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Recommendations on Implementation of the "Help America Vote Act"

The "Help America Vote Act of 2002" (HAVA) impacts every part of the voting process, from voting machines to provisional ballots, from voter registration to poll worker training. This introduction is designed to assist citizen activists, concerned organizations, and government officials in implementing the new law in ways that will ensure the enfranchisement of all eligible citizens and encourage efficient administrative practices. Not every element of the HAVA is covered, but the most important parts of the act are set out. Because of the complexity of the law, there will be differences of opinion on how it should be implemented. This briefing aims to encourage implementation that will be most efficient and sensitive to the voting rights of all Americans. More restrictive interpretations may be possible, but the law should be implemented to enfranchise rather than disenfranchise, and restrictive interpretations may encourage legal challenge. Concerned citizens should contact us for further information.

The law can be found on the Library of Congress website (thomas.loc.gov). Search for "HR 3295" and select the "enrolled" version. Or select Public Law # 107-252.

To be eligible for major federal grants, each state must establish a fund in the treasury of the state government and develop an implementation plan in a public process. Fulfilling the requirements of the law and implementing the state plan may require states to make legislative changes as well as changes in administrative practices. Citizens should be involved in each of these processes.

Over the past two years, news coverage of the voting reform issue has often made it seem as if most voting problems will be solved by the purchase of new voting machines. This is simply not true. States need to overhaul a wide variety of election procedures, as laid out in this briefing, in order to bring about true voting reform.

The State Planning Process

The state implementation plan must be developed in a public process. This includes both participation by citizens in the process and a public review. The state's chief election official should ensure that the membership of the planning committee: (1) represents citizens who will advocate for the voters' interests, and (2) reflects the make-up of the electorate. In states covered by the alternative language section of the Voting Rights Act, committees should include members of relevant language minorities. Committees should be nonpartisan rather than bipartisan. States and jurisdictions should be encouraged to wait on large equipment purchases until the state's needs and priorities have been determined. Consideration should be given to reforms that can expand the franchise, including election day registration and public education on voting rights restoration for citizens with felony convictions. The state plan should be completed before the state legislature passes conforming legislation, and the law's requirements should be linked to the state fund. Be

alert to the level of discretion left to election officials. States should make sure that counties and municipalities agree to a “maintenance of effort” in funding election administration.

Disability Access

In addition to requiring and paying for one accessible voting system in every polling place by January 1, 2006 (see Voting Systems), the HAVA allocates \$100 million to make polling places physically accessible, but there is no national definition of “accessible” or a deadline for implementation. The state plan and legislation should include a definition of “accessible” and a deadline for complete implementation. Cities and counties should not substitute federal money for their local share of election administration costs -- the result could be that they spend the federal funds before becoming accessible. States should offer a California style permanent absentee ballot for voters with disabilities who voluntarily wish to vote absentee.

Provisional Ballots (Title III, Sections 302 (a) and (d))

1. By January 1, 2004, every state must provide a provisional ballot to any person who declares they are: a) registered to vote and b) eligible to vote in a federal election. Even if she is not on the voter list or her eligibility is challenged, she must be offered a provisional ballot.
 - a) (Technically, the voter declares to be a “registered voter in the jurisdiction in which the individual desires to vote.” States or localities may attempt to use a restrictive definition of “jurisdiction,” such as precinct. The HAVA contains no definition, but the National Voter Registration Act (NVRA) defines jurisdiction for federal purposes as the largest geographic area governed by a unit of government (municipality or larger) that performs all the functions of a voting registrar. When the statewide voter list is operational, this will be a state; until that time, in many states, it will be a county. It is not a precinct or polling place.)
2. A state must have a system to determine whether to count each provisional ballot cast. While the precise details are not set out, the decision to count or not count an individual ballot must be made “in accordance with State law.” A well-run system should provide for counting a vote if the voter is eligible to vote for a particular office; for example, a voter should have his vote counted for a U.S. Senate race even if he is not eligible to vote for a local office because he is not a resident of a particular ward or district. Also, the system must set up uniform procedures by which an official “determines that the individual is eligible under State law to vote.”
3. Election officials must establish a system to notify a voter who cast a provisional ballot whether it was counted, and if not, why not. At a minimum, there must be “a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.” At the polling place, the voter must be given written instructions on how to obtain that information. However, a state should also send a mailing to voters whose votes are not counted so they can, by return mail or other method, correct any problems and vote in future elections.
4. The system for providing, verifying and counting provisional ballots must be uniform throughout the state and within each polling place. This means that states must set up uniform systems and, perhaps more importantly, ensure that there is uniform poll worker training for applying the system on a consistent basis throughout the state.

5. A state or local election official's verification of voter eligibility should automatically retain the voter's registration for future elections. In addition, many states have created a provisional ballot envelope that doubles as a voter registration application. If the election officials find the voter is not registered, the information on the ballot envelope is used to register the person, thus saving both the election official and the voter time and energy.

Voting Information (Title III, Section 302 (b))

After January 1, 2004, voting information must be posted at every polling place on election day, including: a) a sample of the ballot used for that election, b) instructions on how to vote, including how to cast a vote and how to cast a provisional ballot, c) instructions for mail-in registrants and first-time voters (see other sections), d) general information on voting rights under applicable federal and state laws, including information on the right of an individual to cast a provisional ballot, e) instructions on how to contact the appropriate officials if these rights have been violated, and f) general information on federal and state laws prohibiting fraud and misrepresentation.

States should go farther than this minimum posting requirement by creating a Voter's Bill of Rights, listing the right to replace a spoiled ballot, the right to vote of anyone standing in line when the polls close, the right to ask for and receive assistance from polling place officials, etc. In addition to being posted, the Bill of Rights should be mailed to voters and published in local newspapers.

Voting Systems (voting machines) (Title III, Section 301)

1. Each polling place must have "at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities." The voting system must "be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters." Full federal funding is provided.
2. Otherwise, states should consider whether spending money on new voting machines is the best use of election reform resources at this time. Voting machines may not be the most significant problem facing voters. According to the Caltech/MIT study, voter registration and polling place problems equal or exceed voting equipment problems nationwide. The use of funds to improve registration management systems may be the best, first use of money. In addition, future voting machines may be better than current versions, and current capacity problems in the industry may raise the cost of machines.
3. By January 1, 2006, all voting systems must provide for "second chance" voting. The system must allow the voter to privately and independently a) verify her votes on the ballot, b) provide the opportunity to correct any error (through issuance of a replacement ballot if necessary), and c) be notified and have the opportunity to correct an "overvote" (casting too many votes for a particular office, usually more than one vote).

Voter Registration

A. Identification Requirements When Registering to Vote (Title III, Sec. 303(a)(5))

A state may not accept or process any voter registration application unless it includes: 1) the applicant's driver's license number or, if the registrant doesn't have a current and valid driver's

license, 2) the last four digits of the applicant's Social Security Number. For voters who do not have either of the above numbers, the state must assign a unique number to identify the voter for registration purposes. It is up to the state to determine "whether the information provided by an individual is sufficient to meet the requirements . . . in accordance with State law."

The chief state election official and the state motor vehicle authority must enter into an agreement to match information in their databases "to verify the accuracy of the information provided on applications for voter registration." "Verify" is undefined. In addition, the motor vehicle authority must enter into an agreement with the U.S. Social Security Commissioner "for the purpose of verifying applicable information." There are no specifics on "matching" or "verifying," indeed there is no requirement that individual applicants be checked.

B. Addressing the Problems and Concerns Created by these Provisions

The voter registration provisions pose several concerns. First, driver's license and Social Security data are liable to errors. Second, data may not match due to inadvertent mistakes such as transposing numbers or changing names. The result will be that eligible voters will not be registered, impacting women, ethnic minority group members and persons with disabilities disproportionately. The following steps should be taken to help guard against these risks when drafting state legislation, regulations, or training manuals to implement the above federal provisions:

1. The responsibility and authority for accepting and verifying voter registrations lies with the state, not with local officials acting on their own. States must ensure that systems are in place for the uniform and nondiscriminatory application of these procedures. Because the chief election official of the state administers the registration list, that official is responsible. (See the section on statewide voter lists.)
2. The statewide voter registration system should be designed and integrated so that the DMV and other state databases provide missing or erroneous data for voter registration applications. For example, if a registrant provides a partial driver's license number, along with name and date of birth, the DMV system can correct the driver's license number and the application can be accepted, processed and verified.
3. Notice to the voter is important. Under the NVRA, each applicant must be given notice of the disposition of the application. Under the HAVA, when information cannot be verified through DMV or SSA records, the state should require election officials to notify voters in sufficient time for them to correct the problem before the next election. The state should also require election officials to assist and facilitate the process of making these corrections.
4. A properly designed and run voter registration system will reduce the need for complicated and confusing voter identification systems at the polls.
5. Though the deadline for these new restrictive voter registration provisions is January 1, 2004, states may receive a self-certifying waiver until January 1, 2006, since the provisions are part of the statewide voter registration system (see below). States should make sure that the voter registration provisions take effect simultaneously with the establishment of their statewide voter registration list.

6. States should update their voter registration forms to ensure that applicants may provide their driver's license number or, if they have no driver's license, the last four digits of their Social Security number. A literacy expert should be consulted when designing forms.

Citizenship and Age Boxes (Title III, Section 303 (b)(4))

The HAVA requires that the federal mail-in registration form include check-off boxes for citizenship and being 18 years of age by election day. If neither the "yes" box nor the "no" box is checked, the State is required to notify the applicant of the incomplete form with sufficient time to allow completion of the form. This subsection is "subject to state law," so the state may choose to honor the affirmation of citizenship and age that goes with the signing of the registration form and register a person who did not check the "yes" box. (If a "no" box is checked, the application should be rejected). The HAVA does not require states to redesign their state voter registration forms to include check-off boxes.

Identification for First-Time Voters Who Register by Mail

A. Identification Requirements When Casting a Ballot (Title III, Sec. 303(b))

A citizen who registers by mail and either, 1) has not previously voted in an election in the state, or 2) has not previously voted in a jurisdiction in a state that does not yet have a statewide computerized voter registration list, must present: 1) a current and valid photo identification; or 2) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. Voters who do not present ID must be permitted to cast a provisional ballot (but whether the vote will count is determined by the provisional ballot system). (If a first-time voter casts her vote by mail, she must submit a copy of one of the documents with the ballot.)

Exemptions: The ID requirement does not apply if the voter is entitled to vote absentee under the Uniformed and Overseas Citizens Absentee Voting Act, the Voting Accessibility for the Elderly and Handicapped Act, or other federal law. In addition, a voter is exempt if she submits either a driver's license number or at least the last four digits of her Social Security Number and her identity is verified by matching this information with an existing state record.

B. Addressing the Problems and Concerns Created by this Provision

The ID requirement presents a significant risk that election officials and poll workers may, at their discretion, selectively notify voters of alternative forms of identification and/or fail to identify the complete list of available alternatives. In states that already have photo ID requirements similar to the new federal provision, there have been discriminatory impacts on racial and ethnic minority voters, persons with disabilities, the elderly, youth and the homeless. The following steps should be taken to help guard against these risks:

1. Implement the statewide voter list as soon as possible. A statewide list will ensure that voters who have moved between jurisdictions in the state and reregistered by mail will not be subjected to unnecessary ID requirements. This will also reduce the burden on poll workers and other election officials.

2. Recognize that registrants who are matched or verified in the voter registration program (with either driver's license or Social Security information) are exempt from the ID requirement.
3. Recognize that the ID requirement only applies to registrations received "by mail." If an organization conducts a voter registration drive and hand delivers the resulting forms to a registrar, those are not registrations "by mail" and the ID requirement does not apply to those applicants, even if the mail-in form is used.
4. Provide training and require election officials and poll workers to notify voters what forms of identification they may present as "current and valid photo identification" (such as student cards) and what alternative ID qualify if they do not have photo ID. List numerous examples of alternative identification, and post them at polling places. Also, require notification that voters without ID are still entitled to cast a (provisional) ballot.
5. Require that state and local election officials collect and report information on the impact of these provisions on voters, including the number and demographic characteristics of voters who do not have the required identification.
6. Registrars should issue voter cards and those cards should include the voter's name and address. The state should provide funding for voters to purchase government-issued ID and to make copies of identification to submit with mail-in ballots.

Statewide Voter Lists (Title III, Sections 303 (a))

1. Each State, acting through the Chief State Election Official, must establish an official, uniform and nondiscriminatory statewide computerized voter registration list that is centralized and interactive. While the system must allow local election officials to enter information and have access to the list, states must ensure that the Chief Election Official has responsibility and authority for each entry. The system must be coordinated with other state agency databases.
 - a) States should integrate the DMV database and other state systems, especially those of disability, public assistance and other social service agencies, with the voter registration database. This will ensure that list maintenance and voter registration systems are routinely and easily updated with change of address information.
 - b) The responsibility and authority for accepting, verifying, updating and purging voter registrations lies with the state alone. States must ensure the uniform and nondiscriminatory application of these procedures. As local election officials interact with the statewide list under state law, there must be sufficiently clear statewide standards to avoid non-uniform treatment of voter registration applications and inconsistent list maintenance procedures.
 - c) The statewide voter list should be designed and operated so that the DMV and other state databases provide missing or erroneous data for eligible voters. For example, if a registrant forgets his or her driver's license number, a matching name, address and date of birth should be sufficient in most cases to verify the voter in the DMV database.
 - d) States should make the entire list available to all local election officials, including poll workers, on election day. A laptop computer at the polling place is preferable so that poll workers can verify eligibility of any voter and the location of their polling place. On-line access at the polling place should be considered. List access at polling places can facilitate reforms like election day registration.

- e) States are not required to use a Social Security number as an identifier; rather states should assign a driver's license number or other unique identifier that can be tied in with the DMV to facilitate accurate list maintenance.
 - f) States must take the appropriate steps necessary to provide "adequate technological security measures to prevent the unauthorized access" to statewide voter lists. The statewide voter lists will contain confidential information that if improperly disclosed could not only threaten a voter's privacy, but would also make the voter vulnerable to identity fraud.
2. List maintenance programs must ensure that eligible voters remain on the voter lists. Eligible voters must not be erroneously removed from the list.
 - a) At a minimum, a state's system for purging voters must ensure against false positives and must verify the accuracy of the data that is used to develop the final lists. Those compiling the list must use unique identifiers and personal verification by the voter so that if two people share the same name and birthdate, one is not unlawfully removed (such as one William Hill being removed because another William Hill is convicted of a felony).
 - b) The quality and integrity of the data used to determine felony convictions, deaths and duplicates must be the highest possible, with checks to ensure that only accurate and reliable data are used. There must be a system to detect and correct data entry and other errors. For a true duplicate, there must be a one hundred percent match on the first name, last name, address, date of birth and all other available information (such as a unique identifier or middle initial).
 3. List maintenance procedures carried out pursuant to the new law must comply with the National Voter Registration Act (NVRA). Removal of any name from the statewide voter registration list for any reason is subject to the same "notice and opportunity to correct" provisions in the NVRA that are required for removal of voters for change of address.
 - a) States must provide all voters with notice and the opportunity to correct errors before being removed from registration lists. Voters must also be given two federal general elections after the notice is sent to appear at the polls to correct any errors and cast their ballots.
 - b) Voters cannot be removed simply because they have not voted. A notice to a voter that he or she may be removed from the list must be triggered by some information indicating that the voter may have moved or otherwise become ineligible.
 - c) Purging must be completed before 90 days ahead of an election.

Poll Worker Training and Recruitment

1. States must put training systems in place for poll workers and other election officials to ensure uniform and nondiscriminatory treatment of voters in determining: a) who is offered a provisional ballot, b) whose provisional ballots are counted, c) how "second-chance" voting works, d) who may provide assistance to voters in the polling booth, e) who is asked for identification at the polls, e) what forms of identification are accepted at the polls, f) what forms of identification are accepted upon registration, g) how registration applications are processed and approved, h) how voters' names are removed from the list because of ineligibility or duplication and i) how voter education requirements are carried out.

2. Because of Bush v. Gore, the NVRA, the HAVA and the Voting Rights Act, states should ensure the same procedures are used at all polling places statewide, within each polling place, and at each registration agency. Effective training, using the best methods available from adult education systems, should be designed to ensure this result.
3. Recruiting a diverse and large enough number of poll workers is a continuing issue in election administration. Citizen organizations will want to work with election officials to assist in recruitment and training. Officials should consider: a) using government workers as poll workers through assignment by their employers, voluntary paid service or unpaid voluntary leave; b) encouraging private employers to assist by providing poll worker leave; and c) seeking students and other youth poll workers through schools and outreach programs.
4. The issue of poll workers, election officials or “poll watchers” who are seen to be discouraging or intimidating voters should be dealt with in training programs. At a minimum, law enforcement personnel in uniform should not be part of the polling process.

State Complaint Procedure/Alternative Dispute Resolution (ADR)

(Title IV, Section 402)

1. States must develop a uniform and nondiscriminatory administrative procedure that allows any person to file a complaint for violations of the Act. This must include a formal complaint process with a hearing on the record, if requested by the complainant. Both system violations (such as failure to set up an appropriate provisional ballot process) and individual violations (such as failure to provide someone a provisional ballot) must be addressed. States must set up procedures that provide a means to address and resolve violations that occur immediately prior to an election or on election day. Certain procedures will be best for election day violations (such as a voter hotline and accessible election officials at each polling site).
2. The state must designate an agency to be in charge of the complaint procedure. It should not be the same agency that carries out any of the substantive provisions of the Act, but a separate agency that reports directly to the governor. The process must be completed within 90 days or the complaint must be resolved by an ADR proceeding. An ADR system must have the full record available and must provide for additional findings, especially where the state has not responded and the record needs to be established so that the complaint can be resolved.
3. All aspects of the complaint procedure should be open for public review. The procedure should be simple enough for voters to use on their own, but also allow complainants to have advocates assist them if they choose. States must make voters aware of the procedures for filing a complaint and that they are entitled to a full hearing on the record. States must also notify voters about the ability to seek ADR if there is no response from the agency designated to resolve the violation.
4. The state is required to determine if there has been a violation of the Act and make the appropriate findings and order a remedy. A final determination should be subject to judicial review according to each state’s administrative procedures, as all determinations by state agencies are generally accorded. In the unlikely event that there is not a state administrative procedure act (APA), states should implement a means of judicial review by a state court of decisions under this Act. ADR cannot be a substitute for judicial review.