

Is HAVA Being Abused? Part II Good for the Goose; Why Not for the Gander?

By Ellen Theisen, June 4, 2005

In spite of the federal government's repeated failures to meet statutory deadlines imposed by the Help America Vote Act of 2002 (HAVA), the U.S. Department of Justice has declared that the States must meet their HAVA deadlines, even without the HAVA-mandated research and guidance intended to help the States comply with HAVA wisely.

HAVA requires the Federal Election Assistance Commission (EAC) to develop guidance on voting systems standards by January 1, 2004. The standards were intended to guide the States as they upgraded their election equipment to meet the HAVA Section 301 requirements by the January 1, 2006 deadline.

In violation of HAVA, the President delayed the appointment of the members of the EAC for more than nine months after the HAVA deadline — two weeks before the statutory deadline for providing the voting system standards. Furthermore, HAVA authorized up to \$10 million for each year from 2003 to 2005 for the EAC to carry out its duties. However, only \$2 million was appropriated for 2003 and the EAC was not formed in time to use the funds. Only \$1.2 million was appropriated for 2004. "The total operating budget for Fiscal Year (FY) 2004 was just \$1.2 million."¹

On April 30, 2004, the EAC reported its concern about this situation to the President and Congress, listing nine missed deadlines caused by the delay in its establishment and the lack of funding. Following the list, the EAC says:²

"The implications of these delays are likely to include continued problems with election equipment; other unresolved election administration issues such as voter verifiable paper audit; and the likely inability of States and local election jurisdictions to meet HAVA requirements by statutory deadlines."

The website of the EAC explains two other programs intended to help the States select high-quality voting systems. Neither program has been implemented because the federal government failed to appropriate the \$30 million authorized by HAVA for these programs for 2003:³

- ◆ "Pilot programs that test and implement on a trial basis new technologies in voting systems and equipment. The results of such tests and trials are to be reported to Congress.
- ◆ "Research and development to improve the quality, reliability, accuracy, accessibility, affordability, and security of voting equipment, election systems, and voting technology.

"The Act authorizes appropriations of \$10 million in fiscal year 2003 for pilot programs and \$20 million in fiscal year 2003 for technology improvements. These funds were to remain available until expended, but they are not available because no funds have been appropriated to support these programs. "

¹ U.S. Election Assistance Commission. **Annual Report. Fiscal Year 2003.** April, 2004. Page 11.
http://www.eac.gov/about/report/docs/2003annualreport.pdf/attachment_download/file

U.S. Election Assistance Commission. **Fiscal Year 2004 Annual Report.** January 2005. Page 3.
http://www.eac.gov/about/report/docs/annualreportfy04.pdf/attachment_download/file

² EAC 2003 Annual Report. Page 2.

³ http://www.eac.gov/pilot_programs.asp?format=none

So, as of the end of Fiscal Year 2004, only \$1.2 million (2.4% of the \$50 million authorized by HAVA) had been made available by the federal government to support the work of the EAC and these important research programs. In contrast, \$1.3 billion had been disbursed to the States to pour into the purchase of voting systems without the benefit of the guidance and assistance mandated by HAVA.⁴

In January of 2005, the EAC again told the President and Congress:⁵

"the delayed establishment of EAC and operating budget constraints restricted its ability to conduct some HAVA-mandated activities within the prescribed timeline. EAC was forced to postpone or limit ... [among other activities] Development of updated voluntary voting system guidelines and a national voting system testing program."

And again, the EAC voiced its concern that States were still expected to meet voting systems requirements, even though the prerequisite guidance mandated by HAVA had not yet been developed.

"Perhaps the most serious implication of the delayed EAC startup is the impact it will have on State procurement of new election equipment and the ability of some States and local election jurisdictions to meet HAVA requirements by statutory deadlines.

"Although these activities have not been completed, the Commissioners understand that all HAVA requirements must be met. EAC is working diligently to fulfill its obligations."

In the final section of the report, which discusses the activities planned for 2005, the EAC acknowledges that it cannot provide guidance to the States in time to help them make wise choices as they procure HAVA-compliant voting systems. The Commissioners are clearly resigned to the fact that they can only provide that guidance after the States have their new systems in place.⁶

"Many States are directing efforts to meeting the January 2006 deadline for implementation of statewide voter registration databases and the replacement or upgrade of voting systems to meet HAVA requirements.... the Agency expects to receive initial recommendations for voting system standards from the TGDC and NIST for use in voting system procurements, laying the groundwork for future technical assistance to the States."

Nevertheless, on May 10, 2005, in a response to a question from the Louisiana Secretary of State, the U.S. Department of Justice declared that HAVA "unambiguously requires" the States to have their new voting systems in place and ready for use in time to meet the "absolute" deadline of January 1, 2006.⁷

"As with the other Title III requirements, we view the January 1 deadline in Section 301 as building in necessary time for states to train poll workers, educate voters, and conduct testing on new voting systems prior to their use in the first election for federal office next year. We believe that if Congress had intended to allow states to delay their implementation of HAVA's voting system standards until the first election for federal office after January 2006 (as opposed to being ready *on* January 1, 2006), Congress would have used language saying just that."

However, Congress was also unambiguous in its absolute deadline for the appointment of the Election Assistance Commission. If Congress had intended to allow the appointment to be

⁴ EAC 2004 Annual Report. Page 13

⁵ EAC 2004 Annual Report. Page 5

⁶ EAC 2004 Annual Report. Page 30

⁷ <http://www.usdoj.gov/crt/voting/hava/lavotsyst.htm>

delayed for over a year after HAVA was enacted, it would not have stated in Section 203(a)(4): "The appointments of the members of the Commission shall be made not later than 120 days after the date of the enactment of this Act."

Further, Congress was unambiguous in its absolute deadline for the development of voting system standards to guide the States in their compliance with HAVA. If Congress had intended to allow the standards to be developed after the need for them had passed (as opposed to when they would be useful), it would not have stated in Section 311(b)(1) that the EAC "shall adopt recommendations" with respect to the Section 301 voting system requirements "not later than ... January 1, 2004." Of course, the EAC could not comply because it had only been established two weeks before the deadline.

In July of 2004, the EAC was finally able to begin the process of developing the HAVA-mandated guidance and may have the standards released by the end of 2005 – about 24 months late. If the States' HAVA deadlines had a corresponding "flexibility," their need to purchase voting systems could be delayed for nearly two years.

Rather than holding the States to standards the federal government has repeatedly failed to meet, Congress should immediately extend the deadline for HAVA compliance, giving the EAC an opportunity to complete its research and develop strong standards, and giving the States breathing room to make wise decisions based on guidance from the EAC – as was the intent of HAVA.