

## New York's New Voting System Renders Voting a Useless Formality: Nullifying the Consent of the Governed

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We hold these truths to be self-evident, that all ... are ... endowed ... with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, ***Governments are instituted ... deriving their just powers from the consent of the governed***  
– Declaration of Independence

The original purpose of constitutional limitations was to check arbitrary actions of monarchs who abused their power. The American experiment of self-government aimed to limit power through the people's will: the state being the instrument for carrying out that will. The most fundamental concept of democracy is the idea that government exists to serve the rights of the people and must be based on the *consent of the governed*. That consent must be informed by the watchfulness of citizens. We have neither the luxury nor the right to trust the government. In enacting regulations regarding the conduct of our public elections, the state *must* facilitate our ability to fulfill our obligation to be vigilant by an open process that enables publicity - contemporaneous public scrutiny- and includes our participation in the very device by which we preserve our sovereignty. Distrust of governmental abuse of power is part of our revolutionary heritage and is reflected in the constitutional limitations against its abuse.

### **Concealed Vote Counting and Non-adjudicated Post-election Night Recounts are Illegal and Have Been Forbidden For all of New York's History Because They Permit the Government to Subvert the Will of the People**

More than any other public business conducted by the state on behalf of the people, elections must be the most vigilantly scrutinized because elections are the main vehicle for renewing and maintaining the *consent of the governed*. Particularly given the inherent conflict of interest - in which elected representatives are responsible for the creating the mechanism by which they hope to re-elect themselves - the people must fulfill their constitutional duty to oversee each crucial step of the election *while it is in progress*, in order to deter the possibilities for fraud from corrupting the transparently witnessed count. Eternal vigilance by the people has often been said to be the price we pay for our liberty.

New York's Election Reform and Modernization Act (ERMA) prevents the exercise of our constitutional responsibility to vigilantly scrutinize each step of the electoral proceedings. **ERMA replaces our existing transparent electoral system with a concealed vote counting process, precluding the possibility for public oversight; thereby nullifying our consent.** The results produced by this undemocratic process are then to be cloaked with the appearance of legitimacy by an after-the-fact review. The Supreme Court has rejected ex post facto reviews as insufficient to protect our constitutional right to contemporaneously review the actions of the state as it conducts our public elections. This is our last chance to defend this assault on our freedom. By Independence Day 2010 it will be too late.

The liberties of our country, the freedom of our civil Constitution, are worth defending at all hazards; and it is our duty to defend them against all attacks. We have received them as a fair inheritance from our worthy ancestors: they purchased them for us with toil and danger and expense of treasure and blood, and transmitted them to us with care and diligence. It will bring an everlasting mark of infamy on the present generation, enlightened as it is, if we should suffer them to be wrested from us by violence without a struggle, or to be cheated out of them by the artifices of false and designing men.  
- Samuel Adams

## **In Order to Effectively Restrain Government Abuse, Citizens Must Be Able to Participate in Every Essential Step of Our Public Elections**

In New York "the election law has endeavored to safeguard an election, in explicit directions as to the performance of the duties by the election officials"<sup>1</sup> so that those duties can both be witnessed and openly challenged by observers.

[T]he **watchers** representing each party and candidate were **entitled to examine** every ballot carefully .... **The watchers not only have the right, but it is their duty, to draw the attention of the inspectors to void ballots, and to insist that they be not counted,** and if, with the facts which render a ballot void thus drawn to their attention, the inspectors should persist in counting it, they would face a criminal prosecution without much hope of escape. <sup>2</sup>

The Court of Appeals, New York's highest court, ruled that "**each step [be] taken, and announcement made, in the presence of officials and watchers,**" upholding legislation which prohibited the state's unobserved control over an important aspect of the electoral process.<sup>3</sup> Over a century ago, New York's legislature and judiciary recognized that a method of voting which permitted government insiders to perform an essential component of the election outside the public's view was unconstitutional. The mere opportunity for unobserved manipulation was sufficiently destructive of the right to vote for the Court to declare that the "will of the people may not be thwarted by the errors or frauds of the inspectors of election."<sup>4</sup>

In flagrant disregard for New York's constitutional precedence, ERMA returns us to that long-since discredited voting system by permitting critical stages of the election to be conducted outside the public's view, secretly controlled by the voting vendor with "certified" approval by the state. The very programming of the software instructing the voting computers how the public's votes are to be counted is concealed from the thousands of New Yorkers who are currently mandated to be present to examine the programming of the lever machine. ERMA then requires that the results of this unconstitutional method of voting receive the imprimatur of validation, using ballots that have also been removed from public view to 'verify' the election.

## **ERMA's Method of Vote Counting Was Found Constitutionally Wanting 113 Years Ago**

ERMA permits the count and the evidence of the count to be controlled by a few people who have concealed opportunities for fraud. This was precisely what the 1896 legislative reforms, upheld by the Court of Appeals, conclusively ended by forbidding the state's having exclusive control over any aspect of the electoral process.

Prior to 1896 New York's electoral system enjoyed numerous theft-detering safeguards, including a transparent canvass conducted by bipartisan election officials, but the single step of preparing the election returns was done by the inspectors at the conclusion of the open canvass, after the observers had left. In 1896 the Legislature amended the law so that all stages of the proceedings would be protected by the benefits of

public scrutiny, mandating public participation at every juncture so as to "render it possible to deal effectively with errors or willful frauds in the canvass of the votes."<sup>5</sup>

The Court recognized that the exclusion of public observers from a single key step reduced:

voting [to] a useless formality, as it depends upon the will of the inspectors of election as to who shall hold the offices, and not upon the vote of the people.<sup>6</sup>

New York's current Legislature has forgotten its history and the restrictions imposed on it by our constitutional form of self-government. For the first time in 232 years ERMA will exclude public observers, instead requiring that the election night count be secretly counted, thereby returning:

voting [to] a useless formality as it depends upon the will of the [vendor/state] as to who shall hold the offices, and not upon the vote of the people.<sup>7</sup>

As if such an undemocratic method of voting could subsequently be redeemed, ERMA then exacerbates the uselessness of voting by having the invisibly counted results verified by a review of some of the ballots after election night. This 3% count of post-election night ballots, which have themselves been under the exclusive control of bipartisan election officials and outside of the public's ability to observe or question, similarly renders voting:

a useless formality as it depends upon the will of the ... election [officials] as to who shall hold the offices, and not upon the vote of the people.<sup>8</sup>

In March 2009, the German Constitutional Court declared Germany's computerized voting system unconstitutional, finding that it is not possible for citizens to "reliably examine, when the vote is cast, whether the vote has been recorded in an unadulterated manner."<sup>9</sup> The court proclaimed:

The principle of the public nature of elections, which results from the fundamental decisions of constitutional law in favour of democracy, the republic and the rule of law prescribes that all essential steps of an election are subject to the possibility of public scrutiny.

The United States Supreme Court has declared that the public cannot be excluded from witnessing criminal trials, holding there is an implicit constitutional right to attend and *observe* the trial as it proceeds; not review what happened after the fact. Recognizing that it is the ability to evaluate the state's performance *while it is conducting* the public's business which provides the check against the potential for abuse of power, the Supreme Court stated:

[P]ublic access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government. "The knowledge that every criminal trial is subject to **contemporaneous review** in the forum of public opinion **is an effective restraint on possible abuse of judicial power,**" *In re Oliver*, 333 U.S., at 270, ... "[w]ithout publicity, all other checks are **insufficient: in comparison of publicity, all other checks are of small account.**"<sup>10</sup>

Similarly the public's right to contemporaneously review and verify the vote counting procedures that culminate in a transparently discerned tally on election night "is an effective restraint on the possible abuse of ... power"<sup>11</sup> and has been the hallmark of New York's constitutional electoral system; until now.

It is the duty of citizens, county boards of election, candidates and party representatives to resist such unconstitutional usurpations of power. If we fail to insist upon our right to watch and challenge “servitude is at once the consequence of [our] crime.”<sup>12</sup>

## **The Use of Non-adjudicated Post-election Night Ballots to Recount or Verify the Election Results is Unconstitutional**

It is precisely because citizens and their election officials must be able to concurrently observe and examine every point along the way that New York’s Laws have always required the first count be a verified, conclusive count, prohibiting the use of post-election night voted ballots to alter the results of the transparently conducted canvass on election night. Removal of ballots from the continuous scrutiny of those required to witness each step not only undermines the possibility for vigilance, but increases their vulnerability to fraud. In order to satisfy the constitutional requirements of transparency and of protection against opportunities for fraud, New York’s laws have *never* permitted post-election night recounts of some or all of the voted ballots.

For all of New York’s history only in a judicial proceeding, where a jury must first determine whether the ballots are in the identical condition as they were at the time they were cast, might the post-election night voted ballots be used to alter the election night outcome. Just as in a criminal trial the state has the burden to prove that evidence outside the public view, the ballots in the case of elections, has not been tampered with. The State’s word is not sufficient to satisfy constitutional imperatives.

In a democratic society we do not convict a citizen based on a police officer’s word that the gun was found in the defendant’s hands or a urine sample containing an illicit drug was taken from the defendant’s body. In both cases, constitutional due process requires a hearing to establish the validity of the evidence. We have no right to simply trust the police officer. It isn’t personal: it is integral to a constitutional institution which imposes a higher obligation on us to safeguard our liberty.<sup>13</sup> There must be a judicial proceeding in which the chain of custody can be challenged or proven.

Chain of custody 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.<sup>14</sup>

Without the opportunity for an adjudication of the condition of the evidence, the public has no way of knowing if evidence had been tampered with. How would we know whether the urine sample was tainted or the gun switched if not through an open judicial proceeding where the opportunity for testimony and cross examination is designed to encourage true and accurate fact finding.

Ballots removed from continuous observation of the poll site become evidence that is required to be preserved inviolate.<sup>15</sup> The Court of Appeals has stated, specifically regarding the use of post-election night ballots in a judicial proceeding, that only “upon the condition of inviolability ... is the evidence of any value.”<sup>16</sup> We cannot accept the word of the most honest board of elections that the ballots were preserved inviolate with no opportunity for tampering any more than we can accept the word of the police officer. Both because our history has shown us that post-election night ballots are too fraught with the possibility for tampering and because time consuming judicial hearings to establish chain of custody don’t serve the need for prompt election outcomes, post-election night voted ballots have historically been excluded from the electoral process.

Obviously New York's legislature would have no authority to pass a law directing that henceforth, citizens may be convicted for illicit drug use based on a police officer's statement that the chain of custody of the evidence was unimpaired. A judicial proceeding, in which that chain of custody would have to be proven, cannot be bypassed. By the same constitutional application, New York's legislature has no authority to pass a law directing that post-election night ballots may be used to alter the election results based on the board of elections' statement that the chain of custody of the ballots was unimpaired. A judicial proceeding, in which that chain of custody would have to be proven demonstrating the ballots are the original ballots cast by the voters, cannot be bypassed.

No legislature has the power to violate the constitution, and yet this is precisely what ERMA has done: post-election night ballots are to be used to try to verify the invisibly tabulated software count without proof that these ballots are the same ballots cast by the voters. Assuming 232 years of history is correct the likelihood that those ballots will be tampered with is great, but no one will ever know because ERMA requires that we trust the government.

We don't trust Venezuela's post-election night manual audit of paper ballots, which confirmed the computerized tallies giving Hugo Chavez his victory in 2008.<sup>17</sup> We don't trust that the government of Iran's recent post-election night partial recount verified the election results. And yet we are supposed to trust New York's government first by relying on its assurance that "certified" voting computers are safe to vote on (contrary to all scientific evidence) and then relying on its word that the post-election night ballots being used to verify the concealed vote count, have been preserved inviolate.

**But you must remember, my fellow-citizens, that eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing. It behooves you, therefore, to be watchful in your States as well as in the Federal Government**

- Andrew Jackson, Farewell Address, March 4, 1837

Eternal vigilance means resisting unconstitutional legislation that thwarts the possibility for vigilance. Once the people permit critical aspects of their elections to be determined by the unobservable actions of the state, they can no longer "retain the necessary means of control over their institutions."<sup>18</sup> A plethora of scientific evidence unequivocally demonstrates that replacing transparency with trust in the State's certification process<sup>19</sup> is not only unconstitutional, but foolish. Certified voting computers cannot be made secure enough to rely on:

[E]xperience in *testing software and systems has shown* that testing to high degrees of *security and reliability* is from a practical perspective *not possible*.<sup>20</sup>

Software can be programmed to appear to be in working order for certification testing, when in fact it has been compromised:

[C]orruptions can lay dormant until Election Day, thus avoiding detection through pre-election tests.<sup>21</sup>

The ability to penetrate, reprogram or exploit vulnerabilities in the software sufficient to change the outcome of an election, entirely outside public view, has been repeatedly demonstrated. For the first time in New York's history, the count will be exposed to unpreventable fraud on a massive level.<sup>22</sup> Self-erasing malware will make a subsequent examination of the software impossible. Other exploits can take years and millions of dollars to find,<sup>23</sup> although there wouldn't even be an indication of the need to examine the software after

the election because it can be manipulated to demonstrate an accurate total number of votes cast, but the votes will be switched such that a false tally will not be discernable by election officials or observers.<sup>24</sup>

The object of election laws is to secure ... freedom of choice and to prevent fraud, and not by technical obstructions to make the right of voting insecure and difficult.<sup>25</sup>

In enacting ERMA, the legislature has abdicated its responsibility by creating a method of voting that encourages fraud. A method of voting that fails to prevent known opportunities for fraud disfranchises voters and is unconstitutional.

### **ERMA'S Post-Election Verification Procedures are a Pretense That Requires Voters to Accept the Computer's Unknowable and Possibly False Results**

The deprivation of the constitutional right to contemporaneously verify each stage of the election proceedings cannot be compensated for by a subsequent check of the count. Once the public has been excluded, New York's legislature and judiciary have already rejected the resulting count as worthless declaring voting to be reduced to "a useless formality, as it depends upon the will of [others] and not upon the vote of the people."<sup>26</sup>

But ERMA has enacted an artifice to provide this illegitimate count with the illusion of having been verified. ERMA's post-election verification procedure, like the unlawful count produced by the vendor's/state's exclusive control, is itself "a useless formality." The ballots used to verify the count are also exclusively controlled by the state.

In upholding the public's constitutional right of access to observe a trial *while it is in progress*, the Supreme Court in *Richmond* rejected a post-trial review as an inadequate substitute. It is the public's ability to witness the actual performance of public business which preserves the core of self-government, fulfilling the public's role to guard against the potential for government abuse and furthering the goal of truthfinding:

[O]pen examination of witnesses ... is much more conducive to the clearing up of truth, than the private and secret examination .... And experience has borne out these assertions about the truthfinding role of publicity. ....

In advancing these purposes, **the availability of a trial transcript is no substitute for a public presence at the trial itself.** As any experienced appellate judge can attest, the "cold" record is a very imperfect reproduction of events that transpire in the courtroom. **Indeed, to the extent that publicity serves as a check upon trial officials, "[r]ecordation . . . would be found to operate rather as a cloa[k] than chec[k]; as cloa[k] in reality, as chec[k] only in appearance.**<sup>27</sup>

ERMA's post-election night verification procedures will operate precisely as described by the *Richmond* Court, creating the cloaked appearance of verification while requiring us to accept the unreliable software-generated count, regardless of whether that count reflects the will of the people.

Using ballots which have also been removed from public oversight can easily result in a false verification. Indeed the Court of Appeals has characterized such ballots as potentially "not only the weakest but the most dangerous."<sup>28</sup> Just as the pre-1896 voting system violated the constitution because election inspectors were

able to create fraudulent returns outside of public view, corrupt election officials are able to conform the partial recount to the false results of the computer.

Aside from the constitutional violations, ERMA's 3% partial recount is unlikely to reveal the computer's false results even if the ballots were counted on election night before chain of custody was jeopardized. A 3% sampling is insufficient to detect material discrepancies in many races when the electoral outcome is in fact incorrect. The inadequate sampling provides the illusion of verification when in fact the exploitable software-generated tally will determine the election outcome.

**Since the Purpose of a Democratic Election System Is to Provide for a Demonstrably Honest and Conclusive Original Count, New York has no Law Permitting a Post-election Recount**

The scientific community agrees that software-based voting systems expose the count to unpreventable and undetectable opportunities for fraud. All of New York's venerable safeguards which have prevented the opportunity for fraud from infecting the count are eliminated by ERMA. There are some, professing to represent the interests of the people, who support ERMA's unconstitutional method of voting. In New York groups like Common Cause, NYPIRG, League of Women Voters and New Yorkers for Verified Voting have accepted the deprivation of the constitutional rule of transparency and the concomitant right to prevent a fraudulent count through the public's watchfulness, justifying their acceptance based on an illusion. They are permitting the State to usurp our fundamental rights in exchange for the theoretical ability to recount all of the ballots after election night. Not only is there no legal right to such a recount, but reliance on a post-election night manual recount is the second worst way to conduct a democratic election (the first being a concealed first count).

The potential for tampering after the unidentifiable voted ballots are removed from the poll site presents too great a risk for a democratic electoral process, which is why New York has insisted on a get-it-right-on-election-night system for 232 years. A post-election night recount is a breach of our existing transparent and maximally safeguarded system. Therefore New York has no law which permits a post-election night recount of some or all of the voted ballots. A court cannot order that which the law does not permit.<sup>29</sup>

"They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety"<sup>30</sup> and neither is exactly what those who refuse to resist this unconstitutional law will get. The paper ballots, believed so valuable that these groups are willing to surrender sacred constitutional rights, will be as futile as the right to vote will become pursuant to ERMA.

Those advocating for concealed software-based vote counting on optical scanners, insisting we must have a paper ballots to use as a check *after* the possibility for a fraudulent count has already occurred, either are unwilling to defend their duty to uphold and defend the Constitution or do not understand:

- a) ERMA's method of voting, in which an essential step of the electoral process is controlled by the government outside of the public's ability to contemporaneously observe and question, was found unconstitutional 113 years ago.
- b) It is the public's ability to contemporaneously verify each critical step of the proceedings which provides the deterrence against fraud and satisfies the constitutional rule of transparency resulting in an honest electoral outcome; not an after the count check of some paper ballots.

c) They are abdicating our right to watch and participate in an open electoral process, leaving us to rely solely on an ex post facto review of paper. Post-election night paper ballots are of no value if they have not been preserved inviolate. Unless we are willing to deprive citizens of their liberty without a trial, relying instead on evidence validated solely by the word of the state, these ballots cannot be used unless and until the condition of the ballots is established in a court of law.<sup>31</sup>

d) Leaving aside the issue of using undetectably mutable software in a democratic election, even if ERMA was changed so that the 3% spot check was performed on election night while the chain of custody remained continuously visible, the manual recount will terminate when the inadequate 3% sampling fails to reveal sufficient discrepancies. The election results will be whatever the computer says they are with no opportunity for any further recount. So much for having those paper ballots.

e) The paper ballots and other evidence of whether the votes were accurately counted are supposed to be *preserved inviolate* for possible judicial review. By routinely invading the sealed ballot boxes in an effort to verify the unlawful and unreliable software count we eliminate both the possibility for judicial redress as well as still another safeguard intended to deter fraud.

It was the object of the election law, which was enacted in 1896, ... to secure an honest count, and to preserve for a reasonable time the best evidence, in the event of judicial ... proceedings... for the purpose of criminally convicting the unfaithful election officer, or of trying the title of a person to the office to which he claims to have been elected.<sup>32</sup>

The object of the preservation of the ballots, [is] that it furnishes a further check upon the perpetration of fraud.<sup>33</sup>

f) The paper ballots and other evidence of whether the votes were accurately counted, are needed when the election fails! A democratic electoral system must be designed to prevent failure. This evidence is to be preserved for judicial proceedings in order to convict the thief or prove the wrong person took office. But history has taught us that paper is difficult and sometimes impossible to protect after election night.

Thieves will break through and steal, and **no legislative enactment can prevent** them. The same is true with reference to guarding the ballots from substitution by interested and evil disposed persons.<sup>34</sup>

We must insist on getting the count right under the bright lights of publicity provided at the poll site and avoid the need to have to use the paper ballots or other evidence to challenge the election results. If we forego a transparent first count, relying instead on an ex post facto paper trail: if that trail is derailed, the thief will have prevailed.

g) ERMA requires that we accept the results of the secretly programmed exploitable software, regardless of whether those results are false, because we have no way to prove otherwise. Like the rejected pre-1896 voting system, in which the physical evidence of the count was controlled by the state and "in the event of a fraudulent return ... it was exceedingly difficult to make the necessary proofs,"<sup>35</sup> the only evidence of the election available under ERMA is controlled by the vendor and/or the state. Both the software count and the post-election night ballots cannot be observed or questioned by the public. Once again citizens are deprived of the "necessary proofs" and left with only blind trust in the government, inviting the subversion of the will of the people: a method of voting held unconstitutional 113 years ago.

h) This is the first time in New York's history that the election night count will be unwitnessed, unverified and subject to post-election night alteration, destroying every other safeguard that has protected the integrity of the election results. For all of our history, opportunities for fraud were foreclosed by requiring that the count be conclusively determined on election night:

when the whole election force of officers and party watchers and the public are present, and when there is the least chance for improper conduct or tampering with ballot boxes, and before it is known that the vote is likely to be close between certain candidates; .... to hold the count of the votes at the place where voted, in the presence of the voters, candidates, and officials of the election and of the watchers of the several political parties, and before the importance of a few votes one way or the other is understood, and where there is less incentive to misconduct. **Much of the benefit of the original count would be lost if it was not a final count, but could be changed by a recount.**<sup>36</sup>

### Conclusion

A people may prefer a free government, but if, from indolence, or carelessness, or cowardice, or want of public spirit, they are unequal to the exertions necessary for preserving it; if they will not fight for it when it is directly attacked; if they can be deluded by the artifices used to cheat them out of it; if by momentary discouragement, or temporary panic, or a fit of enthusiasm for an individual, they can be induced to lay their liberties at the feet even of a great man, or trust him with powers which enable him to subvert their institutions; in all these cases they are more or less unfit for liberty: and though it may be for their good to have had it even for a short time, they are unlikely long to enjoy it. -- John Stuart Mill

### ENDNOTES

<sup>1</sup> *In re Hearst*, 183 N.Y. 274 (Ct Appeals, 1905)

<sup>2</sup> *Matter of Hearst* 110 A.D. 346, 350 (emphasis supplied)

<sup>3</sup> Each step has been taken, and announcement made, in the presence of officials and watchers" so that the public could be assured that the inspectors "are responsible for the correctness of the tally sheet and are afforded every opportunity to know that it speaks the truth." --*In re Stewart*, 155 NY 545, 551 (Ct Appeals, 1898) (emphasis supplied in text)

<sup>4</sup> *In re Stewart*, 155 NY 545, 552

<sup>5</sup> *In re Stewart*, 155 NY 545, 550

<sup>6</sup> *In re Stewart*, 48 N.Y.S. 957, 960

<sup>7</sup> *In re Stewart*, 48 NYS 957, 960

<sup>8</sup> *In re Stewart*, 48 NYS 957, 960

<sup>9</sup> <http://www.bundesverfassungsgericht.de/en/press/bvg09-019en.html>

<sup>10</sup> *Richmond Newspapers, Inc. v Virginia*, 448 US 555, 596 (1980)

<sup>11</sup> *Richmond Newspapers, Inc. v Virginia supra* at 595

<sup>12</sup> It is the common fate of the indolent to see their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt. - John Philpot Curran: Speech upon the Right of Election, 1790. (Speeches. Dublin, 1808) as quoted in the Oxford Dictionary of Quotations, NY, 1953, p167

<sup>13</sup> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. --*Richmond Newspapers, Inc. v Virginia supra* at 571

<sup>14</sup> Definition of Chain of Custody, Black's Law Dictionary, Eighth Edition.

<sup>15</sup> Election Law 3-222

<sup>16</sup> *Dailey v. Livingston*, 79 NY 279 (Ct Appeals, 1879)

<sup>17</sup> In March 2009, a CIA cybersecurity expert told the Election Assistance Commission that computerized election systems are vulnerable to hacking and that he believed President Chavez's election was rigged, notwithstanding the post-election manual audit confirming the software tallies. The CIA was particularly interested in Venezuela because Smartmatic, a Venezuelan-owned voting machine company associated with Hugo Chavez's government, owns the intellectual property rights to Sequoia Voting Systems. Sequoia is one of a handful of vendors controlling the voting systems in the United States and will be one of the two vendors in New York if ERMA is not stopped. See, *Most electronic voting isn't secure, CIA expert says*, <http://www.mcclatchydc.com/226/story/64711.html>. The article reports that Smartmatic owned Sequoia until 2007, but that in response to an investigation by the U.S. Treasury Department's Committee on Foreign Investment, Sequoia divested from Smartmatic thus ending the inquiry. In fact, the national security concern was not abated. Recent court documents make clear that Smartmatic still retains the intellectual property (IP) rights over Sequoia, as well as licensing control of the software used in their voting machines and tabulators. See: *Voting Machine CEO Reportedly Lies About Foreign Ownership of Firm* <http://www.alternet.org/democracy/86135/?page=entire>.

<sup>18</sup> An "open...process is essential to fulfill "the First Amendment guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions." --*Richmond Newspapers Inc. v Virginia, supra*, citing *Time, Inc. v. Firestone*, 424 U.S. 448, 473-474, 476-478 (1976)

<sup>19</sup> SBoE Commissioner Douglas Kellner admitted that the optical scan voting system New York plans on using is “not a transparent process.” Conceding that voting on software-based systems conceals how our votes are counted, Commissioner Kellner stated:

And therefore, because it's not a transparent process, we have to substitute for the transparency the certification process.

The transcript from the June 19, 2008 Board meeting is available at, <http://www.elections.state.ny.us/NYSBOE/News/MeetingMinutes/CCTranscriptions06192008.pdf>

<sup>20</sup> National Institute of Standards and Technology (NIST) report on computerized voting systems, Requiring Software Independence in VVSG 2007: STS Recommendations for the TGDC, November 2006, <http://vote.nist.gov/DraftWhitePaperOnSlinVVSG2007-20061120.pdf>,(emphasis supplied in text).

<sup>21</sup> Univ. of Connecticut Voting Technology Research Center, Security Assessment of the Diebold Optical Scan Voting Terminal, October 30, 2006

<sup>22</sup> 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. -- California Secretary of State, Source Code Review of the Diebold Voting System, 2007 [http://www.sos.ca.gov/elections/voting\\_systems/ttbr/diebold-source-public-jul29.pdf](http://www.sos.ca.gov/elections/voting_systems/ttbr/diebold-source-public-jul29.pdf)

<sup>23</sup> As explained by State Board of Elections Commissioner Douglas Kellner:

Machines similar to today's lever machines were at the center of a voter-fraud scandal in the 1940s. The machines had mechanical counters similar to odometers that recorded how many votes were cast for each candidate. Some of the people responsible for counting the votes used pen knives to change the counters and thus the votes. Similarly, the counters used on today's machines could be adjusted prior to the opening of polls to provide an artificial advantage to a candidate. **Unlike e-voting machines, which have all of its inner-workings hidden away as code, the working parts of lever machines are exposed to the world.** 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.

Cairn's, *The First Amendment, Democratic Design and Civic Innovation for the Digital Age*, Interview with SBoE Commissioner Douglas Kellner, November 16, 2005, [http://cairns.typepad.com/blog/2005/11/an\\_afternoon\\_wi.html](http://cairns.typepad.com/blog/2005/11/an_afternoon_wi.html), (emphasis supplied)

<sup>24</sup> There would be no way to know that any of these attacks occurred; the canvass procedure would not detect any anomalies, and would just produce incorrect results. The only way to detect and correct the problem would be by recount of the original paper ballots. -- California Voting Systems Technology Assessment Advisory Board (VSTAAB), 2006, [http://www.sos.ca.gov/elections/voting\\_systems/security\\_analysis\\_of\\_the\\_diebold\\_accuasic\\_interpreter.pdf](http://www.sos.ca.gov/elections/voting_systems/security_analysis_of_the_diebold_accuasic_interpreter.pdf)

<sup>25</sup> *People ex rel. Hirsh v. Wood*, 148 N.Y. 142, 146-147 (Ct Appeals, 1895)

<sup>26</sup> *In re Stewart*, 48 N.Y.S. 957, 960

<sup>27</sup> *Richmond Newspapers, Inc. v Virginia supra* 597 citing *In re Oliver*, 333 U.S., at 271

<sup>28</sup> Regarding the use of post-election ballots, the Court held: "Every consideration of public policy as well as the ordinary rules of evidence require that the party offering the evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been rigorously preserved the ballots are the best and highest evidence, but if not, **they are not only the weakest but the most dangerous evidence.**" – *Dailey v Livingston*, 79 NY 279, 290- 291 (Court of Appeals, 1879) (emphasis supplied)

<sup>29</sup> Pursuant to New York's paper ballot counting laws, the only time ballots could ever be recounted was pursuant to a judicial proceeding. A limited number of ballots that were disputed or challenged during the open canvass were separately identified with endorsements written on the back of each ballot that corresponded to the recordation on the publicly witnessed tally sheet, indicating a void, blank or challenged ballot and the reasons therefore. These identified ballots were not placed in the ballot boxes containing the unidentifiable voted ballots because the sealed ballot boxes were not to be disturbed, but to be preserved inviolate after election night. Instead these questioned ballots were set aside in a separate envelope and preserved for judicial review. Only these identified ballots might be recounted, depending upon the determination of the court.

*A quo warranto* proceeding can be brought challenging title to office, in which the case the ballots might be used as evidence in the judicial proceeding, but only if the jury was satisfied that there had not been the opportunity for tampering and that the ballots therefore were the original ballots cast at the election.

Preserving all of our constitutional safeguards in the conversion to lever-counted elections, the prohibition against post-election recounts of the voted ballots cast by the voter at the poll site was obviously continued; recounting the ballots isn't possible on a lever machine. In some instances we would recanvass the lever machines, meaning we check the numbers as recorded on the lever machine against the paper returns prepared on election night, just as we checked the tally sheet prepared by the inspectors against the returns under our paper ballot system. In some cases discrepancies between the paper returns and the lever's recordations would result in

opening the lever machine to determine whether the machine functioned properly.

In 1920 absentee voting legislation was passed creating another type of paper ballot: ballots not cast at the poll site. The absentee voting statute was a compromise measure intended to prevent the disfranchisement of those voters who absolutely were unable to be present at the poll site. Absentee voting is in derogation of the general Election Law and the maximally protected method of vote casting and counting conducted at the poll site. Additional safeguards for absentee voting were enacted "in recognition of the fact that absentee ballots are cast without the secrecy and other protections afforded at the polling place, giving rise to greater opportunities for fraud, coercion and other types of mischief on the part of unscrupulous partisans." *Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251, 255 (Ct Appeals 2004).

While these additional safeguards assuage the risks, they remain a less secure means of voting. For example, chain of custody is immediately exposed because the voter does not cast the ballot at the poll site where it would be counted under conditions of continuous publicity. The counting of absentee ballots occurs after the aggregate votes is known, and therefore the temptation born of the knowledge of how many votes is needed to sway an election is unavoidably present. Absentee voting is strictly limited in New York because the safeguards providing maximum protection are not available in the exceptional situation of absentee voting.

In 1939 New York's election law was amended to require that the recanvass of the lever machines be made mandatory, requiring an automatic recanvass of each machine after every election (former Election Law section 274, now section 9-208). An amendment to that statute was subsequently passed in 1942 allowing absentee ballots to also be recanvassed, permitting the limited number of paper ballots used in a lever election to be recounted. Our safeguards protecting the poll site count, which represented the super majority of voters who had shown up to cast their ballots, continued intact. The election night count remained unalterable, unless error or fraud were demonstrated in a judicial proceeding, precisely as it was pursuant to New York's hand count system.

The count as recorded on the lever machines, like the count reflected on the tally sheet in a hand count election, is the most secure count and the only one that counts. Only the absentee ballots, which were never cast by the voter at the polling site to begin with, may be recounted. The recount exception for these limited paper ballots was passed only as an extension of former section 274, "deal[ing] with elections conducted by the use of voting machines." *O'Shaughnessy v. Monroe County Bd. of Elections*, 223 N.Y.S.2d 408 (AD 4th Dept 1961).

The automatic recanvass provision under EL 9-208 has no application to paper ballot elections. In *Ullman v Power*, 12 NY 2d 724 (Ct Appeals, 1962), the Court upheld the Appellate Division's finding that the automatic recanvass of absentee ballots pursuant to EL 9-208, "does not authorize an automatic recanvass of ballots in respect of a primary election conducted with paper ballots: it expressly applies solely to an election conducted with machines, and by amendment extends the automatic recanvass to include absentee ballots." *Ullman v Power*, 232 NYS 2nd 711, 712.

There continues to be nothing in the Election Law that would permit a recount of all the paper ballots, as has been the rule for 232 years. ERMA will violate the prohibition banning the use of the post-election night ballots voted ballots, in contravention of constitutional safeguards and in violation of the right to have the evidence of the count preserved inviolate for judicial review.

But even ERMA doesn't permit a full recount unless there's sufficient discrepancy between the computer's count and the hand count, which is rarely if ever going to happen for the reasons explained in this article.

It has been erroneously suggested by some who apparently are not familiar with the case law, that EL 16-106 (4), which provides that "The court may direct a recanvass," entitles the court to direct a recount of the paper ballots. That is incorrect. The recanvass described at EL16-106 (4) is the recanvass discussed above: a rechecking of the numbers on the tally sheet or the lever machines, not an actual recounting of the ballots. It is the only type of recanvass that has ever been available post-election. There remains no statute in New York authorizing a general recount of paper ballots; thus the court cannot direct same.

<sup>30</sup> Benjamin Franklin, Historical Review of Pennsylvania (1759)

<sup>31</sup> See endnotes 14 and 28

<sup>32</sup> It was the object of the election law, which was enacted in 1896, to permit a secret ballot, to secure an honest count, and to preserve for a reasonable time the best evidence, in the event of judicial or of legislative proceedings, instituted after the election was closed, for the purpose of criminally convicting the unfaithful election officer, or of trying the title of a person to the office to which he claims to have been elected. - *In re Hearst*, 21 Bedell 274, 183 N.Y. 274, 281 (Ct Appeals, 1905)

<sup>33</sup> The object of the preservation of the ballots, [is] that it furnishes a further check upon the perpetration of fraud ... It accomplishes this, necessarily, because the ... evidence of how the people voted is to be preserved in such form that it may be used not only to deprive, possibly, the intended beneficiary of the fruit of his office, but also that it may be used ... in criminal proceedings. That, of course, must necessarily operate as a check upon those who might otherwise be persuaded into wrongdoing. -*Brink v Way*, 179 N.Y. 174, 180 (Ct Appeals, 1904)

<sup>34</sup> *Brink v. Way*, 17 Bedell 174, 184, (Ct Appeals, 1904) (emphasis supplied)

<sup>35</sup> The old law [pre-1896] **provided no adequate restraints** upon the officials whose duty it was to canvass the votes. The inspectors made up a statement of the result, and immediately thereafter all the ballots and memoranda of the canvass were destroyed... In the event of a fraudulent return made by the inspectors to the county board of canvassers, **it was exceedingly difficult to make the necessary proofs in the absence of record evidence.** - *In re Stewart*, 155 N.Y. 545, 549, 553 (1898) (emphasis supplied)

<sup>36</sup> *In re Park*, 74 N.Y.S. 915, 916 (1902)