



**The Gifts of HAVA to American Democracy:
Time to Ask for a Refund**

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October 2005

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Executive Summary

The Help America Vote Act has turned the nation's election systems upside down and inside out. What is HAVA? Where did it come from? What does it mean to America's election systems? How should we be dealing with it?

This paper takes the position that while the initial intention may have been honorable, HAVA was in reality another unfortunate example of pork barrel legislation that passed through Congress at the behest of powerful lobbyists and special interest groups.

Electronic voting, which has been used in one form or another in the nation's election systems since the late 1960's, has usurped the rights of the nation's voters to have trusted, free, and fair elections, and HAVA was designed to ensure that electronic voting--specifically computer-based voting systems--would be implemented in every voting precinct in the nation.

HAVA was passed following the 2000 presidential election and purported to resolve issues identified in that flawed process. However, HAVA in fact codified the three largest flaws in the 2000 election:

1. The use of electronic voter registration databases
2. The use of electronic voting machines
3. The use of presidential appointees with powerful authority to influence election outcomes

HAVA also inserted language to imply that its proposed solutions would address the valid concerns of the disability community for equal access to vote privately and independently. However, the intent behind the HAVA solutions proposed for this community was compromised by the financial relationship between the electronic voting machine industry and the most powerful of the disability lobbyists for HAVA: the National Federation for the Blind and the American Association of People with Disabilities.

The result is a dangerous assault on the most basic and fundamental of America's democratic processes: the vote. Election protection, voting rights, and disability activists alike need to work together to restore the integrity of the nation's election systems by either reversing or controlling the outcomes generated by HAVA.

They can do this by fighting for legislation to bring about the following outcomes (not a comprehensive list):

- Nonproprietary public ownership of electronic voter registration systems
- Measures to protect the privacy and security of voters whose names are on the electronic voter registration systems
- Measures to ensure voter rights against false or misleading information in the electronic voter registration systems

- A commitment to study and expeditiously implement the return to hand marked, hand counted paper ballot voting systems as the nation's system of record
- The use of nonproprietary and publicly-owned trusted alternatives to meet the needs of the disability community and others who can not or do not wish to use the paper ballot system
- The inability of the Election Assistance Commission (EAC) to ever become a rulemaking authoritative body
- The restructuring of the EAC to remove partisan presidential appointees from positions of power and decision making
- The restructuring of the EAC to provide authority to the EAC Standards Board as a representative body authorized to make recommendations but not rules for the nation's election systems.

Global electronic voting

Electronic voting has made a news name for itself in America over the past several years. But e-voting is not limited to America; the industry is making significant inroads across the globe.

And wherever it goes, controversy follows.

Recently Ireland decided to [reject the use of electronic voting machines](#),¹ citing the findings of an independent commission that the use of voting machines put at risk the security and accuracy of the country's election systems. From [Australia to Argentina](#)², countries all over the world are debating the merits and risks of e-voting.

The question is: *Why are the nations of the world allowing their election systems to be controlled by private industry, and on top of that, why are they paying those industries millions of dollars for the privilege?*

A brief history

[Voting machines](#)³ have played a role in American elections since the late 1800's, when mechanical lever machines were introduced in New York. Much like today, lever machines were promoted as a solution to election fraud in paper-based systems through means such as stuffing the ballot box. But the lever machines, providing no tangible record of voter intent, offered a new form of ballot stuffing for those who had the access to simply change the mechanical counter on one or more of the machines.

With every increase in complexity to the voting system, the opportunities for election fraud increase accordingly, and the introduction of [computer-based technology](#)⁴ introduced a level of complexity never before experienced in democratic election systems. The change computer-based technology brought to the world of elections makes one almost wistful for lever machine fraud.

[Experts in the field of computer science](#)⁵ have consistently raised alarms about the security of electronic voting systems. But you don't need to be a computer scientist to understand its inherent risks. Unlike ballot stuffing with paper-based systems, or mechanical fraud on individual machines, computer-based election systems opened the door to [one-stop shopping for those determined to commit election fraud](#)⁶.

As the old saying goes, why steal one dollar from a hundred thousand people when you can just go rob a bank.

It's software; it can do anything you want it to do

Would you like your election software to add one vote for every three to the tally for your favorite candidate? No problem. As any software engineer will tell you, "it's software; it can do anything you want it to do."

This fundamental truth about software engineering led computer scientist [Dr. Rebecca Mercuri](#)⁷ to issue the following caution about electronic voting, even when a "verifiable audit trail" is part of the system:

Fully electronic systems do not provide any way that the voter can truly verify that the ballot cast corresponds to that being recorded, transmitted, or tabulated. Any programmer can write code that displays one thing on a screen, records something else, and prints yet another result. There is no known way to ensure that this is not happening inside of a voting system.

And when the software is corporatized and proprietary, there is really no way to know what it has been programmed it to do, because it is hidden inside its [black box](#).⁸ As proprietary products, our election systems are no longer owned by "we, the people." They are privately owned, and their owners, claiming the need to protect their proprietary product, refuse public access to test it to see what it is actually programmed to do: record and count our votes as we cast them.

In this bizarre scenario, currently playing out in [80% of the voting precincts](#)⁹ in the United States of America, we, the people pay for our election systems, but private corporations own them.

Soon, this number may grow to 100%.

The rise of the machine

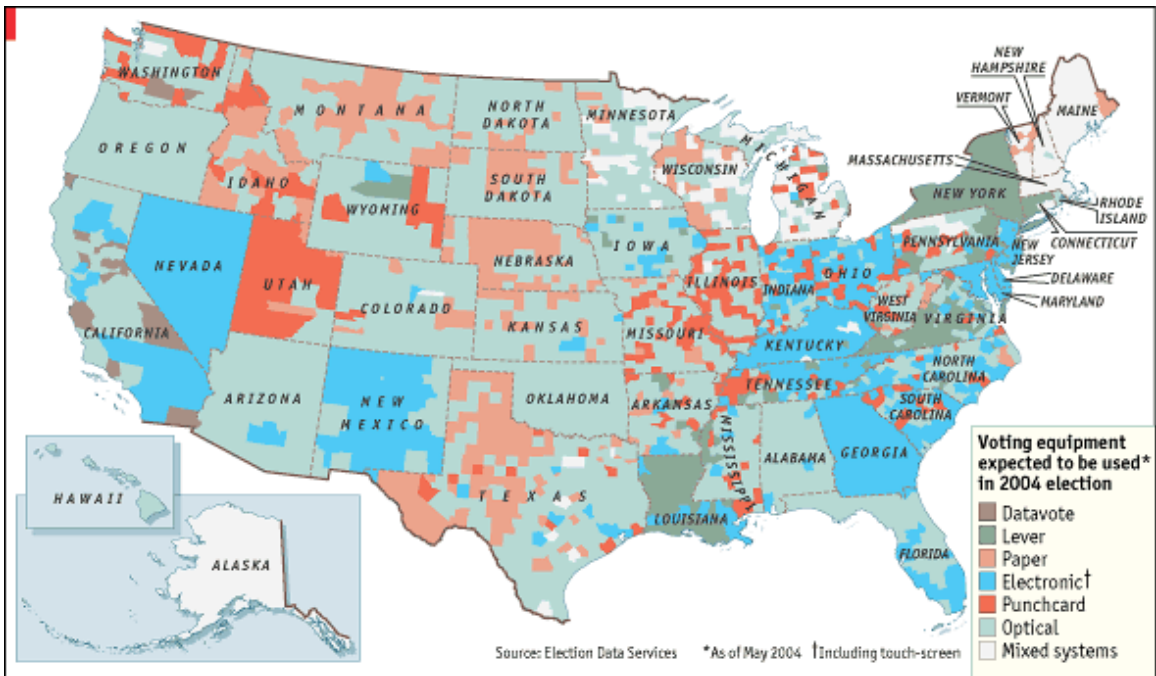
People around the world are in love with technology, and Americans are no exception. But that alone doesn't explain why this country is so heavily invested in electronic voting. Because while technology can be "really cool," it is also really expensive.

Cities and towns, already burdened by budget-busting items such as school support, are not inclined to jump at the opportunity to spend large sums of money on election technology, no matter how persuasive industry marketing and sales people can be. People managing these budgets needed a little more incentive than "cool technology" to put so much money into electronic voting systems.

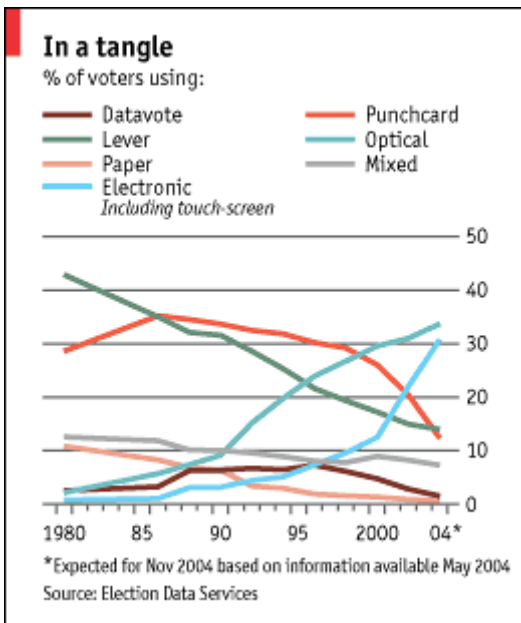
The Help America Vote Act (HAVA) of 2002

That's where HAVA comes in. Following the time honored tradition of good old fashioned pork barrel legislation, [lobbyists for the electronic voting industry](#)¹⁰ helped to define and promote the passage of the [2002 Help America Vote Act \(HAVA\)](#).¹¹ HAVA was passed by Congress and signed by George W. Bush following the disastrous defeat of American democracy in the [2000 presidential election](#).¹²

HAVA took \$3.8 billion of the people's taxpayer dollars for distribution to every state in the nation, to be spent in large part on the electronic voting industry. Following the passage of HAVA, the voting map of the United States became blotchy with electronic voting systems, many "upgraded" with HAVA monies to paperless touch screen systems.



The graph below shows the rise of electronic voting in the past twenty years, with a precipitous rise following the passage of HAVA in 2002:



Codifying the potential for election fraud

You will recall that the passage of HAVA -- one of whose prime sponsors is Congressman Robert Ney, newly infamous for his role in a broad and complex web of [GOP election fraud](#)¹³ -- was urged as a remedy to the flawed 2000 presidential election.

But what HAVA actually did was codify three of the more troubling aspects of the 2000 election:

1. [The use of electronic voter registration databases:](#)¹⁴ In Florida 2000 tens of thousands of voters were unjustifiably purged from electronic voter databases and not allowed to cast their vote.
2. [The use of electronic voting machines:](#)¹⁵ In Florida 2000 countless numbers of votes were mistabulated on electronic voting equipment.
3. [The use of presidential appointees with powerful authority to influence election outcomes:](#)¹⁶ In Florida 2000 the vote recount was shut down by the Supreme Court, which effectively handed over the presidency to George W. Bush.

Most voter rights and electoral integrity organizations have been working hard to analyze the impact of the first and second aspects of HAVA, but few have taken a good, hard look at the third. Let's go through each of these HAVA mandates, giving special attention to HAVA Gift #3.

HAVA Gift #1: Electronic voter registration databases

According to HAVA:

each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, 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 (in this subsection referred to as the "computerized list").

HAVA then went on to specify how this computerized list would be used:

Sharing information in databases.--The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration. (ii) Agreements with commissioner of social security.--The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 205(r)(8) of the Social Security Act (as added by subparagraph (C)).

The recently released [Baker-Carter Commission on Federal Election Reform](#)¹⁷ takes this information-sharing one step further and suggests that information be shared across state lines.

Privacy, security, and the right to vote

The [Brennan Center for Justice](#)¹⁸ presented the following analysis of the HAVA-mandated voter databases:

The state databases themselves could create more problems than they solve without sufficient safeguards, and guidelines for such safeguards should be part of the EAC's guidance. The commission's current database design proposal, however, lacks such guidelines and thus falls short of the law's mandate to protect voters' rights by ensuring that each eligible voter appears on the voter rolls....For instance, HAVA requires that states try to match voter registration information with information in other databases (e.g., DMV records). This matching requirement could inadvertently throw thousands of eligible voters off the rolls in every state for the simple, human reason that data entry errors are inevitable. In New York, 20% of 15,000 voting records compared to DMV records in 2004 turned up "no match," yet a subsequent audit revealed that 99.7% of those mismatches were the result of errors made by elections officials when they input the identification numbers into their database.

Voter rights and election protection advocates are not the only ones concerned about this HAVA provision. Privacy and security advocates alike raise concerns about electronic voter databases. Representatives of the [Electronic Privacy Information Center \(EPIC\)](#)¹⁹, testifying before the Election Assistance Commission, stated:

It is EPIC's position that compliance with Section 303(a) of HAVA should include transparency, privacy, and security for voter registration information, while at the same time meeting the challenge of real-time authentication of voters during an election.

EPIC raised concerns about privacy and security for voters from intrusions by third parties who either hack into or purchase the voter database for both legitimate purposes--such as political campaigns--and for less legitimate purposes--such as for commercial marketing--and for undeniably illegitimate purposes--such as those seeking to perpetrate identity theft on a large scale.

Voting without fear

The bottom line is that the simple act of voting should not expose patriotic citizens to the inevitable and potential byproducts (harassment, identity theft) of having their personal information contained in an electronic format. The fact that the voter databases are intentionally designed to enable queries with other databases, such as the Social Security Administration and the Department of Motor Vehicles -- which is itself designed to interface with other agency databases such as the Department of Justice -- yields an endless stream of Big Brother scenarios that could well result in voter harassment and suppression.

What to do:

Election protection demands that we reverse the negative outcomes of HAVA gift #1 by passing legislation at the state and federal levels to ensure:

- Nonproprietary public ownership of electronic voter registration systems
- Measures to protect the privacy and security of voters whose names are on the electronic voter registration systems
- Measures to ensure voter rights against false or misleading information in the electronic voter registration systems

HAVA Gift #2: Electronic voting machines

Since Election 2000, there have been more stories about electronic voting system problems than you can shake a stick at. In response, the federal government mandated--through HAVA--spending even more money on electronic voting systems. HAVA required states to replace outdated lever machines -- the kinds that produced the hanging chads in Florida -- with newer "voting systems." and went so far as to recommend specific voting systems known as "[DREs](#)" ²⁰ (Direct Recording Electronic machines). And for those states, like New Hampshire, which has no voting machines at all in 45% of its voting precincts, and whose voting machines in the remaining 55% of its precincts are not outdated, HAVA determined nonetheless to ensure the installation of electronic voting machines in every single voting precinct.

How was this accomplished?

Enter the disability community

Although disabled voter access was not an issue in the Florida 2000 debacle, HAVA took a decidedly strange twist when the writers of HAVA inserted language recommending the installation of DREs nationwide to address the voting needs of the disability community -- specifically the blind.

The desire of disability advocates to ensure equal access to private and independent voting is unquestionably an honorable cause. However, the solutions proposed in HAVA caused great concern to both election protection activists and some disability advocates.

The language used in HAVA to address disability concerns opened the door to marketers of electronic voting systems, guaranteeing that even polling places that had never before used technology-based voting systems (as is the case with 45% of New Hampshire's polls), would now become potential customers for that industry. With this strategy, HAVA changed the nature of the voting systems of the entire nation.

For better or worse.

Everyone has their price

In politics, the combination of money, power and lobbying rarely results in a favorable outcome for the average citizen. The electronic voting industry, with its vested interest in both money and power, is not exempt from this truism.

Consider the relationship between the voting machine industry and the loudest lobbyists for the disability community in the HAVA arena. In recent years both the National Federation of the Blind (NFB) and the American Association of People With Disabilities (AAPD) together have received [gifts totaling more than a million dollars](#) ²¹ from the voting machine giant Diebold.

For Diebold, it seems that taking on the cause of the disabled just made good business sense. Unfortunately, this cozy relationship calls into question the vociferous lobbying done by certain disability lobbyists on behalf of Diebold's voting technology solutions.

Accessibility and auditability

AAPD lobbyist [Jim Dickson](#)²² has repeatedly countered [the claims of computer scientists](#)²³ from Johns Hopkins and Rice Universities that the voting technologies have serious security issues.

Time after time Dickson has promoted the virtues of the electronic voting industry, while at the same time [calling into question the concerns of election protection advocates](#)²⁴ who demand tangible evidence of voter intent in the form of what has become known as a Voter Verifiable Paper Audit Trail (VVPAT):

Supporters of a VVPAT claim to support access for voters with disabilities. In state after state, county after county, they have prevented jurisdictions from purchasing equipment that meets HAVA's January 1, 2006 deadline. From the hysterical supporters of the VVPAT, we continuously get lip service about supporting accessible, secret and independent voting and organized efforts which prevent it...Boosters of the paper trail ignore 200 years of electoral error and fraud stemming from the use of paper.

The insertion of disability concerns into HAVA has in fact placed voter rights and election protection advocates in the unenviable position of going head to head with the disabled community. At the same time, the zealous pursuit of paperless voting systems by lobbyists like Jim Dickson purporting to represent the disability community, has at times been rejected from within the disability community itself. [David Dixon, President of the Handicapped Adults of Volusia County \(HAVC\) in Florida](#),²⁵ has this to say on the issue:

Accessibility and auditability should not be conflicting values when it comes to voting equipment. National advocates for the blind do the disabled community of Volusia County a disservice when they presume to speak on our behalf for flawed systems that we do not want.

Machines and paper

In the years following the passage of HAVA advocates for a [voter verifiable paper audit trail \(VVPAT\)](#)²⁶ have gained steam, making the compelling argument that voters like to see tangible evidence of their vote and that machines recount their tallies do not amount to a real recount. VVPAT solutions, however, are hardly failsafe; these solutions remain computer-based; relying on hardware, software, printers, and paper that is often not ballot-quality. Machines break down, printers jam, software is hacked, costs rise, and recounts become harder and harder to obtain.

When all is said and done, the only ones getting ahead in this game are the ones who have made the rules, mastered the game, and who are making and marketing the machines (tacking on the price of a printer to boot).

Count the damn ballots

After examining the results from technology-based elections in this country, many

election protection advocates now want nothing less than [paper ballots marked by hand and counted by hand.](#)²⁷ As Lynne Landes writes:

The proposed legislation, popularly known as "voter-verified paper audit trail", sounded all right when I first heard about it a few years ago. But, on closer inspection it became clear that it wasn't a good idea at all. Fundamentally, it allows "voter verification" and "audits" to replace our constitutional right to mark, cast, and count ballots. Under this legislation, machines and election officials continue to control the process, while meaningful citizen participation and oversight is effectively destroyed. Besides all that, don't Dems understand that malfunctioning machines make ballot printers irrelevant? What are they thinking? In the real world, recounts are very rare. In general, they only get triggered if an election is "close." Many people think that if a candidate wins by a significant margin (as Bush appeared to do), then vote fraud or system failure is unlikely. I call it, "The myth of the margin of victory".

But we still have disability lobbyist [Jim Dickson](#)²⁸ saying the only way he can vote privately is with a touch screen machine that has no paper trail:

Accessible touch screens that conform to the 2002 Voting System Standards (VSS) are the only existing federally certified voting systems that meet HAVA's disability access requirements.

These seemingly diametrically opposing views indicate the need for election protection and disability advocates to work together rather than against each other, to think critically and develop win-win solutions for the real stakeholders--the voters--and not an industry that is making billions of taxpayer dollars.

The arguments over paper trails, paper ballots, and disability rights will undoubtedly continue far beyond the January 2006 HAVA-imposed deadline, and each successive election guarantees an increase in lawsuits all around.

What to do:

Election protection demands that we reverse the negative outcomes of HAVA gift #2 by passing legislation at the state and federal levels to ensure:

- A commitment to study and expeditiously implement the return to hand marked, hand counted paper ballot voting systems as the nation's system of record
- The use of nonproprietary and publicly-owned trusted alternatives to meet the needs of the disability community and others who can not or do not wish to use the paper ballot system

HAVA Gift #3: Presidential appointees with powerful authority to influence election outcomes

Now let's turn to the third element in HAVA: the institution of presidential appointees in powerful positions that can influence the outcomes of our nation's elections. The Election Assistance Commission (EAC) was founded through HAVA with a three year mandate to oversee the implementation of HAVA throughout the United States. The EAC consists of four presidentially appointed Commissioners, a Standards Board, an Advisory Board, and a Technical Guidelines Development Committee. We'll look at each of these bodies in a moment; first let's look back at a turning point in the history of American elections.

Powerful people, powerful decisions

Following some odd election day twists and turns, which included the disenfranchisement of tens of thousands of voters, the mistabulation of tens of thousands of votes, and the obstruction of recounting the votes, the 2000 presidential election was ultimately decided by political appointees. When asked to weigh in on the situation, the United States Supreme Court reversed the decision of the Florida Supreme Court to allow the conclusion of the vote recount that had been requested by the Gore campaign. In its "Election 2000" decision, [the opinion of the Supreme Court](#)²⁹ concluded with these words:

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith.

It is so ordered.

It was the declaration of those words, and not the votes of the people of the United States, that allowed George W. Bush to occupy the Oval Office.

Many American citizens were deeply troubled when the 2000 presidential election was decided by the Supreme Court. After all, Supreme Court Justices are political and presidential appointees. Presidential appointees are not *exactly* representative of the people, and representation in decision making is the foundation of a democracy such as ours.

A whole new crop of powerful people

What does this have to do with HAVA? Let's take a closer look at the least known element of HAVA: [The Election Assistance Commission \(EAC\)](#).³⁰ The EAC was created and authorized under HAVA as a temporary Commission designed to exist for the sole purpose of overseeing and ensuring the implementation of HAVA within the dictated timetable. As such, without Congressional reauthorization it is scheduled to sunset at the end of 2005.

As mentioned above, the EAC is led by four presidentially appointed Commissioners. Like the Justices of the Supreme Court, EAC Commissioners are political appointees; and while they are approved by Congress--as are Supreme Court Justices--they are not *representative* officials. The four Commissioners, if asked to write their job description, would probably come up with something like this:

Oversee the distribution to the States of nearly 4 billion dollars to be used in our recommended design, definition, and construction of the infrastructure of the system that decides who will be the president and other leaders of the most powerful nation on the face of the earth.

The second body established by HAVA under the EAC umbrella, and subordinate to the EAC, is the Board of Advisors, which consists of 37 congressionally appointed members drawn from various national associations and government agencies. As defined by HAVA:

The objective of the Board of Advisors is to advise the EAC through review of the voluntary voting systems guidelines described in title II Part 3 of the HAVA; through review of the voluntary guidance described under title III of HAVA; and through the review of the best practices recommendations contained in the report submitted under Section 242(b) of title II (HAVA title II section 212).

A third subordinate body under the EAC umbrella is the Standards Board. The important thing to remember in all of this is that the Standards Board is in fact the *only broadly representative entity* within the EAC, in that it is composed of 110 members drawn from State and local election officials. As such, the Standards Board has considerable moral authority; its members have vastly more experience in running elections than the EAC. As defined by HAVA:

The objective of the Standards Board (the Board) is to advise the EAC through review of the voluntary voting systems guidelines described in title II Part 3 of the HAVA; through review of the voluntary guidance described under title III of HAVA; and through the review of the best practices recommendations contained in the report submitted under Section 242(b) of title II (HAVA title II section 212).

55 members shall be State election officials selected by the chief State election official of each State. 55 shall be local election officials selected under a process supervised by the chief election official of the State. The 2 members of the Standards Board who represent the same State may not be members of the same political party.

A fourth subordinate body under the EAC umbrella is the Technical Guidelines Development Committee. With the Director of the National Institute of Standards and Technology (NIST) as its chair, this is the group that comes up with the recommendations for what should be the nation's technology-based voting systems. As defined by HAVA:

Pursuant to 42 U.S.C. § 15361(b)(1), the Committee will act in the public interest to assist the Executive Director of the Commission in the development of the voluntary voting system guidelines.

Powerful, but with limitations

Created as an oversight advisory commission for the implementation of HAVA, the charge of the EAC is to:

...assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.

Unlike the Supreme Court, the EAC, as an advisory commission, was not created with rulemaking authority.

Section 209 of HAVA stipulates the following limitation on the EAC's rulemaking authority:

The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-7(a)).

The limitation of rulemaking authority is important. It means that although the EAC can make strong recommendations as to how the different states in the union should conduct their elections, the states are supposed to be able to maintain their constitutional rights to conduct elections according to their laws and traditions.

The EAC's argument for de facto rulemaking authority

Regardless of the legal limitations placed on the EAC, the reality is that currently the

EAC has de facto rule-making authority, particularly with regard to interpretation of federal law and certification of voting machines.

In a [September 2005 EAC advisory](#),³¹ the following footnote asserted legal precedent for transforming administrative interpretation into de facto rulemaking authority (emphasis mine):

The EAC is the Federal agency charged with the administration of HAVA. HAVA requires the Commission to draft guidance to assist states in their implementation of Section 301(a). Although EAC's administrative interpretations do not have the force of law associated with legislative rules, the Supreme Court has long held that the interpretations of agencies charged with the administration of a statute are to be given deferential treatment by courts when faced with issues of statutory construction.

This de facto authority can be manipulated to give an edge to paperless voting machines and discourage the use of paper-based systems.

The 2.2.6 Incident: Did the EAC try to kill paper ballots?

In August 2005 the EAC became involved in what we will call the “2.2.6 Incident.” attempted to change the recommendations of the Technical Guidelines Development Committee by adding the following bolded phrase to the [draft version of the Voluntary Voting System Guidelines \(VVSG\)](#):³²

VVSG Section 2.2.6: If the normal procedure includes VVPAT [Voter Verifiable Paper Audit Trail], the ACC-VS (accessible voting system) should provide features that enable voters who are blind to perform this verification. **If a state requires the paper record produced by the VVPAT to be the official ballot, then the ACC-VS shall provide features that enable visually impaired voters to review the paper record.**

Let's take a good look at what the insertion of this single sentence means:

Initially, disability activists like Jim Dickson testified that their only hope in voting independently and privately was through the use of a paperless touch screen machine with an audio component. Then election protection activists came along and said they wanted a voter verifiable paper trail from these machines.

Now along comes the EAC recommending that any machine-generated paper record must also be verifiable by the visually impaired voter. In its discussion of this recommendation, the EAC notes:

For example, the Acc-VS might provide an automated reader for the paper record that converts the contents of the paper into audio output.

Sounds like a great idea!

Unfortunately, the technology doesn't currently exist to do this.

In other words, what we see in the 2.2.6 Incident is the EAC, a political body, attempting to change the technical recommendations of the Technical Guidelines Development Committee in a manner that *effectively kills the possibility of a Voter Verifiable Paper Audit Trail*.

Additionally, paper ballot towns--those that honor the use of traditional ballot boxes to collect hand and machine-marked ballots for hand counting--would be hard pressed to find the ballot box that reads aloud the ballot as it is dropped within.

Whose interests are being served?

The 2.2.6 Incident has the EAC issuing recommendations requiring additional untested and uncertified equipment, a redundant layer of review and hundreds of millions of dollars to the cost of implementing a VVPAT across the country. The requirement, if passed, would have handed the electronic voting industry another cash cow while delivering to America's voters another disrupted election.

Can the electronic voting industry rise to the challenge to develop the technology required to meet the EAC's new recommended requirement? Maybe. But let's recall how they have "risen to the challenge" of VVPAT. Since the VVPAT advocates have gained force the electronic voting industry has busily been marketing plenty of new VVPAT solutions to go with their touch screen machines: Solutions like printers that jam, rolls of thermal fax paper that "record the votes" into sealed canisters, and other clumsy, error-prone technology add-ons.

Representational versus political decision making

What does the 2.2.6 Incident tell us about decision making in the EAC?

Let's look at the decision making roles played by each of the three involved EAC bodies. Recall the nature of each of these bodies: The Technical Guidelines Development Committee is charged with recommending technology solutions, the EAC Commissioners are politically appointed oversight personnel, and the Standards Board is comprised of election officials from every state in the nation.

In its draft guidelines, the Technical Guidelines Development Committee understandably made technology-based recommendations. Their recommendation in this particular guideline was:

If the normal procedure includes VVPAT [Voter Verifiable Paper Audit Trail], the ACC-VS (accessible voting system) should provide features that enable voters who are blind to perform this verification

The political arm of the EAC, its Commissioners, then made adjustments to the TGDC's recommended guidelines, and it is fair to suppose--especially in light of an analysis of the above-mentioned single sentence insertion -- that those adjustments were politically based. The EAC Commissioners inserted the controversial amendment into the guideline:

If a state requires the paper record produced by the VVPAT to be the official ballot, then the ACC-VS shall provide features that enable visually impaired voters to review the paper record.

Where did the Standards Board, the most broadly representational body of the EAC, come down on the issue?

In its August 24-25, 2005 meeting, the EAC Standards Board adopted a resolution calling for the removal of the EAC-recommended amendment from the VVSG.

Score one for representational decision making!

But before we all start celebrating, it must be noted, that the EAC still has the power to impose this change on the nation. This could become a de facto regulation, effectively stifling the efforts of states to implement voter verified paper trail laws in a very practical way. With over 35 states having laws that require voting machines to qualify under federal voting machine standards, voting machine vendors cannot reasonably create equipment that doesn't stand a likelihood of federal approval.

If the EAC adopts Voluntary Voting System Guidelines that make it easy to purchase systems *without* VVPATS but *difficult to implement* VVPATs, it will have, in short order, subverted the election process.

Federalizing election law: the loss of checks and balances

If you have carefully followed the somewhat convoluted story of the 2.2.6 Incident, you will have realized by now that concern over the EAC's status, regulatory authority, impending reauthorization and the consequences thereof, can not be stated strongly enough.

With the insertion of a single sentence, as in the 2.2.6 Incident, or a single footnote, as in the September EAC Advisory, the balance of power can be instantaneously shifted and all checks and balances go out the window.

There are some high ranking politicians who are not only pushing for the reauthorization of the EAC, but for an expansion of its role beyond advisory by granting it rulemaking authority. Senators Clinton and Kerry, both considered by many to be 2008 Democratic presidential contenders, have already introduced [legislation to strike Section 209 from HAVA](#).³³

Remarkably, many voting rights activists agree with this approach; they see in the EAC an opportunity to establish national standards to create an even playing field for voters

regardless of the state in which they live. Because voting systems can widely vary from state to state, some voting rights activists believe that the existence of an authoritative body at the federal level will equalize voting rights throughout the country.

This sounds like a nice idea.

Voter rights, like civil rights, *should* be uniform across the land that proclaims itself "the greatest democracy in the world."

The question is how do you ensure uniform voter rights but defend against uniform corruption in the nation's election systems? In the case of election law, if you are wishing for uniform federal administration of the nation's elections, you have to be careful what you wish for.

Power corrupts; absolute power corrupts absolutely

Let's consider the standards for conducting elections that are in place in two states in the nation: [Florida](#)³⁴ and [Ohio](#).³⁵ Most of us know that these two states were ridden with problems and "irregularities" during the 2000 and 2004 elections. In both of these states, it appeared that decisions were made at the highest levels to run what amounted to fraudulent elections.

You may recall that in both states the top election officials -- the Secretaries of State -- were political operatives running the campaigns for presidential candidate and then incumbent George W. Bush. [Katherine Harris of Florida](#)³⁶ and [Ken Blackwell](#)³⁷ of Ohio each have incurred lengthy allegations against them in their handling of the elections in their states, which successively and handily delivered to George W. Bush the presidency.

In view of this, most people would probably agree that Florida and Ohio would not be ideal models for national standards in election system administration.

In fact, they are shining examples of the dangers when partisan people are in positions of power that can determine who will be the president of the United States.

What kind of power would a rulemaking EAC yield?

In the summer of 2004 DeForest B. Soaries Jr., the first Chairman of the newly created U.S. Election Assistance Commission, sent a memo to then Homeland Security Director, Tom Ridge, suggesting that terrorist threats may require a "postponement" of the November presidential election. In an exclusive news article, [Newsweek reported](#):³⁸

Soaries noted that, while a primary election in New York on September 11, 2001, was quickly suspended by that state's Board of Elections after the attacks that morning, "The federal government has no agency that has the statutory authority to cancel and reschedule a federal election."

Soaries, a Bush appointee who two years ago was an unsuccessful GOP candidate for Congress, wants Ridge to seek emergency legislation from Congress empowering his agency to make such a call.

Homeland Security declined to extend emergency powers to Soaries, who subsequently stepped down as EAC Chair citing, among other things, dissatisfaction with the level of support the EAC has received from the federal government.

In an [opinion piece for the Wall Street Journal](#),³⁹ John Fund summed up the Soaries episode as follows:

With the Constitution stipulating that states and localities control the "time, manner and place" of elections unless Congress specifically overrides them, the EAC was envisioned as having a limited role when Congress created it in the wake of the disputed 2000 election. Most believed it would be restricted to providing states and localities with election advice and grants, along with setting some basic standards.

But Mr. Soaries wanted more. "We have a federal election without federal involvement," he has complained. "With 200,000 precincts in the country, there's a lot of room for variance." He gave an entire speech on EAC voting standards for the states without even once mentioning the word "voluntary." His resignation this week stemmed in part from his belief that the government hadn't given the EAC enough money or any rule-making authority over the states.

Be careful what you wish for

Election protection and voting rights activists longing for federal oversight of the nation's elections systems would be well advised to remember DeForest Soaries, presidentially appointed Chair of the EAC, who, had he been given the authority to do so, would have effectively cancelled the 2004 presidential election.

Think about it.

Because the EAC is governed by presidential appointees, this agency falls under the executive branch and as such, can be given rule making power by Congress, virtually overnight and without notice.

A close parallel is the Federal Elections Commission, which, like the EAC, began its bureaucratic life without rule-making power. Then, virtually without notice, Congress gave the Federal Elections Commission authority to occupy the field of campaign finance reform, preempting the work of state legislatures that often had enacted more substantive state laws than Congress has been able to enact. The resultant deplorable state of our nation's campaign finance regulation may be partially ascribed to the temptation in Congress to capitulate to the lowest common denominator when it comes to elections. Why would anyone expect this pattern to change in the case of the EAC?

Do not underestimate what rule-making power for the EAC would mean.

It means virtually granting the power to a sitting president to prescribe which provisional ballots can be counted, which rules apply to purges of voter registration systems, whether a VVPAT is required, and whether recounts are even possible, to name only a few examples.

In other words, a recess appointment to the EAC before a national election could result in rules changes that could effectively hand a 3-8% winning margin to the party of the president, while at the same time remove any possibility for a recount.

The recent recess appointment of the U.S. Ambassador to the United Nations removes any doubt that authority exists for presidential appointments to finesse the Senate process of advise and consent.

High stakes, careful solutions

In some ways the question of federalizing elections boils down to a familiar ideological debate over federal power versus states rights.

But this is a high stakes game.

At risk is nothing less than control over the power and resources of the United States of America.

With the impending reauthorization of the EAC and stated support among political leaders for expanding its powers, advocates of states rights and voting rights alike should carefully consider their next moves.

On the side of states rights, the National Association of Secretaries of State (NASS) advocates the merits of allowing the "great experimental laboratory" of the states to progress and develop best fit and best practice solutions whose worth can be proven and emulated across the nation. NASS correctly cautions against the centralization of power over the nation's elections systems.

In February 2005, reacting to the implications and the radical nature of the Soaries incident, NASS issued an [open letter to Congress](#)⁴⁰ requesting that the EAC **not** be reauthorized:

Dear Members of Congress:

The secretaries of state voted at the 2005 National Association of Secretaries of State winter conference to dissolve the U.S. Election Assistance Commission after the 2006 federal general election. The following position statement was passed by a majority of the secretaries in attendance:

Recognizing the U.S. Election Assistance Commission's (EAC) task as a limited one, Congress, in the Help America Vote Act of 2002 (HAVA),

wisely authorized the EAC for only three years. Any duties assigned to the EAC can be completed by the National Institute of Standards and Technology or by the state and local election officials who make up the HAVA Standards Board and its Executive Committee. The National Association of Secretaries of State encourages Congress not to reauthorize or fund the EAC after the conclusion of the 2006 federal general election, and not to give rulemaking authority to the EAC. The secretaries believe that allowing the EAC to evolve into a regulatory body is contrary to the spirit of HAVA, and that by 2006 the EAC will have served its purpose. Congress should preserve the states' ability to serve as independent laboratories of change through successful experiments and innovation in election reform.

This approach sits well with John Green, director of the University of Akron's Ray C. Bliss Institute for Applied Politics, who [points out](#): ⁴¹

Offering federal funding is one way the federal government gets past the states rights conflict. On other issues, such as with the Clean Air Act, the federal government sets standards that it then allows states to implement.

If the EAC is reauthorized, election protection activists should aggressively petition against it being granted rulemaking authority. They should also seek to reduce the danger of having centralized power over the nation's election systems placed into the hands of four presidential appointees.

One way to do this is to revise the structure of the EAC to place authority more into the Standards Board with its 110 members representing each state in the Union, and less into politically appointed partisan power brokers.

The reauthorization of the Elections Assistance Commission is pending as we speak.

If the risk regarding a takeover of the election process by the executive branch cannot be mitigated, it is better for Congress to simply decline to reauthorize the EAC. If this option is unpalatable, restructuring its command and control is a feasible option to mitigate this risk while improving the effectiveness of the EAC.

Giving the Standards Board authority over the EAC Commissioners would simultaneously remove the risk of a palace coup involving a recess presidential appointment and the granting of rule making powers, since the EAC would no longer fall under the executive branch.

What to do:

Election protection demands that we reverse the negative outcomes of HAVA gift #3 by passing legislation at the state and federal levels to ensure:

- The inability of the Election Assistance Commission (EAC) to ever become a rulemaking authoritative body
- The restructuring of the EAC to remove partisan presidential appointees from positions of power and decision making
- The restructuring of the EAC to provide authority to the EAC Standards Board as a representative body authorized to make recommendations but not rules for the nation's election systems.

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