

## **IMPLEMENTING THE HELP AMERICA VOTE ACT OF 2002 IN NEW YORK STATE**

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Thank you Sandra, and I really want to thank the Albany Law Journal, particularly Shalyn first, for having me here today, but for putting this symposium together just in general. I'm kind of waiting for the third ball to drop. As you know, the lights went out and then the fire drill, or whatever that was. I don't know if we are the third thing that, we are up here to drop or whatever it's going to be, but . . . And as far as Steve Richman is concerned, the right place for him, we have talked about where we have come from, a special master that the Department of Justice is talking about, is probably the right place for Steve as well.

What I would like to do is give my remarks to you and, in some cases, they cross some lines with stuff that Steve has already covered, but I think I still want to cover them in the context of what I want to share with you this morning.

Election Administrators throughout the country have been given a challenge and an opportunity to improve the election process with the passage of the Federal Help America Vote Act of 2002, the HAVA. The 2000 presidential election acted as a catalyst for government officials at all levels to focus on how elections are conducted. The media attention, the matter in which hanging chads were dealt with, bellmen lists, and the US Supreme Court intervention demanded election process review and modernization. The good news is that election officials had the opportunity to collaborate and participate in that process. However, the other news is that Congress and New York State chose some alleged solutions that have been nearly impossible to comply with, based upon available voting system technology and time lines.

In creating national standards for elections administration, HAVA has two primary pillars of emphasis: to minimize election fraud and to improve disabled voter accessibility. While the heated rhetoric about HAVA implementation is focused on the

replacement of voting systems, HAVA requires much more. A state-wide interactive voter registration system; a voter identification component; provisional, and, in our case, affidavit ballots; training of election workers and voters; a statewide administrative complaint procedure; as well as the disabled voter accessible voting system and polling place. The newly created Federal Election Assistance Commission, the EAC, developed and adopted the Voluntary Voting System Guidelines, the VVSG, in December 2005 to establish specific requirements for compliance with HAVA. These VVSG are effective next in December 2007; it is important to know that.

In addition, for the first time, Federal funding of approximately \$3 billion has been appropriated, allocated, and disbursed by the EAC to the 58 states and the territories to assist in compliance with HAVA. A non-compliance hammer is the recoupment of some of these funds if there is not timely compliance. The requirement to comply with HAVA, a Federal Law, would continue, but with only state and local funding available to implement it.

New York State implementation of HAVA Legislation in the summer of 2005, added several New York State Election Administration items. They include election consolidation and County Boards of Elections, the CBOEs, as well as new voting system requirements of: a full-face ballot, a voter verified paper audit trail, the VVPAT, and Sip and Puff accessibility. New York State adopted the Federal VVSG standards immediately in December of 2005, rather than waiting until their December 2007 effective date. This was a major decision that precluded New York State from joining other states in purchasing 2002 Federal Election Commission qualified voting systems and demonstrating good faith in compliance with HAVA.

New York State 2005 Elections Administration Laws, in acceptance of HAVA Grant Funds, required the discontinued use of the lever voting machines before September 2007. It was also determined that a new replacement voting system should be delivered to the County Boards of Elections, at least six months, but hopefully, a year before its use in elections to allow adequate time to train staff, inspectors, and voters on the new system. This would have required voting system delivery by March of this year for the September primary. Obviously, this never happened in New York State.

Since the Federal EAC was not scheduled to use voting system testing laboratories to test and certify voting systems through the

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Voluntary Voting System Guidelines until January of 2007, New York State initiated a process, as Steve alluded to, to have an independent testing authority create a test process for both the Federal and State standards. However, well into the certification process, New York State learned that their ITA was, itself, not certified to conduct such certification tests. The New York State requirement that any new voting system, software, source code, be escrowed or stored with the State, effectively precluded the certification and use of any voting system that had been submitted for certification. Software companies simply refused to leave their source code open in a manner like that.

New York State also conducted an unrealistic study to determine the appropriate number of voters in an election district who could use a voting system without creating unacceptable wait times, which would discourage voters from voting. The New York State Board of Elections then published standards as to how many voters could reasonably use a Direct Recording Electronic, DRE machine, or optical scan, OP SCAN voting system, for a general election day.

In March of 2006, the Federal Department of Justice initiated the lawsuit to force New York State to create a specific written HAVA implementation and compliance plan. A consent order issued by District Judge Sharp provided, for the interim, the plan B; disabled and unaccessible Ballot Marking Device, the BMDs, to be used on a limited basis in each county only in the 2006 elections; as well as specific time lines for full implementation of new voting systems after August of 2007. At the time, they obviously expected that we would have new voting systems available. Using these ballot marking devices was recognized, by disabled advocacy groups as well as Election Commissioners, as not HAVA compliant.

For the 2007 primary and general elections, County Boards of Elections were challenged to decide between the Federal and State case law and New York State Legislation passed this past summer, regarding the use of lever voting machines and the use of the accessible ballot marking devices. New York State passed legislation in 2007 that prescribed the use of lever machines and the limited use of ballot marking devices in all counties, essentially in conformity with the 2006 consent order that was issued by Judge Sharp. However, the Judge never amended his order to allow the use of lever machines, nor the counting of balance for voters who did not vote at their assigned polling place. In addition, there were no certified HAVA and New York State compliant replacement voting systems available for purchase and use.

As a result, the least unlawful voting procedure would have been to have all voters cast their ballots at their polling place as a paper emergency ballot. The fact that there were only local, and no federal elections involved, served as a legal basis for Commissioners of Elections to conduct the 2007 elections. Thus, commissioners decided to use the time-tested, user friendly, lever machines.

County Boards of Elections also used the ballot marking devices on a similar basis, however, affidavit ballots for all elections, per case law, require that they be cast in the polling place or could not be counted. That was the *Panio v. Sunderland* case that went to the Court of Appeals in 2005.

At our Onondaga County Board of Elections, we believe that it was disingenuous and misleading to have disabled voters use a centralized ballot marking device and not be able to count their ballots. However, after written advice from the State Board of Elections, we decided to use the 2006 approach for disabled voters. They could use assistance to vote on their lever machine, on an absentee ballot, or they could use the centralized ballot marking device to mark their ballots, and then we would manually count them. This process worked fine.

But what voting system is the best one that complies with HAVA and the unique needs of New York State? Both the DRE and Op Scan voting systems are good systems in use throughout the country and throughout the world. Voluntary Voting System Guidelines compliance provides standards that ensure that the systems are reliable, useable, secure, and, equally important, accessible. HAVA explicitly states that Direct Recording Electronic voting machines meet accessibility requirements to provide all voters with the opportunity to vote in private and independently. Use of Op Scan systems requires a: companion, DRE machine, or ballot marking device at each polling place to ensure blind voter accessibility.

There is a question of whether the use of an optical scan voting system with a ballot marking device in New York State is a HAVA compliant system. It would appear that neither the EAC nor the U.S. Department of Justice is prepared to make such a determination as to Op Scan HAVA compliance. Such a decision would likely be made in a court of law. This is the sort of domoglaze hanging over the heads of all the New York State County Boards of Elections. If a county was to purchase the Op Scan voting system with ballot marking devices, and a court ruled

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against their adequate HAVA compliance, that county would be required to replace this voting system at their own expense.

While disability advocacy groups estimate that 20 percent of the population has a disability, there is a question as to actual numbers, and the severity of the various disabilities. It is clear that, while the HAVA goal is to have voting systems address all disabilities, it is also noted that current technology precludes addressing 100 percent of all disabilities. Permanently disabled voters who currently use absentee ballots have overwhelmingly indicated in surveys across New York State that they would prefer to continue using the absentee ballot. The big unknown is how many disabled voters, or potential voters, would vote on a totally accessible voting system at a totally accessible polling place.

Five years after the adoption of HAVA, and two years after New York State Legislation, many questions remain. Some key considerations that remain to be addressed include the following:

A. What type of facility is required to store, maintain and set up the new voting systems? There is a chain of custody security issue here of concern to us.

B. What are the County Boards of Elections permanent and temporary personnel and office requirements to implement the new HAVA and New York State mandated requirements, not just the voting systems? How do we best restructure the County Boards of Elections to accommodate the new priorities and accountabilities for State, County and Federal requirements? Can our current County Board of Elections Staff adapt to this changing environment? There is an increased focus on transparency of the process and the expectation of a perfect, not a fair, election process.

C. Who will pay for everything? Federal and New York State funding appears to be a fleeting thing.

D. Who will train the election staff, the inspectors, and the voters?

E. How can we best utilize the media to understand and communicate the new election administration paradigm?

F. What type of, and how many, lawsuits can be expected from disabled voters; candidates who lose, et cetera, if strict compliance with HAVA and New York State Election Laws is not achieved?

G. Since we do not expect to have a new electronic voting system in place in time for the 2008 elections, who legally determines what system we do use; the courts, the New York State Board of Elections, the Federal Government, or the County Commissioners of Elections? Is it all paper ballots, emergency paper ballots, at

polling places?

H. How do we budget and plan in this ever changing environment? The answer to these questions appears to be that we need to make some basic assumptions and remain flexible. That is the nicest way I could put it. As we work to certify the results from the general election on November 6, 2007, we have an eye on 2008. There will be a Presidential primary on February 5th, as well as a September primary, and a November general election with voting for the Federal offices of U.S. President, Vice President and members of Congress. My crystal ball foretells New York State County Boards of Elections still be using lever machines for the presidential primary. After that, the future in 2008 is cloudy.

We may have just lever machines with ballot marking devices in limited locations in each county, and a Federal Judge authorizing County Boards of Election to count such ballots. Or we could have ballot marking devices in every polling place being used for disabled voters, voting independently and in private, and lever machines for everyone else; a dual voting system. Unfortunately, the least likely scenario is the use of HAVA and New York State compliant certified voting systems in every election district for all our voters. This is more likely to become a reality in 2009 or later, depending on where Federal Legislation takes elections administration in our country.

In summary, election administrators throughout the country share the goals of HAVA, which are to improve and standardize the election process. New York State has made it more difficult to comply with HAVA. The initial time delays conveyed a perception that New York State was not making a good-faith effort to comply as all other states and territories have done. New York State immediately adopted the higher Voluntary Voting System Guideline standards as a pre-condition for certifying a replacement voting system. The rest of the country based their decision as to which replacement voting system to purchase on those voting systems that had already been certified to the 2002 Federal Election Commission Standards.

The voting system vendors continue to develop new technology in an effort to attain VBSG compliance. However, to date, no voting system in the country has been VBSG certified. This leaves New York State in an untenable bind. The HR811 Holt Bill in Congress, and other Federal Legislation currently being contemplated, are focused on voter verified paper auditor trail, the VVPAT, increased audit requirements and extended

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implementation dates. The VVPAT and the post election automatic audit requirements are already in New York State Law. At this point, until the legal dust settles, extended implementation dates are what are needed for New York voters and harried election administrators. Thank you.