



March 19, 2007

Honorable Members of the United States House of Representatives
Honorable Members of the United States Senate

Dear Member,

I am writing to express serious reservations about key provisions in HR 811, the Voter Confidence and Increased Accessibility Act. This office is not able to support this bill in its current form. I welcome the opportunity to work with you to improve the Act.

The Help America Vote Act (HAVA) required major changes to many election practices. Washington State, like most states, successfully implemented this legislation without incident. Some states have yet to complete implementation. Additional federal mandates that require specific remedies on aggressive timelines, as contemplated in HR 811, will jeopardize future elections. I want to highlight a few provisions that are of special concern. More detailed information for your staff is attached.

Available Technology. The legislation requires jurisdictions to provide, by November 2008, voting equipment that allows blind and visually impaired voters to privately and independently verify their ballots. However, no such technology is currently on the market and will likely take years to develop and test. The Act states that NIST must develop best practices by January 2010, after the states must have the equipment available. The time period and methods for implementing this change are not reasonable.

Source Code. The legislation requires voting system software source code to become public information. Releasing such proprietary information will decrease competition, increase the cost for local jurisdictions, and reduce the voting equipment options available to the public.

Litigation. The legislation appears to create a private right of action, which will cause nuisance lawsuits to skyrocket. This is inconsistent with a policy already established in HAVA.

Funding. The funding level is inadequate. Twenty-eight states do not currently mandate paper records for all voting equipment. These states will need to purchase new equipment for every jurisdiction.

Audits. Finally, requiring manual audits by a state Election Audit Board would be astronomically expensive, as the Board would be required to audit each county before an election could be certified. This would delay certification by weeks and place the security of ballots in jeopardy when they are removed from secure storage and handled.

We all share the goal of improving the elections system, but HR 811 is not the answer in its current form. My office is available to assist you and your staff in developing legislation for election reform.

Sincerely,

A handwritten signature in cursive script that reads "Sam Reed". The signature is written in black ink and is centered on the page.

SAM REED
Secretary of State

Enclosure

Washington State Secretary of State Analysis of HR 811

Available Technology.

Section 2(b)(1) amends Section 301(a)(3)(B) of HAVA and states:

By November 2008, the voting system must satisfy the accessibility requirement by using at least one voting system equipped for individuals with disabilities at each polling place and must meet the requirements for accessibility, voter verified paper ballots, and audit capacity by using a system that:

- *Allows the voter to privately and independently verify the content of the permanent paper record through the conversion of the printed content into accessible media; and*
- *Ensures that the entire process of ballot verification and vote casting is equipped for individuals with disabilities.*

Sec. 2(b)(2) adds a new subsection to state:

By January 1, 2010, the Director of the National Institute of Standards and Technology (NIST) must study, test, and develop best practices to enhance accessibility of ballot verification mechanisms for those with disabilities, for voters whose primary language is not English, and for voters with difficulties in literacy. The Director must investigate existing and potential methods or devices that will assist such individuals and voters in creating voter-verified paper ballots and in reading or transmitting the information printed on such ballots back to the individuals and voters.

HR 811 risks either not having equipment available that can meet these requirements by November 2008, or rushing to utilize untested and unreliable technology that will cause problems in the polling place.

Technology does not currently exist that allows a visually impaired voter to independently verify the paper ballot. Many years are necessary to:

- set standards for new technology;
- allow vendors to design new voting equipment according to those standards;
- allow the independent testing authorities to test the equipment according to those standards;
- allow the Election Administration Commission to certify the equipment;
- allow vendors to market the new voting equipment to the local jurisdiction; and
- provide time for the local jurisdictions to learn the new equipment and train poll workers.

Existing equipment that may initially appear to provide independent verification actually does not. For example, some voting equipment marks the ballot for a visually impaired voter by relying on audio and verbal prompts. This system then allows the voter to “verify” the ballot by interpreting back to the voter the location of the marks made on the ballot. However, this is not an *independent* verification since the information used to print the mark at a specific location is the same information used to interpret the meaning of the mark. A device with an incorrect definition of the ballot cannot notify the voter that the ballot will not be counted as intended.

Under the Act, NIST is required to develop best practices by 2010, but the states are required to implement the equipment by November 2008. If the equipment is designed and sold before the standards and best practices are in place, the equipment will have to be redesigned and repurchased after the standards are issued.

In order to be successful in the elections environment, voting equipment must meet a complex set of standards that includes durability and ease of use by voters and pollworkers. HAVA set up the Technical Guidelines Development Committee (TGDC) and the Election Assistance Commission (EAC) to develop evolving sets of voting systems standards that recognize all factors required for voting systems to be successful. The TGDC and the EAC should be given the opportunity to function as HAVA intended.

Source Code.

Section 2(c)(1) amends Section 301(a) of HAVA by adding a provision that states:

No voting system used in a federal election may contain or use software that has not been certified by the state or any software undisclosed to the state in the certification process. The election official must disclose, in electronic form, the source code, object code, and executable representation of the voting system software and firmware to the Commission, including programming files. The Commission must make this information available for inspection promptly upon request to any person.

Disclosing sensitive software source code to competitors will decrease competition and profits, which will stunt innovation and likely increase costs for local jurisdictions. Australia is the only country that we know has used open source code in voting systems, but the government contracted the full costs of designing, engineering and building a single, nation-wide voting system.

Funding.

Sec. 2(d)(1) amends Section 257(a) of HAVA by adding a provision that states:

For fiscal year 2007, \$300,000,000 is available to states to purchase or modify equipment to meet the requirements of this Act.

More funds will be needed to implement this act. Voting equipment that can incorporate accessible verification technology that is also useable, reliable, and durable will require the redesign and replacement of all existing electronic voting devices in the nation.

Spending on this now is premature. The funds are sufficient for the 28 states that do not currently require voter-verified paper audit trails (Washington would not receive funding for this purpose since we have already implemented this requirement). However, all electronic voting equipment will need to be replaced once accessible verification technology becomes available.

Litigation.

Sec. 3(b)(1) amends section 401 of HAVA by adding a provision stating:

A person aggrieved by a violation of section 301, 302, or 303 (voting system standards, provisional voting and voting information requirements, computerized statewide voter

registration list requirements and requirements for voters who register by mail, respectively), may file a written, signed, notarized complaint with the Attorney General.

This provision appears to create a private right of action, which will result in a large number of nuisance lawsuits. The provision requires the Attorney General to respond in a short period of time. In addition, this is inconsistent with the policy already established in HAVA that only the Department of Justice can enforce HAVA.

Audits.

Sec. 5 adds Subtitle III to HAVA:

The “Chief Auditor” of the state must appoint an Election Audit Board to conduct random hand counts of voter-verified paper ballots. The Chief Auditor must be someone other than the Secretary of State and must be designated by the state Attorney General to conduct annual audits. The Board must be comprised of party representatives and others who have professional experience conducting audits, and who reflect the demographic composition of the voting age population.

This provision details specific requirements for the organization of state government without establishing a policy objective. The Board will result in few if any people with experience in election administration. The Attorney General does not designate anyone “to conduct annual audits.” The provision is simultaneously detailed and vague.

The number of voter-verified paper ballots subject to a hand count is determined as follows:

- 1. If the “final unofficial count” reveals the margin of victory between two candidates is less than 1%, the hand count must occur in 10% of the precincts.*
- 2. If the “final unofficial count” reveals the margin of victory is between 1% and 2%, the hand count must occur in 5% of the precincts.*
- 3. If the “final unofficial count” reveals the margin of victory is greater than 2%, the hand count must occur in 3% of the precincts.*

States may not certify results of an election subject to an audit prior to the completion of the audit and the submission of the results to the Commission for publication.

This provision does not recognize basic procedures in election administration.

The provision assumes that the State announces all precinct results. It is the local jurisdictions, not the State, that conducts elections.

The provision assumes that all voting occurs on election day. With the popularity of permanent absentee voting in many states in the West, voting is occurring for two to three weeks before election day, and ballots continue to be received for two to three weeks after election day. All election results are unofficial until the election is certified. The audit will undoubtedly delay the certification of each election.

It is unclear if the Board conducts the hand recount or if the local jurisdiction conducts it on the Board's behalf. The cost for this program will be astronomical. The security of the ballots will be compromised because ballots will be moved, resorted and manhandled unnecessarily.

Definitions.

Throughout HR 811, many terms are not clearly defined. For example:

- It is unclear if “electronic vote tally” in Section 2(a)(1) refers to Direct Recording Electronic (DRE) device tallies, or Optical Scan systems which scan paper ballots, tally the votes, and produce electronic vote tallies that are reported through software.
- It is unclear in Section 2(a)(1) whether the vote tally determined by counting the individual permanent paper ballots by hand refers to the voter verified paper ballot that has been accepted by the voter or all paper ballots that have been voted and cast at the polling place, by mail, and on a DRE.
- It is unclear whether “power-line” in Section 2(c)(1) refers to a power source.
- Section 5(322)(a) uses “unofficial count.” It is unclear at what point the count during the 21 day certification period becomes the “unofficial count.”