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Two Steps Forward, One Step Back, and a Side Step: Asian Americans and the Federal Help America Vote Act

Glenn D. Magpantay*

I. INTRODUCTION

Congress enacted the Help America Vote Act (“HAVA”)¹ in response to the presidential election debacle in 2000² and similar problems that occurred in the 2002 election. According to Congressman Bob Ney (R-Ohio), one of the bill’s sponsors, HAVA “will cause states and localities to fundamentally restructure their election systems in a host of tremendous ways.”³ HAVA will present many opportunities, and perhaps some challenges, for Asian Americans struggling to exercise their right to vote.⁴

Asian Americans are one of the fastest-growing minority groups in the nation—they number almost twelve million and their naturalization rates are steadily increasing.⁵ However, citizenship has not necessarily translated into meaningful access to the political franchise, Asian Americans have had to overcome numerous obstacles.⁶

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1. Help America Vote Act of 2002, 42 U.S.C. §§ 15301-15545 (2002).

2. See U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), available at <http://www.usccr.gov/pubs/vote2000/report/main.htm>.

3. H.R.CONF. REP. NO. 107-3295 (2002) cited in ELECTION REFORM INFORMATION PROJECT, ELECTION REFORM BRIEFING: READY FOR REFORM? 2 (2003), available at <http://electionline.org/Portals/1/Ready%20for%20Reform.pdf>.

4. Tova Andrea Wang, 2004: A Report Card; The Appearance of a Disaster Averted Obscures an Election System That’s Still Badly Broken, AMERICAN PROSPECT, Jan. 2005, at A4.

5. The 2000 Census identified 11,898,828 Americans of Asian heritage. U.S. CENSUS BUREAU, PUB. NO. PHC-T-1, POPULATION BY RACE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: 1990 AND 2000, TABLE 3 (2001), available at <http://www.census.gov/population/cen2000/phc-t1/tab03.pdf>. Asian American growth since 1990 is 72.2%. *Id.*, TABLE 4, available at <http://www.census.gov/population/cen2000/phc-t1/tab04.pdf>. Note that the 2000 Census allowed people to report more than one race, while the 1990 Census did not. Thus, the 72.2% increase from 1990 to 2000 is due both to changes in the census survey and in changes in the population.

6. See generally Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31 (2004).

Asian Americans are typically newly naturalized citizens. They are often “unfamiliar with the American electoral process, having come from Asian countries with political systems very different from the United States and which may even lack a tradition of voting.”⁷ They often do not understand “basic political procedures,” such as the need to register in advance of the elections, the need to enroll in political parties in order to vote in primaries, and how to operate voting machines.⁸

Asian American civil rights groups, such as the Asian American Legal Defense and Education Fund (“AALDEF”),⁹ have regularly monitored elections for compliance with the Voting Rights Act of 1965 and to document other voting problems.¹⁰ They and other advocates¹¹ have urged that all election reforms should incorporate the special needs of Asian Americans, who have endured a history of voting disenfranchisement.¹² Congress responded to these concerns, in part, with HAVA.¹³

7. *Language Assistance Provisions of the Voting Rights Act: Hearing on S. 2236 Before the House Subcomm. on Civil and Constitutional Rights of, the H. Comm. on the Judiciary*, 102d Cong. 1 (1992) (statement of Margaret Fung, Executive Director, AALDEF) [hereinafter Fung, *Language Assistance Provisions*]; S. Rep. No. 102-315, at 12 (1992) (on file with author).

8. *Id.*

9. *See supra* note *.

10. Voting Rights Act of 1965, Pub. L. No. 89-110 (1965) (current version at 42 U.S.C. §§ 1973-1973bb-1 (2005)). Congress passed the Voting Rights Act of 1965 in order to force states to grant full voting rights to all citizens, regardless of color. Previous to the passage of the act, enforcement of voting rights by way of case-by-case litigation of Fourteenth and Fifteenth Amendment violations was extremely remedial in nature and state governments were constantly and quickly adapting themselves to prior Supreme Court rulings. As soon as one unconstitutionally discriminatory state practice was struck down, a new one would be devised. In response to this pervasive and enduring problem, Congress saw fit to clarify and extend access to the voting franchise in 1965 by way of the Voting Rights Act. Since the Act was initially passed, it has been amended and extended by Congress in 1970 (Pub. L. No. 91-285), 1975 (Pub. L. No. 94-73) and 1982 (Pub. L. No. 97-205). One of the more noteworthy additions to the Act came in the 1975 language assistance provisions, where Congress expanded the coverage to include discrimination against persons in language minority groups. Some of these special provisions are up for renewal in 2007.

11. Advocates at AALDEF, amongst those at other organizations, have been involved in several coalitions before and after passage of the Act in the furtherance of voting rights and election reform. In particular, AALDEF has been engaging government agencies responsible for implementing HAVA and providing them with recommendations for their implementation plans. *See, e.g.*, AALDEF, ANNUAL REPORT: 2003 2-4 (2003), available at http://www.aaldef.org/images/2003_annual_report.pdf; Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, to Edward Schulgen, Deputy City Commissioner, Philadelphia County Board of Elections (Apr. 4, 2005) (reviewing problems observed in Philadelphia, PA during the 2004 general election) (on file with author); Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, to Peter C. Harvey, New Jersey Attorney General (Mar. 21, 2005) (reviewing problems observed in New Jersey during the 2004 general election) (on file with author); Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, to Michelle K. Tassinari, Legal Counsel, Massachusetts Elections Division (Mar. 14, 2005) (reviewing problems observed in Massachusetts during the 2004 general election) (on file with author).

12. *See Diaz v. Silver*, 978 F. Supp. 96, 101 (E.D.N.Y. 1997) (citing Affidavit of Michael Shen, President of the Board of Directors of AALDEF, for Defendant-Intervenor, ¶¶ 21,25), *aff'd.*, 522 U.S. 801 (1997).

13. Help America Vote Act, *supra* note 1. The Help America Vote Act (HAVA) arose out of the aftermath of the 2000 presidential election and the nationwide concerns about the validity of the outcome and the integrity of the voting systems in place in varying states. Congress saw

This article will explain certain provisions of HAVA and their impacts on Asian Americans. Specifically, it discusses provisions relating to language assistance, identification requirements for first time voters, and provisional ballots.¹⁴ The article makes a series of recommendations for the implementation of these provisions, and touches upon the feasibility of some alternative legal recourses. Hopefully, this article will be useful to community advocates and policy makers as states and localities implement HAVA's new mandates.

II. THE HELP AMERICA VOTE ACT

A. Overview

1. HAVA Generally

The Help American Vote Act will significantly change voting processes across the country. HAVA will provide voters with new rights, will mandate changes in how states conduct elections, and will increase the federal government's role in facilitating election reforms.

HAVA establishes a series of voting requirements within each state, such as minimum standards for voting machines, voter registration and voter access, as well as uniform voting procedures. For example, HAVA will provide voters with the opportunity to cast provisional ballots;¹⁵ ensure access for voters with disabilities;¹⁶ make voting information¹⁷ more accessible by providing sample ballots, instructions on how to vote, and information about voter's rights;¹⁸ create procedures for voters to complain about improper voting procedures;¹⁹ and allow voters to verify their candidate selections, correct any voting errors, and be notified before they cast their ballots if they accidentally voted for more than one candidate for a single office.²⁰

HAVA also mandates that states require identification to verify new voters;²¹ create new statewide computerized voter lists;²² eliminate punch

the need to establish more uniform standards for federal elections and the voting systems used in those elections. The general legislative purpose of HAVA was to establish a program of election funding and minimum election requirements for individual states in order to increase the accessibility of the vote to all voters, particularly disabled voters and limited English proficient voters. HAVA was intended primarily to be a means to replace punch card and lever voting machines, while also establishing a commission to assist in the administration of Federal elections on the state level. *See generally* H.R. 3295, 107th Cong. (2002).

14. Provisional ballots are an alternative method of ballot-casting that are available in special circumstances. Primarily, these ballots allow a voter to cast a vote in the event that one's name does not appear on the list of eligible voters for a given precinct, one does not have proper identification and is required to show identification, or one is deemed ineligible to vote in a given precinct by an election official. Help America Vote Act § 302(a), 42 U.S.C. § 15482 (2002).

15. *Id.* § 302(a).

16. *Id.* § 301(a)(3).

17. *Id.* § 302(b)(2).

18. *Id.* § 302(b)(2)(2).

19. *Id.* §§ 401-402.

20. *Id.* § 301(a)(1).

21. *Id.* § 303(b)(2).

card and lever voting systems;²³ train poll workers in the law's new requirements;²⁴ and include affirmative check-off boxes for U.S. citizenship and being 18 years of age on all mail-in voter registration forms.²⁵

At the federal level, the law creates the U.S. Elections Assistance Commission. This Commission will be responsible for studying voting problems and recommending improvements;²⁶ establishing programs to expand poll worker recruitment;²⁷ and providing federal money to help states comply with and improve the administration of elections.²⁸

All of these provisions must be fully in place by January 1, 2006. Some provisions must be instituted earlier. For instance, new provisional ballots and voting information at poll sites must have been in place by January 1, 2004.²⁹ Statewide-computerized voter lists and verification of voters must also have been instituted by January 1, 2004. However, this requirement may be extended to January 1, 2006.³⁰ Identification of first-time voters who register by mail will be required of all voters who register after January 1, 2003.

In addition to complying with deadlines, in order to be eligible for federal money, states must submit a plan for implementing HAVA's new provisions.³¹ Implementation of HAVA is left to the discretion of the states.³² Accordingly, community groups may urge states to undertake specific methods for implementing HAVA's requirements, as well as other election reforms.

2. Asian Americans

Changes in particular states and localities will dramatically help to expand access to the vote for most of the nation's Asian Americans. Asian Americans are concentrated in only a few states.³³ Just about half (51%) of the nation's Asian American population resides in California, New York, and Hawai'i.³⁴ Three-quarters (75%) reside in just ten states: the aforementioned three, Illinois, Texas, New Jersey, Washington, Florida,

22. *Id.* § 303(a).

23. *Id.* § 102.

24. *Id.* §§ 251-258.

25. *Id.* § 303(b)(4)(A).

26. *Id.* §§ 201-210.

27. *Id.* §§ 501-503.

28. *Id.* §§ 1-6, 251-273.

29. *Id.* § 303(d)(1)(A).

30. *Id.* § 303(d)(1)(B).

31. *Id.* § 254.

32. *Id.* § 305; Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, Department of Justice, to Hon. Nancy L. Worley, Secretary of State, Alabama (Mar. 17, 2003) (on file with the U.S. Department of Justice).

33. CLAUDETTE E. BENNET & JESSICA S. BARNES, U.S. CENSUS BUREAU, THE ASIAN POPULATION: 2000: CENSUS 2000 BRIEF 4 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>.

34. By state, the Asian American population and percentage of the state population are as follows: California, 4,155,685 and 12.3%; New York 1,169,200 and 6.2%; Hawai'i 703,232 and 58.0%. *Id.* at 4-5.

Virginia, and Massachusetts.³⁵ Other states where Asian Americans constitute large percentages of the population include Oregon, Alaska, Maryland, and Nevada.³⁶ Within these states, Asian Americans are typically concentrated in only a few cities.³⁷ Nationwide, New York City has the largest Asian American population, followed by Los Angeles.³⁸

Since 1965, the Asian American population has more than tripled. Much of the growth resulted from increased immigration.³⁹ Because of this, more than two-thirds (69%) of the Asian American community is foreign-born⁴⁰ and four out of five (80%) speak a language other than English in their homes.⁴¹ Even though the right to vote is a fundamental right, barriers due to language and the immigrant experience continue to render the political and electoral processes inaccessible to many Asian Americans.

3. Broad Impact of HAVA

Several HAVA provisions will facilitate access to the vote. The problems most Americans faced when they voted – poor administration, missing names from voter registration lists, inability to change votes before casting their ballot, voting on unreliable voting machines – are the same problems that Asian Americans confronted. Since HAVA is designed to remedy these problems, this law will eliminate obstacles for all voters.

Moreover, many of these problems have weighed more heavily on Asian American voters. Signs providing voting instructions have been frequently missing from poll sites in Asian American neighborhoods.⁴² Asian American voters have been disproportionately turned away from the polls

35. By state, the Asian American population and percentage of the state population are as follows: Illinois 473,649 and 3.8%; Texas 644,193 and 3.1%; New Jersey 524,356 and 6.2%; Washington 395,741 and 6.7%; Florida 333,013 and 2.1%; Virginia 304,559 and 4.3%; and Massachusetts 264,814 and 4.2%. *Id.* at 5.

36. By state, the Asian American population and percentage of the state population are: Oregon 127,339 and 3.7%; Alaska 32,686 and 5.2%; Maryland 112,456 and 5.6%; and Nevada 32,686 and 5.2%. *Id.*

37. In New York State, Asian Americans are concentrated in New York City; in Washington, they are in Seattle; in Illinois, they are in Chicago; in Pennsylvania, they are in Philadelphia; and in Massachusetts they are in the greater Boston area. *Id.* at 4,7

38. New York City has 872,777 Asians, making up 10.9% of the total population. Los Angeles has 407,444 or 11.0% of the total population. *Id.* at 7.

39. Paul Ong & Suzanne J. Hee, *The Growth of the Asian Pacific American Population: Twenty Million in 2020*, in THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020 11, 19 (1993).

40. U.S. CENSUS BUREAU, PUB. NO. PCT63D, CENSUS 2000 SUMMARY FILE 3: PLACE OF BIRTH BY CITIZENSHIP STATUS (2002).

41. U.S. CENSUS BUREAU, PUB. NO. PCT62D, CENSUS 2000 SUMMARY FILE 3: AGE BY LANGUAGE SPOKEN AT HOME BY ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER (2002). Limited English proficiency is defined as all who speak English less than “Very Well.”

42. AALDEF, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE NYC 2001 ELECTIONS: AN ASSESSMENT OF THE NYC BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT (2002) 10 [hereinafter AALDEF SECTION 203 REPORT 2001]. See also Letter from Glenn D. Magpantay to Peter C. Harvey, *supra* note 11; Letter from Glenn D. Magpantay to Michelle K. Tassinari, *supra* note 11; Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, to Daniel DeFrancesco, Executive Director, New York

because their names were inadvertently missing from voter rolls.⁴³ In states that do not provide provisional ballots, voters who have registration complications are simply not allowed to vote. Some states, such as Illinois, Pennsylvania, and Massachusetts,⁴⁴ have substantial Asian American populations, and thus the lack of provisional ballots may disproportionately impact this population. HAVA will help remedy these shortcomings in the electoral process.⁴⁵

HAVA's provisions for alternate language accessibility and state implementation of provisional voting may further expand access to the vote for Asian Americans. However, other provisions, like identification requirements, may have regressive consequences. Much of HAVA's impact turns on how states choose to implement HAVA's provisions.

B. *Language Assistance to the Vote*

Language assistance is essential for Asian Americans to participate in the electoral process. Nationally, almost half (43%) of Asian Americans over 18 years of age have limited-English proficiency.⁴⁶ A vast majority of Asian Americans (81%) speak a language other than English in their homes.⁴⁷ Asian Americans are immigrants and newly naturalized citizens.⁴⁸ Most (66%) Asian Americans are citizens; where about half (53%) acquired citizenship through naturalization.⁴⁹

Because of this, Asian Americans are often "unfamiliar with the American electoral process, having come from Asian countries with political systems very different from the United States and which may even lack a tradition of voting."⁵⁰ It is common for new citizens not to understand basic voting procedures, such as the need to register by a certain date to be eligible to vote in particular elections, the importance of enrolling in political parties to vote in primaries, and even how to operate voting machines.⁵¹

City Board of Elections (Feb. 5, 2002) (reviewing missing materials during the New York 2001 elections) (on file with author).

43. AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 5-6; Letter from Glenn D. Magpantay to Edward Schulgen, *supra* note 11; Letter from Glenn D. Magpantay to Peter C. Harvey, *supra* note 11; Letter from Glenn D. Magpantay to Michelle K. Tassinari, *supra* note 11; Letters from Margaret Fung, Executive Director, and Glenn D. Magpantay, Staff Attorney, AALDEF, to Daniel DeFrancesco, Executive Director, N.Y. City Board of Elections 2 (Nov. 2, 2001), 6 (Dec. 20, 2001) (on file with author).

44. See ELECTION REFORM INFORMATION PROJECT, ELECTION REFORM BRIEFING: THE PROVISIONAL VOTING CHALLENGE 5 (2001), available at <http://electionline.org/Portals/1/Publications/Provisional%20Voting.pdf>.

45. Unfortunately, many state officials have questionably interpreted HAVA's provisional ballot and jurisdiction requirements in a manner inconsistent with the National Voter Registration of 1993, resulting in widespread disqualification of provisional ballots in the 2004 general election. Wang, *supra* note 4.

46. U.S. CENSUS BUREAU, *supra* note 41.

47. *Id.*

48. See Fung, *supra* note 7, at 1; S. REP. 102-315, at 12.

49. U.S. CENSUS BUREAU, *supra* note 40.

50. Fung, *supra* note 7, at 1; S. REP. 102-315, at 12.

51. Fung, *supra* note 7, at 1.

In New York City, the Chinatown Voter Education Alliance found that in 1982, 35.2% of Chinatown voters, as compared to 18.9% of voters outside of Chinatown, went to the polls but did not vote — or mistakenly lost their votes through inadvertence — once they were in the voting booths.⁵²

Language assistance must be provided on Election Day to ensure that the vote is accessible to Asian Americans. HAVA does not specifically require increased voting access for language minorities, but the statute does contain two provisions that can be used to this end.

1. Mandatory Language Assistance

One can argue that HAVA mandates language assistance⁵³ through the incorporation of the Language Assistance Provisions (Section 203) of the Voting Rights Act.⁵⁴ Subsequently, HAVA obligates assistance in languages and jurisdictions already covered under the Voting Rights Act.

Under Section 203 of the Voting Rights Act, covered jurisdictions must translate ballots, voter registration forms, voting instructions, and all other voting materials,⁵⁵ and provide interpreters to assist limited-English proficient voters.⁵⁶ Individuals also have the right to have a person of their choice assist them while voting.⁵⁷ Further, the Voting Rights Act requires that local election officials publicize the availability of language assistance and encourages cooperation with community-based organizations to develop language assistance programs.⁵⁸

The Voting Rights Act mandates language assistance when the census reports that a political subdivision has 5% or more than 10,000 voting-age (over 18 years of age) citizens who speak the same Asian, Hispanic, or Native American language, have limited-English proficiency, and, as a group, have a higher illiteracy rate than the national illiteracy rate.⁵⁹ After

52. *Id.*

53. Help America Vote Act § 301(a)(4), 42 U.S.C. § 15481 (2002).

54. Voting Rights Act, 42 U.S.C. § 1973 (2005); Implementation of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. § 55.16 (2005). HAVA directly cites the § 203 Language Assistance Provisions of the Voting Rights Act into its mandatory requirements and standards for voting systems. 42 U.S.C. § 15481(a)(4); *see also* 42 U.S.C. § 15451(b)(1).

55. Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. §§ 55.15, 55.19 (2005).

56. *Id.* §§ 55.18, 55.20.

57. *Id.* § 55.20(c).

58. *Id.* § 55.20.

59. Voting Rights Act, 42 U.S.C. § 1973(c). “Political subdivisions” are usually defined as counties. *See* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871-02 (July 26, 2002).

the 2000 census, the following counties and Asian languages⁶⁰ were covered under Section 203:⁶¹

Alaska

Kodiak Island Borough: Filipino

California

Alameda: Chinese

Los Angeles: Chinese, Japanese, Korean, Filipino, Vietnamese

Orange: Chinese, Korean, Vietnamese

San Diego: Filipino

San Francisco: Chinese

San Mateo: Chinese

Santa Clara: Chinese, Filipino, Vietnamese

Hawai'i

Honolulu: Chinese, Japanese, Filipino

Maui: Filipino

Illinois

Cook: Chinese

New York

Kings: Chinese

New York County: Chinese

Queens: Chinese, Korean

Texas

Harris: Vietnamese

Washington

King: Chinese

There have been many local deficiencies in compliance with this federal mandate.⁶² Some poll workers have outright resisted providing voters with language assistance.⁶³ Translated materials have been missing, hidden from, or otherwise unavailable to voters.⁶⁴ When such materials were available, they have been poorly translated or mistranslated. In 2000, ballots in New York flipped the Chinese translations of the party headings so Democratic candidates were listed as Republicans and vice versa.⁶⁵ Poll

60. While the Census does not measure the breakdown of dialects spoken within the ethnic groups on which data is collected, a jurisdiction that is covered by Section 203 of the Voting Rights Act mandates that oral assistance be provided "to the extent needed to enable members of the applicable language minority to participate effectively in the electoral process" (as determined by the U.S. Attorney General). 28 C.F.R. § 55.20 (2005). Clearly, in order for language assistance to be properly implemented, the dialects spoken by a covered jurisdiction's language minorities have to be ascertained beyond what the Census reports.

61. Voting Rights Act Amendments of 1992, *supra* note 59.

62. See generally AALDEF SECTION 203 REPORT 2001, *supra* note 42; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, ACCESS TO DEMOCRACY: LANGUAGE ASSISTANCE AND SECTION 203 OF THE VOTING RIGHTS ACT (2000) [hereinafter NAPALC].

63. NAPALC, *supra* note 62, at 15; AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 9; Letter from Margaret Fung, Executive Director & Glenn D. Magpantay, Staff Attorney, AALDEF, to Daniel DeFrancesco, Executive Director, N.Y. City Board of Elections (Feb. 5, 2002) (reviewing missing materials during the New York 2001 elections) (on file with author).

64. AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 10. During both the 2000 NYC Primary Elections, twenty-nine Election Districts at sixteen sites were missing specific Chinese language materials, and in the General Elections, forty Election Districts at eighteen sites were missing specific Chinese language materials. See Letter from Glenn D. Magpantay to Daniel DeFrancesco, *supra* note 42.

65. William Murphy et al., *Spirit Willing: System Weak*, NEWSDAY, Nov. 8, 2000, at A10; Editorial, *Bungled Ballots in Chinatown*, N.Y. TIMES, Jan. 1, 2001, at A1; Letter from Margaret

sites had too few interpreters.⁶⁶ Sometimes they spoke the wrong language or dialect, for instance, when voters spoke Cantonese but interpreters spoke Mandarin.⁶⁷ In the 2004 elections, a Chinese American voter who asked for assistance was directed to a Korean interpreter.⁶⁸

Although HAVA does not add new counties or languages for required coverage, its implementation can address deficiencies at poll sites by underscoring the need for language assistance. For example, HAVA requires that voting materials be posted.⁶⁹ Section 203 of the Voting Rights Act requires that those signs be translated.⁷⁰ In conjunction with Section 203, HAVA can ensure the availability and posting of translated signs.⁷¹ HAVA also requires that poll workers be trained to make voting information available to voters.⁷²

HAVA gives voters an easier avenue to enforce their rights to language assistance. The Voting Rights Act has its own private right of action, but litigating under the Act can sometimes be prohibitively expensive.⁷³ Section 203 is primarily enforced by the Department of Justice so voters are relegated to report violations solely to the Department.⁷⁴ It is in the Department's discretion whether and how to act on these complaints. HAVA mandates that states create grievance procedures for individuals to

Fung, Executive Director, & Glenn D. Magpantay, Democracy Project Director, AALDEF, to Daniel DeFrancesco, Executive Director, New York City Board of Elections 1 (Dec. 21, 2000) (on file with author).

66. AALDEF, *ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2003 ELECTIONS IN NYC: AN ASSESSMENT OF THE NEW YORK CITY BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT 10* (2004), available at http://www.aaldef.org/images/05-04_accessdemocracy.pdf [hereinafter AALDEF SECTION 203 REPORT 2003]; AALDEF, *ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2002 ELECTIONS IN NYC: AN ASSESSMENT OF THE NYC BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT 15* (2003), available at http://www.aaldef.org/images/09-04-03_accessdemocracy.pdf [hereinafter AALDEF SECTION 203 REPORT 2002]; AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 11; CHINESE FOR AFFIRMATIVE ACTION ET AL., *INCREASING ACCESS TO THE BALLOT FOR NEW CITIZENS 1*, 4-5 (2000), available at <http://www.caasf.org/PDFs/pollreport110700.pdf>.

67. AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 8-9; *see also* Letter from Kathay Feng, Voting Rights Unit Director, Asian Pacific American Legal Center, to Conny B. McCormack, Registrar-Recorder/County Clerk, Los Angeles County 2-3 (Jan. 15, 2001) (on file with author).

68. AALDEF, *ASIAN AMERICAN ELECTION PROTECTION 2* (2004).

69. Help America Vote Act, 42 U.S.C. § 15482(b)(1) (2002).

70. Voting Rights Act, 42 U.S.C. § 1973aa-1a (2005).

71. Letter from Ralph F. Boyd to Nancy L. Worley, *supra* note 32, at 4.

72. Help America Vote Act §§ 261(b), 302. Many poll workers are untrained or improperly trained, particularly when it comes to their duty to make language assistance materials available (when required by law or policy). The proper training of poll workers, accompanied by sufficient oversight, can help ensure that translated materials and signage are available at the poll sites.

73. Lawsuits under the Voting Rights Act require detailed and widespread evidence of voting barriers. Such barriers must be reported by location (e.g., neighborhood, county), poll site and election. *See generally* Coalition for Education in Dist. One v. Bd. of Elections of New York., 370 F. Supp. 42 (S.D.N.Y. 1974). Costly expert witnesses must often be employed. *See, e.g.,* Rodriguez v. Pataki, 308 F. Supp.2d 346, 361 (S.D.N.Y. 2004).

74. Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. § 55.2(b)(1),(2) (2005).

report HAVA violations.⁷⁵ A full-fledged lawsuit is not necessary. Since HAVA incorporates Section 203 of the Voting Rights Act, this could provide private recourses for voters who are denied language assistance.⁷⁶ Because HAVA works in concert with the Voting Rights Act on language assistance, limited-English proficient voters now may have other opportunities to enforce their rights.

2. Voluntary Language Assistance

Many states and localities have large and growing Asian American populations that are not covered under Section 203.⁷⁷ For example, the Asian American population in New Jersey has doubled since 1990, numbering over half a million.⁷⁸ But there is no Asian language covered under Section 203 in any county in New Jersey.⁷⁹ As a result, many Asian Americans with limited-English proficiency in New Jersey have great difficulty participating in the political process.

a. Funding

HAVA provides federal money to help states improve election administration.⁸⁰ These funds may be used to improve accessibility to the vote and poll sites for "individuals with limited proficiency in the English language."⁸¹ States have broad discretion to use the money for language assistance or to use these funds for other purposes, such as purchasing new voting machines or developing the statewide voter databases required under HAVA.⁸²

Nevertheless, the federal government will pay for translated voting materials and interpreters at the polls, if states and localities seek funding for these purposes. Unfortunately, states are unlikely to do this on their own volition.⁸³ Local advocacy from community groups is essential to ensure some of this discretionary money is used for language assistance.⁸⁴

75. Help America Vote Act § 402. A violation of HAVA requires the state to provide an "appropriate remedy."

76. Currently, the Department of Justice is responsible for the enforcement of Section 203 of the Voting Rights Act. 28 C.F.R. § 55.2 (b) (1), (2). HAVA, however, mandates that every state establish administrative complaint procedures to promptly respond to voter grievances. *See infra* note 184.

77. Voting Rights Act, 42 U.S.C. § 1973aa-1a, (2005).

78. BENNET & BARNES, *supra* note 33, at 5.

79. 28 C.F.R. §§ 55.14-21.

80. Help America Vote Act, 42 U.S.C. §§ 15301-306 (2002).

81. *Id.* § 101(b)(1)(G).

82. *Id.* § 101(b)(1).

83. AALDEF, ASIAN AMERICANS AND ELECTION REFORM: AN UPDATE ON THE HELP AMERICA VOTE ACT (HAVA) 3-4 (2003), available at http://www.aaldef.org/images/05-18-03_hava.pdf. Frederick Douglass once said "Power concedes nothing without a demand." Letter from Frederick Douglass to an Abolitionist Associate (1849), in ORGANIZING FOR SOCIAL CHANGE: A MANDATE FOR ACTIVITY IN THE 1990s (Kimberley A. Bobo et al., eds.) (1991).

84. *See, e.g.*, Letter from AALDEF, Asian American Political Coalition, Korean American Voters' Council of New York/New Jersey, National Young Korean American Service and Education Consortium, and Young Korean American Service and Education Center to Peter Harvey,

Indeed, these funds will only be available if they are aggressively encouraged.

b. Effective Targeting

If states opt to translate materials, they also have the discretion to decide which materials to translate and where such materials should be provided.⁸⁵ There are various options for providing language assistance. A state could develop a specific methodology to determine which languages are most prevalent in the state and/or identify localities to provide language assistance.⁸⁶ For instance, model statutory language could read:

Counties or election districts where the primary language of 10% or more of the registered voters is Spanish or an Asian language must provide bilingual voting materials and interpreters in those languages.⁸⁷

This assessment is made periodically depending on the size and growth of language minority groups, rates of citizenship, and levels of English proficiency. Once states identify such languages and localities, *all* voting materials should be translated, including the ballot.⁸⁸

c. Statewide Options

i. Translating most voting materials

Another option is to translate only certain materials, but make these materials available statewide.⁸⁹ This is particularly convenient because HAVA systematizes many voting operations on the state level. Voter registration forms, instructions on how to vote, nonpartisan election guides for statewide offices, and notices about voters' rights are already uniform in

New Jersey Attorney General (Aug. 7, 2003) (Draft State Plan on Implementation of HAVA) (on file with author); Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, to Massachusetts Elections Division (Aug. 29, 2003) (Draft State Plan on Implementation of HAVA) (on file with author); Statement of Glenn D. Magpantay, AALDEF, to the New York State Task Force on Implementation of HAVA, Albany, N.Y. (March 12, 2003) (on file with author).

85. Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. § 55.19; Letter from Ralph F. Boyd, Jr., Assistant U.S. Attorney General, to Nancy L. Worley, Secretary of State, Alabama, *available at* http://www.usdoj.gov/crt/voting/hava/states_ltr.pdf. (March 17, 2003) (discussing HAVA and offering the Civil Rights Division's assistance in the jurisdictions' efforts to comply with the requirements of Title III of the new Act).

86. *See, e.g.*, N.J. STAT. ANN. § 19:6-1.

87. New Jersey election law requires language assistance. Generally, counties or election districts where the "primary language of 10% or more of the registered voters is Spanish" must provide bilingual voting materials and interpreters. *See* N.J. STAT. ANN. §§ 19:6-1, 12-9, 14-21, 14-25, 15-18.1, 23-22.4, 31-6.4, 31-6.11, 32-4.1, 49-4. This statute can be amended to include Asian languages as well.

88. This option is preferred because it allows for the maximum accessibility of the elections for language minorities.

89. Letter from AALDEF, Asian American Political Coalition, Korean American Voters' Council of New York/New Jersey, National Young Korean American Service and Education Consortium, and Young Korean American Service and Education Center to Peter Harvey, *supra* note 84.

many states due to HAVA.⁹⁰ Costs would be minimized because these materials would only need to be translated once and used across the state.⁹¹

Localities with large and concentrated Asian American populations not covered under Section 203 should seek federal funds under HAVA to voluntarily provide written and oral language assistance.⁹² Some of these include:

Illinois:⁹³

Cook County: Korean

New Jersey:⁹⁴

Bergen County: Korean

Middlesex County: Chinese, Gujarati

New York:⁹⁵

Kings County: Bengali, Urdu

Queens County: Bengali

90. For example, many states, such as New York and New Jersey, utilize a single standard voter registration form that is effective statewide. Such materials could easily be translated once and then similarly be available to all voters in a given state. *See, e.g.,* NEW YORK STATE BOARD OF ELECTIONS, NEW YORK STATE VOTER REGISTRATION FORM (2005), available at <http://www.elections.state.ny.us/download/voting/voteform.pdf>. Furthermore, the National Voter Registration Act encourages states to adopt methods to increase voter registration and participation. Voting Rights Act, 42 U.S.C. § 1973gg(b) (2005).

91. Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, to Joi M. Taylor, Special Assistant to the Attorney General of New Jersey (July 28, 2004) (discussing Asian language voter registration forms) (on file with author).

92. Mem. from Daphne Hsu, AALDEF, to Glenn D. Magpantay, Staff Attorney, AALDEF (Aug. 26, 2004) (on file with author) (regarding the state use of federal HAVA funds for Asian language assistance and summarizing the findings from: telephone interviews by Daphne Hsu, AALDEF, with Sherri Mortenson Brown, Office of the Secretary of State of Minnesota (Aug. 17, 2004); with Todd Valentine, Special Counsel of the New York State Board of Elections (Aug. 6, 2004); with Tony Miller, Attorney with the California Secretary of State Elections Division (Aug. 3, 2004); with Amy Sawyer, Michigan Bureau of Elections (Aug. 3, 2004); with Patrick Williams, HAVA specialist with the Department of State of the Commonwealth of Pennsylvania (Aug. 3, 2004); with Rhonda Moore, Office of the Secretary of State of Nevada (July 29, 2004); with Faith Lyon, Ohio Election Reform Administrator (July 24, 2004); with Dan Meuse, Office of the Secretary of State of Rhode Island (July 21, 2004); with Richard Rasmussen, Wisconsin State Elections Board (July 21, 2004); with Frank Garcia, HAVA Manager of the Oregon Secretary of State Elections Division (July 19, 2004); with Don Wright, North Carolina Board of Elections (July 19, 2004); with Tom Godkin, Alaska State Division of Elections (July 19, 2004); with Sarah Bradshaw, Office of the Secretary of State of Florida (July 19, 2004); with Mark Patron, Office of the Secretary of State of Illinois (July 19, 2004); with Nikki Trella, Maryland Board of Elections Election Reform Director (July 19, 2004); with Michelle Tassinari, Office of the Secretary of the Commonwealth of Massachusetts (July 19, 2004); with Tim Hanson, Office of the Secretary of State of Michigan (July 19, 2004); with Elizabeth Winn, Office of the Secretary of State of Texas (July 19, 2004); with Barbara Cockrell, Virginia State Board of Elections (July 19, 2004); with Sean Merchant, Office of the Secretary of State of Washington (July 19, 2004)).

93. KOREAN AM. COAL., TOP 25 COUNTIES IN THE UNITED STATES FOR THE KOREAN POPULATION, available at http://www.calstatela.edu/centers/ckaks/census/top_25_counties.pdf (last visited Nov. 27, 2005).

94. Letter from AALDEF, Asian American Political Coalition, Korean American Voters' Council of New York/New Jersey, National Young Korean American Service and Education Consortium, and Young Korean American Service and Education Center to Peter Harvey, *supra* note 84.

95. Statement of Glenn D. Magpantay to the NYS Task Force on Implementation of HAVA, *supra* note 84.

Massachusetts:⁹⁶

City of Boston: Chinese, Vietnamese

City of Lowell: Khmer

Pennsylvania:⁹⁷

City of Philadelphia: Chinese, Vietnamese, Khmer

Virginia:⁹⁸

Fairfax County: Korean, Vietnamese

Michigan:

Wayne County: Arabic

Because these Asian language groups are highly concentrated in these localities, a similar proportion of voting materials should be translated, including the ballot.

ii. Translating some voting materials

Some states have more geographically dispersed Asian American populations. For example, Chinese, Korean, Cambodian, or Vietnamese populations are not heavily concentrated within any particular regions in Georgia, North Carolina, Maryland, Oregon, and Rhode Island.⁹⁹ In these states, only *some* voting materials should be translated and made available statewide.

Voters typically only use one standard voter registration form across the state.¹⁰⁰ Likewise, notices about voters' rights, in the forms of informational flyers or posters, are usually based on state laws that apply uniformly to citizens statewide. For counties or states that have one standard voting machine, translated instructions on how to vote are also all the same. When specific Asian populations are dispersed, translating only some voting materials for use statewide would efficiently dedicate the funds provided by HAVA.

In jurisdictions already covered under Section 203 for one or more languages, they may be more easily persuaded to provide assistance in other languages as well.¹⁰¹ For example, New York City is already covered for Chinese and Korean assistance.¹⁰² While Bangladeshi and Pakistani voters are growing in numbers, no language assistance is provided to them. Translating voter registration forms and providing interpreters at selected

96. Letter from Glenn D. Magpantay to Massachusetts Elections Division, *supra* note 84.

97. PENNSYLVANIA VOTER COALITION, ELECTION DAY 2004 ANALYSIS, FOURTH DRAFT (March 7, 2005) (unpublished report, on file with Pennsylvania Protection and Advocacy, Inc.).

98. SOUTHERN POVERTY LAW CTR., VIETNAMESE AMERICANS, LESSONS IN AMERICAN HISTORY: SIZE AND GEOGRAPHIC LOCATIONS OF VIETNAMESE AMERICAN POPULATION, available at http://www.tolerance.org/teach/web/vietnamese/vac_pdfs/vac_map1_vapopulation.pdf (last visited Nov. 27, 2005).

99. BENNET & BARNES, *supra* note 33, at 5-6.

100. For example, New Jersey and Pennsylvania use the same voter registration form statewide.

101. Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, to Peter Kosinski, Chairman, New York State Task Force on Implementation of HAVA and Deputy Director, New York State Board of Elections (April 14, 2003) (on file with author).

102. See, e.g., 9 N.Y.C.R.R. § 6213.2.

poll sites in Bengali and Urdu would be very helpful to expand access to the vote.¹⁰³

d. Other Options

In providing voluntary assistance, a state or county looks to where assistance is needed, what materials should be translated, and in which languages. Again, these decisions are left to the discretion of states and localities. Accordingly, local advocates must tenaciously persuade decision-makers to seek federal funds to provide Asian language assistance in elections.¹⁰⁴

Language assistance can also be provided through bilingual poll workers. HAVA creates a new national college program to expand bilingual poll worker recruitment.¹⁰⁵ In jurisdictions that do not translate voting materials, bilingual poll workers have been able to provide voters with greatly needed language assistance. Community groups can also recruit minority and bilingual applicants for poll worker positions.

Although HAVA itself does not expand language assistance already required under the Voting Rights Act, HAVA can encourage states to voluntarily provide or expand language assistance so many more Asian Americans can access the vote. When language assistance is required, HAVA can help remedy deficiencies in implementation.

3. New Voting Machines

Because HAVA requires the modernization of elections systems, many localities will overhaul their voting equipment and purchase new voting machines.¹⁰⁶ States must replace punch cards and old lever voting machines with HAVA compliant voting systems.¹⁰⁷ These non-HAVA-compliant systems do not allow voters to verify and change their selections, do not notify voters if they over-vote, or are inaccessible to voters with disabilities.¹⁰⁸ Adopting new voting machines presents both opportunities and problems for Asian American voters with regard to Section 203 of the Voting Rights Act. These concerns differ among jurisdictions that are cur-

103. As of the 2000 Census, the Bangladeshi American population in New York City had surpassed 28,000, with an explosive growth rate of 471% between 1990 and 2000. ASIAN AM. FED'N OF N.Y.: CENSUS PROFILE: NEW YORK CITY'S BANGLADESHI AMERICAN POPULATION (2005), available at <http://www.aafny.org/cic/briefs/bangladeshi.pdf>. The New York City Pakistani American population numbered around 34,000 in the year 2000, having grown at a rate of 154% since 1990. ASIAN AM. FED'N OF N.Y.: CENSUS PROFILE: NEW YORK CITY'S PAKISTANI AMERICAN POPULATION (2004), available at <http://www.aafny.org/cic/briefs/pakistani.pdf>.

104. AALDEF, ASIAN AMERICANS AND ELECTION REFORM: AN UPDATE ON THE HELP AMERICA VOTE ACT, *supra* note 83.

105. Help America Vote Act § 501, 42 U.S.C. 15521 (2002).

106. See Help America Vote Act, title I (mandating replacement of specified voting systems and improvement of voting technology, as well as authorizing federal funding for such improvements).

107. *Id.* § 15302.

108. *Id.* § 15481.

rently covered by the Voting Rights Act, are likely to be covered after the 2010 census, and will not likely be covered even after 2010.

a. Section 203 Considerations

Jurisdictions already covered under Section 203 of the Voting Rights Act must provide new voting machines that have bilingual or multiple language capability. In New York City, for example, current voting machines were purchased more than forty years ago before any language assistance was envisioned. Today, these machines are able to accommodate translated ballots, but have severe space limitations.

Asian American voters have consistently complained that the Chinese characters have been too small to read.¹⁰⁹ In Queens, ballots must be translated into Korean, Chinese, and Spanish pursuant to Section 203.¹¹⁰ Jurisdictions that purchase new HAVA-compliant machines must ensure that they have multilingual capability and do not face technical challenges.

HAVA also requires accessibility for voters with disabilities.¹¹¹ In counties covered under the Voting Right Act, voting machines for the disabled must also be able to accommodate limited-English proficient disabled voters. Anything written or displayed in English must also be displayed in the required Asian languages. Audio voting for the blind must be multilingual. If voters have disabilities, such as senior citizens with poor eyesight, then they must be able to use these voting systems as well.¹¹²

Demographic trends suggest that more languages and jurisdictions will be covered under Section 203 by 2010. Accordingly, new voting machines with multilingual capabilities must be purchased in these jurisdictions. After the 2000 Census in New Jersey, only Spanish language assistance was required under Section 203.¹¹³ Bergen and Middlesex counties have large and growing Korean and Chinese populations, respectively.¹¹⁴ After the 2010 Census, language assistance might very well be expanded to include these counties. Thus, ballots will have to be available in three languages: English, Spanish, and either Korean or Chinese. New Jersey must be prepared to comply with new federal mandates. It would be extremely wasteful to purchase one set of machines today and abandon them in a few years due to these new federal mandates.

109. AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 8-9.

110. Fung, *Language Assistance Provisions*, *supra* note 7.

111. 42 U.S.C. § 15481(a)(3).

112. Letter from Margaret Fung, Executive Director, & Glenn D. Magpantay, Staff Attorney, AALDEF, to John Ravitz, Executive Director, N.Y.C. Board of Elections (Feb. 17, 2004) (observing hearing impaired Chinese voters who needed sign-language interpreters) (on file with author).

113. *See* Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. § 55.19 (2005).

114. ASIAN AM. FED'N OF N.Y., CENSUS INFORMATION CTR.: NEW CENSUS 2000 RESULTS FOR NEW JERSEY SHOW TREMENDOUS GROWTH IN ASIAN AMERICAN COMMUNITIES THROUGHOUT STATE (2001), available at <http://www.aafny.org/pdf/pr20010815.pdf>.

If there is no Section 203 coverage now and coverage is unlikely even after 2010, localities can still purchase new voting machines, like computer display and touch screen machines, that can show ballots translated into multiple languages. Such forward thinking will help many of the state's citizens to vote and is economically efficient in the long-run.

b. Implementation Considerations

These new voting system purchases and objectives for language capability have a few caveats. First, multilingual machine capability is not synonymous with multiple machines each displaying different languages. The Department of Justice, at the urging of AALDEF,¹¹⁵ has opposed segregating voters by language, forcing them to use different machines.¹¹⁶ All voters, whether or not they are proficient in English, must be able to vote on the same machines.¹¹⁷ The machines must provide ballots in English and all the required languages.

Second, there is also a significant difference between voting machine capability and what they actually provide to the voters. Computer display voting machines have multiple language capability, but that does not mean that they will actually be *programmed* to display multilingual ballots on Election Day. Multiple language capability is a major selling point regularly used by vendors to election administrators, and by election administrators to the public or their overseers.¹¹⁸ The unfortunate result to guard against is that on Election Day machines are used that could be programmed in a different language, but only display ballots in English.

Lastly, bilingual ballots must be fully bilingual. It is relatively easy to translate presidential, gubernatorial, and mayoral races because the translations only need to be done once and used throughout the jurisdiction. Local races for the lower state house and town councils, on the other hand, change by poll site and election district/precinct. All of the races appearing on ballots must be translated to fully ensure limited-English proficient citizens have the right to vote. Translations require care and are often very involved. Complete and accurate translations of ballots are much more effective than offering partially translated ballots. Local races must espe-

115. All complaint letters that AALDEF has sent to local Board of Elections have been copied to attorneys at the Department of Justice's Voting Section. *See, e.g.*, Letters from Margaret Fung, Executive Director, & Glenn D. Magpantay, Staff Attorney, AALDEF, to John Ravitz, Executive Director, N.Y.C. Board of Elections, *supra* note 114 (reviewing observations from 2003 Primary Elections) (on file with author).

116. 28 C.F.R. § 55.19(d).

117. Help America Vote Act § 301, 42 U.S.C. § 15481(a)(4) (2002) (mandating that voting systems provide alternative language accessibility pursuant to Section 203 of the Voting Rights Act of 1965). The Supreme Court "has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34 n. 74 (1973) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

118. *See, e.g.*, ELECTION SYSTEMS & SOFTWARE, ES&S AUTOMARK VOTER ASSIST TERMINAL: PRODUCT OVERVIEW, available at <http://www.cssvote.com/HTML/docs/AutoMark.pdf> (last visited Nov. 27, 2005).

cially be translated¹¹⁹ since Asian Americans tend to exert the most electoral influence at the local levels.¹²⁰

Without mandatory coverage under Section 203 of the Voting Rights Act, local advocates must work hard to persuade state and local election officials to provide language assistance to voters. This advocacy is timely as states are already considering election reforms in the course of implementing HAVA. Local advocates should stress that their goal is simply to expand access to the vote.¹²¹

4. Litigation Options

Courts have historically played a critical role in guaranteeing the voting rights of racial and ethnic minorities. Today, however, courts may be of little avail, thereby making legislation and policy advocacy the most effective ways to expand access to the vote.¹²² Litigating to expand language assistance is typically not a viable option. Private litigation can be prohibitively expensive. Moreover, litigation to bestow new rights and duties upon the state usually structures relief in terms of remedying past injustices. To get to the remedy of compulsory language assistance, the injustice sometimes must be severe, egregious, and widespread.¹²³

In *U.S. v. City of Hamtramck*,¹²⁴ the United States Department of Justice brought suit against the city and law enforcement officials for racially profiling and interrogating Asian American voters, specifically Arab and Bangladeshi American voters. Hamtramck is a historically Polish community where South Asians were growing in numbers. These minority groups began to assert themselves politically and thereby threatened to displace whites already in power. City officials investigated and intimidated minority voters on Election Day.

119. 28 C.F.R. § 55.19(b).

120. Asian American voters exert the most electoral influence at the local level because town council and state lower house seats are smaller than congressional and state upper house seats. The vast majority of Asian Americans elected to public office in the country are at the local level. See generally, UCLA ASIAN AM. STUDIES CTR, NATIONAL ASIAN PACIFIC AMERICAN POLITICAL ALMANAC, 9TH. EDITION (2001).

121. Letter from Glenn D. Magpantay to Edward Schulgen, *supra* note 11; Letter from Glenn D. Magpantay to Peter C. Harvey, *supra* note 11; Letter from Glenn D. Magpantay to Michelle K. Tassinari, *supra* note 11; Letter from AALDEF, Asian American Political Coalition, Korean American Voters' Council of New York/New Jersey, National Young Korean American Service and Education Consortium, and Young Korean American Service and Education Center to Peter Harvey, *supra* note 84; Letter from Glenn D. Magpantay to Massachusetts Elections Division, *supra* note 84; Statement of Glenn D. Magpantay to the New York State Task Force on Implementation of HAVA, *supra* note 84. However, almost no states are seeking money for language assistance in their HAVA state implementation plans. For example, Pennsylvania, Massachusetts, and New York do not request these funds; Hawaii is seeking money for language assistance which is already required by law.

122. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Holder v. Hall*, 512 U.S. 784 (1994); *Shaw v. Reno*, 509 U.S. 630 (1993).

123. See *infra* note 126.

124. *United States v. City of Hamtramck* (E.D. Mich. 2000) (on file with the U.S. Department of Justice).

The Department of Justice brought suit and the subsequent consent decree not only called for the cease and desist of the intimidation, but also required the city to provide bilingual poll workers and translated notices to voters in Arabic and Bengali. *Hamtramck* is one of the only cases where Asian language voting notices had been mandated by a court. But to get to this remedy, the minority group had to endure exceptional indignities and disenfranchisement.

Another possible claim is when language minority voters are denied language assistance under Section 208 of the Voting Rights Act. Section 208 provides that:

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.¹²⁵

Voters have the right to be assisted by persons of their choice who often translate ballots and show them their voting options. When this right is compromised, even in jurisdictions where language assistance is not already required, it could create an opening to litigate for language assistance.¹²⁶ However, no case has been filed to this effect.

Today, it is generally difficult to find public officials who overtly attempt to disenfranchise Asian American voters *en masse*, through statements or otherwise.¹²⁷ Segregationists no longer stand at city clerk's offices preventing minorities from registering to vote. Yet, the law still holds that discriminatory intent is needed to prove one's voting rights were obstructed.¹²⁸ In today's society, discriminatory intent is "coded" and comments of racial animus are watered down.¹²⁹ Racism is rarely publicly displayed.¹³⁰ Discrimination and racism generally do not manifest themselves in the same ways they did in the 1950s and 1960s.¹³¹ But, legal stan-

125. Voting Rights Act, 42 U.S.C. 1973aa-6 (2005).

126. See, e.g., *United States v. Berks County*, 250 F.Supp. 2d 525 (E.D. Pa. 2003).

127. But see *Vacco v. Spitzer*, 685 N.Y.S.2d 583 (N.Y. Sup. Ct. 1998) (describing how New York State Attorney General Dennis Vacco sought to dispatch police officers to investigate 103,000 persons as illegal voters simply because their names did not appear on credit card reporting lists); see also Letter from Margaret Fung, Executive Director, and Glenn D. Magpantay, Staff Attorney, AALDEF, to Janet Reno, Attorney General, U.S. Department of Justice (Dec. 8, 1998) (complaining about *Vacco v. Spitzer*) (on file with author).

128. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

129. Discriminatory intent is a much more difficult burden to meet than discriminatory effect. In the present day, few public officials will openly make incriminating discriminatory statements. That is not to say that such intent does not necessarily exist when new laws or policies are implemented. Instead, such intent may be "coded" or buried in, and disguised by, the framework of a state or locality's "legitimate governmental interest." See, e.g., *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996).

130. But see Celia W. Dugger, *Queens Old-Timers Uneasy As Asian Influence Grows*, N.Y. TIMES, Mar. 31, 1996, at A1 (quoting Flushing Councilwoman Julia Harrison as describing Asian Americans as "marauding invaders," "colonizers," and stating that Asians eat "dandelions.>").

131. It is important to note that more subtle forms of minority voter disenfranchisement that are facially racially neutral abound. These include identification checks, poll sites confusion, and lack of notice confirming voter registration and poll sites. AALDEF, ASIAN AMERICAN ELECTION PROTECTION, *supra* note 68, at 2.

dards to prove discrimination and racism have not significantly changed to address most modern day realities.¹³²

The absence of evidence of discriminatory intent makes it more difficult to file successful suits to compel jurisdictions to take affirmative steps to enfranchise racial, ethnic, and language minorities. Because of these realities, HAVA may provide more remedies than courts are willing or able to impose.¹³³

C. *New Identification Requirements*

HAVA creates new identification requirements for voters. These new requirements were supported under the guise of protecting against fraud.¹³⁴ However, these requirements create more barriers to the vote and will simply disenfranchise voters. Moreover, these identification requirements only apply to new voters.¹³⁵ Targeting only new voters is attenuated in addressing the state's concerns of fraud. Are current and long-time voters, who are more familiar with election procedures and unscrupulous campaign tactics, less likely to commit fraud? Regardless of the motives behind these new identification requirements, these provisions will disproportionately affect new citizens and young adults.¹³⁶ Jurisdictions should minimize the impact of these new requirements so that they do not frustrate Asian Americans' right to vote.

1. Verification of All New Voters

HAVA requires that all new voter registration applicants provide their drivers' license numbers or the last four digits of their Social Security numbers.¹³⁷ Election entities must enter into agreements with departments of motor vehicles and the Social Security Administration to verify information in the applications. The information to be matched or verified includes the applicants' names and dates of birth.¹³⁸ This identification process presents several potential problems for Asian American voters.

132. See, e.g., *Bush v. Vera*, 517 U.S. 592, 116 S. Ct. 1941 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995) (affirming a lower court decision finding a Congressional redistricting plan unconstitutional; it was so bizarre on its face that it was unexplainable on any grounds other than race); *Shaw v. Reno*, 509 U.S. 630, (1993) (acknowledging that states may intentionally create voting districts with race in mind, without coming under strict scrutiny). These cases highlight the quandary that arises in pinpointing unacceptable racially-motivated actions.

133. Over the years, the courts have shown great reluctance in construing either Congressional enactments, or the Fourteenth or Fifteenth Amendments of the U.S. Constitution, to expand voting rights beyond that which is explicitly mandated or beyond a case-by-case basis. It was this reluctance that initially led to the enactment of the Voting Rights Act of 1965 itself. Over the years, legislation has been far superior to litigation in extending voting rights. See *supra* notes 12, 125-126 and accompanying text.

134. See generally DEMOS, *SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD* (2003) (countering arguments against fraud to institute voting barriers).

135. Help America Vote Act § 303, 42 U.S.C. § 15483(b),(d) (2002).

136. AALDEF, *ASIAN AMERICAN ELECTION PROTECTION*, *supra* note 68, at 2.

137. Help America Vote Act § 301.

138. *Id.* § 303.

At the outset, flaws in databases of registered voters are not uncommon. AALDEF conducts regular voter registration drives after citizenship swearing in ceremonies. AALDEF spot-checked the rolls of registered voters against copies of hundreds of voter registration forms they had collected in 2001 and 2002¹³⁹ and found numerous errors.

AALDEF discovered that a number of voter registration forms that they submitted were poorly or never processed. Applicants were entirely missing from the database of registered voters. Names were entered incorrectly. For instance, compound Chinese names were improperly entered as first names and middle initials. Spaces or hyphens were missing. Voters' first names and surnames were inverted. Voters' apartment numbers were not entered or street addresses were entered incorrectly. Finally, some voters' dates of birth were incorrectly entered, either in the year or day of the month. These errors present serious dilemmas as election officials try to match the missing, faulty, or different names of voters against other databases.¹⁴⁰

Likewise, possible flaws in the databases of state motor vehicles offices and/or the Social Security Administration will also make matching records with voter registration forms difficult because the information may not be identical. For instance, as in the voter registration database, those who input forms at these offices may also have difficulty understanding compound or long Asian names.¹⁴¹

Furthermore, a number of Asian American voters cannot provide drivers' licenses or Social Security numbers. Many do not have these items.¹⁴² Additionally, some Asian American voters born with traditional Asian names, who later adopt Anglicized names, may encounter problems when their names are checked.¹⁴³

States must ensure that the verification requirements of HAVA do not disenfranchise a disproportionate number of Asian American voters. First, when matching names between the voter registration forms and state motor vehicles offices or Social Security Administration databases, slight dif-

139. AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 5-6; Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, to John Ravitz, Executive Director, New York City Board of Elections (May 7, 2003) (reviewing errors in the database of registered voters) (on file with author).

140. AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 5-6; Letter from Glenn D. Magpantay to John Ravitz, *supra* note 139.

141. N.Y. STATE HAVA IMPLEMENTATION TASK FORCE: MINORITY REPORT IN RESPONSE TO STATE IMPLEMENTATION PLAN 10-12 (2003), http://www.brennancenter.org/programs/downloads/NYS_HAVA_Minority_Report-Official.pdf.

142. *See, e.g., Leah Rae, Fight May Have Unintended Victims*, JOURNAL NEWS, Jan. 10, 2005, at 6A (focusing on how the N.Y. State Department of Motor Vehicles' policy of denying drivers' licenses to undocumented immigrants has also affected legal immigrants and other unintended groups); *see also* Memorandum from New York State Citizens' Coalition on HAVA Implementation to New York State Task Force on HAVA Implementation (Mar. 19, 2003), <http://www.nypirg.org/goodgov/hava/havaadvocvoterregmemoonid.html>.

143. For example, Helen Suh is the same person as "Suh Hejin". Helen is this person's English name and Suh is this person's family surname. But in Korean, this person's name is Suh Hejin.

ferences, frequently resulting from typographical errors, should not disqualify applicants from being registered to vote, especially when other data, such as addresses, match.

Second, when there are no matches or voters do not provide their drivers' licenses or Social Security numbers, individuals should be allowed to show other forms of identification so that they may vote.¹⁴⁴ Third, because of flaws in the database of registered voters, the election administrators should use the process of voting by provisional ballot as opportunities to both correct mistakes and register new voters. These recommendations will help ensure that HAVA's verification requirements will not prevent new Asian Americans from registering to vote.

2. Identification of New Voters who Register by Mail

HAVA requires all new voters who register by mail to present either a "current and valid photo identification; or . . . a utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."¹⁴⁵ These can be presented as copies included with the mailed-in voter registration forms or in person when voters come to the polls on Election Day.¹⁴⁶ These requirements do not apply if voters submit either their drivers' license numbers or the last four digits of their Social Security numbers and the voters' names and dates of birth match.¹⁴⁷ This requirement is burdensome in that it requires voters to provide additional documentation in order to vote or register to vote.¹⁴⁸ It may also result in voter's ballots being disqualified if they do not have such identification.¹⁴⁹

Policy-makers and election officials must be mindful that HAVA's identification provision focuses on voters who register *by mail*, not on those who register in person or whose voter registration forms were personally

144. Other forms of identification might include any picture identification (such as a passport), valid student identification cards, or credit and bank cards.

145. Help America Vote Act § 303(b), 42 U.S.C. § 15483 (2002).

146. *Id.*

147. *Id.*

148. Laws requiring identification or proof of citizenship as a prerequisite to voting have been likened to a modern version of the poll tax, as they would require voters to purchase and have readily available official identifying documentation in order to vote. These additional requirements burden voters both when registering and when voting. In addition to burdening and disenfranchising voters, voter identification laws create longer lines at poll sites and add to the overall confusion of poll worker and voter alike. See Testimony of the Mexican American Legal Defense and Education Fund (MALDEF) before the Wisconsin State Senate Committee on Labor and Election Process Reform in opposition to S.B. 42 (Mar. 22, 2005) (delivered by Maria Valdez, Chicago Regional Counsel, MALDEF) [hereinafter Valdez, Testimony on Wisconsin Voter Identification Bill]; Testimony of MALDEF before the Georgia State Elections Subcommittee for the House Government Affairs Committee in opposition to H.B. 244 (Mar. 21, 2005) (delivered by Joel Alvarado, Policy Analyst, Atlanta Regional Office, MALDEF) [hereinafter Alvarado, Testimony on Georgia Voter Identification Bill]; Testimony of MALDEF before the Texas State House Elections Committee in opposition to H.B. 516 (Feb. 16, 2005) (statement of Nina Perales, San Antonio Regional Counsel, MALDEF) [hereinafter Perales, Testimony on Texas Voter Identification Bill].

149. *Id.*

delivered. Thus, a group conducting a voter registration drive should be able to drop off the forms and those new registrants will not need to show identification when they vote. New York seems to be adopting this procedure in its implementation of HAVA and other states should follow suit.¹⁵⁰

However, the federal requirements are described as “minimum requirements,”¹⁵¹ and nothing prevents states from instituting “more strict”¹⁵² requirements, so long as they are not inconsistent with the federal requirements.¹⁵³ Indeed a number of states are already trying to be more restrictive by applying identification requirements to all voters or all new voters regardless of whether they registered in person or by mail.¹⁵⁴ Some of the proposals even look to require proof of citizenship at the time of voter registration.¹⁵⁵ Advocates for election reform must fight against such proposals to prevent minority voter disenfranchisement.¹⁵⁶

Instead, states should guard against disenfranchisement by allowing for an expansive list of acceptable forms of “photo identification . . . or other government document[s].”¹⁵⁷ For example, states should consider student photo identifications, Medicaid/Medicare cards, and Section 8 (public housing) rent statements as valid identifications or documents per HAVA’s requirements.¹⁵⁸ Some have even suggested that personal mail delivered by the U.S. Postal Service could also be used to demonstrate voters’ names and addresses.¹⁵⁹

Even with these suggestions, the potential for states to misapply HAVA in a discriminatory fashion still exists. HAVA does not universally require identification in voting.¹⁶⁰ Yet, when AALDEF monitored the 2001 elections, they found that poll workers improperly required more than 300 Asian American voters to show identification in order to vote.¹⁶¹ The

150. A.B. 121, 228th. Leg. (N.Y. 2005) (the proposed amendment to state election law, § 5-108, contains a provision to exclude from the requirements imposed upon those registering by mail those “whose registration application is sent to the Board of Elections by mail accompanied by a statement signed and notarized by an individual other than the applicant stating that such applications was collected as a result of an in-person voter registration drive.”).

151. Help America Vote Act § 304, 42 U.S.C. § 15484 (2002).

152. *Id.*; See also MALDEF, VOTER IDENTIFICATION AND CITIZENSHIP BILLS RESOURCE KIT: CHART SUMMARIZING PROOF OF CITIZENSHIP AND VOTER IDENTIFICATION PROPOSALS IN THE STATES (2005).

153. Help America Vote Act § 304; Letter from Ralph F. Boyd to Hon. Nancy L. Worley, *supra* note 32; see also, Valdez, Testimony on Wisconsin Voter Identification Bill, *supra* note 148, at 3-5; Alvarado, Testimony on Georgia Voter Identification Bill, *supra* note 148, at 5-6; Perales, Testimony on Texas Voter Identification Bill, *supra* note 148, at 3-4.

154. Wang, *supra* note 4.

155. MALDEF, *supra* note 152; Valdez, Testimony on Wisconsin Voter Identification Bill, *supra* note 148; Alvarado, Testimony on Georgia Voter Identification Bill, *supra* note 148; Perales, Testimony on Texas Voter Identification Bill, *supra* note 148.

156. See Wang, *supra* note 4.

157. Help America Vote Act § 303(b), 42 U.S.C. § 15483(b) (2002).

158. Memorandum from New York State Citizens’ Coalition on HAVA Implementation, *supra* note 142.

159. *Id.*

160. Help America Vote Act § 303(b).

161. AALDEF SECTION 203 REPORT 2002, *supra* note 66, at 18-19.

same happened in 2004,¹⁶² and according to AALDEF Executive Director Margaret Fung, “Asian American voters were subjected to racial profiling at the polls, since they were routinely asked for identification in order to establish their eligibility to vote, even when it was not required.”¹⁶³

States must ensure the careful training of all poll workers on the correct application of these new identification requirements. Identification has been required too often of Asian American, foreign-born, and limited-English proficiency voters.¹⁶⁴ Election officials must stress that identification is only required in very limited instances.

Both HAVA’s verification and identification checks create barriers for Asian Americans to access their right to vote. States must take proactive steps, such as the above recommendations, to minimize the impact of these new requirements on the Asian American community.

3. Litigation Responses

Along with the sensitive implementation of HAVA’s new verification and identification requirements, constitutional claims may provide additional protections for Asian American voters. A court may intervene and strike down part of a congressional statute that is racially discriminatory in its application.¹⁶⁵ In addition, the application of the identification check requirement to only a select group of the voting population may also be inconsistent with the Fourteenth and Fifteenth amendments of the Constitution.¹⁶⁶

To raise a challenge under the Fourteenth and Fifteenth amendments, the plaintiff must prove that the identification checks weigh more heavily on racial and ethnic minority voters, effectively disenfranchising these groups.¹⁶⁷ A successful plaintiff must make a showing that such require-

162. AALDEF, THE ASIAN AMERICAN VOTE, A REPORT ON THE MULTILINGUAL EXIT POLL IN THE 2004 PRESIDENTIAL ELECTION (2005), available at http://www.aaldef.org/images/04-20-05_exit_poll_report.pdf.

163. AALDEF, ASIAN AMERICANS AND ELECTION REFORM: AN UPDATE ON THE HELP AMERICA VOTE ACT, *supra* note 83, at 2; see also Wang, *supra* note 4 (quoting Margaret Fung).

164. AALDEF, ASIAN AMERICANS AND ELECTION REFORM: AN UPDATE ON THE HELP AMERICA VOTE ACT, *supra* note 83, at 2; see also Wang, *supra* note 4 (quoting Margaret Fung); Letter from Glenn D. Magpantay to Peter C. Harvey, *supra* note 11; Letter from Glenn D. Magpantay to Michelle K. Tassinari, *supra* note 11.

165. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

166. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966), the Court reiterated that the right to vote was a fundamental political right and that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Id.* at 667 (citing *Yick Wo*, 118 U.S. at 370; *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964)). Where there is a fundamental right involved, as in cases with suspect classifications, strict scrutiny is the standard to which the government is held in determining whether a law or policy violates the Equal Protection Clause of the Fourteenth Amendment. Thus, any state would have the burden of proving that any challenged identification requirement policy is narrowly tailored to serve a compelling governmental interest.

167. See *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding a permanent nationwide statutory ban on literacy tests as a constitutionally valid exercise of Congressional power under the Fourteenth and Fifteenth Amendments); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating poll tax as an unconstitutional violation of the Equal Protection Clause);

ments actually and intentionally discriminated against minority voters.¹⁶⁸ A sustainable challenge may also need to demonstrate that HAVA's requirements neither discriminated against nor burdened white voters.¹⁶⁹

To prove all the necessary elements for a successful constitutional challenge, the discrimination must have occasion to take place. There have been relatively few elections in which the voter registration verification and identification checks have been implemented. When implemented, facts must be gathered to demonstrate the discriminatory impact of these new requirements.¹⁷⁰ To demonstrate the unconstitutionality of the requirements, minority voters must be turned away for lack of identification while non-minority voters in the same circumstances were free to vote. This requires monitoring of elections to document the impact of these identification checks.

Advocates must delicately balance their activities. They must work with election officials to minimize the impact of these verification and identification requirements in advance of the elections, while carefully monitoring their actual impacts on Election Day. While minority voter disenfranchisement may strengthen litigation claims and the likelihood of eliminating the identification requirement altogether, a strong case comes at high costs.

D. *Provisional Ballots*

As in the 2000 election debacle in Florida,¹⁷¹ many Asian Americans were denied the right to vote because their names were inadvertently missing from lists of registered voters located at poll sites or poll workers could

Smith v. Allwright, 321 U.S. 649 (1944) (holding that the right to vote in primary elections, regardless of race, is a right secured by the U.S. Constitution); Myers v. Anderson, 238 U.S. 368 (1915) (invalidating state grandfather clauses that limited the right to vote to only those citizens whose ancestors were eligible to vote).

168. See Washington v. Davis, 426 U.S. 229 (1976) (holding that discriminatory impact alone is not generally enough to warrant finding that the Equal Protection clause has been violated; only discriminatory intent can trigger strict scrutiny); See also Arlington Heights v. Metro. Hous. Dev. Corp. 429 U.S. 252 (1977) (stating that in order to establish discriminatory intent in governmental action absent a clear pattern unexplainable on grounds other than race, the court should look to: historical background, surrounding events, departure from standard procedures, or legislative history).

169. Shaw v. Reno, 509 U.S. 630 (1993). In Shaw, the Court allowed white voters to challenge a redistricting plan creating minority-majority districts solely on the basis of its discriminatory intent, without having to make an additional showing of discriminatory effect and injury-in-fact (see also City of Mobile v. Bolden, 446 U.S. 55). After Shaw, states creating minority-majority districts must justify their creation with a compelling state interest; in the past, before Shaw, the creation of such districts was the compelling state interest. Following this rationale, in the aftermath of Shaw, minority voter plaintiffs may need to demonstrate that any remedy sought will not have a discriminatory effect on white voters.

170. AALDEF, ASIAN AMERICAN ELECTION PROTECTION, *supra* note 68, at 2.

171. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 2. The allegations were with respect to the disenfranchisement of thousands of Haitians, and the constitutionality of the Florida felon disenfranchisement provision of the Florida constitution.

not find their names.¹⁷² In 2001, for example, more than two hundred Asian American voters in New York complained of this problem.¹⁷³

HAVA requires that on Election Day, states offer provisional ballots to voters who declare that they are eligible and registered to vote, but deficiencies exist that may prevent them from voting.¹⁷⁴ For example, if voters' names do not appear on lists of registered voters or if their eligibility is challenged, states must provide voters provisional ballots.¹⁷⁵ Afterwards, the state must determine individuals' eligibility to vote and if found eligible, count their ballots. HAVA's new requirement will ensure that all states have provisional ballots.¹⁷⁶ For states that already provide provisional ballots, implementation of HAVA may provide an opportunity to resolve many shortcomings in this voting procedure.

This provision is indeed welcome. As demonstrated by *Bush v. Gore*,¹⁷⁷ elections are almost never redone.¹⁷⁸ Compelling a new election is an extraordinary court action, requiring a showing that the infractions and irregularities were so great that, in the aggregate, they would have changed the outcome of the election.¹⁷⁹ That is to say, plaintiffs must demonstrate that the number of election defects overwhelm the winning candidate's margin of victory.

Unfortunately, *Bush v. Gore* held that the citizenry is not entitled to a perfect election, only to a fair election.¹⁸⁰ The Court thus held that lost votes are unfortunate, but permissible in a "fair"¹⁸¹ election. As a consequence of this ruling, advocates must endeavor to correct errors on Election Day, recognizing that any other remedy will rarely be afforded.

172. AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 5-6, Letter from Margaret Fung & Glenn D. Magpantay to Daniel DeFrancesco, *supra* note 42, at 2; Letter from Margaret Fung & Glenn D. Magpantay to Daniel DeFrancesco, *supra* note 42, at 6.

173. AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 5-6.

174. Help America Vote Act § 302(a), 42 U.S.C. § 15482 (2002).

175. Other instances that may trigger the use of a provisional ballot are: 1) if a voter who is required to show identification under the relevant federal and state election law lacks the sufficient identification, 2) if there is an indication that a voter may have already voted in that same election, 3) if there is an indication that a voter has a felony conviction that would strip one of the right to vote according to the relevant state election law or, 4) if a voter is voting as a result of an order extending the time established under state law for closing the polls.

176. See generally ELECTION REFORM INFORMATION PROJECT, THE PROVISIONAL VOTING CHALLENGE 5 (2001). States without provisional ballots include Illinois, Pennsylvania, Massachusetts, Nevada, and Indiana. States were required to comply with the provisional ballot requirements of HAVA by January 1, 2004 as per 42 U.S.C. § 15482(d).

177. *Bush v. Gore*, 531 U.S. 98 (2000).

178. In reversing the Florida State Supreme Court's order for a recount of the 2000 election, the U.S. Supreme Court stated, "there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed." *Id.* at 110.

179. *Id.*

180. *Id.*

181. *Id.* at 109-110

Provisional ballots provide the necessary opportunity to preserve votes that otherwise might be lost.

1. Even Application and Availability

HAVA mandates the availability of provisional ballots.¹⁸² However, some poll workers have been poorly trained in the procedures and laws regarding provisional ballots, frustrating HAVA's mandate.¹⁸³ The New Jersey Appleseed Public Interest Law Center found that while voters in one county could vote by provisional ballots, voters in another county were denied.¹⁸⁴ AALDEF found that some poll workers in New York did not give Asian American voters provisional ballots because the poll workers simply assumed they were not citizens.¹⁸⁵ Such ballots must be provided with equal application.

Additionally, *Bush v. Gore*¹⁸⁶ seems to hold that election procedures must be consistent across the state. In *Bush v. Gore*, the Court was struck by the different procedures for counting ballots in different counties in Florida. The Court held that counting needed to be consistent. It follows that other election procedures, like the application and availability of provisional ballots, should also be consistent.

2. Provisional Ballots as Voter Registration Forms

As previously discussed, the omission of Asian American voters' names in lists of registered voters is not uncommon.¹⁸⁷ This omission is partly due to mistakes as voter registration forms were entered into computerized lists, if they were entered at all.¹⁸⁸

Sometimes, voters were enrolled into the wrong political parties when their forms were entered. When AALDEF spot-checked the roll of registered voters, they found that voters' preferred political party enrollments were sometimes ignored. Democrats were enrolled into the Republican

182. Help America Vote Act § 301(a)(6), 42 U.S.C. § 15481(a)(6) (2002).

183. Letter from Glenn D. Magpantay to Peter C. Harvey, *supra* note 11; Letter from Glenn D. Magpantay to Michelle K. Tassinari, *supra* note 11.

184. The New Jersey Appleseed Public Interest Law Center ("NJ Appleseed") is a non-profit and non-partisan legal organization that addresses social and political problems facing residents of New Jersey, and has developed a project to study HAVA compliance within the state of New Jersey. NJ Appleseed determined that the administration and counting of provisional ballots in New Jersey is applied inconsistently across the state, since the process is currently determined at the county level. See N.J. APPLESEED: MAKING NEW JERSEY'S VOTES COUNT, NEW JERSEY CITIZENS' COALITION ON IMPLEMENTATION OF THE HELP AMERICA VOTE ACT (2004), at <http://www.njappleseed.org/Downloads/Making%20Votes%20Count04.pdf>; see also Letter from Glenn D. Magpantay to Peter C. Harvey, *supra* note 11.

185. AALDEF SECTION 203 REPORT 2002, *supra* note 42, at 19-22.

186. *Bush v. Gore*, 531 U.S. 98, 116-120.

187. See AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 5-6; see also Letter from Glenn D. Magpantay to Peter C. Harvey, *supra* note 11; Letter from Glenn D. Magpantay to Michelle K. Tassinari, *supra* note 11.

188. Letter from Glenn D. Magpantay to John Ravitz, *supra* note 139.

Party and vice versa.¹⁸⁹ One poll worker in New York reported that some Asian American voters have had to complete provisional ballots in multiple elections. If those voters were not registered, either because of some deficiency in their original voter registration form or by some processing error by election administrators, then their ballots in every election were uncounted. In addition, their future ballots would not be counted either. Errors in the database of registered voters must be corrected.

Provisional ballots are inserted into envelopes to ensure privacy. On the envelopes, voters sign their names and take oaths affirming their registrations.¹⁹⁰ These envelopes should double as operative voter registration forms. All states that have instituted provisional ballots after 2000, including New York, Maryland, and Georgia, use this process as opportunities to register eligible voters.¹⁹¹ Therefore, even if the voter's ballot cannot be counted in the instant election because there is no record of the voter, these individuals can have their ballots counted in future elections.

Voter registration forms require much of the same information as provisional ballot envelopes. Applicants provide their names, addresses, dates of birth, and political party enrollments. Both voter registration forms and provisional ballot envelopes typically have oaths and require signatures attesting to the truth of the information provided.¹⁹² Other requirements may apply under state laws, but generally slight changes in the provisional ballot envelope will meet the legal requirements for voter registration and allow the envelope to be used to register new voters.

Another alternative is to print provisional ballot envelopes with voter registration forms attached (either on the backs or as perforated tear-off forms).¹⁹³ When voters use the provisional ballots, poll workers can require that both the ballot and registration form be completed, ensuring that the voter will be registered for subsequent elections.

If voters have taken all the necessary steps to register and come to their assigned poll sites on Election Day, they should be able to vote and have their votes counted. If their votes cannot be counted, corrective measures must be put into place. Using provisional ballot envelopes as voter registration forms will help remedy problems for future elections.

189. AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 5-6; Letter from Glenn D. Magpantay to John Ravitz, *supra* note 139.

190. Help America Vote Act § 302, 42 U.S.C. § 15482(a)(2) (2002) (a voter must attest that he is both a registered voter in the given jurisdiction and eligible to vote in the given election).

191. N.Y. ELEC. L. § 5-208; *see also*, Letter from Margaret Fung, Executive Director, and Glenn D. Magpantay, Staff Attorney, AALDEF, to John Ravitz, Executive Director, New York City Board of Elections (Aug. 10, 2004) (regarding the use of affidavit ballot envelopes to correct voter registration omissions).

192. Help America Vote Act § 302(a)(2); National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg-3(c)(2)(C), 1973gg-5(a)(6)(A), 1973gg-7(b)(2).

193. Letter from Margaret Fung & Glenn D. Magpantay to John Ravitz, *supra* note 191.

3. Counting Provisional Ballots

Another common shortcoming in states' provisional ballot systems is the requirement that the validity of ballots be determined before they are counted. For example, in order for provisional ballots to be counted in New York, voters must be at their correct poll sites.¹⁹⁴

In New York, because of changes largely due to redistricting, in the 2001 and 2002 elections, many Asian Americans did not know where to vote.¹⁹⁵ Voters complained that they were not informed of their poll sites.¹⁹⁶ On some occasions, election administrators themselves gave incorrect or conflicting information about voters' poll site assignments.¹⁹⁷ Too many Asian Americans lost their right to vote because of this misdirection.

States should compensate for these errors by ensuring votes are counted for individual races. For example, even if voters are at the wrong poll sites but are still within the congressional districts in which they reside, then their votes for Congress should be counted. Likewise, this method of counting votes for individual races should apply to state legislative and city councilmanic races. For statewide and citywide offices, such as governor, United States Senate, and mayor, an individual's vote on a provisional ballot cast at the wrong poll site should always be counted.¹⁹⁸ Any poll site a voter would logically go to, even if it is the incorrect site, will provide ballots that allow an individual to vote for these city or statewide races. Therefore, votes in these races should be counted.

HAVA creates new opportunities for voters who would otherwise be turned away from the vote.¹⁹⁹ However, advocates must ensure that provisional ballots are made available and counted effectively. Using the provisional voting process to register new voters and correct errors, in addition to counting as many of the votes on provisional ballots as possible, will ensure this new federal right will expand access to the vote.

E. *Advocacy Methods*

In some states, HAVA will help many more Asian American voters. In other states, it may discourage or even disenfranchise Asian American

194. *Panio v. Sunderland*, 825 N.E.2d 85 (N.Y. 2005).

195. Letter from Margaret Fung & Glenn D. Magpantay to Daniel DeFrancesco, *supra* note 63, at 3.

196. AALDEF SECTION 203 REPORT 2002, *supra* note 66, at 23-24; AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 13-14.

197. AALDEF SECTION 203 REPORT 2002, *supra* note 66, at 24-25; AALDEF SECTION 203 REPORT 2001, *supra* note 42, at 13-14; Letter from Glenn D. Magpantay to Edward Schulgen, *supra* note 11; Letter from Glenn D. Magpantay to Peter C. Harvey, *supra* note 11; Letter from Glenn D. Magpantay to Michelle K. Tassinari, *supra* note 11.

198. LEADERSHIP CONFERENCE ON CIVIL RIGHTS, RECOMMENDATIONS ON IMPLEMENTATION OF THE "HELP AMERICA VOTE ACT" 2 (2002), available at <http://www.lawyerscomm.org/2005web/site/projects/votingrights/votingrightspics/hava.pdf>.

199. Help America Vote Act § 402(a), 42 U.S.C. § 15512(a) (2002). HAVA mandates that states devise uniform and nondiscriminatory administrative complaint procedures to respond to voter grievances. These procedures, including provisions for administrative hearings at the request of complainants, are a means for voters to address any violation of Title III of HAVA.

voters. Community groups must remain engaged in election reforms and closely watch proposals regarding HAVA implementation. There are several key junctures that require such vigilance. Advocacy groups should monitor states' compliance with HAVA, comment on their states' HAVA implementation plans, and consider other non-litigation remedies under the Voting Rights Act.²⁰⁰

Groups have monitored elections for compliance with the Voting Rights Act²⁰¹ and documented barriers to voting.²⁰² This monitoring effort has been highly successful in persuading election officials to change current procedures.²⁰³ These groups, through their support or opposition to various HAVA implementation proposals, can help diminish the disenfranchisement of voters. Groups must continually monitor elections to ensure that states appropriately, evenly, and fairly implement HAVA. Any problems, particularly those resulting in discriminatory treatment, should be reported to the Justice Department, local election officials, and civil rights groups.

States must develop plans outlining how they will implement HAVA's new provisions.²⁰⁴ A committee with citizen participation and input from the public must develop these plans to help ensure proposals do not promote voter disenfranchisement.²⁰⁵ Community groups can seek representation on these committees. They are also invited to make recommendations for implementation. Once the HAVA plan is adopted, it must be sent to the U.S. Department of Justice for publication in the Federal Register.²⁰⁶ Groups can again submit comments to the HAVA plan after it is published.²⁰⁷

The Voting Rights Act²⁰⁸ provides advocates with another option to remedy problems under its enforcement provisions (Section 5). Jurisdic-

200. See *infra* note 202 and accompanying text. Under Section 5 of the Voting Rights Act, the Attorney General is authorized to file suit to enjoin any violations of Section 5. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Supreme Court extended Section 5 enforcement power to private entities by recognizing the right of any private individual or organization with standing to seek injunctive relief against a Section 5 violation in federal court in the judicial district where the violation occurred.

201. Voting Rights Act, 42 U.S.C. §§ 1973 *et seq.* (2005).

202. Magpantay, *supra* note 6. Civil rights organizations such as AALDEF and the National Association for the Advancement of Colored People ("NAACP") regularly monitor elections for Voting Rights Act compliance. See AALDEF, Voting Rights (last visited Dec. 20, 2005), <http://www.aaldef.org/voting.html>; NAACP, Voter Empowerment Program (last modified Sept. 8, 2005), http://www.naacp.org/programs/vote/vote_index.html

203. AALDEF SECTION 203 REPORT 2002, *supra* note 66, at 9. Amongst other improvements, the New York City Board of Elections recruited more interpreters for the 2002 elections than it had done in previous years and developed a back-up pool of interpreters to be dispatched to poll sites when needed.

204. Help America Vote Act § 254, 42 U.S.C. § 15404 (2002).

205. *Id.* § 255.

206. *Id.* § 254.

207. *Id.* § 256 (requiring that a state make a preliminary version of its HAVA implementation plan available to public inspection and comment, as well as publish accompanying notice, no less than 30 days prior to submitting the plan for approval).

208. Voting Rights Act, 42 U.S.C. § 1973c (2005).

tions with a history of voting discrimination are required to "preclear" all voting changes by the Department of Justice or a federal court before they can take effect. Most jurisdictions do not litigate but submit changes directly to the Department of Justice for preclearance. Preclearance ensures that any changes do not retrogress or weaken the voting strength of racial and ethnic minorities.²⁰⁹ Community groups are invited to submit comments on such changes.²¹⁰ If preclearance is denied, the changes may not take effect and these jurisdictions must abandon the retrogressive change or propose anew.

III. CONCLUSION

HAVA resulted in two steps forward, one step back, and a side step for Asian Americans in their efforts to participate in the electoral franchise. New requirements for provisional ballots and poll site accessibility will facilitate the voting process. New identification requirements will only burden, if not disenfranchise, voters. Language assistance, the most important way to make voting accessible to Asian Americans, was not mandated or expanded, but HAVA contains some provisions that may be helpful for local advocates. States must implement HAVA in ways that eliminate barriers to the vote for Asian Americans. This will help ensure that all Americans can fully enjoy the fundamental right to vote.

209. Letter from Ralph F. Boyd, Jr. to Hon. Nancy L. Worley, *supra* note 32 (citing *Young v. Fordice*, 520 U.S. 273 (1997) (when discretion is granted to state officials regarding the manner in which they implement federal legislation, covered jurisdictions must comply with preclearance provisions of Section 5)).

210. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.29 (2005).