

MAY 2007***PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND, INC. (PRLDEF)*****STATEMENT OF CONCERN REGARDING H.R. 811 AND THE PROBLEMS OF ELECTRONIC VOTING TECHNOLOGIES AND ELECTRONIC BALLOTS*****PRLDEF's Mission to Champion Civil Rights***

For the last 35 years, the Puerto Rican Legal Defense and Education Fund (PRLDEF), a New York based civil rights and advocacy organization, has used impact and class action litigation to set landmarks in protecting the civil and constitutional rights of Latinos. PRLDEF's work has sought to defend the U.S. Constitution, equal access to education, minority voting rights, immigrant rights, fair employment practices, and non-discrimination in housing.

In the 1970's and 1980's PRLDEF was instrumental in the passage of amendment provisions in the federal Voting Rights Act of 1965, which secured the voting rights of linguistic minorities in the United States. Since then we have been combating discriminatory gerrymandering in redistricting, promoting election reform and voter access, and advancing integrity in the U.S. census count in order to preserve our constituents' rights in civic participation and fair representation in government.

PRLDEF worked for the re-authorization of the key provisions of the Voting Rights Act, in the "The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006" which extended essential tools to protect the voting rights of linguistic minorities and others for 25 years. Our legal successes have advanced the practice of providing voting instructions and ballots in languages required by Latinos and other minorities.

In 2007, PRLDEF sees a different threat to voting rights, not only for Latinos and other minorities, but for all citizens. That threat is posed by and embedded in highly touted computerized electronic voting technologies.

Ensuring Ballots Reflect Voter Intent

PRLDEF joins other organizations and individuals committed to ensuring that federal election reform legislation upholds Section 301(a)(1)(A)(i) of the Help American Vote Act of 2002 (HAVA), which requires that all voting systems "*permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted.*"¹

While we support the improvements in language and disability access provided by Direct Record Electronic (DRE) voting machines, we have grave concerns about the so-called "ballots" these machines produce, which are nevertheless counted as the official ballots for the all-important initial tally. These "ballots" are nothing more than electrical charges inside the computer, which no voter can verify. Thus, voters cannot know with certainty that the votes cast and electronically recorded and counted, are, in fact, accurate and based on their own choices.

¹ Help America Vote Act of 2002. http://www.fec.gov/hava/law_ext.txt

Currently, federal legislation such as H.R. 811,² has been proposed to improve upon this situation by requiring that voting machines provide a “voter-verified paper ballot” that the voter can immediately review and approve. This appears to be a step forward, but the provision is both misleading and insufficient. Under the proposed legislation, the paper printouts would not be considered the official ballots; they would only be counted in recounts or if they were randomly selected for an audit. Therefore, they are not actual ballots; they are just a paper trail and unlikely to ever be counted. The unverifiable cyberspace “ballot” in the computer’s memory would continue to be deemed the official ballot, even though it might not match the votes on the screen or those on the paper printout.³ This regime is dangerous and unacceptable.

Recent elections in which electronic voting systems have been used confirm the existence of the types of problems that could be anticipated by the use of unverifiable ballots. Though not usually covered in national papers and media and thus kept under the radar, PRLDEF finds that an alarming number of aggregated accounts of voter complaints evidence serious problems in electronic-based voting machines,⁴ including the widespread inexplicable “vote-flipping” phenomenon,⁵ documented reports of votes disappearing from electronic voting machines,⁶ reports of electronic systems adding votes,⁷ and election disputes that could not be resolved because only the electronic “ballots” were available.⁸

Compounding these disruptions were operational failures of the machines, such as the failure to print out “zero tapes” to confirm that no votes were stored on the machines prior to the election, and failure to record write-in votes.⁹ Florida and New Mexico experienced such severe electronic voting problems that those States have passed legislation outlawing the use of

² Voter Confidence and Increased Accessibility Act of 2007. <http://www.govtrack.us/congress/billtext.xpd?bill=h110-811>

³ “A Deeper Look at ESI’s Report of the Discrepancy-Ridden Vote Counts In Diebold Touch-screen Voting Machines. August 23, 2006. <http://www.votersunite.org/info/ADeeperLook-ESI.pdf>

⁴ Electronic Voting: a Failed Experiment. 183 Direct Record Electronic (DRE) Voting Machine Failures Reported in the News. March 10, 2007. <http://www.votersunite.org/info/DREFailedExperiment.pdf>

⁵ “E-Voting Failures in the 2006 Mid-Term Elections: A sampling of problems across the nation”. January, 2007 (Sources: VotersUnite, VoteTrustUSA, VoterAction, and Pollworkers for Democracy) <http://www.votersunite.org/info/E-VotingIn2006Mid-Term.pdf>, pages 5-7.

⁶ 4,532 votes lost in Carteret County, NC, 2004. “More than 4,500 North Carolina votes lost because of mistake in voting machine capacity.” USA Today. November 5, 2004. http://www.usatoday.com/news/politicselections/vote2004/2004-11-04-votes-lost_x.htm

199 votes lost in Berks County, PA, 2005. Three races affected. “Election Problems in Berks County.” WFMZ.com. May 18, 2005. <http://wfmz.com/cgi-bin/tt.cgi?action=viewstory&storyid=3784>

5,000 votes lost in Dallas, TX. 2002. “Glitch affects 18 races; Problems in counting early votes could alter some election outcomes.” Dallas Morning News. May 8, 2002. Ed Housewright. Article archived at http://www.votersunite.org/info/content/mess-up_072104.asp

18,000 votes lost in Sarasota County, FL. 2006. “FL-13 task force will turn over investigation to GAO.” The Hill. May 3, 2007. By Aaron Blake. <http://thehill.com/campaign-2008/fl-13-task-force-will-turn-over-investigation-to-gao-2007-05-02.html>

⁷ 3,893 votes added in Franklin County, OH. 2004. “Glitch Found in Ohio Counting.” New York Times. November 6, 2004. By John Schwartz. <http://www.nytimes.com/2004/11/06/politics/campaign/06ohio.html?ex=1257483600&en=16f49551a98f9208&ei=5090&partner=rssuserland>

2,087 presidential votes added in NM. 2004. “Summary Report on New Mexico State Election Data.” HelpAmericaRecount.Org. January 4, 2005. by Ellen Theisen and Warren Stewart. <http://www.votersunite.org/info/NewMexico2004ElectionDataReport-v2.pdf>

Hundreds of votes added in Miami-Dade, FL 2005. “Discrepancies found in votes, signatures.” Miami Herald. May 7, 2005. By Noaki Schwartz and Jason Grotto. Article archived at <http://www.votersunite.org/article.asp?id=5361>

100,000 votes added in PA. Banfield v. Cortes, -- A.2d --, 2006 WL 4459432 (Pa. Cmwlth., April 12, 2007) http://www.voteraction.org/States/Pennsylvania/Documents/Legal/442MD06_4-12-07.pdf

⁸ Election declared invalid in Hinds County, MS. 2003. “District vote set; contender may quit.” Clarion Ledger. January 21, 2004. By Julie Goodman. <http://www.clarionledger.com/news/0401/21/ma04.html>

“FL-13 task force will turn over investigation to GAO.” The Hill. May 3, 2007. By Aaron Blake. <http://thehill.com/campaign-2008/fl-13-task-force-will-turn-over-investigation-to-gao-2007-05-02.html>

⁹ Banfield et. al. v. Cortes, -- A.2d --, 2006 WL 4459432 (Pa. Cmwlth., April 12, 2007) http://www.voteraction.org/States/Pennsylvania/Documents/Legal/442MD06_4-12-07.pdf

electronic “ballots,” though they preserved the use of DRE-type machines to provide accessibility.¹⁰

PRLDEF would support election reform legislation that complies with HAVA and requires all voting systems to permit voters to verify the actual ballot that is cast and counted. This means that where DRE-type devices are used, they must produce a voter-verified paper ballot that would be the official ballot for all tallies and audits. Any voting technology used to produce these ballots must be accessible to minority language voters, including those with disabilities, and the official ballots must be verifiable by all citizens with the concomitant ability to verify with contemporaneous accessibility.

Preventing Ethnic Profiling in the Voting Booth

Technical experts and advocacy groups have brought to our attention the serious matter of electronic voting systems’ ability to process electronic ballots differently when different languages are chosen. Experience has taught us to be wary of differences in the treatment of different ethnic groups, since differences inevitably present opportunities for unjust discrimination.

Indeed, there is already evidence that these differences in processing may be discriminating against minority voters. Votes cast in Spanish were lost during a touch screen machine demonstration to the California legislature, but the system worked properly when English was chosen.¹¹ Touch-screen review screens failed to display votes properly when Spanish was selected in official parallel testing on election day in Palm Beach County, Florida.¹²

In New Mexico, during the 2004 election, electronic ballots in Hispanic and Native American precincts registered three times as many undervotes (no vote cast) as the electronic ballots in Anglo precincts. But when the state switched to paper ballots, the undervote rates in minority precincts were comparable to those in Anglo precincts.¹³

Disproportionate numbers of African-American votes were lost when electronic voting machines debuted in Miami-Dade County, Florida in 2002. The Florida ACLU reported, “*Not only are there a significant number of missing votes, but there's also an alarming racial disparity in the errors that occurred during the last election.*”¹⁴

While electronic voting machines promise greater accessibility for voters with limited English proficiency and those who have disabilities, the opportunity they present for ethnic profiling by language choice is unacceptable. This is another reason why, whenever DRE-type

¹⁰ "House stays past midnight to pass paper ballot proposal." 15 February 2006. Associated Press. Archived at <http://www.voteraction.org/States/NewMexico/NM.html>

Governor Crist Applauds Legislature For Boldly Reforming Florida’s Elections. May 3, 2007 Press Release. <http://www.flgov.com/release/8957>

¹¹ “Wrong Time for an E-Vote Glitch”. Wired News. August 12, 2004. By Kim Zetter. <http://www.wired.com/politics/security/news/2004/08/64569>

“Lawmakers cut e-voting’s paper trail: Manufacturers demonstrating new printers in Nevada were embarrassed when machine failed to recognize votes.” Tri-Valley Herald. Ian Hoffman. August 13, 2004. Article archived at <http://www.votersunite.org/article.asp?id=2512>

¹² “Palm Beach County, Florida Parallel Testing Program Report of Findings, November 7, 2006 Election”. <http://www.votersunite.org/info/PalmBeachParallelTesting2006.pdf>, pages 26, 27, 29.

¹³ “2004 and 2006 New Mexico Canvass Data Shows Undervote Rates Plummet in Minority Precincts When Paper Ballots are Used”. February 25, 2007. (Source: VotersUnite.Org) http://www.votersunite.org/info/NM_UVbyBallotTypeandEthnicity.pdf

¹⁴ “Analysis of September 10th Voting Fiasco in Miami Dade Demonstrates Disproportionate Impact on Racial Minorities, ACLU Says” October 21, 2002. http://www.aclufl.org/news_events/archive/2002/racialimpactrelease.cfm

devices are used to offer the necessary accessibility, paper ballots, which voters can verify, must be produced and those paper ballots must be deemed to be the official ballots for all counts.

Using Voting Technology Wisely

The right to vote is the fundamental right in this country. This right requires that all citizens have unfettered access to the ballot and that all citizens are able to cast ballots they know reflect their true choices. There is an expensive, spiraling, and unjustified dependency on computerized technology to ensure that our votes are properly and fairly cast, recorded, and respected in our democracy.

While PRLDEF applauds the accessibility that new voting systems can provide to voters with special needs, an unquestioning reliance on technology, however, must not be allowed to abridge each voter's right under HAVA to verify the real ballot.

Access to the polling place and access to a ballot in our own language are both essential to the right to vote. Yet, if we cannot even assure ourselves that our official ballots reflect our true choices, we might as well have lost the right to vote.

PRLDEF's Principles In Support of HAVA Reform

We, therefore, urge policy-makers and advocates to support the following principles:

- Voting technology must facilitate the free and private expression of each voter's intent, including those with limited English proficiency and those with disabilities, in compliance with the Voting Rights Act.
- Where DRE-type devices are used to facilitate access for language minority voters and voters with disabilities, the devices must produce a paper ballot which the voter can review and approve in whatever language or manner the voter requires in compliance with the Voting Rights Act, and that paper ballot must be the official ballot for all tallies and audits.
- All aspects of elections must be open and observable by the citizens.

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