

VOTING MATTERS II:

No Time to Waste

A Report from
the New York State Attorney General's Office



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EXECUTIVE SUMMARY

In February 2001, the Attorney General issued a report identifying significant problems with the voting process in New York and urging action on key recommendations to ensure voter access and participation, voter choice, and vote integrity.¹ The 2001 AG Report was issued in response to a just-concluded Presidential election in which it became clear that many voters nationwide lost their votes due to flaws in the electoral process, and that these losses made critical differences in close elections. The Report took a thorough look at New York's electoral process and identified key changes that needed to be made to ensure that each and every citizen has a full and fair opportunity to vote and to have that vote counted.

The 2001 AG Report was a call to urgent action on the part of the Governor, the State Legislature and the State Board of Elections, to improve our registration system, to make voting equally accessible to all of our diverse citizens, and to make sure votes are counted in a fair and uniform way. The Report called for changes to voting machines, creation of a statewide registration list, expanded opportunities to register and to vote, and a host of other needed reforms.

In response to the serious problems with the 2000 Presidential vote, Congress acted – it passed new legislation in 2002, the Help America Vote Act (“HAVA”), mandating significant improvements in the electoral process across the country, with tight deadlines for compliance and the promise of significant federal funds for doing so. HAVA requires states to upgrade their voting machines, to create a statewide computerized registration list, and to make many other changes to ensure the right to vote and the right to have those votes counted.

What did New York do in response? The simple answer is: very little.

In November 2004, some election races across the country once again were decided by a tiny margin of votes. In addition, there were numerous reports in New York State of election-day difficulties that led to lost

¹ “Voting Matters in New York: Participation, Choice, Integrity, Action,” Office of Attorney General Eliot Spitzer, February 12, 2001 (“2001 AG Report” or “Report”).

voting opportunities. Most notably, in a State Senate race in Westchester County, questions regarding what votes should be counted went all the way to the Court of Appeals, and the outcome will turn on a small number of votes. Three months have passed since that election was held, and these votes still have not been counted and no winner has been declared.

These incredibly close races highlight the importance of each citizen's individual vote – which is the keystone of our democracy – and the need to improve our election process. The time for action is now.

Unfortunately, New York is not even close to meeting the HAVA deadlines and runs the substantial risk of losing federal funding for necessary changes. Before the HAVA deadlines expire in 2006, New York's automated lever voting machines must be replaced with machines that are fully accessible to the disabled and otherwise in total compliance with HAVA. A statewide voter registration computerized database must be put in place. Additionally, long-sought reforms to our methods of vote casting and vote counting should be made.

This updated report seeks to send the alarm to the decision makers and the populace: we must act now to reform and renew our voting system. Our democracy requires no less.

I. New York State Must Urgently Comply With The Federal Election Mandates

A. The Federal Help America Vote Act Sets New Requirements And Imposes New Obligations On New York.

In response to the 2000 Presidential vote count controversy, Congress passed the Help America Vote Act (“HAVA”) in October 2002.² HAVA's goal is to ensure the integrity of the electoral process and to increase voter participation nationwide. The Act imposes significant mandates on the states, including a statewide computerized voter registration database, standards for new voting machines, equal access to vote casting for disabled voters, provisional ballots at the polls, a limited requirement for voter identification at the polls, a statewide administrative procedure for voting complaints, training for poll workers, and the provision of accurate and comprehensive information to voters.

² 107 P.L. 252 (Oct. 29, 2002); see 42 U.S.C. §§ 15301-15545.

Congress made federal funds available to supplement state funds for HAVA implementation. HAVA requires states to submit to the Federal Election Commission (“FEC”) a State Implementation Plan (“SIP”) detailing the intended use of federal funds.³ Federal funding is contingent on states’ compliance with HAVA-imposed deadlines for implementing key mandated actions. In some instances, HAVA permits states to seek a one-time deadline waiver, establishing specified new deadlines, but the new time frames remain short.

To prepare New York’s SIP, Governor Pataki established a twenty member HAVA Implementation Task Force chaired by the Deputy Executive Director of the New York State Board of Elections, and composed of fifteen state, county, and local officials, two party officials, and two members of not-for-profit entities. New York presented its SIP to the FEC in August 2003.⁴ The Draft Plan set forth the State’s intention to meet the requirements of HAVA, but offered few details on achieving compliance. Four members of the HAVA Task Force released a minority report strongly criticizing the Draft Plan for its vagueness and lack of detail.⁵ Numerous civic groups also objected that the Draft Plan failed to provide meaningful guidance on how the state would meet HAVA’s mandates.

B. New York Must Dramatically Step Up Its Timeline For HAVA Compliance.

Immediate state action is necessary to implement the HAVA requirements. There is little time left for New York to meet HAVA’s deadlines on key reforms, such as new voting technology and a statewide computerized registration list. This delay must end, and actions must be taken to ensure that HAVA’s goals are met. The significant additional federal funds available to the state should not be forfeited because of a failure to timely meet these deadlines.

³ HAVA §§ 254, 255; 42 U.S.C. §§ 15403, 15404.

⁴ New York State Help America Vote Act State Implementation Plan, New York State Board of Elections, Draft Plan, August 2003 (“Draft Plan”).

⁵ New York State HAVA Implementation Task Force Minority Report, September 2003.

1. Statewide Computerized Voter Registration List

HAVA set a January 1, 2004 deadline for the creation of a statewide computerized voter registration list.⁶ New York received a waiver of this deadline and must comply by January 1, 2006. No further waiver may be obtained. New York has not yet created such a list, and work on this project must proceed immediately.

2. New Voting Machines

HAVA imposes numerous requirements for new voting systems. As a result, New York must replace its old lever machines with upgraded modern technology capable, among other things, of providing access for individuals with disabilities, alternative language accessibility, and a permanent paper record with a manual audit capacity.⁷ New York received a waiver of the original November 2004 deadline and must now have HAVA-compliant machines in place in time for the “first election for Federal office held after January 1, 2006,” which is November 7, 2006.⁸ No more administrative waivers can be sought.

No detailed plan yet exists for the replacement of our lever machines. HAVA specifically requires return of federal funds received but not spent on “voting system replacement.”⁹ New York has already received \$66 million in early federal funds for HAVA implementation, most of which is earmarked for voting machine replacement. Every day of decisionmaking delay makes it more unlikely that New York can meet the November 2006 deadline.

3. Provisional Ballots

HAVA requires states to adopt “uniform and nondiscriminatory standards” defining what constitutes a vote and what is to be counted as a vote for each type of voting machine used in the state.¹⁰ HAVA also requires

⁶ HAVA §303(d)(1), 42 U.S.C. § 15483(d)(1).

⁷ HAVA, §§ 301(a)(2), (3), and (4); 42 U.S.C. §§ 15481(a)(2), (3), and (4).

⁸ HAVA § 102(a)(3), 42 U.S.C. § 15302(a)(3).

⁹ HAVA § 102(d)(1), 42 U.S.C. § 15302(d)(1).

¹⁰ HAVA, §301(a)(6), 42 U.S.C. § 15481(a)(6).

that voters whose registration cannot be verified be offered provisional ballots, and that voters have free access to information as to whether their votes were counted, and if not, why not.¹¹

The Draft Plan notes that New York's currently-used affidavit ballots satisfy the provisional ballot requirement, but that New York must "amend" its notification process to ensure that provisional voters are informed of the disposition of their votes.¹²

4. Voter Identification Requirements For Registration By Mail

HAVA sets forth proof of identity requirements for first-time registered voters who register in person, and for those who register by mail.¹³ For first-time voters in federal elections who registered to vote by mail on or after January 1, 2003, states were required to apply identification requirements at the polls on and after January 1, 2004.¹⁴ These voters must provide identification at the polls, unless their mail-in registrations included certain verifiable forms of identification (i.e., a driver's license number or the last four digits of their Social Security number). The list of acceptable identification at the polls includes "current and valid photo identification," or "a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter."¹⁵

A state law codifying HAVA's identification requirements was enacted on September 7, 2004.¹⁶ It applied to the November 2004 elections, but sunsets on July 1, 2005. There reportedly was confusion in many polling places on Election Day regarding which voters had to provide identification and which forms of identification were acceptable. To better guide the public and ensure consistency statewide, a revised version of the law should be enacted that specifies acceptable identification documents, including, for example, official

¹¹ HAVA § 302, 42 U.S.C. § 15482.

¹² Draft Plan, 6-7, 23.

¹³ HAVA §§ 303(a)(5)-(8), (b); 42 U.S.C. §§ 15483(a)(5)-(8), (b).

¹⁴ HAVA §§ 303(d)(2)(A) and (B), 42 U.S.C. §§ 15483(b)(2)(A) and (B).

¹⁵ HAVA § 303(b)(2)(A)(I), 42 U.S.C. § 15483(b)(2)(A)(I).

¹⁶ Chapter 420 of the Laws of 2004.

letters from government agencies addressed to the voter, student identification cards and public housing identification cards.

5. State-Based Administrative Complaint Procedures

HAVA required that states either certify to the FEC before January 1, 2004 that state-based administrative complaint procedures have been put in place, or submit a plan explaining how this requirement will be met.¹⁷ The Draft Plan included a proposal to expand New York State's toll-free election information line, 1-800-FORVOTE, but deferred implementation to the State Board of Elections.¹⁸ This work needs to be done.

6. Election Fund

HAVA requires states to appropriate 5 % of the total projected cost of HAVA-related reforms into a state election fund, in order to be eligible to receive the substantial federal funding.¹⁹ It is essential that the 2005-06 state budget enacted by the Legislature include this funding.

II. Voter Participation Must Be Increased.

Voter turnout in New York remains comparatively low. In the 2004 presidential election, for example, less than 60% of New York's voting age population went to the polls.²⁰ New York can and must do better. We must strengthen our electoral process at all stages, from registration to vote counting. We must make it more streamlined, transparent and fair, and we must ensure the integrity of the process and the confidence of the voters. We must afford every eligible voter the opportunity to vote, including the physically disabled, those who speak languages other than English, and all others who have been historically disenfranchised.

A. Increase Voter Registration.

¹⁷ HAVA § 402, 42 U.S.C. § 15512.

¹⁸ Draft Plan, 39.

¹⁹ HAVA §§ 253(b)(5), 254(b), 42 U.S.C. §§ 15403(b)(5).

²⁰ Committee for the Study of the American Electorate (November 4, 2004).

In 2004, three million New Yorkers of voting age were not registered to vote. While many of these individuals may not have been eligible to vote, this number is still extremely high. State law mandates that the State Board of Elections take “all appropriate steps to encourage the broadest possible voter participation in elections,” and review each county board of election’s plan for voter registration, especially for groups historically under-represented among registered voters.²¹ New York must continue its efforts to register voters.

1. Make It Easy For New Voters To Register.

Congress has recognized the need to increase opportunities for citizens to register. The National Voting Registration Act (“NVRA”) requires that an individual applying for a new or renewed driver’s license be given the opportunity to register to vote, and that registration also be available at other designated state agencies, including public assistance and disability services offices.²²

In 2004, as in 2000, some New Yorkers who believed they had registered in this fashion found that their names did not appear on registration records when they went to the polls. As noted in the 2001 AG Report, the State Board of Elections should evaluate these concerns and address them, including improving data entry and expediting information transmittal to boards of elections.

2. Institute Election-Day Registration.

The 2001 AG Report endorsed election-day registration as a means to enable voting by citizens who miss the deadline for registration. Election-day registration would enable such citizens to exercise their franchise. In fact, the four states with the highest percentage turnout of eligible voters in 2004 – Minnesota, Maine, Wisconsin and New Hampshire – all permit election-day registration.

While there is no evidence that election-day registration has increased reported fraud in these states, election-day registration should be paired with various fraud prevention mechanisms such as requiring voters to sign an oath or affidavit that they are qualified to vote, requiring proof of identity and residence, segregating the

²¹ N.Y. Election Law §§ 3-102(14), 3-212(4)(b)(3).

²² 42 U.S.C. § 1973gg.

votes cast by election-day registrants, and requiring that the eligibility of these registrants be promptly verified.

3. Improve Registration Of Young Voters.

Voter registration forms should be distributed to high school seniors at the beginning of the school year. This would allow age-eligible students to register in time to participate in that year's November general election. By law, students living on college and university campuses may register for absentee ballots from their home addresses or, if they regard their campus addresses as their residences, may register to vote in the county where their institutions are located. Surveys conducted by the Office of the Attorney General suggest that students seeking to register in the counties in which their schools are located may sometimes encounter difficulties. In three counties in which residential colleges are located, individuals posing as students called the local boards of elections posing as students seeking to register and were told that they would have to register in the county of their family's residence. Although subsequent calls to the local board of elections determined that these statements did not reflect county board policy, the survey results suggest, at a minimum, the necessity for greater training of boards of elections staff.

B. Create And Maintain The HAVA-Mandated Statewide Computerized Registration Database.

The 2001 AG Report recommended the creation of a statewide computerized registration list. HAVA now mandates creation of such a list, which must contain the name and registration information for every legally registered voter in the state, with expedited updating of information.²³ HAVA further requires that the database be coordinated with other existing government databases. It requires that all state and local election officials be able to obtain "immediate electronic access" to the list.²⁴ This will enable a voter's registration status to be verified at the polls, and also provide the ongoing opportunity for corrections and updates. HAVA further requires the states to ensure the technological security of the list and to provide safeguards for the accuracy of

²³ HAVA § 303(d), 42 U.S.C. § 15483(d). As noted, the deadline for New York to comply is January 1, 2006.

²⁴ HAVA § 303(a)(1)(B)(v), 42 U.S.C. § 15483(a)(1)(B)(v).

the information it contains.²⁵

To increase the utility of the list, it is imperative that voters be able to confirm through the boards of elections that their names are on the list prior to an election. In addition, voters must be able to request that errors be corrected in order to ensure that otherwise properly registered voters do not lose their right to vote when there are mistakes in spelling of names, inverted names or excluded middle names, especially given New York's many and diverse voters.

In addition, such a database would avoid the recurrent problem of registered voters being turned away or being required to vote by affidavit ballot because their name is not on the local poll worker's list, when the real problem is that they are at the wrong election district. The poll worker should be able immediately to access the statewide computerized list, ascertain the correct district and direct the voter to it.²⁶

There should be safeguards against the misuse of the information contained in the list. The 2001 AG Report endorsed limiting access to voter registration information to the electoral purposes for which it was gathered. The database must be secure against unauthorized intrusion and must not be made available for commercial purposes.

C. Improve Voter Education And Outreach.

The 2001 AG Report underscored the responsibility of state and local authorities for voter education. The Report endorsed publishing voter guides, using the Internet and computer kiosks to educate voters, and creating and publicizing a voter's bill of rights. These recommendations remain all the more important given the HAVA-mandated changes New York must implement.

²⁵ HAVA, § 303(a)(3) and (4), 42 U.S.C. § 15483(a)(3) and (4).

²⁶ The New York Court of Appeals held last week that affidavit ballots filed in the correct polling place but in the wrong election district should be counted. Panio v. Sunderland, ___ N.Y.2d___, 2005 WL 237139 (Feb. 2, 2005).

In November 2004, for example, the New York City Board of Elections' hot line and website both malfunctioned on Election Day and the previous day. As a result, numerous public interest groups, such as the League of Women Voters, NYPIRG, and the NAACP Legal Defense and Education Fund were inundated with calls seeking information about where and how to vote.

Local boards of elections should ensure that polling site location information is mailed to voters. They should also use website postings, hotlines, and other available media to make sure voters know where and how to vote. On election days, accurate information must be available from workers at polling sites. Local boards of elections must be available by phone and internet to answer questions and must anticipate the rush of calls and efforts to access the website that will occur on election days. Sufficient funding must be made available for local boards of elections to get the job done.

III. The Vote Casting Process Must Be Improved.

All eligible voters must be able to vote easily, reliably, and efficiently.

A. Voting Technology Must Be Improved.

On Election Day 2004, as in past elections, there were numerous reports of broken voting machines. When machines break and voters must use emergency ballots, the process slows, lines get longer, and voters become discouraged from voting. New York relies almost entirely on lever machines that are over 40 years old, with close to 20,000 such machines serving some 15,000 election districts state-wide.²⁷ Because no new lever voting machines are being manufactured, it is increasingly difficult to get the spare parts to fix broken machines. This usually can be done only by cannibalizing discarded machines from other states.

HAVA sets new standards for "voting systems" and promises significant funds for states to update their machines by the 2006 deadline.²⁸ Such systems must maintain voter privacy and ballot confidentiality, permit voters to verify their choices, notify voters of "overvotes," permit voters to change their votes and correct errors

²⁷ New York State currently has some electronic machines in use in St. Lawrence, Franklin and Saratoga Counties.

²⁸ HAVA § 301, 42 U.S.C. § 15481.

before their votes are finally cast, produce a permanent paper record for the voting system that can be manually audited and is available as an official record for recounts, and provide alternative language accessibility as required by law.²⁹

HAVA requires that the voting “system” be accessible to individuals with disabilities, including “nonvisual accessibility for the blind and visually impaired,” and “in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”³⁰ HAVA requires the use “of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.”³¹ Experts agree that direct recording electronic (DRE) touch screen technology is capable of meeting the disability access, alternative language, and other requirements of HAVA. At the same time, however, electronic technology raises reliability concerns for many regarding the lack of transparency of the vote recording and counting. For these reasons, any touch screen electronic technology used should include an electronic voting terminal with a voter verifiable paper audit trail.

Reliability and voter confidence in electronic technology require that the source code and software used must be verifiable by public and independent experts. Testing of machines must be done publicly and independently, including random testing on Election Day. The Legislature must either provide for the selection of one voting machine model for statewide use, or establish statewide standards within which localities may select voting machines.

New York also should repeal the statutory requirement that the entire ballot appear on one page (the “full face ballot”),³² which excludes consideration of most new voting systems. No other jurisdiction has such a requirement. Keeping that requirement will force the state to spend more for voting machines and will make it

²⁹ HAVA § 301, 42 U.S.C. § 15481.

³⁰ HAVA § 301, 42 U.S.C. § 15481.

³¹ HAVA § 301, 42 U.S.C. § 15481.

³² N.Y. Election Law § 7-104.

more difficult for the disabled to get the full access that HAVA requires. For example, the visually impaired can have difficulty with the small type required to fit a lengthy ballot on one page or screen, and an unwieldy one-page ballot can prevent wheelchair voters or those with limited arm movement from accessing all choices. The full face ballot requirement can also limit the ability to expand the number of alternative languages into which a ballot can be translated, particularly languages which contain more characters than English.

B. Provisional Ballots

HAVA requires every state to offer “provisional” ballots at the polling site to two categories of voters: (1) any voter whose name does not appear on the registration list but who claims to be a registered voter; and (2) any other voter whom the poll worker deems to be ineligible to vote (e.g., someone required under HAVA to provide identification but who does not provide it.)³³

New York has long provided voters who state they are registered but whose registration is not found at the polling place the right to vote by “affidavit” paper ballot. Additionally, New York has provided the same type of ballot, termed an “emergency” ballot, to ascertainably registered voters when a machine breaks down at a polling place. Poll workers do not always advise voters of their opportunity to vote by affidavit ballot. While access to a statewide registration list should address some of these ills, it is critically important, and now a matter of federal law, for voters to be offered provisional ballots when their claim of registration cannot be ascertained at the polling site. Additionally, poll workers in New York must be thoroughly trained on the use of provisional ballots when federal law requires identification and the voter cannot provide it.

C. Polling Place Access To The Disabled

There are still numerous polling places where access for the disabled is difficult, especially for individuals in wheelchairs, those who have difficulty walking up stairs, and those with vision impairments. Adequate signage and other information regarding accessible entrances must be provided. If New York can meet HAVA requirements with regard to this provision, substantial federal funding could be available.³⁴

³³ HAVA § 302(a), 42 U.S.C. § 15482(a).

³⁴ HAVA §§261-265, 42 U.S.C. § 15421-15425.

D. Nondiscriminatory Access To All Must Be Ensured.

There were complaints on Election Day 2004 about the lack of language interpreters, even in areas where the need for interpreters should have been anticipated. Efforts must be made to enforce the language rights imposed by the nation's voting rights laws. Local governments must make sure to provide adequate funds to their boards of elections to make these improvements.

In some instances, voters were deterred from voting when their polling places were located in buildings, such as courthouses, which imposed barriers to entry such as requiring an identification document even of voters who were not required to bring identification to the polls. Polling places cannot be located in such buildings unless those additional restrictions are alleviated for voters.

E. Support Election Workers.

In every election, thousands of poll workers dedicate long hours and strenuous efforts to the process. These men and women perform an essential service, for which New Yorkers are greatly in their debt. Nonetheless, in every election there are reports that election workers provided mistaken or confusing information, were unfamiliar with the voting process and law, did not attend to their duties, or otherwise made it difficult or impossible for some voters to cast their votes. HAVA requires New York to update its voting machines, maintain a statewide computerized voter registration database, seek identification from certain voters at the polls, and a host of other changes. It is more urgent than ever that election workers are prepared for the critical job of ensuring that every eligible vote is properly cast and counted. Thus, the pool from which poll workers are recruited should be expanded and poll workers should receive adequate training. Sufficient funds should be provided for these efforts.

1. Expand the Pool of Eligible Poll Workers.

Four inspectors and two clerks generally work at each election district. They are hired by local boards of elections, but appointed by the two major political parties³⁵ Boards of elections may also have a "standby pool"

³⁵ N.Y. Election Law § 3-400(3).

to fill inspector and clerk positions not filled by the political parties. With vacant posts at some polling places, it is clear that the pool of available workers must be expanded.

To enlarge the pool of poll workers, New York should allow local boards of elections to appoint poll workers other than upon the appointment of political parties. Outreach efforts to all New Yorkers could encourage average citizens, including bilingual citizens, to volunteer their services.

New York could also adopt the “split shift” approach used by some districts around the country, such as in California, to lessen the daunting burden of a 17-hour day at the polls, by providing that some workers work until mid-day and others begin their shift at that time. Some observers think this would cause additional delays if some poll workers leave but their replacements do not show up in a timely fashion. However, election officials already face the administrative problem of poll workers who do not show up in time to open the polls at 6 a.m., and a reduction in the burden on all poll workers might reduce lateness and absenteeism overall.

2. Training

The New York Election Law requires poll workers, before their first service in an election and “at least once every three years thereafter,” to “complete a course of instruction, and, before certification, pass an examination.”³⁶ The State Board of Elections is required to provide local boards with appropriate instructional material and guidance for preparing the examinations. The Election Law also requires that poll workers be certified in order to fill their positions at the polls, which means they must have passed their examinations.³⁷ However, reports of untrained poll workers are too persistent and numerous to be without foundation. Boards of elections must diligently enforce the statutory training requirement. It is especially important for poll workers to master the new requirements of HAVA. The Election Law should be amended to require training every year, not every three years.

³⁶ N.Y. Election Law § 3-412(3).

³⁷ N.Y. Election Law §3-410.

F. Make Voting More Convenient.

Exercising the franchise should be easy, not difficult. Voters have a right to expect the process to be efficient and convenient, and should not have to clear unnecessary hurdles, spend endless amounts of time, or have their patience tried to the point of discouragement in their effort to cast their vote.

1. Voters Need Correct Information About Where To Vote.

As noted earlier, confusion and misinformation all too often are the order of the day on Election Day.

A very serious recurring problem is that voters are not always being directed to the correct polling site or to the correct election district line within a polling place. When that occurs, some registered voters may get discouraged and give up. Some may wind up in the wrong polling site or the wrong election district within the right polling place. As the New York Court of Appeals held last week, affidavit ballots cast by voters who present themselves at the right polling place but the wrong election district should be counted.³⁸

Every effort must be made to ensure that voters show up in the right polling place and the right election district so that they may vote without recourse to an affidavit ballot. Creating and maintaining the computerized statewide registration list should enable properly trained poll workers to access correct information on the spot and ascertain whether a person is registered to vote, as well as to provide the voter's proper election district.

2. Expand "Offsite" Voting Opportunities.

New York should also expand the opportunities for voters to vote "offsite" before Election Day. This includes making changes in the requirements for absentee ballots and ensuring that military ballots are widely available and the process fluidly handled.

a. Military Ballots

Military ballots were the first absentee ballots in New York. With U.S. troops currently stationed across the globe, and with the increasing call-up of National Guard reserves to serve for long periods of time, it is critically important that military ballots be efficiently distributed, received and counted, so that all our state's

³⁸ Panio v. Sunderland, *supra*.

soldiers can participate fully in their democracy. Persons serving in the military and their families can vote in their designated “home of record,” regardless of where they may be stationed or for how long.

In recent years, New York has enacted two statutes, each with a sunset provision, that allowed military ballots to be received at the local board of elections up to 13 days after the general election. The latest such statute expired on December 31, 2004. Given that our soldiers and their families are deployed all over the world, often in places of combat, the law should be reenacted, without a sunset provision.

b. Other Absentee Ballots

Absentee ballots are available to certain other voters in New York. Ensuring that all absentee ballot requests are processed in a timely fashion and that ballots are mailed out in accordance with the law are continuing challenges. There were numerous complaints in the 2004 election of failures by local boards of elections to do so.³⁹

Broadening the eligibility for absentee voting would help expand the number of individuals who vote. State law permits absentee ballots only to persons who are unavoidably out of the county on Election Day, who are unable to appear at the polls due to illness or disability, who are patients in a VA hospital, or who are detainees awaiting trial or convicted persons in prison for other than a felony. Many suggest that the law should be changed to permit anyone who prefers to vote by absentee ballot to do so. Indeed many other states have much more liberal provisions for absentee ballots. Even without a wholesale change in the law enabling any registered voter to vote absentee, New York could consider liberalizing the rules to extend absentee voting rights, for example, to primary care givers or others with responsibilities that can make it difficult to go to the polls on the day of an election.

Changes in the absentee ballot application should be made to limit the number of questions asked of voters seeking an absentee ballot. The absentee ballot application in New York requires answers to detailed

³⁹ See, e.g., Testimony of the NAACP Legal Defense and Educational Fund, Inc. before the New York State Assembly Committee on Election Law, December 21, 2004.

questions that are unnecessarily intrusive, such as requiring the absentee voter to state his/her position and the nature of the business or studies that require them to be out of town on Election Day, how long they expect to be away, where they are going on vacation, and the name and address of their employer (even if they are just going on vacation). There is no sound reason to require answers to such intrusive questions.

A needed reform in the interests of absentee ballot integrity is to put a statutory limit on the number of absentee ballot applications and ballots that can be collected by an authorized agent. While agents are often necessary or useful to ensure that a disabled or ill person can vote, too many ballots collected by one agent can raise questions about undue influence.

IV. Make Sure All Eligible Votes Are Counted.

No matter what other improvements in the voting process are made, at the end of the day, if the voter's vote is not counted because of hypertechnical rules and non-uniform practices, the system has failed. All too often in close elections in New York, eligible voters are denied the right to have their vote count.

A. Counting Provisional Ballots

HAVA requires the "prompt verification" by election officials of whether the voter casting a provisional ballot is eligible to vote and, if so, requires that the vote be counted.⁴⁰ When the provisional vote is cast, the voter must receive information advising that he or she has the right to ascertain whether the vote has been counted, and if not, why not. The state or local boards of elections must provide the voter with a "free access system," such as a toll-free number or website, by which the voter, and only the voter, can obtain this information. The deadline for compliance with this provision was "on and after January 1, 2004,"⁴¹ but New York has yet to provide this capability.

All paper ballots of whatever sort – affidavit, emergency, absentee, military – should be made uniform and counted in a manner consistent with the statewide standards as to what votes count. The 2001 AG Report

⁴⁰ HAVA, § 302, 42 U.S.C. § 15482.

⁴¹ HAVA § 302, 42 U.S.C. § 15482.

urged such statewide standards, but they have yet been adopted.

Last week, the Court of Appeals decided that affidavit ballots cast in the right polling place but the wrong election district should be counted.⁴² It is all the more important, especially in close races, that uniform statewide standards for vote counting be applied and practiced, and that they favor ensuring that the votes of registered voters are counted.

As urged in the 2001 AG Report, New York's prohibition against the counting of a paper ballot if it contains a stray mark or tear, even where the vote is clear, should be repealed.⁴³ Many votes by absentee and affidavit ballot are rendered invalid by this 19th century artifact. If the voter's intent is clear, the vote should count.

B. Conform The Law Regarding The Court's Role in Hearing Election Challenges in General Elections.

New York Election Law authorizes a losing candidate in a primary election to bring a lawsuit challenging the validity of the election, and authorizes the court to call a new election where fraud or irregularity make it impossible to determine who won. A losing candidate in a general or special election has no such remedy. Instead, the candidate must petition the Attorney General to bring a "quo warranto" action to oust the declared winner as a "usurper" after he or she has taken office.⁴⁴

There are three main problems with this procedure. First, because a quo warranto action cannot be brought until the declared winner takes office, the procedure allows a person who was not duly elected to exercise governmental powers. Second, the process entails a time-consuming duplication of effort, because before bringing a quo warranto action the Attorney General must make the same kinds of inquiries and determinations that the court will be asked to make. Third, there is no compelling reason for the Attorney

⁴² Panio v. Sunderland, ___ N.Y.2d ___, 2005 WL 237139 (Feb. 2, 2005).

⁴³ N.Y. Election Law § 9-112.

⁴⁴ The New York Court of Appeals recently confirmed that this is the sole state court remedy available to a losing candidate in a general or special election. Delgado v. Sunderland, 97 N.Y.2d 420 (2002).

General to be involved in disputes of this nature which the courts are fully capable of adjudicating.

Though quo warranto actions are uncommon, the Appellate Division recently invited the Legislature to “reexamine” the remedy, which the court described as rooted “for the most part . . . in the 19th century or earlier.” People v. Delgado, 1 A.D.3d 72 (2d Dep’t 2003). The Attorney General last year proposed a program bill to amend Election Law § 16-102 to grant the Supreme Court jurisdiction to review challenges to the validity of general and special elections to the same extent and in the same manner as it currently hears challenges to primary elections. Moreover, the bill explicitly provides that the court can determine who was rightfully elected in a general or special election, or order a new election if such a determination cannot be made. The Attorney General’s proposed bill or a similar bill should be enacted this year.

CONCLUSION

All New Yorkers have a stake in the fairness and effectiveness of the voting process. Unfortunately, New York’s current electoral process needs to be upgraded, and the State must act expeditiously or risk losing substantial federal funds. The time to act is now.