

THE HAVA REQUIREMENT FOR A VOTER VERIFIED PAPER RECORD

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This paper explains that the Help America Vote Act of 2002² 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 voter. HAVA further requires that this voter verified paper record be available for a manual audit of the voting system, and for any recount.

HAVA requires, in section 15481, subdivision (a)(2)(B), that:

“(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 . . . shall be available as an official record for any recount”

Taken together, these provisions requiring a “paper record” that is to be used for a “manual audit” for the “voting system” make it apparent that HAVA requires a paper record that is seen, verified, and turned in by the voter.

The suggestion has been made, however, that the requirement of a paper record to be used for a manual audit can be satisfied by a paper record of votes that is produced for the first time after the polls have closed – that is, a printout of what the computer has stored, and that has never been seen by the voter.

This interpretation, however, that a post-closing printout of what the computer has stored would satisfy HAVA, would permit an audit or a recount to be conducted on the content of a computer and not on a contemporaneous paper record of votes cast, and would make the requirement for a “manual audit capacity” virtually meaningless.

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² Help America Vote Act of 2002 (“HAVA” in this paper), enacted as Public Law Number 107-252, October 29, 2002, 116 Statutes 1704, and codified at 42 U.S.C. §15301 et seq.. All references in this paper are to 42 U.S.C. §15481 unless otherwise noted.

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 had 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.

At most, even a complete manual count of paper ballots printed by the computer post-closing could only verify that the computer had accurately tabulated various totals -- that is, that the computer had "done the math."

Such an audit or recount could not manually determine whether the computer had accurately made a record of voter intent -- that is, that the paper record printed post-closing actually represented the votes intended to be cast by the voters.

An audit using a record of votes printed post-closing, of course, could not be considered a manual audit of the complete voting system -- it would be a partial audit, at best, limited to the math performed by the computer. It would not be an audit of whether the voters' intent was accurately recorded by the computer -- and that is the critical issue.

HAVA's requirement of a "manual audit" compels the interpretation of "paper record" as meaning a record that has been seen and verified by the voter.

First, it is apparent from the common meaning of the words "manual audit" that HAVA requires that this audit be conducted by visual examination and counting by hand, and not by machine. A common dictionary definition of "manual" applicable to this context is "worked or done by hand and not by machine." The term "audit" applicable to this context means "a methodical examination and review." (Both definitions from Webster's Ninth New Collegiate Dictionary.)

So far, therefore, we have a requirement for a methodical review by hand. The next question is: What is to be reviewed?

HAVA provides that it is the "voting system" that is to be audited (§15481(a)(2)(B)), and defines the voting system as including "the total combination" of equipment that is used "(A) to define ballots; (B) to cast and count votes; (C) to report or display election results; and (D) to maintain and produce any audit trail information . . ." (§15481(b)(1)). In other words, the system to be audited is the complete process of casting and counting votes. There cannot be a "manual" audit of the casting of votes, of course, unless there is credible and contemporaneous evidence of the votes cast that can be reviewed by hand, as a check on the electronic portion of the system.

Further, the critical issue in any voting system is whether the system has accurately reflected voter intent. The question raised in counting the votes in Florida in the 2000 Presidential election, for instance, was not whether the machines had accurately done the math -- it was whether the ballots that were counted actually reflected the voters' intentions. That issue

can be determined in an audit of a voting system only by examining what the voter has seen and approved -- a paper record reviewed and verified by the voter.

The importance of a paper record verified by the voter is also emphasized by HAVA's use of the term "audit" rather than some other term that would merely require some lower level of examination. Requiring an "audit capacity" for the voting system, including the accurate recording of the votes cast, clearly contemplates a paper record as the source document – as the original record of the voters' actions – and not a secondary document produced after the fact as evidence only of what is in the computer system at that time.

The distinction between an original paper record of an act and electronic records as indirect evidence is an important one in the field of auditing, as indicated by the standards of auditing practice promulgated by the American Institute of Certified Public Accountants in its Statements on Auditing Standards (AICPA Professional Standards, 1998, American Institute of Certified Public Accountants, New York). The AICPA's "Standards of Field Work" require that "Sufficient competent evidential matter is to be obtained through inspection, observation . . . and confirmations to afford a reasonable basis for an opinion." (AU §150.02, ¶ 3.) Under "Nature of Evidential Matter" the standards recognize that "Corroborating evidential matter includes both written and electronic information" (AU §326.17), and that "In certain entities, some of the accounting data and corroborating evidential matters are available only in electronic form" (AU §326.18). Thus, the AICPA standards draw a distinction between a source document that is an original written record, on one hand, and an electronic record, on the other. The standards for field work do not contemplate that an electronic record printed out after the fact is the same as an original written record.

In this light, the significance of the HAVA requirement that the system produce "a permanent paper record" for use in a "manual audit" or a recount is again apparent. HAVA does not provide for a manual audit of an electronic record of votes cast (or of a printout of an electronic record, which is the same thing). HAVA requires a permanent paper record of votes cast, and that can only be read as meaning a contemporaneous paper record, that the voter has seen and verified.

This distinction between an original paper record of a transaction or an act and electronic records as indirect evidence of that matter is also found in standards promulgated for government auditing promulgated by the Comptroller General (Government Auditing Standards, 2003 Revision, General Accounting Office, June 2003), which incorporate the AICPA standards for field work for financial audits (§4.01). In addition to financial audits, government audits also include performance audits. In that context, the field work standards require that "Sufficient, competent, and relevant evidence is to be obtained to provide a reasonable basis for the auditor's findings and conclusions" (§7.48). Guidance provided for concluding what constitutes "sufficient, competent, and relevant evidence" provides that "Evidence obtained through the auditors' direct physical examination, observation, computation, and inspection is more competent than evidence obtained indirectly" (§7.53, ¶ b) and "Examination of original documents provides more competent evidence than do copies" (§7.53, ¶ c). Thus, these government auditing standards also contemplate that an original written record is the better evidence of a fact than indirect evidence or a copy. Applied to the context of an audit of a voting

system, it is apparent that a paper ballot that the voter has seen and verified is better evidence than a printout of an electronic record that the voter who purportedly created the record hasn't seen.

In summary, it is apparent that the requirement of HAVA that a voting system used in a Federal election provide a paper record for a manual audit can be satisfied only by a system that produces a paper record that the voter sees and verifies, and that is retained by the election official as the record of votes cast for purposes of an audit and any recount.

This statutory requirement is not a bare legal requirement without practical significance. To the contrary, a paper record that has been reviewed and verified by the voter is an essential element of a transparent and open voting system. A voter verified paper record that will be available for an audit of the system and for any recount greatly reduces the possibility of fraud and provides a means of detecting and correcting unintentional error in the electronic system. Equally importantly, it assures each voter that the vote has been accurately cast, and that there is a paper record of that vote to serve as a check on the electronic system, and eliminates the suspicion of impropriety. An open and transparent voting system increases the voters' confidence in the system and the public's trust in the results. It is an essential element of the democratic process by which we elect the government of this great republic.