?" p. 4.

<sup>96</sup> ERIP, *Election Reform 2004*, p. 12.

<sup>97</sup> ERIP, "Ready for Reform?" p. 4.

<sup>98</sup> Dan Seligson, "Post-2000 Election Changes Are Still Incomplete," *electionline.org*, February 2004 (hereafter cited as Seligson, "Post-2000 Election Changes").

passage of HAVA, and 467 did so between 2000 and 2002.<sup>99</sup> In total, this represents less than 25 percent of all counties in the United States.<sup>100</sup>

The minimum requirements for technology leave room for states to adopt systems that may be more prone to error than others, at least until EAC's technology committee develops standards, and even those will be recommendations, not requirements. HAVA does not decertify lever systems or punch cards, despite their questionable performance in the past. HAVA also gives states latitude to determine what will constitute a vote, rather than establishing definitions for each type of voting equipment. Because system standards are not required until 2006, there is the potential that the 2004 elections will not go any more smoothly than the 2000 elections.

### ***Provisional Voting***

Evidence suggests that consistent use of provisional ballots can reduce the number of votes lost to inaccurate registration lists by 50 percent.<sup>101</sup> Section 302 of HAVA requires states to enact provisional voting procedures by January 1, 2004. It states that any individual not on a registration list must be allowed to cast a provisional ballot after signing a written affirmation of eligibility. The state must provide verification to each voter that his or her ballot was counted. States must establish a free access verification system, for example, a toll-free telephone number or Internet site. States must count all valid provisional ballots and provide an explanation to any person whose provisional vote is not counted. A ballot's validity shall be determined by state law. In addition, HAVA requires states to post at each polling place information about the availability of provisional ballots.<sup>102</sup>

During the 2000 elections, 19 states offered some form of provisional voting, although they varied in scope and availability.<sup>103</sup> Since then, as prescribed by HAVA, every state has had to create a process for providing provisional voting and a system to inform voters whether their provisional ballots were counted. Several states had to modify existing rules for provisional voting, and every state had to create a new notification system.<sup>104</sup>

As of December 2003, 40 states were compliant with this requirement, and two states had legislation pending. Another six states are exempt from this requirement either because they

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<sup>99</sup> Election Data Services, Inc., "New Study Shows 50 Million Voters Will Use Electronic Voting Systems, 32 Million Still with Punch Cards in 2004," Feb. 12, 2004, p. 2 (hereafter cited as EDS, "New Study Shows").

<sup>100</sup> According to the Census Bureau, there are 3,142 counties in the United States. It should be noted that in some New England jurisdictions, voting technology decisions are made at the township level, not the county level.

<sup>101</sup> Kim, "Help America Vote Act," p. 592, *citing* California Institute of Technology/Massachusetts Institute of Technology Voting Technology Project, *Voting: What Is, What Could Be*, 2001, p. 30, <[http://www.vote.caltech.edu/Reports/july01/July01\\_VTP\\_%20Voting\\_Report\\_Entire.pdf](http://www.vote.caltech.edu/Reports/july01/July01_VTP_%20Voting_Report_Entire.pdf)> (hereafter cited as Caltech/MIT, *Voting*).

<sup>102</sup> Help America Vote Act § 302(b), 42 U.S.C. § 15301 (2002).

<sup>103</sup> USCCR, *Election Reform*, p. 49.

<sup>104</sup> ERIP, *Election Reform 2004*, p. 19.

allow Election Day registration or have no registration at all. Iowa, Kansas, and Mississippi have yet to pass state legislation for provisional voting.<sup>105</sup>

Although states have pressed forward on this requirement, there are still some issues that must be worked out before the next election. For example, for some financially insecure counties, the cost of special envelopes and staff time to produce and distribute provisional ballots is burdensome. In addition, voters in small rural jurisdictions fear that a provisional ballot, labeled with a voter's name, invalidates the right to secrecy. The potential for voter privacy violations is of particular concern in counties where neighbors and family members sometimes run against each other.<sup>106</sup>

### ***Statewide Voter Registration Lists***

Errors on registration lists and incorrect purging of voter names proved to be major sources of disenfranchisement in the 2000 elections. Research found that registration list problems were responsible for half of the 4 million to 6 million votes lost in that election.<sup>107</sup> HAVA thus establishes requirements for voter registration list maintenance. Section 303 requires states to develop centralized, nondiscriminatory, computerized voter registration lists linked with other state agency databases, specifically motor vehicle authority data.<sup>108</sup> In addition, the databases must allow local election officials immediate access to the lists and state assistance with expeditious data entry. The systems must assign each voter a unique identifying number, either a voter registration number, or one that corresponds to a driver's license or social security number.

States are also required to engage in regular list maintenance activities, such as removing names of deceased voters. They must provide adequate security measures and establish safeguards against removing eligible voters.<sup>109</sup> According to Section 303, names can only be removed in accordance with the National Voter Registration Act of 1993 (NVRA), which allows states to take such actions when voters have neither responded to a notice nor voted in two consecutive general elections. States also may remove names of voters deemed ineligible by state law. NVRA requires that felony status be linked to computerized state agency records, although neither HAVA nor NVRA establishes safeguards to prevent erroneous classification of felon status (discussed in greater detail below).

Unless states sought and received waivers, HAVA required voter registration databases to be functional by January 1, 2004. Since 41 states asked for extensions until January 1, 2006, most will not have statewide systems in place before the November elections.<sup>110</sup> Only four states

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<sup>105</sup> Ibid.

<sup>106</sup> H. Gregory Meyer, "Interim Ballots Address '00 Flaw," *Chicago Tribune*, Mar. 15, 2004, p. 1.

<sup>107</sup> The Constitution Project, "Federal Election Reform."

<sup>108</sup> Per the National Voter Registration Act of 1993, which remains in effect, states are also required to provide registration opportunities through public assistance offices and offices providing benefit services to persons with disabilities. Such databases must also be linked to the statewide registration list.

<sup>109</sup> Help America Vote Act § 303(a)(2), 42 U.S.C. § 15301 (2002).

<sup>110</sup> ERIP, *Election Reform 2004*.

(Delaware, Kentucky, Louisiana, and South Carolina) claim to have had compliant systems in place for many years, and therefore do not foresee the need to make changes prior to future elections.<sup>111</sup>

The registration database as described by HAVA poses potential problems for states. HAVA does not clearly define list matching for voter registration databases. HAVA notes that felon status must be coordinated with other agency records to ensure accuracy, but does not address the possibility that corrections records may not be updated or accurate. Presumably, individuals wrongly identified as felons would be allowed to cast provisional ballots, but this is yet unknown. Furthermore, some are concerned that a centralized database, which places the authority for maintenance in the hands of a few state officials, could be used to facilitate large purges of eligible voters.<sup>112</sup> States will inevitably look to EAC for guidance on list matching and roll maintenance, but until it is a working organization, none will be available.

The lack of guidance and the slow disbursement of federal funds have hampered the development of databases. California, for example, says it will either modify its existing database or install a new one “as soon as is reasonably possible.” It makes no provision for what the state will do in the meantime to ensure registration list accuracy, although presumably California is slightly ahead of other states because it already has a computerized list in place.<sup>113</sup> Florida, on the other hand, has 67 county-level registration databases that are combined into the state’s Central Voter File quarterly. The counties are not connected to the central list. Following each election, a private company reviews the combined list to eliminate duplicate listings and ineligible voters. After the 2000 elections, Florida officials urged improvement of the system “as soon as possible,” but developed no contingency plan for the interim, and it is unclear what the state has done since then.<sup>114</sup>

The state of Ohio also has a decentralized database, but plans to contract with a vendor to centralize the system and enable both written and electronic means for voters to register. The state’s plan does not indicate when this will occur, nor does it propose a backup plan.<sup>115</sup> Likewise, Virginia has a computerized database, but it is not in compliance with HAVA. Rather than modify its existing system, the state will develop an entirely new one.<sup>116</sup>

Kentucky’s system is reportedly one of the best in the country because, although it is maintained at the state level, it allows county-level access. County officials can instantaneously update voter

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<sup>111</sup> ERIP, “Ready for Reform?” p. 7.

<sup>112</sup> The Constitution Project, “Federal Election Reform.”

<sup>113</sup> Kevin Shelly, secretary of state, California, *My Vote Counts: California’s Plan for Voting in the 21st Century*, p. 13, <<http://www.myvotecounts.org>> (last accessed Mar. 30, 2004) (hereafter cited as California, *My Vote Counts*).

<sup>114</sup> The Governor’s Select Task Force on Election Procedures, Standards, and Technology, *Revitalizing Democracy in Florida*, Mar. 1, 2001, pp. 48–51 (hereafter cited as Florida, *Revitalizing Democracy*).

<sup>115</sup> J. Kenneth Blackwell, secretary of state, Ohio, *Changing the Election Landscape in the State of Ohio*, May 13, 2003, p. 35 (hereafter cited as Ohio, *Changing the Election Landscape*).

<sup>116</sup> Jean R. Jensen, secretary, State Board of Elections, Virginia, *Virginia State Plan*, draft for public comment, June 2003, p. 9, <[http://www.sbe.state.va.us/web\\_docs2/HAVA/HAVADRAFTPlanForPublicComment.htm](http://www.sbe.state.va.us/web_docs2/HAVA/HAVADRAFTPlanForPublicComment.htm)> (last accessed Mar. 30, 2004) (hereafter cited as Virginia, *State Plan*).

records and receive written confirmation the next day. Kentucky's Board of Election is preparing to provide Internet access to the database for official use at precincts on Election Day.<sup>117</sup>

### ***Voter Identification***

In an attempt to prevent voter fraud, HAVA establishes minimum requirements for voter identification. First-time voters registering by mail must present a valid photo ID or a current utility bill, bank statement, or paycheck bearing their name and address.<sup>118</sup> HAVA requires the same for absentee ballots and mail-in votes. If a voter does not have an acceptable form of identification at the polls, he or she must be allowed to cast a provisional ballot until eligibility can be determined.<sup>119</sup>

The HAVA voter identification provisions were among the most controversial as the bill was being developed. Civil rights groups were concerned that minority and low-income populations would be unfairly penalized by the identification requirement or disparately required to prove their identity even when not required (i.e., they are not first-time voters). These concerns are justified given their common occurrence in 2000. Likewise, disabled voters are less likely to have driver's licenses or to live alone and thus have utilities in their names. The same may be true of immigrant voters, who are more likely to share households. Advocates argued that identification is necessary to prevent voter fraud. Because HAVA prescribes only a minimum identification requirement, states have flexibility to adopt more stringent rules and can establish higher identification standards.

During the 2000 elections, 11 states required all voters to present verification at the polls before voting. In 2003, six additional states (Alabama, Colorado, Montana, North Dakota, South Dakota, and Tennessee) passed universal voter identification rules requiring every voter to present identification before receiving a ballot, bringing the total to 17 states.<sup>120</sup> Since the passage of HAVA, 25 states that did not previously require verification will ask for identification from first-time voters who registered by mail but did not include identification.<sup>121</sup> To date, no states have expanded the available identification alternatives beyond what HAVA lists as acceptable (i.e., photo ID, utility bill, bank statement, or paycheck),<sup>122</sup> although Ohio's state plan indicates that it will do so.<sup>123</sup>

Given the new identification requirements and the technicalities involved, it is imperative that states train poll workers to understand when ID is required. Evidently this did not happen in some jurisdictions prior to the 2004 primary elections. For example, in Cleveland, during the

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<sup>117</sup> Florida, *Revitalizing Democracy*, pp. 50–51.

<sup>118</sup> Help America Vote Act § 303(b)(2), 42 U.S.C. § 15301 (2002).

<sup>119</sup> *Id.* § 303(b)(2), (B)(i–ii).

<sup>120</sup> Seligson, "Post-2000 Election Changes."

<sup>121</sup> ERIP, *Election Reform 2004*, pp. 17–18.

<sup>122</sup> ERIP, *Primary Education*.

<sup>123</sup> Ohio, *Changing the Election Landscape*, pp. 35–36.

March primary, poll workers required some Cuyahoga County voters to produce identification before being allowed to cast ballots. The four poll workers said they had been instructed during training to ask for identification. By 11:00 a.m., someone from the county Board of Elections had called the precinct to tell them to stop. Only 185 new registrants who had not provided driver's licenses or social security numbers upon registration should have been asked to produce identification.<sup>124</sup>

### ***Complaint Procedures***

As a condition of receiving funds and to provide an avenue of redress for voters who believe their rights have been violated, states must establish uniform and nondiscriminatory complaint procedures.<sup>125</sup> HAVA does not specify who in the state is responsible for receiving and resolving complaints, but it does stipulate how complaints are to be processed:

- complaints must be written and notarized;
- complainants must be allowed to request a hearing;
- states shall determine whether or not there was a violation and if a remedy is necessary;
- states must resolve complaints within 90 days, or within 60 days thereafter using alternative dispute resolution; and
- if a state dismisses a complaint, the results of the procedures must be published.

What states have done to set up complaint procedures for individuals who believe their rights have been violated has not been widely studied to date. Some states, such as California, had complaint procedures in place before HAVA's enactment. California administers a toll-free telephone number for filing complaints and has procedures for filing written complaints with the secretary of state. Complaint forms are translated in appropriate languages and made accessible to persons with disabilities.<sup>126</sup> Ohio is developing its complaint process, which, according to the secretary of state, will be nonadversarial rather than highly evidentiary, and will include both alternative dispute resolution and formal hearings.<sup>127</sup> Virginia has informal grievance procedures, but is working to adopt a formal complaint mechanism.<sup>128</sup>

HAVA complaint requirements yield some foreseeable problems. HAVA requires states to resolve complaints within 90 days. However, certifying an election before complaints are resolved, as many states will do, will not protect the rights of violated voters, particularly in the event of a pattern or practice violation that could sway election results. In addition, HAVA does not separate the complaint resolution function from the administration of elections; nor does it specify who is responsible for processing complaints. This separation was central to the

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<sup>124</sup> Barb Galbincea and Connie Schultz, "Confusion Plagues Voters, Poll Workers," *Cleveland Plain Dealer*, Mar. 3, 2004, p. B1.

<sup>125</sup> Help America Vote Act § 402(a), 42 U.S.C. § 15301 (2002).

<sup>126</sup> California, *My Vote Counts*, p. 30.

<sup>127</sup> Ohio, *Changing the Election Landscape*, pp. 36–37.

<sup>128</sup> Virginia, *State Plan*, p. 22.

Commission's recommendations to ensure that the entity allegedly committing or condoning an unlawful practice is not also responsible for investigation and resolution.

## NATIONAL ELECTION REFORM INADEQUACIES AND POTENTIAL PITFALLS

As the preceding description of HAVA illustrates, many of the Commission's recommendations were incorporated into the legislation, but not all have been implemented to date. Congress satisfied the most urgent needs, as identified after the 2000 elections by codifying access, uniformity, and efficiency—at least for some aspects of elections. Significantly, HAVA provides federal funding for state reform, requires provisional ballots, creates uniform standards for voter identification, establishes minimum technology standards, requires complaint procedures and voter education, and mandates statewide, computerized voter registration lists.

However, the law's interpretation and implementation may possibly lead to procedures that either diverge from Commission recommendations or neglect them altogether. Some provisions of HAVA are problematic either because they are so vague or because they only establish minimum standards. Moreover, implementation delays are built into HAVA because it set contingency deadlines that allow states latitude to request extensions beyond 2004 for two core requirements: voting equipment replacement and registration databases. States' need for additional time correlates with federal foot-dragging, but HAVA should have established fixed dates that guaranteed swift reform and attached penalties to untimely compliance. Table 4 lists the Commission's major recommendations and describes how HAVA addresses them.

**Table 4. Comparison of Commission Recommendations for Election Reform and the Help America Vote Act**

1.	<p><b>USCCR</b></p> <p>Minimum, mandatory, and voluntary national standards must be set for voting equipment, error rates, absentee and sample ballots, list maintenance, identity verification, ballot counting and tabulation, recounting (including what counts as a valid vote), voter education, felon disenfranchisement, and state and local responsibilities. Mandatory standards must be set for provisional ballots, ballot kick-back features on voting equipment, data collection and reporting, language assistance, and assurance of physical accessibility.</p> <p><b>HAVA</b></p> <p>Establishes minimum guidelines for technology—including ballot verification, kick-back features, audit capacity, and error rates (as developed by FEC)—voter identification, and voter information provided at the polls. Establishes mandatory requirements for statewide registration lists, provisional voting, and use of technologies to assist voters with disabilities. Charges EAC with studying various aspects of election administration, including technology, ballot design, voter registration, and accessibility.</p>
2.	<p><b>USCCR</b></p> <p>Sufficient funding must be provided for election reform.</p> <p><b>HAVA</b></p> <p>Whether funding is sufficient remains to be seen. HAVA authorizes \$3.86 billion for election reform, but Congress failed to fully appropriate the amount designated for 2003. The President's requests have been consistently below the authorization.</p>



3.	<p><b>USCCR</b></p> <p>One central, high-ranking official should have sole responsibility and accountability for federal elections, and ensure compliance with national standards. This requirement should be a condition for receipt of federal funds.</p> <p><b>HAVA</b></p> <p>Does not specify who should administer elections, but suggests that each state should have a chief election official to coordinate reform activities and serve as the administrator of funds.</p>
4.	<p><b>USCCR</b></p> <p>Laws protecting voting rights must be enforced. DOJ should be given the necessary funds to monitor registration and elections and to pursue allegations of voting rights violations.</p> <p><b>HAVA</b></p> <p>Charges the attorney general with monitoring compliance with the technology and administrative requirements of HAVA and bringing civil actions seeking declaratory or injunctive relief. The attorney general must also certify that states not receiving HAVA funds meet the Title III requirements. No mention of whether specific funding for this purpose will be available to DOJ.</p>
5.	<p><b>USCCR</b></p> <p>States should establish and publicize procedures for complaint filing and resolution, including investigation strategies and timelines. The resolution of complaints should be the responsibility of an independent office, not affiliated with a state election office. DOJ's Voting Rights Section should perform random audits of voting procedures to ensure fairness.</p> <p><b>HAVA</b></p> <p>Requires states to establish complaint procedures and publicize the complaint process. Complaints must be resolved within 90 days or, if not, within 60 days using alternative dispute resolution. If a state dismisses a complaint, the results and procedures must be published. The law does not separate complaint processing from election administration.</p>
6.	<p><b>USCCR</b></p> <p>Every state must be required to provide provisional ballots to voters who wish to contest their exclusion from voter registration lists or who have recently moved to a new jurisdiction. Verification of the provisional ballot should be performed immediately after an election so that the vote can be counted or the voter can appeal a decision not to count a vote.</p> <p><b>HAVA</b></p> <p>Requires the use of provisional ballots. Individuals not on a voter registration list must be allowed to cast a ballot after signing an affirmation of eligibility. Also requires states to set up a free access system to enable voters to verify whether their votes were counted. If a vote is not counted, it must be explained and justified by state law.</p>
7.	<p><b>USCCR</b></p> <p>States must develop improved registration technologies that enable real-time statewide registration of voters to eliminate the need for early registration deadlines and the possibility of data entry errors.</p> <p><b>HAVA</b></p> <p>Requires states to develop centralized, nondiscriminatory, computerized voter registration lists that are linked with other state agency databases. Also requires local access to the lists and regular maintenance activities. Name purging must be in compliance with NVRA.</p>
8.	<p><b>USCCR</b></p> <p>Election Day should be made a national holiday, perhaps Veterans Day, to enable more states to solve logistical problems relating to hiring poll workers and using accessible buildings. Uniform polling hours should be established statewide.</p> <p><b>HAVA</b></p> <p>Charges EAC with studying the feasibility of conducting elections on different days, establishing a national holiday, and designating specific dates as Election Day.</p>

9.	<p><b>USCCR</b></p> <p>Congress should establish statutory authority for FEC to develop national voting technology standards and operational guidelines. Federal guidelines should be broad enough to accommodate states' needs, but should require voting equipment to meet minimum standards, including accessibility for limited English proficient and disabled voters.</p> <p><b>HAVA</b></p> <p>Requires states to use technology that meets minimum standards, including ballot correction, notification of invalid ballots, ability to produce a paper record, audit capacity, and accessibility. Charges EAC with developing additional voluntary standards (for security, fraud prevention, privacy, Internet voting, etc.) and certifying systems using accredited laboratories.</p>
10.	<p><b>USCCR</b></p> <p>Federal guidelines must be set for voter identification to ensure that they are uniform and nondiscriminatory. Provisional ballots should be made available to individuals who do not meet the identification requirement.</p> <p><b>HAVA</b></p> <p>Establishes minimum requirements for voter identification. Requires voters registering by mail to present a current photo ID or utility bill, bank statement, or paycheck indicating name and address prior to casting a ballot for the first time. Absentee ballots must be accompanied by one of these items. Provisional ballots must be available to voters without identification.</p>
11.	<p><b>USCCR</b></p> <p>The federal government must develop uniform guidelines for disability access to improve enforcement of existing laws. All polling places must be made accessible immediately, and federal funds should be made available to improve accessibility, including TDD devices, wheelchair accessible voting booths, accessible ballots, and pilot programs for Internet voting. State efforts and success in this regard should be tracked.</p> <p><b>HAVA</b></p> <p>Requires states to ensure polling places are accessible to voters with disabilities and requires at least one direct recording electronic system at each polling place. Reiterates that states must use technologies that ensure compliance with the Americans with Disabilities Act and the Voting Accessibility for the Elderly and Handicapped Act. Also sets aside specific funding to ensure accessibility, establish outreach programs, and train election officials. Establishes technology research grants that must include plans for accommodating disabled voters and charges EAC with studying accessibility issues.</p>
12.	<p><b>USCCR</b></p> <p>The FEC should develop minimum standards for voter education materials and guidelines for the frequency of distribution. Standard materials should include information on how to file a complaint and applicable voting rights laws. Local outreach efforts should also include distribution of sample ballots and technology demonstrations.</p> <p><b>HAVA</b></p> <p>Requires posting of information about voting rights, provisional ballots, state and federal voting fraud laws, and complaint procedures, as well as voting instructions and a sample ballot, at polling places. Precincts using punch cards or paper voting technology must instruct voters on how to correct a ballot before it is cast.</p>
13.	<p><b>USCCR</b></p> <p>The federal government must set minimum requirements for the means used to accommodate the language needs of voters and establish proficiency standards for bilingual poll workers, registration officials, and translation services. Quality assurance procedures must be in place to ensure language-appropriate ballots, voting instructions, technical assistance materials, and complaint forms. States should be required to report to DOJ on the provisions available, utilization rates of bilingual materials, and outcomes of efforts.</p> <p><b>HAVA</b></p> <p>No mention of specific language assistance requirements other than to reiterate that states must use technologies that enable them to remain in compliance with Section 203 of the Voting Rights Act. Also charges EAC with studying LEP accessibility issues and establishes technology research grants that must include plans for accommodating LEP voters.</p>
14.	<p><b>USCCR</b></p> <p>The voting rights of ex-felons should be restored upon completion of their sentences and parole. Those on probation should be allowed to vote.</p> <p><b>HAVA</b></p> <p>No mention of disenfranchisement specifically, but requires states to match felon status for the purpose of voter registration with other agency records to ensure accuracy.</p>

15.	<p><b>USCCR</b> Election data must be collected uniformly across precincts in every state. Data should be collected on: precinct characteristics such as equipment and types of ballots used; communications systems; number of poll workers; poll worker training programs; polling place hours; ballot availability in non-English; accessibility features to assist voters with disabilities or limited English proficiency; and criteria used to purge names from registration lists.</p> <p><b>HAVA</b> No mention of data collection for these areas, but directs EAC to study the collection of nationwide statistics on fraud.</p>
16.	<p><b>USCCR</b> Congress should establish a mandatory waiting period (21 days) after an election before certification of results to include provisional, absentee, and overseas ballots and to allow for resolution of voting discrepancies and voter complaints.</p> <p><b>HAVA</b> No mention.</p>
17.	<p><b>USCCR</b> State election officials should work with the federal government to develop a checklist of functions to be completed before, during, and after an election.</p> <p><b>HAVA</b> No mention.</p>
18.	<p><b>USCCR</b> Voter registration cards should be provided to individuals being sworn in as U.S. citizens to help new Americans become eligible to vote more quickly. Immigration offices should provide registration assistance.</p> <p><b>HAVA</b> No mention.</p>

The Commission recommendations that were not specifically addressed by HAVA can be implemented by federal and state officials through legislation and operating procedures. Following are a few issues the Commission raised in 2001 that deserve examination before the 2004 elections, especially given the status of state reform.

### **Data Collection**

HAVA makes no mention of data collection to facilitate the study of election administration nationwide. Although states must submit plans and report on election activities, there is no guarantee that the information will be presented in a uniform format that will facilitate national analysis and comparisons. Areas that would lend themselves to uniform study and reporting include equipment types, communication systems, poll worker training programs, ballot availability in non-English languages and Braille, and accessibility features for voters with disabilities.

### **Planning Tools**

HAVA does not require EAC to develop a checklist, for use by states, of functions to be completed before, during, and after an election to ensure efficiency and compliance. Given the disparities in preparedness that existed between counties in the last election, there should be standards for election activities. A checklist, which includes assurances that the requirements of HAVA are in place, would serve as a useful planning tool.

## **Election Certification**

HAVA does not establish a mandatory waiting period before certification of an election. Election certification should be aligned with the mandated use of provisional ballots and the establishment of complaint processing procedures to ensure that all eligible votes are counted. Otherwise, these safeguards will be rendered useless.

## **Voter Education and Poll Worker Training**

HAVA allows states to use Section 101 funds for poll worker training, and it calls on EAC to study methods of recruiting, training, and improving the performance of poll workers. It does not, however, require states to develop uniform training standards to ensure that poll workers across precincts are equally knowledgeable. Nor does it require EAC to develop a training module on HAVA's requirements and voting rights.

The recent primary elections demonstrated the need for better poll worker training. In Orange County, California, poorly trained poll workers gave 7,000 voters incorrect access codes to generate their ballots. The codes represented adjacent precincts and caused the wrong ballots to appear on voting screens. The computer presented many voters with ballots identical to those they would have properly received, but because of the wrong code, an unknown number cast votes in races for which they were ineligible.<sup>129</sup>

Similarly, a voter in Florida reported that a poll worker gave him the wrong system activation card, which erroneously called up a town ballot. He did not realize what had happened before he cast his ballot, at which point he was informed that nothing could be done to correct the mistake. The same problem occurred at another precinct, but in that instance poll workers, after conferring for nearly an hour, finally settled on the solution to offer the voter a provisional ballot, although state law does not allow provisional voting under those circumstances. In Florida, a state canvassing board determines which provisional ballots will count.<sup>130</sup>

In the recent primary elections in Georgia, voters who had filled out the wrong voter certification form or been given wrong access cards by poll workers voted on machines that called up the wrong ballot. The access card only allowed them to vote on a state flag referendum and not for a presidential primary candidate. One voter said that poll workers allowed him to return in the afternoon and vote again after having casting a wrong ballot in the morning. Commenting to media on that incident, county election officials reiterated that allowing anyone to vote twice is against the law.<sup>131</sup>

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<sup>129</sup> Jean O. Pasco, "Ballot Error Effect Cited: Orange County Registrar Says Incorrect Electronic Ballots May Have Altered a Race's Outcome, But Says Results Will Be Certified Today," *Los Angeles Times*, Mar. 30, 2004 (hereafter cited as Pasco, "Ballot Error Effect").

<sup>130</sup> Anthony Man and Kathy Bushouse, "99,000 Voters, But Few Glitches; Some Problems Still Hamper Election Day," *Fort Lauderdale Sun-Sentinel*, Mar. 10, 2004, p. 1A (hereafter cited as Man and Bushouse, "99,000 Voters").

<sup>131</sup> Carlos Campos, "Election 2004: Super Tuesday: Scattered Glitches Mar Balloting; Human Errors Cited as Cause," *Atlanta Journal-Constitution*, Mar. 3, 2004, p. 12A.

In addition to improved poll worker training, scenarios such as these could be prevented through voter education. If voters know their rights, they will be less likely to accept misinformation. However, HAVA's voter education requirements are limited to polling place postings and instructions, not pre-election outreach and education, although states can use HAVA funds for that purpose. Some groups advocate expanding the minimum voter information requirements to include a Voter's Bill of Rights.<sup>132</sup> At a minimum, states should be required to disseminate public service announcements and publish sample ballots prior to Election Day.

### Reinstatement of Ex-Felon Voting Rights

HAVA establishes no guidelines for the reinstatement of voting rights for ex-felons, and instead leaves it to the states to determine who can vote and how voting rights are restored. The result is a patchwork of disenfranchisement laws and a complex labyrinth of reinstatement procedures. This is a gross legislative oversight that deserves examination given the magnitude of the impact of disenfranchisement laws.

An estimated 4.7 million Americans are unable to vote because of felony convictions.<sup>133</sup> Nationally, blacks are five times more likely than whites to be unable to vote due to a criminal record. Similar disparities apply to Latinos.<sup>134</sup> Experts contend that disparities in law enforcement and sentencing, including but not limited to, discretionary arrests and prosecutions biased against nonwhites, are to blame for the disparities in felony status and, ultimately, disenfranchisement.<sup>135</sup> According to the Bureau of Justice Statistics, in 2002, the composition of male inmates in state and federal prisons was 45 percent black, 34 percent white, and 18 percent Hispanic.<sup>136</sup> Relative to their representation in the U.S. population, blacks are incarcerated at eight times the rate, and Hispanics at 3.5 times the rate, of whites.<sup>137</sup> These rates are at least in part attributable to disparities in U.S. drug sentencing policy. For example, stricter guidelines applicable to crack cocaine compared with its powdered form, have resulted in blacks being convicted more often and serving longer sentences than whites.<sup>138</sup> The prison population swelled

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<sup>132</sup> Leadership Conference on Civil Rights, "Recommendations on Implementation of the 'Help America Vote Act,'" Dec. 19, 2002, <<http://www.civilrights.org>>.

<sup>133</sup> The Sentencing Project, "Felony Disenfranchisement Rates for Women," March 2004.

<sup>134</sup> Disenfranchisement rates for Hispanics are more difficult to ascertain because of citizenship status and voter eligibility. Comparisons with the voting-age population are not accurate. Instead, analysis should consider citizenship status. See MALDEF, *Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States*, December 2003.

<sup>135</sup> Dēmos, "Democracy Denied: The Racial History and Impact of Disenfranchisement Laws in the United States," April 2003, p. 1 (hereafter cited as Dēmos, "Democracy Denied"). See also National Research Council, Committee on Law and Justice, "The Overrepresentation of Minorities in the Criminal Justice System," p. 2.

<sup>136</sup> U.S. Department of Justice, Bureau of Justice Statistics, "Prisoners in 2002," July 2003, p. 9. Figures include only those inmates sentenced to more than a year (hereafter cited as BJS, "Prisoners in 2002").

<sup>137</sup> Center for Juvenile and Criminal Justice, "America's One-Million Nonviolent Prisoners," March 1999, <[http://www.cjcj.org/pubs/one\\_million/onemillion.html](http://www.cjcj.org/pubs/one_million/onemillion.html)>.

<sup>138</sup> See Michael Coyle, "Race and Class in Crack Cocaine Sentencing," the Sentencing Project, n.d., <<http://www.sentencingproject.org/pdfs/5077.pdf>> (last accessed Apr. 1, 2004). Hispanics are more likely to be convicted of

in the 1980s and 1990s fueled by a drive to enforce drug sentencing laws; between 1986 and 1991 alone the number of African Americans imprisoned for drug offenses increased 465 percent, a rate that far exceeds the increase in the number of imprisoned violent offenders.<sup>139</sup> Today, the overwhelming majority (85 percent) of offenders subject to heightened crack cocaine penalties are black.<sup>140</sup> Moreover, black prisoners are more likely (25.5 percent) than white prisoners (13.5 percent) to have been convicted of a nonviolent drug offense. The same is true for Hispanics (22.9 percent).<sup>141</sup> Most state felon disenfranchisement laws do not distinguish between violent and nonviolent offenders, thus loss of the right to vote is the same for drug offenses, even relatively minor ones, as for violent offenses.

The cumulative effect of sentencing disparities, high drug incarceration rates, and state disenfranchisement laws is that minorities, even those who have completed their sentences, are disenfranchised at a higher rate than whites. Of those disenfranchised, 1.4 million are African American men—a figure that represents 13 percent of the black adult male population, and is seven times the national average.<sup>142</sup> If the current trend in incarceration continues, three in 10 of the next generation of black men can expect to be disenfranchised in their lifetime.<sup>143</sup>

As of January 2004, every state except for two (Maine and Vermont) prohibits prisoners from voting. Twenty-nine states prohibit individuals with probation, and 33 prohibit individuals with parole status, from voting. Seven states prohibit all ex-felons, regardless of having paid their debt, from voting, and an additional seven states restrict terms under which ex-felons can vote (see table 5).

Some states restore felons' right to vote once they have served their sentences, but most states place restrictions on the reinstatement of voting rights. Eight states require a pardon or order from the governor; two states require action from the pardon or parole board.<sup>144</sup> The state of Alabama requires some ex-felons to submit DNA samples as a condition of regaining voting rights.<sup>145</sup> Obtaining a full pardon or other such measure often requires navigating a complex bureaucratic process, and many states do not educate convicted felons about reinstatement policies and procedures.

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powder cocaine offenses than crack. However, Hispanics are more likely than whites to be convicted for both crack and powder cocaine. *Ibid.*, p. 10.

<sup>139</sup> The Sentencing Project, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*,

<sup>140</sup> U.S. Sentencing Commission, "Report to the Congress: Cocaine and Federal Sentencing Policy," May 2002, <[http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.htm](http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm)>.

<sup>141</sup> BJS, "Prisoners in 2002," p. 10. These figures represent only sentenced prisoners under state jurisdiction and those with sentences of more than a year.

<sup>142</sup> The Sentencing Project, "Felony Disenfranchisement Laws in the United States," fact sheet, January 2004. *See also* the Sentencing Project and Human Rights Watch, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, October 1998 (hereafter cited as the Sentencing Project/Human Rights Watch, *Losing the Vote*).

<sup>143</sup> The Sentencing Project/Human Rights Watch, *Losing the Vote*; Dēmos, "Democracy Denied," p. 3.

<sup>144</sup> The Sentencing Project/Human Rights Watch, *Losing the Vote*, p. 5.

<sup>145</sup> Dēmos, "Democracy Denied," p. 3.

Table 5. Categories of Felons Disenfranchised Under State Law

	Prison	Probation	Parole	Ex-Felons	
				All	Conditional
Alabama	X	X	X	X	
Alaska	X	X	X		
Arizona	X	X	X		X (2nd felony)
Arkansas	X	X	X		
California	X		X		
Colorado	X		X		
Connecticut	X		X		
Delaware	X	X	X		X (5 years)
District of Columbia	X				
Florida	X	X	X	X	
Georgia	X	X	X		
Hawaii	X				
Idaho	X				
Illinois	X				
Indiana	X				
Iowa	X	X	X	X	
Kansas	X	X	X		
Kentucky	X	X	X	X	
Louisiana	X				
Maine					
Maryland	X	X	X		X (2nd felony, 3 years)
Massachusetts	X				
Michigan	X				
Minnesota	X	X	X		
Mississippi	X	X	X	X	
Missouri	X	X	X		
Montana	X				
Nebraska	X	X	X	X	
Nevada	X	X	X		X (except 1st time nonviolent offenders)
New Hampshire	X				
New Jersey	X	X	X		
New Mexico	X	X	X		
New York	X		X		
North Carolina	X	X	X		
North Dakota	X				
Ohio	X				
Oklahoma	X	X	X		
Oregon	X				
Pennsylvania	X				
Rhode Island	X	X	X		
South Carolina	X	X	X		
South Dakota	X				
Tennessee	X	X	X		X (pre-1986)
Texas	X	X	X		
Utah	X				
Vermont					
Virginia	X	X	X	X	
Washington	X	X	X		X (pre-1984)
West Virginia	X	X	X		
Wisconsin	X	X	X		
Wyoming	X	X	X		X (5 years)
U.S. total	49	29	33	7	7

Source: The Sentencing Project, "Categories of Felons Disenfranchised Under State Laws," updated January 2004.

During the 2000 elections, not only did state disenfranchisement laws have a disproportionate effect on minorities, but widespread errors on registration lists, caused by a lack of procedures for removing a name from the rolls, stood in the way of the right to vote for many eligible citizens. States have an obligation to ensure that their felon lists are accurate and that felons eligible for reinstatement are removed from ineligible lists. The fact that most states will not have their centralized voter registration systems up and running before the upcoming elections makes it highly unlikely that this will be the case. Therefore, ex-felons attempting to vote should be provided provisional ballots until eligibility can be established. This will be a civil rights issue closely monitored.

### **Preventive Measures**

With the exceptions presented here, HAVA generally addresses the problems the Commission and others identified after the last election. However, the status of states' election readiness, as described in the preceding discussion, furthers the possibility that the same voters who were disenfranchised in 2000 will be disenfranchised again in 2004. Federal efforts to standardize elections are important and necessary, but effective implementation will require leadership and vigilance at the state level.<sup>146</sup> So far, without the money to fully implement HAVA requirements, states are at varying stages of implementation, and many systems will look no different in 2004 than they did in 2000.

Funding delays may have set state implementation of HAVA requirements off course, however, states could undertake myriad tasks that would enhance their readiness for the November elections even without HAVA funds. The Commission offers the following 12 points, embodied in its previous findings, recommendations, and reports, that states could implement irrespective of federal grants:

1. *Get organized.* States should begin by creating a checklist of what needs to be done over the next seven months at the state and local levels to prepare for elections. This was a Commission recommendation in 2001, and it holds necessary today.
2. *Train poll workers.* State and local election officials should make sure that all poll workers understand HAVA's provisional ballot and identification requirements, complaint procedures, equipment operation, voter rights, and how to ensure accessibility, and privacy, for voters with disabilities and limited English proficiency.
3. *Strengthen supervisory staff.* There should be at least one supervisor at every polling place on Election Day to resolve any problems that might arise. Supervisors should receive adequate training and have direct access to state officials at all times during polling hours.
4. *Check registration lists.* States that already have computerized registration databases should immediately begin checking for accuracy, comparing them with other state

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<sup>146</sup> The Constitution Project, "Federal Election Reform."



databases, and sending out letters to voters whose eligibility is questionable. All of these steps should be performed with care prior to *any* roll purging.

5. *Test equipment.* Whether voting equipment is old or new, states should begin testing and trouble shooting equipment that will be used in the 2004 elections. States should refrain from making impulse equipment purchases, even if EAC distributes money in the next few months, unless they are proven systems that are easily installed and operated.
6. *Develop ballots early.* States should begin developing ballots early so that they can be tested for usability, and samples can be widely distributed to voters in advance.
7. *Perform a trial run.* States should perform election trial runs in selected precincts that have had difficulties in the past. The mock election should test everything from setting up a polling place to registration lists to equipment.
8. *Develop voter education materials.* States should develop educational materials specific to their voting systems. States with similar systems should share applicable materials to prevent duplication of efforts and resources.
9. *Develop multiple language materials.* States know, based on the 2000 Census, whether they are required to provide voting materials in languages other than English. They should begin developing such materials now so that they can be tested for usability and accuracy.
10. *Examine polling places.* States should dispatch examiners to every polling place to assess accessibility and recommend changes where necessary. If polling places cannot be easily made accessible, they should be changed. Voters requiring assistance should be allowed to cast a ballot at an accessible site. However, voters should be given ample notice if a polling place changes, and inaccessible polling places should be publicized well in advance so that voters needing assistance can determine where to go or vote absentee.
11. *Review felon lists.* States should begin checking felon lists for accuracy. Voter lists should be matched with corrections data. Prior to purging any name, that individual should be contacted to confirm felon status. States should then engage in outreach to ex-felons eligible to vote to assist them with the reinstatement process.
12. *Conduct registration drives.* States should work well ahead of registration deadlines to ensure that all eligible voters are registered. Registration drives should also be used as a venue for voter education, to inform voters of new procedures and their rights.

States may show creativity when developing systems to achieve compliance with HAVA. The state of Ohio, for example, has proposed the installation of “practice” voting devices at polling places and via the Internet, which simulate the actual voting machines used.<sup>147</sup> This type of hands-on voter education will improve voter confidence and reduce voter error, and can also serve as a testing device for poll workers. Although the federal government will ultimately monitor state success, it is incumbent on state officials to routinely check themselves. Again, Ohio has been a model in this area by proposing ongoing performance measurement from the local level up to the

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<sup>147</sup> Ohio, *Changing the Election Landscape*, p. 29.

state.<sup>148</sup> In doing so, state officials recognize the importance of local participation in the reform process and vigilance.

There are likewise tasks EAC should engage in over the next seven months to assist states. Although the EAC chair has indicated that his priority at this point is to distribute federal funds to states, the commission should also provide guidance where necessary. EAC should begin by identifying priority issues that can feasibly be addressed in the next seven months. For example, at this point it appears impossible that EAC could test and recommend equipment in time, especially since the technology committee has not yet formed. Instead, EAC should work on developing HAVA-specific voter education materials.

EAC should assess potential problem areas based on a thorough review of state plans and actions and work with DOJ to promote compliance. DOJ has been reviewing state plans and monitoring activities. It should now develop a strategy, or refine past strategies, for monitoring elections. Every precinct that experienced problems in 2000, or the 2002 midterm elections, should be monitored. For this, DOJ will have to tap into external resources and train national and local organizations to assist. DOJ and EAC should work together to ensure that the needs unique to specific regions, whether rural or densely populated, are met.

EAC should draw on the expertise and resources of FEC to ensure that at least the known glitches are prevented. Perhaps EAC should use some of its operational funds to hire contract workers who can assist states with readiness tests, training, and registration. Certain states may require more aid than others if voters in those states are to have confidence casting their ballot in November 2004. Of course, the many questions that have been raised about the vulnerabilities of various voting technologies (discussed below) that could lead to voter disenfranchisement mean that additional measures, such as adequately training poll workers in the use of new technology, should begin now.<sup>149</sup> The government can accomplish this by immediately providing state election officials sufficient funds to implement HAVA and moving swiftly, but clearly toward adopting fair, secure, and accessible voting system standards.

## **RECORDING THE NATION'S INTENT: EQUIPMENT**

The word "ballot" derives from the Italian word, *ballota*, little colored ball. In ancient Athens, officials gave each eligible voter a tiny clay ball; a vote was cast by dropping the ball into their candidate's clay pot.<sup>150</sup> Such systems had existed in earlier forms, employing small pebbles and stones instead of clay balls. Although paper ballots, on which voters record their choices by marking a printed form, date back to 139 B.C., the method did not become popular until it was adopted in Australia in 1856. New York was the first American state to adopt the paper ballot in

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<sup>148</sup> Ibid., p. 39.

<sup>149</sup> Leadership Conference on Civil Rights, "Statement of Principles on Electronic Voting," Feb. 17, 2004, p. 1 (hereafter cited as LCCR, "Statement").

<sup>150</sup> "History of Voting Machines," in *Beyond the Textbook*, Glencoe, a McGraw-Hill Company, <[http://www.glencoe.com/sec/socialstudies/btt/election\\_day/history.shtml](http://www.glencoe.com/sec/socialstudies/btt/election_day/history.shtml)> (last accessed Mar. 30, 2004).

statewide elections in 1889.<sup>151</sup> As of 2000, 1.3 percent of U.S. registered voters still used paper ballots. Paper is a primary method in some rural areas, and is used widely for absentee and provisional balloting.

Mechanical lever machines debuted in 1892 in Lockport, New York. Lever balloting assigns a candidate's name to small handles that when turned record each vote and track them cumulatively. Upon exit, another lever opens a curtain and returns the handles to their original positions. By 1930, every major American city used lever machines, and by 1960, more than half of the country did so. Punch cards were first used in the late 1890s, originally to tabulate data for the Baltimore Health Board. The U.S. Census later adopted the technology. Fulton and DeKalb Counties in Georgia were first in America to use punch cards in an election, and did so for the 1964 primary elections. The method requires voters to use a stylus to punch holes through heavy paper or card; positions of each opening are associated with voter decisions. The segment of removed paper is referred to as a chad. The success of such systems depends on myriad variables, notably machine maintenance, strength and dexterity of the user, and quality of the preprinted paper or card ballot. Either the voter or a poll worker feeds the card into a computer to record the voter's intent. However, depending on any given variable, the chad may not separate cleanly from the card, in which case the computer cannot definitively interpret the voter's intent.<sup>152</sup>

Mark-Sense or optical scan technology, widely used in educational testing, requires voters to fill a designated area with a marker. Computers recognize and track marks as votes. More recently, direct recording electronic, or DRE, systems have come on the scene. Some consider these an electronic version of old lever machines in that choices are associated with buttons or graphics on a computer screen. The voter either presses buttons or touches the screen to make his or her choices. The machine stores the choices via a memory cartridge, diskette, or smart card for later aggregation with results from other machines.

National interest in voting technology surged after the 2000 presidential election demonstrated inadequacies, especially in punch card systems. Stories about voting equipment dominated the news, and America began to understand their many limitations. Nationally, between 4 million and 6 million votes for president are estimated to have been lost in 2000, 1.5 million directly attributable to voting equipment. Moreover, an estimated 3.5 million Senate and gubernatorial votes were lost during election cycles for these offices leading to the 2000 elections, also because of equipment problems.<sup>153</sup>

### **Effects of Ballot Design and Engineering on Election Outcomes**

Voting equipment, irrespective of type, must satisfy sometimes competing criteria. A voter's ballot must be (1) private, (2) tamper-resistant, (3) fortified against human error propensities, and (4) comprehensible to and usable by the entire voting population. Universal access must be

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<sup>151</sup> Mary Bellis, "The History of Voting Machines," <<http://inventors.about.com/library/weekly/aa111300b.htm>> (last accessed Mar. 30, 2004) (hereafter cited as Bellis, "History").

<sup>152</sup> Bellis, "History."

<sup>153</sup> Caltech/MIT, *Voting*, pp. 8–9, 21.

considered from the ballot design stage and taken into account during engineering. Weaknesses in any criteria can affect election results.<sup>154</sup>

The problems in Florida were most often blamed on the vulnerabilities of punch card voting equipment;<sup>155</sup> a design flaw often left intact the chads that equipment was supposed to detach. Undetached, the section prevented the card reader from detecting a vote on the ballot. Approximately 28 percent of registered voters used punch card machines in 2000, more than any other type.<sup>156</sup> In all, five types of voting equipment were used throughout the country at that time: hand-counted paper ballot; punch card, also using paper ballot; optical scan; mechanical lever machine; and electronic.<sup>157</sup>

In 2000, the percentage of registered voters using each type of equipment was as follows:

- 1.3 percent hand-counted paper ballot;
- 27.9 percent punch card;
- 29.5 percent optical scan;
- 16.9 percent mechanical lever machine; and
- 12.6 percent electronic.<sup>158</sup>

In the 1992 and 1996 presidential election cycles, more registered voters used hand-counted paper ballots, punch card, and lever machine equipment than in 2000. Conversely, more voters used optical scan and electronic systems in 2000 than in 1992 or 1996. For example, in 1992 39.8 percent of voters used punch card equipment, 3.9 percent used electronic, and 12.6 percent used optical scan systems (see figure 1).

The move toward optical scan and electronic systems held for the 2002 midterm elections, but the number of voters being moved from punch card equipment (34.3 percent in 1998, 27.9 percent in 2000, and 20.9 percent in 2002) may decelerate by the November 2004 elections. Still, the proportion of voters using electronic equipment increased from 12.6 percent in 2000 to 22.5 percent in 2002.

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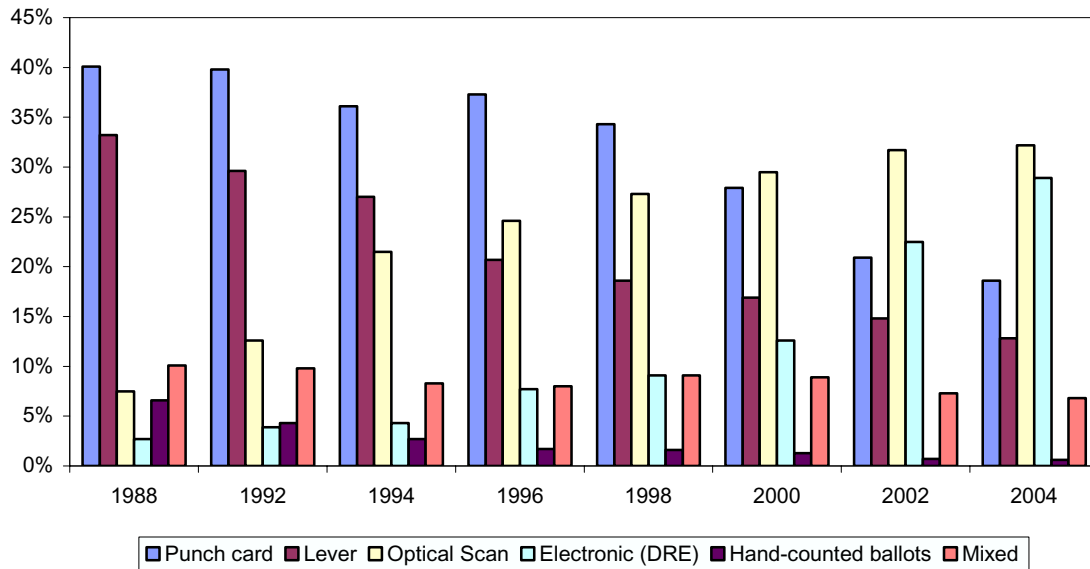
<sup>154</sup> Tadayoshi Kohno, Adam Stubblefield, Aviel D. Rubin, and Dan S. Wallach, "Analysis of an Electronic Voting System," Johns Hopkins University Information Security Institute, technical report TR-2003-19, July 23, 2003, p. 3 (hereafter cited as Johns Hopkins Study).

<sup>155</sup> See Paul S. Herrnson, Richard G. Niemi, and Scott Richman, "Characteristics of Optical Scan and DRE Voting Equipment: What Features Should be Tested?" n.d., p. 1 (hereafter cited as Herrnson et al., "Characteristics").

<sup>156</sup> U.S. Commission on Civil Rights, "Voting Rights Procedures Nationwide: An Overview of the November 2000 Elections," briefing paper, draft, Mar. 23, 2001, appendix A, pp. A-1-A-4 (hereafter cited as USCCR, "Voting Rights"). See Federal Election Commission, Office of Election Administration, "Types of Voting Systems Used in the United States," *citing* statistics from Election Data Services, Inc. (hereafter cited as FEC, "Types of Voting Systems").

<sup>157</sup> USCCR, "Voting Rights"; FEC, "Types of Voting Systems." See also USCCR, *Election Reform*; and USCCR, *Voting Irregularities*, for related discussions.

<sup>158</sup> Election Data Services, Inc., "Type of Voting Equipment by County," 1999 (data from May); EDS, "New Study Shows," p. 7 (data from Nov. 7, 2000, Nov. 5, 2002, and Feb. 9, 2004), p. 7; FEC, "Types of Voting Systems."

**Figure 1. Percent of Registered Voters Using Each Type of Voting Equipment**

\*2004 registered voter counts are from official 2002 general elections registered voter counts. Equipment usage rates for 2004 are projected. Source: Federal Election Commission, Office of Election Administration, "Types of Voting Systems Used in the United States," citing statistics from Election Data Services, Inc.; Election Data Services, Inc., "Type of Voting Equipment by County," 1999 (data from May); Election Data Services, Inc., "New Study Shows 50 Million Voters Will Use Electronic Voting Systems, 32 Million Still with Punch Cards in 2004," Feb. 12, 2004 (data from Nov. 7, 2000, Nov. 5, 2002, and Feb. 9, 2004), pp. 1, 5-7.

### Equipment Forecast for November 2004

After the 2000 elections, most Americans equated "older" with error prone. Jurisdictions, encouraged by promises for funding under HAVA, began to replace lever and punch card equipment with electronic systems.<sup>159</sup> Election Data Services, an organization that tracks the administration of elections, projects that the proportion of voters using electronic equipment will reach 28.9 percent in 2004. However, in the 2004 general election 12.8 percent of registered voters will still use lever machines, and 0.6 percent may use hand-counted paper ballots.<sup>160</sup> The latter translates to more than 1 million voters nationwide who will employ the earliest voting method used in America.<sup>161</sup> Moreover, roughly 22.2 million may cast votes on lever machines.<sup>162</sup>

<sup>159</sup> See National Conference of State Legislatures, "Voting in America: Final Report of the NCSL Elections Reform Task Force," 2001, <[http://www.ncsl.org/programs/press/2001/electref0801.htm#\\_Toc522012609](http://www.ncsl.org/programs/press/2001/electref0801.htm#_Toc522012609)> (last accessed Mar. 10, 2004); "Voting Machines Firms Smile," *cnnmoney*, Nov. 16, 2000, <<http://money.cnn.com/2000/11/16/companies/voting/>> (last accessed Mar. 10, 2004).

<sup>160</sup> EDS, "New Study Shows."

<sup>161</sup> Matt Courtney, "Paper Ballots Firmly Entrenched in Rural America," *In Focus This Week . . .*, *electionline.org*, June 20, 2002, <[http://www.electionline.org/article.jsp?id=electionline\\_Weekly\\_for\\_6-20&p=1](http://www.electionline.org/article.jsp?id=electionline_Weekly_for_6-20&p=1)> (last accessed Mar. 9, 2004); Federal Election Commission, "Paper Ballots," <<http://www.fec.gov/pages/paper.htm>> (last accessed Mar. 9, 2004) (hereafter cited as FEC, "Paper Ballots"); Caltech/MIT, *Voting*, p. 18; EDS, "New Study Shows."

<sup>162</sup> Federal Election Commission, "Mechanical Lever Machines," <<http://www.fec.gov/pages/lever.htm>> (last accessed Mar. 9, 2004); FEC, "Paper Ballots"; EDS, "New Study Shows."

### County Equipment Forecast

In 2000, more counties used optical scan voting equipment than any other,<sup>163</sup> and fewer counties used electronic voting systems, including direct recording electronic machines (DRE), than any other one system.<sup>164</sup> By 2002, the number of counties using DRE technology increased 7.7 percent (see table 6). As counties began to phase out lever machines and hand-counted ballots between 1980 and 1998, punch card, optical scan, and electronic systems grew in prominence and were used in 20 percent, 39 percent, and 8 percent of counties, respectively, by 1998. The number of counties using either optical scan or DRE technology will likely continue to increase in 2004.<sup>165</sup> Despite these modernization trends, 28 percent of counties will still use punch card, lever machine, or hand-counted ballots in 2004.

**Table 6. Percent of Counties Using Each Type of Voting Equipment\***

Year	Punch card	Lever	Optical scan	Electronic (DRE)	Hand-counted ballots	Mixed
1980	19.1%	36.4%	0.8%	0.2%	40.4%	3.0%
1998	20.2%	15.3%	38.8%	8.2%	13.1%	4.5%
2000	16.9%	13.9%	41.1%	9.9%	11.9%	4.8%
2002	14.0%	9.3%	43.7%	17.6%	9.8%	5.0%
2004	9.7%	8.7%	45.5%	21.5%	9.6%	4.9%

\*2004 registered voter counts are from official 2002 general elections registered voter counts.

Due to rounding, percents may not equal 100.

Source: Election Data Services, Inc., "New Study Shows 50 Million Voters Will Use Electronic Voting Systems, 32 Million Still with Punch Cards in 2004," Feb. 12, 2004 (data from Nov. 7, 2000, Nov. 5, 2002, and Feb. 9, 2004), pp. 1, 5-7; California Institute of Technology and Massachusetts Institute of Technology, *Voting: What Is, What Could Be*, July, 2001, p. 88; Eric A. Fischer, "Voting Technologies in the United States: Overview and Issues for Congress," Mar. 21, 2001, <<http://www.ncseonline.org/NLE/CRSreports/Risk/rsk-55.cfm?&CFID=12938384&CFTOKEN=45795333>> (last accessed Mar. 11, 2004).

### State Equipment Forecast

According to a nationwide survey, in the 2004 elections more than 50 million voters will use electronic voting equipment, 55 million will use optical scan systems, and 32 million will use punch cards.<sup>166</sup> States that used punch cards in 2000, but will no longer include Arizona, Florida, Georgia, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, South Dakota, and Wisconsin. Among the states in which a large number of jurisdictions have replaced punch card systems are California, Illinois, and Ohio (see table 7). Punch card technology has generally been

<sup>163</sup> No effort has been made to distinguish voting technology use trends in counties from other election jurisdictions, including election districts, parishes, and independent cities. In fact, because the organizations that collect the data used by the Commission for this analysis represent it at the county level, it would not be possible to differentiate these trends.

<sup>164</sup> The number of counties that combined various systems was fewer than those employing electronic voting equipment alone.

<sup>165</sup> Eric A. Fischer, "Voting Technologies in the United States: Overview and Issues for Congress," Mar. 21, 2001, <<http://www.ncseonline.org/NLE/CRSreports/Risk/rsk-55.cfm?&CFID=12938384&CFTOKEN=45795333>> (last accessed Mar. 11, 2004); Caltech/MIT, *Voting*, p. 8; EDS, "New Study Shows."

<sup>166</sup> EDS, "New Study Shows."

replaced by electronic or optical scan technology throughout these jurisdictions.<sup>167</sup> The states with the largest number of counties planning to use punch cards are Illinois, Missouri, Ohio, Tennessee, and Utah.<sup>168</sup> Overall, precincts in 22 states will continue to use punch cards in the 2004 primaries and general election.<sup>169</sup>

**Table 7. State Voting Equipment in November 2004**

States no longer using punch card systems	States with the largest number of jurisdictions replacing punch card systems		States with the largest number of jurisdictions replacing mechanical lever machines	
	State	Jurisdictions	State	Jurisdictions
Arizona				
Florida	California	17	Georgia	75
Georgia	Colorado	13	Indiana	12
Minnesota	Georgia	18	Massachusetts	23
Montana*	Illinois	38	Tennessee	32
Nevada	Indiana	13	Virginia	12
New Jersey	Ohio	50		
North Dakota				
Oregon				
South Dakota				
Wisconsin				

\*As of the date Election Data Services presented its analysis (Feb. 12, 2004), Mineral County, Montana, had not selected new voting equipment.

Source: Election Data Services, Inc., "New Study Shows 50 Million Voters Will Use Electronic Voting Systems, 32 Million Still with Punch Cards in 2004," Feb. 12, 2004 (data from Nov. 7, 2000, Nov. 5, 2002, and Feb. 9, 2004), pp. 1–2, 5–7.

Several states have also replaced mechanical lever machines with new voting technology. The states replacing the largest number of these systems include Georgia, Massachusetts, and Virginia (see table 7). Mechanical lever machines will still be used widely in Virginia, as well as in Connecticut, Louisiana, and New York in 2004.<sup>170</sup> In New York, mechanical lever machines may still be used in 2006 because state officials have been unable to reach consensus in numerous areas, such as whether to use one voting technology system or several throughout the state.<sup>171</sup>

### System Overload: Electronic Equipment Limitations

Some states have deferred decisions to replace punch card and lever machines because of uncertainty about federal funding and guidelines. Additionally, replacing equipment is the most expensive reform project for states. Nearly half of states expect machine expenditures to

<sup>167</sup> Ibid., pp. 1–2. As of the date Election Data Services presented its analysis (Feb. 12, 2004), Mineral County, Montana, had not selected new voting equipment.

<sup>168</sup> EDS, "New Study Shows," p. 2.

<sup>169</sup> ERIP, *Election Reform 2004*, p. 15.

<sup>170</sup> EDS, "New Study Shows," p. 2.

<sup>171</sup> Eric Lipton, "Replacement Near, Old Vote Machines Are New York Issue," *New York Times*, Oct. 20, 2003, <<http://www.nytimes.com/2003/10/20/nyregion/20VOTE.html?ex=1382068800&en=d611aec7b26515a4&ei=5007&partner=USERLAND>> (last accessed Mar. 23, 2004) (hereafter cited as Lipton, "Replacement Near").

consume more than 60 percent of their federal funds.<sup>172</sup> In the meantime, independent studies are warning that without appropriate safeguards and guidelines, some electronic systems can be rendered insecure and vulnerable to break-ins from hackers.

We identify several problems including unauthorized privilege escalation, incorrect use of cryptography, vulnerabilities to network threats, and poor software development processes. We show that voters, without any insider privileges, can cast unlimited votes without being detected by any mechanisms within the voting terminal software. Furthermore, we show that even the most serious of our outsider attacks could have been discovered and executed without access to the source code. In the face of such attacks, the usual worries about insider threats are not the only concerns; outsiders can do the damage. That said, we demonstrate that the insider threat is also quite considerable, showing that not only can an insider, such as a pollworker, modify the votes, but that insiders can also violate voter privacy and match votes with the voters who cast them. We conclude that [the Diebold] system is unsuitable for use in a general election. Any paperless electronic voting system might suffer similar flaws, despite any “certification” it could have otherwise received.<sup>173</sup>

Another study concludes that purchasers of DRE systems need to guard against (1) software that is closed and proprietary, thus only the company that designed the system can access its operating programs; others likely will not know until too late, if at all, whether improper coding or integrity problems exist; (2) software that undergoes insufficient scrutiny during qualification and certification; (3) increased vulnerability to various forms of computer programmer attacks; and (4) a lack of voter-verified audit trails, paper or otherwise.<sup>174</sup>

A main problem with electronic voting technology is its overreliance on the “correctness, robustness, and security” of the programs that instruct it to take action. Should software contain coding flaws, such systems are exploitable by malicious insiders or unscrupulous other actors. Such actors could include election campaign workers, state officials, equipment manufacturers, and operating system engineers. Any party that introduces flaws into the system could take advantage of those flaws to illegally cast or eliminate votes.<sup>175</sup> Several studies have concluded that DRE systems are vulnerable to manipulation by individuals with relatively basic technological knowledge.<sup>176</sup> A person wishing to influence an election could erase or multiply

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<sup>172</sup> Election Reform Information Project, “Roads to Reform: Planning for the Help America Vote Act,” September 2003, p. 3, <<http://www.electionline.org>>.

<sup>173</sup> Johns Hopkins Study, Abstract.

<sup>174</sup> David Jefferson et al., “A Security Analysis of the Secure Electronic Registration and Voting Experiment (SERVE),” Jan. 21, 2004, p. 2 (hereafter cited as Jefferson et al., “A Security Analysis”).

<sup>175</sup> Johns Hopkins Study, p. 3.

<sup>176</sup> See Eric A. Fischer, “Election Reform and Electronic Voting Systems (DREs): Analysis and Security Issues,” Nov. 4, 2003 (hereafter cited as Fischer, “Election Reform and Electronic”) pp. CRS-10–CRS-16; Tadayoshi Kohno et al., “Analysis of an Electronic Voting System,” Feb. 27, 2004 (hereafter cited as Kohno et al., “Analysis”); Tadayoshi Kohno et al., “Analysis of an Electronic Voting System,” response to Diebold’s technical analysis, Aug. 1, 2003; Fairfax County Republican Committee, “Operation Ballot Integrity,” 2004; Herrnson et al., “Characteristics.”



votes for any particular candidate.<sup>177</sup> In either instance, votes could be nullified and voters disenfranchised. Although security concerns are paramount as states consider whether to use DRE technology, a second important and related fear is the inability of these systems to offer proof of a vote.<sup>178</sup>

### *Vote Verification and Audit Capability*

HAVA requires states that receive federal funding to adopt systems that offer a voter verification of ballots and audit capacity. Such a system might require that local precincts, even those that use DRE technology, provide voters a printed copy of their completed ballot before leaving the booth (although many only provide on-screen voter verification). After verifying the ballot's accuracy, voters would be given a chance to make any changes before placing it into a secure, vault-like, limited access container. Vaults would be collected, stored, and retained for a specific period following an election to make possible independent, hand-counted audits, if necessary.

For example, in the March 2004 primary elections, Florida workers ended up counting ballots by hand again after improper coding on DRE technology gave Representative Richard Gephardt a decisive win in one county despite that he had dropped out of the race two months earlier. Officials discovered that the coding was improperly printed on the ballots, and the optical scan perceived votes intended for Senator John Kerry as intended for Representative Gephardt.<sup>179</sup>

In Broward County, Florida, one candidate lost a special election in January for a state House seat by 12 votes. Touch screen machines produced 137 blank ballots even though the seat was the only race. The ballots could not be checked because the technology did not offer paper verification.<sup>180</sup> In West Palm Beach, the DRE presented a review screen, but not a physical document to a voter, which showed that he had touched the wrong name. Though he corrected the problem on the review screen, a paper document could have verified that the correction had been made and saved in a vault in the event the machine's count came into question. Another voter expressed frustration at trying to have the screen respond to his touch, indicating that the equipment required three tries before he could cast his vote.<sup>181</sup> Paper verification would raise voters' confidence that what they indicated to the machine indeed registered.

Equipment manufacturers argue that DRE voting machines can offer printouts from their memory cards or diskettes if needed after an election. Many advocates of such machines contend that the language of the voter-verified paper audit trail provision under HAVA does not actually require contemporaneous inspection of paper ballots at the time that ballots are cast. However,

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<sup>177</sup> Realistically, the number of votes is limited to a number that will not readily be detected. For example, casting 500 votes for a candidate at a particular polling location where only 1,000 registered voters cast their ballot will be easily detected.

<sup>178</sup> Kohno et al., "Analysis," p. 21.

<sup>179</sup> Bill Kaczor, "Election Problems Stir Bad 2000 Memories," Associated Press, Mar. 11, 2004.

<sup>180</sup> Doug Abrahms, "Accuracy in Voting Machines Remains Issue in Election Year," Gannett News Service, Jan. 16, 2004.

<sup>181</sup> Man and Bushouse, "99,000 Voters," p. 1A.

technology that relies on a machine system printout after the election may be insecure because the voter is not present to confirm his or her intent. Audits would be useless if they did not reflect the choices expressed by the voter, or could not accurately sum the cumulative outcome. DRE systems produce “digital ballots,” rendering error or fraud detection more difficult.<sup>182</sup> Like the old mechanical lever machines, a voter casting a ballot on a DRE system “takes it on faith” that the vote was recorded correctly.<sup>183</sup>

Alternatively, security models such as the voter-verified audit trail allow for electronic voting systems that produce a paper trail that can be seen and verified by a voter. In such a system, the correctness burden on the voting terminal’s code is significantly less as voters can see and verify a physical object that describes their vote. Even if, for whatever reason, the machines cannot name the winner of an election, then the paper ballots can be recounted, either mechanically or manually to gain progressively more accurate election results.<sup>184</sup>

While states are required to use equipment that meets the audit capacity and voter verification criteria in all federal elections, the federal government has not issued guidelines for acceptable methods. Central (cumulative) paper audit capacity is necessary, but voters needn’t be provided a paper receipt or ballot. DRE devices may provide only on-screen verification. Moreover, states are not required to comply until 2006. The latitude for compliance and the timeframe in which states are expected to act leave the real prospect that many voters will likely cast unverifiable ballots in the November 2004 elections.

Another problem with voting technology that does not offer physical documentation is that it may leave too much room to accommodate escape from accountability. In the 2000 elections, most Americans could not determine whether problems were more the fault of flawed equipment, missteps on the part of poll workers and election officials, or a lack of voter education. Election officials in recent primaries have blamed encoder problems on improperly trained poll workers.<sup>185</sup> DRE technology could make corrupt actions easier, more covert, difficult to detect or trace, and more sweeping in impact on individual voters.

Many experts point to a conspiracy among slot machine workers who rigged the devices so that odds shifted in response to a particular sequence of coins. From 1992 until 1996, the fraud went undetected.<sup>186</sup> In the same manner, DRE voting machines that employ smart card technology are vulnerable to any worker or voter entering the precinct with a rigged card that would allow him or her to cast or erase multiple votes without detection.<sup>187</sup> Systems are only as secure as the people who design, administer, and use them.

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<sup>182</sup> Elise Ackerman, “Campaign Launched to Ban Digital Ballots,” *San Jose Mercury News*, Mar. 12, 2004 (hereafter cited as Ackerman, “Campaign Launched”).

<sup>183</sup> Fischer, “Election Reform and Electronic,” p. CRS-5.

<sup>184</sup> Johns Hopkins Study, p. 21.

<sup>185</sup> Rachel Konrad, “Electronic Voting Runs Into Some Glitches,” *Associated Press Online*, Mar. 3, 2004.

<sup>186</sup> John Schwartz, “Electronic Vote Faces Big Test of its Security,” *New York Times*, Feb. 28, 2004, p. A1 (hereafter cited as Schwartz, “Electronic Vote”).

<sup>187</sup> Johns Hopkins Study, p. 4.

For example, though he later retracted the statement, and most observers accepted his explanation as an unfortunate word choice, equipment manufacturer Walden O'Dell expressed in a fundraising letter a commitment to "helping Ohio deliver its electoral votes to the president next year."<sup>188</sup> Statements such as this can erode the public's confidence that the government will protect its rights. Contractors that state governments hire and standards that the federal government certifies should be vetted to ensure that they cannot plant and take advantage of known flaws that could manipulate the system.

The model where individual vendors write proprietary code to run our elections appears to be unreliable, and if we do not change the process of designing our voting systems, we will have no confidence that our election results will reflect the will of the electorate.<sup>189</sup>

Electronic technology also assumes that county and precinct workers and volunteers have computer expertise necessary to resolve technical problems, but most do not. In the March 2004 primary elections, a computer battery problem in San Diego County, California, delayed and frustrated voters, some of whom left without casting votes or were forced to other polling locations. Problems occurred at 10–15 percent of the county's precincts.<sup>190</sup> The American Civil Liberties Union called for a probe after receiving reports that voters had been disenfranchised.<sup>191</sup>

In the 1970s, few states had guidelines for testing or evaluating voting equipment, and local officials took salespeople at their word that the systems worked, or depended on referrals from other jurisdictions. These informal means brought about chilling stories about equipment that failed to deliver accurate counts. The situation led the General Accounting Office's Office of Federal Elections (precursor to FEC) to sign an interagency agreement with the National Bureau of Standards for operational guidelines that would ensure the accuracy and security of computer-based vote-tallying processes. *Effective Use of Computing Technology in Vote-Tallying*, released in 1975, concluded that a basic cause for computer-related election problems was the lack of technical skills at the state and local levels for developing or implementing standards for voting hardware and software evaluation.<sup>192</sup>

Computer glitches, which crashed some machines in Maryland, were resolved with the help of a team of computer experts hired to troubleshoot problems statewide. Poll workers shut off two of the machines in Charles County, one when a backup battery would not hold a charge, and the second when its printer failed. In St. Mary's County, two of the 284 machines malfunctioned, and election officials took them out of service.

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<sup>188</sup> Schwartz, "Electronic Vote, p. A10.

<sup>189</sup> Johns Hopkins Study.

<sup>190</sup> Rachel Konrad, "Poll Workers Grapple with Electronic Voting Glitches," Mar. 3, 2004, <<http://sfgate.com/cgi-bin/article.cgi?file=/news/archive/2004/03/03/state0339EST0046.DTL>> (last accessed Mar. 4, 2004).

<sup>191</sup> American Civil Liberties Union, "ACLU Calls for Probe into Election Problems," *signonsandiego.com*, Mar. 3, 2004 (hereafter cited as ACLU, "ACLU Calls for Probes").

<sup>192</sup> Bellis, "History."

In Anne Arundel County, Maryland, one precinct experienced problems because computer experts delivered the wrong decoder to poll workers for operating the machines. Poll workers gave out paper ballots while computer experts resolved the problem.<sup>193</sup>

Transmitting election returns online further erodes system integrity. An hour after polls closed in March, election officials in Howard County, Maryland, realized that their main server failed to download data being sent to it from modems across the county.<sup>194</sup> However, Maryland election officials state that only unofficial results, not used as the basis for official election results, were transmitted via modem because official polling place results are loaded onto the memory card of each machine.<sup>195</sup> In San Antonio, tabulation computers had to be reprogrammed midway through the vote count after it was discovered the computers had not been properly programmed with updated data to count mail-in paper ballots.<sup>196</sup> Worldwide, computer viruses have proven the capacity of lone individuals to intercept and alter information transmitted through electronic networks.

Electronic systems and HAVA were supposed to restore voter confidence, and the law calls for states to upgrade registration databases and voting equipment by 2006. As this paper has demonstrated, the original hope of the law for system upgrades by this year has been all but abandoned.

### ***Networked State Registration Rolls***

State and federal officials also have encouraged use of technology to link local systems into statewide databases and thus facilitate verifying eligible voters whose polling places may have changed, and to prevent the occurrence of a voter being registered in multiple jurisdictions. However, use of unique identifiers, such as social security number, to help discern between similar names, in the hands of more workers and volunteers magnifies potential for piracy, system abuse, and identity theft.<sup>197</sup> Thus, as it develops criteria for contractors and equipment, the federal government should not assume that off-the-shelf technology will promote integrity and support voting rights enforcement. It may instead do well to involve itself at design and engineering stages to bring about that outcome.

In 2000, the Commission also found that prior to the elections, officials in Florida had removed thousands of names from voting registration rolls on grounds that they were convicted felons. In fact, only a fraction of those removed actually had felony convictions; most were Floridians who had similar names. After the election, state officials ordered the names replaced on the rolls, but

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<sup>193</sup> Raymond McCaffrey and Cameron W. Barr, "Debut of New Technology Gets Mostly High Mark," *Washington Post*, Mar. 3, 2004, p. B4.

<sup>194</sup> *Ibid.*

<sup>195</sup> Linda H. Lamone, administrator, Maryland State Board of Elections, letter to the U.S. Commission on Civil Rights, Apr. 29, 2004.

<sup>196</sup> Tom Bower, "Texas Primary; Bexar Computer Glitch Delays Counting of Votes; Tabulation Was Held Up About 90 Minutes While Voting System Was Re-Programmed," *San Antonio Express-News*, Mar. 10, 2004, p. 12A.

<sup>197</sup> Johns Hopkins Study, pp. 12–14.

affected Floridians had already been barred from voting.<sup>198</sup> Therefore, as registration list technology is developed, it should be designed to account for similar names and other data anomalies that might trigger incorrect purging. Use of unique numeric identifiers will safeguard against removal for name duplication or data entry errors.

### ***Technology Assisting Voters with Disabilities***

HAVA codifies requirements for polling place and equipment accessibility for voters with disabilities. All systems purchased using Title II funds must meet disability access standards by January 1, 2007. By then, every polling place must have one electronic voting machine accessible to visually, physically, and hearing-impaired voters.<sup>199</sup> HAVA also charges EAC with studying accessibility issues and provides money to states to make necessary alterations to equipment or facilities. However, requirements for access were in place long before HAVA, as mandated by the Americans with Disabilities Act and the Voting Accessibility for the Elderly and Handicapped Act. Months before HAVA passed, FEC developed guidelines to assist states with meeting access requirements.

FEC established system standards for disabled individuals for all voting technology with specific standards directed at electronic voting equipment. It said that voting machines must be accessible to individuals who use modes of transportation, such as wheelchairs. Electronic voting equipment must also have audio capabilities, permit visual elements to be adjusted, and require a force less than 5 lbs. to operate.<sup>200</sup> Nonetheless, states in large measure have not complied with existing disability rights laws or FEC guidelines. For example, New Hampshire officials already know that the state will not have voting equipment accessible to disabled voters in all precincts by November 2004. Florida anticipates that it may not either.<sup>201</sup> Anticipating problems, disability rights groups filed suit against San Francisco and three other California counties for failing to provide touch screen voting equipment for disabled individuals during the March 2004 Democratic primaries.<sup>202</sup>

### ***Language Capability***

HAVA also contains language accessibility requirements for individuals with limited English proficiency (as per Section 203 of the Voting Rights Act of 1965 (VRA)),<sup>203</sup> but EAC has not yet established specific technology standards in this area. Consequently, states are uncertain how to proceed, and many jurisdictions are hesitant to invest in voting technology that may not meet the

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<sup>198</sup> USCCR, *Voting Irregularities*, pp. 109–10.

<sup>199</sup> Help America Vote Act, 42 U.S.C. § 15301.

<sup>200</sup> Federal Election Commission, “Voting System Standards,” <<http://www.fec.gov/pages/vssfinal/vss.html>> (last accessed Mar. 5, 2004).

<sup>201</sup> David Damron, “Millions of Voters Face Mess at Polls,” *Orlando Sentinel*, Jan. 4, 2004, p. A1.

<sup>202</sup> Harriet Chiang, “Disabled Seek Upgrade in Voting,” *SFGate.com*, Mar. 9, 2004, <<http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/03/09/BAGIP5H2K21.DTL>>.

<sup>203</sup> Help America Vote Act § 301(a)(4), 42 U.S.C. § 15301 (2002).

government's standards.<sup>204</sup> A few states, including Arizona, Colorado, and Maine, may provide language assistance beyond what is required by VRA. The District of Columbia, Oregon, Virginia, and Wisconsin plan to ensure that new voting technology provides language assistance beyond VRA. The vast majority of states, however, do not yet have specific plans and are awaiting issuance of government standards.<sup>205</sup>

### **Initiatives to Improve Security, Audit Capacity, and Access**

Many experts examining DRE systems believe that voter-verified audit trails (providing voters a receipt listing their selections) would resolve many of these problems and improve voter confidence.<sup>206</sup> Legislators may do well to focus attention on ensuring system integrity from the design stage and also bolstering voter protections through required audit capabilities.

Some legislators have taken steps to ensure vote proof is provided. Among the efforts, Representative Robert Wexler sought a court injunction requiring that equipment in Florida provide voters a printed verification document showing that they voted.<sup>207</sup> Mr. Wexler's lawsuit has been granted an expedited trial schedule. According to Mr. Wexler, this gives Floridians hope that they will have a voting system that works by November 2004.<sup>208</sup> Representative Rush Holt introduced a bill (the Voter Confidence and Increased Accessibility Act of 2003)<sup>209</sup> in the House in May 2003 that:

- requires all voting technology to produce a voter-verified paper record for use in manual audits and recounts;
- bans the use of undisclosed software and wireless communications devices in voting technology;
- requires all voting technology to meet these requirements in time for the November 2004 general election; and
- requires that electronic voting equipment be provided for persons with disabilities by January 1, 2006 (a year earlier than required by HAVA).<sup>210</sup>

<sup>204</sup> Brennan Center for Justice at NYU School of Law, Leadership Conference for Civil Rights, and People for the American Way, "HAVA Implementation in the 50 States: A Summary of State Implementation Plans" (hereafter cited as Brennan Center, "HAVA Implementation in the 50 States"), pp. 17–18; Tom Joyce, "York County PA, Officials Hesitant to Invest in Unproven Voting Technology," *York Daily Record*, Mar. 22, 2004 (hereafter cited as Joyce, "York County").

<sup>205</sup> Brennan Center, "HAVA Implementation in the 50 States," pp. 17–18. See Joyce, "York County."

<sup>206</sup> Jefferson et al., "A Security Analysis," p. 2.

<sup>207</sup> Steve Ellman, "Intent vs. Choice," *Broward Business Daily Review*, Feb. 6, 2004, p. 1.

<sup>208</sup> "Wexler Scores Victory in Federal Court; Judge Cohen Rejects Hood and LePore's Attempts to Delay Until After Election," Mar. 22, 2004, <[http://www.house.gov/wexler/press\\_releases/Mar\\_22\\_04.htm](http://www.house.gov/wexler/press_releases/Mar_22_04.htm)> (last accessed Mar. 25, 2004).

<sup>209</sup> H.R. 2239, 108th Cong., 1st Sess. (2003).

<sup>210</sup> Rush Holt, "On Election Day 2004, How Will You Know If Your Vote Is Properly Counted?, Answer: You Won't," news release, May 22, 2003, <<http://www.holt.house.gov/issues2.cfm?id=5996>> (last accessed Mar. 10, 2004); H.R. 2239, 108th Cong., 1st Sess. (2003).

Mr. Holt's legislation was referred to the House Committee on Administration in May 2003, where it currently awaits action.<sup>211</sup> Senators Hillary Clinton and John Edwards also have introduced a bill to amend HAVA to require voter verification and improved security for voting technology.<sup>212</sup>

Officials at the state level have also undertaken steps to resolve problems. In Georgia, for example, the state senate considered two bills, approving one, that required election equipment to provide printed receipts.<sup>213</sup> Receipts, however, will not be required until new federal guidelines, which also are expected to require a paper trail, take effect, and Congress provides funds for Georgia's plan.<sup>214</sup> California's secretary of state, concerned with the security and accessibility of DRE technology, is reviewing these systems and has ordered that by July 2005, they provide a "voter-verified paper trail."<sup>215</sup> Despite the security that a printed receipt may offer, however, some argue that voting technology that can be programmed to record an incorrect vote can be programmed to falsify the receipt.<sup>216</sup>

Legislators might do well to study automated banking, gasoline, car wash, grocery, and other cashier-less point-of-sale technology; overnight shipping companies may offer best practices for accumulating, securing and tracking ballots. Such retail systems follow high standards for registering, documenting, and verifying transactions, build in audit trails that pinpoint accountability, and apply penalties to those who break the law.

Jurisdictions that have not replaced existing systems are unlikely to do so by November 2004.<sup>217</sup> The process of acquiring new voting technology, including testing different equipment, selecting one or more, and certifying the selected equipment, is time consuming.<sup>218</sup> Installing electronic, specifically DRE systems, may be cost prohibitive to state and local governments already in fiscal crises. It is estimated that placing touch screen DRE equipment in 88 percent of the 190,000 precincts in the United States, assuming that the remaining 12 percent already have them, would cost \$3.3 billion. With an average of 60 precincts per county, placing six DRE machines per precinct would cost approximately \$1.2 million per county.<sup>219</sup>

<sup>211</sup> "Bill Summary & Status for the 108th Congress," H.R. 2239, <<http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.02239>> (last accessed Mar. 25, 2004); H.R. 2239, 108th Cong., 1st Sess. (2003).

<sup>212</sup> S. 1986, 108th Cong. 1st Sess. (2003). Peter S. Canellos, "Stirring in Florida Bespeak 2000 Dispute," *Boston Globe*, Mar. 16, 2004, p. A3.

<sup>213</sup> Meg Smothers, "Paper Receipts No Guarantee," *Atlanta-Journal Constitution*, Feb. 23, 2004 (hereafter cited as Smothers, "Paper Receipts") p. A15; "Senate Approves Delayed Paper Ballot Bill," Associated Press, Mar. 18, 2004 (hereafter cited as AP, "Senate Approves Delayed").

<sup>214</sup> AP, "Senate Approves Delayed."

<sup>215</sup> Ackerman, "Campaign Launched"; Ed Fletcher, "Senators Assail Touch-Screen Voting," *Sacramento Bee*, Mar. 12, 2004, p. A3 (hereafter cited as Fletcher, "Senators Assail").

<sup>216</sup> Smothers, "Paper Receipts," p. A15.

<sup>217</sup> Fletcher, "Senators Assail," p. A3.

<sup>218</sup> See Lipton, "Replacement Near," for an example.

<sup>219</sup> Norman Garfinkle and Patrick Glynn, George Washington University, Institute for Communitarian Policy Studies, "Report on Election Systems Reforms," July 2001, pp. 3-4.

The federal government must ensure that voters are not disenfranchised in November 2004, whether using advanced electronic technology or a punch card system. To do so, EAC should immediately begin verifying that states are well on the way to resolving any lingering problems from the 2000 elections. To ensure that all votes are counted, the government should require certification that any voting technology used is nondiscriminatory and provides for second-chance voting and voter verification. History offers myriad examples of using equipment, people, and processes to manipulate elections and disenfranchise voters. We owe it to ourselves and our future to have robust, well-designed election systems to preserve the bedrock of our democracy.<sup>220</sup>

## CONCLUSION

In 2001, in two reports and in testimony to Congress, the Commission issued recommendations to address problems it found in Florida and nationwide regarding the right to vote and to have one's vote counted. HAVA provided solutions to numerous problems, and adopted many but not all of the Commission's recommendations. However, HAVA enactment and implementation have been slow. For example, critical monies have not yet been distributed to the states. Moreover, Congress has never fully appropriated the level of funding authorized under HAVA. Thus, it will be difficult if not impossible for states to build the necessary election infrastructure by November. Indeed, 24 states have asked and received from the federal government waivers on replacing punch card and lever machines. Forty-one states have requested and been granted extensions to 2006 for implementation of the requirement for computerized statewide voter registration lists, which the Commission has considered vital to protecting voting rights.

This report does not critique whether the decision to grant waivers was appropriate. However, the waivers together with the fact that Congress and the administration delayed appointing EAC commissioners set into motion a domino effect that resulted in subsequent other benchmarks also being missed. Thus, the potential is real and present for significant problems on voting day that once again will compromise the right to vote. Avoiding this will require unprecedented effort by all with authority and responsibility for implementing HAVA and voting generally, and will necessitate extraordinary cooperation and coordination between federal and state officials, as well as among various state and local officials. For starters, officials should adopt the 12 suggestions proposed on page 38, which embody some of the Commission's earlier recommendations and highlight the problems that are most urgently in need of attention given the current state of HAVA implementation and with only nine months to go before the 2004 presidential election.

The federal government could consider adopting an emergency posture and use all available means to ensure that *every* eligible citizen can vote and have his or her vote counted. Securing voting rights was the result of many acts of courage, determination, and sacrifice. When the right to vote is infringed, whether by poor planning or intentional actions, the nation as a whole suffers. As President Lyndon Johnson foreshadowed in 1965, the denial to any group of citizens

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<sup>220</sup> Johns Hopkins Study.



the right to vote should raise concerns about the system's integrity as a whole.<sup>221</sup> The 2000 elections showed that, although the nation has come a long way, we are still far from reaching the goal of universal democratic participation. The 2004 elections will test again the nation's resolve to ensure voting rights.

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<sup>221</sup> Virginia E. Hench, "The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters," *Case Western Reserve Law Review*, vol. 48 (Summer 1998), p. 771.

## Addendum

### Federal and State Voting Reform Progress—July 2004

#### Introduction

In conjunction with its April 9, 2004, briefing on voting and election reform, the U.S. Commission on Civil Rights prepared an election readiness briefing paper titled “Is America Ready to Vote?” The briefing paper described the Commission’s findings and recommendations on election vulnerabilities following the 2000 presidential election; the implementation of the Help America Vote Act of 2002 (HAVA), passed in response to the voting problems identified in the 2000 election; the national election reform inadequacies and potential pitfalls still facing the country; and the status of electronic voting system reform. This addendum provides an update to the Commission’s briefing paper and offers information on the most recent developments related to continuing efforts by federal, state, and local governments to implement the reforms under HAVA and address election preparedness inadequacies and potential pitfalls that may still jeopardize the fair and smooth administration of the upcoming fall elections.

#### Felon Purge Practices

As of July 2004, problems persist for states trying to maintain accurate statewide voter registration lists. For example, in Florida, controversy continues over the practice of purging suspected felons from voter registration rolls. Florida is among seven states that take away the right to vote from all ex-felons, regardless of whether they have paid their debt to society. The state re-enfranchises ex-felons who have served their sentences only if they apply for restoration of their voting rights. Those who do not, or do not successfully do so, are ineligible to vote and the state purges them from its rolls. As part of the purge verification process, suspected felons must be notified by state officials of their status before being removed. In June, the state of Florida announced that a backlog of 62,000 ex-felon applications for re-enfranchisement had been reduced to 8,000. As many as 600,000 former prisoners, however, have not applied for restoration of their voting rights and still do not have their rights restored.<sup>1</sup>

In May, the director of Florida’s State Division of Elections began asking local election supervisors to notify persons on the state’s purge list to give them the opportunity to challenge removal of their names. Many supervisors have delayed doing so, out of concern about the accuracy of the list.<sup>2</sup> The director resigned abruptly in June amid reports that he was uncomfortable with the growing pressure to trim suspected felons from the voter rolls in time for

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<sup>1</sup> Gary Fineout, “Former Inmates Get Civil Rights Restored,” *Miami Herald*, June 18, 2004, p. B1.

<sup>2</sup> Gary Fineout, “State Elections Chief Resigns From Post,” *Miami Herald*, June 8, 2004, p. B6.

the fall elections.<sup>3</sup> Some local election supervisors have indicated that they lack the staff, expertise, and money to purge their lists without causing the same kinds of errors that occurred in 2000.<sup>4</sup> Officials also expressed doubt that they will have enough time to verify all potential felons in their counties in time for the August 31, 2004, primaries.<sup>5</sup>

At their annual summer conference in June, the state's election supervisors agreed that when disputes or uncertainty occurred, they would allow names to remain on voter rolls until eligibility could be determined definitively. The supervisors agreed to use multiple sources to verify convictions and identities of suspected felons. The Florida Department of Law Enforcement has stated that it will establish a page on the agency's Web site so that supervisors and voters can correct errors. As in 2000, the department is also establishing a call center that will operate 12 hours a day, including weekends, to handle criminal background inquiries.<sup>6</sup>

According to several newspaper editorials, opening the state's purge list to the public would help expose potential problems and instill confidence in the state's purge process.<sup>7</sup> After the Florida secretary of state initially refused to release the computer list of some 47,000 suspected felons to the public on the basis of protecting privacy rights,<sup>8</sup> news media network CNN, U.S. Senator Bill Nelson (D-FL), and others sued the state for its release.<sup>9</sup> The Florida attorney general, who normally represents the state in litigation, was also critical of the decision to keep the list from the public, stating that he would have trouble defending the secretary of state's interpretation of the law in court.<sup>10</sup> On July 1, 2004, a state circuit court judge ordered the state Division of Elections to make the list immediately available to the public.<sup>11</sup>

An analysis by the Miami Herald of the disclosed list revealed that more than 2,100 Florida voters whose rights were already formally restored through the state clemency process were erroneously included on the list.<sup>12</sup> Some 1,600 of those granted clemency had not re-registered to vote. In a move criticized by local election supervisors and voting rights activists, the state originally directed local jurisdictions to require those ex-felons re-register before restoring their voting rights. While state officials maintained they were simply following the law, legal experts

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<sup>3</sup> Bob Mahlburg, "Elections Chief Resigns Amid Felon Debate," *Orlando Sentinel*, June 8, 2004, p. A1; Fineout, "State Elections Chief Resigns From Post," p. B6.

<sup>4</sup> William March, "Glimmer of 2000 on Voter Rosters," *Tampa Tribune*, June 7, 2004, p. A1.

<sup>5</sup> May Bell and Bob Mahlburg, "Voting Chiefs: Purge Must Be Fair," *Orlando Sentinel*, June 10, 2004, p. A1.

<sup>6</sup> *Ibid.*

<sup>7</sup> "Elections Establishment Still Missing the Message," *Palm Beach Post*, June 16, 2004, p. 12A; "Defend Voters Rights," *Florida Today*, June 18, 2004, p. 10; "Openness That Counts," *Orlando Sentinel*, July 6, 2004, p. A10.

<sup>8</sup> Jim Ash, "Groups: Publicize Criminal Voter List," *Palm Beach Post*, May 27, 2004, p. 1A; "Defend Voters Rights," *Florida Today*, June 18, 2004, p. 10.

<sup>9</sup> Lucy Morgan, "Voter List Lawsuit Recalls 2000 Turmoil," *St. Petersburg Times*, June 10, 2004, p. 6B; Ash, "Groups: Publicize Criminal Voter List," p. 1A.

<sup>10</sup> Bell and Mahlburg, "Voting Chiefs: Purge Must Be Fair," p. A1. The suit is being defended by private attorneys hired by the secretary of state. *Ibid.*

<sup>11</sup> Steve Bousquet, "Felon Voters List Made Public," *St. Petersburg Times*, July 2, 2004, p. 1A.

<sup>12</sup> Erika Bolstad, Jason Grotto, and David Kidwell, "Thousands of Eligible Voters Are on Felon List," *Miami Herald*, July 2, 2004, p. A1.

stated the governor could choose to end the practice, and civil rights groups asserted that federal law prohibiting government officials from disqualifying voters over paperwork mistakes or other procedural barriers superseded state law.<sup>13</sup> On July 7, 2004, the state reversed its position, stating that ex-felons granted clemency who had not re-registered to vote would not be deleted from voter rolls.<sup>14</sup> Some local election supervisors stated they were leaning toward ignoring the requirement, and the state conceded that it could not force the supervisors to remove persons on the state's purge list from voter rolls.<sup>15</sup>

A subsequent analysis by the Sarasota Herald-Tribune and the New York Times also revealed that the purge list failed to identify Hispanic ex-felons in far greater numbers than people of other races or ethnic groups.<sup>16</sup> While Hispanics make up 17 percent of the state's population, only one-tenth of 1 percent of persons on the purge list were Hispanic.<sup>17</sup> The state admitted that a flaw in the method used to produce the list may have excluded Hispanic ex-felons.<sup>18</sup> As a result, on July 10, 2004, the state announced it would no longer use the purge list of some 47,000 suspected felons in its purge efforts.<sup>19</sup> However, the Florida secretary of state indicated that local supervisors of elections would be required to find other ways to ensure that felons were removed from voter rolls.<sup>20</sup>

Addressing concerns about potential erroneous purges, such as those that occurred in Florida in 2000, in April, Representative David Price (D-NC) introduced the Protect American Voters Act of 2004,<sup>21</sup> which would require states to (1) notify, no later than 30 days before an election, individuals who are being removed from the voter rolls; (2) allow voters to appeal their removal; (3) rule on an appeal within 10 days; and (4) provide provisional ballots to voters whose appeals are pending at the time of the election. The bill, however, would not prevent states from removing actual convicted felons from voter registration rolls.<sup>22</sup> In July, responding to the purge problems experienced by Florida this year, Representative Robert Wexler (D-FL) introduced the

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<sup>13</sup> Bob Mahlburg and John Maines, "State Defends 'Potential Felons' List," *Orlando Sentinel*, July 3, 2004, p. A1; David Kidwell, Jason Grotto, and Erika Bolstad, "Voting Rights Face a New Hurdle," *Miami Herald*, July 3, 2004, p. A1.

<sup>14</sup> "Florida to Let Former Felons Vote," *Associated Press*, July 8, 2004.

<sup>15</sup> Kidwell, Grotto, and Bolstad, "Voting Rights Face a New Hurdle," p. A1; Gary Fineout, "State Won't Try to Force 48,000 Voters Off Rolls," *Miami Herald*, July 7, 2004, p. B1.

<sup>16</sup> Chris Davis and Matthew Doig, "Hispanics Missing from Voter Purge List," *Sarasota Herald-Tribune*, July 7, 2004, p. A1; Ford Fessenden, "Florida List for Purge of Voters Proves Flawed," *New York Times*, July 10, 2004, p. A13.

<sup>17</sup> Chris Davis and Matthew Doig, "Hispanics Missing from Voter Purge List," *Sarasota Herald-Tribune*, July 7, 2004, p. A1.

<sup>18</sup> *Ibid.* Fessenden, "Florida List for Purge of Voters Proves Flawed," p. A13.

<sup>19</sup> John Pain, "Florida Scraps Flawed Felon Voting List," *Associated Press*, July 10, 2004.

<sup>20</sup> *Ibid.*

<sup>21</sup> H.R. 4250, 108th Cong., 2d Sess. (2004).

<sup>22</sup> David Price, "Price Introduces the Protect American Voters Act," news release, Apr. 29, 2004, <[http://www.house.gov/apps/list/press/nc04\\_price/pava.html](http://www.house.gov/apps/list/press/nc04_price/pava.html)> (last accessed July 1, 2004); H.R. 4250, 108th Cong., 2d Sess. (2004).

Fair and Open Voting Standards Act of 2004,<sup>23</sup> which is similar to the Protect American Voters Act, but requires notification no later than 90 days before the date of removal and no later than 60 days before the date of an election. Also, under the bill, no removal would be permitted while an appeal is pending.

### **Initiatives to Improve Electronic Voting Security, Audit Capacity, and Access**

In April, concerns over the security and reliability of direct recording electronic, or DRE, machines led the California secretary of state to ban four California counties from using DRE machines and order 10 other counties to improve security and reliability before using devices in November. The secretary of state, following the recommendations of a state panel, revoked state approval of touch screen voting machines manufactured by Diebold Election Systems, and ordered that counties buy only machines that provide voter-verified paper ballot receipts.<sup>24</sup> Under the order, the 10 counties that use non-Diebold machines could keep them in service provided they (1) gave voters the option to use paper ballots, (2) allowed no connection to the Internet, (3) ensured that printouts could be made of ballots cast electronically, (4) allowed state officials to participate in technical reviews of randomly chosen machines on Election Day, and (5) submitted detailed documents to the secretary of state about testing, software, and inner workings of the machines.<sup>25</sup> The measures were designed to answer concerns about the ability of voters to verify the accuracy of their ballots, permitting meaningful recounts as specified under California law, and securing voting systems against tampering and/or manipulation.<sup>26</sup>

The secretary of state also requested that the state attorney general consider taking criminal or civil action against Diebold for allegedly installing machines that were not properly certified and then misrepresenting their status.<sup>27</sup> However, a San Diego County grand jury subsequently issued a report (of no legal effect) supporting Diebold machines, and registered its disagreement with the state.<sup>28</sup>

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<sup>23</sup> H.R. 4758, 108th Cong., 2d Sess. (2004).

<sup>24</sup> Greg Lucas, "State Bans Electronic Balloting in 4 Counties; Touch-Screen Firm Accused of 'Reprehensible', Illegal Conduct," *San Francisco Chronicle*, May 1, 2004, p. A1; Kevin Shelley, secretary of state, California, "Decertification and Withdrawal of Approval of Certain DRE Voting Systems and Conditional Approval of the Use of Certain DRE Voting Systems," <[http://www.ss.ca.gov/elections/ks\\_dre\\_papers/decert1.pdf](http://www.ss.ca.gov/elections/ks_dre_papers/decert1.pdf)> (last accessed July 1, 2004).

<sup>25</sup> Jim Sanders, "All Voting Machines Decertified But an Official Says 10 Counties Might Be Able to Get Approval Before the November Election," *Sacramento Bee*, May 1, 2004, p. A3; Shelley, "Decertification and Withdrawal of Approval of Certain DRE Voting Systems and Conditional Approval of the Use of Certain DRE Voting Systems."

<sup>26</sup> Shelley, "Decertification and Withdrawal of Approval of Certain DRE Voting Systems and Conditional Approval of the Use of Certain DRE Voting Systems."

<sup>27</sup> Jim Sanders, "All Voting Machines Decertified," p. A3.

<sup>28</sup> Helen Gao, "Touch-Screen Voting Machines Backed; County Grand Jury Report Is Favorable," *San Diego Union Tribune*, May 28, 2004, pp. B-3:2,7; B-1:1; B-2:6.

In June, the state lifted the ban on Orange and Merced counties' computerized voting systems, after both complied with the conditions imposed by the secretary of state.<sup>29</sup> For example, Hart InterCivic, the manufacturer of the Orange County machines, agreed to hand over its source code for testing by the state.<sup>30</sup> In contrast, Riverside, San Bernardino, Kern, and Plumas counties, joined by disability advocates, filed federal lawsuits seeking to reverse the ban.<sup>31</sup>

Election officials elsewhere have also shown growing reticence toward electronic voting machines. Solano County, California, canceled its contract with Diebold as a result of the secretary of state's action, and 20 of 31 counties given state approval to purchase Diebold DRE voting systems in Ohio have decided against doing so or are waiting until after the November elections to make decisions.<sup>32</sup>

In addition, the League of Women Voters reversed its endorsement of paperless electronic voting systems as reliable alternatives to punch card and lever systems at its biennial convention in June.<sup>33</sup> Delegates voted overwhelmingly in favor of a compromise resolution that supported "voting systems and procedures that are secure, accurate, recountable and accessible."<sup>34</sup> The reversal came after many delegates contended that paper ballots were the only way to safeguard elections from fraud, hackers, or computer malfunctions.<sup>35</sup>

A group of Maryland voters also filed suit against the Maryland State Board of Elections in April seeking to move state election officials to decertify their electronic voting machines. The plaintiffs claimed that the Diebold-manufactured machines did not comply with state and federal law, and should not be used until alleged security vulnerabilities had been resolved and voter-verified paper audit trails instituted.<sup>36</sup> The suit alleged that the machines were found susceptible to vote switching by computer experts.<sup>37</sup>

Stories document continuing electronic voting machine malfunctions. In June, state officials in Florida conceded that Election Systems & Software electronic voting machines in 11 counties

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<sup>29</sup> Stuart Pfeifer, "State Lifts Ban on O.C. E-Voting," *Los Angeles Times*, June 11, 2004, p. B5; "Secretary of State Recertifies Orange County Touch Screen Voting Machines," *Associated Press*, June 10, 2004.

<sup>30</sup> Pfeifer, "State Lifts Ban on O.C. E-Voting," p. B5.

<sup>31</sup> *Ibid.* Ian Hoffman, "Solano County Drops Diebold Voting System; Decision Follows California Secretary of State's Call for Probe," *Oakland Tribune*, May 26, 2004, Local and Regional News Section.

<sup>32</sup> Hoffman, "Solano County Drops Diebold Voting System."

<sup>33</sup> "Paperless Ballots Lose Voters League Backing," *Los Angeles Times*, June 15, 2004, p. A13; Amy Keller, "Activists Rally on Ensuring Paper Trail for Ballots," *Roll Call*, June 22, 2004; Rachel Konrad, "Women's Group Drops Support for E-Voting," *Associated Press*, June 15, 2004.

<sup>34</sup> Katharine Q. Seelye, "He Pushed the Hot Button of Touch-Screen Voting," *New York Times*, June 15, 2004, p. A16; "In Brief/Washington, D.C.: Paperless Ballots Lose Voters League Backing," *Los Angeles Times*, June 15, 2004, p. A13.

<sup>35</sup> Rachel Konrad, "Women's Group Drops Support for E-Voting," *Associated Press*, June 15, 2004.

<sup>36</sup> Peter Geier, "Suit Seeks to Pull Plug on AccuVote Machines," *The Daily Record*, Apr. 22, 2004.

<sup>37</sup> Johnathon E. Briggs, "Suggested Calif. Ban on Voting Equipment Heartens Md. Opponents," *Baltimore Sun*, Apr. 24, 2004, p. 3B. State election officials, however, maintained the voting machines were secure and that paper ballot receipts were not necessary. *Ibid.*

had software flaws that would make manual recounts impossible.<sup>38</sup> The machines failed to provide a consistent electronic “event log” of voting activity if asked to construct what happened during an election.<sup>39</sup> A Miami-Dade elections worker also found that some Election Systems & Software machines failed to record 162 votes in an October local election.<sup>40</sup> As a result, several coalition groups, including the American Federation of County, State and Municipal Employees, asked that the governor order an independent audit of the state’s touch screen voting systems, as had been done in Maryland.<sup>41</sup> The state declined, stating that the flaws could be repaired, and expressed confidence in the state’s efforts to ensure a smooth election.<sup>42</sup> Several voting rights groups then filed suit against the state in July to overturn a state rule that prohibits manual recounting of ballots cast with touch screen machines. The plaintiffs alleged in their suit that electronic voting machines were “known to malfunction and to be subject to malicious tampering.”<sup>43</sup>

The growing trend in the demand for voter-verified audit trails is also reflected in several proposals recently introduced in Congress, despite continuing divisions in both the House and Senate over the need to amend HAVA to require such audit trails.<sup>44</sup> While the degree of regulation contemplated in the legislation differs, all proposals nonetheless call for some type of voter-verified audit trail. On April 8, 2004, Senators Bob Graham (D-FL), Hillary Clinton (D-NY), and Barbara Boxer (D-CA) introduced the Restore Elector Confidence in Our Representative Democracy (RESTORE) Act of 2004 amending HAVA to require voter-verified permanent records for electronic voting machines.<sup>45</sup> Previously, all three senators had introduced separate legislation on the matter.<sup>46</sup> In May, Senator John Ensign (R-NV) introduced another bill, the Voting Integrity and Verification Act of 2004 (VIVA), also seeking to amend HAVA by requiring equipment to produce a voter-verified permanent record.<sup>47</sup> Unlike VIVA, the RESTORE Act requires public disclosure of voting system software, changes the audit trail compliance deadline from November 2006 to November 2004, requires federal certification of

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<sup>38</sup> “Elections Establishment Still Missing the Message,” *Palm Beach Post*, June 16, 2004, p. 12A.

<sup>39</sup> “Flaw in Florida Touchscreens Could Hamper Manual Recounts,” news release, *Associated Press*, June 12, 2004.

<sup>40</sup> Bob Mahlburg, “Coalition Wants Governor to Examine Voting Systems,” *Orlando Sentinel*, June 30, 2004, p. B5.

<sup>41</sup> Mary Ellen Klas, “Request for Review of Voting Gear Denied,” *Miami Herald*, June 30, 2004, p. B4.

<sup>42</sup> Bob Mahlburg, “Coalition Wants Governor to Examine Voting Systems,” p. B5; Klas, “Request for Review of Voting Gear Denied,” p. B4.

<sup>43</sup> Jane Sutton, “Lawsuit Challenges Florida Ballot Recount Rules,” *Reuters*, July 7, 2004.

<sup>44</sup> Lou Dobbs, “Lou Dobbs Tonight,” broadcast program, transcript no. 062200cb.110, *CNN*, June 22, 2004, 6 p.m. EST.

<sup>45</sup> S. 2313, 108th Cong., 2d Sess. (2004).

<sup>46</sup> On December 9, 2003, Senators Bob Graham and Hillary Clinton introduced two separate bills seeking to amend HAVA to require voter-verified permanent records for electronic voting machines—the Voter Confidence and Increased Accessibility Act of 2003 (S. 1980, 108th Cong., 1st Sess. (2003)) and Protecting American Democracy Act of 2003 (S. 1986, 108th Cong., 1st Sess. (2003)), respectively. In February, Senator Barbara Boxer introduced the Secure and Verifiable Electronic (SAVE) Voting Act of 2004 (S. 2045, 108th Cong., 2d Sess. (2004)), also requiring voter-verified permanent records.

<sup>47</sup> S. 2437, 108th Cong., 2d Sess. (2004).

technological security of voter registration lists, and requires voting machine hardware and software be certified by Election Assistance Commission (EAC) accredited labs.<sup>48</sup>

In addition, Representative Steve King (R-IA) introduced the Know Your Vote Counts Act of 2004 in the House in April requiring a voter-verified paper audit trail for all electronic voting machines by 2006.<sup>49</sup> The legislation is less expansive, however, than the Voter Confidence and Increased Accessibility Act of 2003<sup>50</sup> introduced by Representative Rush Holt (D-NJ) in May 2003. For example, in addition to requiring a voter-verified paper audit trail, Holt's version bans the use of undisclosed software and wireless communications devices in voting technology and requires compliance with voter-verified paper trail requirements for the November 2004 elections.<sup>51</sup>

At the end of June, the Brennan Center for Justice and the Leadership Conference on Civil Rights released a report containing electronic voting preparation recommendations for jurisdictions with time and resource constraints. The recommendations included procedures for monitoring election glitches, as well as independent security review of machines and their software. The chairman of the Election Assistance Commission applauded the report and announced that he would study ways for the report's recommendations to be incorporated in the work of the Commission.<sup>52</sup>

### **EAC Guidance**

On May 5, 2004, the Election Assistance Commission conducted its first hearing. The EAC examined electronic voting issues and brought together computer experts, election officials, advocacy groups, and voting machine manufacturers. Some local election officials and advocacy group representatives who testified joined machine manufacturers in advocating the use of DREs as a convenient, secure, and accurate means of recording votes. Other speakers, however, including California Secretary of State Kevin Shelley and Johns Hopkins University computer security expert Aviel Rubin, expressed concern about the vulnerability of DREs and advocated voter-verified audit trails, including paper trails. The commissioners also expressed concerns about the power of vendors over the voting process. They noted that the vendors create the equipment, pay for certification testing, and have technicians play key roles in local election offices.<sup>53</sup>

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<sup>48</sup> Bob Kibrick and Pamela Smith, "Verified Voting Legislation: Senate Bill Comparison," <<http://www.verifiedvoting.org/legislation/federal/senate/senatebillcomparison.asp>> (last accessed July 1, 2004).

<sup>49</sup> H.R. 4187, 108th Cong., 2d Sess. (2004).

<sup>50</sup> H.R. 2239, 108th Cong., 1st Sess. (2003).

<sup>51</sup> Kibrick and Smith, "Verified Voting Legislation: House Bill Comparison."

<sup>52</sup> Brennan Center for Justice and Leadership Conference on Civil Rights, "Recommendations of the Brennan Center for Justice and the Leadership Conference on Civil Rights for Improving Reliability of Direct Recording Electronic Voting Systems," <[http://www.civilrights.org/issues/voting/lccr\\_brennan\\_report.pdf](http://www.civilrights.org/issues/voting/lccr_brennan_report.pdf)> (last accessed July 10, 2004); John Schwartz, "Report Calls for Fixes in High-Tech Voting," *New York Times*, June 30, 2004, p. A18.

<sup>53</sup> Dan Keating, "Paper Receipts Opposed for Voting Machines," *Washington Post*, May 6, 2004, p. A8



The EAC held a second hearing in Chicago on June 3, 2004, examining problems including transition from optical scan, punch card, and lever machine voting systems, as well as the use of provisional balloting. Local election officials testified that they were not convinced that current electronic voting systems were technologically ready. Some local election officials also warned about predatory equipment manufacturers who push local officials to purchase systems that do not offer a verified paper trail and have yet to be tested.<sup>54</sup>

Subsequent to the hearings, the EAC chairman announced that he would recommend the agency request all voting software vendors allow election officials to analyze proprietary source codes; ask every jurisdiction that uses electronic voting devices to implement enhanced security measures in November; invite every voting software vendor to submit its certified software to the National Software Reference Library at the National Institute of Standards and Technology; solicit information about suspicious electronic voting activity and request aggressive responses from the U.S. Department of Justice; and document incidents and record data concerning electronic equipment malfunctions in November.<sup>55</sup> The chairman also announced the formation of a 15-member Technical Guidelines Development Committee.<sup>56</sup> The committee will be charged to work for nine months to draft standards for all voting systems used in the United States.<sup>57</sup>

### **Voter Identification**

Other incidents demonstrate the need for proper poll worker training on ID requirements. For example, during the June special election in South Dakota to fill a vacant U.S. House of Representatives seat, poll workers turned away voters who could not produce ID, in violation of laws that permit voters to complete an affidavit in lieu of ID.<sup>58</sup> The ID requirement disproportionately affected Native Americans, who are less likely than the general population in South Dakota to have specified forms of ID such as driver's licenses, and thus raised further allegations of discrimination through misapplication of the law.<sup>59</sup>

A study released in April by the Brennan Center for Justice and the New York Public Interest Research Group also revealed that ID requirements under HAVA confused even local election

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<sup>54</sup> David Mendell, "Chicago Balks at Video Voting; Election Officials Hesitate to Grab at Federal Dollars," *Chicago Tribune*, June 4, 2004, p. C3.

<sup>55</sup> DeForest Soaries, "Chairman Soaries' Remarks about Electronic Voting Security Strategy for the November 2004 Presidential Election," speech, June 8, 2004, <<http://www.eac.gov/docs/Voting%20Security%20Strategy.pdf>> (last accessed July 1, 2004).

<sup>56</sup> U.S. Election Assistance Commission, "U.S. EAC Forms Technical Committee to Create New Voting Standards," news release, June 17, 2004, <[http://www.eac.gov/news\\_061704\\_2.asp](http://www.eac.gov/news_061704_2.asp)> (last accessed July 1, 2004).

<sup>57</sup> *Ibid.*

<sup>58</sup> Adam Cohen, "Indians Face Obstacles Between the Reservation and the Ballot Box," *New York Times*, June 21, 2004, p. A22; "Group Alleges Election Irregularities," *Associated Press*, June 10, 2004.

<sup>59</sup> Cohen, "Indians Face Obstacles Between the Reservation and the Ballot Box," p. A22; "Lawmakers Debate Whether to Repeal Voter ID Law," *Associated Press*, June 12, 2004.

boards. Some local boards did not understand the new requirements and others did not know what forms of ID were legally acceptable.<sup>60</sup>

In June, Representative Henry J. Hyde (R-IL) introduced the Federal Election Integrity Act of 2004,<sup>61</sup> which would require individuals registering or re-registering to vote in an election for federal office to provide proof of U.S. citizenship. Official proof would include a U.S. birth certificate, naturalization card, or U.S. passport.<sup>62</sup>

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<sup>60</sup> Erika Rosenberg, "Officials Are Confused by Voter ID Law, Surveys Say," *Poughkeepsie Journal*, Apr. 14, 2004, p. 7A.

<sup>61</sup> H.R. 4530, 108th Cong., 2d Sess. (2004).

<sup>62</sup> Henry J. Hyde, "Hyde Introduces Legislation to Prevent Voter Fraud," news release, June 17, 2004, <<http://gop.house.gov/item-news.asp?docId=59884>> (last accessed July 1, 2004); H.R. 4530, 108th Cong., 2d Sess. (2004).