

TAKE THE COUNTIES INTO ACCOUNT: THE HELP AMERICA VOTE ACT IN NEW YORK STATE

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INTRODUCTION

The 2000 presidential election went down as one of the most eventful in history due to the problems voters had voting in Florida in a very close election. In 2002, Congress passed a bipartisan piece of legislation called the Help America Vote Act of 2002 (hereinafter “HAVA”),¹ which sought to remedy some of the problems with the contentious 2000 election through the modernization of voting systems. Although HAVA does not require a certain type of voting machine, it does mandate that states replace lever voting machines with electronic machines that meet the requirements for voting systems standards laid out

¹ Help America Vote Act of 2002, 42 U.S.C. § 15301 (2002).

in 42 USC § 15481.²

As well as remedying problems with the 2000 presidential election, HAVA is also intended to make the voting process the same for individuals with disabilities as for non-disabled voters.³ Specifically, the Help America Vote Act “mandates that every state in the U.S. must implement an electronic style of voting machine system that will allow a voter with any type of disability to vote on the same machine as a voter without a disability.”⁴

HAVA gives federal funds to the states for complying with its election and voting system requirements, and a large number of states implemented and complied with HAVA by the 2004 general election deadline that the statute sets forth.⁵ Every single state in the United States—except for New York—had implemented HAVA by the second deadline of January 1, 2006, by which states had to apply for a waiver to delay complying with HAVA.⁶ Even more astoundingly, two years after that “late deadline” passed, New York has still not fully complied with HAVA and has not even completed a permanent, acceptable plan to implement the Help America Vote Act.⁷

New York has partially complied with HAVA in that the New York Legislature passed the Election Reform and Modernization Act of 2005, which amended election laws to incorporate the requirements of HAVA, and authorized the New York State Board of Elections to implement HAVA.⁸ However, the Board of Elections did not do so by the January 1, 2006 deadline; therefore, the United States Department of Justice sued New York State in 2006 for noncompliance with HAVA.⁹ The case was heard by Judge Sharpe in the U.S. District Court for the Northern District of New York, who ruled that New York must implement HAVA and that the State Board of Elections must

² *Id.* § 15481.

³ *Id.* § 15481(a)(3).

⁴ James M. Clancy & John A. Graziano, *The County Dilemma, The Impact of the Help America Vote Act on New York State* (Oct. 31, 2006), available at http://www.albanyweblog.com/2006/11-Nov/11-02-06_Ref_01.html.

⁵ 42 U.S.C. § 15302(a).

⁶ *Id.* § 15302(a)(3); Andrea Senteno, *New Voting Machines May Not Meet State Standards*, GOTHAM GAZETTE, Dec. 2007, available at <http://www.gothamgazette.com/article/voting/20071219/17/2384>.

⁷ Senteno, *supra* note 6.

⁸ Election Reform and Modernization Act of 2005, 2005 N.Y. Sess. Laws ch. 181, § 1 (McKinney) [hereinafter ERMA].

⁹ *United States v. N.Y. State Bd. of Elections*, No. 06-CV-0263, at 1 (N.D.N.Y. June 2, 2006).

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submit a plan stating how it plans to bring New York into compliance.¹⁰

The plan for implementing HAVA in New York has become more of a saga and there have been several additional chapters in the *U.S. v. N.Y. State Board of Elections* lawsuit.¹¹ The rest involve essentially the same issues that the original case contained: New York State has still not fully implemented HAVA, the U.S. wants New York to implement HAVA as quickly as possible, and the New York State Board of Elections argues why it needs more time to comply.

This paper will discuss why New York has not been able to comply with HAVA yet, or even come up with a comprehensive plan to fully implement HAVA that the State, the U.S., and the Courts all agree with. Additionally, this note will cover the technological aspects of HAVA, such as the main types of systems the State Board of Elections must choose between to authorize for use in the State. Finally, this paper argues that it is the counties in New York that are the true victims of the dispute because it is they who must actually implement HAVA; i.e., choose from among the authorized machines to buy, purchase the new electronic machines (which the counties may not have received the funding from the State to do so yet), and then train poll workers on the new machines and educate the general public on how to vote on the machines.

I. THE HELP AMERICA VOTE ACT OF 2002

The Help America Vote Act of 2002 was signed into law by President George W. Bush in October of 2002.¹² HAVA has been called “the first major federal election legislation since the Voting Rights Act of 1965.”¹³ The main purposes of HAVA are to replace outdated voting machines, create “centralized” databases of registered voters in each state, and improve administration of elections.¹⁴ Other major focuses of the Act are to develop accessibility for disabled voters and to educate voters.¹⁵

¹⁰ *Id.* at 1–2, 8.

¹¹ *Id.* at 1–4.

¹² Jeffrey Zaino & Jeanne Zaino, *Election by Litigation: The Electoral Process Post-Bush v. Gore*, 62 DISP. RESOL. J. 72, 75 (2007).

¹³ *Id.*

¹⁴ Help America Vote Act of 2002, 42 U.S.C. § 15301 (2002).

¹⁵ *Id.* § 15481(a)(1)(B), (a)(3).

HAVA is codified at 42 U.S.C. § 15481.¹⁶ In 42 U.S.C. § 15481, HAVA requires that “[e]ach voting system used in an election for Federal office” must conform to certain standards.¹⁷ Under 42 U.S.C. § 15481(a), new voting machines must permit voters to verify their votes “in a private and independent manner” before they cast their ballots and allow them to change their vote or correct any errors, if needed.¹⁸ Another important requirement is that the voting system must notify voters of certain errors with their votes, such as voting for more than one candidate running in the same race.¹⁹ The voting machine would notify voters before they have actually cast their votes and allow them to change their vote to the correct candidate.²⁰ Of course, this must be done in a way that maintains voter privacy.²¹

Another major requirement of the HAVA legislation creates new standards for disabled individuals to provide better access to voting machines.²² Specifically, HAVA mandates that the voting machines “be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”²³ In order to satisfy this requirement, each polling place must have “at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities.”²⁴

Title I of HAVA requires the Administrator of General Services to pay states to improve election administration and replace punch card and lever voting machines.²⁵ At the outset, there was \$325 million total available to the states for replacing the “outdated” lever and punch card systems.²⁶ In order to receive this federal funding, the states must have applied for the program and replaced old voting systems by the 2004 General

¹⁶ *Id.* § 15481.

¹⁷ *Id.* § 15481(a).

¹⁸ *Id.* § 15481(a)(1)(A)(i)–(ii).

¹⁹ *Id.* § 15481(a)(1)(A)(iii)(I).

²⁰ *Id.* § 15481(a)(1)(A)(i)–(iii).

²¹ *Id.* § 15481(a)(1)(C).

²² *See generally id.* § 15481(a)(3) (requiring voting systems to be accessible to disabled individuals).

²³ *Id.* § 15481(a)(3)(A).

²⁴ *Id.* § 15481(a)(3)(B).

²⁵ *Id.* § 15302(a)(1)–(2).

²⁶ *See id.* § 15304(a).

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Election.²⁷ Alternatively, if states could not comply with HAVA by the 2004 General Election, they were permitted to apply for a waiver, which would give states until the first federal election held after March 1, 2008,²⁸ with their plan for compliance. States would receive varying amounts of funding based on the number of precincts they have that they will need to bring into compliance with HAVA.²⁹ HAVA would provide states with approximately \$4,000 for each precinct (but that number could change).³⁰ Also under Title I, an additional \$325 million would be appropriated to states for improving election administration.³¹

Title II of HAVA establishes the Federal Election Assistance Commission.³² The Election Assistance Commission was planned to consist of two democrats and two republicans appointed by the president.³³ Having two appointees from both of the two major political parties would help to ensure fairness in overseeing HAVA and help to alleviate concerns that the other party will make elections favor them in some way. The Commission has an advisory role as it has no true lawmaking capacity.³⁴ Under HAVA, the Election Assistance Commission may issue guidelines on implementation and compliance with HAVA as well as guidelines for voting systems.³⁵ One of the most important activities of the Commission has been testing and certifying different kinds of voting machines made by different voting machine manufacturers.³⁶ The Election Assistance Commission shall also study various election issues and oversee grant programs for others to study issues such as voting technology, disabilities, and requirements payments.³⁷

Title II of HAVA also sets up an Election Assistance Commission Standards Board, which must include a state election official and a local election official, of different political parties, from every state.³⁸ A final duty of the Commission is dispensing funds to the states, above and beyond the funds

²⁷ *Id.* § 15302(a)(3)(A).

²⁸ *Id.* § 15302(a)(3)(B).

²⁹ *Id.* § 15302(c)(1)(A).

³⁰ *Id.* § 15302(c)(1).

³¹ *Id.* § 15304(a)(1).

³² *Id.* § 15321.

³³ *Id.* § 15323(a).

³⁴ *Id.* § 15329.

³⁵ *Id.* § 15322.

³⁶ *Id.* § 15371(a)(1).

³⁷ *See id.* § 15322(3)–(4).

³⁸ *Id.* § 15343(a).

promised in Title I.³⁹ The Election Assistance Commission had authorization to distribute \$1.4 billion to the states in Fiscal Year 2003, \$1 billion in Fiscal Year 2004, and \$600 million in Fiscal Year 2005.⁴⁰ However, Congress only appropriated \$833 million of the \$1.4 billion authorized in Fiscal Year 2003.⁴¹

Before states will be eligible to receive the federal funds, they must first submit a comprehensive “State Plan.”⁴² Each state’s plan must include specifics about how the federal funding will be used and how the state will distribute the funding to “other entities,” which should be mostly local governments who bear the cost of elections, but the plan does not say this in particular.⁴³ Additionally, all State Plans must state a plan for voter education and poll worker training on the new electronic machines as well as adapting voting guidelines to the federal requirements.⁴⁴ States must establish a “fund” to receive the federal grant and develop other fiscal guidelines for complying with HAVA, such as determining how much it will cost the state to implement HAVA.⁴⁵

Under Title III of the Help America Vote Act, states are required to provide voters an opportunity to check for and correct ballot errors in a private and independent manner.⁴⁶ This is one of the most important provisions of HAVA because it allows voters to correct their ballots if they have made a mistake while voting. For example, if a voter votes for too many candidates, does not vote in all of the races, or makes some other mistake, the voting machine notifies the voter and enables them to check or correct their votes.

A large part of Title III of HAVA is dedicated to the voting rights of disabled individuals.⁴⁷ Each precinct in every state must have at least one voting machine that is accessible to disabled voters.⁴⁸ Former aids to disabled voters, such as “curb-side voting” and “voter assistance,” no longer meet the

³⁹ *Id.* § 15330.

⁴⁰ Leonard M. Shambon, *Implementing The Help America Vote Act*, 3 ELECTION L.J. 424, 437–38 (2004).

⁴¹ *Id.* at 437.

⁴² 42 U.S.C. § 15403(b)(1).

⁴³ *Id.* § 15404(a).

⁴⁴ *Id.* § 15404(a)(3)–(4).

⁴⁵ *Id.* § 15404(b).

⁴⁶ *Id.* § 15481(a)(1)(A).

⁴⁷ *Id.* § 15481(a)(3).

⁴⁸ *Id.* § 15481(a)(3)(B).

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requirements of HAVA; “all voters, including individuals with disabilities, must be able to cast their votes unassisted and in private.”⁴⁹

Title III also deals with the problem of voters being disenfranchised at the polls.⁵⁰ For example, states must “provide provisional ballots to ensure no individual is turned away at the polls.”⁵¹ Provisional ballots would allow individuals whose voting registration status is in question to preliminarily cast their votes on Election Day on “provisional ballots” that will then be counted once the voter’s registration status is verified.⁵² Title III also states that election officials shall establish a “free access system” so that voters who cast a provisional ballot can find out whether their vote was counted.⁵³ In order to improve state-wide voter registration systems, HAVA mandates that states “implement . . . a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the state.”⁵⁴ This database then will be used to create an accurate and up-to-date voter registration list for Election Day.⁵⁵

Title IV of the Help America Vote Act, interestingly, became very important in the saga of New York’s delay in implementing HAVA. Title IV of HAVA states that the U.S. Department of Justice may seek declaratory or injunctive relief for violations of HAVA.⁵⁶ As will be discussed, *infra*, the U.S. Department of Justice sued New York State under this title of HAVA when the State missed its deadlines.⁵⁷ The remaining Titles of HAVA (Titles V–IX) are not important to the discussion of New York’s failure to implement HAVA on time.

⁴⁹ Summary of “The Help America Vote Act” of 2002, at 2, <http://www.sos.state.ms.us/elections/HAVA/Summary.pdf>; *see also* 42 U.S.C. § 15481(a)(3)(A).

⁵⁰ *See* 42 U.S.C. § 15481.

⁵¹ Summary, *supra* note 49, at 2; *see also* 42 U.S.C. § 15482(a).

⁵² 42 U.S.C. § 15482(a).

⁵³ *Id.* § 15482(a)(5)(B).

⁵⁴ *Id.* § 15483(a)(1)(A).

⁵⁵ *Id.* § 15483(a)(1)(A)(i)–(v).

⁵⁶ *Id.* § 15511.

⁵⁷ *See infra* Part IV.

II. THE NEW YORK LEGISLATURE PASSES THE ELECTION REFORM AND MODERNIZATION ACT OF 2005

The New York State Legislature passed the Election Reform and Modernization Act of 2005 (ERMA) on July 12, 2005, giving the New York State Board of Elections the power to implement HAVA in New York State.⁵⁸ The Legislature did not make a quick decision about HAVA; it debated the issue from 2003 until 2005 when ERMA was passed.⁵⁹ Nor did the Legislature take the decision lightly: “[b]y accepting the federal funding available, New York committed itself to abandoning the lever machines for new, largely unproven style of voting machines.”⁶⁰

ERMA amends section 1-104(18) of New York’s Election Law to authorize the implementation of HAVA in the state.⁶¹ Section 7-200 explains that the State Board of Elections must approve particular voting machines and then the several county boards of elections may choose any of those voting systems that have been approved by the State Board of Elections.⁶² However, section 7-200(1) specifies that the county boards of elections may not use “more than two types of voting machines or systems.”⁶³ Also, since the machines will be new to most voters, ERMA requires that

[f]or five years after any voting machine or system of a type approved by the state board of elections pursuant to the [E]lection [R]eform and [M]odernization [A]ct of 2005 is first used in any election district, the local board of elections which owns such machine or system shall provide a model or diagram of such voting machine or system for each polling place in which any such election district is located.⁶⁴

Another important section of ERMA deals with the process for voting machines or systems to be considered by New York to be bought and used.⁶⁵ Voting system owners must apply to have their machines examined by the board of elections and pay a fee.⁶⁶ Specifically, ERMA states,

[t]he state board of elections shall cause the machine or system to

⁵⁸ ERMA, 2005 N.Y. Sess. Laws ch. 181, § 1 (McKinney).

⁵⁹ Clancy & Graziano, *supra* note 4.

⁶⁰ *Id.*

⁶¹ ERMA, 2005 N.Y. Sess. Laws ch. 181, § 2.

⁶² *Id.* § 7-200.

⁶³ *Id.* § 7-200(1).

⁶⁴ *Id.* § 7-200(2).

⁶⁵ *Id.* § 7-201(1).

⁶⁶ *Id.*

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be examined and a report of the examination to be made and filed in the office of the state board. Such examination shall include a determination as to whether the machine or system meets the requirements of section 7-202 of this title and a thorough review and testing of any electronic or computerized features of the machine or system. Such report shall state an opinion as to whether the kind of machine or system so examined can safely and properly be used by voters and local boards of elections at elections, under the conditions prescribed in this article and the requirements of the federal Help America Vote Act.⁶⁷

Furthermore, once the state board of elections reports that the system meets the voting system requirements of New York Law and HAVA, then the voting machine is considered certified.⁶⁸ Then it is up to the counties in New York to choose which of the certified voting systems they would like to purchase and use for elections in their counties.⁶⁹

ERMA establishes a citizens' election modernization advisory committee within the state board of elections.⁷⁰ However, the co-executive directors of the board of elections serve on the committee, as well as four local board of election commissioners (split between the two major parties), four disability rights advocates, and two members of the legislature, one each appointed by the temporary president of the senate and the speaker of the assembly.⁷¹ The makeup of this board exemplifies the bipartisan nature of everything involving HAVA and ERMA because fair and accurate elections are an issue in which both major political parties have a stake.

Subsequent sections of ERMA are similar to HAVA's section on voting systems requirements.⁷² However, one interesting provision that ERMA contains, but HAVA does not, is section (f), which states that voting systems must "be provided with a 'protective counter' which records the number of times the machine or system has been operated since it was built and a 'public counter' which records the number of persons who have voted on the machine at each separate election."⁷³

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* § 7-200(1).

⁷⁰ *Id.* § 7-201(1-a).

⁷¹ *Id.*

⁷² *See, e.g., id.* § 7-200; Help America Vote Act of 2002, 42 U.S.C. § 15481 (2002).

⁷³ ERMA § 7-202(1)(f).

At section (j), ERMA lays out the voter verifiable paper trail by requiring a voting machine to retain all paper ballots cast or produce[d] and retain a voter verified permanent paper record which shall be presented to the voter from behind a window or other device before the ballot is cast, in a manner intended and designed to protect the privacy of the voter; such ballots or record shall allow a manual audit.⁷⁴

ERMA does specifically state that “[l]ocal boards of elections which obtain voting machines pursuant to this chapter may determine to purchase direct recording electronic machines or optical scan machines in conformance with the requirements of this chapter.”⁷⁵ Punch card ballots, however, are eliminated by ERMA and the law states that punch card ballots will not be used after September 1, 2006.⁷⁶ In the 2000 Florida federal presidential election, punch card voting systems were used in several of the counties that encountered problems with voters not being able to completely punch out their choice on the ballots and, thus, ERMA banned them.⁷⁷

III. THE U.S. DEPARTMENT OF JUSTICE SUES NEW YORK STATE BOARD OF ELECTIONS

Recall that Title I of HAVA created a deadline for states that electronic voting machines were supposed to be in place by the 2004 general election or the state could apply for a waiver to have them in place by January 1, 2006.⁷⁸ The State Board of Elections could not meet the 2004 deadline because the New York State Legislature did not even pass ERMA, which gave the power to implement HAVA, until July of 2005.⁷⁹ The Board of Elections then failed to create a plan to implement HAVA before January 2006.⁸⁰

Thus, since New York was in violation of the Help America Vote Act, the United States Department of Justice (U.S. DOJ) filed a lawsuit against New York State in February 2006.⁸¹ On

⁷⁴ *Id.* § 7-202(j).

⁷⁵ *Id.* § 7-202(4).

⁷⁶ *Id.* § 7-209.

⁷⁷ *Id.*; L. David Roper, Florida 2000 Presidential Vote, <http://arts.bev.net/roperldavid/politics/FL2000.htm> (last visited Sept. 14, 2008).

⁷⁸ *See infra* Part II.

⁷⁹ Clancy & Graziano, *supra* note 4; *see supra* text accompanying notes 64–67.

⁸⁰ Clancy & Graziano, *supra* note 4.

⁸¹ *Id.*; Press Release, Department of Justice, Justice Department Sues New

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March 23, 2006, Judge Sharpe in the United States District Court for the Northern District of New York found the New York State Board of Elections in noncompliance with Sections 301 and 303(a) of the Help America Vote Act, 42 U.S.C. 15481 and 15483(a).⁸² As a result of that order, in April 2006, the New York State Board of Elections submitted a proposed Plan for New York's Compliance with the Help America Vote Act.⁸³ However, the Court found that this "proposed State compliance plan [would] not bring the State of New York into full compliance with HAVA in time for the Fall 2006 federal elections (the September 2006 primary and the November 2006 general election) in New York."⁸⁴ In his opinion, Judge Sharpe recognized that it would have been impossible to require New York to fully comply with HAVA before the Fall 2006 elections without causing complete chaos.⁸⁵

Thus, the Court laid out a remedial plan to comply with sections 301 and 303(a) of HAVA⁸⁶ that state and local jurisdictions must implement in order to partially comply with HAVA in time for the Fall 2006 elections.⁸⁷ The order mandated that each jurisdiction must include at least one voting machine that complies with HAVA's requirements for individuals with disabilities, "that will provide the opportunity to vote independently and privately to all voters with disabilities no matter their residence location in the jurisdiction."⁸⁸

Additionally, the State Board of Elections was directed to submit a document to the Court stating "specific polling locations at which accessible voting devices will be deployed," the number of such voting devices at each location, the geographic area represented, and what provisions would be made for any disabled individuals who needed transportation to their polling location.⁸⁹

York State Over Voting Rights: Lawsuit Seeks to Vindicate Rights of Disabled Voters and Federal Election Reform Efforts (Mar. 1, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/March/06_crt_108.html.

⁸² Proposed Remedial Order at 1, *United States v. N.Y.S. Bd. of Elections*, No. 06-CV-0263 (June 2, 2006), *available at* <http://www.nyv.org/doc/USCourtOrder060206.pdf> [hereinafter Proposed Remedial Order].

⁸³ *Id.*

⁸⁴ *Id.* at 2.

⁸⁵ *Id.*

⁸⁶ *Id.*; Help America Vote Act of 2002, 42 U.S.C. §§ 15481, 15483(a) (2002).

⁸⁷ Proposed Remedial Order, *supra* note 82, at 2.

⁸⁸ *Id.* at 2–3.

⁸⁹ *Id.* at 3.

Regarding the Statewide Voter Registration List, named NYSVoter, Judge Sharpe's order stated that the State Board of Elections must file its plan for implementation of that list by September 15, 2006.⁹⁰ Further, the State Board of Elections had until December 31, 2006 to submit to the court proposed regulations for NYSVoter that the United States would have fourteen days to review and comment on.⁹¹

As this was only a remedial plan for compliance with HAVA, another section of the order stated that by August 15, 2006, the State Board of Elections "must file with the Court a proposed detailed schedule for implementation of its long term proposal for replacing all lever voting systems in the State with all HAVA-compliant voting systems in every polling place by September 2007."⁹² Furthermore, if the State Board of Elections is going to be in breach of the terms of the decision, it must notify the United States.⁹³ If that is going to be the case, the State Board of Elections must work with the United States to resolve the issue.⁹⁴

Following the decision by Judge Sharpe in 2006, the New York State Legislature amended section 11 of the Election Reform and Modernization Act of 2005 to extend the state deadline to replace existing voting machines until September 1, 2007.⁹⁵ Chapter 506 of the 2007 Laws of New York requires at least one voting machine accessible to disabled voters, in compliance with HAVA, to be placed at each polling site.⁹⁶ The amendment also requires that there be at least one ballot marking device,⁹⁷ which is "equipped for individuals with disabilities" in each county in the state until existing machines can be replaced.⁹⁸ Thus, the main sections of the amendment are intended to provide individuals with disabilities the same access to voting as other voters. Finally, the law authorizes the State Board of Elections to

⁹⁰ *Id.* at 4.

⁹¹ *Id.*

⁹² *Id.* at 3.

⁹³ Proposed Remedial Order, *supra* note 82, at 5.

⁹⁴ *Id.* at 5-6.

⁹⁵ 2007 N.Y. Sess. Laws A-948 (McKinney).

⁹⁶ 2007 N.Y. Sess. Laws 1113 (McKinney).

⁹⁷ Ballot marking devices allow disabled persons to vote independently by providing for specific accessibility features to overcome the applicable disability. New Yorkers for Verified Voting (NYVV), *Ballot Marking Devices*, <http://www.nyvv.org/paperballotBallotMarkers.shtml> (last visited Sept. 14, 2008).

⁹⁸ 2007 N.Y. Sess. Laws 1113 (McKinney).

“prescribe procedures for implementing this section.”⁹⁹

IV. WHAT IS THE MATTER WITH NEW YORK?

New York is the only state in the country that has not complied with HAVA. In a memorandum of support by the United States for its motion to enforce the U.S. District Court’s June 2, 2006 Remedial Order, the U.S. pointed out that “[w]ith the glaring exception of New York, every state has met these requirements and implemented HAVA-compliant voting systems for use in federal elections.”¹⁰⁰ The reason the United States brought this motion to enforce the remedial order is that the Court had ordered the State Board of Elections to propose a plan to comply with HAVA; but the Board submitted two separate proposals by the Democratic and Republican commissioners because they seemingly could not agree on one.¹⁰¹ The U.S. then moved to enforce the Court’s remedial order, arguing that the State Board of Elections’ plans failed to comply with HAVA.¹⁰²

In its memorandum, the United States argued that the June 2, 2006 Remedial Order required New York to “implement HAVA-compliant voting systems throughout the State in time for the September 2007 elections.”¹⁰³ On September 7, 2007, New York submitted to the Court a proposed timeline of implementing the new electronic voting systems.¹⁰⁴ There were two main steps to the state’s plan: obtaining an independent testing laboratory “to test voting systems, develop a certification protocol for testing voting systems to State certification standards, and actual certification testing of voting systems;” and reviewing the submissions of private voting machine manufacturers in order to authorize machines for the state to use in elections and “subsequent actions to procure certified systems chosen by counties and provide for delivery, local testing and training on such systems for use in federal elections.”¹⁰⁵ These steps must be taken in order for any new electronic voting machines to be used

⁹⁹ *Id.* at 1114.

¹⁰⁰ Memorandum in Support of United States’ Motion to Enforce the June 2, 2006 Remedial Order at 1, *United States v. N.Y. State Bd. of Elections*, No. 06-CV-0263 (N.D.N.Y. Nov. 5, 2007) [hereinafter *Memorandum to Enforce Remedial Order*].

¹⁰¹ *Id.*

¹⁰² *Id.* at 2.

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

for elections in New York because “[u]nder State law, the prerequisite to any rollout of a new voting system in New York is certification of the system as compliant with State voting systems standards.”¹⁰⁶

This is where the biggest delay has come from in New York’s implementation of HAVA: nothing else can proceed until the State Board of Elections has certified machines that may be used. However, the deadline for certifying machines keeps getting pushed back by the Board of Elections. For example, voting machine certification was supposed to be completed in the Fall of 2006, but was delayed.¹⁰⁷ In the September 7, 2006 schedule that the Board submitted to the Court, the deadline was extended until February 2007;¹⁰⁸ however, in February 2007, the Board told the Court that issues with New York’s chosen independent testing laboratory, CIBER, made it “infeasible for the State to meet the September 2007 deadline for voting systems implementation contained in the Remedial Order.”¹⁰⁹

V. TWO MAIN TYPES OF ELECTRONIC MACHINES BETWEEN WHICH NEW YORK IS CHOOSING

The first type of electronic machine that New York is considering is the optical scan, by which voters mark their votes on a sheet of paper that can be read by an optical scan machine—a form of paper ballot.¹¹⁰ Poll workers would give optical scan sheets to voters, who would vote in a private booth by making a mark next to the candidates for whom they are voting.¹¹¹ Next, voters would feed their ballots into an optical scan machine that is able to read the ballot and then count the votes.¹¹² Finally, the optical scan system tallies all the votes.¹¹³

The main benefit of the optical scan system is that it is fairly easy to use because many people are familiar with filling in optical scan sheets that are commonly used for tests in schools, colleges, universities, and exams for jobs. Also, many people—especially those who do not own or do not like electronics—would

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Clancy & Graziano, *supra* note 4.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

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more likely be confident that their vote was cast accurately. Additionally, since the optical scan ballot itself is the paper record that fulfills one of the requirements of HAVA, no extra step is necessary.

The downside to the optical scan system is the same as that of other electronics; electronics are machines and no machine is foolproof. There is always a chance that a machine can break or malfunction. Also, electronics can be compromised by hackers, and optical scan machines are included.¹¹⁴

The second main type of voting machine system that New York is considering is the Direct Recording Electronic (DRE) machine.¹¹⁵ The DRE is an electronic machine that allows voters to select their candidates on a computer touch-screen that is akin to an ATM machine.¹¹⁶ Voters' results are then recorded electronically on the DRE machine and then voters are able to view their votes on a piece of paper, similar to a receipt, behind a clear window.¹¹⁷ This allows voters to make sure their votes were cast for the candidates that they actually wanted to vote for, and permits them to change their votes before their votes are counted.¹¹⁸ One of the benefits of DRE machines is that they prevent errors in voting by highlighting undervotes and preventing overvotes.¹¹⁹ Also, DREs allow voters to use languages besides English and easily allow party-line voting.¹²⁰ Importantly for the purposes of HAVA, DRE machines make it "[p]ossible to avoid two sets of machines—one for able-bodied voters and one for those with special needs."¹²¹

Allowing voters to double-check their votes complies with section 7-202 of the New York Election Law, which mandates that voting machines have a voter verified paper audit trail.¹²²

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Richard Niemi, Dep't of Political Sci., Univ. of Rochester, Address at The Albany Law School Journal of Science & Technology Symposium: The Irony of Electronic Voting Machines (Nov. 16, 2007).

¹²⁰ *Id.*; PAUL S. HERRNSON, RICHARD G. NIEMI & SCOTT RICHMAN, CHARACTERISTICS OF OPTICAL SCAN AND DRE VOTING EQUIPMENT: WHAT FEATURES SHOULD BE TESTED? 4, http://www.capc.umd.edu/rpts/MD_EVote_HerrnsonNiemi.pdf (last visited Sept. 15, 2008).

¹²¹ Niemi, *supra* note 119.

¹²² *Id.*; N.Y. ELEC. LAW § 7-202(j) (McKinney 2007).

New York Election Law § 7-202 specifically states that a voting machine or system must

retain all paper ballots cast or produce and retain a voter verified permanent paper record which shall be presented to the voter from behind a window or other device before the ballot is cast, in a manner intended and designed to protect the privacy of the voter; such ballots or record shall allow a manual audit and shall be preserved in accordance with the provisions of section 3-222 of this chapter[.]¹²³

After voters verify that their votes are recorded correctly, the paper drops into a ballot box to be tallied.¹²⁴ Just as with the optical scan system, the DRE voting machines are also susceptible to attack by hackers.¹²⁵ Additionally, since they are computerized, there is also the chance that DREs may malfunction or break.

Which system should New York choose? There are several factors to consider, but the chosen voting system should fully comply with HAVA, be cost-effective, and easy for voters of all ages to use. Although the exact purchase cost of each system varies from manufacturer to manufacturer, in general, DRE machines cost more than optical scan machines.¹²⁶ However, the extra cost of a ballot-marking devices must be added to the optical scan machines because “[i]n order to be in compliance with HAVA regulations the optical scan machines must be accompanied by a ballot-marking machine for use by the disabled voting population.”¹²⁷ A separate ballot-marking or other device is unnecessary with the DRE machines, so there is no added cost.

Another additional cost with optical scan machines is purchasing privacy booths or some other system to ensure that voters are able to vote privately, without anyone else being able to view who they voted for.¹²⁸ Also, paper ballots must be purchased to use with the optical scan machines as well as protective sleeves for voters to keep their ballots in.¹²⁹ So, even though the cost of DRE machines is more expensive up front, the additional pieces required to use the optical scan machines might eventually make the cost of optical scan machines higher than

¹²³ N.Y. ELEC. LAW § 7-202(j).

¹²⁴ Clancy & Graziano, *supra* note 4.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

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that of DREs, or at least equal. Thus, since the cost of the machines would likely equal out, the decision should come down to which type of machine would be easier for voters to use and which voters feel the most confident voting on.

The DRE machines are likened to ATM machines because they are computerized and have touch-screens. The youngest people of voting age would generally have no trouble using the DRE machines because they have grown up with computer technology and are likely to have encountered an ATM machine before. Older voters, however, may not have used an ATM machine or even a computer before, and they may be uncomfortable using DRE machines. As computer technology increasingly becomes a part of society, more and more people are used to encountering this type of machine, and it will likely not be a problem. For those voters who are not comfortable on the new machines, poll workers should be well-trained on the new machines and, thus, competent to aid voters who need help.

Optical scan machines would likely be easier for voters of all ages to use. Younger voters have encountered optical scan forms in school for taking tests and older voters may have used similar forms to play the lottery. Additionally, filling in a bubble with a pen or pencil is easy enough for almost everyone to understand without much help.

The bigger question may be how much confidence do voters have in each of these types of machines? And what have studies shown about the percentage of voting errors for both of these machines? In some studies of various types of voting systems, “[v]oters in simulated elections rated some DREs higher than paper ballots.”¹³⁰ Paper ballots, by contrast, have been criticized as “old-fashioned.”¹³¹ Furthermore, paper ballots have ranked low in voter confidence in some surveys, perhaps because voters realize that they still allow for human error, such as incorrectly filled in bubbles, or being counted incorrectly, even if they are filled out correctly.¹³² Voters in simulated elections have also been dissatisfied with the fact that it is necessary to start over with a new ballot when they want to change their vote.¹³³ However, optical scan machines were “[o]ver 97% accurate on all

¹³⁰ Niemi, *supra* note 119.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

systems in [the] simplest situation.”¹³⁴ Some DRE machines were more accurate than the paper ballots when voters needed to change their votes.¹³⁵ But generally, paper ballots were more accurate than DREs.¹³⁶

Whichever system New York chooses, the best way to improve voting accuracy will be to train poll workers very well on the new electronic machine so that they, in turn, will be better able to help voters. Training is necessary because studies have shown that voters are unsure how to vote their first time.¹³⁷ This will be especially relevant once new technologies are put in place because New York citizens, accustomed to lever machines, will feel as though they are voting for the first time.

Ultimately, as Richard Niemi suggests, students in high schools should be trained on how to vote on the new machines.¹³⁸ Since many high school seniors turn eighteen while they are still in school and come of age to vote, it makes sense to train them on voting while in school. Additionally, teachers might be able to devote time to making sure that each student is well-trained and the students might get more one-on-one attention in school than if they needed help at a polling place. Students also may feel more comfortable asking their teachers for help if they have trouble with the voting system than going up to a poll worker, who is a stranger, on voting day. Lastly, if young people learn how to vote while in high school, they may become more comfortable with the process and more likely to actually go out and vote on Election Day. Historically, young people do not exercise their right to vote as much as other age groups of society,¹³⁹ so anything that may help to get younger voters out to vote would be helpful.

VI. HOW COUNTIES ACTUALLY BEAR THE BURDEN OF IMPLEMENTING HAVA

We, by no means, intend to supplant the traditional role that [s]tate and local governments have played administering elections for Federal office. But, for the first time, with this legislation, the

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See, e.g.,* KELLY HOLDER, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004: POPULATION CHARACTERISTICS, U.S. CENSUS BUREAU 2, 5 (Mar. 2006), <http://www.census.gov/prod/2006pubs/p20-556.pdf>.

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Congress—[t]he Federal Government—will set basic minimum requirements and provide critical resources for Federal elections . . . For the very first time, the Federal Government will become a real partner with [s]tate and local governments in the administration of Federal elections . . . For the very first time, again, the Congress and the Federal Government will start paying their fair share of the cost of administering elections for Federal office.¹⁴⁰

-Connecticut Senator Christopher Dodd, Senate Co-Sponsor of HAVA legislation

Counties in New York State conduct all elections—state and federal.¹⁴¹ Thus, the voting experience might be slightly different from county to county, but the State has always created certain standards with which all counties must comply.¹⁴² Now, HAVA has created standards with which all counties must comply, but uses the State as a middleman to create a plan for all of New York, so that the counties are fairly uniform. The counties already have a big task when it comes to running elections because there are so many different factors involved in voting. For instance, counties must oversee citizens registering to vote, registering for a particular party or no party affiliation, and buying, fixing, transporting, and storing the voting machines. They must also hire poll workers and train them on machines, keep a current list of all people validly registered to vote in the county, conduct primary and general elections, and then count votes. Thus, there is a lot the counties have to deal with, even after developing a good system and having the same type of voting machine for years.

This electronic revolution of voting machines that HAVA requires is expensive because each polling site must discard its old voting machines (meaning lever machines in New York) and replace them with new electronic voting machines if the State chooses to receive HAVA funds.¹⁴³ Although the federal government provides funding to states that agree to implement

¹⁴⁰ Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?*, 29 U. ARK. LITTLE ROCK L. REV. 679, 681 (2007); 148 CONG. REC. S709-11 (daily ed. Feb. 13, 2002) (statement of Connecticut Sen. Dodd, Co-Sponsor of HAVA legislation).

¹⁴¹ Clancy & Graziano, *supra* note 4; N.Y. ELEC. LAW § 3-226 (McKinney 2008).

¹⁴² N.Y. ELEC. LAW § 3-226.

¹⁴³ See 42 U.S.C. § 15481(a), (c); Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1732 (2005).

HAVA, it is the counties within those states that ultimately bear the burden of implementing HAVA. Furthermore, just because the state has received funding does not necessarily mean the funding has trickled down to the counties for them to progress with implementing HAVA.

The counties in New York State got a taste of implementing HAVA as they were required to quickly implement new machines, called ballot-marking devices, for the 2006 Primary Election.¹⁴⁴ This implementation resulted from the United States's 2006 lawsuit against the New York Board of Elections, culminating in "Plan B."¹⁴⁵ However, Plan B is only "a temporary solution[,] where at least one handicap accessible voting machine would be available per county in New York for the 2006 Primary and General Elections."¹⁴⁶ The problem with rushing the counties into implementing Plan B is that the counties were forced to spend a lot of money (a portion of their allotted federal funding) on a machine that was not planned to be used more than twice.¹⁴⁷ These machines were only intended to be used temporarily because the New York Board of Elections had not selected any election machines to be used permanently that would also comply with HAVA.¹⁴⁸

Buying machines that will be used just twice is extremely wasteful in terms of taxpayer funds as well as time spent implementing and training people on the machines. However, New York was left with no other choice after the U.S. lawsuit and the U.S. District Court's order in 2006. As the 2008 federal elections approach, New York still does not have a permanent plan for HAVA implementation, even though U.S. District Court Judge Gary Sharpe ordered on December 20, 2007 that the State must submit a plan by January 4, 2008.¹⁴⁹ New York has delayed implementation of HAVA for so long that Judge Sharpe warned that if the Board of Elections misses this deadline, the next step will be to appoint a "special master" to oversee New York's implementation of HAVA or jail the Elections Officials.¹⁵⁰

¹⁴⁴ Clancy & Graziano, *supra* note 4.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Ray Rivera, *Tools to Help Disabled Vote Are on Way*, N.Y. TIMES, Dec. 23, 2007, available at <http://www.nytimes.com/2007/12/23/nyregion/23voting.html>.

¹⁵⁰ Valerie Bauman, *Judge: N.Y. Must Make Voting Machine Plan*, ONEIDA DAILY DISPATCH, Dec. 21, 2007, available at

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Judge Sharpe also “ordered that every polling place have at least one machine by next fall that is accessible to the disabled and allows them to vote independently.”¹⁵¹

The Judge explained that the Board of Elections should “help” the counties in New York implement HAVA by the fall of 2008,¹⁵² but the task falls upon the counties. Since the counties do have a large burden, the State Election Commissioners’ Association urged the Court to set a deadline of 2009 for full implementation of HAVA.¹⁵³ There is the fear that replacing the lever machines, on which voters have been accustomed to voting for decades, with new electronic machines in such a short period of time will cause chaos¹⁵⁴ during the 2008 elections. Presidential elections generally have the highest turnout of voters out of all the elections, and it would be the first time most of those voters encounter the new electronic machines. Add to this the fact that the machines would be new to even the poll workers, and it is easy to picture the chaos that could erupt.

In September 2007, the Election Commissioners’ Association, which included several county representatives, submitted its recommendations to the New York State Board of Elections Commissioners, asking them not to propose anything that would require the counties to implement any new voting standards too quickly because it would be a burden on the counties.¹⁵⁵ The Report states, “[t]he County Boards of Election must not plan or be asked to undertake a plan that will result in the electoral equivalent of a ‘train wreck.’”¹⁵⁶ The counties have made it clear throughout the HAVA compliance process that it would be an unrealistic burden for them to be rushed into implementation.¹⁵⁷

It is unfair for the State to take so long in fulfilling its obligations that need to be fulfilled before the counties can do their part and to then create an unrealistic timeline for the counties to satisfy their part of the requirement. Since the

http://www.oneidadispatch.com/site/news.cfm?newsid=19135904&BRD=1709&PAG=461&dept_id=68844&rft=6.

¹⁵¹ Cara Matthews, *Board of Elections Scolded by Judge*, TIMES UNION (Albany), Dec. 21, 2007, at A3.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Senteno, *supra* note 6.

¹⁵⁵ Letter from Election Comm’rs Ass’n of the State of N.Y. to N.Y. State Bd. of Elections (Sept. 19, 2007) (on file with Albany Law Journal of Science and Technology).

¹⁵⁶ *Id.*

¹⁵⁷ Senteno, *supra* note 6.

counties are actually the ones who are truly implementing HAVA, the State Board of Elections, the U.S. District Court for the Northern District of New York, and the United States government should take the counties' interests into account more when they are arguing over deadlines for New York to comply with HAVA. Also, not only would it be a burden for counties to rush through implementation, but it increases the possibility of problems on Election Day.

If poll workers have not been sufficiently trained and cannot help voters adequately, voters may not be able to cast their votes properly or lines may become very long at polling sites. If voters cannot cast their votes, it may lead to disenfranchisement and has the potential to affect the outcome of an election. The states that have implemented HAVA and have had trouble with the new electronic machines on Election Day have been those states that did not take enough time to train poll-workers and voters.¹⁵⁸ For example,

In the 2002 primaries, Broward and Miami-Dade counties, two of the state's most populous, were plagued with machine problems from the moment the polls opened (hours late in many locations) until closing. The meltdown was largely pinned on poll-worker inexperience with the new technology, but poor training and machine glitches played a large part.¹⁵⁹

This is a worst-case scenario, but voting is arguably the most important right we have as Americans and it is important for elections to operate correctly.

VII. CONCLUSION

2007 was the fifth anniversary of the passage of the Help America Vote Act, and New York is the only state that has still not complied with the law. Of the states that have complied with HAVA, some have been successful and some have not. New York should learn from the mistakes of the states that have been unsuccessful and should not rush the counties into compliance; although the State has pressure on it from the U.S. and the U.S. District Court for taking so long to come up with a plan for compliance, the U.S. and the Court should not punish the

¹⁵⁸ THE PEW CENTER ON THE STATES, THE HELP AMERICA VOTE ACT at 5: VOTING MACHINES, BEYOND THE CALL FOR PAPER, *available at* <http://www.pewcenteronthestates.org/uploadedFiles/HAVA.At.5.pdf>.

¹⁵⁹ *Id.*

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counties in New York for the State's tardiness. In fact, the silver lining of the situation is that New York can see the machines that have caused problems in other states and not buy those; it can take extra time to train its poll workers and educate the general public; and it can look for guidance to the states that have been successful in complying with HAVA, and have run Election Days with minimal problems. All of the major players in the situation must keep in mind first and foremost the average voter and the value of his or her Constitutional right to vote on Election Day.

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