

**Testimony of Council Member Bill Perkins
Deputy Majority Leader
Chair of the Governmental Operations Committee
Before the New York State Board of Elections
Hearing Concerning Draft Voting Systems Standards
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My name is Bill Perkins. For the past eight years it has been my privilege to serve in the New York City Council, representing the ninth district. I am the Deputy Majority Leader, and the Chair of the Governmental Operations Committee. The Committee's many responsibilities include oversight of the New York City Board of Elections and of local election law. Over the past three years the Committee has held several hearings concerning the federal Help America Vote Act of 2002 (HAVA). My testimony today will focus on HAVA implementation in New York as it relates to the voting system standards under consideration at this hearing.

Machiavelli said that, "There is nothing more difficult to plan, more doubtful of success, more dangerous to manage than the creation of a new system." It appears he may have been correct, as I must report that we New Yorkers should be ashamed and alarmed by the mangled process of HAVA compliance, as it has unfolded in our State. New York is the Empire State. It is supposed to act as an example to the rest of the country, indeed to the rest of the world. New York is expected to lead, and we should never waver from that role. Yet, on the subject of compliance with the Help America Vote Act, our only distinction thus far is that we are running dead last in implementation. We are a State and a City perilously at risk of forfeiting substantial federal dollars for noncompliance. What is worse, we are jeopardizing government's credibility with the public, the transparency and accountability of future elections, and even the legitimacy of our system of government. While every other jurisdiction under HAVA's purview has undertaken

substantive measures to prepare the way for modernized voting, New York continues to dither, to misstep, to mire the process in what can only be called institutional and political dysfunction. The catastrophe which today we call HAVA “compliance” in New York is yet another maddening example of the lack of leadership that has come to characterize Albany, at many levels, on every side of the political spectrum.

What makes this latest episode especially frustrating is the fact that so much is at stake. Recall the events that prompted Congress to craft HAVA: the 2000 Presidential election had been reduced to a circus of “hanging chads” and partisan vituperation; the United States Supreme Court became an instrument of politics; and the legitimacy of an election for the highest office was encumbered by a question mark. Our leaders in Washington understood that the time had come for bold, reasonable, decisive action. To Congress’ credit, and even to the President’s, HAVA was drafted, passed and signed into law with the intention and the means to restore credibility to American democracy. It is to Albany’s *discredit*, however, that New York is now the leading candidate to replace Florida in the next great electoral crisis.

How did New York collapse into such a sorrowful state of affairs? It has been documented by others, but I would be remiss in my civic and official duties if I did not make a record here of the squandered opportunities, as I understand them. The history of New York’s HAVA misadventure is consummately relevant to the matters now confronted at this hearing.

The first blunder occurred when Governor George Pataki established the HAVA Implementation Task Force (“Task Force”). Under HAVA the State was required to submit a HAVA Implementation Plan (“Plan”) to the Federal Elections Commission. The

Task Force was created ostensibly to perform the critical first step of preparing New York's Plan.

One would think, given the fundamental and sensitive nature of the mission confronting the Task Force, that the Governor would make it his first priority to assemble a Task Force that reflected the various constituencies of New York. He didn't. Instead, he drafted a much more exclusive roster. Never mind that he stacked the Task Force with members of his Party and of his Administration. The real offense was that he neglected to appoint a Task Force that was representative of the diversity that characterizes the people of New York. The Task Force he assembled underrepresented women and communities protected by the Voting Rights Act, and short-changed poor, urban areas as well.

The Governor compounded matters when he by-passed the Executive Director of the State Board of Elections ("State Board") for the role of Chair of the Task Force. At the time the State Board Director was an acknowledged expert on HAVA, and presumably the state's 'Chief Election Official' a designation that was relevant because HAVA entrusted stewardship of the Implementation Plan to this office. Since the Director was not a member of the Governor's Party, the Governor reached past him and selected a Deputy Director at the State Board, a member of the Governor's Party, and bestowed upon him the title of 'Chief Election Official' for the State, a title that had not previously existed. It was a move that was clearly engineered to shoehorn a member of the Governor's Party into control of the Task Force.

Regrettably, the Chair did not make creative or diligent use of the Task Force. He convened it just five times prior to publication of a draft of the Plan. He did not form one subcommittee. He did not commission one study. He did not call for one vote. He refused

to hold even one public hearing prior to the drafting of the Plan. Incredibly, the Chair even denied members of the Task Force the opportunity for a substantive, collective, formal review of the Plan, which was drafted by staffers at the State Board, prior to its submission to the FEC. The Chair did agree to tolerate fifteen minutes of public comment prior to some meetings, and half an hour after, which time was mostly utilized by representatives of non-profits such as NYPIRG, DEMOS, the Brennan Center, Common Cause, Citizen's Union, the League of Women Voters, and others, some which offered their valuable time and expertise to the Task Force, to no avail.

Good government groups joined with members of the Task Force in repeated, concerted calls for greater diversity, more meetings, public hearings, better transparency and accountability with respect to the process. These pleas went unheeded. The Chair consistently responded that his technique was one of discussion leading to "consensus" over the course of a handful of meetings, a process that apparently would only become burdened by the formalities inherent in official hearings. It was the Chair's position that the HAVA timeline required such immediate action that it precluded the substantive deliberation and outreach called for by advocates and various Task Force members. He later admitted that by "consensus" he actually meant the consensus of staffers at the State Board, who in his discretion as the 'Chief Election Official' he would assign the responsibility of actually drafting the Plan. The accuracy of the Chair's reading of the timing required by the federal statute, and of his discretion under the statute, was questioned; but it appears that the Chair never bothered to document or substantiate his interpretation at any meeting of the Task Force.

Not surprisingly, the Plan that was submitted to the FEC was long on vagueness and platitudes and short on concrete details. For example, the Plan provided no guidance on vital questions such as what types of voting machines should replace the almost 20,000 lever-action machines used throughout the state for half a century. It also failed to identify areas where HAVA implementation would require State legislation, to advance sample legislation, or even to acknowledge a role for the Legislature.

The Plan included no meaningful standards for compliance with HAVA requirements regarding improved accessibility for disabled voters, and it provided no mechanism for inclusion of advocates for the disabled in the certification process. It also failed to take advantage of the opportunity to improve accessibility for voters whose English proficiency is limited. It also missed easy opportunities to increase voter registration, such as suggesting simple changes that could be made to provisional ballots, which in New York is done by affidavits that may easily be converted to voter registration applications for aspiring voters who it turns out are not registered.

The Plan had other problems. It was silent on the crucial matter of a voter verifiable paper trail, which in the minds of many is critical to accountability and credibility of the vote. The Plan did not provide any guidance on the compilation of the statewide, computerized voter registration database, which is another hallmark of HAVA. The Plan also did not put forth a sample Voter's Bill of Rights for display at poll sites.

One particularly glaring oversight is the fact that the Plan does not make plain the principle that every aspect of vote tabulation must remain under the public's control. Not taking a stand on this issue opens the door for private manufacturers to infiltrate public elections through control of voting system elements such as source-code, software, and

hardware. Ultimately, the Task Force's failure to advance an actual, credible, tenable action plan left far too many details unresolved. Much is left to the discretion of staffers at the State Board, again without sufficient or substantial public comment.

To their credit, some members of the Task Force issued an aptly-titled Minority Report ("Minority Report") correctly identifying many of these very concerns, and ripping the last of the façade off of the notion that the procedure employed by the Chair of the Task Force would result in "consensus." Perhaps the most critical issue raised by the Minority Report is the Plan's failure to facilitate procurement of a single, uniform voting system for use throughout the entire State. This omission is particularly troubling since the Chair himself repeatedly acknowledged that HAVA's intent is uniformity in voting; that uniformity in voting is in fact, "the key to success of the law's intent."

As it turns out, this is one of the more catastrophic of the many failures involved. New York lost a golden opportunity to enhance equality of voting throughout the state, and also to take advantage of economies of scale with respect to procurement and maintenance of machines, which would have maximized taxpayers' buying power. This is where the Governor's Task Force set the stage for the Legislature's disastrous decision to allow fifty-eight local Boards of Elections to select their own voting machines from among varying technologies and models to be certified by the State Board.

The facts that members of the Task Force felt compelled to issue a Minority Report, and that the Report was more specific and proactive than the Plan itself indicate that the Task Force, despite the shortcomings of its composition, possessed the intellectual resources to create a more significant Plan. These facts also show that the leadership of the Task Force lacked the political will or interest to produce such a

substantial Plan. The Governor, through his appointment power, held ultimate influence over the Task Force. We can only surmise that it was the Governor's will that the business of the Task Force be conducted in such an insular, partisan manner. It must also have been the Governor's intent for New York to submit a toothless Plan that is stone deaf to public input. In New York's tortured march toward impending non-compliance with HAVA, Governor Pataki may be credited with having led the State in its first critical, misguided steps.

However, the Governor was not alone. The Legislature had the responsibility to pass enabling legislation in order to comply with various aspects of HAVA. This was easily the greatest opportunity any lawmaker in Albany would ever have to strengthen and expand voting in New York. Did they respond like individuals on the precipice of a historic moment? No. They descended to the usual partisanship, and let it cloud their collective judgment. They withheld compromise and delayed action, all of which wasted time and energy, which always means money. In the end, the Election Reform and Modernization Act (ERMA) was passed on the last day of the legislative session, in the summer of 2005, two years after the filing of the Plan, and a scant fifteen months before the fast approaching deadline. Sadly, after all of that time, the Legislature produce legislation which remains incomplete.

Under HAVA, our Legislature was responsible for enabling legislation to provide the counties throughout the State with the tools necessary for the work of modernizing elections. These measures included a statewide computerized voter registration database, standards for new voting machines, equal access for disabled voters, provisional ballots at the polls, the setting of standards for voter identification at the polls, creation of statewide

administrative complaint procedures for voters, training for poll workers, and the sharing of accurate and comprehensive information with the voting public. A Joint Legislative Conference Committee on HAVA (“Conference Committee”) was created.

Now, reasonable people understand that forging agreement on complex, legislative matters can be a difficult endeavor, fraught with all manner of legal and political perils. I am especially sensitive to this. However, there is nothing to suggest that the particular duties attendant to HAVA were so onerous as to result in the retrograde motion that characterized the Conference Committee’s deliberations. For example, it was three years after the passage of HAVA before the Legislature could finally resolve the roiling controversy over which list of identifications to approve for statewide use at the polls. To be sure, genuine concerns were raised, such as one side believing that over-reliance on driver’s licenses would disenfranchise downstate individuals and communities that are less likely to drive or own cars, and the other side’s concern that lax ID standards could lead to wholesale vote fraud. I certainly do not mean to trivialize the challenge. But does this really sound like a puzzle that is so complicated, so confusing to the legislative mind, as to risk any part of the over 200 millions federal dollars attached to compliance? Is it really the case that the question, “Hey folks, what ID’s should we use?” is enough to grind Albany to a three-year halt? Great and historic wars have been fought and won in less time.

Of course there were other more serious, more complex and controversial issues for the Conference Committee to contend with. The most confusion, apparently, was sown by the question of which voting machine technology to certify for use by the

counties. Lobbyists for companies that produce voting machines descended upon the capitol, presumably to clarify the issues. They failed.

Again, there is no doubt that this particular task must have presented members of the Conference Committee with a palpable challenge. After all, the choice of voting technology is not incidental, but rather central to HAVA. Some would argue, myself amongst them, that the choice of voting technology is fundamental not only to HAVA, but to the entire democratic process. Legislative leaders may be forgiven for treating this particular point soberly, and not rushing its deliberation.

What is not excusable, however, is to delay action to the point where a spark becomes a five-alarm fire, and then to run screaming from the room. This is what the Legislature did when it waited until June of 2005, three years after the passage of HAVA, five years after the Florida debacle, but a mere fifteen months before an intractable deadline, to finally decide that each of the fifty-eight local Boards of Elections should each just select their own technologies. The Conference Committee could not finish the job and figure out what works best for the people of this State. So they washed their hands. If this is all they were going to offer, couldn't the Legislature have had this breakthrough sooner rather than later? They ate up all of our precious time on a very critical point, arguably the centerpiece of HAVA, only to produce nothing.

The Legislature's decision to make no decision essentially guarantees the subversion of HAVA to the extent that uniformity of voting standards across the state is now a virtual impossibility. The likelihood of HAVA compliance plummeted the instant Albany "punted" the decision on technology to the counties and New York City. Do legislative leaders really believe that fifty-eight local boards will more easily be able to

sort through the issues surrounding the various voting technologies? Do they believe that the local boards will be able conclude their evaluations, complete the procurement process, make the infrastructural changes necessary, train staff and poll workers, and perform the sundry other tasks required by HAVA compliance in a matter of months? How about the fact that the process is now languishing at the State Board of Elections, which is responsible for certifying the actual machines available to the local boards? In this context, the Legislature's delay and ultimate abdication of responsibility all but assures that New York will not timely comply with HAVA.

Critical to an understanding of the depth of this malfunction is the knowledge that HAVA compliance always came with a deadline. The first deadline was the first federal election of 2004. That deadline came and went with zero substantive movement in New York. Ironically, the only real action taken by the State, other than the filing of the anemic Plan, was an application for a one-time only waiver of the deadline, which extended the deadline to the first federal election of 2006, which is now just months away. The deadline is important because over 200 million federal dollars are at risk if we do not timely comply.

I am not alone in my frustration. Criticism and anxiety generated by this entire process is mounting in every corner. The list of organizations that have voiced serious, HAVA-related concerns to the Governmental Operations Committee includes virtually every good government group in this city. I am sure that the State Board has heard from all of them. Every major newspaper has also lamented HAVA's stagnation in New York.

The professionals who will be responsible for the ground-level work of HAVA implementation are also concerned. The Executive Director of our own New York City

Board of Elections, Mr. John Ravitz testified, as late as this year, 2005, before the Council's Governmental Operations Committee, that he remains "in the dark" regarding HAVA implementation. Asked if HAVA non-compliance is basically a *fait accompli*, he responded that the very question keeps him up at night.

Mr. Ravitz is so concerned that this process has simply not left enough to comply, that he has warned the City to engage now in preemptive negotiations with the United States Department of Justice. Indeed, the Justice Department itself is already threatening that it will take action against New York for non-compliance. Those who think that these are empty threats, or that the Justice Department will only confront the State, and that local Boards need not worry, should know that Westchester County has already been sued under HAVA for failing to have an effective Spanish language election program and failing to have information posted in polling places. You may add the exorbitant cost of litigation to money that will be lost by taxpayers due to New York's poor performance.

Right now the process of HAVA compliance depends squarely upon the State Board. The Board has issued draft Guidelines for Voting System Standards ("Guidelines"). These Guidelines are rife with problems. For example, there is no provision to alert voters of "undervotes" and allow for correction, which is guaranteed to disenfranchise voters and depress turnout in individual races, especially the ones that appear further down ballot, and are easier to overlook.

There is also no prohibition in the guidelines against communication capabilities in electronic voting equipment, which again leaves our public elections vulnerable to infiltration and corruption. Similarly, the Board's guidelines provide for no independent audits of the computer code and software of new voting systems. The guidelines do not

create any mechanisms for testing security and assuring the public of the system's integrity. How can a public that is so familiar with the frequency of computer hacking feel any security in the integrity of votes tabulated by technology that is characterized by gaping holes of remote access, and which lacks independent oversight?

There are several other problems with the Guidelines. For example, the provision regarding the voter verifiable paper record does not require tailoring for the visually impaired or for language minorities. The Guidelines also fail to protect the State's language minorities in that they are silent on requiring machines to be accessible to groups protected under the Voting Rights Act. This is New York. We are a city upon a hill that draws people from around the world. This is also a City that has three counties that are subject to pre-clearance by the Department of Justice. New voting systems must provide assistance in the languages currently required by law, and also have the capability of adding future languages.

Most relevant, I suppose, to the ultimate purpose of my participation at this hearing, is the fact that the Guidelines should have gone further to make sure that the local Boards of Elections will have a choice between various voting systems. The Guidelines should require that vendors submitting computerized Direct Recording Electronic (DRE) machines for sale in New York must also submit their Optical Scan (PB/OS) systems for consideration.

This does not mean that the State Board would be taking a stand in favor of one technology over another. However we all know, as it has been widely reported, that vendors would prefer to market more costly DREs than optical scan systems. The Board should not stick its head in the sand on this. By not requiring equity from the vendors in

terms of technologies offered, the Board is acquiescing in the stacking of the deck in favor of the more expensive technology. This is especially distressing because of the mounting evidence that DRE's are the inferior choice for New York.

Optical scan systems have many advantages over DRE's. For example, whereas DRE systems force absentee and provisional voters to use a different type of ballot from everyone else, PB/OS voters all use an identical ballot. Voters will easily understand optical scan ballots, as it is basically an exercise in filling bubbles next to the names of one's selections. On the other hand, many segments of the population such as those with cognitive disabilities and the elderly consistently report difficulties with DRE technology.

Optical scan ballots are automatically voter verified because the voter marks it him or herself. DRE's do not require voter verification. Furthermore, PB/OS systems allow voters to vote only once. A DRE system may be compromised via "smart" cards to calculate multiple votes for every vote cast. But optical scan systems already in use typically have many security features for auditing and preventing counterfeiting, such as tear-off ballots with serial numbers, watermarks and the like. There is also the fact that the voters will be assigned only the number of ballots needed at sign in, and that there may be an accounting at the end of the day of the total number of optical scan paper ballots that have been cast, spoiled, or which remain unused. These can be tracked and counted and reconciled against the sign-in logs.

Optical scanners allow voters to easily correct mistakes, as the scanner will reject an over-voted or smudged ballot, allowing the voter to get a fresh ballot to correct the mistake. PB/OS systems also warn voters in the case of an under-vote, allowing for the opportunity to cast any missed votes or continue with the casting of the ballot.

Studies also consistently find that optical scan systems have lower incidents of invalid votes than DRE systems. Optical scan ballots are easy to recount by hand; no special expertise is needed. DRE's on the other hand require a computer engineer to perform this pivotal function. With optical scan systems, voters can vote in the event of equipment failure, because they can still fill in their paper ballots. With DRE's, once the machine shuts down, there is no way to record the vote, meaning that many votes will be discouraged and inevitably lost.

As if all of the preceding arguments based on accuracy, transparency, fairness, equality, simplicity, practicality, security, integrity, constitutionality, logic, and reason were not enough, there is also the fact that PB/OS systems are simply more cost effective than DRE's. It has been estimated that the total cost for acquisition of DRE systems for the State of New York is in excess of \$230 million. The acquisition cost for optical scan systems is around \$114 million, for a potential statewide savings of around \$116 million.

While PB/OS systems do have ongoing expenses, especially those related to the paper involved, these are more than offset by the storage and transportation costs involved with DRE's. More to the point is the fact that the lifespan of these technologies are so out of sync. No one knows how long DRE's will last, but touchscreens are notoriously fragile and are generally not warrantied beyond five years. PB/OS systems can last a minimum of fifteen years, judging by the fact that Oklahoma has been using the same PB/OS machines for just about that long.

For those of us who look for silver linings, New York's delayed HAVA implementation could be seen as having one unintended benefit: we could learn from the mistakes of others. Unfortunately, that is not happening here. Jurisdictions throughout the

country implementing DRE systems have unleashed an epidemic of voting irregularities, miscounts and system failures. In Miami-Dade County, Florida, the problems consistently plaguing their recently purchased DRE systems included flawed vote counts due to hardware and software malfunctions, and operational costs overruns way beyond expected costs. So many votes were lost during one referendum that the controversy forced the resignation of the county's Supervisor of Elections. The new Supervisor issued a report recommending that the county would be better off scrapping its \$25 million worth of new DRE's and starting from scratch with optical scan.

Is New York learning from that example? Of course not. The only machine that the State Board has even tested for certification so far is a DRE. And what a machine it is. The model that was tested, a LibertyVote DRE by Liberty Elections Systems, is missing a voter verifiable paper audit function and a sip/puff attachment for disabled access, as required by ERMA. The State Board wrote to their Voting Systems Citizen Advisory Task Force members notifying them of the fact of the testing and indicating that they find it acceptable to test the machine as is, because they can always perform more tests when the machine is modified. Never mind that it is counterintuitive and unscientific to test a system that is missing key elements and expect that the results will be accurate.

Incidentally, the LibertyVote DRE is essentially the same model that was purchased by the Republic of Ireland at an acquisition cost of over \$60 million. Much to their surprise, Ireland's Independent Commission on Electronic Voting refused to certify the machines due to concerns over security and accuracy. Currently they are collecting dust at an annual storage rate of close to a million dollars a year. It is unclear whether they will ever be suitable for use during an actual election.

Tomorrow, I will introduce a Resolution in the New York City Council that calls for the State Board of Elections to promptly certify optical scan machines for consideration by the local boards of elections. It also calls for the New York City Board of Elections to choose optical scan as the next generation of voting technology for our city. Several good government groups support this technology. Major newspapers, including the *New York Times* have already endorsed optical scan as the only logical choice. I hope that our city goes in the right direction

New York still has an opportunity to accomplish all that HAVA was meant to provide. I urge this State Board to do all it can. Move quickly please, because we are running out of time. Be creative, act in good faith, with transparency, accountability, and due diligence, and with respect for substantive public input. Provide the local boards with the tools for a fair and robust process. Remember that history is building on the precedents that you establish; the future is watching every thing you do. Thank you.