

## **THE HELP AMERICA VOTE ACT OF 2002 AND THE EVOLUTION OF VOTING**

*Matthew Masterson*

Well, thank you, first of all, for being here, and on behalf of Commissioner Hillman, I want to thank everyone for attending such an important conference and conducting such an important discussion. I know Commissioner Hillman had surgery less than a month ago, and she was doing really well, and then she came down with a fever and the doctors ordered her not to travel. But I know those of you who know Commissioner Hillman know, that if the doctors didn't give her the order, she would be here, and she would certainly be willing to talk. So on behalf of Commissioner Hillman, I thank all of you for being here.

I would also like to thank the Albany School, the Albany Law Journal of Science and Technology, and Shalyn Morrison for putting on a terrific program. I cannot, you know, highlight enough how important discussions like these are, and the EAC is just proud to be able to participate in such a discussion. And I also want to thank Mr. Szczesniak who participates in our Standards Board, on our Standards Board, as one of the election officials. We rely heavily on our Standards Board and Board of Advisors, and the election officials that participate in those Boards, to inform us and tell us what is going on on the ground, on the front lines, and so thank you, Mr. Szczesniak, for your participation. Also, I would like to apologize. I don't think my comments are in the book, but I told Shalyn that I'll gladly email them to her so that they can be posted on the Albany Law School website and also post them on the EAC website so that everyone can have a chance to look at them.

So with that said, let's talk about The Help America Vote Act of 2002 and the evolution of voting. And as the previous speakers have alluded to, you cannot explore where we are now or where we are headed without a look at the past. So, how Americans voted, and I know this has been touched on, so I'll try to get through this quickly. For many years, paper ballots, punch cards,

lever machines, were used to cast ballots. We all remember that; we all know that, here in New York, and then problems that arose during the 2000 election sparked a need to reform elections and the way we vote. And the fact is that people just started paying more attention. People started calling for accountability and verifiability, and demanded change. And so that brought about the Help America Vote Act of 2002.

Real quick, you know, we all remember the butterfly ballot and the confusion that it created for some on which candidate they were voting for, what lined up with what, and then of course, the famed hanging dimple, or pregnant chads. We all remember Leno, Letterman making jokes, the famous videos of people holding up ballots, in the light, to try to determine what the vote said. And the question that has been addressed here already today was the question of voter intent. There were people that were concerned about, you know, election officials or state law determining the voter intent with regard to hanging chads, dimple chads, pregnant chads, and determining what the voter's intent was with those things. So that is sort of what lead to, and lead into, the Help America Vote Act of 2002.

And I know Mr. Brace covered this a little bit, but I think, you know, especially since I can get my graphics up here, I guess, we can look at some of the numbers on how people were voting in 2000, and then how people voted afterwards. And you can see here that, and this is per registered voters, 30.76 percent voted on punch card machines, almost 25 percent voted on optical scan equipment in 2000, and 16, almost 17, percent were voting on lever machines; mostly in New England and New York, obviously. So, and then you can see the mixed in paper ballots down at the bottom, so that gives you kind of a view of how people were voting in 2000. And then we look at 2006, and the drastic change that took place.

After the demand for accountability and the passage of the Help America Vote Act, we see that optical scan equipment moved up to the number one spot with 41 percent per registered voter voting on optical scan equipment. And then we see electronic equipment at 33 percent, being the second most used equipment for people to vote on. And the reasons for this were many, but it was mostly accessibility and language requirements and the requirements of HAVA driving this. So we see the jump from electronic equipment up, and then we see the lever machines in New York and Connecticut maintaining at 11 percent. So we can look at a side-by-side comparison here and see the enormous amount of change

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that took place in such a short amount of time. In six years, we are totally reformed, or had the biggest amount of change in the way we voted in the history of America over the course of six years. And the driving force behind this was the demand for accountability and the Help America Vote Act. So now that we have that background, we can look better at what the Help America Vote Act did.

Okay. The Help America Vote Act, first and foremost, provided more than \$3 billion to the states to improve the administration of Federal Elections. This funding, the Section 101 Funds, were used to improve the administration; Section 102 Funds were used only to replace the punch card and lever voting machines. And we can see that it's important to remember that HAVA's only applicable to Federal elections. It is not applicable to State elections. So this was used to improve the Federal election system. And we can also see that the Title 2 requirements payments, which is money set aside to improve certain areas in HAVA; such as helping states meet the voting system standards if they so choose; helping states create the statewide voter registration databases and meet accessibility requirements that are required in HAVA, and then implement the provisional validating requirement that are in HAVA and the voter information requirements in the other HAVA mandates. So what we see here is, while HAVA had focused on some of the machines, we also see that it focused on the entire election process, and I think that is my main message here today, we need to focus on the entire election process, not just on the machines.

What else did HAVA do? Well, it created a new and expanded Federal role in election administration. How did it do this? Well, it created the Federal Election Assistance Commission. What is the purpose of the Federal Election Assistance Commission? First, HAVA demanded that we establish the voluntary standards for voting equipment. Now, prior to the passage of HAVA, the Federal Election Commission, or FEC, had adopted two sets of Federal voting standards; one in 1990 and one in 2002. But HAVA mandated that the Election Assistance Commission, in a very short amount of time, create the next set of voting system standards, which became the 2005 VBSG, and were adopted by our Commissioners in December of 2005.

HAVA also mandated that the EAC certify voting equipment and accredit test laboratories, and it is important to remember that this is the first time that the Federal Government had certified voting

equipment and had accredited test laboratories. Prior to the passage of HAVA and the creation of the EAC, the National Association of State Election Directors, a private entity without any Federal funding or Federal support, was in charge of certifying election equipment. So this is the first time, the EAC's certification and accreditation program, it is the first time the Federal Government has gotten involved in the certification of voting systems and accreditation of test laboratories.

HAVA also called on the EAC to disburse and oversee HAVA Funds, to account for those funds and the way that the states are using them. It also called on the EAC to develop a uniform registration form for use across the U.S. It also called on the EAC to develop research base insights for the improvement of election administration. And you can see on our website some of the studies that we have conducted as far as UACAVA and Overseas Voters; studies about poll workers and poll worker retention. And so that's how the EAC is working to try to serve that role that HAVA called on us. And a lot of those studies are mandated by HAVA.

Also the EAC was called on to issue best practices for election administration. And, actually, outside, I know they have been provided, we have our quick start management guides, which I'll talk about a little bit later, about the topics that we cover, but these serve our management guidelines function that we provide to election officials. These go out, and also our binders and management guidelines, go out to over 6,000 election officials across the United States, and all are available on our website so that everyone can be aware of management guidelines, and I'll go into the process of how these are developed a little bit later so you can understand sort of how we developed that process.

So as you can see, HAVA brought about a lot of change, and it prompted the first certification and accreditation of voting laboratories and voting equipment by the Federal Government. For just a second, I would like to talk about these voluntary voting system guidelines. What are they; what are their purposes? Well, as I stated before, prior to the creation of the Election Assistance Commission, the Federal Election Commission passed the Voting System Standards, or VSS, for 1990 and 2002. Their standards were designed to be standards by which equipment could be tested against, but like I said before; the Federal Government did not conduct that testing. The National Association of State Election Directors was the one conducting the testing. In 2005, the VVSG,

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or Voluntary Voting System Guidelines were created. These guidelines were the first set that would be tested by the Federal Government. So we created the standards just like the FEC, but now we can test to our own standards and certify the labs to test to these standards.

Also, I'd like to mention, and this is a project very close to my heart, that the EAC is currently looking into developing, or is developing, the next round of Voluntary Voting System Guidelines. What we are calling the next iteration of the Voluntary Voting System Guidelines. Currently on our website, we have the draft recommendations from our Technical Guidelines Development Committee. That is a committee mandated by HAVA, and all of the information about the members of our TGDC is on our website, and I encourage you to visit, [www.eac.gov](http://www.eac.gov). Go to it and look into who is helping to develop these standards, and the National Institute of Standards and Technology is their technical assistance.

So over the course of the last year, year and a half, MIST and the TGDC have worked together in order to create these recommendations and they turned over the recommendations to us in August, the end of August, August 31st. And the EAC has come up with a two-plus year review period for this next iteration of voluntary voting system guidelines, and that is where you all come in. We have posted on our website, for public comments, these recommendations. You will see there is an HTML version of these voluntary voting system guidelines with a comment feature under each section. So if you are interested in a specific area, if you are interested in disability, useability, security, I encourage you, go read and see what these standards are proposing, and make your comments to us. We have received, to this point, 200 comments. Our public comment period closes on February 5th, and we hope that everyone takes advantage, and all comments are posted publicly. Go on and read what others are suggesting to us, and see how others are feeling about these proposed standards. You know, the more information the Commission has to work with, the better they're going to be able to take the next step, which is the promulgation of the draft EAC next iteration of the Voluntary Voting System Guidelines.

So after the public comment period is closed, we are going to take all the comments and make policy decisions. The Commissioners will make policy decisions, based on the comments, in a draft version, a VVSG draft version will be created by the EAC. That will go out for another 120-day public comment period so that the

public has a chance to comment on the changes that the EAC has made; so that the public can make suggestions to us on changes to make. So I encourage you to get involved. If there are specific areas that you are concerned about, please, please make those comments. We want those and we need those. So after that final 120-day comment period, the EAC will make whatever final changes are necessary and promulgate the next iteration of Voluntary Voting System Guidelines. But please keep in mind that these guidelines are intended for the next generation of voting systems; not the ones that are out there right now. Okay.

A lot of the technology suggested, a lot of the information suggested, for instance, this next iteration, as presented by the TGDC, requires software independence. It does not allow for RF wireless, and it creates new usability and accessibility benchmark standards to be tested to, using actual people, to test to the usability of the machines. And so those are the proposed standards by the TGDC, and it takes it to the next step. This is a total rewrite of the 2005 VVSG.

So with that said, you know, like I had stated before, HAVA mandates that the Federal Government take the next step, and that's to certify and test these voting systems to these guidelines. So let's briefly talk about voting system certification. Before July 2006, voting systems were not tested by the Federal Government; they were tested by the National Association of State Election Directors. In July of 2006, the National Association of State Election Directors closed their doors, and the EAC had to start an interim program until the adoption of its full-time program, or full program, on January 1st of 2007.

It is important to note that participation in our program by states is completely voluntary, and, actually, New York is a really good example of that, in that it decided that the 2005 standards, or the 2005 VVSG, be required, but our program or our certification currently is not required for the State of New York. But it must be tested to our standards. So they took our standards, but do not require our certification. So it is up to the states to make the decision how much, or how little, of our program to use.

Also, I want to mention briefly that the program, all the information on our program, is available on our website. The EAC is trying extremely hard to post everything we can to our website so that the public can be informed. So all the registered manufacturers are listed up on our website. All the registration materials are listed up on our website. The voting systems that are

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being tested and the date of submission are being posted on our website. The test plans that the test labs submit are posted on our website. When the final test reports are adopted, those will be posted on our website. All certified voting systems, when we have certified voting systems, will be posted on our website. All accredited test laboratories, which we currently have four, are posted on our website as well as their registration material and accreditation material.

Also, the EAC, as part of its testing and certification program manual, which has also been provided outside, has a quality monitoring program as part of its testing certification program. This allows the EAC to go and look into the EAC certified voting machines. All the manufacturers are required to report any anomalies to a certified EAC voting machine to the EAC. Also, the EAC has adopted a policy in which anomaly reports, or voting system reports submitted by states or counties to our Executive Director or our Chairperson, will be posted on our website, and you can go check that out at [www.eac.gov](http://www.eac.gov). We have the California report currently. California submitted their report to the EAC formally, and so it is posted on our website, and we are also working with Florida to post one of their reports. So states, we cannot force states to submit these reports. We cannot make them do it; we don't have the power under HAVA. Section 209 clearly states what the EAC's authority is, and we cannot make states submit that information. So I encourage all state officials that are here to work with your reports and submit them to the EAC so that we can get the best information out there; so we can be the clearing-house for that kind of information.

So where do we stand now because of HAVA? Well, first of all, as we have heard today, the public is demanding accessibility, and HAVA calls for that accessibility. HAVA requires that each polling place shall have at least one voting system that is accessible to voters with disabilities. That voting system shall allow every voter to vote independently and privately, and provide voters with disabilities the same opportunity for access and participation as other voters. And that's the spirit of HAVA with the disability community, and it is clearly stated in there. These requirements, however, do not prevent voters with disabilities from seeking assistance, and that is important to know. All it requires is that the voting systems provide voters with disabilities the same opportunity for access and participation. But if a voter with disabilities wants that help, or chooses to take advantage of that

route, that is their choice. But if they don't want that, the other option needs to be available to them. Also, it's important to know that the EACs 2005 VVSG increases accessibility requirements from the 2005 VVSG from 29 in 2002 to 120 in 2005. And then this next iteration that's proposed takes it even a step further. So as we can see, things have changed drastically since 2000, thanks to HAVA.

The public also demands accountability. Election Administration is now in the spotlight more than ever. People are demanding to know what processes are involved with elections and how everything works. Election officials and voters used to take for granted that our votes would be counted accurately, but now the American public is demanding to know how this process works. And we support the public's right to view this process. And most election officials are very willing to participate and educate voters as best as they can. So ask your election officials about setting up voting systems and testing them out. Ask your election officials whether you can witness the logic and accuracy testing that goes on with the voting system. Most election officials will gladly allow you access to watch that sort of logic and accuracy testing. Ask about how votes are tabulated. Ask about how audits are supposed to be conducted in your area. Ask how the audit process works. And ask how recounts will be conducted based on the machines or the voting equipment that you use.

Basically, what I'm saying is, learn more about elections. And this is where our management guidelines come in, because these are intended and written by election officials. We have a group that we change up for every topic that comes in and gives us their best practices; their best ideas. We get volunteers from across the country, both state election officials and county election officials, to give us their best ideas, and you can see some of our topics here that we cover.

You know, new voting systems; poll workers; poll worker training; contingency planning; media and public relations; ballot preparation, certification; absentee and vote by mail; acceptance testing; security; change management and polling place vote centers. We cover a vast array of topics, and we are going to continue to find the topics that are most important. I know we have slated provisional balloting as one of the topics, best practices for provisional balloting, and all this information's up on our website so that voters and election officials can, you know, reap the benefits of the information that we've been able to gather from

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election officials across the country.

I encourage you to go on our website and check out our manuals as well. How our program works. Look at our certification manual. The lab manual that was mentioned earlier is going out for a public comment before the end of the year. I encourage you to get on there and look at what standard we're going to hold the labs to. How are we going to deal with their conflict of policies? What, you know, what standards are we holding them to? And that will be available for public comment as well.

Finally the public demands verification. We have seen a trend, and I think it is fairly obvious here today, that voter verified paper audit trails are becoming more and more popular. They are now required in 36 states, and in 2004 Nevada was the only state that required VPATs. That's become a trend that's become very popular, and some states are moving away from electronic voting to optical scan because voters have informed those officials that they like the feeling of having a paper ballot.

States are now conducting aggressive testing programs. As I mentioned, the California top to bottom review and the Florida reviews have shown that states are now more—more demand is being put on states to be accountable to these sorts of things, so they're conducting their own testing. And we're working with states so that the Federal testing can help in the higher level testing so states can focus in on exactly what they need out of their voting systems. We urge all the election officials here today to submit all the information that you have to us through our programs, so that we can get everything we can on the website to educate the voters and the election officials.

So with all that said, what can we expect from the 2008 elections and what should voters expect? Well, we don't know. So the voters should expect—some voters could expect to cast their ballots on new equipment. You know, we have been talking about it here today a lot. So check with your local election officials on the equipment that you use. Ask to see the equipment. A lot of polling places will have demonstrations. I know it has been mentioned here a couple of times today that the voting equipment that was proposed in New York was taken out so that people could try it out. Take advantage of that. Take advantage of election officials' willingness to be open and transparent to you to use the equipment. If you are not sure about something, contact someone and ask questions.

Voters, know your rights. Voters have a right, under HAVA, to

ask for a provisional ballot if they are not allowed to vote, voters have a right to file a complaint if they think their rights have been violated. And, also, know the requirements on you. Many states, as we know, are adopting state voter ID laws, so know what you're going to need to vote. Educate yourselves and demand that, you know, the election officials and the people involved in the process help to educate you.

So just a couple of points in conclusion. First, you know, HAVA demands that all voting systems be secure, accurate and reliable. The voting system is important, but it is not the complete process. We must talk about the entire voting process when we are talking about voting. You know, find out about how your voting systems are tamper proof, how they are stored. Where they are stored. You know, the transportation of them to the polling places. How they are set up. The chain of custody procedures. You know, the integrity of the vote count. How are your votes being counted? You know, the backup and contingency planning. It made me laugh this morning because the lights went out, but that's something election officials have to deal with and be prepared for, and election officials are keenly aware of the sort of problems, you know, a fire can break out, and election officials prepare for that. So find out what plans election officials have and, you know, the EAC has got information about how some election officials, the best practices to dealing with that sort of thing.

Training and poll workers are perhaps the two most important things. You know, we have heard it already from the election officials that were up here today. Poll workers are difficult to come by and hard to train, and it is not a very rewarding job. It is a lot of hours, you know, 16, 17 hours, for not a lot of money, and certainly not any glory. You know, and so if you are interested in voting and this is something you're passionate about, get involved. Be a poll worker. You know, find out about the system by being involved in the system. Certainly no one is going to turn you down. We all need poll workers. You know, every state in the United States needs poll workers.

And also the money that is needed for training goes overlooked, I think. Most election officials that we talked to, when they are asked what is the number one thing you need; it is more money and more training and more money for training. Because it has become such a problem and such a challenge to get everyone trained in the amount of time that they need to train people.

So, you know, a comprehensive approach is how we should be

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looking at election administration. We cannot just focus on the machines, or the funding, or the people involved, or the management procedures. All of those make up our voting system, and we need to focus on all areas instead of just one. It is the entire process. So, as my old boss used to tell me, the details in voting matter; it is all about the details in voting. Taking care of every last ounce so you're prepared for whatever might come along. And how are you going to handle the issues that may present themselves and prevent disaster. So with that, I appreciate your listening. I know you just came back from lunch and are probably sleepy and whatnot, so I appreciate your time. And I'll be glad to answer whatever questions you might have for me.