

HAVA or Havoc?

BY SARAH TOBIAS

“I think a lot of us had a sense that something . . . went wrong on Nov. 2 and it had to do with the election process and procedures in place that were unacceptable.”¹

The Help America Vote Act (HAVA) was intended to transform America’s electoral future for the better. Anticipating that the new law would prevent disfranchisement and promote public confidence, its sponsors claimed that passage of HAVA would herald “a new day for our nation’s democracy.”² Even President Bush expressed optimism when he signed HAVA into law in October 2002. The president described the measure as one that would undoubtedly increase the integrity of our electoral process. “Through these reforms, the federal government will help state and local officials to conduct elections that have the confidence of all Americans,” he said. “We’re counting on these officials to meet their responsibilities, to protect the sanctity of the vote, and to encourage Americans to exercise the right to vote.”³

In the aftermath of Election 2004, such optimism has all but evaporated. HAVA-mandated changes in registration and voting procedures

confused poll workers and the public alike on Election Day, resulting in disarray at the polls. These problems were compounded by administrative ineptitude and exacerbated by voter intimidation and suppression on and around Election Day. To many observers, our electoral system seems even more vulnerable now than after the 2000 debacle.

It wasn’t meant to be this way. HAVA held great promise as a first step toward election reform. The law allocated \$3.9 billion to states, disbursed over three years, to pay for improvements in voting equipment and election administration. But HAVA implementation was thwarted from its inception. Although Congress passed HAVA with strong, bipartisan support it nevertheless consistently underfunded the new law. The Election Assistance Commission—a body intended to disburse HAVA funds to the states and to give guidance on complex implementation challenges—was supposed to be up and running within 120 days of HAVA’s passage, but it wasn’t established until the end of 2003. Meanwhile, most states proceeded with election reform at a glacial pace, with many waiting until 2006 to carry out HAVA’s new requirements.

Under these circumstances, it would have been surprising if Election 2004 had run smoothly. In fact, long before Election Day it became clear that problems at the polls were imminent.

Electronic Voting

The furor surrounding whether a so-called voter-verifiable paper trail should be added to touch-screen voting machines was an early indication of trouble to come. In 2003, a group of advocates and computer experts, largely unaffiliated with those working on HAVA implementation, began to call for states to ensure that any touch-screen voting machines purchased with HAVA funds were affixed to printers capable of reproducing a paper record of the votes cast. Each paper record would be verifiable by the voter, so she could check that the votes cast on the computer screen were identical with those recorded on paper. The goal, these computer experts argued, was to enhance transparency and public confidence in electronic voting while alleviating concerns that the vote could be manipulated.

But many HAVA advocates protested, adamant that introducing a paper trail without the provision of

sight-to-voice technology would create new and inequitable barriers to voting for sight-impaired people. HAVA advocates were also concerned that the push for paper trails would inflate the price of touch-screen machines, making states more inclined to purchase optical scan machines—which are far less accessible for people with disabilities and with limited English language proficiency. The vociferous debate that followed clearly indicated many Americans were anticipating that problems with our electoral system could reach a new order of magnitude in the 2004 elections.

Perhaps unsurprisingly, problems with electronic voting machines did develop at the polls. Voters reported more than eleven hundred incidents on November 2. In Carteret County, North Carolina, a touch screen machine lost approximately forty-four hundred votes on Election Day. Meanwhile, in Columbus, Ohio, an electronic voting machine erroneously gave 3,893 extra votes to Bush. In Broward County, Florida, touch screen machines assigned votes to the wrong candidates. In state after state, votes were electronically overcounted or undercounted.⁴

But problems with electronic voting machines were just one symptom of an electoral system in

crisis. Other problems were even more insidious.

Registration Forms

Take, for instance, HAVA's requirement that states must use newly designed voter registration forms asking registrants to check a box specifying their citizenship status, and to furnish a driver's license number or the last four digits of their Social Security number. Months before the election, advocates became concerned that not all states were timely in producing the new forms, while many small-scale voter registration drives continued to use the old ones.

Advocates' fears were realized at the end of October, when a federal judge threw out a lawsuit filed on behalf of more than ten thousand mainly Latino and African American voters in the state of Florida. These individuals had signed the new, HAVA-mandated voter registration forms affirming that they met all voter eligibility requirements, but they omitted to check a box to confirm their citizenship status or give the license or Social Security number required for identification purposes. Election officials rejected their registrations. HAVA implementation hampered, rather than helped, their ability to access the polls.

Voter Identification

HAVA's new voter identification requirements created other problems. HAVA required first-time voters registering by mail to supply acceptable documentary evidence of identity along with their registration form, or else face an ID check at the polls. Only certain types of identification—"a current and valid photo identification; or . . . a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter"—fit the bill. Some states went beyond HAVA's mandates to impose ID provisions on all voters, irrespective of whether they were casting a ballot for the first time or not. For instance, in 2003, Alabama, Colorado, North Dakota, South Dakota, Montana, and Tennessee imposed universal identification requirements.

Advocates were concerned that HAVA's new ID provisions would lead to disfranchisement on Election Day because people would be prevented from voting if they arrived at their polling place without acceptable proof of identification. They were also worried that the new ID provisions would exacerbate the likelihood of discrimination on Election Day. Given minority communities' long and ongoing struggle against biased

treatment at the polls, they feared that poorly trained election workers and predatory challengers would strictly enforce the new ID requirements with people of color and members of other marginalized groups, but be more lenient toward white voters.

Advocates' fears were realized on November 2. In Missouri, African Americans were singled out by Republican poll challengers, who asked them—but not white voters—for additional proof of residency and identification. In Lancaster, Pennsylvania, poll workers asked African American voters, but not white voters, for ID. In New York, Asian American voters were repeatedly—and unnecessarily—asked to show identification to prove their eligibility to vote. Throughout the country, all voters at certain polling places were erroneously asked to show identification at the polls. Many states, of course, already had ID provisions before HAVA implementation. But new ID requirements typically increase the possibility of people being prevented from voting if they show up at their polling place without acceptable proof of identification. HAVA's ID provisions clearly created hurdles to the ballot box—especially for new voters and for voters of color.

Provisional Ballots

Then, of course, there was the thorny issue of provisional ballots. HAVA mandated that poll workers offer these ballots to would-be voters whose names did not appear on the voter rolls. The hope was that provisional ballots would prevent a rerun of the Florida 2000 debacle, when thousand of eligible voters were turned away from the polls because their names were not on the voter lists. But Congress did not create a uniform procedure for determining under what circumstances provisional ballots should count, deferring this decision to the states. Consequently, some states adopted a narrow approach and imposed restrictive requirements on those voting provisionally. For instance, in Ohio and Florida election officials were instructed not to count provisional ballots unless they were cast in the correct polling place. Meanwhile, Connecticut, Delaware, Kentucky, Louisiana, and Nevada enabled voters to cast provisional ballots for federal races only—automatically precluding them from voting in state and local races.⁵

The Election Protection Hotline reported enormous confusion about provisional ballots on November 2. Many problems affected people who were eligible to vote and who had registered to

vote in their state in a timely fashion, but whose names were nevertheless left off the list. Poll workers repeatedly refused to give provisional ballots to some of these voters. Others never got to vote because their polling place ran out of provisional ballots early in the day. Still others were told to fill out a provisional ballot when they could instead have used a regular ballot. In Lucas County, Ohio, for instance, a voter arrived in the correct polling place but used a provisional ballot because poll workers failed to direct him toward the correct precinct table in the same building. Many voters expressed concern that their provisional ballots would not be counted. If HAVA was intended to increase public confidence in the electoral process, then the imbroglio over provisional ballots proved that we still have a long way to go.

Other Hurdles

Of course, voters confronted problems beyond those that can be directly tied to HAVA implementation on Election Day. Many people stood in inordinately long lines hoping to cast a ballot on November 2; a wait of three to five hours in Ohio was not uncommon. Delays were exacerbated by a shortage of voting machines and confused or poorly trained poll

workers. Eligible voters arrived at the polls only to find they had been erroneously purged from the rolls. Other eligible voters were disenfranchised because they never received the absentee ballots they requested.

And then, thousands of voters were forced to grapple with organized attempts at voter suppression and intimidation. In Milwaukee, a flyer purporting to be from the “Milwaukee Black Voters League” was circulated in African American neighborhoods. “If you’ve already voted in any election this year, you can’t vote in the presidential election,” it said. “If you violate any of these laws, you can get ten years in prison and your children will get taken away from you.” Meanwhile, in South Carolina, a letter purporting to be from the NAACP falsely warned voters that they were liable to be arrested at the polls if they had previously failed to pay child support, or if they had an outstanding parking ticket. In Pennsylvania, fliers handed out in a Pittsburgh-area mall informed voters that the election had been extended due to immense anticipated voter turnout. Republicans should vote on Tuesday, November 2, and Democrats should vote on Wednesday, November 3.

HAVA certainly did not create all these problems; many problems involving election administration and voter suppression are recurrent ones. But HAVA didn’t remedy them, either.

The Way Forward

Where does all this lead? HAVA implementation will not be complete until 2006, but many advocates now predict that unless we continue the struggle for more extensive electoral reform we’ll almost inevitably encounter a scenario from an electoral horror movie in a subsequent election. The number of provisional ballots cast will exceed the margin for victory. Checking these provisional ballots will be extraordinarily time- and labor-intensive, delaying the final outcome of the elections for weeks. Lawsuits will surely follow, especially if suspicions arise that poll workers have counted provisional ballots selectively to suppress the vote. In other words, at some time in the future we are likely to see a reenactment of Florida 2000—but now on a grand scale—disenfranchising millions and giving a whole new meaning to the term *déjà vu*.

Under these circumstances, circumventing havoc in future elec-

tions seems to be the challenge of the moment. It is an urgent one.

ENDNOTES

1. Fields, R. “Ohio Voters Tell of Election Day Troubles at Hearing.” *Cleveland Plain Dealer*, Nov. 14, 2004 (<http://www.cleveland.com/news/plaindealer/index.ssf?/base/news/1100428444286470.xml>; retrieved Dec. 16, 2004).
2. “Announcing Conference Agreement on Election Reform Legislation.” Statement of U.S. Sen. Christopher Dodd, Oct. 4, 2002 (<http://www.dodd.senate.gov/press/04-speeches.html>; retrieved Dec. 14, 2004).
3. “President Signs Historic Election Reform Legislation into Law.” Remarks by President at Signing of H.R. 3295, Help America Vote Act of 2002, Oct. 29, 2002 (<http://www.whitehouse.gov/news/releases/2002/10/20021029-1.html>; retrieved Dec. 14, 2004).
4. Mooney, B. C. “Voting Errors Tallied Nationwide.” *Boston Globe Archives*, Dec. 1, 2004 (www.boston.com).
5. See Weisbard, A. “Placebo Ballots: Will ‘Fail-Safe’ Voting Fail?” (Report) New York: Demos, Oct. 28, 2004 (<http://www.demos-usa.org/pub296.cfm>; retrieved Dec. 14, 2004).

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