

Election Reform and the Right to Vote

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If the security of the right to vote could be measured by the sheer number of new laws passed since the November, 2000 presidential election dealing with voting and elections, it would be easy to conclude that today the right to vote is unassailable. In the past three years there has been a dramatic increase in the volume of election-related legislation at the state level, as well as comprehensive legislation in Congress. To date, state legislatures have passed a total of 800 new laws dealing with election administration, voting systems, and voter registration procedures.

At the federal level, the President signed into law The Help America Vote Act of 2002 on October 29, 2002, hailed by its sponsors as “the most comprehensive package of voting reforms since enactment of the Voting Rights Act of 1965” and “the first civil rights act of the 21st century.” Senator Dodd went so far as to claim that while the Voting Rights Act identified practices such as poll taxes and literacy tests that federal law would ban, the Help American Vote Act, asserting new rights and breaking new ground, was the first time in over 213 years that the federal government was taking a proactive and protective role in the conduct of elections. On the house side, Representative Hoyer asserted that the new law would “strengthen the foundation of democracy and shore up public confidence in this most basic expression of American citizenship, the right to vote and to have one’s vote counted.”

Unfortunately the Help America Vote Act of 2002 [hereinafter HAVA] and the hundreds of new state laws that implement it not only fail to provide adequate guarantees that every qualified citizen will be allowed to vote and that each vote will be counted but also create new threats to the ability of traditionally disenfranchised populations to register and vote. Simply put, the systemic failure of election reform has been the refusal to provide any effective enforcement mechanisms for qualified voters whose right to vote is denied, and the failure to acknowledge fully and thus, to provide effective remedies for, election administration disasters that have disenfranchised millions of voters and disproportionately disenfranchised minority voters in recent elections. At the same time, election reform, in the name of preventing undocumented, unprosecuted, and largely mythical voter fraud, has put in place new requirements that have the potential to discourage and disenfranchise thousands of voters in every state.

Certainly it is the content of the new state and federal measures that matters, not how many new laws are on the books. In the legislative struggles over that content, those who saw the problems in the 2000 election as primarily problems of voter fraud and sought to make it more difficult to register and vote gained significant victories. They hailed HAVA because it would disenfranchise dogs and dead people allegedly registered to vote

in several states, require voters to produce identification when they cast their ballots, and mandate statewide voter registration lists that include a voters' drivers' license number or social security number. While increasing the hurdles a voter must jump in order to become registered and stay registered, the Act has no significant avenue of recourse for voters, individually or collectively, who are wrongfully removed from voter registration lists. In fact, while giving states money to change their election machines, HAVA also required nationwide implementation of the very changes in voter registration list maintenance that led to so many legitimate voters being wrongfully removed from Florida's registration rolls in the months leading up to the November 2000 election. Despite the fanfare, and whatever the intentions, of the current spate of election reform measures throughout the country, the bottom line remains that the right to vote is not adequately protected. The following is a brief survey of what HAVA and the new state implementing laws accomplish, and the major threats to voting rights that remain.

I. The Goals of Post-2000 Election Reform

In the days and weeks following the November 2000 election, while the nation's attention was focused on Florida and resolution of that state's count, there were significant and disturbing reports of election irregularities in many states throughout the country. Much of the controversy centered on the problem of ballots cast but not counted. An estimated 1.5 to 2 million ballots nationwide were not counted because of faulty equipment and confusing ballots. Georgia, Idaho, Illinois, South Carolina and Wyoming had higher rates of uncounted ballots than Florida, as did several cities, including Chicago and New York. Another significant factor, voter registration difficulties, led to millions of properly registered voters being turned away from the polls because their names had been wrongfully purged from voter registration lists or because their voter registration applications were not processed properly. The U.S. Census current population survey estimated that between 1.5 and 3 million votes in 2000 were lost because of registration problems. A third barrier to voting occurred because of poorly trained precinct officials and problems with election-day administration. Again relying primarily on the Census Bureau survey, nationwide it is estimated that up to 1 million registered voters were not able to vote because of long lines, confusing locations, or precinct officials who could not find a voter's name on the precinct rolls.

There were also isolated complaints of voter fraud. Immediately after the 2000 election the concerns about fraud in Florida related to allegations that some counties failed to purge felons from their voter registration lists. In Missouri, Republicans criticized a state judge's order keeping certain polling places open longer than originally scheduled to accommodate heavy voter turnout as the "biggest fraud on the voters in [Missouri] and [the] nation that we have ever seen." By the time that HAVA was passed, additional allegations were being made, including the claim that 3,000 voters nationwide had voted in two different states in the 2000 election, that dogs and dead people had voted, and that in more recent elections in South Dakota, ballots were cast by "people who don't exist."

In addition, overseas and military voters, and voters with disabilities raised significant concerns. Overseas and military voters were unable to cast a ballot when local election officials failed to mail absentee ballots in time or when those ballots were not counted properly when they were returned. A GAO report documented the continuing failure to make voting precincts and voting methods equally accessible to voters with disabilities, despite federal laws requiring accessibility. In 2000, only 15% of polling places nationwide had no potential impediments to persons with disabilities. In recent years, this lack of accessibility has led to an estimated 1.3 million citizens with disabilities encountering problems in voting.

A. Election Reform Goals in Congress

Election reform after the 2000 election was aimed at fixing these problems. At the federal level, these issues were acknowledged in a general way in the legislative history accompanying HAVA. Thus, in contrast to the civil rights rhetoric in Congress when the bill was passed, the House Report accompanying the bill has a more modest statement of purpose:

The purpose of H.R. 3295, the Help America Vote Act of 2001, can be stated very simply--it is to improve our country's election system. The circumstances surrounding the election that took place in November 2000 brought an increased focus on the process of election administration, and highlighted the need for improvements. The Help America Vote Act of 2001 will make it possible to implement needed improvements.

The remaining paragraphs of the Statement of Purpose address the question of local versus federal control of elections and purports to leave the responsibility for election administration at the local level, as well as leaving accountability in the hands of local officials. The House Report concludes:

Further by leaving the responsibility for election administration in the hands of local authorities, if a problem arises, the citizens who live within their jurisdictions know whom to hold accountable. The local authorities who bear the responsibility cannot now, and should not in the future be able to, point the finger of blame at some distant, unaccountable, centralized bureaucracy.

While local control must be preserved, it is time to recognize that the federal government can play a valuable roll [sic] by assisting state and local government in modernizing their election systems. H.R. 3295 will, for the first time, give the state and local governments some financial assistance, from the federal government, to improve their election infrastructure.

Throughout the discussion of HAVA's provisions, the House Report is more of a technical monograph for state election officials than an analysis of the need to protect the right to vote. Discussions of the ways in which legally qualified voters were prevented

from casting an effective ballot in the 2000 election suggest that these technical defects will be solved by competent federal assistance and minimum federal standards. Eliminating overvotes and undervotes, providing access for voters with disabilities, and improving procedures for military and overseas voters are simply administrative matters that can be solved with improved machinery and new federal standards.

What this framework sorely lacks is any acknowledgment of the forces that led to millions of voters being disenfranchised in the first place. HAVA's legislative history suggests that guaranteeing that every qualified voter is properly registered and that every vote is counted is like programming the VCR. It may be difficult, but with the right on-screen instructions and a simplified remote control, every local election official can do it. And, dear voters, if you don't record the program you wanted, try again when it is repeated next time.

There were winners and losers in the November 2000 election, and conscious decisions made in the months leading up to that election to take specific actions that state officials knew would have concrete results. Florida election officials were told by Choicepoint, the private firm they contracted with to compile lists of felons, that the state's procedures for matching those lists with lists of registered voters would result in high error rates. They were warned that their matching criteria would produce large numbers of "false positives" or mis-matches. In addition, state officials knew that there was slim justification under state law for removing voters from Florida rolls who had been convicted of felonies in other states before becoming Florida residents, since many of those citizens had their rights restored in the state of their conviction before moving to Florida. Professing a concern about "fraud" but clearly unconcerned about the numbers of voters who might be wrongfully removed from the voter registration rolls, state officials forged ahead, instructing Choicepoint to compile the unreliable lists anyway. State officials were also unconcerned about violating federal law, namely the National Voter Registration Act (NVRA), 42 U.S.C. § 1973gg, which prohibits states from conducting programs "to systematically remove the names of ineligible voters from the official lists of eligible voters" within 90 days of an election.

The wrongful purging of thousands of voters in Florida in the months before the November 2000 election was not merely a technical failure of election administration. It was a calculated and intentional program to achieve a particular result. Moreover, it had a disparate impact on black voters. Just as literacy tests disproportionately affected black voters, so do voter purge programs that use erroneous law enforcement records. The goals of post-2000 election reform at the federal level never included eliminating racially discriminatory practices, since the racial dimension of the disenfranchisement problem was never acknowledged by most lawmakers.

Most significantly, the fact that "[s]tudies of the nation's election system find that a significant problem voters experience is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters" was not seen as implicating any particular voter's individual rights. There is no sense of outrage that large numbers of voters were

prohibited from voting in the 2000 election. In short, HAVA's legislative history does not indicate that it was enacted to expand protections afforded to individual voters. Protecting the right to vote was not a goal of the Help America Vote Act. The goal of the federal election reform effort was to provide federal money for state initiatives to replace election machines and centralize voter registration databases, already underway in many cases, and to establish minimum federal standards for statewide voter registration databases, provisional balloting, voter id requirements, and new citizenship check-off requirements.

Indeed, some opponents of HAVA characterize it as having goals that are significantly threatening to the right to vote. Earlier this year, SCLC President Martin Luther King, III, and journalist Greg Palast, after reviewing how Florida's centralized statewide database was used to purge legally registered voters, had this to say about HAVA:

Astonishingly, Congress adopted the absurdly named "Help America Vote Act," which requires every state to replicate Florida's system of centralized, computerized voter files before the 2004 election.

The controls on the 50 secretaries of state are few -- and the temptation to purge voters of the opposition party enormous.

African-Americans, whose vote concentrates in one party, are an easy and obvious target.

The act also lays a minefield of other impediments to black voters: an effective rollback of the easy voter registration methods of the Motor Voter Act; new identification requirements at polling stations; and perilous incentives for fault-prone and fraud-susceptible touch-screen voting machines.

Whether or not it was intentionally designed to repeat the disenfranchisement that occurred in Florida, there is no doubt that certain aspects of the new legislation, particularly the voter identification requirements and the citizenship check-off requirement for voter registration forms were widely condemned in the civil rights community as likely to have a disenfranchising effect on first-time voters. In light of these anti-fraud provisions, and the legislative compromises they represent, it is difficult to view HAVA as a major source of protection for the right to vote. The law was designed to impose certain federal requirements on the election process, not to enhance protections at the federal level for the right to vote.

B. Election Reform Goals at the State Level

It is difficult to generalize about states' election reform goals. Certainly the same problems recognized by federal lawmakers were motivating state legislators. There were thirteen national task forces making recommendations on election reform, many of which were addressing what states should do as well as what is appropriate for the federal government. Fifteen states had special legislative task forces or special committees and twenty-six states had a Secretary of State's task force to review election procedures and make recommendations for changes.

State legislatures began the election reform bandwagon, with Florida in the forefront, passing in May of 2001 a comprehensive law that prohibited the use of punch card machines, revamped how the state would construct and manage its statewide voter database, required more careful review of ballot design, and allocated funds for poll worker training and voter education efforts. In total, by the end of 2002, states had passed 492 new election laws, including fifteen states that required new voting equipment, seventeen states that implemented new voter registration list maintenance and purging procedures, thirty-three states that made changes to their absentee balloting procedures and twenty-five states that mandated increased pay, better training or improved recruitment of poll workers.

It is certainly possible to point to new state laws that created greater protections for the right to vote and that allow court enforcement of those expanded rights. Washington state, for example, enacted new criminal penalties for any elections officer who intentionally disenfranchises or discriminates against an eligible voter in 2001, along with greater protections such as prohibiting election officials from requiring a social security number and requiring voter registration information to be provided in foreign languages. California passed the California Voting Rights Act of 2001, a measure providing for a state law cause of action for vote dilution but without the geographic compactness requirement as a pre-condition for a finding of liability that is currently a part of federal law. The new law defines how polarized voting is determined under such claims, establishes who has standing to bring a claim, and provides for a reasonable attorney's fee for prevailing plaintiffs.

In 2001, New Mexico repealed its permanent ban on the right of convicted felons to vote, Kentucky passed a law making it easier for persons convicted of felonies who have served their sentences to apply for restoration of their civil rights, and Connecticut restored the voting rights of convicted felons upon release from confinement and, if applicable, discharge from parole. In 2003, Wyoming modified its law to provide for the automatic restoration of voting rights for persons convicted of non-violent crimes.

Even prior to HAVA, sixteen states passed laws addressing polling place accessibility, mandating that new voting systems be accessible and provide a way for visually impaired voters to cast a secret vote, or otherwise making the voting process more accessible to elderly and disabled voters. In 2003, 10 states passed measures to improve accessibility for voters with disabilities, some as part of comprehensive HAVA implementation and others with single-issue bills.

At the same time, states passed laws that moved in the other direction, restricting the right to vote by expanding prohibitions on felon and ex-felon voting and requiring universal voter identification for all voters which goes far beyond HAVA's minimum standards. Florida's first election reform bill, while requiring election supervisors to post a "Voter's Bill of Rights and Responsibilities" also explicitly stated that the new law creates no rights and cannot be enforced by any civil action.

While increasing protections for the right to vote are certainly possible through progressive state laws, there is certainly no uniformity and no overwhelming trend to do so. Even at the state level, the majority of new laws passed since the 2000 election have dealt with technical aspects of election administration rather than overall grants of rights and the creation of meaningful remedies for violations of those rights. State election reform efforts do not indicate that substantial state rights guaranteeing exercise of the franchise make further federal constitutional protection unnecessary.

II. HAVA – What it Does and How States are Implementing It.

For our purposes, HAVA's salient features can be summarized as follows:

1. **Money to states:** Title I authorizes \$650 million to be made available to states, half to implement the election administration requirements under the act and half to replace punch card and lever machine election equipment.
2. **Uniform Election Technology and Administration Requirements:** These are part of the new law's minimum, mandatory requirements, contained in Title III. While not every state is required to seek funds, every state must comply with the minimum standards on various timetables. The requirements include:
 - a. Voting system standards including an opportunity for voters to verify their ballot before it is cast, manual audit capacity, including a permanent paper record, accessible to the disabled, able to provide alternative language accessibility, and comply with error rate standards by January 1, 2006.
 - b. States must enact provisional voting laws by January 1, 2004.
 - c. States must have computerized voter registration lists which assign a unique identifier to each voter, are coordinated with other state agencies and other state databases, are immediately accessible by state and local election officials; and must have list maintenance procedures in place to remove ineligible voters and update the database including safeguards against removing eligible voters by January 1, 2004 or self-certify that they need until January 1, 2006 to comply.
3. **Anti-Fraud Voter Identification Requirements:** Individuals registering to vote must provide a driver's license number or the last four digits of their social security number, and the data in the state motor vehicle database must match the information in the voter registration database. First-time voters registering by mail must provide photo identification or other government document showing their name and address when registering or voting. Federal mail-in voter registration forms must be changed to include an initial check-off box indicating that the applicant is a U.S. citizen, although states are

under no obligation to change their state voter registration forms to include check-off boxes.

4. **Election Assistance Commission:** Title II establishes a four-member “Election Assistance Commission (EAC)” with numerous responsibilities in administering various programs established by the law, including grant programs, technical assistance to states, and the development of guidelines.
5. **State Election Reform Plan:** In order to receive funding, the Governor of the State must submit to the Commission a plan demonstrating how the state will improve election administration procedures, provide for voter education, distribute funds, and adopt performance goals and measures. States must also certify that they are in compliance with other federal election laws in order to receive funds under HAVA.
6. **Grants to Ensure Access for the Disabled:** The U.S. Secretary of Health and Human Services is authorized to administer grants to state and local governments to make polling places accessible to persons with disabilities, including the blind and visually impaired.
7. **Enforcement and Criminal Penalties:** HAVA provides no new remedies for violations of the right to vote. If state and local officials fail to comply with Title III of the act, containing the voting system standards, provisional voting and voting information requirements, computerized statewide voter registration list requirements, and new voter registration and voter-id procedures, the Department of Justice is authorized to bring a civil action in federal district court for declaratory and injunctive relief. If an individual voter feels that the state has violated the any provision of Title III, and if the state receives federal money under the act, the state is required to set up a complaint procedure and the voter can file a complaint. If, under that procedure, the state decides that it has violated the act, it shall provide an appropriate remedy. This is essentially an “internal affairs” model of complaint resolution. The state has the chance to correct administrative errors that citizens bring to its attention, but the individual has no opportunity to require a state to do anything it does not consent to do, and there is no neutral decision-maker to evaluate the facts of a complaint.

There is no private enforcement of an individual’s rights under HAVA in federal court, unless a state authorizes such suits as part of their administrative procedure, a highly unlikely proposition. In short, if HAVA does expand the right to vote in any way, it does so without providing an independent remedy for violation of that right.

There are, however, expanded criminal penalties for individuals. HAVA makes it a federal crime to conspire to “deprive voters of a fair election” which happens when an individual knowingly and willfully gives false

information in registering or voting. Additionally, it is a federal crime, under HAVA, to knowingly commit fraud or knowingly make a false statement with respect to citizenship status.

The National Conference of State Legislatures reports that in the year since HAVA was passed, forty-five states have considered HAVA-related legislation, and thirty-six states have passed new HAVA-related laws. Of those thirty-six, twenty-four are comprehensive HAVA-compliance laws designed to bring their state's laws into compliance with the numerous mandatory requirements summarized above. The five states without HAVA-related legislation are: Delaware, Michigan, Ohio, South Carolina and Virginia. Recently released state plans give an overview of how states will be using the federal money they are receiving under HAVA. Nationwide, while election reform is progressing on different tracks in each state, most states are spending at least 21% or more of the federal money they receive on new machines, and thirty-six states are spending 40% or more of their federal funds on new machines.

Some of the key issues being monitored as states implement HAVA include new machine expenditures and controversies over the reliability of some vendor's products, the ease of use and instruction provided for voters unfamiliar with the new technology, the security of touch-screen or DRE voting systems, how states are implementing the statewide voter registration database requirements, what changes are being made to state laws involving voter identification requirements, and how the provisional ballot requirement is being implemented. Advocates in New York, Colorado, Massachusetts and elsewhere have lobbied to try to make sure that the state planning process is open to community involvement from a cross-section of public interest organizations. Overall, state implementation of HAVA has focused on upgrading voting machines, and changes in voter registration processes.

Perhaps the most significant positive benefit of HAVA in protecting the right to vote will come from effective use of provisional balloting. While states have widely different practices currently, this mechanism has the potential, when implemented properly, of catching the votes of qualified voters whose registration applications were not processed correctly. For example, Utah issued 10,686 provisional ballots in 2002, of which 8,315 were determined to be legal votes. Maryland also used a provisional ballot for the first time in 2002, but issued them only to voters who had attempted to register at the Motor Vehicles Administration. Of 1,451 provisional ballots, 437 were counted because officials were able to determine that the voter's registration application or new information had not been processed due to administrative error.

Conducting efficient elections with easy to use election machines, highly trained precinct officials, accurate voter registration rolls and an adequate provisional ballot safety net certainly improve the chances that few voters will be denied the right to vote. But improvements in election technology and more sophisticated computerized registration databases are no substitute for legal remedies when intentionally or unintentionally, election practices and procedures do abridge the right to vote. Potential

barriers to the effective franchise for all citizens still exist, and the legal framework for attacking those barriers remains woefully inadequate.

III. Major Threats to the Right to Vote in 2004

Those who seek to limit the right to vote of minority voters, poor voters, and others continue to use a variety of old and new tactics. Leaving aside vote dilution, which continues to be a significant barrier to the effective political participation of minority voters throughout the country, and the Supreme Court's near-complete erosion of Section 5 of the Voting Rights Act, as significant problems beyond the scope of this discussion, there remain several significant ways that the right to vote, particularly for minority voters, is in jeopardy.

Here are some substantial potential barriers:

1. *Wrongful purging of qualified voters from statewide voter registration databases.*

This is the "Floridization" of voter registration databases problem. If states fail to ensure the accuracy of the data they use to determine who has a felony conviction, fail to use accurate data regarding persons whose civil rights have been restored, or fail to use appropriately strict matching criteria so that different people with similar names are not mistakenly identified as the same person, it is likely that many voters, including many black voters, will be wrongfully removed from statewide voter databases. There is wide latitude for administrative decisions on crucial factors to be made behind the scenes that will significantly impact whether HAVA's statewide databases requirement will improve elections or prevent legally qualified voters from voting. Provisional ballots do not solve the problem unless election officials are willing to re-examine why a person's name was removed from the list and whether the criminal justice system information is correct. While arguments have been advanced that election officials should bear the burden of proof before removing a voter's name from the voter registration list, HAVA does not require state purge programs to carry any particular safeguards for wrongful purging, and does not specify that a voter's name should not be removed unless there is clear proof of the voter's ineligibility to vote.

2. *Improper rejection of legitimate voter registration applications because of mismatches with state data or the failure to verify identifying information.*

Again justified by the phantom voter fraud problem, HAVA's minimum standards include the requirement that new voter registration applications must include a driver's license number or the last four digits of the voter's social security number. That information must then be matched with data the state has in its drivers' license files or with data from the Social Security administration. The crucial question is, what happens if the data does not match perfectly. For example, Susan gets married, takes her husband's last name and moves with him to a new county. She mails in her voter registration application to the board of elections in her new county before changing her driver's license to reflect her new address. Her name on the voter registration application

will not match her name in the state's drivers' license database, nor will her address. Is her voter registration application rejected? Since having an up to date drivers' license is NOT a requirement to be a voter in Susan's state, she is legally qualified to register without having to update her drivers' license information. It is wrong under state law for the state to refuse to register her. However, the Department of Justice has recently issued the advice that in those circumstances, the application "must be denied." The exact language of the law is as follows: "Determination of validity of numbers provided – The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law." Nevertheless, the Justice Department, while acknowledging that HAVA, like the NVRA, leaves the ultimate decision of whether to register an applicant up to the State or local election official who has that authority under State law, at the same time insists that Congress intended for such applications, where the "verification process" indicates that the registrant is not eligible, has provided inaccurate or fraudulent information, or information that cannot be verified, the registrant must be rejected.

How often this becomes a problem will depend on what states do to verify the information. Will Susan's local election official call her up on the phone and ask her why her last name and address are different on her drivers' license? Will she have the chance to explain that, since under state law she has 60 days to change her license, she plans to do so the first day she can take off from work and wait three hours in line at the DMV? If not, will the state inform voters that when they move they should change their driver's licenses first before trying to change their voter registration? This example doesn't even factor in the numerous problems that arise when inaccurate data, or data entry errors result in difficulties verifying the information a voter has provided.

3. Difficulties with, and Discriminatory application of, voter id requirements.

It is certainly true that some people will have difficulties producing the identification required under HAVA of first-time voters who register by mail. For states that are newly implementing blanket voter id requirements for everyone, it is more likely that large numbers of voters will show up at their precinct without proper id. Most damaging, however, is the potential for poll workers to require one or more forms of identification for minority voters, while applying more lax standards to white voters. These problems have been reported in numerous elections in Virginia, Florida and other states with voter identification requirements that pre-dated HAVA.

4. Negative impact of the citizenship check-off requirement.

New citizens, and persons who for language, literacy or other reasons have difficulties filling out forms, are likely to find their voter registration applications rejected because of the new and completely redundant requirement for federal voter registration applications that a voter check-off that they are a citizen and will be at least 18 years old when they go to vote. This new requirement, put in place without any demonstration that a) there is a problem with non-citizens fraudulently registering to vote or b) that the

problem will be eliminated by requiring the check-off box on voter registration applications, could result in thousands of eligible voters not being registered to vote.

5. *Intimidation of minority voters at polling places.*

Unauthorized poll watchers, videotaping of voters as they approach precincts, setting up police road blocks on the way to precincts in black communities, and threatening to challenge the qualifications of black voters if they try to vote are time-honored tactics that surface in every major election. Two weeks ago, the Mississippi Secretary of State requested help with investigating serious voting irregularities in seventeen counties, involving attempts to intimidate voters. HAVA did nothing to address this problem. While such activities violate the Voting Rights Act because they make it more difficult for minority voters to participate in the political process, and they are usually targeted at minority voters, current enforcement, which is primarily in the hands of the Department of Justice, has not been aggressive or particularly effective in eliminating these scare tactics.

IV. Conclusion

Legislation at the state and federal levels following the 2000 election has sought to correct some of the problems that led to so many votes being lost throughout the country. While some new measures, such as provisional ballots, have the potential to help protect the right to vote, overall, there have not been new rights established at the state level. HAVA does not give private citizens the ability to go to court to protect their right to vote, nor does it put in place any new penalties that might prevent or discourage practices that abridge the right to vote. Election reform has been an administrative and technical effort for the most part, motivated more by concerns about voter fraud and less about denials of the right to vote. Significant problems, some created by HAVA, some pre-dating it, still threaten the right to vote. Any effort to draft a constitutional amendment articulating a general right to vote should include attention to how these problems can be addressed.

National Conference of State Legislatures, *The States Tackle Election Reform*, October 7, 2003, available at: <http://www.ncsl.org/programs/legman/elect/taskfc/03billsum.htm> [hereinafter NCSL 2003 Report].

148 CONG. REC. H7841 (daily ed. Oct. 10, 2002 (statement of Rep. Steny Hoyer (D-Md.))).

148 CONG. REC. S10500 (daily ed. Oct. 16, 2002 (statement of Sen. Christopher Dodd (D-Conn.))).

See, id.

148 CONG. REC. H7842 (daily ed. Oct. 10, 2002).

See, e.g., 148 CONG. REC. S10488-90 (daily ed. Oct. 16, 2002 (statement of Sen. Kit Bond R-Mo.)); S10500 (daily ed. Oct. 16, 2002 (statement of Sen. Mitchell McConnell R-Ky.)).

See United States Commission on Civil Rights, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001).

See, e.g., Democratic Investigative Staff, House Committee on the Judiciary, *How to Make Over 1 Million Votes Disappear: Electoral Sleight of Hand in the 2000 Presidential Election*, (August 20, 2001).

Caltech/MIT Voting Technology Project, WHAT IS, WHAT COULD BE 8-9 (July 2001) [hereinafter Caltech/MIT Report].

Id. at 17.

U.S. Census Bureau, Current Population Survey, Voting and Registration Supplement, *cited in* Caltech/MIT Report at 8-9 and 90.

Id., in addition, anecdotal accounts of election-day irregularities such as those highlighted in Florida and elsewhere in the country support this finding. *See, e.g.*, Advancement Project, AMERICA'S MODERN POLL TAX: HOW STRUCTURAL DISENFRANCHISEMENT ERODES DEMOCRACY, (Nov. 7, 2001).

Volusia County's Supervisor of Elections, for example, was criticized publicly for leaving convicted felons on the voter registration rolls.

Dirk Johnson, *Judge Delays Closing of Polls in St. Louis Amid Unexpectedly Heavy Turnout*, N.Y. TIMES, Nov. 8, 2000, at B10 (quoting Senator Kit Bond).

148 CONG. REC. S10488 (daily ed. Oct. 16, 2002 (statement of Sen. Kit Bond R-Mo.)) The allegation that 3,000 voters double-voted was later disputed by state officials in the affected states who investigated the claim and concluded that it had no basis in fact. *See* Jim Drinkard, *Dems Blast GOP Efforts on Voter Fraud*, USA TODAY, Oct. 24, 2002, at 8A.

See Brian Kim, *Recent Development: Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 587 (2003) (reporting controversy regarding military ballots in the 2000 election).

See United States General Accounting Office, ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS 7 (October 2001).

See Schur, Kruse, Schriener, and Shields, *Voter Turnout, Voting Difficulties, And Disability In The 2000 Elections: Laying A Challenge At Democracy's Door*, available at: <http://www.accessiblesociety.org/topics/voting/voterturnout.htm>.

H. REP. NO. 107-329(I) at 31-54 (December 10, 2001).

Id. at 31.

Id.

See, e.g., id. at 38.

42 U.S.C. § 1973gg-6(c)(2)(A).

H. REP. NO. 107-329(I) at 38 (December 10, 2001).

Rhode Island, for example, passed a state law updating its election machines contingent on the receipt of federal money.

Martin Luther King, III and Greg Palast, *Jim Crow Revived in Cyberspace*, BALTIMORE SUN, May 8, 2003, available at: <http://www.sunspot.net/news/opinion/oped/bal-op.voting08may08,0,7994499.story?coll=bal%2Doped%2Dheadlines>

Letters opposing the identification requirements by civil rights groups are collected at: Constitution Project, Election Reform Initiative – Letters to Congress on H.R. 3295, at <http://www.constitutionproject.org/eri/legislation.html>

See National Conference of State Legislatures, *The States Tackle Election Reform*, March 24, 2003, available at: <http://www.ncsl.org/programs/legman/elect/taskfc/TackleElectRef.htm> [hereinafter NCSL 2002 Report]

2001 Fla. Laws ch. 40. For a summary of the Florida election reform bill, see www.ncsl.org/programs/legman/elect/taskfc/flbill.htm.

NCSL 2002 Report, *supra* n. 28.

See 2001 Wash. Laws, Chap. 41.

CAL. ELEC. CODE §14025 et seq. (2001).

Id., §14030.

2001 N.M. Laws, Chap. 46.

2001 Ky. Acts Chap. 115

2001 Conn. Acts, P.A. 01-11.

2003 Wyo. Sess. Laws, Chap. 132.

NCSL 2002 Report, *supra*, n. 28.

The 10 states are: AZ, AK, FL, GA, IN, LA, ME, NV, ND, WA, compiled from the NCSL Election Reform Legislation Database, available at: http://www.ncsl.org/programs/legman/elect/elections_search.cfm

See, e.g., Massachusetts H.B. 2883, 2001; 2001 Ark. Acts, Act 560; 2003 Ark. Acts, Act 1451

Alabama, Colorado, Montana and South Dakota enacted new laws requiring all voters to show identification at the polls following HAVA. *See* electionline.org, *Election Reform Briefing: Roads to Reform, Planning for the Help America Vote Act*, 8, September 2003 [hereinafter “*electionline.org HAVA Planning Briefing*”].

After reciting the bill of rights and responsibilities, the Florida law states: “Nothing in this section shall give rise to a legal cause of action.” 2001 Fla. Laws, ch. 40, §60 (3) (codified as FLA. STAT. ANN. §101.031(3)).

There are numerous comprehensive summaries of HAVA available online. *See, e.g.*, Leadership Conference on Civil Rights, *Voting Rights Fact Sheet, Summary of H.R. 3295*, February 11, 2003, available at: <http://www.civilrights.org/issues/voting/details.cfm?id=11266>; National Assn. Of Secretaries of State and National Conference of State Legislatures, *Help America Vote Act of 2002 Summary*, November 19, 2002, available at: <http://www.ncsl.org/programs/legman/elect/nass-ncslsummaryw-orecs.htm>.

Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 301-303, 401, 116 Stat. 1666, 1704-15.

Id., §402, 116 Stat. 1715-16.

Id., §905, 116 Stat. 1729.

NCSL 2003 Report, *supra* n. 1. DEMOS-USA also maintains a list of HAVA-related legislation, available at: <http://www.demos-usa.org/demos/HAVA/bills-5-15%20-%20update.htm>.

electionline.org *HAVA Planning Briefing*, *supra* n. 41 at 3.

See, e.g., ACLU of Florida, *Analysis of September 10th Voting Fiasco in Miami Dade Demonstrates Disproportionate Impact on Racial Minorities*, October 21, 2002, available at: <http://www.aclufll.org/racialimpactrelease.html>.

See id. at 5-8; League of Women Voters, *Helping America Vote: A Guide to Implementing the New Federal Provisional Ballot Requirement*, August 2003,

[hereinafter *LWV Provisional Ballot Guide*] available at:
http://www.lwv.org/join/elections/hava_resources.html.

See, e.g., Letter from Asian American Legal Defense & Education Fund, et al, to Thomas Wilkey, Executive Director, NYS Board of Elections, November 22, 2002, available at: <http://www.demos-usa.org/demos/HAVA/Wilkey%20letter%20Nov%202002.pdf>;

LWV Provisional Ballot Guide, supra n. 50 at 3.

Id.

I am also leaving aside here at least two of the major ways that the franchise is currently restricted, namely by denying the vote to felons and ex-felons, and by denying representation to residents of the District of Columbia, because those are covered by other papers.

See Barber, Halpert, Wright and Litwin, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HARV. C.R.-C.L.L.REV. 483 (1988)

Letter from Hans A. von Spakovsky, Counsel to the Assistant Attorney General, Civil Rights Division to Judith A. Arnold, Esq., Assistant Attorney General, Counsel for Election Laws, Maryland dated September 8, 2003, available at: www.usdoj.gov/crt.

HAVA, Section 303(a)(5)(A)(iii).

Clay Harden, *Voting Problems Widespread in Counties*, CLARION LEDGER, November 5, 2003.