

7810 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

August 4, 2004

The Honorable Joseph H. Neal
Member, House of Representatives
P. O. Box 5
Hopkins, South Carolina 29061

Dear Representative Neal:

You seek an opinion concerning the mandate of the federal Help America Vote Act (HAVA) which enumerates certain requirements for future voting systems. Specifically, you wish to know "whether Title III, Section 15481, (a)(2)(B) of the HAVA Act requires that all voting machines must produce a paper record of the vote cast by each voter that has been seen and verified by the voter." It is your "belief that the lack of a contemporaneous paper record of votes cast would make the HAVA requirement for a 'manual audit capacity' meaningless" In support of this conclusion, you have attached a copy of a legal analysis by Darryl Wold, entitled "The HAVA Requirement for a Verified Paper Record."

By way of background, you state the following:

Title IV of the HAVA Act gives citizens the right to seek injunctive relief if they believe that any section of Title III of the act has been violated.

The Election Commissions rush to spend over \$48 million in HAVA funding is fraught with problems that underscore the need for a verifiable paper ballot. The Commission is considering bids of around \$30 million to purchase machines without a paper receipt capacity, claiming they would cost too much. I question the need for nearly \$18 million to be held out for training.

It is possible that in the next few years there will be federal or state legislation (already passed in a number of states and pending in the US Congress) that will require voter verifiable paper ballots. I fear that without your intervention, our state will have bought a pig in a poke and have to pay the difference to comply with the new law.

If the state uses its purchasing power wisely, we can acquire the paper trial before it is required, for significantly less than the cost of a retrofit. The considerations go beyond a violation of HAVA to why the Election Commission is insistent on making a really bad investment for our state.

Request Letter

“ On behalf of myself, my constituents and all the citizens of South Carolina, I ask that you be our attorney in this matter. Our democracy depends on the citizens’ belief that their votes count.

Law / Analysis

It is our opinion that HAVA requires that voting systems produce a permanent paper record with a manual audit capacity to enable election officials to conduct fair and accurate recounts. However, the Act does not require that such paper trail be seen and verified by the voter after it is produced. The Help America Vote Act (HAVA) was enacted by Congress and signed into law on October 29, 2002 “in response to the problems which arose from the last presidential election.” Sequoia Voting Systems, Inc. v. Ohio Secretary of State, 125 Ohio Misc.2d 7, 796 N.E.2d 598, 600 (2003). Codified at 42 U.S.C. 15301 et seq. (P.L. 107-252), HAVA’s stated purpose is to “create and establish a federally funded program to facilitate the replacement of punch-card voting systems with a more accurate, secure and user-friendly electronic voting system. Id. The Act has been described as requiring “major changes,” promising federal funding “to accomplish these sweeping reforms.” Heckert, “Major Legal Changes are Underway for Federal Elections,” 27-Feb. Wyo. Law. 32 (February, 2004). The design of such changes are “to reduce the likelihood of voter fraud while promoting greater voter participation, certainty that all legal votes are counted, and confidence in the election process.” Id.

A part of the HAVA deals specifically with “Uniform and Nondiscriminatory Election Technology and Administration Requirements.” These requirements are set forth in Part A of Subsection III of Chapter 146 of Title 42 and are codified as 42 U.S.C. § 15481. Pursuant to this portion of the Act, for example, a voting system for a federal office must permit the voter to verify that his or her vote is cast and counted; provide the voter the opportunity to change the ballot or correct an error; and the system must notify the voter if he or she has cast multiple votes for a single office and provide the voter an opportunity to correct the ballot before the vote is cast and counted.

42 U.S.C. § 15481(2) specifically provides for the “audit capacity” of a voting system. Such provision reads as follows:

- (2) Audit capacity
- (A) In general

The voting system shall produce a record with an audit capacity for such system.

- (B) Manual audit capacity
 - (i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.
 - (ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.

- (iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

(emphasis added).

Several principles of statutory construction which have been applied by the federal courts in construing Acts of Congress are pertinent to your inquiry. First and foremost, it is well recognized that “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985). In interpreting a statute, “[i]f the statutory terms are unambiguous ... review generally ends and the statute is construed according to the plain meaning of the words.” Greenery Rehab. Group v. Hammon, 150 F.3d 226, 231 (2d Cir. 1998). Unless otherwise defined, words used in a statute will be interpreted according to their ordinary, contemporary, common meaning. Perrin v. United States, 444 U.S. 37, 42 (1979). However, the plain meaning rule should not be applied to produce a result which is inconsistent with the policies underlying the statute’s passage. Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988). A remedial statute must thus be interpreted liberally to effectuate the purpose of enactment. Cody v. Cmty. Loan Corp. of Richland County, 606 F.2d 499, 505 (5th Cir. 1979).

Moreover, the well-recognized rule of construction “expressio unius est exclusio alterius” also serves as a guide in construing the relevant statute. See, Rosmer v. Pfizer, Inc., 272 F.3d 243 (4th Cir. 2001). This rule acknowledges that Congress is fully cognizant as to how to make a statute reach more broadly if it so desires; when it does not, such omission or limitation is deemed to indicate such broad reach was not intended. In other words, this “expressio” rule of construction “instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded.” Reyes - Gaona v. N.C. Growers Assn., 250 F.3d 861 (4th Cir. 2001).

With this general background in mind, we turn now to the interpretation of HAVA itself. One scholar has summarized Title III of HAVA as follows:

[a]rguably the most important provisions of the Help America Vote Act are in Title III, which specifies uniform election technology and administration requirement for voting systems used for federal elections To comply with Title III [by January 2006], a voting system must enable the voter to review his or her vote selection before the ballot is cast and counted and allow the voter, if necessary, to change or correct his or her vote In addition, voting equipment must alert voters of over votes – ballots with more than one choice of candidate for a single office and permit voters to correct such mistakes Each voting system must comply with error rates established by the FEC [Federal Election Commission] Also the new voting equipment must produce a “permanent paper record” with a manual audit

capacity, that will serve as the official record for any recount conducted
(emphasis added).

Kim; "Help America Vote Act," 40 Harvard Journal on Legislation, 579, 590 (Summer, 2003). This scholarly article also comments upon the Act's enforcement mechanism for a violation of Title III of HAVA:

[i]n implementing the Act's Title III provisions, states and localities have discretion to choose how they will implement them. ... If state and local authorities fail to comply with voting system standards, provisional voting rules, statewide voter registration list requirements, and procedures for registering by mail, the Attorney General can bring a civil action against the state or local jurisdiction in federal district court for declaratory and injunctive relief to compel violators to comply In addition, states receiving federal funds under the Help America Act must establish state-based administrative complaint procedures that can be used by people who feel that there has been a violation of Title III When a complaint is appropriately lodged, there must be a hearing on the record and the state must provide an appropriate remedy As there is no private right of action, ... the Department of Justice and state officials must be vigilant in helping to ensure that states and local governments comply with Title III.

Id., at 593.

Following HAVA's enactment in 2002, a number of Senators and Congressmen introduced legislation because they did not believe HAVA went far enough. The concern of these lawmakers is that HAVA, as presently written, does not mandate a voter verifiable paper trail. On February 2, 2004 Senator Barbara Boxer of California introduced the Secure and Verifiable Electronic Voting Act of 2004 (SAVE). Her comments on the floor of the Senate are particularly instructive:

[t]he 2000 presidential election exposed a number of serious problems with the accuracy and fairness of elections procedures in this country, as well as the reliability of certain types of voting technology. As a result of these irregularities, many eligible voters were effectively disenfranchised and thus deprived of one of their most fundamental rights. This is not acceptable in a democracy such as ours

In 2002, Congress passed the Help America Vote Act (HAVA). This important legislation sets Federal minimum standards for voting systems, including requiring that the equipment used is reliable, accurate, and accessible to all. It encourages the use of direct recording electronic voting systems to replace the outdated punch card and lever machines. It also requires that voting systems provide voters the opportunity to correct errors and that they produce a permanent record with a manual audit capacity.

However, HAVA does not go far enough

My bill, the Secure and Verifiable Electronic Voting Act – the SAVE Voting Act would require that a voter-verifiable paper trail for each vote cast be in place for the November 2004 elections. What that means is this: after an individual votes, he or she will have the opportunity to review the vote on a piece of paper, before it becomes part of the official record. If there is a discrepancy, the voter will have the opportunity to change his or her vote before it is recorded in the official record. This paper record will then be the official permanent record used for any recount or verification.

150 Cong. Record S 371-03, S 374.

Likewise, Congressman Rush Holt of New Jersey has reintroduced H.R. 2239, known commonly as The Voter Confidence and Increased Accessibility Act of 2004. Like Senator Boxer, Congressman Holt's concern is that HAVA does not presently require a voter-verified paper trail, and it is the purpose of his legislation to require one. In his words,

HAVA requires voting machines to produce a "permanent paper record with a manual audit capacity," but his provision fails to guarantee anything other than a print-out of whatever the machine records, including the so-called "ballot image." Though it allows the voter to verify his or her vote before it is finally cast, this verification happens before the permanent record is produced. In other words, while HAVA requires a paper trail, the actual paper record itself is not voter-verified. As a result, the voters would never know – and election officials could never determine – whether a faulty machine erroneously recorded the voter's intent on the actual paper record. HR 2239 would require that voters be able to verify the actual paper record after it is printed.

Congressman Rush Holt Website, <http://www.holt.house.gov/display2.cfm?id=7850&type=Home>. Congressman Holt indicates his Bill does not make the voter-verifiable paper trail a "receipt" and thus "the records cannot leave with the voters." Thus, he argues, his legislation does not enable such paper to "be used to sell votes or intimidate voters." Id.

Others have similarly interpreted HAVA as requiring a paper trail, but not one which is voter-verified. See, Website of verifiedvoting.org ["In the rush to pass this new Act (HAVA) some key elements were left out, such as a 'voter verifiable paper receipt'. The newest Act, introduced by Representative Rush Holt, hopes to update the original HAVA Act with specific solutions to the question of voter verified paper receipts and other obvious discrepancies."] Sostek, "No Soft Touch," (May, 2004) from Governing's May, 2004 issue and found on the website of Governing.com. ["A few states have seen bills introduced in their legislatures to require papers trials, but none has passed thus far. An amendment to HAVA is also pending in Congress to require paper trails nationwide. That bill has attracted the support of 128 co-sponsors. The article adds that "It is not entirely clear

whether paper would provide an additional layer of security. While a paper receipt would convince voters that "the machine did record their vote as cast, that paper might be more vulnerable to manipulation than electronic machines."]; Weinstein, "Push For Voting Changes May Not Cure All Ills," Wall Street Journal, April 22, 2004, found on Fair Elections.Us website [notes that Congressional efforts are underway to amend HAVA to require voter-verifiable paper trails]; Cindy Parker, "New Machines Make Voting Fairer for Disabled," The State, July 27, 2004 ["An additional requirement that new voting systems produce a ballot receipt for each voter ... would appear to be both beyond the mandate of the federal law (HAVA) and very expensive."]; "Help America Vote Act - A Summary," found on New York Public Interest Group website at <http://www.nypirg.org/goodgov/hava/havadescr.html> ["a permanent paper record with a manual audit capacity available as official record for recounts (which is not required to be voter-verifiable)"]; "Questions and Answers on Direct Recording Electronic Voting Systems," League of Women Voters website <http://www.wv.org> ["If the voter is given a receipt; that shows how he or she voted, then vote buying schemes can be very effective and voter intimidation can ensue."]

You have submitted a legal analysis for our review, authored by Darryl R. Wold, former Chairman of the Federal Election Commission. This analysis is entitled "The HAVA Requirement for the Voter Verified Paper Record." Mr. Wold's paper concludes that HAVA "requires that any voting system used in an election for Federal office must produce a paper record of the vote cast by each voter that has been seen and verified by the voters." He argues that "[t]aken together," the provisions of § 15481 "make it apparent that HAVA requires a paper record that is seen, verified and turned in by the voter." In Mr. Wold's view,

[a] paper record consisting solely of ballots printed by the computer after the closing of the polls – and therefore never seen by the voters would mean that a manual audit or recount would simply amount to reviewing what was stored in the computer. The audit or recount could not manually verify that the computer had accurately recorded the voter's intent, or hand accurately stored that information, or had accurately printed out that information. Both an audit and a recount, therefore, would miss the key element of the system – whether the voter's intention had been accurately recorded.

Id at 2.

While Mr. Wold's interpretation may possess a certain appeal, it is clear that his analysis "implies" the requirement of a voter-verifiable paper trail. However, as Representative Holt has stated, the reason he introduced H.R. 2239 is that the present version of HAVA "allows the voter to verify his or vote before it is finally cast" and "this verification happens before the permanent record is produced." Holt Website, supra. The express mention of this requirement that the voter be allowed to verify his or vote before the paper record is produced, and the omission of any express voter-verified paper record makes it extremely difficult to "imply such a requirement, as Mr. Wold does. The canon of construction expressio unius est exclusio alterius clearly supports our conclusion. The fact that a number of bills have been introduced and are now pending which would

amend HAVA so as to require a voter-verifiable paper trail, as well as the virtually consistent interpretations, referenced above, which conclude that HAVA does not presently require a voter-verified paper trail, also strongly reinforces our conclusion.

Conclusion

1. Title III of the Help America Vote Act of 2002 mandates that by January 2006, all voting systems used in elections for federal offices must comply with certain mandatory requirements.
2. Among these requirements are that new voting equipment must produce a "permanent paper record" which possesses a "manual audit capacity" which will serve as the official paper record for any recount which may be necessary. This permanent paper record must be an exact reproduction of each voter's vote so that if a recount must be conducted, the ballots, as cast, may be counted accurately and fairly.
3. In addition, Title III requires that the voter must be given the opportunity to review his or her vote selection before the ballot is cast and counted and to "change the ballot or correct any record before the permanent paper record is produced."
4. Title III also requires that the system must advise voters of over votes – in order to make a correction if a voter has made more than one choice of candidate for a single office.
5. However, under no reasonable construction of Title III of HAVA, as presently enacted, is a so-called "receipt" for the voter's review and verification required by the Act. As noted, the Act mandates that the voter must be given "an opportunity to change the ballot or correct any record before the permanent record is produced." (emphasis added) No voter verification of the permanent paper record itself is mentioned in the Act.

While some persons have attempted to construe the Act as "implying" a voter-verified paper record, most have read the legislation consistent with its literal language as neither requiring a voter-verified paper record deposited with election officials, or as requiring a voter "receipt" which the voter might keep. This construction is accurately reflected in a number of Congressional efforts to amend HAVA so as to require such a voter-verified paper trail.

In short, as presently enacted, HAVA does not require a voter verified paper record or a voter "receipt." The express requirement in the Act that the voter be given the opportunity to correct his or her vote before the permanent paper record is produced, is a strong indication that voter verification of the paper trail was not intended by Congress., ("Expressio unius est exclusio alterius.")

6. A voter-verified paper trail would create numerous legal and practical problems and such thorny issues may have been one major reason Congress did not enact this requirement as part of the present Act. Among the legal problems which could be encountered by a requirement of a voter receipt or a voter-verified paper trail are possible voter fraud and intimidation. As noted above, the League of Women Voters has identified these potential problems. In addition, possible compromise of the constitutional right to a secret ballot is also a major potential problem accompanying a voter-verified paper trail. See, Art. II, § 10 of the South Carolina Constitution. In addition, many have noted the likelihood that a voter-verified paper trail would create long delays and impose additional costs upon the voting process.
7. In terms of mechanisms for enforcement of any alleged violation of Title III, the Act requires that such must be done by the United States Attorney General. 42 U.S.C. § 1551 provides that “[t]he Attorney General may bring a civil action against any state or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief ... as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under Sections 15481 ... of this title.” This provision references the United States Attorney General only.

In addition, the Act also provides that states receiving federal funding under the Act must establish state-based administrative complaint procedures for those who believe there has been a violation of Title III. Upon a complaint having been filed, there must be a hearing on the record and the state must provide an appropriate remedy. The state must make a final decision on the complaint within 90 days from the date of filing unless the complainant agrees to a longer period of time. If the state finds no merit to the complaint, it must dismiss it and publish the reasons for its conclusion. See, § 402(a) of the Act.

8. In construing HAVA or any other Act, we cannot infer a requirement which Congress itself omitted. By the statute’s express terms, the voter is given the opportunity to correct his or her ballot “before the permanent paper record is produced.” While HAVA clearly requires a permanent paper trail in order to conduct fair and accurate recounts, the Act does not require a voter “receipt” or a voter-verified paper trail.

Yours very truly,



Henry McMaster