

**Testimony of Tova Andrea Wang, Program Officer  
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Before the New York Assembly Standing Committee on Election Law; Assembly  
Standing Committee on Government Operations

Public Hearing on New York State's Implementation of the Help America Vote Act

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My name is Tova Wang, and I am from The Century Foundation and the National Commission on Federal Election Reform, co-chaired by former presidents Carter and Ford. I am pleased to say that some of the more far-reaching provisions in the new election reform law were taken directly from the Commission's recommendations.

Over the past several months, I have been working with former Attorney General Robert Abrams, attorney Arthur Fried and Professor Ron Hayduk of CUNY, who will be addressing you next, on a Century Foundation Report entitled, "The Help America Vote Act – Impact and Potential for New York." This report goes through every single provision of HAVA, interprets these provisions from a legal perspective, and describes how those provisions might best be complied with and/or implemented in New York specifically. The report will be published and distributed in a couple of weeks. Today we would like to present some of the key findings and recommendations that we make in the report.

### **Machines**

We believe that under HAVA the state must replace all of its current lever machines. First, if New York accepts the millions of dollars the federal government is offering for replacement of the machines, it must replace *all* of the machines. Moreover, the lever machines are not accessible to many of the disabled. HAVA requires that every polling site have one machine that is accessible to the disabled. Theoretically the state could, using its own money, keep the lever machines for everyone but the disabled, but this makes little practical sense. In many jurisdictions in the state, such as in New York City, there are multiple election districts in one polling site, frequent machine breakdowns and an unacceptably high rate of lost votes. More importantly, we believe that the law requires an audit paper trail for each vote cast, something the current lever machines are not capable of doing.

The legislation does not specifically require the state to procure a single type of voting system statewide, but we believe there are significant advantages to doing so. First, there are likely economies of scale in purchasing. Second, a statewide voter education campaign could be launched. Voters who move within the state will always be familiar with the voting machine no matter where they go. Finally, poll workers could be trained on one system and be qualified to work anywhere in the state. Georgia purchased one type of machine for its elections last year, and, coupled with extensive voter education and intensive poll worker training programs, the elections went very smoothly. And this is a critical link we want to emphasize: new voting

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technology must be matched by substantial funding for thorough voter education and rigorous poll worker training.

In terms of funding for replacement of the machines, the maximum amount of funds available for voting system replacement under Title I is \$4,000 times the number of qualifying precincts, or approximately \$56 million for New York State. If appropriated funds are not sufficient to ensure that all states receive the amount calculated according to this formula, each state's funds will be reduced proportionally, and our understanding is that that amount is likely to be cut by about 16 percent.

There are approximately 20,000 voting machines in use in New York State. At the current cost of between \$3,000 and \$8,000 per machine, depending upon the characteristics desired, it would cost New York anywhere between \$60 million and \$160 million to replace them on a one for one basis. That means that clearly the state is going to have to commit some of its own resources to replace voting machines.

The law also says that states may not exceed a voter error rate beyond that set by the Federal Election Commission. However, it states that the error rate should be "determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter." After the 2000 presidential election, the public was outraged that so many people's votes were "lost" and never counted in the election. In NYC, the rate of lost votes was not only higher than the national average but also Florida's. Sometimes this was because voting machines did not work as they should.

In other cases, voters failed to properly execute their vote, whether on a machine or by paper ballot. But such cases often are the result of confusing ballot designs or instructions that caused voters to fail to register their votes as intended. Many voters across the country experience problems voting properly because they are visually impaired or disabled or do not speak English, and the methods by which they vote are not equipped to meet their needs. Poorly trained poll workers sometimes give voters the wrong instructions on how to properly vote, leading to vote loss.

The most effective way to address these grave problems is to utilize a standard that addresses both ways in which voters are potentially disenfranchised by the voting system: (1) votes discounted due to mechanical errors of the voting system, and (2) voting systems that cause ballot spoilage by the unintentional action of the voter.

As a result, we recommend that New York State establish its own benchmarks for the voting system with HAVA funds. These benchmarks, or performance measures, should include both technology- based errors and human based errors. New York State should regularly collect a variety of data to assess the performance of its election system, including how well HAVA is being implemented. We outline such benchmarks and the kinds of data that would be useful in assessing performance in TCF's forthcoming report.

The new federal law also requires that voting machines have a paper audit trail. We believe the law requires that the paper record be one that is for each individual vote, not a paper tally of all the votes cast on the machine as it is done now. This is necessary so the paper trail can later be counted or compared with the electronic record. Without a vote-by-vote paper record, fraud or some types of machine failure or faulty code would not likely be detected. In one Florida precinct in the November 2002 election votes intended for one candidate were counted for his opponent because of a misaligned touch screen. How many votes were miscounted could not be

determined, and thus corrected, because there was no voter verifiable paper or other vote-by-vote record available.

## **Voter Education**

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The Help America Vote Act requires New York State to institute broad and significant changes in the way it currently conducts elections, from phasing out its aging fleet of voting machines and upgrading computer systems used in tracking voter registration data to the way elections officials process registration applications and provide information to voters and poll workers alike. The foul-ups that occurred in the September 2002 primary elections in Florida—where new technology was employed -- demonstrated that technological improvements not matched with serious improvements in poll worker training and voter education is a recipe for election day disaster.

Other than requiring certain voting information to be posted at all polling places on Election Day, the Help America Vote Act does not impose specific mandates for how New York must train its poll worker and educate its voters. HAVA does, however, provide New York State with some of the funds necessary to carry out new education and training programs as well as enhance existing ones. The amount of federal funds that New York will receive will fall short of the total amount necessary to properly train all election officials and educate all voters about the changes HAVA requires, and New York State will need to set aside its own money to ensure full and fair implementation of HAVA.

HAVA does, however, require that certain information be available at every polling site. To comply with this part of the law, each county could develop its own posters displaying this information. However, we believe it would be more effective and efficient if the state designed a standard voting information poster for all counties to use. This approach would save time and resources for county election officials, and would make it easier for the State Board of Elections to ensure that all voting information posters are written and designed in a clear, easy to understand manner, with all the required pieces of information included.

Similarly, it makes sense for the state to provide other materials in a uniform fashion to voters and poll workers. Nearly 20% of the population moves each year, and most of them move from one jurisdiction (county) in the state to another. If the state uses uniform election materials, then voters and poll workers will be familiar with these election materials (from ballot design and voter information to poll worker manuals). Problems could arise if localities design their own materials; such variation may cause unnecessary confusion to voters and poll workers. In addition, the volume of new materials required by HAVA suggests that central purchase by the state will yield a more cost effective approach, given economies of scale.

In addition, we advise that the State Board of Elections adopt the Governor's Task Force recommendation and develop a statewide Voter's Bill of Rights that includes several additional information items than HAVA minimally requires, such as the right to ask for and receive assistance in the voting booth. A Voter's Bill of Rights could also incorporate detailed information about what forms of identification are acceptable for first-time voters who registered by mail, the right to replace a spoiled ballot, and the right of anyone standing in line when the polls close to vote.

As the Governor's Task Force points out, the Voter's Bill of Rights could be distributed and publicized prior to Election Day as well: on boards of elections' websites, in local newspapers in the weeks leading up to an election, and in voter guides and other information mailed to

registered voters. It could even be distributed at all voter registration locations, such as the Department of Motor Vehicles and social services offices.

In addition, New York could take this opportunity – and the federal funds HAVA provides – to consider additional ways that it can help educate New Yorkers about the voting process and their rights and responsibilities as voters. For example, it could create a voter guide whether through the State Board of Elections or another agency. Such a guide could include the type of information that is required to be posted at poll sites on Election Day as well as candidate information, a sample ballot, and information about where and when a voter should go to vote. Several states such as California – and NYC’s Campaign Finance Board – provide models for a voter guide. A sample ballot and the Voter’s Bill of Rights could also be published in local newspapers along with candidate and ballot question information.

Moreover, public service announcements are free. The state could pass legislation encouraging media outlets to disseminate such information as a public service. Additionally, the state could appropriate federal funds to place advertisements and information in media outlets, particularly the largest media markets. These methods have been used effectively in several states and jurisdictions.

As noted earlier, while Florida’s experience with new voting machines poses a warning to New York and other states, Georgia presents a positive alternative. Unlike Florida, when Georgia purchased new electronic voting machines in 2002 it did so uniformly across the state, with every county obtaining the same voting equipment. The statewide purchase simplified voter education. It also had the effect of cutting costs because it could take advantage of an economy of scale. Because every Georgia voter would be using the same new machine in the 2002 elections, the state was able to conduct a blanket, statewide education campaign through the media, without the concern that a voter from any given county might receive misinformation that applies to another county’s different kind of voting machines. Georgia hired thirteen regional voter education coordinators about five months prior to the November 2002 election, when the new machines were first used. The state also mailed to every registered voter in the state a color brochure with instructions about how to use the new machines. Georgia appropriated approximately \$4.5 million – distinct from the cost of the new machines – to support its statewide deployment, a substantial portion of which was spent on voter education and outreach.

## **Poll Workers**

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We also believe that an increase in poll worker pay will likely improve the number and quality of workers, as it did recently in New York City. Additionally, we suggest that working at the polls could qualify as compensatory time for government employees, be supported by tax incentives to businesses, or count as jury duty. Split shifts could reduce poll worker fatigue and errors.

We also recommend that the state recruit high school students to work as poll workers, as many other jurisdictions are now doing. To do this, New York could amend Election Law §§ 3-400, 3-401 to permit non-registered voters to serve as poll workers if they are not yet eligible to vote.

## Statewide Voter Registration System/Voter Registration

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The gap between New York's current method of maintaining registration records and that which HAVA mandates is substantial. HAVA requires that a "single, uniform, official centralized [and] interactive" list of all registered voters be maintained at the state level in a uniform and non-discriminatory way. Currently, however, New York "does not maintain a statewide list of registered voters" at all. Instead, the fifty eight local boards of elections are each responsible for maintaining registration records. We believe that simply ensuring that each local board of elections' list is computerizing and linking those lists to each other, while administratively simpler, is probably a violation of HAVA.

Also, we argue it would be prudent to integrate into the list information obtained from other state systems, such as state and city universities, the Department of Motor Vehicles, disability services, and other public assistance or social service agencies. Doing so would make the list more accurate by allowing new information to be assimilated into it. For example, a voter may not, as a matter of course, inform the relevant board of elections when he or she moves or changes names. But, the voter might inform another agency or another agency might detect the change on its own. For example, if a college age registered voter's address changes, he or she would likely inform the university. If the university's records were integrated into the electronic registration list, it could be used to update information on the registration list. Of course, it is critical for any change in registration status to be verified first by these individuals to avoid improper purging of the rolls and voter disenfranchisement.

One major difference between New York law and the new federal law is that HAVA establishes an identification process that first time voters must follow in order to register to vote. HAVA requires that first time voters use an approved form of identification when registering to vote. In addition, voters who are currently registered will now have to use identifying information when re-registering to vote because of a recent move or the decision to change party affiliation but will not have to show identification when voting. It should be underscored that this identification requirement when voting only applies to first time voters and voters who are first registering in the State.

Section 303 of HAVA now sets forth specific types of identification requirements that a first time voter must possess in order to register. For example, HAVA specifically states that in order for a voter to register to vote, that person must include a valid driver's license number on the registration form, or if the voter does not have a driver's license, the voter must use the last four digits of his or her social security number. If a voter has neither of these pieces of information, then the State will assign the voter a unique identification number.

These HAVA requirements will have a dramatic impact on New York City, where approximately 60% of city residents possess driver's licenses as compared to the rest of the state where 91% of individuals have driver's licenses. In addition, if one does not have his or her social security number memorized, or carry it with them, then this requirement will be an impediment to first time registrants. There is, however, another option under HAVA when one does not have either a driver's license or social security number. Section 303(a)(5)(ii) provides that if an applicant does not have either form of identification, then the State shall assign the applicant a number, which will serve to identify the applicant. This number should coincide with the computerized list number.

New York will also have a special responsibility to ensure that these requirements do not have a chilling affect on voter registration. New York State will also need to have a well-planned

and implemented education drive to inform voters about these changes and to ensure that people trust the system.

Under the HAVA provisions any first time voter who registers by mail will be required to show identification at the polling place in order to vote if he or she did not provide the documentation when mailing in their registration form. The type of documentation provided for in HAVA, however, simply does not adequately take the poor or married people into account. For example, it is not unusual that only one spouse is listed on household bills or that the low income people, senior citizens, people with disabilities, and students who do not have driver's licenses, bank accounts, paychecks or other forms of identification. Unless New York State clarifies other types of "documentation," disenfranchisement will occur. Therefore, New York could provide a voter registration card or other documentation with a voter's name and address that would identify a person for the purposes of HAVA. Furthermore, New York should recognize other forms of identification as valid for the registration process.

Also, we believe the language of the law could appropriately be interpreted to mean that the identification requirement only applies if the registration is actually mailed, i.e., sent by the care of the United States Post Office; not just by use of a mail registration form. It would not apply to mail registration forms delivered to the Board by individuals or groups engaging in voter registration. This will greatly cut down on the number of individuals who would be required to provide identification when they vote at a polling place.

Section 303(b)(2)(B)(i) of HAVA provides that if a voter appears at the polls and does not have the required identification, then the voter is allowed to cast a provisional ballot. In addition, a voter who mails in a ballot without the proper identifying information will also have the ballot be treated as provisional. It is essential that poll workers are aware of this provision and are adequately trained to abide by it so that voters will not be turned away if they do not have the proper identification. New York must ensure that poll workers do not misinterpret HAVA to mean that when a voter does not have identification or does not appear to be registered that they are unable to vote. All potential voters must be given a provisional ballot. New York must also ensure that poll workers and election officials are aware of the many documents other than a driver's license that satisfy HAVA's identification requirements.

Lastly, for purposes of validating provisional ballots cast, New York should define a voter's jurisdiction as a county, which is the largest geographic area governed by a unit of government. This definition is in line with the National Voter Registration Act, popularly known as motor voter. New York's current affidavit ballot law requires voters to affirm that they are registered to vote in that particular election district, a far too-restrictive definition for purposes of compliance with the new federal law. Following the motor voter standard would increase the number of provisional ballots validated and also allow a voter's choices to count for at least some offices.

### **Administrative Grievance Procedure**

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We recommend that New York establish an independent agency to be in charge of the complaint procedures. It should not be the same agency that carries out any of the substantive provisions of HAVA, but rather a separate, independent and nonpartisan state agency, similar to New York City's Independent Budget Office. This agency should issue an annual report to the Governor and the public, reporting the number and nature of the complaints filed and the details of their disposition.

Thank you for this opportunity to present this testimony today.