

## Help America Vote Act: A New Pattern in State Election Reform

By R. Doug Lewis

*Congress enacted the Help America Vote Act (HAVA) in 2002. Supporters of HAVA would indicate that it is one of the few times that the federal government has established a national program that relies on the states to determine the best methods of implementing the mandates and goals, while opponents would point to its lack of clear direction and clear authority of the federal government to determine whether a program is meeting its objectives.*

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When Congress passed the Help America Vote Act (HAVA) in 2002 and the president signed it in October of that year, the act became one of the unique examples of federal mandates with Congressional funding but great state control. The specifics of the mandates, while important to elections, are not the focus of this discussion. Rather it is the way federal legislation can craft a role for each level of government and allow each level to do what it does best, that is the focus here.

State leaders at both the legislative level and the administrative level can learn useful tools by studying HAVA as an example of what to ask Congress to do in other legislation – or to avoid because of the HAVA legislation. It is somewhat unique in federalism and should become a case study for national and state programs, because it sets new precedents.

Reacting to the razor thin margins of the Florida presidential election of 2000, Congress sought to revitalize the infrastructure of American democracy by establishing “minimum standards” (called mandates in most other legislation) which had never before existed at the federal level for elections. The act itself is a watershed event in the history of American democracy because it brought for the first time, a significant federal role to the conduct of elections in America. Congress authorized \$3.865 billion to be spent on updating and transforming the nation’s elections process, although at this writing \$3.0 billion of the money has been actually appropriated with less than \$700 million actually distributed to the states.

What makes HAVA somewhat unique is that although the federal government established fundamental mandates in the legislation, it left to the states how to accomplish those tasks. The act requires some responsibilities and roles which have historically been the purview of local governments, now be the responsibility of the state, including the development and maintenance of statewide voter databases, an appeals process for complaints about elections administration

that has moved from the local level to the state level, and compliance with the provisions of the act are focused now at the state rather than local level.

While the U.S. Constitution established that states have the prime responsibility for elections, the process of administration of elections being the function of local government was the general practice throughout American history, even pre-dating the formation of a nation. (Elections in what is now the United States may have begun as early as 1610 to 1620 for local offices and a few years later for legislative offices.) This was principally because of two conditions. First, it made more sense during a period when communications were difficult and even state capitals were not easily accessible, to have elections conducted locally. Secondly, and equally as important, was the serious distrust the nation’s founders had of centralized authority, especially elections authority. As rebellious colonists marshaled complaints about unpopular taxes or trade requirements, the King’s British colonial governors tried to remove or limit the powers of state legislatures and to control who could serve in those bodies and how they got elected. The nation’s founders got what they wanted – a system that is not terribly efficient but is exceedingly difficult to manipulate and relies on local governments to manage and make work.

Because the 2000 election revealed that there was little state control of the election administration process, Congress sought to establish more review of that process, if not at the federal level, then certainly at the state level. Many in Congress sought to give the federal government far more authority over the conduct of elections, but state and local governments fought hard to maintain state and local responsibility for the process. The result, however, established more direct authority for the process at the state level. In order to keep the U.S. Department of Justice (or any other federal agency) out of an administrative role, in addition to its historic role of enforcement,

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states had to be willing to take on additional oversight to assure that elections met the objectives established by Congress.

### **Mandating Plans without Federal Approval**

One of the mandates included states accepting responsibility for creating State Plans for how HAVA funds would be spent to meet the objectives of HAVA and to have those plans developed through open public meetings and available for comment by voters and voting groups within the states. There is also a requirement that those plans be published in the *Federal Register* for 45 days prior to actual funding by the United States Election Assistance Commission (USEAC or EAC). What is unusual in this situation is that while the federal government requires written plans with accessibility and involvement of the public, those plans then become “self actuating.”

No federal agency is empowered to make value judgments as to whether those plans actually accomplish the mandates of HAVA, but rather leave it to states to devise the plans, do so in an open and public manner, have them published in the *Federal Register*, and then tell the USEAC that they meet the requirements of the legislation for funding purposes. While they have to file statements that they are in compliance with a number of federal election laws (Voting Rights Act and National Voter Registration Act) and disability laws (Americans with Disabilities Act and Elderly and Handicapped Voting Accessibility Act), unless someone can show positively that they are not in compliance with one of those acts, the state gets its funding under HAVA.

The beauty of this provision is that it establishes a level of trust between governments essentially indicating that the federal government will establish overall goals to be achieved, that state government has to plan and specify how to implement those goals within their borders, and local governments must actually make the administrative functions work. This means that there is no attempt to form one national plan or program to force the states to all behave in the same manner for elections purposes. It also allows states and the District of Columbia (as well as all U.S. territories) to determine how to individually comply with the act. We have already seen that there are more solutions to some of the problems than most people envisioned.

It may be true that some of the solutions will be better than others, but some would never have been developed had there been a federal requirement to do it one way. Each state will measure its own performance against its own plan and not against an-

other state’s plan. Clearly this will frustrate some policy analysts and advocacy organizations because it becomes difficult to say with credibility that state A should have done it more like state B. The ingenuity of HAVA is that it counts on states having very different solutions and allows the states to meet its objectives with uniqueness and originality.

For instance, a simple mandate of the legislation creates provisional ballots but leaves to the states how to determine what administrative rules and provisions go with implementing provisional ballots. Similarly, HAVA mandates that each voting site in the state have at least one voting device that makes it possible for disabled and blind persons to vote secretly and independently, without telling states exactly how to do that, or even what equipment should do that. We are likely to see a variety of answers and solutions developed over the years to comply with this mandate.

### **Funding and “No Year Money”**

The HAVA law is also unique in that its funding comes from fiscal year budgets of the federal government. But once it is distributed to the states, it essentially becomes “no year money,” meaning that states are not required to spend it in one specific fiscal year. The advantage of this is quite clear: states are not forced to either find ways to spend money in a fiscal year so they can then qualify for new funds in another fiscal year — and yet there is no advantage to holding money. The objective is to get the money in the hands of the states, and the states can utilize that money according to its own time table as long as the funds are expended for allowable projects under the law.

Clearly, the states can benefit greatly from planning their own cash flows to meet their State Plans. With proper planning and intelligent application of resources, states may find a way to earn interest on their HAVA funds and to extend the benefits of HAVA funding far beyond the actual amounts appropriated by the federal government. The law indicates even the interest earned is to be maintained for elections funding. This is not to say that states can sit on the funds for years without action or can delay action in order to “grow” their elections funds. HAVA establishes some very ambitious dates for compliance with some of the mandates and it may not be possible to delay any of those provisions to a more prudent schedule. One example of this is that statewide voter databases have to be fully functional by 2006.

History of software projects of this magnitude indicate that such databases have usually taken four to six years (or more) to develop, implement, debug and then rely on them. Congress established that it wanted

these done in less time than may have been prudent, but the states have no option but to try to comply. With an accelerated deadline date, states have not had the time to develop local government “buy-in” to both the concept and the reality that it has to work. Instead states have been forced to shove the concept at the local governments and indicate that necessary deadlines mean that locals will simply have to adapt. Clearly, some states will comply and have few problems in doing so, but we can fully expect that others will have significant difficulty in making such databases function well within that time frame.

And, it is not as if the state can simply decide to take over the database input from the local governments. This is one example of the HAVA law — and elections practice — where state and local governments have to rely on each other. If one fails, both fail. Locals must rely on the state to develop a database that is useful not only in maintaining names and developing a voter registration list, but also can assist the locals in conducting their elections, tracking voter participation and voter history, tracking voter needs, determining who needs an absentee ballot, etc. States must rely on locals to correctly input data, to maintain it well for changes and updates of individual voter records, to assure that street addresses are correct and match U.S. Postal compliance needs, etc.

The point here is that each level of government, federal through local, has to rely on each other to get this done and to make it function well for the voters. If the deadline is too unrealistic, the federal government forces development of shoddy databases; if the states are too unrealistic and do not fashion a database useful for local election administration, its functionality to locals becomes void. If local governments are too unrealistic in their expectations and/or they try to drag their feet in implementing the changes, the end result is that voters suffer and/or an election disaster can happen. Clearly there are high stakes in a federalism concept that essentially requires each level to depend and support each other — when history has shown that there are traditional conflicts between and among governmental levels.

Additionally, one part of the law provides “incentive” money for the states to get rid of antiquated voting systems such as lever machines and punch card systems. And it requires the states to certify that they will be in compliance by the 2006 election in order to receive funding under that provision of the act. It relies on the state indicating that the entire state will be in compliance by the deadline. But if some of the local jurisdictions decide (for whatever reason) not to comply by the deadline, the act only

requires the states to return the pro-rata share of the non-compliance, not the entire federal funding. In other words, the federal government is rewarding “substantial” compliance without forcing parts of the state to suffer because one or more local jurisdictions choose not to participate.

### Federal Agency Assistance and Review

Congress established the new EAC at the federal level but gave it little authority — it can neither interpret nor enforce the law. It has no regulatory authority of any kind, but is expected to help define best practices and serve as a clearinghouse for election administration practices and procedures. It is charged with developing “voluntary” voting machine standards (now called guidelines) to apply to any voting equipment used in federal elections.

The commission can provide “advice” but state and local governments are not forced to follow or to even pay particular attention that advice. Additionally, the EAC will initiate a number of federal studies to advance the research on good elections practices. Essentially, the EAC is to be a national resource to both Congress and the states. Its standards body, in fact, is comprised of one representative from each state and territory along with one local government representative from each state (not from the same party as the state representative).

No federal program ever comes without audit capacity. What is different in this approach to a new federalism is that the traditional agencies can audit and review, but are restricted in their ability to judge levels of compliance with HAVA. The U.S. General Accounting Office (GAO) can perform its usual and customary role of determining whether federal funds were spent as Congress specified in law. But unlike most federal laws, there are no benchmark solutions for the GAO to determine how well each state performed. States must be measured against how well they performed against the plans they themselves developed.

It will be difficult (notice that we did not say impossible) for the GAO to make legitimate claims that a state spent money more wisely than another because the law does not establish a national norm, nor promote comparing a one state to another. Human nature, being what it is, will inevitably lead to some of these comparisons by not only the GAO but other groups and organizations. The point is that this law is somewhat unique in that it forces the audit groups to rely primarily on comparing the state’s performance to what the state indicated in its State Plan that it will do.

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Less constricted is the U.S. Department of Justice (DOJ), but it too must use a somewhat different measuring stick than in the past. The DOJ will carry its tradition of compliance review, especially when it comes to deciding whether states were truthful in stating that they already comply with the requirements of other federal laws in order to receive federal funds under HAVA. And that is a heavy stick indeed. Constitutional and federal election law provisions give the DOJ wide latitude in determining whether civil rights (voting is considered a civil right of this nation) have been restricted by a state or local government's actions.

But other sections of the law require even the DOJ to measure the state by what the actual letter of the federal law requires and then whether the state met its own plans in complying with the law. Some provisions of HAVA law do not indicate a clear answer or direction. This was done on purpose by the bill's principal backers so that states would have greater responsibility for determining their own answer and solutions as befits their own state laws and elections practices.

The HAVA law will be used for many years to come as an example of a 'good' or a 'bad' law when it comes to evaluating the appropriate actions of state and local governments. State legislators will need to look closely at the concepts established within HAVA as examples of how they want the federal government to construct future laws affecting state and local governments.

Supporters of the HAVA legislation as written will indicate that it is one of the few times that the federal government has established a national program that relies on the states to determine the best methods of implementing the mandates and goals. It takes an approach that the federal government is trusting state governments and through them, local governments, to act responsibly in serving the public and letting each level of government do determine how best to accomplish the goals.

Opponents of HAVA will point to its lack of clear direction and clear authority of the federal government to determine whether a program is meeting its objectives. Those who favor national programs, with all states doing it identically, will use HAVA as an example of how the federal government must take a stronger role in directing the activities of states to comply with Congressional intent.

### Model Legislation – Is It or Isn't It?

This unique law may also provide state legislatures and governors with a blueprint for determining similar structures within state statutes. If the HAVA law works well in establishing that the federal government can set desired policies and broad goals, with state governments determining how best to accomplish those, and local governments actually implementing them. Along with the appropriate accountability at each level, the elections law passed as a result of election 2000 may have a much broader national impact for generations to come than simply its elections purposes. HAVA, while not especially well written from a clarity standpoint, establishes unique concepts that bear close observation in fostering a new era of federalism where governments actually trust each other and work together to serve the public. Only time will tell whether that direction is successful.

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### About the Author

**R. Doug Lewis** is executive director of The Election Center, a national nonpartisan, nonprofit organization serving elections and voter-registration professionals. A certified elections/registration administrator, his contributions include authoring the Professional Education Program for elections/registration officials, developing of the first Code of Ethics for voter-registration and elections administrators, establishing the Professional Practices Papers program and establishing a National Task Force on Election Reform to study the 2000 presidential election.