

House Administration Subcommittee on Elections
Testimony of
Chris Nelson, South Dakota Secretary of State
March 23, 2007

Madam Chairwoman and Members of the Committee:

Thank you for the opportunity to offer testimony on HR811. It is a privilege for me to come before this honorable committee.

Allow me to introduce myself. My name is Chris Nelson. I am the Secretary of State of South Dakota. From 1989 until 2002 I served as the State Election Supervisor for South Dakota. In 2002 I ran for Secretary of State and was elected. In 2006 I ran for reelection unopposed. One of the reasons I was unopposed is that I have earned a reputation in my state of being able to lead the conduct of elections in a manner that is fair to all parties and independents, open to the fullest participation and instilled with integrity. I serve as the co-chair of the National Association of Secretaries of State Elections Committee. I understand the election process and know what works and what doesn't.

I think it is vital that you hear from the perspective of a state election official who has experience in conducting elections and who will shoulder the weight of compliance with HR811.

Let me assure you that every day, election officials at the state and county level are working to ensure that elections across America are conducted fairly, that voters are able to cast their votes as they intend and that their votes are counted correctly. Our commitment as election officials is the same as yours. We work daily to ensure that this process works. State and local election officials are passionate about wanting to provide an election in which voters are well served. We do not take our responsibility lightly.

I believe there are three questions that need to be answered today.

#1 – Does further change need to happen in our election system?

#2 – Who is best positioned to fashion that change?

#3 – How can change occur without damaging the current system?

The last six years have seen monumental changes in the election system in America. This period of change is unrivaled in the history of our country. In nearly every instance, election officials in America have responded to the call for change and performed well.

Are there areas that still need improvement?

The answer is "Yes".

After each election evaluations are made concerning what needs to be improved. Election officials look ahead to the next election to anticipate what changes are needed to provide a perfect voting experience.

HR811 gives the impression that Congress believes no change is occurring across America and therefore it needs to be mandated at the federal level. Nothing could be further from the truth. Every day state legislatures, secretaries of state, state boards of elections, county boards of elections and local election officials are evaluating and working to make the next election even better than the last one. Change is happening.

Who is best positioned to drive that change. I believe the most effective change will come from state and local officials who know and work with voters every day.

These officials understand the landscape. They understand what will work best for their community. They talk daily with their constituents. State and local officials are capable of assessing where change is needed and have the ability to implement that change. Local officials can create solutions that fit their locality. What works in Los Angeles County may not be the best answer for Jones County South Dakota with 817 registered voters. Likewise the perfect fit for Jones County would likely not work in San Jose or San Diego.

Inflexible federal laws such as HR811 which provide one-size-fits-all “solutions” are ripe for unintended consequences. These consequences can be especially harsh in those parts of our country that may fall outside of the “norm.”

A poignant example of an unintended consequence of the Help America Vote Act occurred in South Dakota. The law requires voting machines to be programmed in languages covered by the minority language requirements of the Voting Rights Act with no regard for the usability of such requirement. South Dakota spent \$28,000 complying with this singular requirement in 2006. Ten people used that function. All ten were bilingual and did not use it out of need. \$2800 per voter is not taxpayer money well spent. State and local election officials could have found much more effective ways of serving the minority language voters than this universal mandate in HAVA.

When state and local officials evaluate change, their first priority is to do no harm to those parts of the election system which are working well. There are parts of HR811 which may damage processes which currently work well. I will address those portions of the bill.

Section 2 individual voter-verified paper ballot requirement:

Let me be very clear, I am a paper component advocate in my state. Given the mandates of HAVA to provide a voter assist terminal for voters with disabilities, I worked with our local election officials to determine the best system for our citizens. We chose an optical scan paper system with a voter assist ballot marking device. It is the right answer for South Dakota. Our citizens universally have approved the system and have great confidence. I cannot tell you that such a system is going to be the best for other jurisdictions with different demographics.

HR811 requires paper ballots of archival quality readable by naked eye and by scanner. Many of the voting machine voter-verified paper systems today would not be considered archival quality or meet the scanner requirement. Many of these systems have been implemented in the last two years as a direct result of the requirements in HAVA. Hundreds of millions of dollars have been spent on procurement, installation and training for these systems. They may be working fine in their jurisdictions. HR811 requires these systems be scrapped in a shameful waste of taxpayer dollars.

Jurisdictions who complied in full faith with the requirements of HAVA will be set back two to four years as they search for, procure, implement, test and train on voting equipment which would be HR811 compliant. Millions of dollars will be spent retooling. It is unlikely the \$300 million authorized in HR811 will come close to covering the costs. State and local governments will be left to fund the deficit created by this mandate.

The bill requires an emergency paper ballot system essentially requiring many counties to print a full compliment of paper ballots plus operate their electronic voting equipment. This added requirement puts more strain on the system and adds to the cost.

HR811 attempts to deal with the scenario of paper ballot counts not matching the electronic count. Any system which has the capability for printer breakdown will have the distinct probability of vote totals which do not match. This bill can attempt to define which count is used in various situations but I can guarantee that which ever candidate loses a close race in this scenario, the disparity will end up in a courtroom or the Floor of the House or Senate for ultimate resolution. One side will claim the paper is correct. The other side will claim the electronic record is correct. Citizens will wonder if either side is correct and ask why we have a system capable of producing more than one result. It is a recipe for destroying voter confidence.

Section 2(c)(1) election notice prescription:

This section prescribes the exact language of a notice to voters in the polling place. Is it really necessary to place the exact wording and type requirement in federal law especially when the requirement is language which would be very difficult for new adult readers to comprehend?

When election notices are created in South Dakota, we work with a local literacy council and new adult readers to craft notice language that is precise, yet clear and easy to read for new adult readers. These may be new citizens whose first language is not English or it may be others who never learned to read English as children. We have been told by literacy experts that election notices which are unnecessarily complex discourage participation. At the state level, we understand that concern.

The proposed notice language contained in HR811 violates several of the principals used by literacy experts. First, the notice is in upper-case letters. Messages in all upper-case letters are hard for new readers to decipher. Using upper and lower case letters is easier to follow and read. Second, the sentences are too long. Third, words like “representing”, “serve”, “vote of record”, “audits”, “confirmed”, and “accurately” would be difficult for first time readers to deal with. They should certainly not be mandated in federal law.

Section 3 sidesteps the State Administrative Complaint Procedure:

HAVA required the creation of a state administrative complaint procedure for resolving HAVA Title III complaints by voters. HR811, while not removing the state procedures, in reality replaces them with an investigation by the Department of Justice. Allow the state complaint procedure to work. Allow citizens to interact with their state election officials to solve problems and complaints. Must every complaint be federalized by turning it over to the Department of Justice without giving state officials time to resolve complaints? Give state election officials a chance to work things out with their constituents.

Private Right of Action:

I can assure you from personal experience that the Department of Justice stringently monitors state compliance with HAVA. DOJ has repeatedly conducted written and verbal checks for compliance with the various requirements of HAVA. It is with the understanding that failure to comply will mean answering a lawsuit brought by the Department of Justice. Private Right of Action may unnecessarily duplicate and complicate those enforcement efforts.

Section 5 Audit Requirement:

As election officials we understand that accountability is a mandatory and valuable part of the election process. States have and are adopting audit requirements that meet the needs of their state. These are audit requirements that work in harmony with their current requirements instead of complicating their process.

South Dakota has a system which allows any three voters in a precinct to request a recount of all the races in their precinct if there is a belief that the results are not correct. This recount is paid for by the county with no liability for the requesting voters. This has served as our safety valve and citizen check on the vote count. The voters are in control. Recounts can be requested where and when necessary. When recounts are conducted, they routinely uphold the original counts. Recount boards are judicially appointed to take partisanship out of the board appointment process while allowing board members who have election experience to serve on the board. The process works well. There is absolutely no need to conduct an across-the-board audit by newly appointed officials having no election experience.

Confidence in our state's system is high. In 2002 former Congressman and current Senator John Thune ran against Senator Tim Johnson. Thune lost by a margin of less than sixteen one hundredths of a percent – 524 votes. No recount was called because the system is trusted and the results would not have changed.

The audit provision of HR811 will lead to unintended consequences. I have spoken to my state auditor regarding this provision. His response is that this provision will place his department in a conflict of interest situation, one which they strive to avoid at all costs in their profession.

The logistics of conducting this audit are concerning. First it will take time. Will the audit board travel to each county of a state to conduct the hand count? In South Dakota this will take 20 to 30 working days. Larger states would be even longer. Or will ballot boxes be transported to the State Capitol for counting? Transporting ballot boxes outside the county would be unprecedented. Following elections, ballot boxes are typically secured pending any local recount or court challenge. If the audit board is not willing to travel to each county, the previously sealed and secured ballot boxes would be transported with an accompanying loss of security once outside the local courthouse.

HR811 delays the certification of federal elections. Certification can now be done within seven days of the election in my state. The audit requirement would draw out that time, again with unintended consequences.

In 2004 South Dakota's lone House seat was vacant and a special election was held to fill the seat. South Dakotans were most anxious to fill the seat quickly. Under our procedures we were able to have our new congresswoman, Stephanie Herseth, certified with a day or two of the election. HR811 would have delayed that certification by weeks leaving our state or any vacant congressional seat without representation for much longer than necessary.

HR811 authorizes reimbursement for the costs of the audit. The fact is that HAVA authorized \$800 million more than has ever been appropriated to assist states in complying with the original HAVA mandates. Until this HAVA money is appropriated and provided to states, there is great skepticism among election officials as to whether the HR811 promise of additional reimbursements will ever be made. To us, this is looking like another unfunded or under-funded mandate.

In closing, it is crucial to remember that election officials across our great country are striving every day for what we all want – elections which are free, fair, open and accurate. Those officials are giving their all to make democracy happen in their jurisdictions. I know. I work with them every day.

I can share one great truth with you that I have learned from my experience as a state leader. It is this. It is much more productive to lead by working with not against those in other units of government. Many of us at the state and local level perceive HR811 as working against us. The rigidity of the requirements of the bill take away and complicate the progress we are making. We ask that you work with us to accomplish our purposes. Work with us by allowing the existing HAVA mandates to be implemented and the kinks worked out before adding new mandates.

State and local officials are best positioned to see the needs of this great system of elections we have in this country. Allow us to continue improving that system as our experience and understanding guide us. We are committed to that end.

One final thought. Our country's election system is much like a guitar string. A tweak here and a peck there by those who know the guitar and beautiful music is the result. Continued pressure

on that string by those who don't know the limits of instrument and soon the guitar string will snap – an unintended consequence.

As election officials make careful changes and improvements to their system, the beauty of citizens participating in the selection of their leaders is fulfilled. Relentless pressure of one federal mandate after another after another may one day cause this election system to snap. Let's not make that mistake. Allow state and local election officials time to absorb the requirements of HAVA before further pressure is brought to bear.

Thank you for your consideration.