Andi Novick, Esq.
Founder and Legal Counsel

Joanne Lukacher
Executive Director

Susan Greenhalgh
Communications Director

Howard Stanislevic
Director of Voter Education

Re-Media

Election Transparency Coalition

P.O. Box 113, Staatsburg, NY 12580   Email: Joanne@re-mediaetc.org
Phone: (845) 876-2359   (845) 337-4855   http://re-mediaetc.blogspot.com

TESTIMONY BEFORE THE NEW YORK CITY BOARD OF ELECTIONS
ANDREA T NOVICK, ESQ.
MARCH 4, 2009

1) The Help America Vote Act (HAVA) never banned lever voting machines. New York's lever voting system, augmented with Ballot Marking Devices (BMDs) is HAVA-compliant and Democracy-compliant.

The Election Reform and Modernization Act (ERMA) of 2005, wherein the Legislature decided our lever machines should be replaced with software-based systems, effectively shut down any public conversation about what voting system best serves the interests of democracy . The legislature no doubt, thought this was necessary, in part because the levers were not accessible to citizens with special needs and partially based on the common misconception that HAVA banned levers. But HAVA never banned levers. In fact HAVA expressly states that lever voting systems, along with optical scan and DRE systems, are legal so long as they comply with the requirements of HAVA.[1] While there has never been a court ruling, the erroneous 'HAVA-banned-levers' myth was disingenuously elevated by a 2005 Election Assistance Commission (EAC) advisory. But the EAC's interpretation as reflected in that advisory is specious. I've provided a copy of my legal analysis[2] explaining why the EAC's interpretation is unfounded and erroneous.

I recently came across a letter that may shed some light on how the EAC could have come up with such an irrational interpretation, construing HAVA as rendering lever machines illegal under all circumstances, in contravention of a Department of Justice primer on HAVA and in disregard of the explicit language of the statute to the contrary. The EAC advisory was issued within one week of the State of Pennsylvania's asking the EAC for just such an opinion. It seems Pennsylvania was getting a good deal of resistance from those advocating for the continued use of lever voting machines along with BMDs. But the State of Pennsylvania wanted to buy a new software-based system and those arguing in favor of HAVA-compliance by retaining levers with BMDs were interfering with the State's desire to replace the levers. Under Pennsylvania's statute the levers were legal so Pennsylvania needed the Federal statute to be construed as making the levers illegal. Pennsylvania's counsel wrote the fallacious interpretation claiming HAVA banned levers for failing to satisfy the paper audit requirement and the EAC adopted the interpretation as its own, smoothing the way for Pennsylvania to facilitate its plan.

1

As an update to that collaborative effort – three years later the State of Pennsylvania is still embroiled in litigation with the voters, who recently won a ruling permitting them to challenge the State's choice of electronic voting machines "that provide no way for Electors to know whether their votes will be recognized."

What Pennsylvanians learned from their experience, and as dozens of computer scientist reports have now corroborated,[3] is that all software-based voting machines - optical scanners and DREs- are undetectably mutable and susceptible to unpreventable fraud. Software tabulates votes invisibly, concealing the vote counting process. Our lever machines however, as we know from our experience over the last century, are transparent, immutable, reliable and along with New York's election laws provide a secure, theft-deterring electoral system.

New Yorkers now have the advantage, which comes from being the last state to have computerized its elections, of learning from the misfortune of the other states and the overwhelming scientific evidence accumulated over the past several years, or we can do the same thing over and over again and expect different results; which Einstein is attributed to having described as *insanity*.

Now that we've installed Ballot Marking Devices in every polling site, we've satisfied the only federal impediment our levers couldn't meet; making our current lever voting system combined with BMDs, a HAVA compliant system. It would be *insane* not to ask the question: why are we surrendering our secure affordable lever machines, that we already own, for the high-priced, shoddily made, theft-inviting software-based machines that the rest of the nation is suffering with?

Is it because of what Errol Louis wrote in Sunday's Daily News? Is this hearing just a "window-dressing for a rigged process" as Mr. Louis suggests? Has everyone already been influenced by the vendors? Or can we still talk about democracy and what voting system would best serve the needs of a self-governing people?

2) The Requirements of a Democratic Election [4]

"**It is essential to the maintenance of a democratic society** that **the public business be performed in an open and public manner** and that the citizens of this state be fully aware of and able to o**bserve the performance of public officials**…. The people must be able to remain informed if they are to retain control over those who are their public servants. **It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."** [5]

This is the *minimum* that is required in a democratic electoral system:

> -- **public business must be performed in an open and public manner** and

> -- we must be able to **observe the performance of public officials.**

Why? Because "**It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.**"

Software-based optical scanners and DREs require **the public's business be performed in a secret, hidden manner** in which we are precluded from **observing the performance of public officials.** That means we've just destroyed that which "**is essential to the maintenance of a democratic society.**"

When the focus of the decision as to which voting system should we choose, is governed by the requirements of a democracy, the choice becomes obvious. In order for **the commonwealth to prosper and enable the governmental process to operate for the benefit of those who created it,** we must have an open electoral system which **enables us to observe the performance of public officials.**

Since a democratic electoral process requires that elections **be performed in an open and public manner** so that **citizens** can **observe the performance of public officials**, then we can answer the next question of which voting system satisfies the requirements of a democracy, by determining which system enables *us* to observe *you*, our election commissioners and the election workers you're responsible for?

3) Certification of software-based systems is a ruse. A certified system can be undetectably hacked just the way an uncertified system can be. Certification is not going to make a software system secure or reliable, or transparent.

This is not my legal opinion. This is the conclusion of the National Institute of Standards and Technology, the very experts who advise the Federal government, who have concluded that no amount of certification testing will make a software-based voting system secure:

"[T]esting to high degrees of **security and reliability** is from a practical perspective **not possible.**"[6]

The State Board of Elections can continue to waste millions on certification testing, but whether it certifies those optical scanners or not is irrelevant to the requirements of a democratic electoral system. The vote counting is still invisible. There's nothing for you or us to observe. In other words, certified or not, concealed vote counting by software violates that which is **"essential to the maintenance of democracy."** And it doesn't make it any less unconstitutional because someone in the government has access to the source code. If we can't observe the process of how

the scanner's been programmed to count the votes and we can't tell how the scanner actually counted the votes at the elections, how are we supposed to know what the scanner did?

The answer to that question cannot be, trust the government. That's undemocratic and unconstitutional.

The Legislature, knows certification isn't going to make the software secure and reliable. That's why ERMA requires a partial hand count of the ballots: because there's no way to tell if the software's been exploited. If the software was compromised, "The canvass procedure would not detect any anomalies, and would just produce incorrect results."[7]

The 'we'll just audit paper ballots after the election' answer of ERMA, EL 9-211, is a desperate attempt to deal with an electoral process that is fatally flawed by design. Post-election hand counts, a procedure considered so inviting to ballot tampering that it has been prohibited for all of New York's history, is also unconstitutional.

4) Lever Voting Technology is Superior to Software- based Technology for the Purposes of Running a Democratic Election

We know from the evidence that all software systems conceal that which you and we must observe if we are to **maintain our democracy**. We know that our lever voting system enables you to see every step of the process so that you can prevent error and fraud and safeguard the process and feel confident that the results are accurate. In fact it is part of your constitutional duty to do precisely that.

You assure us that you will SEE that the voting machines are properly programmed to count votes. The law further mandates that it is the legal duty of party representatives to observe you or your bipartisan machine technicians program each lever for each election. You make sure that you SEE that the machines are locked and sealed against tampering. Lever machines, enjoying the benefit of their mechanical immutable technology, can't move once they're programmed.

You, as election commissioners, have extraordinary powers: you have the power to appoint and remove the machine technicians and other board of election employees at will. We, the People, want you to have this level of authority because we want to ensure that you can perform your duties so as to be able to guarantee us the safest election results possible. That is how the constitutional right to vote and the right against disfranchisement have been interpreted in New York for two centuries.

If tomorrow the State passed a law that said the levers are going to be programmed by someone you'll have no control over and you won't be able to see how the machines are programmed to count votes, but you'll just have to accept that the machine is correct -- how are you supposed to prevent error and fraud from infecting the count? How are you supposed to know the vote count

is accurate. How are you supposed to perform your duties?

Clearly you wouldn't be able to perform those duties of your offices we rely on you for.

5) The Constitution Trumps all, including the Federal Court Order

There are many ways in which ERMA violates New York's Constitution, which I've laid out in articles cited herein as well as a synopsis of the litigation I've prepared.[8] If ERMA is unconstitutional on any one of the myriad grounds I've set forth, then any agreement based on an unconstitutional law would be null and void.[9]

In 2006 the Department of Justice sued the State in order to enforce HAVA compliance,[10] but the issue of how that compliance was best achieved was never litigated. The State had already enacted ERMA in 2005, requiring the replacement of the levers with software systems. The Federal Order was a voluntary agreement by which the State entered into a timetable for ERMA'a compliance.

[The State's certification process, which has held things up until now, is not a requirement of HAVA (which is why Judge Sharpe doesn't care about whether we certify the software machines or not). Nor is the replacement of our lever machines a requirement of HAVA. Both the desire to replace the levers and to certify the software are the State's choice: they are both part of ERMA; not HAVA.]

The State's agreement in the Federal action to implement ERMA, would be null and void if ERMA was declared unconstitutional.

In particular, the Legislature exceeds its authority in precluding constitutional officers - which the election commissioners are pursuant to NY Constitution, Art II, sec.8 - from performing those duties integral to their office. For example, the ability to safeguard and control the conduct of elections by being able to observe and prevent error and fraud is impossible when software invisibly tabulates votes and election commissioners can no longer witness that the voting machines have been properly programmed.

In 1894 we, the People, amended New York's Constitution and made election officials who receive, record and count the votes, constitutional officers. Because you are constitutional officers, the Legislature's authority to enact laws which impede your duties to the voters is limited by the Constitution. The Legislature has no power to preclude you from performing your essential duties.

The Legislature can't blindfold you and tell you to do your job of ensuring that those levers are properly programmed and locked against tampering, and then expect you to be able to prevent error and fraud or have control over your employees and the conduct of the elections. Similarly,

in enacting ERMA, and requiring that the programming and counting be concealed, the Legislature has exceeded its power in preventing you from seeing or being able to supervise those who program and secure the voting machines, the same as if you were blindfolded.

ERMA places you in the position of either violating your constitutional oath of office and requiring you to certify the election results as accurate, when you have no idea if there is any basis for those results because you've been prevented from seeing the programming of the machine and have been robbed of your constitutional authority to maintain control over the process, or puts you in the position of having to refuse to certify the election results as accurate because you don't want to lie and say you are certain of the accuracy of the count when in fact you have no reason to know whether the count is accurate. ERMA places you in the untenable position of having to violate a constitutional proscription. That is precisely why you have both standing and the responsibility to sue the State, challenging the constitutionality of ERMA.

On behalf of the 1800 citizens who have signed a petition in support of saving the lever voting system and to commence litigation against the State's unconstitutional laws requiring the replacement of our levers with concealed software-based voting systems, and on behalf of those counties and the Association of Towns who have passed resolutions in support of our lever voting system, I am urging you to join with us to resist the State Law that prevents you from performing those duties integral to your office- the duties necessary to guarantee fair, just and accurate elections.[11]

Andrea T. Novick, Esq.

349 Ackert Hook Rd

Rhinebeck, N.Y. 12572

(845) 876-2359

1. HAVA Section 301(a)(1)(A) expressly states that so long as: "the voting system (**including any lever voting system,** optical scanning voting system, or direct recording electronic system) shall..." comply with five federal standards, the system is HAVA-compliant (emphasis supplied).

As SBoE Commissioner Kellner testified in December, 2004:

"The federal Help America Vote Act. "sets minimum standards for voting machines**. Our lever machines satisfy all but one of those standards, that there be at least one machine at each poll site that is 'accessible for individuals with disabilities.**

2. *See **Discredited federal E-voting oversight commission issued an incorrect 2005 'legal advisory' helping to keep NY on a collision course with democracy***, http://www.bradblog.com/?p=6956, and the legal analysis referred to therein, also found therein, *New York's Voting System Satisfies and Surpasses HAVA,* also available at, http://sites.google.com/site/remediaetc/home/documents/EACAdvisoryShouldbeRevoked.pdf

3. Over three dozen independent computer scientists' reports from prestigious universities across the nation, http://sites.google.com/site/remediaetc/home/documents/Scientific_Studies_7_20_08.pdf , in addition to the National

Institute of Standards and Technology (NIST) cited below, corroborate that the software-based voting systems used across the nation are susceptible to undetectable fraud on a massive scale, enabled solely by the use of software: **"An attack could plausibly be accomplished by a single skilled individual with temporary access to a single voting machine. The damage could be extensive - malicious code could spread to every voting machine in polling places and to county election servers."**

4. *The Last Transparent Electoral System in the United States of America Cannot Be Allowed to Perish,* http://sites.google.com/site/remediaetc/home/documents/LastTransparentElectoralSystemvic.pdf- is an article that recounts New York's electoral history and constitutional safeguards that have protected the franchise for the past two centuries, all of which will be undermined by ERMA.

5. McKinney's Public Officers Law § 100, Legislative declaration

6. Requiring Software Independence in VVSG 2007: STS Recommendations for the TGDC, 11/06, http://vote.nist.gov/DraftWhitePaperOnSIinVVSG2007-20061120.pdf (emphasis supplied)

7. California Voting Systems Technology Assessment Advisory Board Security Analysis of the Diebold AccuBasic Interpreter, 2/06, commissioned by California's SoS, Debra Bowen, http://ss.ca.gov/elections/voting_systems/security_analysis_of_the_diebold_accubasic_interpreter.pdf

See also, **"[A] compromised machine [will] appear to work correctly when the system's audit reports are evaluated.** Avi Rubin's Blog, *UConn VoTeR center report: Diebold AV-OS is vulnerable to serious attacks,* 10/31/06, http://avi-rubin.blogspot.com/2006/10/uconn-voter-center-report-diebold-av-os.html

See also **NYS Board of Election Commissioner Douglas Kellner's** explanation of how New York's lever system successfully prevailed in a scandal in the 1940s:

"The fraud of the 1940s was uncovered because volunteers from the polling stations noticed that the numbers on their machines at the counting location were not the same as when they left the polling station. Similarly, any tampering with a lever machine today would be plainly visible to the volunteer preparing it for poll opening. **Becoming aware of fraud on an e voting machine would be much more difficult, because so much of their inner workings are invisible to all but the software programmers**.

Fighting fraud carried out by code is also particularly expensive. Some e voting systems run on 150,000 lines of code and to uncover whether fraud has occurred, or by whom and how, requires an army of programmers, a number of years, and millions of dollars. Even then, there is no guarantee that their examination will produce results." (emphasis supplied)

8. Litigation Synopsis, http://sites.google.com/site/remediaetc/home/documents/LitigationSummaryfinal109.pdf

9. In 2003 the Court of Appeals found the Governor had exceeded his constitutional authority in entering into an agreement authorizing casino gambling and the agreement was thus null and void. *Saratoga v Pataki*, 100 NY2d 80.

10. *U.S.A v New York State Board of Elections*, *et. al.*, Civil Action No. 06-CV-0263

11. *I can only speak for myself, although I am certain that all other Commissioners in the State of New York feel as impassioned as I do. My main responsibility is to the voters, to ensure that my Board does all it can to implement the law as well as to* **guarantee fair, just, accurate elections**. *Up until now I have felt secure and confident that I have been able to do this. Through the use of the Automatic Lever Voting Machines, though aged, I am* **able to certify election results and I am certain of the accuracy by which we conduct our elections."** -- John A. De Grace, Nassau County BoE Commissioner, Dec. 20, 2005 testimony to SBoE in NYC