

Voting Integrity Task Force Statement
To
The Dutchess County Legislature
26 January 2009

First we would like to commend the legislature for the sensible stand you took last month with the passage of a resolution toward retaining our lever voting machines. From what I understand, your message has resonated with county election boards throughout the state as each county struggles to guarantee a safe and responsible system for casting and counting our votes while acting as good stewards of the taxpayers' money in this difficult economy.

We have come before you several times in the past 6 months in order to make statements on various public issues from the perspective of the Voting Integrity Task Force. Your action in passing this resolution unanimously shows that you have been listening to us and to other members of the public as well as to election officials and professional staff. We will therefore not repeat the information you clearly know. (We are attaching here a copy of our statement in the public budget hearing.) We would, however, like to clarify one or two issues which continue to be either under-reported or misunderstood.

Although we were spared the spectacle of Florida 2000 or Ohio in 2004 with regard to the presidential race, there were many questionable and/or contentious outcomes in 2008 which throw a light on the kinds of voting issues which this task force has examined. These include the reliability of electronic vote counting, the pall of vendor dependence over the autonomy and authority of our election officials as public guarantors of the security of elections, and the reliability of random audits and recounts, including the near impossibility of maintaining and demonstrating an adequate chain of custody with regard to post-election verification.

We submit for your reading a list of examples, but would like to highlight here a few more high profile computer failures from the 2008 elections including thousands of phantom votes reported by Sequoia voting machines in the Washington, DC September primaries, blamed by the company on static discharge and/or, the old stand-by, human error and not defective hardware or software, explanations dismissed by the DC council committee where a special committee is now examining the incident. In Upshur County, WV all Election Day optical scan ballots had to be re-counted after it was discovered that machines were double counting early ballots. In Palm Beach, FL re-scans of 262 rejected ballots revealed different results each time they were scanned. Differing tallies for the same ballots also plagued Oakland County, Michigan where local clerks were prohibited from performing any maintenance or cleaning because it would void the machine warranty, while the saga of the Minnesota senatorial election re-count raises constitutional issues involving chain of custody of the ballots.

We would also like to clarify the question of the maintenance of the lever machines if we are allowed to continue using them since many people are under the impression that the machine parts are unavailable and they will no longer be able to be repaired or replaced.

At least one lever machine company in NYS is indeed on the verge of going out of business since the direction of the state has been to make their machines legally obsolete, however, the company does have a warehouse of parts which would enable the lever machines in New York State to be maintained indefinitely, and the company, AVM, stands ready to do business if they foresee a continuing market for their goods and services. We have attached a letter from that company. However, time is of the essence here since effective January 1st of this year they no longer provide employment to their skilled technicians. Unlike with the electronic ballot scanners, basic repair and maintenance of the lever machines can also be performed by local board of elections technicians.

Finally we observe that Dutchess County, through the passage of this resolution has become a beacon for the rest of the state. One thing which has become abundantly clear in the course of our study is that while there is huge support from election commissioners and other officials across the state for retaining out lever machines, a sentiment that has been bolstered by the enormous implications of the national economic crisis, there is also a huge leadership vacuum. (As an example of other counties dealing with this crisis see the newspaper article of 1- 25-09 from Broome County). Dutchess County is in a unique position to fill that leadership role. We can no longer afford to wait and see how politics and the economy will affect how we conduct fair and transparent elections, the most important of our privileges and responsibilities as citizens of a democracy. We urge the Dutchess County legislature both to continue to lead by example but also to take an active role in organizing their fellow county legislators throughout the state, beginning with the following:

- 1- Forwarding a copy of the Dutchess County resolution to every state legislator, urging them to amend ERMA to allow for the retention of the lever machines.
- 2- Forwarding a copy of the resolution to each NY State congressional representative, providing them with background material and asking them to work to make clear that lever machines are allowed under HAVA.
- 3- Forming a bi-partisan legislative committee to consider joining the lawsuit being developed by the Election Transparency Coalition of New York, and urging other counties to join in this effort. Such an alliance is currently under consideration by Nassau County. We have attached a two page synopsis of the litigation for your consideration. If Dutchess were to join, other counties would likely follow suit.

It has been our privilege to contribute to the vital mission of the Voting Integrity Task Force and we are happy to continue to assist the legislature as advisors on any of the recommended actions or other voting related activities.

Respectfully submitted,

Joanne Lukacher
Gary Kenton
Helen Grosso

Voting Integrity Task Force Statement
to the Dutchess County Legislature Budget Hearing
December 4th 2008

We are here representing the Voting Integrity Task Force, a citizens task for created by unanimous vote of the County Legislature to study and make recommendations on how we cast and count our votes in Dutchess County.

We will be making a formal presentation to the legislature at their regular public meeting on January 26, 2009 at which time we will be making the case for retaining our present lever voting machines based on their overwhelming superiority to software dependent machines, such as the optical scanners, in terms of security & transparency.

Tonight we are here to discuss cost.

Allow me to preface my remarks by saying that with the provision of Ballot Marking Devices at every polling place Dutchess County is now in compliance with the requirements of HAVA, the federal Help America Vote Act.

Looking over the projected budget of the Board of Elections several new items, many of which will become ongoing annual expenses appear to be directly attributable to the conversion to electronic vote counting. These include:

Annual costs of leasing a new, climate controlled storage and work facility \$75,000

Electricity for this facility \$23,000

Additional staff will be needed to prepare and maintain the machines and the vulnerability of these machines to undetectable tampering will require new full time security measures.

Because staff will be working at the additional storage/office facility on a regular basis, employee mileage reimbursement allowance has doubled.

Additional commercial printing costs for the paper ballots to accommodate these machines will add another \$160,000 over last year's budget.

There is a new line item for an additional 119,000 worth of software for 2009.

There will be a need for new equipment, among them privacy booths for the voters and special cases for securing and transporting the paper ballots.

The cost of office supplies for the Board of Election has more than tripled from \$46,000 in 2008 to almost \$183,000 for next year

The 2009 budget also anticipates an additional \$150,000 for professional and other service for this new equipment.

Transportation of the op-scans is more specialized – requiring climate controlled and air-cushioned trucks. It is to be assumed that these additional costs will also affect our towns and villages each time they must set up for a school board election, local budget vote or special referendum.

The Board of Elections budget reflects 1.3 million in income from a new line item called an election service charge. Is it intended that this money will be collected from the local governments, the towns and villages, as recommended by the county executive?

The above items are the known expenses to which can be assigned a budget estimate.

Unknowable expenses include the cost of mandatory audits and re-counts to check the accuracy of the Optical Scanners. What happens when there are missing votes, misplaced ballots and phantom ballot readings as are appearing in the ongoing re-count of the Minnesota senate race? These “glitches” are far from isolated and have been a regular feature of software dependent vote counting around the country.

Remember that these increased annual costs will be permanent and escalating.

The Optical scan machines have a 5 year warranty. Then what? HAVA helped pay the first time. Who pays in 5 years?

We can't put a price on our right to cast our votes and see that they are accurately counted as cast . What we can do is to allocate our resources wisely. The lever machines are not perfect but, in direct contrast with the Optical Scanners, failures are rare and tampering is difficult, easily detectable and does not spread from machine to machine. These wonders of mechanical engineering have lasted in many cases close to a century and can continue to count our votes into the indefinite future. We own these machines and they can do the job with little further expenditure. Let's put our money into making them work better by maintaining, renovating and perhaps improving them and into training a new generation of poll workers in the protocols which accompany them, all designed to assure and protect and accurately count our votes without unpredictable and ever increasing expense.

What New York Election Commissioners have to look forward to if Computerized Voting Systems are Permitted to Replace our Existing Lever Voting System

Excerpted below are just some of the ways in which New York's County Boards of Election could be prevented from fulfilling their duties through no fault of their own, were NY to abandon our lever voting machines. These are the actual experiences of honest men and women across the nation, thwarted in their ability to do their job due to their dependence on irresponsible voting system vendors with their overly complex and shoddily made computerized voting equipment (be they DREs or Optical Scanners).

In New York, Sequoia is the company that will be servicing and maintaining the Dominion Optical Scanner, chosen as the Ballot Marking Device by the majority of NY counties. About a third of the voters in the State will be using systems provided by ES&S. The problems with software-driven DREs or Optical Scanners are similar regardless of the vendor. All of the voting vendors' performance records have been equally problematic.

The following examples of election officials' experiences conducting elections on computerized voting machines are all documented in mainstream media reports and the citations included herein:

- Texas Director of Elections, Ann McGeehan, referring to ES&S's poor performance, described the preparations for the 2006 elections "completely unacceptable and disturbing**We regret the unacceptable position that many political subdivisions are in due to poor performance by their contracted vendor.**"¹
- Illinois Commissioner of Elections in Cook County, citing tabulation problems by the Sequoia's optical scanners and DREs in the 2006 election said: "**The administration of this election was a train wreck.**" Sequoia officials insisted however that the system "performed very well, overall."²
- Texas election programmer William Singer wrote the Secretary of State's office after the 2004 vote to report that ES&S pressured officials to install unapproved software during the presidential primaries. "**What I was expected to do in order to 'pull off' an election ...was far beyond the kind of practices that I believe should be standard and accepted in the election industry.**"³

¹ Ann McGeehan, Letter to Texas Election Officials, *Status of Ballot and Programming Card Orders for the May 13, 2006 Elections*, April 24, 2006 available at <http://www.sos.state.tx.us/elections/laws/statusofballot.shtml>

² Vote snafu: Some blame new equipment. Chicago Sun-Times. Mar 23, 2006. by Steve Patterson. <http://www.suntimes.com/output/elect/cst-nws-machine23.html>

³ William Singer letter to Geoffrey S. Connor, Texas Secretary of State, July 29, 2004, available at http://www.bradblog.com/Docs/WilliamSinger_TarrantSosComplaint_072904.doc

- Elections supervisor Ion Sancho of Leon County Florida, concerned about the security of the Diebold optical scanners, arranged for Finnish computer programmer Harri Hursti to independently examine a Diebold optical scanner. Hursti **demonstrated how easy it was to subvert the memory card without detection**. Instead of correcting the gaping security hole, Diebold responded by pressuring the election supervisor to not reveal Diebold's flaws.⁴

- In 2007 a **Princeton University computer scientist hacked a Sequoia AVC computer (DRE) within a few seconds**. Rather than addressing the vulnerability, Sequoia pointed to its own misleading marketing material that claimed: "tamper proof products, including... the AVC Advantage, are sought after from coast to coast for their accuracy and reliability." However the scientist described:

[H]ow simple it was for me to access the ROM memory chips containing the firmware that controls the vote-counting. **Contrary to Sequoia's assertions in their promotional literature, there were no security seals protecting the ROMs.**⁵

- Another Princeton professor, Ed Felten, found that the same Sequoia machines had vote count discrepancies in the 2008 Primaries.⁶ **The public counter failed to match the number of ballots cast, which was inconsistent with Sequoia's explanation for the discrepancies.**⁷

- After Union County, NJ clerk Joanne Rajoppi persuaded the Constitutional Officers Association of NJ to have an independent study of the machines done by Felten, a **Sequoia executive, Edwin Smith, put Rajoppi on notice that an independent analysis would violate the licensing agreement between his firm and her county. ... Smith also argued the voting machine software is a Sequoia trade secret and cannot be handed over to any third party.**⁸

- Finally, a Princeton report released just three weeks before the 2008 General Election, per a court order, stated:

⁴ Harry Hursti, "Security Alert: July 4, 2005, Critical Security Issues with Diebold Optical Scan Design," Black Box Voting, available at <http://blackboxvoting.org/BBVreport.pdf>

⁵ Andrew Appel, *How I bought used voting machines on the Internet*, February 8, 2007 available at <http://www.cs.princeton.edu/~appel/avc/>

⁶ Ed Felten, Freedom to Tinker Blog, *Evidence of New Jersey Election Discrepancies*, <http://freedom-to-tinker.com/blog/felten/evidence-new-jersey-election-discrepancies>

⁷ *Ibid.* *NJ Election Discrepancies Worse Than Previously Thought, Contradict Sequoia's Explanation*, <http://www.freedom-to-tinker.com/blog/felten/nj-election-discrepancies-worse-previously-thought-contradict-sequoias-explanation>

⁸ Newark Star-Ledger, *Plan for voting machine probe dropped after lawsuit threat*, http://www.nj.com/news/index.ssf/2008/03/voting_machine_maker_threatens.html

“[S]ometimes the AVC Advantage does not properly record the intent of the voter. The AVC Advantage's susceptibility to installation of a fraudulent vote-counting program is far more than an imperfection: **it is a fatal flaw.**”⁹

- Optical-scan machines made by Election Systems & Software failed pre-election tests in Oakland County, Michigan, producing different tallies for the same ballots every time. The top election official in, County Clerk Ruth Johnson wrote a letter to the Election Assistance Commission requesting a federal directive to allow county clerks to conduct random audits to test machine accuracy. **Johnson stated that local clerks were prohibited from performing any maintenance or cleaning as it would void the warranty, and that conflicting vote totals had surfaced in other areas of the state.**¹⁰

- California's Secretary of State's 2007 Top to Bottom Review of the voting computers in the state revealed that **Sequoia's voting system could be subverted without "leaving any evidence that the security of the system had been compromised.... Sequoia's security hardening consisted in large part of a customer relations campaign to allay fears that tampering would be a problem."**¹¹

- Arkansas' White County Clerk described the problems in a runoff election in 2006 as “a royal mess.” County Election Commissioner Nunnally wrote to the Secretary of State complaining that, **“ES&S has now proven in four states that they are unable to meet deadlines for the delivery of programming, regardless of the time period they have to work. ES&S is set up to box us into [sic] using their proprietary services for election preparation. They are doing this in every state they sell. They don't have the resources to meet the needs for these services and that is a verifiable fact at this point.”**¹²

- The state of California sued Diebold for **misrepresentations** made to the Secretary of State **regarding the installation of uncertified software** on their machines. A False Claims Act lawsuit filed against Diebold was settled in 2006 by Diebold paying \$2.6 million.¹³

⁹ Appel, et al, Princeton University Center for Information Technology Policy, *Insecurities and Inaccuracies of the Sequoia AVC Advantage 9.00H DRE Voting Machine* <http://citp.princeton.edu/voting/advantage/>

¹⁰ Kim Zetter, Wired Threat Level Blog, *ES&S Voting Machines in Michigan Flunk Tests, Don't Tally Votes Consistently*, <http://blog.wired.com/27bstroke6/2008/11/michigan-electi.html>

¹¹ Scott Fulton, *Three e-voting systems susceptible to attack*, California Team Finds, BetaNews, July 30, 2007 http://www.betanews.com/article/Three_EVoting_Systems_Susceptible_to_Attack_California_Team_Finds/1185822412

¹² *Election 2006: 'a royal mess': White County Election Commissioner claims state advised to break the law*. The Daily Citizen. June 5, 2006. http://www.thedailycitizen.com/articles/2006/06/06/news/top_stories/top01.txt

¹³ California Attorney General *Press Release, Attorney General Lockyer announces \$2.6 million settlement with Diebold in electronic voting lawsuit*, November 10, 2004, <http://ag.ca.gov/newsalerts/release.php?id=843>

- The **Indiana Election Commission** discovered in March, 2004, that **ES&S had installed uncertified firmware in some of their voting machines**. When forced to reinstall the certified version, it didn't tabulate the votes correctly. **An exasperated member of the election commission said, "I just think I was absolutely lied to by your CEO ... I sat in this room and you all lied to me. You're so derelict in your duties...."**¹⁴

- In 2005 **Indiana sued ES&S** after it once again installed uncertified software in the voting system of another Indiana county. **Indiana claimed ES&S lied about swapping out the uncertified software**. The lawsuit was settled by ES&S paying \$1.2 million.¹⁵

- In 2006 **Indiana filed a formal complaint against ES&S for failing to provide working equipment and ballots in several counties in time for an election, and providing defective voting equipment, software and services.**¹⁶

- **Oregon's Secretary of State sued ES&S in 2006 for breach of contract for failure to deliver voting machines**. ES&S had agreed to all of the standard state contract terms, but subsequently informed the SoS that it would not agree to the terms of the contract, and would not deliver the voting machines unless the Secretary changed the terms of the contract. The SoS refused to alter the contract to meet ES&S's demands, which led to the lawsuit. **"We will not leave our elections in the hands of companies that do not follow through on their obligations, and we will not be coerced into altering our contracts."**¹⁷

- **San Francisco's city attorney sued ES&S for "a panoply of wrongdoing that includes fraud, breach of contract, negligent misrepresentation and multiple violations of California's False Claims Act and Unfair Competition Law."** **Blaming the vendor for its failure to meet the terms of its contract with the city**, SF's attorney said:

San Francisco's experience with ES&S raises extremely troubling questions, not simply about the integrity of this company's technology, but about the integrity of this company itself.**There can be no more important duty in a representative democracy than to conduct elections, and it is a travesty to see that duty so flagrantly undermined by the fraudulent conduct of an election systems vendor.**¹⁸

¹⁴ Brian Burdick March 15, 2004 quote on WishTV web page now removed, referring to meeting in which ES&S management lied; see *Indiana Election Commission Minutes, March 10, 2004*, Item F, pp 33-38, available at http://www.in.gov/sos/elections/pdfs/IEC_Minutes_March_10_2004.pdf

¹⁵ Jason Thomas, *Voting machine company to pay county \$1.2 million*, The Indianapolis Star (via Knight-Ridder/Tribune Business News) August 15, 2005, http://www.accessmylibrary.com/coms2/summary_0286-9538963_ITM

¹⁶ Indiana Secretary of State Press Release, *Rokita serves notice of violations to voting machine vendor*, April 28, 2006, <http://www.in.gov/sos/press/2006/04282006.html>

¹⁷ Oregon Secretary of State Press Release: *Bradbury sues voting vendor (ES&S)*, April 20, 2006, <http://www.sos.state.or.us/executive/pressreleases/2006/0420.html>

¹⁸ *Fog City Journal's coverage*, http://www.fogcityjournal.com/news_in_brief/pr_herrera_ess_071120.shtml,

The litigation was subsequently settled for \$3.5 million dollars.

- Iowa's Pottawattamie County Auditor Mary Jo Drake found a county-wide ballot programming problem in its ES&S optical scanners that went completely undetected until after the 2006 primary election when **hand counts revealed that votes had been switched** between candidates: the Republican candidate would have lost the election according to the machines.

The **faulty programming affected every race on the ballot, and the county ordered a full hand recount of all races.** [otherwise] the wrong candidates would have taken office. ... The gross errors, like Pottawattamie's, are the ones that are caught. But if an error affected only a race for the U.S. Congress, governor or the state senate -- and that race was closely fought -- no one would know.¹⁹

- Pennsylvania's Cumberland County undertook a **9.5 hour hand recount after a problem involving an ES&S software coding error** in a 2005 election. The hand count changed the winner of the election.²⁰

- In Arkansas, Clark County, 2006 **ES&S failed to print ballots on time requiring local officials to print the ballots on an office printer and count them by hand.**²¹

- Washington, Grays Harbor, 2004 **ES&S scanners were downloading some disks twice, requiring the county to recount the ballots, changing the outcome of the election.** County Auditor Spatz was surprised when told that ES&S scanners had double-counted ballots in other states.²²

- Upshur County, West Virginia, filed a complaint with its Secretary of State over machine failures in the May 2008 election. During the hand recanvassing of the May election, the

<http://www.sfgate.com/cgi-bin/object/article?f=/c/a/2008/01/23/BA4AUJQ2D.DTL&o=0&type=printable>

¹⁹ Sean Flaherty, *In An Age Of Computerized Voting, Is It Possible To Maintain Voting Integrity?* July 03, 2006, originally in *The Iowa City Press-Citizen*, http://www.votetrustusa.org/index.php?option=com_content&task=view&id=1460&Itemid=113, Knauss, Leaders, Williams win in GOP supervisors primary. *The Daily Nonpareil*. June 8, 2006. http://www.zwire.com/site/news.cfm?newsid=16757670&BRD=2703&PAG=461&dept_id=555106&rft=6

²⁰ *DJ race still up in the air*. *Sentinel*, November 11, 2005. <http://www.cumberlink.com/articles/2005/11/11/news/news02.txt>
Archive: <http://www.votersunite.org/article.asp?id=6323>

²¹ *Ballot problem could prolong count tonight* *The Daily Siftings Herald*, May 23, 2006 by Donna Hilton. Story archived at <http://www.siftingsherald.com/articles/2006/05/23/news/news1.txt>

²² *Gray's Harbor County re-count boosts Gregoire*. November 16, 2004. By Rebecca Cook, Associated Press. <http://www.kgw.com/sharedcontent/APStories/stories/D86D7FA80.html>

Commission **"tossed out all Election Day optical scan ballot results and recounted them,"** when it discovered that the machines double counted the early voting ballots.²³

- White County, Arkansas experienced **machine failures which forced election officials to fully hand count the ballots, changing ALL machine-reported results,** and overturned the victory in one race. **"No voting machines functioned properly in any of the 32 White County voting sites on Tuesday."**²⁴

- Wayne County, West Virginia was **forced to count paper receipts from DREs that erroneously recorded voter choices** in the recent 2008 election. "Though only a small number of paper receipts have been checked thus far, the **errors appear to be widespread and affect several races....** The commission will not certify the election results until the Secretary of State's office investigates the matter."²⁵

- In the nation's capital, the D.C. Board of Elections and Sequoia were both blamed for a 2008 primary election blunder that caused **thousands of phantom votes to appear** in initial results. Although a report from a D.C. Council committee **dismissed Sequoia's theories** that human error or static discharge, and not defective software or hardware, was at fault when a cartridge from Precinct 141 added thousands of votes, **it committed the special committee to examine the effectiveness of the elections board and its top staff.**²⁶

- Miscounts by Sequoia Voting Systems op-scans were also implicated in a disputed 2008 judicial election in Palm Beach County Florida. Re-scans of 262 rejected ballots revealed differing results every time they were scanned. **Attorney Gerald Richman said the findings showed the machines can't be trusted. "We have to get a new election or a hand recount," he said.**²⁷

- Finally I refer you to a 2007 Electoral Commission Report²⁸ produced in response to the problems with the **Dominion optical scanner** used in Britain last year for the first time. Dominion is new to the field, but as the report reveals, the myriad of breakdowns and computer problems experienced by election officials in Britain are not at all new. As the annexed

²³ Amanda Hayes, County finds major election blunder, May 21, 2008. The Record Delta (Buckhannon, WV) available at http://www.therecorddelta.com/V2_news_articles.php?heading=0&page=&story_id=1490

²⁴ Warren Watkins, *Winner rejoices, then deflated*, May 21, 2008. Daily Citizen (Searcy, Arkansas), http://www.thedailycitizen.com/articles/2008/05/22/news/local_news/news01.txt

²⁵ Bryan Chambers, *Complaint filed on Wayne voting machines*, May 22, 2008. The Herald-Dispatch (Huntington, WV), <http://www.herald-dispatch.com/news/x1266665102>

²⁶ Nikita Stewart, Washington Post, *Firm, Elections Board Faulted in Voting Mishap* <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/08/AR2008100803542.html>

²⁷ Mark Hollis, Miami Sun Sentinel, *Lawyer says Palm Beach County voting machines need repair*, http://weblogs.sun-sentinel.com/news/politics/palm/blog/2008/10/attorney_gerald_richman_said.html

²⁸ The Electoral Commission, UK, *Stratford and Warwick Pilot Report, Aug, 2007*, http://www.electoralcommission.org.uk/data/assets/electoral_commission_pdf_file/0012/13215/Stratfordstatutory_evaluationreport_27188-20108_E_N_S_W.pdf

newspaper account describes, the elections “ended in chaos as the electronic votes were chucked out following a catalogue of errors and the whole thing was recounted by hand, delaying results by several days.”²⁹ The article went on to state that, “The list of things that went wrong is far too extensive to repeat here, but if you want an example of how not to manage an IT project, look no further than the link at the end of this story.” The link is to the Electoral Commission Report prepared for this pilot project in which certain jurisdictions had experimented with the use of these optical scanners. The Report found:

The pilot scheme did not facilitate the counting of votes. ... [In some jurisdictions] no contests were counted electronically. The scanning of ballot papers took a lot longer than expected due to the need to scan certain batches more than once. ... [S]ignificant delays in the count process [led] to a reversion to a manual count. ... The use of electronic counting significantly increased the total cost of delivering these elections compared with a manual count.

The Dominion Optical Scanners are of course the ones selected as ballot marking devices by most of New York’s counties. As BMDs they only have to mark ballots which in the 2008 election, were hand counted. It is as **counting devices** however, that the history of optical scanner use, Sequoia’s deficient performance record and the experience of British election commissioners’ should cause a rational State Board of Election to refrain from thrusting these problematic voting machines onto the counties.

In addition to the above examples, there are thousands of additional reports of failed DREs and optical scanners. There is no dispute in the scientific community or in New York that voting software even were it to work well, can only be verified by a partial hand count of the paper produced by the DRE or counted by the optical scanner. **The closer the margin of victory reported by the voting system, the larger the hand count would have to be confirm that the outcome was correct.**³⁰ And should the manual count reveal inconsistencies, this could necessitate a full hand count. For an election that spans multiple counties, this means the hand count would have to be expanded, **even in counties where no errors were found initially.**³¹

Thus the new computerized system planned for New York will produce unknowable results which will then be checked after election night by counting paper. New York has a lever voting system that does not rely on paper ballots to prove the accuracy of its elections and that gets the job done on election night. How can we surrender a functioning time-tested, reliable voting system to one so inferior, unreliable and far costlier?

²⁹ <http://www.theinquirer.net/en/inquirer/news/2007/08/03/e-voting-comedy-of-errors-in-shakespeares-stratford>

³⁰ McCarthy, Stanislevic, Lindeman, Ash, Addona and Batcher, *The American Statistician, Percentage-Based versus Statistical-Power-Based Vote Tabulation Audits*, http://verifiedvoting.org/downloads/TAS_paper.pdf

³¹ Philip Stark, *The Annals of Applied Statistics, Conservative Statistical Post-Election Audits*, <http://statistics.berkeley.edu/~stark/Preprints/conservativeElectionAudits07.pdf>

Voting Machine Service Center, Inc
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716-287-2090

January 23, 2009

To Whom It May Concern:

Voting Machine Service Center, Inc (VMSC) has been in business for over 32 years. During those 32 years, it has serviced the Automatic Lever Voting Machine (AVM) along with supplying all the parts and technical support necessary for the AVM. At no time during those years, was it unable to fulfill any order requests from our customers in New York State or any other states that use the AVM.

In addition, VMSC purchased the mechanical automatic voting machine division from Sequoia Pacific in February 2001, thus making Voting Machine Service Center, Inc. the sole authorized mechanical automatic voting machine company.

VMSC also *manufactures* parts and supplies or subcontracts this to different suppliers and vendors according to AVM original prints and specifications. Shoup paper rolls are another supply that VMSC provides.

VMSC has not authorized any other election company to sell, produce, or distribute its product. This includes but is not limited to Printer packs and paper rolls for the AVM.

Due to lack of sufficient orders over the past two years, VMSC regrets that it will not be able to fully service its customers as it has in the past. However, going forward in 2009 and beyond, VMSC will be able to sell to you items that are currently in stock on a first come first served basis. Other parts and supplies may be specially ordered, given a sufficient deposit, lead time and final payment prior to shipping. Minimum orders may also be required.

Given the above conditions, VMSC can say with confidence that the AVM lever machines in the State of New York could be maintained indefinitely.

Sincerely,

Heidi L. Marshall
Cc; file

PressConnects.com Binghamton.
Old lever machines may count vote again
Test of new machines is behind schedule

"We may be using the lever machines - again," said John Perticone, the Democratic commissioner of the Broome County Board of Elections....Such uncertainty is affecting the budgets of Broome's election board for the second year, said Eugene Faughnan, Broome's Republican commissioner. Broome's election board exceeded its \$1 million budget by about \$200,000 last year, records show.

Blog response *"If some towns have stopped picking up Christmas trees to save a few bucks, how can we justify the cost of replacing these machines?"*

About the issue

Voters in Broome and across New York were supposed to have used their old lever-voting machines, some in Broome more than half a century old, for the last time in November. Electronic ballot counting devices were set up at polling places Nov. 4, but were available only to disabled voters. The expectation was that all New York voters would use the new electronic system this year.

Following years of political wrangling in Albany, New York was the last state of all 50 to implement in 2006 its version of the federal Help America Vote Act, enacted by Congress in 2002 to establish minimum standards for voters.

New York was given \$221 million from the federal government to replace its lever-voting machines. A year ago, the state suddenly decided that the individual counties would have to decide which machines to purchase. In the end, Broome and all but two New York counties purchased the Sequoia brand of electronic ballot counters. The state approved testing requirements for the new machines that exceeded federal standards.

But further delays mounted. In October, the Colorado testing company chosen to certify New York's new machines lost its accreditation from the federal government. SysTest failed to create and validate test methods, improperly documented its testing and used unqualified personnel to do the work, according to the U.S. Election Assistance Commission.

Broome's machines have been certified for use by disabled voters, Republican election commissioner Eugene Faughnan said. They haven't been certified to state standards for all voters. Fortunately for voters, the old lever machines remain safe in storage.

<http://www.pressconnects.com/article/20090125/NEWS01/901250341/1001>

Old lever machines may count vote again
Test of new machines is behind schedule

By Nancy Dooling • ndooling@gannett.com • Staff Writer • January 25, 2009

Retirement may not be an option for Broome's venerable lever-voting machines after all.

Advertisement

Election board officials here and across New York are bracing for another year of uncertainty as the state has failed to implement a federal court order putting in place a new statewide voting system that is accessible to the disabled and includes a paper record of vote tallies.

So far, despite the order of a federal judge to comply, that hasn't happened.

"We may be using the lever machines - again," said John Perticone, the Democratic commissioner of the Broome County Board of Elections.

Such uncertainty is affecting the budgets of Broome's election board for the second year, said Eugene Faughnan, Broome's Republican commissioner. Broome's election board exceeded its \$1 million budget by about \$200,000 last year, records show.

It's difficult to project how much money the board will need for its election budget this year. As of Jan. 7, the court-ordered testing, certification and selection of New York's voting systems and devices "is in jeopardy and behind schedule," according to a report issued this month by the state board.

The state Board of Elections must now submit a weekly progress report to Gary Sharpe, the federal judge who ordered the state to comply with the federal mandate. Sharpe is a former federal prosecutor from Binghamton who now holds a federal judgeship in Albany. He's expressed his frustration with New York's election board, saying the state has thumbed its nose at the federal government.

In the meantime, Broome's election officials are moving forward with the expectation that the new system will be put in place in time for September's primary and November's general election.

Officials are already looking at the expected cost of the system. For instance, if the new system is in place, the board will have to purchase enough paper ballots to meet state guidelines. No one knows if this will be one, two or three ballots per voter, Faughnan said. The state hasn't yet made up its mind on the issue.

At 65 cents each and with up to 116,000 potential voters in Broome, the cost for paper ballots could amount to hundreds of thousands of dollars. With one countywide race this year, all of Broome's voting districts will likely need different ballots, especially with some local offices up for re-election this year.

Factor in the cost of training more than 1,000 local elections inspectors and the price will continue to mount, Faughnan said. A public campaign to help Broome voters become familiar with the new system is also expected to cost money in overtime and in practice paper ballots.

Most Broome voters have only ever used the lever machines to vote.

Relief wrote:

The big question is why replace a machine that is only in use a few times each year? Why go to the expense? Don't tell me that we can't modify existing machines or develop a system to accommodate handicapped people. Are these machines broken or does the government just want to usher in electronic voting? In a poor economic climate like we have here today, I just can't see the logic in replacing something that works just for the sake of going for something new. I don't trust computers and the people who control them. How much easier would it be to fix elections when the votes are in electronic form? How much easier would it be for "a system glitch" to mess up the vote tally? Being the last state to adopt electronic voting is not a good excuse to replace the machines. I don't care what other states do. They don't live here and I don't live there. If some towns have stopped picking up Christmas trees to save a few bucks, how can we justify the cost of replacing these machines?

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Synopsis of the Litigation

This litigation challenges the constitutionality of changes to New York's Election Law, enacted by the Election Reform and Modernization Act of 2005 (ERMA), by which the State proposes to replace the lever voting system with a software-based voting system (DREs or Optical Scanners) that invisibly tabulate the votes. ERMA will dismantle every aspect of New York's open electoral process which for two centuries has involved a team of bipartisan election officials and observers, witnessing and safeguarding every step of the canvass, culminating in an accurate verified completed count on election night. Software-based voting machines, on the other hand, conceal the counting process from election officials and observers, constitutionally precluding them from performing their duties to guard against error and fraud, and produce an unknowable tally, irrefutably susceptible to undetectable and therefore unpreventable error and fraud.

For 232 years New York has enjoyed a transparent electoral system resulting in a secure, witnessed, at-elections count, which is then publicly proclaimed and committed to on election night before tampering to paper ballots can intervene to corrupt the guarded election night count. For 232 years, and as still mandated by EL 9-100, New York's Constitution, Art. I, § 1, Art. II, § 1 has been interpreted as requiring that the count be knowable, certain and concluded on election night, while the watchfulness of election officials, authorized watchers, party representatives can best deter fraud. The integral duties of the constitutional election officers, owed to the public as entrusted guardians of the public's elections, are unconstitutionally surrendered to the invisible processes of software, contravening New York's Constitution, Art. II, § 8.

To further preserve the integrity of the election outcome, since 1896 New York's Election Law has required a contemporaneously created physical record of the publicly observed canvass both to prove the accuracy of the count and to prevent fabricated evidence, created outside the public view, from subverting that count. For over two centuries New York's laws have protected the publicly recorded at-elections count from corruption by making it unalterable, recognizing that once the ongoing scrutiny of the poll site ends the risk from subsequent unobserved tampering increases dramatically. Accordingly New York has always forbidden the post-election use of ballots from affecting the completed tally of ballots cast and counted at the poll site; until ERMA.

ERMA represents an abdication of the legislature's responsibility to protect the constitutional right to see that votes are being accurately and honestly counted and to prevent known opportunities for fraud from infecting the count. Dozens of scientific studies have established the susceptibility of software-driven voting machines to unseen tampering, concluding these machines are "insufficient to guarantee a trustworthy election" regardless of any government certification. The unconstitutionality of New York's new electoral system, which invites disfranchisement by eliminating every existing theft-detering safeguard while exposing the results to the even greater opportunities for unseen and massive manipulation that software facilitates, is only exacerbated by the State's attempt to legitimize the uncertain and unreliable software-generated results with post-election hand counts.

Post-election counts of ballots that were openly cast and counted at the election have **never** been permitted in New York, except as an incident to a judicial proceeding. In fact post-election paper ballots were understood to be so potentially dangerous that until 1896 New York burned them. When we began preserving them it was solely to secure them as evidence for *a quo warranto* or criminal proceeding. EL 9-211 represents yet another example of a constitutional infringement upon the duties of constitutional election officers who are mandated to preserve these ballots inviolate. EL 3-222

ERMA's disregard of two centuries of precedence, in utilizing these inherently suspect post-election ballots, independently offends the Constitution by authorizing post-election hand counts without providing any constitutional due process procedures for determining the factual issues of whether the ballots being counted to verify the machine's results represent the actual ballots cast on that machine or if, in fact, the chain of custody was disturbed. In those rare instances when elections have been challenged in New York, post-election ballots were used to affect the at-elections count only if a jury was satisfied that those ballots represented the identical ballots cast at the election. Chain of custody is a factual determination and "requires testimony of continuous possession by each individual having possession, together with testimony by each that the object remained in substantially the same condition during its presence in his possession" "from the time it is obtained to the time it is presented in court." Black's Law Dictionary (8th ed. 1999)

Employing a mutable technology and hiding the counting process, deprives election officials, candidates and the public of both eyewitness and physical evidence of error or fraud: software can erase all evidence of how the software was programmed to miscount the votes. By choosing a technology which is so unprotected from known opportunities for alteration that it creates the need for a significant amount of hand counting which is to commence after election night, ERMA invites fraud, encourages protracted litigation to alter election outcomes, and impairs the only evidence not susceptible to software alteration: the paper ballots. ERMA utterly fails in its primary responsibility: to ascertain and demonstrate the true number of votes cast at the election. And at the end of this new electoral process we are left with literally no reliable evidence or proof that would enable candidates or the public to challenge erroneous results in a judicial proceeding: the ultimate constitutional offense.

Having created a system in which errors or frauds cannot be detected or controlled by election officials or observers, ERMA places election officers in an impossible position: requiring them to violate their oath of office and certify results they were prevented from participating in and thus have no basis for knowing whether they are correct or not. Nullifying our election officials' and observers' ability to engage in the safeguarding and ascertaining of the at-elections count violates the explicit constitutional right against disfranchisement and the right of suffrage, as consistently interpreted by the courts of this state, as well as the right to a transparent electoral process, as guaranteed by the implicit requirements of the First Amendment, New York Constitution. Art. I, § 8.

Two centuries of case law reveal successive legislatures responsibly assuming their affirmative duty to protect the franchise from known opportunities for fraud. As a result New York has a rich body of precedence unconstitutionally condemning any method of voting which would destroy safeguards designed to enable officials and observers from detecting and deterring fraud; prevent the electorate from seeing that their votes are being fairly counted; permit a limited number of individuals unobserved control over the count or of evidence of the count. There is even precedence for the worthlessness of tallies created under cover of concealment. When the lights temporarily went out during a canvass, the Court of Appeals found "the opportunity to commit fraud existed" rendering the tally "so uncertain and unreliable that it could not be used for any purpose, and its value as evidence was wholly destroyed."

Software-based secret vote counting produces at-elections tallies that are far more uncertain, unreliable and worthless than the tally created when the lights went out. Critical to the success and constitutionality of New York's manual paper and lever counting systems is that they enable the potential for 100% knowledge of the results, including error or fraud. With software systems there is in reality 0% knowledge. ERMA's post-election count, itself unconstitutional, cannot rescue a failed at-elections count nor redress the deprivation of those myriad constitutional rights ERMA has wrought.