

Analysis of the “Voting Opportunity and Technology Enhancement Rights Act of 2005”

On January 25, 2005, Senator Dodd (D-CT) introduced the “Voting Opportunity and Technology Enhancement Rights Act of 2005” (S. 17) into the U.S. Senate. It was co-sponsored by Senators Reid (D-NV), Stabenow (D-MI), Rockefeller (D-WV), and Schumer (D-NY). Bob Kibrick, Legislative Analyst for VerifiedVoting.org, has prepared the following analysis of this bill.

General Comments

There are a couple of good provisions in this bill (e.g., Sec. 5, Provisional Ballots, and Sec. 7, Election Day Registration), but most of the rest are extremely problematic.

Specific Comments

1. Section 2. Finding and Purposes

Subsection (a) ("Findings") contains several paragraphs of lofty sounding platitudes (including words from Lincoln). It asserts that "the right of all eligible citizens to vote and have their vote counted is the cornerstone of a democratic form of government..." But it says nothing about a right of citizens to have their vote counted in a manner that is accurate and verifiable.

Subsection (b) ("Purposes") include paragraph (3), which calls for the expanding/establishing requirements and standards to provide for the accessibility, accuracy, verifiability, privacy, and security of all voting systems and technology used in Federal elections. Unfortunately, the provisions, which follow in Section 4, fall short of providing either accuracy and verifiability.

2. Section 3. National Federal Write-In Absentee Ballot

This creates a new section (Sec. 321 under HAVA Title III and Sec. 297 under HAVA Title II) that would establish a Federal Write-In Absentee Ballot. The actual format of this ballot and the standards under which it would be distributed and processed are not fully defined in this bill but are left to the EAC to define.

While this section may be well intended (i.e., to provide one more way of ensuring that voters, especially overseas voters, can be assured of at least casting a vote for Federal offices), it contains a terrible loophole in the proposed §321(b)(2), found on page 5, lines 1 through 8 of this draft, which reads:

"(2) DEADLINE.- An otherwise eligible national Federal write-in absentee ballot shall be counted if postmarked or signed before the close of the polls on election day and received by the appropriate State election official on or before the date which is 10 days

after the date of the election or the date provided for receipt of absentee ballots under State law, whichever is later.

I have highlighted the "or" between "postmarked" and "signed". The problem with this deadline is that it provides no mechanism for confirming that a ballot was indeed signed before the close of the polls. What if a voter completes such a ballot after the close of the polls, backdates it, signs it, and pops it in the mail? So long as it arrives within the 10-day window specified in this paragraph, it is to be counted, even if arrives with no postmark or a postmark indicating it was mailed after the close of the polls.

When coupled with the provision to make such Federal write-in absentee ballots (as contained in the proposed §297(b)(1), found on page 7, lines 1 through 3 of this draft), the deadline loophole creates the potential for widespread casting of such ballots after the polls have closed.

3. Section 4 Voter Verified Ballots

Despite its title, this section does little to establish any meaningful requirement for voter verified ballots while at the same time interfering with the rights of States to establish requirements for voter-verified paper ballots. It leaves the ambiguous language of HAVA's manual audit capacity requirement (§301(a)(2)) unchanged, and while it calls upon the EAC to establish uniform and non-discriminatory standards for meeting that requirement [see page 10, lines 4 through 10], it sets no deadline by which those standards must be established.

Instead of correcting the known deficiencies in the existing language of HAVA §301(a), it tacks on a new paragraph (7) ("Voter Verified Ballots") at the end of that subsection. There it establishes a requirement, effective 1/1/2009, that voting systems must provide voters with "an independent means of voter verification...which allows each voter to verify the ballot before it is cast and counted". It further requires the voting system to provide voters a choice of 4 different verification options: a paper record, audio record, pictorial record, or electronic/accessible record.

Unfortunately, this new paragraph (7) is incredibly deficient in establishing any meaningful requirement for a voter-verified ballot, because:

a) This paragraph does not itself explicitly define what it means for a voter to "verify the ballot". Unlike other pending VVPB legislation (e.g., Ensign's VIVA bill), it does not require that the voter be able to verify "the accuracy of their ballot". While the existing HAVA §301(a)(1)(A)(i) specifies that a voting system must "permit the voter to verify...the votes selected by the voter on the ballot before the ballot is cast and counted", that language does not include verification by the voter that the votes selected on the ballot represent the voter's intent. For example, miscalibrated touch screens sometimes register "voter selections" other than what the voter intended.

b) It fails to make any explicit provision for the voter to be able correct any error that the voter discovers on any such a voter verified ballot record. While the existing language of HAVA §301(a)(ii) makes provision for the voter to "change the ballot or correct any error before the ballot is cast and counted", that clause makes no reference to the "voter verified ballot records" that are newly-defined in this paragraph; rather, §301(a)(ii) refers only to the "ballot", which could be construed as the non-voter-verified electronic record inside a DRE voting machine. Thus, if the voting system produces a "voter verified ballot record" (either paper, audio, pictorial, or electronic) that is incorrect, the voter is afforded the opportunity to verify that it is wrong, but then what? Note that while there is a conforming amendment (see page 9 lines 18 through 23) which amends §301(a)(i) to make reference to this newly-added paragraph (7) ("Voter Verified Ballots"), there is no corresponding conforming amendment for §301(a)(ii).

c) This paragraph makes no specification that the voter verified ballot record needs to be permanent. For example, it does not require that the audio or pictorial records be maintained after voters have cast their ballots, nor does it provide any specification of what those records are or how they would be produced. Is a pictorial record a photo of the selected candidate? What would be the pictorial record for a ballot measure?

d) Nor does it specify that the voter verified ballot record becomes a permanent record only after the voter has certified that such a record accurately reflects the voter's intent.

e) It fails to specify that the voter verified ballot record (whatever its format) needs to be preserved in any way.

f) It fails to specify that the voter-verified ballot record is itself an official record of the voter's vote, rather than merely a vehicle for assuring the voter that any non-voter-verified electronic record (maintained invisibly inside a DRE voting machine) is correct.

g) It fails to establish that in any discrepancy between a non-voter-verified (and invisible) electronic ballot record and a voter-verified ballot record that the voter-verified ballot record shall be the true and correct record of the votes cast.

h) It fails to establish that the voter-verified ballot records shall be the official records used for purposes of any recount or audit.

In addition, by imposing a requirement that any voting system must provide voters a choice of the 4 different methods of verification, it would effectively prevent after 1/1/2009 any further deployment of currently-designed optically scanned ballot systems (including precinct-count optical scanners and associated ballot marking devices), since those systems do not provide these 4 choices. This would further narrow the range of existing HAVA compliant voting technologies from which States could choose to meet their voting needs, and, over time, would force States to ultimately move to DRE voting machines.

Further, requiring each voting system to provide these 4 different methods of verifying a voter-verified ballot record will add considerable expense to any system that meets such a requirement.

In addition, if the voter-verified ballot records are to be used to conduct any type of meaningful audit or recount, elections officials will be forced to deal with four different flavors of such voter-verified ballot records, thereby greatly increasing the cost, complexity, and likelihood for error in any such recount or audit.

With regard to the 1/1/2009 date specified in this paragraph (7), not only do these vague and ill-defined requirements not become effective until that date but any voting systems purchased before that date "in order to meet the requirements of paragraph (3)(B)" are permanently exempted from meeting the "voter-verified ballot" requirements of this paragraph (see page 9, lines 14 through 17):

(7)(D) The requirements of this paragraph shall not apply to any voting system purchased before January 1, 2009, in order to meet the requirements of paragraph (3)(B).

The referenced paragraph (3)(B) of HAVA §301(a) reads:

satisfy the requirement of subparagraph (A) [the requirement that voting systems be accessible to individuals with disabilities] through the use of at least 1 direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.

Note that (3)(B) says jurisdictions must deploy "at least 1" such system to meet its requirement but does not preclude them from deploying more than one. As a result, a jurisdiction might argue that all of the new voting systems it deployed were done so as to comply with HAVA's §301(a)(3)(B) requirement.

Taken together, this essentially means that any voting systems purchased prior to 1/1/2009 will be exempt from the "voter verified ballot" requirements of this paragraph (7), which means that hardly any machines will be required to comply with this requirement. Given the significant amount of new HAVA funding (\$2 billion) proposed for FY 2006 in Sec. 16 of this bill (see page 25, line 7), most jurisdictions will have installed their new voting systems well before 1/1/2009, and will thus be exempt from even the vague "voter verified ballot" requirements of this section.

In any case, by creating such a late deadline, this paragraph fails to put in place ANY voter verified ballot requirement in time for the next Presidential election in 2008.

In summary, the "voter-verified ballot" requirements established in Section 4 of this bill do little to provide any meaningful voter-verified ballot requirement on any useful time scale. Longer term, they will impose complex, ill-defined, and costly mandates on the States, potentially interfering with State-level voter verified paper ballot bills that have

already been passed into law by a number of States, and further restricting the range of HAVA-compliant choices from which States can choose to meet their voting system needs. Other Federal legislation (pertaining to voter-verified ballots) that is about to be introduced (e.g., Sen. Ensign's Voting Integrity and Verification Act of 2005 and Rep. Holt's Voter Confidence and Increased Accessibility Act of 2005) does not suffer from the numerous deficiencies identified for Sen. Dodd's bill.

Section 5. Requirements for Counting Provisional Ballots

No concerns

Section 6. Minimum Required Voting Systems & Poll Workers in Polling Places

Provisions are well intended but need further refinement. For example, in subsection (b) of the new Section 299 proposed for addition to the new subtitle E of Title II (see page 13, lines 12 through 15), the language calls for:

"(b) DISTRIBUTION. - The standards described in subsection (a) shall provide for a uniform and nondiscriminatory geographic distribution of such systems and workers"

"Geographic distribution" seems to be a poor method for specifying this; it could be read to require a given number of voting systems per square mile, regardless of the population density.

Section 7. Election Day Registration

No comments

Section 8. Integrity of Voter Registration List

Provisions are well intended but inadequate. Would be more effective if the required public notice prior to an election for Federal office listed all names of voter removed from the registration list since the most recent Federal election, regardless of whether those names had previously appeared on any such lists between that prior election and the one about to occur.

Section 9. Early Voting

Provisions are well intended, but might not give sufficient flexibility to the States and local jurisdictions. For example, the requirement for uniform hours of operation for each day of early voting might not provide for optimal accessibility in certain circumstances and locations, e.g., in towns where the schedules of residents are dominated by factory schedules that might vary on different days of the week.

Section 10. Acceleration of Study on Election Day as a Public Holiday

No comments

Section 11. Improvements to Voting Systems

Subsection (a) of this section would amend HAVA §301(a)(1)(B) to remove punch card voting systems and central count voting systems. The net effect would be to prohibit the use of such systems for ballots that are cast in a polling place. (Presumably, such systems could still be used for mail-in absentee ballots and mail-in ballots).

While it is probably a worthwhile goal to phase out the continued use of central count punch card systems for votes cast in the polling place (because such systems fail to provide any protections against over-voting or under-voting), the proposed language would also prohibit the use of precinct-count punch card systems, which might not be advisable.

Large jurisdictions (e.g., Chicago) have made extremely effective use of precinct-count punch card systems, providing the same level of protections against over-voting and under-voting as are provided by precinct-count optical scan systems.

Further analysis is needed as to where precinct-count punch card systems should be banned, as this proposed language would do.

Section 12. Voter Registration

There are some good provisions in this section, but the proposal for voter registration via the Internet raises serious concerns. It would create the potential for wide scale, automated, and anonymous alterations of voter registration lists from any location on the globe. Given the currently unchecked abuses of Internet spammers, the prevalence of viruses that silently infect millions of machines and enlist them to engage in malicious attacks on other systems, and the potential for denial of service attacks on voter registration systems, and you have the potential for widespread voter registration havoc. Many of the same concerns that make Internet voting problematic make an Internet-based voter registration system equally problematic.

Section 13. Voter ID

No comments

Section 14. Impartial Administration

This section mandates that States must allow "uniform and nondiscriminatory access to any polling place for the purposes of observing a Federal election" to various groups, including:

- (A) Party challengers
- (B) voting rights and civil rights organizations
- (C) nonpartisan and domestic observers and international observers

This could have unintended consequences and could pose additional burdens on States and jurisdictions with respect to size requirements of polling places.