

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 and party representatives can best deter fraud. The duties of election officials are surrendered to the invisible processes of software, contravening New York's Constitution, Art. II, § 8. The Legislature has unconstitutionally exceeded its authority in nullifying these integral duties of constitutional election officers; duties which are owed to the public.

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 even greater opportunities for unseen and massive manipulation facilitated by the new software, is further exacerbated by the State's attempt to legitimize the uncertain and unreliable software-generated results using 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. Newly enacted EL 9-211's post-election audit procedure represents yet another example of a constitutional infringement upon the duties of constitutional election officers who, since 1896 and as still required pursuant to EL 3-222, are mandated to preserve these ballots inviolate.

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)

By employing a mutable technology and hiding the counting process, election officials, candidates and the public are deprived of both eyewitness and physical evidence of error or fraud: malware can erase all evidence of how the software was programmed to miscount the votes. In choosing a technology which is so vulnerable to known opportunities for manipulation that it requires an extensive post-election manual count in an effort to try to verify the unreliable machine results, ERMA invites fraud, encourages protracted litigation, 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. At the conclusion of this new computerized electoral process we are left without reliable evidence or proof that would enable candidates or the public to challenge erroneous results in a judicial proceeding. Effectively denying judicial recourse for deprivation of a constitutional right is the ultimate constitutional offense. Art. I, §§ 1 and 6.

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. Denying a transparent electoral process that enables our election officials and observers the ability to observe, safeguard and ascertain the at-elections count, violates the explicit constitutional right against disfranchisement (Art. I, §1) and the right of suffrage (Art. II, §1), as consistently interpreted by the courts of this state, and as additionally protected 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 condemning any method of voting which would: destroy those safeguards intended to facilitate the detection and prevention of fraud; preclude the electorate from seeing that its votes are being fairly counted; permit a limited number of individuals unobserved control over the count or of evidence of the count (all of which are violated by ERMA). 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 the constitutionality of New York's manual paper and lever counting systems is that there is a potential of 100% knowledge. With any computerized system, there is a reality of 0% knowledge. ERMA's post-election hand count, itself unconstitutional, cannot rescue a failed at-elections count nor redress the deprivation of those myriad constitutional rights ERMA has wrought.