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# Election Reform: Politics and Policy

James W. Ceaser

Daniel J. Palazzolo

University of Richmond, [dpalazzo@richmond.edu](mailto:dpalazzo@richmond.edu)

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# Election Reform

## Politics and Policy

Edited by

Daniel J. Palazzolo and James W. Ceaser



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# I

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## INTRODUCTION

The introductory section of the book includes two chapters. The first chapter describes the general trends in election reform from 2001 to 2003, including the variation in reform activity among the states, and develops the framework used to explain election reform across eleven states. The second chapter reviews the essential components of the Help American Vote Act (HAVA) passed by Congress in October 2002 and suggests some ways in which the states are likely to respond to the incentives and requirements of the HAVA. Both chapters provide an important context for the next eleven chapters that analyze election reform politics in the states.

# Election Reform after the 2000 Election

*Daniel J. Palazzolo*

The 2000 presidential election, marked by a crisis in the electoral process in the state of Florida and a challenge to the legitimacy of the election of George W. Bush, sparked a national debate on the quality of American democracy. The discussion quickly came to focus on “technical” problems associated with voting practices, including issues related to voter registration, ballot counting, ballot machinery, and election administration. Numerous commissions weighed in on these issues and made recommendations for reforming various aspects of the election system.<sup>1</sup> Congress debated election reform and ultimately passed the Help America Vote Act (HAVA) at the end of the 107th Session of Congress in 2002. Legislatures in all fifty states also took up the issue, and many states passed measures to improve election administration.

The proliferation of election reform across the United States raises several important issues for scholars, policy makers, and election reform analysts. The central focus of this volume is on questions dealing with the legislative responses to the 2000 election. What policy changes did the states and Congress enact in response to the 2000 election crisis in Florida? How can we explain the policy choices they made, or failed to make? What remains to be done to improve elections in the United States? This book addresses these questions by applying a framework for explaining the type and degree of election law reform in the states between 2001 and 2003. A striking fact in this analysis is the wide variance in the responses of the states. State legislatures reacted differently to the 2000 election, in terms both of the degree and the pace of policy changes aimed to correct problems with their election systems. State performance in election reform can be classified under one of three broad categories: (1) states that took the initiative and engaged in major electoral reform well before the

passage of HAVA; (2) states that made incremental changes during the same period; and (3) states that did little or nothing until being prompted, or forced to respond to federal legislation. Table 1.1 classifies all fifty states into these three categories of reform.

The primary analytical and theoretical purpose of this research project is to explain the variation in election reform across the states after the 2000 election with reference to a framework that includes the following key factors: (1) the threat of a close election, like the one experienced in Florida, (2) the capacity of election law in the state prior to 2000, (3) the state's political culture, (4) the partisan makeup of the legislative and executive branches, (5) the fiscal situation, (6) the influence of stakeholders—interested groups and election officials, (7) commission recommendations, (8) leadership, and

**Table 1.1. Classification of Fifty States by Three Patterns of Election Reform, 2001–2003**

<i>Leading Major Reform States:</i>		
<i>Moved quickly after the 2000 election to enact comprehensive reforms, including funding to replace voting equipment</i>		
Florida	Georgia	Maryland
<i>Incremental Change States:</i>		
<i>Gradually enacted modest but noteworthy improvements in election laws and in most cases lacked a consensus or did not find the need to adopt comprehensive reforms</i>		
Alaska	Mississippi	Rhode Island
Arkansas	Missouri	South Carolina
California	Montana	South Dakota
Colorado	Nebraska	Tennessee
Idaho	Nevada	Texas
Indiana	New Jersey	Utah
Iowa	New Mexico	Vermont
Kansas	North Carolina	Virginia
Kentucky	North Dakota	Washington
Louisiana	Ohio	West Virginia
Maine	Oklahoma	Wisconsin
Michigan	Oregon	Wyoming
Minnesota	Pennsylvania	
<i>Late-Developing Reform States:</i>		
<i>Failed to adopt significant reforms until forced by the requirements of the Help America Vote Act (HAVA).</i>		
Alabama	Delaware	Massachusetts
Arizona	Hawaii	New Hampshire
Connecticut	Illinois	New York

(9) external forces, such as the prospect—and ultimately the passage—of federal legislation. We use this framework to engage in systematic analysis of the reform politics in a sample of eleven states selected from the three categories in table 1.1.<sup>2</sup> The states of Florida, Georgia, and Maryland fall into the first category of major reform states; California, Idaho, Missouri, Pennsylvania, and Virginia represent the second category of incremental change states; and Arizona, Illinois, and New York are instances of the third category of late-developing reform states.

## HOW MUCH REFORM?

Within months after George Bush was finally certified the winner of Florida, recommendations for reforming elections emerged from various commissions set up to study election systems and processes. A review of the commission reports revealed a broad consensus in favor of several minimal requirements in each state's electoral systems: statewide registration, provisional balloting, procedures that allow voters to correct their ballot, and standard procedures for conducting ballot recounts. Other aspects of the voting system that achieved consensus, but might be classified as enhancements that go beyond those requirements, included: up-to-date voting machinery and ballots, improved poll worker training, additional voter education, and better tactics for recruiting poll workers. Because some of those provisions are costly, even if state legislators believed that they are desirable, fiscal constraints might prohibit them from being enacted. Two other major issues—establishing statewide recount procedures and standards, and restoring the right to vote for felons who have completed their sentences—also received widespread support among commissions, but these matters turned out to be more contentious among policymakers. Finally, commission reports themselves took different views on “reforms” relating to the role of the national government in election administration, no excuse early voting, military and overseas ballots, and accessibility for disabled voters (electionline.org 2001, 16–17).

In spite of the crisis that ensued from the 2000 presidential election, few states enacted immediate wholesale changes in election law. In a report published a year after the 2000 election, Common Cause President Scott Harshbarger summed up the legislative activity of the states: “By looking at what’s happened in state legislatures in the past year, you’d never know that we had a genuine electoral crisis on our hands just a year ago.” He further noted: “Even with all the commission reports, academic studies, and investigative journalism on our electoral shortcomings, states have not responded with the kind of urgency that the problems demand. Many are simply waiting in vain

for financial help to arrive from Washington without doing anything to pave the way” (Common Cause 2001). Thomas Mann of the Brookings Institution noted: “If you expected an immediate policy response after the debacle of November and December, you have been and will be disappointed” (Walsh 2001, A02). As table 1.2 illustrates, states passed only a portion of the election reform bills introduced in the three years following the 2000 presidential election. Presumably, gridlock at the state level was rooted in fiscal constraints, anticipation over whether Congress would provide federal funding and mandates for state level action, and a lack of consensus among policy makers (electionline.org 2001, 8; Walsh 2001; Walsh and Balz 2001). One academic study concluded that state legislators failed to reform election laws because incumbent legislators had little incentive to change the status quo (Greco 2002).

It may be that some of the expectations of rapid and universal actions were excessive, given the difficulty and complexity of the issues involved. While the general picture of limited initial reform is valid, there was considerable movement afoot in a large number of states. A fifty state survey of legislative actions compiled by the Election Reform Information Project, published about one year after the 2000 election, found a mix of legislative changes. At the high end, Florida, Georgia, and Maryland enacted significant reforms in several aspects of their voting systems, including registration, ballot design, counting procedures, voter education, and voting equipment. Other states passed a variety of laws that made incremental improvements in voter registration (e.g., Colorado, Indiana, Kansas, South Dakota, Texas, and Virginia), absentee or early voting (e.g., Nevada, New Mexico, and Virginia), voter assistance and poll place access (e.g., Nevada and New Mexico), voting equipment (e.g., Idaho, Texas, and Utah), vote counting (e.g., Maine, Nevada, Ohio, and Virginia), post-election recount procedures and standards (e.g., Colorado, Kansas, Texas, Virginia, and Washington), election day workers (e.g., Alabama), and voter education (e.g., Indiana and New Jersey). Of course, some states, such as Arizona, Illinois, and New York, failed to make any significant changes in election law in the period immediately following the 2000 election. Given the mix of responses among the states, it should be both interesting and instructive to inquire into why a few states immediately made major changes, why others only took incremental steps, and why others still failed to take action until Congress passed the HAVA.

**Table 1.2. Election Reform Legislation in the States, 2001–2003**

<i>Bills</i>	<i>2001 Bills</i>	<i>2002 Bills</i>	<i>2003 Bills</i>
Introduced	2,088	1,555	1,692
Passed Into Law	321	171*	285*

\*Does not include New York.

Source: National Conference of State Legislatures, “States Tackle Election Reform” (March 24, 2003, and August 22, 2003) [www.ncsl.org](http://www.ncsl.org).

## ANALYTICAL FRAMEWORK FOR EXPLAINING ELECTION REFORM

In the study of state-level elections, political scientists have focused much less attention on the formation of election law than on campaign finance, candidate recruitment, redistricting, and voting behavior, including the effects of ballot design, candidate status, early voting, motor voter, party control, fiscal conditions, and registration and voting laws.<sup>3</sup> Since the 2000 election, political scientists have conducted research on the effects of the butterfly ballot on voting errors in Palm Beach County, Florida (Wand 2001); the relationship between demographic and socioeconomic factors and the type of voting equipment voters use (Knack and Kropf 2002); the causes of voided ballots (Tomz and Van Houweling 2003; Knack and Kropf 2003); and the inconsistencies in ballot design (Niemi and Herrnson 2003). Thus far there are no published academic studies of the legislative aspects of election reform.

Understanding how and why state legislators responded to the election crisis of 2000 is of practical interest to policymakers, administrators, and policy analysts. Explaining why the states responded in different ways has theoretical implications for the broad study of policy innovation.<sup>4</sup> With these purposes in mind, it seemed helpful to develop a general framework, based on the major factors related to reform, to study the various patterns of election law activity in the states.

The framework permits analysis of election reform on three dimensions. First, it allows the testing of hypotheses for how each factor independently affects election reform. Second, by distinguishing between structural factors in place prior to or at the conclusion of the 2000 elections (i.e., the threat of a close election, the capacity of election law, political culture, and party control) and situational factors that took effect as the legislative process developed in each state (i.e., commission recommendations, the fiscal situation, stakeholders, leadership, and external events), it is possible to map the sequence of factors that affected the outcomes of the legislative process. The structural factors are antecedent variables whereas the situational factors are intervening variables in the sequence of the legislative process. Finally, the framework allows consideration of the combined effects of key factors on reform outcomes. The independent effect of any single variable may be either muted or enhanced by the presence of other factors listed in the framework.

### Structural Factors

#### *Threat of a Close Election*

The chaos that occurred in Florida, or something akin to it, could have happened in any state in an election that was as close and as crucial to the outcome of the national decision. The closer the election, the higher are the stakes for the candidates and their parties. Unless all of the problems associated with



ensuring the accurate counting of every vote are eliminated, controversy is inevitable in close elections. Having said that, some states are clearly more susceptible than others to the danger of a Florida-style debacle. We begin with the hypothesis that, following Florida's lead, battleground states, in which the margin of victory for the winning candidates is close to 1 percent or less, are more likely than non-battleground states to seek immediate and perhaps major changes in election administration.<sup>5</sup>

Applying an objective standard is the most reliable way to measure the threat of a close election, though the perceptions of a threat, and the role of policymakers in framing the degree to which a close election might disrupt the electoral system, also came into play in some states. For example, Maryland falls into the category of major leading reform states, even though it is traditionally a state won comfortably by Democratic candidates in presidential elections and in statewide races. (The recent election of Republican gubernatorial candidate Robert Ehrlich in 2002 is a notable exception.) An objective measure of the "closeness of the election" would not lead one to expect that Maryland would be a state inclined to comprehensive reform. But other factors—Maryland's progressive political culture and persuasive leadership—worked in this direction.

### *Capacity of Election Law*

A state's potential for a disaster like the one experienced in Florida also depends on the capacity of election law. While human error will always create the possibility of controversy in a close election, the chance of crisis and breakdown can be reduced by clear and uniform statewide recounting rules, comprehensible ballots, functioning machinery, an effective statewide registration system, and effective voter education, poll worker training, and poll worker recruitment tactics. The capacity of a state's election law should be an important factor in explaining the degree of legislative reform following the 2000 election. While no state could claim perfection, some states had greater capacity than others to administer elections.

One way to measure the capacity of election law is to determine the extent to which a state meets the minimum requirements for elections agreed upon by various commissions—statewide registration, provisional balloting, procedures for allowing a person to change his/her vote, and standard procedures for conducting recounts. Florida had none of these in place prior to the 2000 presidential election. States that met one or more of these minimal requirements before the 2000 election would have greater capacity and would be less in need of reform than states like Florida.<sup>6</sup> A state's residual vote rate and type(s) of voting equipment used by the voters in a state are also objective measures of capacity. States with relatively high rates of overvotes and undervotes and large numbers of punch card machines are most

susceptible to voter error (see Ansolabehere and Stewart 2002; Knack and Kropf 2003).<sup>7</sup> Those states should be more likely to engage in reform.

### *Political Culture*

A state's political culture can affect the type and degree of election reform. King (1994) uses Elazar's (1984) concept of moralistic, individualist, and traditionalist political cultures and Sharkansky's (1969) index of political culture to study the effects of political culture on registration rules and voting turnout in the states. King (1994, 118) hypothesizes that: "Apparently, some cultures value and promote citizen participation in the political process more than others." He finds that a state's political culture affects registration rules; states with more "traditionalist" cultures, where elites dominate the process and are more inclined to discourage voter participation, had more restrictive registration rules than "moralistic" states that value democratic governance and citizen participation. Thus, states with traditionalist and individualist cultures are less likely to react immediately and adopt reforms that ease voter participation than states with moralistic cultures.

Once again, other variables may enhance or diminish the effects of political culture. States with traditional cultures may also have a history of poor election laws, and a limited capacity of election law, coupled with strong leadership and the threat of a close election might overcome cultural barriers to reform. Georgia fits this pattern of election reform. Conversely, states that value voter participation and "good governance" might enact major changes in spite of the fact that they have good election laws in place and face no clear threat of a close election. Maryland fits this pattern of reform.

### *Party Control*

Partisan control of the legislative and executive branches at the state level is a factor in explaining legislative output generally (Clarke 1998), though the effects vary by policy area (Bowling and Ferguson 2001). While many aspects of election law are nonpartisan, a few divide along party lines. As Cokie Roberts once put it, "Democrats want every vote to count; Republicans want every vote to count only once" (Ceaser and Busch 2001, 248). Republicans have been more likely to seek safeguards against fraud in voter registration and voting processes, while Democrats are more committed to ensuring equal access to polling places and recount rules that allow for consideration of the voter's intent (Seligson 2001). Democrats and their constituent groups opposed a provision in a United States Senate bill that required a photo ID at the polling place for voters who register by mail (Foerstel 2002). Republicans are also less likely to support restoring voting rights for felons who have completed their sentences. Democrats are generally more supportive of a stronger role for the

national government, including clear requirements, rather than mere guidelines, that states and localities must meet to comply with federal law (Calmes 2001). Thus, a Republican-controlled legislature coupled with a Republican governor will have different priorities than a Democrat-controlled legislature and a Democratic governor. Legislation might be more likely to stall altogether in states where legislatures are nearly equally divided by party, or where one party controls only one of the two chambers (Clarke 1998), or perhaps where opposite parties control the legislative and executive branches.

Once again, though, party control cannot be viewed in isolation from other factors; states with strong party competition may also be the most susceptible to a close statewide election. Major reform may also be less likely in state legislatures dominated by one party, although the outcome of the process may also depend on which party is in control. States in which one party dominates the state government are almost by definition less likely to experience close elections, and legislators of the majority party will have few incentives to change election laws. Idaho, where the Republicans are firmly in control and have been for a long time, is perhaps a case in point. Such states are obviously less prone to partisan gridlock, but they are also more likely to make incremental changes than to adopt major reforms. Party preferences also affect the behavior of the dominant party; states dominated by Democrats may seek major reforms to solve problems associated with election administration. This was the case in Maryland, for example. Perhaps the states most likely to adopt major reform, then, are those in which one party controls both the legislative and executive branches and where the legislative majority of either party has a comfortable margin of control, or where the Democratic Party dominates.

## **Situational Factors**

### *Commissions*

In addition to numerous national commissions and task forces established to review election administration in the United States, twenty-one states formed commissions to study some aspect of election law or the election system in their states.<sup>8</sup> In general, commissions may be set up to solicit information from experts, shift blame for unpopular decisions, or manage legislative workloads (Campbell 1998). In the case of election reform, commissions were mainly created to solicit information about the status of electoral systems and, especially in states with short legislative sessions, to manage workloads. The commissions were designed to develop a better understanding of the election problems within their respective states and, in most cases, to recommend improvements in the election system. To the extent that commissions serve as a means of building consensus among interested parties, election law changes are more likely in states that have commissions.

*Fiscal Situation*

The state's fiscal situation is also likely to affect reform efforts. Election reform emerged just as the nation was entering a recession. After years of full coffers, many states experienced revenue shortages in 2001 and 2002, and costly election reforms had to compete with other spending priorities. Fiscal constraints may prohibit upgrades in registration systems, resources for new machinery, and funds for voter education or poll worker recruitment, even if policymakers agree that they are worthy improvements. For the first two years of the reform period, fiscal constraints may also have caused states to wait until Congress and the president acted before investing new resources in the election system. On the other hand, in cases like Florida the political crisis was so severe and the public expectations for reform were so great that legislators overlooked the budgetary effects of new spending.

*Key Stakeholders: Interested Groups and Election Officials*

Organized groups are important participants in the legislative process. At the state level, group density influences the amount of legislation introduced and the ratio of introduced legislation enacted into law (Gray and Lowery 1995), and group representation affects the lawmaking process (Bowling and Ferguson 2001). At the national level, civil rights groups have worked vigorously to expand voting rights and to impose federal requirements for ballot access and provisional voting. Group influence should accordingly be a factor in states where existing laws do not meet the expectations of civil rights groups. Several of the chapters in this volume assess the effects of reform advocacy groups, such as state chapters of the NAACP, Common Cause, and the League of Women Voters.

In addition to organized interest groups, state-level agencies, local election officials, and election reform experts actively participated in the election reform process, either by serving on commissions or working directly with legislative committees. In many states, election officials played key roles in setting the reform agenda and providing valuable information about the election system to policy makers. The studies in this volume also reveal jurisdictional differences between state and local officials. As the drift of the reform debates moved toward greater uniformity across states, local officials were particularly concerned about losing control over election administration and about the potential financial costs of sharing the burden for new voting equipment. Thus, we begin with the hypothesis that states with centralized election systems may be able to reach consensus more easily than states with decentralized systems, where administrative authority is more dispersed.<sup>9</sup>

### *Leadership*

Leaders may also play important roles in moving legislation. In the area of election reform, several notable policy entrepreneurs seized the moment to advance changes in election law.<sup>10</sup> For example, Cathy Cox, the Secretary of State in Georgia, made election reform a top priority and provided important leadership in her state. Secretary of State John Willis exercised similar leadership in Maryland. States without active leaders, either from the executive branch or within the legislature, are less likely to achieve significant reform. In some cases, legislative leaders will seek to preserve the status quo in election law. They may prefer to maintain, rather than reform, a system within which the majority party gained power. In general, because elected officials are more directly accountable to voters, strong leadership on election reform is more likely in states that elect executive officials to administer elections.

### *External forces*

This study concentrates on different factors at the state level to account for the degree and type of electoral reform taken in response to the crisis of the 2000 election. Yet two other forces from outside the states that came after the 2000 election also affected the politics of election reform: (1) the prospect of federal legislation, including grants to states that upgrade their election systems and guidelines for spending those funds, and (2) the September 11, 2001, terrorist attacks.

Prior to the passage of the Help America Vote Act (HAVA), many states hesitated to enact reforms, as state legislators awaited legislative action from Washington. The enactment of the HAVA, with requirements and guidelines about how states should administer elections, gave state legislators more incentives to adopt election reforms, though their responses will vary. Reports conducted by electionline.org illustrate the variety of recommendations that will come from state planning bodies established in response to the HAVA (electionline.org 2003b and 2003c). As Robert Montjoy points out in chapter 2, the HAVA offers a mix of requirements the states must meet to hold federal elections and incentives for them to reform election laws. The HAVA is likely to have a greater effect on states that made no significant changes in election law during the two years following the 2000 election; this was certainly true in Illinois and Arizona.

The September 11, 2001, terrorist attacks indirectly affected election reform efforts. Whereas the 2000 election may have created a sense of urgency for states to deal with election problems, September 11 pushed new issues on to the states' agendas. The momentum behind election reform lost steam after September 11, as states turned more attention to security issues and economic problems related to the terrorist attacks. Though election reform

might have become less important for all states after the events of September 11, three states in this study—New York, Pennsylvania, and Virginia—were among the most likely to turn their focus toward economic and security-related issues.

## APPLYING THE FRAMEWORK: A COMPARATIVE STATE ANALYSIS

After an analysis of the role of HAVA in chapter 2, the authors in the next eleven chapters apply the framework of factors to each state. Through analysis of reforms in three categories of states, a few general conclusions can be suggested. Legislators in major, leading reform states generally recognized the threat of a close election and/or a weak capacity to administer elections, were bolstered by bold commission recommendations, and were strongly led. In these states, a consensus quickly emerged among stakeholders that significant reforms were needed either to deal with a crisis or with a potential crisis. Of course, Florida passed the most comprehensive reforms in this group, and it is distinguishable from the other states by having actually experienced a crisis. Thus, public opinion in Florida, more than in any other state, “demanded” a major policy response.

Legislators in incremental change states—Idaho, California, Missouri, Pennsylvania, and Virginia—either did not see the need for immediate, wholesale reforms because the capacity of their systems was generally sound and they did not face the threat of a close election, or they were deterred by economic conditions, partisan differences over key issues, or a lack of strong leadership. They did, however, make modest, steady improvements in various areas of the electoral process such as absentee balloting, provisional voting, recount procedures, and registration guidelines.<sup>11</sup> Several factors required for major reform were absent in these states, though the conditions were suitable for modest changes in particular aspects of their electoral systems.

In late-developing reform states (Arizona, Illinois, and New York), partisanship, political culture, and a failure of leadership resulted in gridlock for the first two years following the 2000 presidential election. Yet, the HAVA requires states to adopt specific reforms, if they have not already done so, including: upgraded voting equipment, voter identification rules and provisional ballots, and a statewide registration list. HAVA also creates incentives for policymakers to accept federal guidelines in exchange for federal funds to upgrade their voting systems. Arizona and Illinois responded affirmatively to the requirements and incentives of the HAVA, whereas New York has delayed passing legislation to bring the state’s laws into compliance with the HAVA.

In the concluding chapter, we draw general conclusions from our study of the individual states by a comparative analysis of the key factors that affect

reform and we use these results to look ahead at the next stage of election reform—implementation. We define the period of reform from the 2000 election to the passage of the HAVA as the “end of the beginning” of the process of election reform, and we suggest how key factors in the framework are likely to affect the future of election reform in the states.

## NOTES

1. Debates over election reform encompass a wide range of topics, including major institutional issues like the Electoral College, campaign finance, and campaign practices. While those topics are worthy of close analysis, this study focuses on reforms associated with the administration of elections. For links to the major national commission reports, see [www.electionline.org](http://www.electionline.org). See Crigler, Just, and McCaffery (2004) for studies and essays of various reform issues.

2. Though the eleven states chosen for this study are not a perfect sample of all fifty states, they represent the various patterns of reform politics that occurred across the states. The three leading major reform states (Florida, Georgia, and Maryland) were easy to choose because they were the only ones to meet the criteria. The most difficult task was selecting states that had made incremental changes, the pattern that fit the largest number of states. We estimate that thirty-eight states fit into the incremental change category. The five that were selected for this study offer a nice blend of key defining characteristics: size, regional location, population demographics, political characteristics, and election reform outcomes. One could have made a strong case for choosing several other states in the incremental change category, including Colorado, Indiana, Minnesota, North Carolina, Oregon, South Dakota, Texas, and Washington. Resource and space constraints prohibited us from including more states in the study. We encourage others to extend the analysis and apply the framework to those states. Finally, the three late-developing reform states were selected from nine states in this category. These states also offer a mixture of the key defining characteristics we used for selecting the incremental change states.

3. King's (1994) study of the effects of political culture on registration rules is an important exception to the general lack of attention to studies on the formation of election law. Most studies on elections at the state level have focused on campaign finance (see Thompson and Moncrief 1998) and (Ramsden 2002), candidate recruitment (e.g., Hogan 2001), redistricting (e.g., Lublin and Voss 2000), and voting behavior, including the effects of ballot design (Hamilton and Ladd 1996; Schaffner, Streb, and Wright 2001; Wand et al. 2001), candidate status (e.g., Carey, Niemi, and Powell 2000; Squire 2000), early voting (Stein 1998; Stein and Garcia-Monent 1997), motor voter (e.g., Franklin and Gwen 1997; Knack 1995), party control and fiscal conditions (Lowery, Alt, and Ferree 1998), and registration and voting laws (e.g., Burden and Greene 2000; Oliver 1996).

4. There is an extensive literature on policy innovation, policy diffusion, and policy adoption, and the findings of those studies have been organized in a variety of ways. Walker's (1969) frequently cited study contains a conceptual discussion of policy innovation and a review of the early literature. For a good review of literature on

the various dimensions of policy diffusion and innovation studies, see Savage (1985). For a review of studies that account for the various determinants that explain policy innovation and diffusion across space and over time, see Berry and Berry (1990) and Berry (1994).

5. Others might expect the opposite effect, suggesting that political competition—measured here in terms of the closeness of the 2000 presidential election—would be more likely to limit election reforms. Greco (2002) argues that the more competitive the state, the less likely elected officials would be to take the chance of passing reforms that might endanger their chances for reelection. Thus, policymakers in competitive states have more incentive to maintain the status quo than to adopt reforms. The trouble with this hypothesis is that it assumes the issues associated with election reform pose a major risk to incumbents or the majority party. The “rules of the game” certainly affect election outcome—especially rules associated with redistricting, campaign finance, and voter access or ease of voting. Yet this study will show that only a few of the issues associated with election reform evoke partisan differences, or cause politicians to worry about their electoral prospects.

6. It is worth noting the variety of registration systems and voter access laws, even among those states that have statewide registration databases and provisional ballots (see [electionline.org](http://electionline.org) and the Constitution Project 2001; and [electionline.org](http://electionline.org) and the Constitution Project 2002a). In some states with a statewide registration database the lists may be controlled either locally or centrally. The types and ways of administering provisional ballots vary among the thirty-seven states that have some form of provisional ballot. And recount procedures can be classified in several ways, including: whether the law has a trigger for automatic recounts, whether requests for recounts are permitted, who pays for the recount, whether partial recounts are permitted, and whether the recount is done manually or by a machine (National Conference of State Legislatures 2001a, 92–94).

7. For a survey of residual vote rates, see Edley et al. 2002.

8. Two states, Michigan and Florida, formed two separate commissions. For a complete list of states and commission reports, see [www.electionline.org](http://www.electionline.org).

9. For a fifty-state review of administrative coordination, see [electionline.org](http://electionline.org) and the Constitution Project (2002c).

10. In his study of consideration and approval of school choice in the states, Mintrom (1997) finds that policy entrepreneurs make a difference in the diffusion of policy innovation.

11. California was the only state in this group that committed funds for election equipment, though the funds were created through an initiative in March 2002.



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## HAVA and the States

*Robert S. Montjoy*

Policy makers trying to shepherd election reform through state legislatures must have glanced over their shoulders at Washington to see what, if anything, Congress would do. Possible federal action may have been a rationale for inaction in some states. It may have had the opposite effect in others, as political entrepreneurs hastened to craft and take credit for their own programs. Thus, with regard to timing, pending federal legislation may have accentuated the existing tendencies of states to be innovators or late developers. Expectations about federal action clearly influenced reforms in some states. For example, the state plans of Georgia and Maryland specifically mention having tracked the emerging federal legislation in their pre-HAVA (Help America Vote Act) state legislation. But others waited for final approval of HAVA before enacting reforms. By 2003 all of the states knew the incentives and requirements contained in the HAVA, and the law forced even the most recalcitrant states to address the reforms that Congress mandated. This chapter describes the requirements of the act and concludes with a few observations on the responses of the states that are covered in this volume.

### THE PURPOSE OF HAVA

HAVA is Congress's response to problems revealed in the 2000 presidential election. It expands the role of the federal government in the administration of elections, but its primary impact will be at the state level. HAVA establishes requirements and provides incentives for state action while leaving the states broad discretion for implementation. Many of the provisions of the act will also affect local governments, but it is up to the states to decide how it will

affect localities. HAVA will serve as a catalyst for change; the nature of the changes will vary as states interpret the act in light of their existing electoral systems and political interests.

The main goal of HAVA is to provide for uniform and nondiscriminatory administration of federal elections. That goal applies *within* states, not across states. HAVA's strategy is to make a single authority within each state accountable for key aspects of federal elections.<sup>1</sup> Given that authority for the administration of elections has been decentralized and even fragmented in many states, the implementation of HAVA will necessarily raise turf issues.

Understanding HAVA requires an examination of the instruments chosen for implementation as well as the policies enacted. At the federal level the act creates the Election Assistance Commission (EAC) but specifically denies it rule-making authority. HAVA doles out responsibilities to several other federal agencies as well. To stimulate the desired actions by the states, HAVA uses a variety of techniques. Three primary ones—information and voluntary standards, requirements, and funding—are discussed below.

As table 2.1 illustrates, HAVA contains many programs. The following account concentrates on HAVA programs and requirements for the states. First, it will be useful to consider the federal structure for implementation.

**Table 2.1. HAVA Outline**

Section	Purpose	FY 2003	
		Authorization (in millions)	Appropriation (in millions)
101-106	payments to states to: <ul style="list-style-type: none"> <li>• improve election administration</li> <li>• replace punch cards and lever machines</li> </ul>	\$325 \$325	\$650
201-210	Election Assistance Commission (EAC)	\$10 annually	\$2
211-216	Standards Board and Board of Advisers		
221-222	Technical Guidelines Development Comm.		
231	testing and certification of voting systems		
241-247	studies to improve election administration		
251-258	<ul style="list-style-type: none"> <li>• payments to help states meet requirements in sections 301-303</li> <li>• state planning process as prerequisite for receipt and maintenance of payments</li> </ul>	(3 years)	
261-265	payments to states and local governments to ensure access for persons with disabilities	\$100 3 years	\$13
271-273	grants for research on voting technology	\$20 (FY03)	<i>continued</i>

**Table 2.1. HAVA Outline (continued)**

Section	Purpose	FY 3003	
		Authorization (in millions)	Appropriation (in millions)
281–283	pilot program for testing equipment and technology	\$10 (FY03)	
291–292	payments to designated organizations within states to promote participation by persons with disabilities	\$10 annually (FY03–06, and as necessary thereafter)	\$2
295–296	National Student and Parent Mock Election	\$0.2 in FY03 and as necessary for 6 years	
301–305	requirements for states <ul style="list-style-type: none"> <li>• voting systems standards</li> <li>• provisional voting and voting information</li> <li>• state registration list and voter ID for first-time mail registrants</li> </ul>	See requirements, payments, sections 251-258	
311–312	voluntary implementation guidance by EAC		
401	enforcement by attorney general		
402	complaint procedure required in states		
501–503	Help America Vote College Program	\$5 for FY03 and as necessary thereafter	\$1.5
601	Help America Vote Foundation	\$5 for FY03 and as necessary thereafter	\$1.5
701–707	military and overseas voting, including <ul style="list-style-type: none"> <li>• postmarking and timely delivery of ballots</li> <li>• single state office for information on registration and absentee ballots</li> <li>• state reports to EAC on numbers of ballots transmitted and returned</li> <li>• ballots not to be refused for early submission</li> </ul>		
801	transfer of Office of Election Administration from Federal Election Commission		

**Table 2.1. HAVA Outline (continued)**

Section	Purpose	FY 3003	
		Authorization (in millions)	Appropriation (in millions)
811–812	applicability of certain other laws		
901	“state” includes D.C. and territories		
902	recipients of grants and payments to be audited and make repayments if requirements are not met		
903	clarifies ability of registrars to remove names from registration list		
904	attorney general to report on adequacy of existing electoral fraud statutes and penalties		
905	criminal penalties		
906	<i>no effect on other laws</i>		

### The Federal Structure

HAVA creates the Federal Election Assistance Commission (EAC) and assigns responsibilities to it and to a number of existing federal agencies. The EAC is to serve as a clearinghouse for information from state and local jurisdictions, provide for the testing and certification of voting equipment by accredited laboratories (but federal certification or lack thereof is not binding on the states), conduct studies to promote effective election administration, manage payments and grants, provide voluntary guidance to the states on the implementation of HAVA requirements, and implement the Help America Vote College Program. To help EAC develop guidelines and recommendations, HAVA creates the Standards Board, the Board of Advisors, and the Technical Guidelines Development Committee.

Several of these responsibilities are continuations and expansions of programs in the Federal Election Commission’s (FEC) Office of Election Administration (OEA). EAC will absorb the staff and duties of the OEA. This move represents an elevation of the federal role in election administration on a par with that of regulating campaign finance, which is the primary concern of the Federal Election Commission.

HAVA assigns duties to other federal agencies as well. The National Institute of Standards and Technology (NIST) is to provide assistance in the areas of voting systems technology and standards. The director of NIST chairs the Technical Guidelines Development Committee. The General Services Administration (GSA) is to distribute to the states on a formula basis the funds

authorized in Title I of the act to improve administration and help replace punch cards and lever machines. The Department of Health and Human Services is to provide grants to states and local governments and to protection and advocacy systems within each state to address the problems of voters with disabilities. The Social Security Administration is to enter into agreements with state driver's licensing agencies to share information, which, in turn, will be used to verify information in statewide voter registration files. The Department of Justice has responsibility for enforcing requirements on the states by civil actions in federal courts. The Department of Defense is to administer new requirements to facilitate registration and absentee voting by members of the armed services. The Comptroller General is to audit all funds provided under HAVA. Each of these agencies will impact the states directly and independently, except for NIST, which acts through EAC, and the Department of Defense.

### **Federal Funding**

HAVA authorized nearly \$4 billion over three years for implementation. Most of that money is to go to the states. The largest categories are \$650 million to improve election administration and to help replace punch card and lever voting machines (Title I) and \$3 billion to help the states meet Title III requirements for voter registration, voting systems, and voting safeguards. On February 13, 2003, Congress finally passed the 2003 budget. The HAVA budget included the full \$650 million for Title I and \$830 million of the \$1.4 billion FY 2003 authorization for Title III requirements. (Table 2.1 lists authorizations and FY 2003 appropriations for the various programs in HAVA.) This is a significant down payment, but it left the states with uncertainties about the amount and timing of future federal funding while they have to proceed with implementation to meet federal deadlines.

Interestingly, HAVA does not provide a deadline for the expenditure of the funds by the states. For example, a state could create a revolving loan fund for the purchase of voting equipment by localities and maintain the principal indefinitely. Although HAVA places specific requirements on the states, it does not place tight restrictions on the ways in which the states spend the funds to meet those requirements.

### **Studies and Voluntary Standards**

EAC is to serve as a national clearinghouse for information and to conduct studies on voting systems. Specifically mandated studies include human factor research and research on Internet voting. The call for human factor research stems from both the widely publicized failures of voters to register presidential votes as they intended (Caltech/MIT 2001; Brady, Buchler, Jarvis,

and McNulty 2001) and the long-standing concerns of advocates over access by the disabled and persons with limited English language proficiency. Research on Internet voting builds on a growing interest in the use of electronic transmissions to facilitate voting as well as fears of associated security problems (Internet Policy Institute 2001).

The EAC will also take over and extend the existing program of voluntary standards for voting systems. Well before the 2000 presidential election, the OEA had already been working in partnership with the NIST and the National Association of State Election Directors (NASED) to develop and promote standards (U.S. Federal Election Commission).

The program is a case study in intergovernmental action. With a few exceptions, the purchase of voting equipment has been a responsibility of local governments, usually counties. Most states have constrained local decisions through certification of specific brands and models. Without the voluntary standards each state would have to conduct its own tests, a task that is repetitive and expensive for vendors and beyond the technical capabilities of some state agencies. FEC and an association of state election officials (NASED) have cooperated in the development of national voluntary standards for voting systems. Vendors who wish to sell equipment have it tested against those standards at approved independent testing labs. States can then apply all, some, or none of the standards in certifying equipment, but the trend is for states to adopt the standards as requirements.

HAVA institutionalizes the voluntary standards program and makes provision for ongoing research and development. It adopts the existing FEC voting system standards as a starting point and provides a broad based process for proposing and reviewing new standards for adoption by the EAC. The EAC will also provide for the testing of voting systems by accredited laboratories, and the NIST will provide technical support and is to evaluate independent testing laboratories.

The intended effects of these provisions are to stimulate the development of improved voting systems and to inform, but not bind, state and local decisions regarding certification and purchase of the systems. There is, however, a timing problem. HAVA requirements for the states will compel decisions on replacement of many existing voting systems before new federal standards and certification are likely to be available. The great potential of HAVA's voluntary standards program lies in the long run.

EAC was also supposed to provide voluntary guidance to the states on the implementation of HAVA. Yet by the time the states had to submit their plans, the Commission was still not up and running. Organizations of state and local election officials, such as NASED and The Election Center, held meetings around the nation to learn about and share interpretations of the act. Members of the congressional staffs of both parties who helped draft the bill generously participated in these meetings and responded to individual questions.

They did not always agree with each other on the implications of particular provisions; states have the opportunity and obligation to make their own interpretation. Meanwhile, the states proceeded to draft implementation plans and submit them for public review in order to certify compliance with the planning process in FY 2003.

## STATE ACTIONS

While HAVA's provisions for studies and voluntary standards will affect the states indirectly by informing future decisions on electoral policy and voting systems acquisition, HAVA also directly affects the states through incentives and requirements. According to a survey by electionline.org (2003a), every state had to modify its system in one or more ways. In reviewing the effects of requirements and incentives on election technology and processes, it is important not to overlook their impact on state administrative structures. In many states, election administration has been a local responsibility with little or no administrative oversight from the state. HAVA makes the state the central actor, and for many programs it designates the chief state election officer as the responsible official.<sup>2</sup>

### **Title I Incentives**

Title I is divided into two programs. Section 101 authorizes block grants to be distributed to the states on the basis of voting age population. The allowable expenditure categories are broad and include improving the administration of elections for federal office, which could cover almost any election-related activity. Because Congress fully funded Title I in FY 2003, the states received shares of \$325 million for Section 101.

Section 102 is an incentive program for states to replace punch card and lever machines. The requirements of Title III virtually preclude the use of lever machines, but not punch cards, in federal elections. Title I, on the other hand, offers the states up to \$4,000 per qualifying precinct if they agree to replace all of their punch cards and lever machines by 2004, or 2006 with a waiver. A qualifying precinct is one that used punch cards or lever machines in the federal election of 2000. The goal of this provision was to push money to the states as quickly as possible. The states were given six months to decide whether to opt into the programs. Because Congress correctly anticipated that the EAC might not be operational by that time, it tasked the General Services Administration with distributing the funds. In some states Section 102 funds are not sufficient to replace all of the punch card and lever machines, thus those states might not have applied for funding. However, they have all made the necessary certification of intent. A great deal of new

voting equipment must be purchased and fielded by 2006, the last deadline for implementation. Accomplishing this goal will be a financial and administrative challenge in many cases.

### **Title III Requirements**

The states must meet Title III requirements dealing with voting systems, voter registration, and voting safeguards by deadlines ranging from 2004 to 2006. These requirements apply whether or not a state receives any funding. The money designated to help the states with Title III requirements (\$830 million in FY03), commonly referred to as “requirements payments,” is contingent on the state submitting an implementation plan and providing matching funds to equal five percent of the total. HAVA includes requirements for how the plan is to be created made available for public comment. In essence, the plan is the link between the requirements and the funding.

### **Voting System Requirements**

The initial cry after Election 2000 was to improve voting technology and, in particular, to replace the punch cards that were the center of the greatest controversy in the Florida recount.<sup>3</sup> The term “voting system” is broadly defined in section 302 to include software, hardware, and practices and documentation associated with functions ranging from the defining of ballots to the production of audit information. The following specific requirements of HAVA deal with state voting systems used in federal elections after January 1, 2006.

#### *Preventing Overvotes*

The system must (1) permit the voter to verify and, if necessary, correct the ballot in private before the votes are cast and (2) notify the voter and allow an opportunity for correction if he or she casts more votes than allowed for a particular office.<sup>4</sup> Punch card and central count voting systems may meet this requirement through an educational program designed specifically for each system that notifies voters of the effects of overvoting and how to correct an error, through a replacement ballot, if necessary. This notification exception was necessary because absentee and mail voting systems (such as that used in Oregon) rely on central count systems in which the voter is not present to correct an error.

#### *Audit Capacity*

The voting system must produce a permanent paper record that can be used in an audit or recount. This record is to be produced only after the voter has had a chance to correct his or her ballot. Lever machines do not automatically



produce an audit trail, although some of the congressional staff who worked on the act said they believed that simply recording the results from the back of the machines after an election would qualify. Some of the earlier (push-button) DRE equipment has the same problem, but manufacturers have suggested refits that they say will meet the requirements. Most touch-screen DRE equipment produces a tape with a record of individual votes, randomized to avoid identification. This record contains only what the machine recorded; the voter does not see tape. Some companies are now showing models that print out an individual ballot to allow voter verification. The issue of voter verification is, itself, controversial, with proponents, such as Representative Rush Holt (D-NJ), declaring it essential to ensure integrity of the vote count while opponents fear increased vote buying and intimidation if voters receive a printed copy of the ballot.

### *Accessibility for Individuals with Disabilities*

The system must allow individuals with disabilities, including the blind, to vote privately and independently in the same manner as other voters. This has been a key issue for the disabled community, many of whom required the assistance of someone else to cast a ballot that was, necessarily, not secret. HAVA specifies that this requirement can be satisfied by placing in each polling place one direct recording electronic (DRE) system or other system that can meet the requirements of the act with, for example, an audio function for the visually impaired.

### *Alternative Language Accessibility*

The system must meet the requirement in the Voting Rights Act of 1965 that any language minority constituting five percent or more of a local jurisdiction's population should have ballots and instructions available in its language. Most jurisdictions already meet this requirement by printing alternate ballots, setting up multiple languages on the ballot face, or using touch-screen direct recording electronic (DRE) devices, which can be programmed to present the ballot in one of several languages depending upon the needs of the voter.

### *Error Rates*

HAVA adopts as a requirement for 2006 the voluntary standard for error rates recommended by the Federal Election Commission at the time of the act's passage in 2002.

### *Uniform Definition of What Constitutes a Vote*

Each state is to develop a uniform and nondiscriminatory standard for what constitutes a vote for each voting system in use in the state. The re-

quirement stems from disagreements during the Florida recount on how to count such things as hanging chad on punch cards or stray marks on optical scan ballots. Florida, like many states, used an “intent of the voter” standard. The problem was that in a highly contentious recount, each party advocated different interpretations. Moreover, different counties were developing different interpretations. Other states had specific rules of interpretation (e.g., if chad is hanging by one corner count it, otherwise do not). HAVA requires all states to specify counting rules for uniform application within the state.

These requirements will affect states differently depending upon their existing laws and voting systems. The deadline of January 1, 2006, gives time for action, but not much time since the purchase and installation of new voting systems is a lengthy process. By far the most expensive requirements nationwide are for the replacement of voting equipment and the placement of at least one DRE, or other accessible system, in each polling place.

### Voter Registration Requirements

Voter registration, which is required in all states except North Dakota, is more than a means of establishing eligibility to vote. It also establishes *where* a person is eligible to vote. Since representation is geographically based, location determines the particular offices for which a person can vote. Election officials also use registration lists along with other information to estimate the need for equipment, supplies, and poll workers. Thus, accurate registration lists are important to the electoral process. HAVA affects state voter registration by mandating a statewide computerized voter registration list and requiring people who register for the first time in a state by mail to provide a form of identification.

#### *Statewide Registration List*

Section 303 of HAVA requires a “single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State.” The unique identifier is to be, in order of preference: a driver’s license number, the last four digits of a social security number, or a number assigned by the voter registration system. At an implementation workshop for election officials in San Francisco in December 2002, staffers who drafted this language said they piled on the adjectives to ensure a dramatic change from the locally based, sometimes manual systems in use in many jurisdictions

Both the central list and the unique identifier address longstanding problems in keeping the voter rolls current, problems compounded by increased mobility in the population and efforts to make voting more

accessible (electionline.org and the Constitution Project 2002a). When registrars receive an application, they check their lists to determine whether the person is already registered. A large jurisdiction can have many people of the same name. Removing “deadwood” can also be a problem as registrars have a hard time obtaining information on people who have moved or otherwise become ineligible. A computerized database with unique identifiers allows rapid checking of the file to speed the processing of applications and to remove prior registrations throughout the entire state.

Section 303 of HAVA contains specific requirements for list maintenance. Election officials are to maintain voting histories and use failure to vote in two consecutive federal elections as a trigger to investigate the voter’s status, but failure to vote by itself cannot be reason for removal from the list. HAVA also mandates a series of interagency and intergovernmental agreements to permit the matching of information in databases. Election officials are to coordinate with appropriate state agencies to obtain information on deaths and felony convictions. The chief state election officer is to enter into an agreement with the state motor vehicle agency, which is to enter into an agreement with the U.S. Social Security Administration, to share relevant information, subject to certain safeguards. All of this sharing is to collect and verify information on changes in status that affect an individual’s registration.

The implementation of a statewide voter list is not simple, as states that created their own central list before HAVA have discovered. Some of the issues are financial and technical: buying equipment, creating a database, obtaining training, and possibly hiring new staff to make a central voter file work. Some issues have to do with service to voters and to political parties. Local officials have complained that central lists are too cumbersome and that it takes too long to obtain copies or to make corrections, especially just before an election. (HAVA addresses this concern by mandating timely entry of information and immediate electronic access to any election official in the state.) Other issues have to do with politics and turf. Election history is full of accounts of manipulated voter lists, and there are still accusations in some jurisdictions of names added or not added, purged or not purged, to the benefit of one political faction and the detriment of another. Then there are straightforward issues of accountability. As one chief county election official in Alabama said, “If that list is wrong at the polling place, those people are not looking to the state, they’re coming after me.” For all these reasons, many local officials feel safer with their own lists, so centralization can be a contentious issue.

### *Registration by Mail*

HAVA also addresses a concern raised by the mail registration requirement in the National Voter Registration Act, or NVRA. A person who registers by mail

and votes absentee could vote for the rest of her or his life without ever being seen by an election official (Montjoy 1994). This possibility raised concerns about potential fraud. HAVA deals with this issue by requiring persons who use mail registration for their initial registration within a state to provide a form of identification when they register or when they vote for the first time in that jurisdiction. The identification requirement can be satisfied by a copy of either a valid photo identification, such as a driver's license, or one of a list of other documents, such as a utility bill, that show the individual's name and address. Another alternative is for the applicant to submit either a driver's license number or the last four digits of his or her social security number and for an election official to match the registration information in a state database.

Although the identification requirement does not appear onerous, it has caused concern and controversy. The concern has to do with the additional administrative processes required to enforce the rule. For example, election officials will have to track the names of persons required to show identification the first time they vote. Poll workers and absentee election workers will have to be trained to deal with them. Officials have expressed concern over the practice of requiring identification of some voters at the polls but not others. In addition, attempts to expand the HAVA identification requirement have caused controversy. Some states already require identification of all voters at the polls, and lawmakers in others have sought to follow suit by turning the limited HAVA requirement into a universal requirement. HAVA legislation failed over this issue during the 2003 legislative sessions in at least two states.

### **Voting Safeguards**

Section 302 of HAVA seeks to safeguard voting rights by requiring states to offer provisional ballots and to provide information to voters at the polling place.

#### *Provisional Ballots*

HAVA requires states to offer provisional ballots to avoid turning potential voters away from the polls. This requirement responds to complaints from Florida and other places that voters who believed they were registered were turned away from the polls. Under HAVA such a voter would be allowed to cast a provisional ballot after providing required information. Provisional ballots are to be kept separate from regular ballots until the eligibility of the voter can be determined under state law.<sup>5</sup> HAVA also requires that the voter be given written information on how to find out if the ballot was counted and, if not, the reasons for its rejection.

According to a survey conducted by electionline.org and The Constitution Project (2001), the HAVA provisional voting requirement will force changes in most

states. Many states have different voting safeguards and some have none at all. Thus provisional balloting will require changes in polling procedures and training for poll workers. In addition, states that have not used provisional voting in the past may have to allow more time for certification of elections. Those with closely scheduled elections, as is the case with some primaries and run-off primaries, may have to allow more time between them. The time needed will vary because the resolution of provisional ballots will still be a matter of state law.

### *Information Requirements*

HAVA requires certain information to be posted in the polling place. This includes: a sample ballot, the date and hours for voting, instructions on how to vote, instructions on how to cast a provisional ballot, other information on voting rights, and information on whom to contact if there is a problem. The goal here is to ensure consistency in administration by letting voters know what is required. (The administrative complaint procedure described below provides a mechanism for them to act on that knowledge.) Of course, poll officials are supposed to know and apply the law uniformly, but the recruitment and training of qualified poll officials is a major problem in most jurisdictions (U.S. General Accounting Office 2001, 168). HAVA also requires the posting of information for people who register by mail, including the identification requirements for those who register for the first time in a state.

### **The State Plan**

In order to receive requirements payments under HAVA, the chief election officer of each state is to develop a plan through a committee that includes local election officials (including the chief election officers of the two most populous jurisdictions), stakeholders (including representatives of groups of individuals with disabilities), and other citizens. The plan is to be made available for public inspection and comment for at least thirty days within the state before it is submitted to the EAC. Then, the EAC is to publish the plan in the Federal Register for forty-five days. The intent is clearly to create an opportunity for broad participation in the planning process. The plan can be changed in subsequent years, but any material changes must go through the same process as the original plan.

HAVA specifies a number of elements that must be included in the plan, several of which add, or strongly imply, additional requirements for states that take the payments. States are to describe how they will distribute funds to local governments and monitor their performance. In another section they are to describe the process for establishing performance measures and assigning responsibility for ensuring that each goal is met. These requirements essentially ask the state to describe its oversight role in implementation. Another item introduces the topic of education and training, which is not mentioned elsewhere in the act. If the state opts to produce standard training ma-

terials or offer a common training program to local officials, this will be a major step toward uniform administration. Finally, there is a maintenance-of-effort requirement that is not found in the rest of HAVA. It attempts to keep budget makers from substituting federal dollars for state dollars that were already being spent on the requirements.

The creation of explicit requirements by means of the plan raises the question of who is to enforce the plan. The EAC is not given explicit authority to approve or disapprove the plan. The required public reviews within the state and through the Federal Register are intended to allow interested parties an opportunity to comment and possibly bring political pressure or threaten lawsuits. The expenditure of funds by states will be audited. Since the plan is a condition for the receipt of the requirements payments, it is possible that noncompliance with a state's own plan could trigger repayment of funds.<sup>6</sup>

### **Funding for Title III Requirements**

HAVA authorizes \$3 billion over three years to help states meet the Title III requirements. The appropriations for FY 2003 are \$830 million. This money is to be distributed by the EAC on the basis of voting age population. To qualify for these payments each state had to create a fund for the federal and state money used to meet the requirements, submit a state plan for meeting the requirements, provide matching funds equal to five percent of the total, and make certain certifications. The states are still obligated to meet the requirements whether or not they receive any payments.

As was the case with the Title I funds, the chief executive officer "in consultation and coordination with the chief State election official" certifies the state's compliance with HAVA requirements. Section 253(b) of the act lists the requirements that must be met. Key among them are that the state has filed its plan for meeting the Title III requirements and implementing the complaint procedure contained in Title IV, and that the state has appropriated the five percent match. In particular, the chief executive officer must certify that the plan contains the required elements and was developed in accordance with the procedural and public notice requirements. These certifications have already been made for the initial submission of plans, but any material changes in the plans must go through essentially the same process as the original plan. So the chief executive officer, who may be of a different party from the chief elections officer, has an important role in the planning process.

## **OTHER REQUIREMENTS AND FUNDING**

### **Administrative Complaint Procedure**

Title IV, section 402, is a requirement for each state to set up an administrative complaint procedure. This was a compromise to allow states to police

their own systems. Basically, it empowers anyone to initiate a complaint to which the state must respond. If the complainant so requests, the state must hold a hearing on the record. The result of the hearing could be (1) a ruling of no violation and, thus, dismissal of the complaint but with publication of the results, (2) a remedy for the violation, or (3) if a final determination is not made within ninety days, a resolution of the complaint by an alternative dispute resolution procedure that the state will have created pursuant to this section. Many election officials were concerned about the potential administrative burden of elevating all election complaints to the state level with a formal hearing. Several features reduce the administrative impact. First, the complaint must be in writing and notarized. Anything that can be settled informally at the local level need not enter the system. Second, the complaints are limited to violations of the Title III requirements. Third, the states are authorized to consolidate complaints.

This lessening of the administrative burden does not negate the potential significance of section 402. This section forces each state to create a mechanism by which it can respond administratively to perceived problems in local jurisdictions, and it provides for the creation of a record that can be used in subsequent legal action. This will be a big step for some state election offices that have had no prior involvement in local administration. For voters, section 402 ensures that complaints will be answered, in one way or another, within a few months. Thus, the complaint procedure is another important vehicle by which HAVA seeks to increase the state role in elections in order to ensure uniform and nondiscriminatory administration.

### **Registration and Absentee Ballots for Uniformed and Overseas Voters**

Title VII of HAVA addresses problems of absent uniformed and overseas voters. It requires each state to designate a single state office to provide information on registration and absentee ballot procedures for uniformed and overseas citizens. It recommends that the state make that same office responsible for actually carrying out the procedures. The act further requires a report to the EAC of the number of absentee ballots transmitted and received in each federal election. Finally, it provides that no state can refuse to accept or process an otherwise valid registration or absentee ballot application on the grounds that it arrived too early within an election year.

### **Programs for Individuals with Disabilities**

HAVA addresses the longstanding problem of access to polling places by individuals with disabilities, including the blind and visually impaired. As is the case with the requirements for voting systems, the goal is to allow these individuals to vote in the same manner as other voters. The act sets up a proj-

ect grant program administered by the Department of Health and Human Services. States apply for funds to improve access and to provide information about accessibility. Congress appropriated \$13 million toward these goals for FY 2003.

## INITIAL IMPLEMENTATION OF HAVA

Except for the distribution of Title I funds and beginning analyses by the National Institute of Standards and Technology, implementation of HAVA has proceeded slowly on the federal level. The nomination and approval process for the Election Assistance Commission took until December of 2003. The states, on the other hand, had to act in order to meet deadlines and ensure that they would be eligible for federal funding, the amount of which is still unknown. A review of the plans submitted by the states in this volume shows both commonality and variety in their responses to HAVA. Three themes were common to the eleven states in our sample. First, they all promised compliance, though not all in the same manner. Second, they all took steps that would increase the authority of the chief election officer (CEO) in one way or another. The central voter file was the most obvious addition in most cases, though delegations of rule-making authority to the CEO were also important. A third and very prominent commonality was the expression of uncertainty, especially with respect to budgets. State officials pointed out that they could not predict some of the costs of implementation and that they were unsure of future federal appropriations. One state submitted its budget with the caveat that it would not consider revisions to be material changes (which would require the same review process as the original plan).

The differences among state plans reflect the different starting points of the states as well as their different strategies for achieving compliance. The early reformers had fewer new requirements to meet than the other states; in particular, they were further along in terms of equipment replacement. They had already invested substantial sums of their own money and would be seeking reimbursement under HAVA. We would expect the other states to make the most dramatic changes in response to HAVA because they had farther to go. That is the general pattern, but it is not uniform. Even some "late developers" were already taking action before HAVA that would bring them into compliance with provisions of the act. Illinois, for example, reported that it had begun work on a central voter file before the passage of HAVA. In other cases the degree of change needed to bring states into conformity varied because states' interpretations of the requirements vary. For instance, Idaho reported in its state plan that it would not require counties to replace punch cards.

The states in this study dealt with budgetary uncertainties in different ways. Six of the eleven states offered budgets that exceeded their "hoped



for” totals (the expected distribution of FY 2003 funds plus their share of the full authorizations for FY 2004 and FY 2005). While few expect to receive their full authorization, these budgets do communicate what the states claim to be the actual costs of implementation. They provide ammunition for future appropriations battles and a rationale for less than full implementation if Congress fails to fully fund HAVA. Others took a more conservative approach, usually budgeting only what they expected to receive in FY 2003 and promising to reallocate if additional funds became available. As a result, comparisons of expected expenditures across states are particularly revealing at this point.

Though HAVA has certainly spurred a great deal of activity at the state level and its requirements produced more commonality among the states, it is too early to judge the full impact of the law. The variation among the states is in the details. The degree of diversity among the states at this point is probably greater than it would have been if the EAC had formed early enough to play an active oversight role as states developed their plans. The states have necessarily had to make their own interpretations of the act and of the planning requirements. At this point the state plans tell us the intended direction of implementation, but the details remain unsettled as the EAC begins to take shape, Congress makes appropriations, and the states and their local jurisdictions work through the details of election administration.

## CONCLUSION: HAVA AND THE STATES

HAVA addresses many issues that emerged from the 2000 presidential election. Major programs directly affecting the states include voting technology, voter registration, voting safeguards, access for individuals with disabilities, and absentee uniformed and overseas voting. The programs are designed to make the state government, especially the chief state election officer, the central actor in implementation. Yet local election officials are still important in most states because they possess practical knowledge and political influence and because the states must rely on them for implementation. Elected officials, including the governor and legislators, are also important because they must pass implementing legislation that directly affects their own political interests.

It is important to recognize that the HAVA is forcing all states to deal with election reform. Changing election law is usually difficult because incumbents have a stake in the existing system and there is rarely a strong constituency for change. Election 2000 stimulated serious action in some states and the HAVA requires action in all. The focus on reform and the high probability of a bill with enough “legs” to get through the legislative

process are inviting to advocates of other measures that are unrelated to HAVA. Attempts to go beyond HAVA requirements caused problems in some legislatures.

The Help America Vote Act of 2002 signals a major change in the constellation of actors involved in the administration of elections in the United States. The federal role is elevated, but the greatest changes will likely come at the state level. HAVA seeks to provide uniform and nondiscriminatory administration of elections within states by pushing responsibility onto state governments and by providing them with authority (to implement requirements), funds, and information. The states and their local jurisdictions are working out new roles and relationships in the electoral process.

## NOTES

1. Of course, the effect will not be limited to federal elections. Elections for state, district and, in most cases, local offices rely on the same law, procedures, and equipment. The systems are so intertwined that changes in federal elections will affect virtually all elections and, therefore, the vital interests of elected officials.

2. The concept of a chief election officer is itself a federal imposition for some states. The National Voter Registration Act of 1993 (NVRA) required each state to name a responsible official for purposes of that act. HAVA extends the responsibilities of this official.

3. Voting equipment is usually divided into five types: paper ballots, lever machines, punch cards, mark-sense or optical scan equipment, and direct recording electronic (DRE) equipment. For a description of each type see U.S. Federal Election Commission (no date). DREs can further be divided into full-face, push-button equipment and touch-screen equipment. In the former, the voter sees the entire ballot at once and pushes buttons to register votes electronically. In the latter, the voter sees a series of screens and touches marked spots on the screen to register votes.

4. This requirement results from the number of uncounted presidential votes in the last presidential election. Whereas an undervote (failure to vote for any candidate) may be deliberate, the assumption is that most overvotes (voting for too many candidates) are accidental. The probability of an overvote varies with the type of equipment (Brady, Buchler, Jarvis, and McNulty 2001; CalTech/MIT Voting Technology Project 2001). Properly functioning lever machines and DRE equipment prevent overvotes. Optical scan ballots do not prevent overvotes, but the ballot-reading equipment can be set to return ballots with overvotes. This step is effective only when the ballots are counted at the polling place and the voter is present to complete a new ballot. Systems in which all the ballots are counted at a central location do not provide this option. Almost all punch card systems lack the "second chance voting" option, and paper ballots cannot be hand counted with the voter present without giving away ballot secrecy.

5. For example, a provisional ballot can be placed in a double envelope with only the outer envelope containing information that identifies the voter. When eligibility is confirmed, the inner envelope is removed and placed in a box. Later the inner envelopes are opened and the ballots are counted. This process allows a measure of ballot secrecy for the provisional voter as long as there is more than one provisional ballot.

6. Both the EAC and the General Accounting Office (GAO) have mandates to audit the expenditure of funds under the program. The GAO can order repayment of funds for noncompliance with any requirements under which the funds are distributed.