

SAFEGUARDING THE VOTE IN NEW YORK: HAVA AND RELEVANT STATE LEGISLATION

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Thank you very much Assemblyman Miller, it's a pleasure to be here. There's been a lot of talk about voting machines, and I would like to first focus on the other technological aspects of HAVA in the time that I have, and then address the machine issue. I've given out a packet, and I'd like to first begin with the statewide voter registration list.

If everyone remembers, in Florida, there was a big problem with the purging of the statewide voter registration list. Katherine Harris became infamous for taking people off the list because their name matched people that were convicted of felonies. In New York, we were determined not to let the same thing happen, and as a result, we adopted what has been described as a bottom-up system, rather than a top-down system.

In New York's system, we provide that only local Boards of Elections can add and remove names. The State Board of Elections is not authorized to add a voter's name or remove a voter's name. The State Board of Elections has the database in its control and on its property, but they are not the ones that are actually doing the registration of voters; that happens at the local level.

So if somebody comes in to get registered, the local Board of Elections processes that registration. They enter the information for the voter into the database that can communicate with the statewide database, and the statewide database runs a duplicate search to see if he or she is registered anywhere else; and there are repercussions if you are. Also, the statewide database is set up to communicate, and HAVA talked about the requirement to do so, with the Department of Motor Vehicles and the Social Security Administration. As a result, numbers that are provided by voters are matched with databases in those two other agencies. New York also tried to avoid some mismatch type problems by requiring

that the State Board of Elections also reach out to other state agencies that might have useful information for purposes of identifying a voter.

The Department of Health and the Department of Corrections in New York is also contacted by the State Board of Elections, and visa versa. They communicate in order to remove deceased voters from the rolls, and to remove people that have been convicted of a felony and incarcerated. You have to be incarcerated, in addition to the felony conviction to lose your right to vote. So that's the way that the database works to try to keep things up-to-date, to not have duplicates, and to maintain the integrity of the process so that we don't run into a situation like they found themselves in in Florida. We also set up a statewide hotline so that you can, or I think the State Board is in the process of doing this, so that you can also find out if your voter registration is up to date, so that you don't get to the polls and you end up having trouble.

In statute, we require the DMV to actually cooperate with the State Board of Elections, and we suggest that the Social Security Administration do the same. Of course, we cannot mandate that, but we put protections into the database, like who can remove and add voters, because we recognized in New York that we wanted to avoid pitfalls that other states had fallen into. We were very, very, careful to look at everything that happened around the country and tried to craft a statute that would avoid those kinds of problems. We also provide that Social Security numbers and DMV numbers cannot be released to the public concerned about identity theft and trying to prevent that.

I brought up the database first because it is so intimately connected with the voter verification requirements. HAVA requires that a voter's identify be verified. It talks about using databases that talk to each other, the statewide database list and DMV and Social Security lists. We were concerned with an argument that had gone on across the country that said when someone comes in to register, if they can't be verified immediately on the spot, that their registration should be rejected.

If you look in the packet that I gave you, on page 23 is a report on what happened in California when they adopted that model, and a number of states adopted that model. In the first three months of 2006, 26 percent of voters in California that went to register were rejected because their numbers didn't match; one-quarter of the potential registrants. In Los Angeles County alone, it was 43 percent. These were the problems that our 2005

Legislation sought to prevent.

I like to use a visual when I talk about verification, and many people don't really understand how important this issue is. If you take a line, and at this end is registration, and at this end is voting, there's a time period often between when a voter registers and when a voter votes, in which their identity can be verified. HAVA doesn't require an on-the-spot verification, and that is really an unfair way to interpret HAVA.

So in the course of negotiating the HAVA Legislation, we concluded that the best way to do it was to have somebody come in and get registered. This is what folks against this model called "presumptive registration," which I actually think is a pretty good idea; if you are 18, a U.S. Citizen, and you live in the district, we said, you are going to be registered. And then we're going to write into statute certain specific steps that would have to be taken in order to verify your identity. On the registration form, for instance, we required that you either give your DMV number, the last four numbers of your Social Security number, or that you check none of the above; and that none of the above box is really important. Because if you don't have that and somebody does not provide one of these other two numbers, the argument could be made, that there is no way to verify his or her identity. So, if you check none of the above, and you are given a unique identifier by the Board of Elections, they then run your name, your number, and your date of birth, to see if there's a match; so that you then are considered verified.

If you're not verified, the first thing the Board has to do is check for data entry errors. Once they do that, if you're still not verified, they have to send out a card, and in the packet, it talks about verification. On page 13, where, in bold, we put it right in the statute in bold, this is what has to be on the card. You need to give us more information. This goes to the voter. You need to give us more information, and if you don't, you may not be able to vote on a machine on Election Day unless you provide identification.

If that doesn't help and the voter doesn't contact the Board within 45 days, we require a second card to go out with similar instructions. Okay, so say all of this has occurred and the voter has not contacted the Board, but a voter shows up at the polls and there's a little notation - and we wrote this in statute - there's a notation next to your name that you have not been verified. So now what's going to happen? This was an issue that was hotly negotiated. What's going to happen when you come to the polls?

Well, essentially, HAVA says, in another area, that if you are a first-time registrant that registered by mail, first-time voter that registered by mail, when you get to the polls, HAVA requires you to provide identification. So what I argued, and what the Assembly argued, was why not treat the non-verified voter the exact same way? And that's what we did. So if you get to the polls and there's that little notation next to your name that you're not verified, you show ID, you vote on a machine. You don't show ID, you vote on an affidavit ballot, or what HAVA calls a provisional ballot.

How is that ballot treated? It's treated like every other affidavit ballot, and when you do a recount, the two lawyers that are there fight over every single ballot. But at least that voter, even though they haven't been verified has the opportunity to have their vote counted.

Okay, in Washington, D.C.—excuse me, the State of Washington, they adopted a law, just like California, that if you go to register and you don't get verified on the spot, you're rejected. Well there was a lawsuit that was brought. And in the packet, page 25, is a copy of the decision in that lawsuit. And guess what the Judge said?

The Judge, basically, described New York's verification law, and said this is the way it's supposed to work. HAVA doesn't say you have to be verified as a qualification to vote. HAVA says we are going to try to verify your identity. And, in fact, the court went so far as to actually use the concept that we created in New York where the judge said, the match of the numbers is just the same as showing up at the polls and showing identity. And then you're verified. And that's the way New York approaches it.

We also have a list of identification items in New York Law that is broad. It's the broad list that HAVA allows, and it includes things like, and this is on page 12, copy of current utility bill, bank statement, government check, paycheck or other government document that shows the name and address of the voter. So it's something from the government or from a business entity that has your name and your address, and you can say, look, this is where I live, and you're verified.

In the Washington case, the judge enjoined the state statute because it was in violation of HAVA and the Voting Rights Act. Okay.

The few things that I want to mention about machines go to the issue of security and options.

In the context of trying to make voting machines secure, we have

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to all recognize that no machine is perfect. Every machine has an error rate. Even our lever machines have an error rate. So we were trying to build in procedural safeguards that would reduce the chance of having problems, whether it was intentional or by mistake.

Now, contrary to what somebody remarked earlier, I actually think the vast majority of election administrators are very honest, hard working, dependable people that really want to get it right and, you know, don't want to impede the election process. There are always a few bad apples, and I concede that, and they get a lot of attention in the media, but I think we really have to be careful to not impugn the reputation of professionals that are trying to do a good job.

So New York has these certain safeguards, and the couple that I'm really proud about is the Voter Verifiable Paper Audit Trail, and the Manual Audit. And when we were negotiating these statutes, we got a lot of calls about, what if people hack, how will we know? Well, that's how we're going to know. You're going to have a printout of what the tally is. This is what New York requires. A printout, and you're going—which is just the tally. And then you're going to have whatever kind of paper record that that machine produces. In an optical scan case, it's the ballot that you filled in. In a DRE case, it's the paper that is printed out by the machine that shows the voter's vote without identifying the voter.

So if you take this paper record and the tally, and you compare it, and right in statute it says the State Board is going to come up with what's that number for the discrepancy? Because, frankly, lawyers in the Capital didn't know technologically enough about that. You need people that know about voting machines to figure out, what's the proper number. And the Board came up with, as David mentioned, one half of one percent. If the difference between those paper records and the tally is half of a percent or more, you go to a full audit. And that really does provide a very significant measure of security.

We also do a few other things.

You had a power loss here today. We have a provision in the law that talks about, if a machine malfunctions, it should secure the votes already cast, and I believe the Board's regs talk about a backup battery of some sort, and that's the idea, that if the machine starts to go bad, you don't want to lose everything that's already in the machine, you want to transition to emergency

ballots, but still have the votes that were already cast.

We also put in this no wireless capability, as David also mentioned, which we thought was very important. An argument was made during negotiations, well, wouldn't it be great if the Board, when all their machines are in the warehouse, if they could just take one main computer and check all the machines? And we said, no, that would not be great, we would not be happy about that.

So we built in some of these very important procedural safeguards.

The escrow requirement was the other security piece, and that's at the front end rather than after the election where the manual audit occurs. So we want the source code to be escrowed, kept confidential. We recognize that there are trademark and copyright considerations here, but we felt that it was very important, given what had happened in Florida and in Ohio, that New Yorkers expected some type of ability to go back and look at the source code. And so we wrote that pretty clearly into the statute. The State Board is still negotiating what that really means. As David pointed out, you have components that are not created by the vendor and so there are some tricky spots in that issue.

We require the audit to be done, and we also created a supreme court proceeding, whereby somebody could go into supreme court and say one of two things in order to request a full audit: Either the discrepancy was met, that discrepancy threshold, and the Local Board didn't agree to the full audit, because I should have mentioned, the Local Boards can agree to move to the full audit.

Now Local Boards operate, basically, where you need to have a two-person agreement. So if we actually have a disagreement at a Local Board, and even though one Commissioner may want to go to the full audit, we have this supreme court proceeding where somebody could go in, a candidate, could go in and say, we hit that threshold; the Board is deadlocked; I'd like to apply to the court to order a full audit.

The other option is when you can show, and this is the very last page of my packet, where evidence presented to the court otherwise indicates that there is a likelihood of a material discrepancy between such manual audit tally and such voting machine or system tally, which creates a substantial possibility that the winner of the election, as reflected in the voting machine or system tally, could change if a voter verifiable record audit of additional voting machines or systems were conducted.

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So we really did build in, at the front end, with the escrow, and all the other requirements, including the disability accessibility pieces and pneumatic breathing switch, far beyond what HAVA asked for, for a quadriplegic person that could vote independently. We put that in. But we did it up front, and we did it after the fact, all having the security issues in mind at every step of the process.

And it's very interesting, because New York has taken a long time. And, you know, we recognize that, and as Assemblyman Miller talked about trying to get it right.

In the context of doing legislation, you're dealing with broad strokes. There's just no possible way that you're going to have the expertise that, the people that actually know this area, that administer elections, are going to have, when things like regulations have to be promulgated, and things have to be actually put into place in the field. So you try to draft these statutes so that it's giving broad outlines and sort of the limitations of what can and can't be done.

And I think New York, in many ways, it's not perfect, the statutes are not perfect, but in many ways, we got it right. And I think the verification piece in particular, I am very proud of, because we have seen repeatedly across the country how this has really created problems, and California, for instance, is trying to fix that right now, as we speak.

So that's, essentially, what I had to say, and, at the end, if anyone has any questions, I'll be happy to answer them.