
**HOUSE COMMITTEE ON ELECTIONS
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2004**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
79TH TEXAS LEGISLATURE**

**MARY DENNY
CHAIRMAN**

**COMMITTEE CLERKS
NOE BARRIOS
NICOLE TUNKS**



Committee On
Elections

October 13, 2004

Mary Denny
Chairman

P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Tom Craddick
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

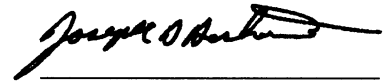
Dear Mr. Speaker and Fellow Members:

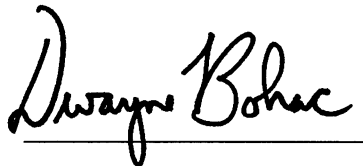
The Committee on Elections of the Seventy-Eighth Legislature hereby submits its interim report including recommendations for consideration by the Seventy-Ninth Legislature.

Respectfully submitted,

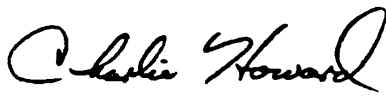

Mary Denny

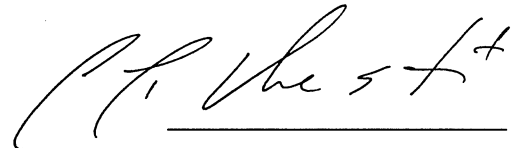












Charlie F. Howard
Vice-Chairman

Members: Joe Deshotel, Dwayne Bohac, Garnet Coleman, Linda Harper-Brown, Carlos Uresti

TABLE OF CONTENTS

INTRODUCTION.....i

INTERIM STUDY CHARGES

 CHARGE #1- IMPLEMENTATION OF THE HELP AMERICA VOTE ACT.....1

 CHARGE #2- RECODIFICATION.....13

 CHARGE #3- HOUSE BILL 1606 RULEMAKING.....17

 CHARGE #4- AGENCY OVERSIGHT.....19

ENDNOTES.....21

INTRODUCTION

At the start of the 78th regular legislative session, the honorable Tom Craddick, Speaker of the Texas House of Representatives, appointed seven members to the House Committee on Elections. In addition to Mary Denny, chair, membership on the committee included: Charlie Howard, vice chair; Joe Deshotel, chair for budget & oversight; Dwayne Bohac; Garnet Coleman; Linda Harper-Brown; and Carlos Uresti.

Following the third special session, the Speaker assigned the committee four charges to study during the interim period: review compliance with and implementation of the federal Help America Vote Act (HAVA); examine the Texas Election Code for an omnibus rewrite and recodification; monitor the Texas Ethics Commission's rulemaking associated with implementation of House Bill 1606 (78R); and monitor the agencies and programs under the committee's jurisdiction. The chairman decided that the committee would consider each of these charges as a whole. Over the course of the interim, and during subsequent special sessions, the Elections Committee convened for several hearings and a work session to consider these interim charges. Charges were addressed jointly at these hearings, so that progress on implementation of HAVA and HB 1606 could be carefully and continually monitored.

The committee would especially like to thank Ann McGeehan, Director of Elections, Texas Secretary of State's office and Karen Lundquist, Executive Director, Texas Ethics Commission, as well as their staffs, for their time and effort in assisting the committee with its charges. In addition, the committee appreciates the input of all of the elections officials, advocates, voters, and otherwise interested individuals who testified at the various public hearings.

Charge #1

Review compliance with the provisions of the Federal Help America Vote Act (HAVA) and implementation through the Secretary of State's office of the legislation passed as issues surrounding HAVA become more settled.

Background:

In 2002, responding to voting irregularities in the previous Presidential election, the United States Congress passed the Help America Vote Act (HAVA).¹ HAVA set certain nationwide standards for election policy and allocated funds for individual states to update and reform their election systems. Although Texas did not experience the magnitude of problems which occurred in other states in 2000, many of the reforms set forth under HAVA are beneficial to improving elections here. To meet the new federal requirements and to receive the state's allocated funding, several election law and policy changes were needed. The 78th legislature passed House Bill 1549 during the regular session and House Bill 1 during the third special session to ensure compliance with the federal act.²

Major HAVA requirements include:

- prohibition of punch card and lever voting systems;
- implementation of a computerized statewide voter registration database;
- implementation of provisional voting;
- the institution of fully accessible, private voting for all voters with disabilities.

House Bill 1549 revised the Texas Election Code, as needed, to reflect these new federal requirements. The bill created the election improvement fund, a dedicated account in the general revenue fund, to facilitate the receipt of federal funds associated with HAVA. Additionally, the secretary of state was given broad rulemaking powers and authorized to put in place procedures and forms necessary for further implementation of the new state and federal laws. House Bill 1, which passed during the third special session, clarified discrepancies that had arisen following the regular session, as a result of the concurrent passage of HB 1549 with other pieces of election legislation.

The interim period following the third special session gave the committee, election officials, candidates, and voters the opportunity to see some of these reforms in action. Both a Presidential primary election and most city elections occurred in the spring of 2004. Deadlines for several major HAVA components occurred during this period. The Elections Committee held two public hearings and one work session throughout the interim to consider HAVA implementation. A wide cross-section of the population--state employees, local election officials, voter advocates, and average voters, appeared before the committee to give their testimony.

Witness List for Interim Charge #1:

January 28, 2004

Elizabeth Hanshaw Winn (Legal Director, Elections Division, Texas Secretary of State)
Daniel Glotzer (HAVA Grants Manager, Elections Division, Texas Secretary of State)
Yolonda Ledesma (City of San Antonio)

March 31, 2004

Ann McGeehan (Director, Elections Division, Texas Secretary of State)
Melinda Nickless (Assistant Director, Elections Division, Texas Secretary of State)
Cliff Borofsky (Elections Administrator, Bexar County)
Beverly Kaufman (County Clerk, Harris County)
Madeleine Hervey (Common Cause Texas)
Adina Levin (ACLU-TX and EFF-Austin)
Barbara Weinstein (League of Women Voters Texas)
Joe Zagar (Capitol Area Central Texas Unix Society and EFF)
Tom Eschberger (Vice President, National Accounts, Election Systems and Software)
Neil McClure (Hart InterCivic)
Bill Stotesberry (Hart InterCivic)
Brian Phillips (SysTest Labs)
Janet Acord (Hays County, Democratic Precinct #337)
Philip Ruiz (Texas Democratic County Chairs Association)

Witnesses testifying on behalf of themselves:

Dan Wallach (March 31, 2004)
J.R. Perez (March 31, 2004)
Bruce Sherbet (March 31, 2004)
Dana DeBeauvoir (March 31, 2004)
Don Jarrell (March 31, 2004)
Thomas Manaugh (March 31, 2004)
Silvia Reveles (January 28, 2004 and March 31, 2004)

Part I- General Implementation

Eighteen months after the passage of HAVA, as Governor Perry signed the legislation implementing the reforms in Texas, its future remained unclear. For much of the initial implementation period, the federal government failed to meet several of its responsibilities. This, in turn, hampered implementation by the state. The Elections Assistance Commission (EAC), the federal agency created by HAVA and charged with its administration, was not appointed until nine months after the deadline set by HAVA.³ Additionally, as of the summer of 2003, a majority of the federal funds promised under HAVA had not yet been appropriated. Despite these delays, and with little to no guidance or funding to accompany the new federal mandates, the Secretary of State's Election Division moved forward, under the leadership of Secretary of State Geoffrey S. Connor, to implement as much of the legislation as possible in a timely manner.

HAVA Funding and the Texas State Plan:

The federal funds for HAVA reforms originate from a variety of sources and include a required 5% state match. HAVA funds can be divided into three categories: Title I funds for election administration improvement and voting system replacement; Title II, Section 263 funds to provide election assistance for voters with disabilities; and Title II requirements payments, available generally for election reform. As of the date of this report, Texas has received all of its 2003 federal HAVA funding, a total of \$81 million. The receipt of this money was delayed considerably, however, due to setbacks with the appointment of the EAC and its approval of the Texas State Plan.

HAVA required each state to submit a state plan, to be approved by the EAC and published in the *Federal Register* for 45 days, before the EAC could authorize the release of any federal funds. The Texas State Plan (*Plan*) outlines the state's HAVA implementation strategy, including an itemized budget for the proposed use of the federal funds and details on how the state anticipates meeting each requirement or standard under HAVA.

To aid in the preparation of the *Plan*, the Secretary of State created a HAVA Advisory Committee. Representative Denny, as chair of the House Elections Committee, served on this panel. The advisory committee also included various voting rights activists, local election officials, disability advocates, and representatives from several state agencies, including the Attorney General's office and the Texas Department of Public Safety. The HAVA Advisory Committee convened for three meetings in Austin, on April 3, May 1, and June 27, 2003. At these meetings, the Secretary of State and staff of the Elections Division listened to input from advisory committee members on various elements and drafts of the *Plan*. Additionally, the Secretary of State's office solicited public comment on the *Plan* at the end of each meeting.⁴ The result of this work was the final version of the Texas State Plan, which the Secretary of State released on September 16, 2003.⁵ The Secretary of State submitted the completed *Plan* as soon as possible, once the Commissioners were sworn into office, in December 2003. At this time, shortfalls with the EAC's own funding hindered the approval and publishing of the *Plan*, and release of funds was again delayed.

Because of this setback, a majority of the HAVA funds were not disbursed to Texas until after the spring of 2004. The delays in the receipt of this funding hindered the implementation of some significant areas of reform, such as replacement of punch card and lever voting machines. Some of those counties required to replace voting machines will not have the new systems in place by the November 2004 election, as originally hoped by HAVA's authors, and many may also miss the official January 1, 2006 replacement deadline. Local election officials spoke at the HAVA Advisory Committee meetings that they were hesitant to move forward with HAVA mandated election reforms until the money was actually available to them.

Now that all of the 2003 HAVA funding has been received by the state, further implementation should proceed smoothly. In addition, the Secretary of State has received notice from the federal government that Texas is eligible to receive an additional \$100 million in 2004 Title II HAVA funds, if the state develops another state plan and provides an additional 5% match. Secretary Connor is currently communicating with the EAC to determine if the federal funds can be drawn down as state funds become available or whether the entire 5% match must be appropriated.⁶

Help America Vote Act (HAVA) FY '03 Funding Breakdown

(source: Texas Secretary of State)

	<u>State</u>	<u>Sub-award</u>
<i>Title I, Section 101 - Election Administration Improvement</i>		
Preliminary Planning for Statewide Voter Registration System	\$465,043	\$0
State Plan Administration	\$3,720,345	\$0
Voter Education	\$2,790,259	\$0
Election Official and Poll Worker Training	\$2,790,259	\$0
Statewide Voter Registration System	\$5,580,517	\$0
County Education Fund	\$0	\$1,860,172
	<u>\$15,346,423</u>	<u>\$1,860,172</u>
Total:	\$17,206,595	
<i>Title I, Section 102 - Punch Card and Lever Voting System Replacement</i>		
Punch Card and Lever Replacement	\$0	\$6,269,521
	<u>\$0</u>	<u>\$6,269,521</u>
Total:	\$6,269,521	
<i>Title II, Section 257 - Requirements Payments</i>		
Free Access System for Provisional Voters	\$1,000,000	\$0
Statewide Voter Registration System	\$8,607,904	\$0
County Voter Registration Election Management Systems	\$0	\$5,580,517
Accessible Voting System in All Polling Places	\$0	\$25,500,000
Grant Funding to Counties for HAVA Compliance	\$0	\$20,000,000
95% Federal	<u>\$9,127,509</u>	<u>\$48,526,491</u>
5% State	<u>\$480,395</u>	<u>\$2,554,026</u>
	<u>\$9,607,904</u>	<u>\$51,080,517</u>
Total:	\$60,688,421	
<i>Title II, Section 264 - Election Assistance for Individuals with Disabilities</i>		
Training/Information Regarding Accessibility	\$833,749	\$0
	<u>\$833,749</u>	<u>\$0</u>
Total:	\$833,749	
Total Federal	<u>\$25,307,680</u>	<u>\$56,656,185</u>
Total State	<u>\$480,395</u>	<u>\$2,554,026</u>
	<u>\$25,788,075</u>	<u>\$59,210,211</u>
TOTAL HAVA FUNDING:	<u>\$84,998,286</u>	

Part II- Voting System Reform

Background:

One of the major intended goals of HAVA funding is voting system reform. Complications and errors with certain voting machines in 2000, including the saga of the hanging and pregnant chads, were among the most publicized problems brought to light in that election. In response to these, HAVA mandates an overhaul of outdated and unreliable voting systems throughout the nation. To achieve this goal, HAVA prohibits the use of punch card and lever machines by January 1, 2006, at the very latest, and provides money for their replacement.⁷

In the 2000 general election, 30.9% of the U.S. population voted on punch card machines and another 18% cast their ballots with lever machines, totaling almost half of the electorate. The remainder of the electorate used paper ballots, optical scan, or direct-record electronic (DRE) voting systems.⁸ Of the 254 counties in Texas, only 17 used punch card or lever voting machines in the 2000 general election. The 17 counties in Texas that used these machines in 2000 are eligible to apply for the Title I funds for voting system replacement. The money available is allocated based on a federally determined formula, which allows about \$3000 per precinct that used the machines in the 2000 election, or \$6.2 million for the state. This amount will not fully reimburse counties for their costs but can be supplemented by HAVA's Title II requirements payments.⁹ This additional HAVA funding can also be used by other counties in the state to upgrade their voting systems.

In addition to the money that is available for the replacement of punch card and lever machines under Title I and Title II requirements payments, HAVA's Title II, Section 264 funds provide \$25.5 million for the acquisition of an accessible voting system in each polling place for use by disabled voters. HAVA requires every polling place used in a federal election to provide at least one voting machine that will allow disabled voters to cast their ballots privately and independently. In HB 1549 (78R), the legislature implemented this provision by requiring at least one Direct Recording Electronic (DRE) voting machine in each polling place.¹⁰ To further facilitate voting system reform by helping counties purchases voting machines at the lowest price possible, the Secretary of State is coordinating contracts through the Texas Building and Procurement Commission. The Secretary of State anticipates bids for the purchase of DRE systems to be in place by November 2004.¹¹

According to procedures adopted by the Secretary of State, HAVA funds for voting system replacement will be spent directly by the counties in the form of grant money that reimburses them for purchases. To ease the distribution of the money to the counties, the Secretary of State has designed an online grant request system, through which counties may apply for the federal funds. Applications for funds include those to be used for voting system replacement, as well as those for voter education efforts, accessibility, and administration enhancement. The grant system went live for Title I funds in May 2004, and for the Title II funds in September 2004. To manage grant requests and to ensure compliance with HAVA and other federal grant guidelines, the Secretary of State hired a grants manager and is incorporating the grant application process into training for election officials. In addition, the Secretary of State has posted information pertaining to grant funding and grant guidelines on its webpage.¹²

As of the date of this report, 5 of the 17 counties have replaced their punch card and lever machines. Of the total 254 counties in the state, 13 are currently using DREs for use by disabled voters, early voters, or for county-wide use in all elections.¹³

While still limited, the growing use of DREs in the state has, in turn, sparked controversy of its own. According to proponents, DREs have a number of advantages over traditional paper and optical scan systems, including: accessibility options available to disabled voters; the capacity for accommodating alternative languages, and the ability to identify undervotes and overvotes before a voter casts a ballot. Like all voting systems, however, DRE machines may have their drawbacks. Focusing on the perceived weaknesses, several groups have created a movement questioning the security and accuracy of these machines.¹⁴ To determine the best course of action for voting system reform relating to the use of DRE voting systems in Texas, the Elections Committee expanded its charge to include consideration of the debate relating to DRE voting security.

National DRE Debate:

Many in the academic and technology communities have been expressing concerns over the security of electronic voting for years, and in recent months, their views have garnered considerable press coverage. Their primary concern focuses on whether computerized ballot machines actually record the votes that the voter selects on the screen and on developing a way to ensure that this happens. Members of the movement are urging lawmakers to require all DREs to produce a voter verifiable paper audit trail (VVPAT), a paper ballot receipt from which voters could verify their choices, much like the receipts which ATM machines print.

In recent months, several states have passed laws outlawing DREs without a paper trail. Some of these laws resulted from studies revealing serious flaws in the security of DREs used in those states.¹⁵ Others were the product of political pressure from VVPAT activists. As this movement has gained momentum, opponents of DRE voting systems in Texas are urging the legislature to require VVPAT on DREs here. In addition to VVPAT, these activists have also focused on possible improvements within the voting system certification process.

Texas Voting System Certification and Standards:

To be used in an election in Texas, each voting system is required to be certified by the Secretary of State, after meeting eleven standards and being reviewed by a group of independent examiners. These examiners are knowledgeable individuals appointed by the Secretary of State and Attorney General's offices. State law prohibits an individual with a pecuniary interest in the manufacturing or marketing of any voting system from serving as a certification examiner.¹⁶ According to the Secretary of State's office, the Texas certification process and statutorily defined standards are among the most stringent currently in place in the country.¹⁷

At the public hearing held on March 31, 2004, testimony revealed two main concerns about the certification process: the closed nature of the examination meetings and the lack of clear standards against which to judge new systems. Witnesses who testified that the certification process needed improvement suggested the following changes to the process: requiring open meetings and public access to the actual examinations; making all software source code used in electronic voting systems available publicly; posting examiner reports on the internet to allow for

public comments; and including an expert in computer programming among the six certification examiners.

Representatives from the Secretary of State's Election Division testified on these suggestions. That office agreed that certain modifications in the certification standards and other election procedures may be needed to adequately accommodate DRE systems. To mitigate any problems with this, Ann McGeehan, Director of Elections, informed the Elections Committee of the Secretary's plan to form a DRE technology standards workgroup. This group, of which Chairman Denny is a member, held its first meeting in the spring of 2004 to begin the process of developing a statewide set of standards and procedures for evaluating and securing DRE systems.

In response to the criticisms about the openness of the certification process, both the Secretary of State's office and witnesses representing voting system vendors expressed hesitation about subjecting certification examinations to open meeting laws and making software source codes publicly available. Ms. McGeehan testified that while not completely open, neither are these meetings completely confidential. State law provides that program codes and software are not public information. Through an open records request, however, the public can obtain recordings of the hearings, as well as the examiner reports.¹⁸

The final suggestion made at this hearing was to require the posting of voting system examiner reports on the internet and to add a public comment period for these reports prior to Secretary of State approval. The Secretary of State's office is currently working to enhance their website to make information about examinations more easily available.¹⁹

Voter Verifiable Paper Audit Trail (VVPAT):

The Election Committee's consideration of the voting system certification process was only part of its larger goal of addressing DRE voting system security, requiring VVPAT, and increasing voter confidence. The consensus among most witnesses was that many voters have lost confidence in the electoral process, particularly the value of casting votes on DRE machines. The testimony divided here, however, as to the most effective solution to the confidence issue.

Advocates of VVPAT testified about their belief in real security threats to elections conducted using DREs without VVPAT. For them, only a paper receipt would restore voter confidence. Several witnesses testified about the possibility of a "trojan horse" in the software of DREs, which would maliciously allow the machines to miscount or alter votes, similar to scams involving slot machines in Nevada. They also detailed worries of industry insiders undetectably programming such bugs into the system software. These individuals testified that although state law requires DREs to show voters a summary screen of their votes before ballots are finally cast, the voters cannot be assured that the computer tabulates the votes as they appear on the screen.²⁰

Likewise, these same witnesses testified that the manufacturer's safeguards, which save vote tallies in multiple locations, are not useful if all of the locations are recording an unintended vote.²¹ Rather than relying on these electronic tallies, advocates for the VVPAT support either counting the paper receipt when tabulating results or using the paper receipts during recounts.

Witnesses pointed to malfunctions in other states where machines allegedly recorded incorrect votes or where weaknesses in software, lapses in physical machine security, or deficiencies in the

certification process made tampering possible. This testimony did not reveal, however, any cases of fraud, attempted fraud, or alleged fraud in connection with DREs in Texas. The testimony also failed to reflect the actual procedures for conducting an election that are already in place in the state.

At this same public hearing, Texas election officials detailed the stringent measures taken to keep machines secure between elections, the low probability of individuals having access to program or reprogram machines, the number of security tests performed on and before election day, and the state-required real time audit log.²² Testimony from election officials included specific concerns about the complications that the inclusion of these printers would cause. These concerns ranged from the possible threat to the secrecy of voters' ballots to the potential problems with paper jams and low ink. Another major concern was the cost that the addition of VVPAT would cause and the potential for another unfunded mandate burdening local government. Other issues raised in opposition to VVPAT were the historical inaccuracy and fraud associated with counting paper ballots, concerns over vote selling, and the complications arising from the ease with which anyone could contest an election.

On the whole, election officials testified that VVPAT is unnecessary and would possibly create more fraud than it prevented. These witnesses felt that the problem of voter confidence with regards to DREs is one of public relations. In their testimony, they noted that the state's election officials are failing in the media, by not educating the public enough on the process and the security measures in place. These individuals also informed the committee about current voter education efforts, from public service announcements to DRE demonstrations at grocery stores.

While VVPAT advocates urged the addition of this capability to Texas voting machines immediately, Ann McGeehan, Director of Elections, testified that no system with VVPAT had been approved yet through the state's certification process. Ms. McGeehan, along with several other witnesses, recommended that the committee wait for federal guidance before deciding to require VVPAT. Such federal guidance would likely be mandated by Congress or stem from recommendations of the EAC. Several bills to require VVPAT on all electronic voting machines have failed to pass in Congress.²³ Meanwhile, the EAC has been charged with evaluating voting system standards, including the use of VVPAT. The EAC held hearings related to DRE security and voting system technical standards on May 5, June 28, June 29, and July 9, 2004.²⁴ As of the date of this report, however, the EAC has yet to report any voting system guidelines. While this work is undertaken by the EAC, the bipartisan authors of HAVA are urging states to wait for federal guidance before passing their own legislation.²⁵

Part III- Voter Registration Reform

Background:

Despite the comparative lack of press coverage, purged and corrupted registration rolls actually caused greater infringement of voter rights during the 2000 election than problems with voting systems. In 2000, many voters showed up at their assigned polling places only to discover that they were not on the list of registered voters. These individuals were prohibited from casting a ballot. After the election, more reports of these refused voters surfaced, many whom had in fact

been properly registered to vote. Some had been erroneously purged from the voter registration rolls. Others had registered at their local driver license office, which failed to transmit the registration information to the voter registrar.²⁶ Two provisions of HAVA attempt to specifically address these concerns. Provisional Voting and the Statewide Computerized Voter Registration Database require each state to implement systems to ensure that every person who goes to the poll on Election Day is allowed to cast a ballot and to ensure that voters are not erroneously removed from or duplicated on voter registration lists.²⁷

Provisional Voting:

In some states, prior to HAVA, voters whose names did not appear on the list of registered voters on Election Day were simply turned away, even if they affirmed that they had registered to vote. This was not the case in Texas. Here, HAVA's provisional voting replaces the state's challenge ballot process. Like challenge ballots, the new provisional ballots are designed to ensure that everyone who wants to vote on Election Day and claims eligibility is allowed to cast a ballot. Unlike challenge ballots, however, the eligibility of provisional voters is verified prior to counting the ballots.²⁸

To fully implement provisional voting, as it was outlined in House Bill 1549 (78R), the Secretary of State adopted several administrative rules. Following input from the public, HAVA Advisory Committee members, and members of the Elections Committee, these rules became effective on February 22, 2004, and July 1, 2004. The provisional voting rules provide details on who may cast a provisional ballot, details of the process for issuing and completing provisional ballots, and step-by-step instructions for verifying, counting, and disposing of provisional ballots.²⁹

In addition to adopting rules related to provisional voting, the Secretary of State, as required by HB 1549, has also implemented a free access system for provisional voters and adopted forms necessary for its implementation. To fulfill HAVA's requirements for a free access system, the Secretary of State requires local election officials to mail a written letter to each provisional voter, at the address given on the provisional ballot affidavit, informing the voter of the disposition of his or her ballot. If a provisional ballot was not counted, the letter also informs the voter the reason it was rejected. If, in the future, the volume of provisional voters increases dramatically, the Secretary of State is authorized to inform voters of the disposition of their ballot via a toll-free access number or the internet. Representatives from the Election Division testified that this will be reconsidered once the state has experienced additional elections using provisional voting.

In an effort to keep the number of repeat provisional voters to a minimum, the Secretary of State, in designing the provisional ballots, included a voter registration form within the affidavit. As provided for in HB 1549 (78R), provisional voters must complete and sign a written affidavit before receiving a provisional ballot. This affidavit not only affirms that the voter is eligible to vote a provisional ballot, but, as implemented by the secretary of state, also collects the necessary information to register that individual to vote. If, during the review of cast provisional ballots, a voter is found to have been ineligible, election officials take steps to ensure that the voter is properly registered to vote for the next election.

As required by HAVA, provisional voting took effect on January 1, 2004, and was first used

statewide in the March 2004 primaries. According to the Secretary of State's office, 1,910 voters cast a provisional ballot at these March elections. Of these, 493 ballots were counted. To educate voters and election workers on the new provisional voting procedures, the Secretary of State implemented a widespread public relations campaign. The Secretary issued a press release about one week before the March 9 primary, and followed this release with a question and answer fact sheet. In addition to these press releases, the Secretary of State also incorporated the new provisional voting procedures into poll worker training materials.

Testimony taken from elections administrators revealed that, out of all of the HAVA requirements, the unknowns about provisional voting caused them the greatest worry prior to implementation. These election officials had no idea how smoothly the process would work nor how many provisional voters would go to the polls. During its first execution in the March primary, however, no problems with provisional voting were reported. Many elections officials noted that the number of provisional ballots was much fewer than anticipated, but they expected the numbers to increase for the November general election.

Statewide Computerized Voter Registration System:

In addition to provisional voting, HAVA mandates that each state develop a computerized statewide voter registration database. In House Bill 1549, the legislature delegated much of the implementation of this requirement to the office of the Secretary of State. Texas currently has a computerized registration database, called the Texas Voter Registration Online System (TVRS). This database, however, is neither statewide nor mandatory. Approximately 154 of the state's 254 counties use TVRS as their voter registration system. Other counties, particularly the larger ones like Harris and Dallas, currently have independent computerized voter registration systems. The Secretary of State also maintains a master voter file, which counties not using TVRS update once per week.³⁰

To implement the statewide computerized voter registration system, the Secretary of State had to take into account the systems already existing in the state. To assess the systems already used by the various counties, the Secretary of State distributed a survey to local voter registrars. This information was compiled and used to determine the state's needs for a new system. Also, to help with securing a new system, the Elections Division hired a business analyst in the fall of 2003. This consultant assisted with the development of a proposal and conducted background research on systems and technology currently used throughout the country.³¹

In November 2003, the Secretary of State's office hosted a mandatory bidder's conference for those companies wanting to bid on the voter registration system. Later that month, the Secretary of State published requirements for the system. Ten proposals were received, carefully rated and reviewed, and the Secretary of State began confidential contract negotiations in mid-February 2004 with the selected vendor.³² Hoping to finalize the contract and begin work on the registration system, the Secretary of State submitted a request to exceed capital expenditure limitations to the Legislative Budget Board (LBB) in March 2004. During the summer of 2004, the Secretary of State's office engaged in an oversight review of the contract with the Office of the Attorney General and the Senate Finance Committee. Suggestions made by these offices were considered and incorporated into the vendor contract.³³

As originally developed, the timeline for the voter registration system allotted fourteen months for development and implementation prior to the January 1, 2006 HAVA deadline. This timeline included a "pilot" use of the system prior to the March 2006 primary elections.³⁴ On September 27, 2004, the Secretary of State submitted a second request to the LBB to exceed capitol budget limitations for execution of the contract. At the time of this report, the Legislative Budget Board had yet to make a decision on this request, and the project had not yet begun.³⁵

While the completion of the computerized registration system has fallen slightly behind schedule due to delays with approval of the project's budget, other aspects of implementing this component of HAVA have been completed. In HAVA's guidelines for the system, the state is required to verify each voter's driver's license or social security number. For those voters without such a number, the state is to assign them a unique voter identification number. Eventually, HAVA requires the computerized voter registration systems to assign each voter a unique identification number. To accommodate this, the Secretary of State revised the voter registration card to request social security and driver's license numbers. Cards were distributed to counties in the spring of 2004.

Additional Rulemaking:

The Secretary of State has also adopted rules relating to an administrative complaint process, as required by HAVA and House Bill 1549.³⁶ House Bills 1549 and House Bill 1 did not require any other specific rulemaking related to the implementation of HAVA, although the Secretary of State is also drafting rules related to the use of and standards for DRE voting systems.

Committee Recommendations:

1. The committee recommends that the Legislative Council draft legislation providing stringent penalties for hacking into or tampering with DRE voting machines be prepared for introduction and consideration by the 79th Legislature, Regular Session.
2. The committee recommends that the 79th Legislature, in preparation of the biennial budget, appropriate the necessary funds for the 5% match to draw down an additional \$100 million in federal HAVA funding.

Charge # 2

Examine the risks, costs, benefits and efficiencies of the entire canon of Texas Election Law for an omnibus rewrite and recodification.

Background:

The 68th Legislature enacted the current Texas Election Code (Code) in 1983, following six years of interim study and review. The recodification bill adopted during that session incorporated many dramatic changes in election law, including the federal Voting Rights Act of 1965 and the National Voter Registration Act, both of which had been enacted since 1951, the date of the previous recodification. Since recodification in 1983, the state has again witnessed monumental developments in elections and voting. The federal Help America Vote Act, the federal Bipartisan Campaign Finance Reform Act, early voting, and the use of electronic voting machines are now major components of the state's electoral process.

During the regular session, it became apparent to members of the Elections Committee that the canon of Texas election law, through its numerous revisions in the last two decades, has become an inefficient, and often confusing, body of law. Some sections of the code do not conform to other sections; some statutes relating to elections are found in other codes; and statutory language relating to elections has often failed to keep up with the technological advancements in the field.

In its preparatory investigation of recodification, the Elections Committee focused on the second of these inefficiencies.

In addition to holding one public hearing related to recodification and rewrite, the committee staff conducted independent research on the issue.

Witness List for Interim Charge #2:

January 28, 2004

Lou Bright (General Counsel, Texas Alcoholic Beverage Commission)

Elizabeth Hanshaw Winn (Legal Director, Secretary of State's Elections Division)

Alan Steen (Administrator, Texas Alcoholic Beverage Commission)

Recodification in the Past:

In the past, the Speaker of the House has charged the House Elections Committee with studying and reviewing the Code for recodification. For the most recent recodification, this charge appeared for four separate interim periods before the legislature finally approved a new Code. While recodification was officially a charge of the Elections Committee, most of the substantive work was undertaken by the Elections Code Study Committee and then completed by the Election Code Revision Commission, both committees of the Legislative Council. The former group began its work in 1977, and the latter continued where they left off, finishing recodification recommendations in 1981. Members from both the House and the Senate served on these two bodies. A subcommittee of the House Elections Committee assisted them with their

efforts. In addition, an Advisory Panel was created for this commission, which included, among others, the Secretary of State and local election officials.³⁷

Unifying Texas Election Law:

Committee staff conducted research to identify provisions relating to elections, voting, or campaign finance currently located in other topical codes of the Texas Statutes. This research concluded that a sizable portion of Texas election law existed outside of the Election Code. In addition to statutes relating to water district bond elections, which are logically located in the Water Code, this research revealed that certain large, substantive sections closely related to chapters in the Election Code are currently located in the Education Code, Alcoholic Beverage Code, and the Government Code.

At its hearing on January 28, 2004, the committee listened to testimony on the feasibility of moving all election administration sections into the Election Code. In addition to comments from the Secretary of State's Election Division, the committee invited testimony from some of the agencies that would be affected by this change.

Lou Bright, general counsel for the Texas Alcoholic Beverage Commission (TABC), testified that his agency would benefit from the complete removal of Chapter 251 from the Alcoholic Beverage Code. This chapter relates to the administration of local option liquor elections. In his testimony, Mr. Bright stated that many local officials contact the TABC when questions arise regarding local option liquor elections because the law governing those elections is located within the Alcoholic Beverage Code. Although some questions regarding local option liquor elections do arise from confusion about the liquor law, Mr. Bright testified that most questions relate to the details of holding the elections. He indicated that the TABC redirects most, if not all, of these inquiries to the Elections Division of the Secretary of State. Acknowledging that election law is a very specialized and often confusing field, staff at the TABC feel that they often do not have the expertise required to effectively assist local officials who are conducting these elections.

Mr. Bright also testified that, in addition to providing a benefit to the state agencies and those calling the agencies with questions, moving local option liquor election law into the Election Code and out of the Alcoholic Beverage Code would be extremely helpful for those conducting the elections. Local option liquor elections are often conducted by county clerks, voter registrars, and city secretaries. These officials are also primarily responsible for other elections held within a county or city. Referring to conversations he has had with these local officials, Mr. Bright felt that moving the local option liquor election law into the Election Code would ease the administrative burden on these election officials since they would only need to use one "book" for conducting all types of elections.

The committee directed Legislative Council to prepare a draft incorporating Chapter 251 of the Alcoholic Beverage Code, into the Election Code. The committee chair also requested that Legislative Council explore the feasibility and efficiency of moving sections of the Government and Education Codes relating to election administration and campaign finance into the Election Code.

Committee Recommendations:

1. The committee recommends that the Legislative Council draft legislation consolidating state election law into the Texas Election Code be prepared for introduction and consideration by the 79th Legislature, Regular Session.
2. The committee recommends that a Joint House and Senate Select Committee on Election Law Recodification be appointed to conduct continuing review of the Texas Election Code in preparation for omnibus recodification.
3. The committee recommends that the Secretary of State and the Texas Ethics Commission, in cooperation with the Legislative Council, identify laws that are obsolete or in need of substantive revision to achieve and maintain efficient and ethical elections. These agencies should forward their recommendations to the joint committee.

Charge # 3

Monitor the Texas Ethics Commission rulemaking for the implementation of House Bill 1606, 78th Legislature.

Background:

During the 78th regular legislative session, the Texas Ethics Commission [TEC] was one of 26 state agencies under review by the Sunset Advisory Commission. Under state law, each state agency is reviewed by the Sunset Commission every 12 years. That entity makes recommendations for continued existence of the agency and offers recommendations for increased efficiency and accountability.³⁸ Because the TEC is constitutionally provided for in Article III, Section 24A of the Texas Constitution, its continued existence as a state agency is not under review during the Sunset process.³⁹ Despite this, the evaluation process does offer the legislature an opportunity to significantly revise and update TEC procedures on a regular basis.

Taking advantage of this scheduled review of the TEC to implement major ethics reform legislation, Speaker Craddick created the House Select Committee on Ethics at the start of the 78th regular session. This committee held hearings and developed a bill, House Bill 1606, which combined the Sunset recommendations with stricter financial disclosure laws, additional conflict of interest provisions, and increased regulation of registered lobbyists. With the enactment of HB 1606, the work of the Select Committee on Ethics was complete, and the Elections Committee resumed jurisdiction over matters related to the TEC and campaign finance during the interim.

To monitor the TEC's rulemaking related to House Bill 1606 and its implementation of this legislation, the Elections Committee invited representatives from the TEC to testify at two public hearings.

Witness List for Interim Charge #3:

January 28, 2004

Karen Lundquist, (Executive Director, Texas Ethics Commission)

March 31, 2004

Karen Lundquist, (Executive Director, Texas Ethics Commission)

Analysis of House Bill 1606 (78R):

In addition to extending the Sunset deadline for the Texas Ethics Commission (TEC) until 2015, House Bill 1606 also amended state law to tighten standards of conduct for candidates, state officers, and registered lobbyists. The bill created more stringent guidelines relating to their campaign finance reports, imposed higher fines for late filing of reports, and increased required disclosure of conflict of interest. To achieve a more efficient and useful agency, following the recommendations of the Sunset Advisory Commission, HB 1606 increased the autonomy of the Executive Director, streamlined the Commission's sworn complaint process, and expanded the use of electronic filing and the internet.⁴⁰

House Bill 1606 required the TEC to adopt rules related to some of these provisions. This included rules for the termination of a campaign treasurer for an inactive candidate or political committee and rules indicating the filing period and deadline for electronic filing by registered lobbyists and speaker candidates.⁴¹ In addition to this specific rulemaking authority required by HB 1606, the TEC has broad rulemaking power authorized by the Texas Government Code. The Texas Government Code, section 571.062 grants the TEC rulemaking authority "on the affirmative vote of at least six members," to implement administrative rules to administer those laws under its jurisdiction.⁴²

Texas Ethics Commission Rulemaking:

The TEC met regularly over the interim to conduct its business. At several of these meetings, new administrative rules were discussed and adopted. The TEC adopted rules relating to House Bill 1606 at its meeting on November 13, 2003, and also at a meeting on May 7, 2004.⁴³ The rules adopted at the first of these two meetings relate generally to new campaign finance requirements, and the rules adopted at the latter relate to the TEC's sworn complaint process. Karen Lundquist, Executive Director of the TEC, discussed both of these sets of rules with the Elections Committee in her testimony at the two public hearings.

House Bill 1606 statutorily defined fines for late filed reports and removed TEC authority to set the fine by administrative rule. The TEC modified Administrative Rules Sections 18.9, 18.11, and 18.13 to conform to this statute change.

The TEC adopted very few new rules related to sworn complaints, but repealed or modified most of Chapter 12 of its administrative rules to conform to changes made to the sworn complaint process by HB 1606. New rules outlined the TEC's acceptable use of its subpoena power and set deadlines for resolving complaints. Modified rules gave the Executive Director the power to determine jurisdiction over a complaint, and repealed rules eliminated the informal hearing process.

In addition to these, the TEC modified other rules previously adopted to conform to the changes in state law made in House Bill 1606.

At the time of this report, certain rules required by House Bill 1606 have not yet been implemented. Those relating to electronic filing by registered lobbyists and speaker candidates have been delayed waiting on implementation of the electronic filing system. At the Elections Committee's March public hearing, Karen Lundquist testified that the TEC was dedicating most of its computing resources towards implementation of the lobby electronic filing system, which has a deadline of December 1, 2004. The TEC should have the rules related to the system in place by that time.

Committee Recommendations:

1. The committee recommends that Administrative Rule Section 20.579(c), which the Texas Ethics Commission adopted, requiring candidates for county chair of a political party to file reports otherwise required only for opposed candidates, be modified so that unopposed candidates for county chair are not required to file these reports.

Charge # 4

Monitor the agencies and programs under the committee's jurisdiction.

The House Committee on Elections has jurisdiction over two state agencies: the Office of the Secretary of State and the Texas Ethics Commission. The implementation of the two pieces of legislation related to interim charges 1 and 3 comprised a large portion of the rulemaking and administrative activities of the agencies during this interim. In addition to monitoring the agencies under the purview of those two charges, Representative Denny fulfilled her responsibilities as committee chair and conducted additional oversight by serving on several advisory committees for the Texas Secretary of State.

The Elections Committee did not hold any hearings related to agency oversight.

Oversight of the Office of the Secretary of State:

As chair of the Elections Committee, Representative Denny holds positions on various state committees related to the Secretary of State's Elections Division. Through this capacity, she attended meetings of the Secretary of State's HAVA Advisory Board and Election Advisory Committee throughout the interim. These groups advise and oversee the Election Division's implementation of certain election laws. The first of these groups, the HAVA Advisory Board, was more active during this interim period, holding meetings every few months. As the HAVA Advisory Board's work related entirely to the implementation of HAVA, a more detailed discussion can be found in that section of this report.

The Election Advisory Committee consists of several government officials, including numerous representatives of the Secretary of State, and members of the Texas media. This group met prior to the primary election in March 2004, and the general election in November 2004, to discuss procedures for the reporting of election night returns, changes made by HAVA, election worker training, and upgrades made to the Election Night Return (ENR) system. During the meeting held in preparation for the November election, the Committee discussed several new reporting features of the ENR, including the reporting of the number of provisional ballots and the total number of voters voting. They did not make any other substantial changes to election night reporting procedures or policies.

Committee Recommendations:

The committee makes no recommendations related to agency oversight.

ENDNOTES

- ¹ 107th Congress, *Help America Vote Act of 2002*, Public Law 107-252. http://www.fec.gov/hava/law_ext.txt (accessed on October 4, 2004). Cited hereafter as HAVA.
- ² Texas House of Representatives, *House Bill 1549*, 78th Legislature, reg. session. Texas House of Representatives, *House Bill 1*, 78th Legislature, 3rd called session. http://www.capitol.state.tx.us/tlo/legislation/bill_status.htm (accessed on October 4, 2004).
- ³ HAVA, Title II, Subtitle A, Part 1, Section 20. Requires EAC commissioners to be appointed no later than 120 days after the date of the act, or February 26, 2003. The four commissioners were not appointed until December 13, 2003. This delay led to internal agency problems with HAVA implementation. Elections Assistance Commission, "Annual Report- Fiscal Year 2003," Washington, DC, April 2004. http://www.eac.gov/annualreport_2003.htm (accessed on October 4, 2004).
- ⁴ Agendas and minutes from the Texas Secretary of State's HAVA Advisory Committee meetings can be accessed at: <http://www.sos.state.tx.us/elections/hava/index.shtml> (accessed on October 4, 2004). A full list of the members of the advisory committee is also available on this website.
- ⁵ Geoffrey S. Connor, Texas Secretary of State, *Texas State Plan, Help America Vote Act*, September 16, 2003. <http://www.sos.state.tx.us/elections/forms/stateplan0916.doc> (accessed on October 4, 2004). Cited hereafter as *Texas State Plan*.
- ⁶ Geoffrey S. Connor, "Letter to DeForest B. Soaries, Jr.," September 9, 2004. The Elections Assistance Commission estimates an additional \$103 million in Fiscal Year 2004 Requirements Payments for the state of Texas. http://www.eac.gov/docs/Excerpts_GSAReqPaymentsEstFY03_FY04_4_04_PUBLIC.xls (accessed on September 16, 2004).
- ⁷ See *HAVA*, Title 1, Section 102.
- ⁸ The CalTech/MIT Voting Technology Project, "Residual Votes Attributable to Technology-An Assessment of the Reliability of Existing Voting Equipment," March 30, 2001, pp. 2-5. http://www.hss.caltech.edu/%7Evoting/CalTech_MIT_Report_Version2.pdf (accessed on October 4, 2004).
- ⁹ *Texas State Plan*, p. 3.
- ¹⁰ See *HAVA*, Title 2, Subtitle D, Part 1, and *House Bill 1549 (78R)*, Section 20.
- ¹¹ Melinda Nickless, "E-mail to Nicole Tunks", September 15, 2004. Hereafter referred to as *Melinda Nickless e-mail*.
- ¹² Texas Secretary of State, "HAVA Funding," <http://www.sos.state.tx.us/elections/hava/funding.shtml> (accessed on October 4, 2004). HAVA Advisory Committee meeting, February 20, 2004. <http://www.sos.state.tx.us/elections/hava/february20thminutes.shtml> (accessed on October 4, 2004). *Melinda Nickless e-mail*.
- ¹³ *Melinda Nickless e-mail*.
- ¹⁴ Verified Voting is one of the organizations created to raise awareness of the VVPAT issue; their website is: <http://www.verifiedvoting.org>. Lee Nichols, "How Safe is Your E-Vote?", *The Austin Chronicle*, February 20, 2004. Doug Chapin, "Certainty is Overrated," *Electionline Weekly*, March 6, 2003. Electionline.org, "Securing the Vote," *Election Reform Briefing*, April 2004.

¹⁵ Tadayoshi Kohno, Adam Stubblefield, Aviel D. Rubin, and Dan S. Wallach; "Analysis of an Electronic Voting System," IEEE Symposium on Security and Privacy 2004; February 27, 2004. This article originally appeared as Johns Hopkins University Information Security Institute Technology Report TR-2003-19 on July 23, 2003.

Studies were also conducted specifically on the systems used in Maryland and Ohio. "Electronic Voting Systems Security Reviews" and "Gap Analysis of the Voting System Security Assessments," <http://www.sos.state.oh.us/sos/hava/index.html> (accessed on October 4, 2004). "Risk Assessment Report," http://www.elections.state.md.us/citizens/voting_systems/ (accessed on October 4, 2004).

In California, the Secretary of State conducted a study of voting systems used in that state, which led to his decertification of DREs without an accessible voter verified paper audit trail and other security measures. Kevin Shelley, "Memo to All County Clerks/Registrars of Voters," February 5, 2004; Registrars of Voters for Counties Using DRE Voting Systems, "Memo to Kevin Shelley, Secretary of State," February 10, 2004; Wired News, "E-Votes Must Leave a Paper Trail," November 21, 2003, <http://www.wired.com/news/evot/0,2645,61334,00.html>, (accessed on November 24, 2003).

¹⁶ Texas Election Code, Section 122.001 and Chapter 122, generally.

¹⁷ Jennifer Waisath, Director of Communications, Texas Secretary of State, "Memo to Interested Parties regarding Electronic Voting System Certification," January 27, 2004.

¹⁸ Texas Election Code, Section 122.0031(d) states that software used in voting systems is not public information. Texas Election Code, Section 122.039 states that the examiner reports, as well as the Secretary of State's report are to be retained on file

¹⁹ Geoffrey S. Connor, Dana DeBeauvoir, and Beverly Kaufman, "In Texas, we're working to ensure that every vote is counted," *Austin American-Statesman*, August 28, 2004.

²⁰ Texas Election Code, Section 129.001 provides that each DRE must give voters a summary screen of their votes with the opportunity to change the selections, before votes are actually cast.

²¹ At the work session held by the Elections Committee on 3/31/04, the voting system vendors explained that their machines record vote selections in multiple locations, such as internal drives and external storage devices.

²² Various sections of the Election and Administrative Code provide for security measures and tests. See Texas Election Code, Sections 127.091-127.1232, 127.127, and 127.151-127.155 generally, as well as Texas Administrative Code Rules 81.45, 81.49, 81.50, and 81.54. Texas Administrative Rule 81.62 requires a real-time audit log.

²³ During the sessions of the 108th Congress, several bills, including HR 2239, S 1980, S 1986, S 2045, and S 2313, would have amended HAVA to require VVPAT but have failed to pass to adoption. <http://thomas.loc.gov> (accessed on October 4, 2004).

²⁴ United States Elections Assistance Commission, "Minutes and agendas of EAC meetings," <http://www.eac.gov/events.asp?fomat=none> (accessed on October 4, 2004).

²⁵ Robert Ney and Steny Hoyer, *Dear Colleague Letter*, March 3, 2004, accessible via: <http://www.house.gov/cha/colleagues.html> (accessed on September 9, 2004).

²⁶ "How America Doesn't Vote," *The New York Times*, February 15, 2004.

²⁷ Electionline.org, "Statewide Voter Registration Databases," *Election Reform Briefing*, March 2002.

²⁸ Texas Election Code, Title 6, Chapter 65, Subchapter B. This subchapter relates to provisional ballots. Those

sections of the Election Code relating to the challenge ballot system were modified or repealed by HB 1549 (78R).

²⁹ Texas Administrative Code, Title 1, Part 4, Chapter 81, Subchapter I, rules 81.172, 81.173, and 81.174.

³⁰ *Texas State Plan*, pp. 2, 7-9.

³¹ HAVA Advisory Committee Meetings, May 1, 2003, and June 27, 2003. Texas Secretary of State, *Implementation Briefing*, April 2004, hereafter referred to as *Implementation Briefing*.

³² *Implementation Briefing*.

³³ Geoffrey S. Connor, "Memo to Senator Stephen Ogden," August 23, 2004.

³⁴ *Implementation Briefing*.

³⁵ Geoffrey S. Connor, "Memo to Midk Morriseey and John O'Brien," September 27, 2004.

³⁶ Texas Administrative Code, Title 1, Part 4, Chapter 81, Subchapter I, Rule 81.171. House Bill 1549 requires rules related to a State-based Administrative Complaint procedure in Section 13.

³⁷ Committee on Elections, *Interim Report to the 68th Texas Legislature*, pp. 8-9; Committee on Elections, *Interim Report to the 67th Texas Legislature*, pp. 19-20.

³⁸ Texas Sunset Advisory Commission website, <http://www.sunset.state.tx.us>. Texas Sunset Advisory Commission, *Report to the 78th Legislature*, February 2003, pp. 109-120. <http://www.sunset.state.tx.us/78threports/final78/final.pdf> (accessed on October 4, 2004).

³⁹ Texas Constitution, Article III, Section 24a.

⁴⁰ Texas House of Representatives, *House Bill 1606*, 78th Legislature, reg. session. http://www.capitol.state.tx.us/tlo/legislation/bill_status.htm (accessed on October 4, 2004).

⁴¹ Texas Election Code, Section 252.0131, and Texas Government Code, Sections 302.013 and 305.0064, as revised by HB 1606 (78R).

⁴² Texas Government Code, Section 571.062.

⁴³ Texas Administrative Code, Title 1, Part 2. Full text of the Texas Ethics Commission's Administrative Rules can be accessed at: [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.ViewTAC?tac_view=3&ti=1&pt=2](http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=3&ti=1&pt=2)