

Analysis of differences between H.R. 533 (Conyers) and S. 17 (Dodd): The Voting Opportunity and Technology Enhancement Rights Act of 2005

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ABSTRACT

This document compares the provisions of the two versions of the “Voting Opportunity and Technology Enhancement Rights Act of 2005” that have been submitted to the U.S. Congress:

- **S. 17**, introduced January 24, 2005, by Senator Dodd of Connecticut and
- **H.R. 533**, submitted February 2, 2005, by Representative Conyers of Michigan.

This analysis is based on the official text of S. 17 (as introduced) obtained from the Government Printing Office (GPO) website, and on the unofficial draft text of H.R. 533 that is posted on the website of the Democratic members of the House Judiciary Committee; that text is assumed to be the same as what was introduced. (As of the date of this document, the official text of H.R. 533 has not yet appeared on the GPO website.)

GENERAL COMMENTS

Despite that fact that both bills carry the same name (*Voting Opportunity and Technology Enhancement Rights Act of 2005*), H.R. 533 differs significantly from S. 17. First, it is nearly twice as long as its Senate companion (i.e., 49 pages versus 25 pages). Second, it contains two additional sections (H.R. 533 sections 3 and 17) not present in S. 17. Third, it accelerates several deadlines from 2009 to 2007.

But most importantly, H.R. 533 specifically addresses some of the concerns that were raised in the January 30, 2005 analysis of S.17 that is posted on the VerifiedVoting.org website. In particular, it establishes more precise requirements for voter verification and makes them effective in 2007 (as opposed to 2009 in S. 17). Furthermore, H.R. 533 eliminates the language of S. 17 that would have exempted most systems deployed prior to 2009 from any requirement for provide a voter verified record.

Unfortunately, despite these improvements, the language of Section 5 of this bill remains fatally flawed. While it is advertised as providing a voter-verified record of the vote, the actual provisions are still too vague and ineffective, leaving critical details to be fleshed out by the Elections Assistance Commission (EAC) at some indefinite point in the future. As a result, H.R. 533 fails to provide a meaningful and effective requirement for any type of voter-verified record, and further fails to establish a specific requirement for a voter-verified paper record.

Accordingly, VerifiedVoting cannot support H.R. 533 in its current form, despite extremely good provisions in other sections of the bill.

SUMMARY OF THE DIFFERENCES BETWEEN SECTIONS

Table 1 summarizes the differences between corresponding sections of the two bills.

Table 1. Differences between sections of the two bills

Section Title	H.R. 533 Section #	S. 17 Section #	Differences
Short Title and Table of Contents	1	1	Clerical changes only
Findings and Purposes	2	2	None
Enhanced Protections Against Voter Intimidation, Threats, Coercion, and Deception	3	-	Not present in S. 17
National Federal Write-In Absentee Ballot	4	3	Minor corrections and clarifications
H.R. 533: Verified Ballots; Preservation S. 17: Voter Verified Ballots	5	4	Major changes, including section titles
Requirements for Counting Provisional Ballots	6	5	None
Minimum Required Voting Systems and Poll Workers in Polling Places	7	6	Significant clarifications
Election Day Registration	8	7	Clerical changes only
Integrity of the Voter Registration List	9	8	Clerical changes only
Early Voting	10	9	H.R. 533 extends election day registration to early voting
Acceleration of Study on Election Day as a Public Holiday	11	10	None
Improvements to Voting Systems	12	11	None
Voter Registration	13	12	Significant changes
Establishing Voter Identification	14	13	Clerical changes only
Impartial Administration of Elections	15	14	Significant changes
Strengthening the Election Assistance Commission	16	15	Minor changes
Additional Protections to Ensure Fair Administration of Federal Elections	17	--	Not present in S. 17
Authorization of Appropriations	18	16	None
Effective Date	19	17	Significant changes

Section titles listed in boldface type will be examined in more detail below.

SECTIONS OF H.R. 533 WITH SIGNIFICANT DIFFERENCES FROM S. 17

Section 3: Enhanced Protections Against Voter Intimidation, Threats, Coercion, and Deception

This section has no counterpart in S. 17. It empowers the Attorney General to bring actions against individuals or groups engaged in unfair or deceptive acts or practices affecting voting in Federal elections.

In such cases, the AG will serve a complaint against those alleged with committing such acts or practices, notifying them of the date and time of a hearing at which those parties can respond to the allegations. If the allegations are sustained, the AG shall state his findings in a written report and issue an order compelling the respondents to cease and desist such acts. Any entity which violates such an order shall be fined in accordance with title 18 U.S.C.

The section also enables individuals aggrieved by a violation of this section to bring a civil action for declaratory and injunctive relief with respect to that violation.

It also affords the AG subpoena powers to obtain testimony and evidence relating to investigation of such allegations. Any person who fails to provide such testimony or evidence will be subject to fine or imprisonment if judged guilty of such failure.

The section also requires the AG to develop and publish procedures by which the public can file complaints regarding such unfair and deceptive acts. It also requires the AG to develop rules defining what acts or practices are considered unfair and deceptive with respect to voting. Such rules are to be proactive so as to prevent such acts or practices.

It authorizes the AG to bring a civil action in U.S. District Court or local court against any entity violating such rules or failing to comply with a final cease and desist order issued by the AG under this section.

The section also amends 42 U.S.C. 1971(b) to attach “knowingly deceive” to references to “coerce” and “intimidate”.

Finally, this section requires the AG to direct the Assistant AG and Chief of the Voting Section to develop and implement procedures for tracking allegations of voting irregularities and the actions taken to address them, and to issue annual reports to Congress detailing the implementation of those procedures.

Section 4: National Federal Write-in Absentee Ballot

This section corrects a typographical error in S. 17: page 4 line 17 of S. 17 incorrectly references Section 298 when it should have referenced Section 297. The corresponding text of H.R. 533 (page 13 line 24) references the correct section.

Also, H.R. 533 (page 14 lines 5 and 6) cites different standards (“... *in the manner provided by standards prescribed by the Commission under section 297(b).*”) for the submission and processing of the Federal write-in absentee ballots than are specified in S. 17 (page 4 lines 23 and 24: “... *in the manner provided by law for absentee ballots in the state involved.*”)

Also, H.R. 533 (page 17 lines 11 through 14) adds additional text to the end of subsection (c) ("*Coordination with Uniformed and Overseas Citizens Absentee Voting Act*"), stating: "*so that such voters face no greater difficulties in the submission and processing of their ballots than those faced by absentee voters who reside in the United States.*"

Section 5: Verified Ballots; Preservation

This section is derived from Section 4 ("Voter Verified Ballots") of S. 17, but has a slightly different name. In fact, wherever the phrase "voter verified ballots" is used in S. 17, it is replaced by the phrase "verified ballots" in H.R. 533. The reason why this was done is not at all clear.

One of the most significant changes that H.R. 533 makes regarding "[voter] verified ballots" is the acceleration of the date (from 2009 to 2007) by which the requirements pertaining to such ballots take effect.

Subsection (a)(1) of this section amends HAVA §301(a) by adding a new paragraph (7) which takes effect in 2007 (page 18 line 5). In addition, H.R. 533 adds **additional text** (page 8, lines 9 through 13) to paragraph (7)(a) so as to clarify that the "*voting system shall provide an independent means of voter verification*" which allows:

*"... each voter to verify **the accuracy of the ballot** before it is cast and counted, **and to correct any errors before the record of the ballot is produced and preserved under this paragraph and paragraph (2)(B)(iii).**"*

Another major change in this section is that it eliminates paragraph (7)(D) from S. 17, which stated that:

"(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)."

That subparagraph of S. 17 would have exempted a large fraction of the voting systems (installed prior to 2009) from the the "verified ballot" requirements of paragraph 7.

Instead, H.R. 533 replaces paragraph (7)(D) with entirely new text, which reads:

"(D) None of the means of verification under this paragraph may employ cryptography in the record."

This section includes a completely new subsection (b) ("Preservation of Records"), which has no counterpart in S. 17. This new subsection of H.R. 533 ensures that the "[voter] verified ballot" records defined by Section 5(a) shall be:

"... available as an official record for any audit or recount conducted with respect to any election in which the system is used, and shall be preserved after the voter has verified its accuracy..."

Unfortunately, this language specifies only that the "verified ballot" records shall be available as "**an** official record" rather than "**the** official record" for any audit or recount.

In addition, the manner or method by which these records are to be preserved is ill-defined and fails to provide for the case of "verified ballot" records that are produced during early voting. In the case of a paper "verified ballot" record, it only requires that it be preserved in a manner that ensures the "security of the votes as verified", rather than the security of the record itself. In the case of non-paper "verified ballot" records, it leaves it to the EAC to define a method which "*... provides protection **of the record** equal to or superior to the methods used to preserve paper records.*"

Subsection (c) (“GUIDANCE”) of this section of H.R. 533 is derived from section 4(b) of S. 17. It amends subtitle E of title II of HAVA by adding a new section 298 (“Verified Ballots”).

Subsection (a) of this new section 298 directs the EAC to issue standards for “verified ballots” required under HAVA §301(a)(7) and for meeting the audit requirements of §301(a)(2).

Subsection (b) (“AUDITS”) of this new section 298 has no counterpart in S. 17. It provides that the standards issued by the EAC under section 298(a): “... shall provide for partial audits of the results of elections using...” the “verified ballot” records
“...produced pursuant to section 301(a)(7), and shall provide that **those records shall be used for the official count of votes** in the event that the tallies derived from the records differ from the tallies derived from the voting system used in the election involved.”

This language of H.R. 533 goes considerably farther than S. 17 in directing the EAC to develop standards for partial audits using the “verified ballot” records and in requiring that those records shall take precedence in those cases where there is a discrepancy between the tallies obtained from voter-verified ballot records and machine tallies.

Unfortunately, while the language of subsection (b) is a very significant improvement over S. 17 (which lacks any such audit language at all), it still leaves the fundamental details of the audit process to the discretion of the EAC. It fails to define what constitutes a “partial audit”; neither does it specify whether any such audit is a manual audit (i.e., hand count of the verified ballot records). It also makes no specification as to how often the EAC is to conduct such partial audits (if at all). Rather, it only requires the EAC to develop standards that provide for partial audits, not that it actually conduct any. Neither does it specify any procedure for determining what percentage of precincts (if any) should be subject to such partial audits. Nor does it specify by what date the EAC is to have such audit standards in place.

Similarly, subsection (a) of Section 298 leaves to the discretion of the EAC the development of standards for both the verified ballot records (mandated by §301(a)(7)) and for the manual audit capacity requirements of §301(a)(2). Neither does it directly specify any deadline by which such standards are to be in place.

By setting only the vaguest of requirements for [voter] verified ballots, manual audits, and partial audits in the text of the bill itself, and by delegating all of the important details to a set of standards to be developed by the EAC at some indefinite point in time, the language of Section 5 of H.R. 533 fails to provide any clear direction to States and jurisdictions confronted with making major purchasing decisions (regarding voting systems) in order to comply with existing HAVA requirements whose deadlines are close at hand (e.g., 2006) as well as with the vague new requirements defined by this bill which take effect in 2007. As a result, these vague provisions of H.R. 533 (like those of S. 17) will likely increase confusion among elections officials while increasing the burden on an already overburdened and underfunded EAC.

Because this section is fatally flawed, VerifiedVoting.org cannot support H.R. 533

Sections 7 through 19:

Differences between the remaining sections of the two bills will be provided in the next release of this document.