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EDITORIAL MEMORANDUM

Voter-verified paper ballots increase confidence in elections

Paper receipts compliant with ADA and HAVA requirements

Last month in South Florida, Miami-Dade County held a referendum to settle the controversial issue of whether to allow slot machines in race tracks and jai alai frontons. The rhetoric surrounding the issue was high, with even Gov. Jeb Bush weighing in on a local issue. The county narrowly defeated it. Shortly after the election, it was discovered that the electronic voting machines used in the referendum recorded 1,246 “under-votes,” or ballots where no votes were cast. Further investigations revealed that hundreds of under-votes were recorded in at least five other elections. Although elections officials insist the lost votes would not have affected the outcome of the referendum, there is no way for elections officials to determine the accurate tally of the single-question referendum. Amid the uproar of the bewildered Miami-Dade County voters, who have no idea if their vote was counted, the Miami-Dade Elections Supervisor resigned.

The tabulation of votes should be a simple task of addition for computers that are capable of far more complex equations. Yet, election after election of voting machine malfunctions have demonstrated the need for a failsafe — voter-verified paper ballots. Voter-verified paper ballots are paper receipts of

votes cast electronically and verified by voters. Voters using direct recording electronic voting machines (DREs) would confirm their selections on a screen and on a contemporaneous paper receipt. Once the voter confirms the selections, the machine counts the electronic vote and the receipt is stored in a locked box. In the event of a recount (or in Connecticut, a recanvass), elections officials would tally the paper ballots, not read the electronic tabulation on the machine.

The voters' selections, or the ballots, collectively represent the most important element of democracy, the permutations of which can be cast in a variety of ways — on paper, on a lever machine, on electronic voting machine and even in a show of hands. The voting machines are simply tools for democracy that allow districts to quickly tabulate the results. Given the spotty reliability of electronic voting machines to record and even store, it is clear that another method of preserving the voters' ballots needs to accompany the new technology, one that has the complete confidence of the voters. A contemporaneous paper ballot confirmed by each voter would be the most accurate and reliable record — a virtual snapshot of each vote cast on an electronic voting machine.

In March, the Connecticut General Assembly's Government Administration and Elections Committee approved legislation, Senate Bill 55, that would require that all new electronic voting machines have a VVPB. The legislation is not without its opponents who claim that VVPBs are a violation of the Americans with Disabilities Act and the requirements of the Help America Vote Act, and could cost the state its \$34 million in federal funds. **In this memorandum, Connecticut Common Cause will dispel those allegations, providing proof that not only are VVPBs ADA- and HAVA-compliant but that the state is not at risk of losing federal funds on the issue of voting technology.**

A RECORD OF ERRORS IN ELECTRONIC VOTING MACHINES

Based on evidence of poor electronic voting machine performance, there is a compelling state interest to have VVPBs. Since the introduction of voting machines, numerous problems — often unexplained — have surfaced:

- At a precinct in Franklin County, Ohio, in the 2004 election, a computer recorded 3,893 extra votes for President Bush. The mistake was discovered when the precinct posted 4,258 votes for Bush despite showing that only 638 voters cast ballots. The malfunction remains unexplained.
- In North Carolina in the November 2004, a machine lost 4,500 votes, an error that may force the state to run new elections for two statewide offices.
- In a special election in Broward County, Fla., for the State House District 91 seat, electronic voting machines showed a total of 134 under-votes. The winner, Ellyn Bogdanoff, received 12 more votes than the runner-up.

BRIEF HISTORY OF VVPB LEGISLATION IN CONNECTICUT

In 2004, democracy and VVPB activists lobbied for legislation that would require a VVPB for all new electronic voting machines. The legislation, Senate Bill 388, was unanimously approved in the GAE and Appropriations committee, and passed on consent in the state Senate. Before the state House of Representatives raised the bill, Secretary of the State Susan Bysiewicz forwarded a letter to the GAE co-chairman from U.S. Representatives Robert Ney and Steny Hoyer, and U.S. Senators Mitch McConnell and Chris Dodd to their Congressional colleagues. In the letter stated:

“The proposals mandating a voter-verified paper record would essentially take the most advanced generations of election technologies and systems available and reduce them to little more than ballot printers. While such an approach may be one way to address DRE security issues, it would, if adopted, likely give rise to numerous adverse unintended consequences. Most importantly, the proposals requiring a voter-verified paper record would force voters with disabilities to go back to using ballots that provide neither privacy nor independence, thereby subverting a hallmark of the HAVA legislation.”¹

The letter also suggests that their Congressional colleagues wait until the Elections Assistance Commission settle the question of voting systems security. The forwarded letter, which had the implied

¹ “Dear Colleague,” Rep. Robert Ney, Rep. Steny Hoyer, Sen. Mitch McConnell, Sen. Chris Dodd, March 3, 2004. (www.house.gov/cha/dearcolleaguemarch3-04.htm)

threat of losing federal funds for “subverting” HAVA prompted the GAE chairs to hold off on VVPB for a year. The House never raised the bill for a vote.

For the record, Nevada, the only state to use electronic voting machines with VVPB, has never experienced any difficulties nor “unintended consequences.”

FALSE ALARM NO. 1 – VIOLATION OF THE ADA

Although electronic voting machines (DREs) have come under fire for a variety of problems, the machines do provide individuals who are visually impaired the opportunity to vote unassisted. Using audio headphones, visually impaired voters can cast their ballots and confirm them without the assistance of a sighted person. Additionally, because the machine is programmable, it is possible for people who do not speak English to vote in their preferred language.

Connecticut Common Cause and other democracy advocates have never sought to prevent the use of DREs, only to enhance them with VVPBs. Unfortunately, the VVPB element of the DREs has come under fire from a handful of advocates for the blind who believe that because the piece of paper can't be audibly confirmed, it is a violation of the ADA.

That assessment is not accurate. Section 202 (Discrimination) of the ADA states:

“Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

The ADA guarantees equality in opportunity. People using electronic voting machines who are visually impaired are not being excluded from voting nor in the opportunity to confirm their votes. The only activity in which they are unable to participate is the confirmation of the VVPBs — an election record that is not essential in the act of voting but in the accuracy of election tallies. In fact, VVPBs are only utilized in the event of a recount, an uncommon occurrence that is triggered statutorily by a major discrepancy or close vote. Although the sighted person has two opportunities to confirm their votes, such a situation does not exclude the visually impaired from participating in elections unassisted.

The Department of Justice in its October 2003 memorandum supports that view:

To the extent the paper record provides sighted voters with an opportunity to check their ballots, this does not deny a benefit to sight-impaired voters, because the DRE machines' auditory component already provides a means for such voters to verify their ballots before casting them. But more importantly, given that all voters were fully capable of confirming their ballot before the advent of paper-producing DRE machines (either by viewing the summary screen, or using the machine's audio capacity), we do not think the paper record provides any "benefit" at all in this regard.²

When California decertified certain electronic voting machines for their inability to produce a VVPB, advocates for the disabled sued the state for the recertification of the machines. The United States District Court for The Central District Of California ruled in favor of California and stated:

"... the ADA does not require accommodation that would enable disabled person to vote in a manner that is comparable in every way with the voting rights enjoyed by person without disabilities. Rather, it mandates that voting programs be made accessible, giving a disabled person the opportunity to vote."³

Advocates for the disabled did not appeal the case and California is among the 11 states that currently require VVPBs for electronic voting machines.

FALSE ALARM NO. 2 – LOSS OF HAVA FUNDS

Critics of VVPBs contend that if Connecticut requires the paper receipts before the Elections Assistance Commission's Technical Guidelines Development Committee has made its recommendations; the state would jeopardize its \$34 million in federal funds. Again, this is not accurate.

² "Memorandum Opinion For The Principal Deputy Assistant Attorney General Civil Rights Division," Department of Justice, October 10, 2003

³ "American Association Of People With Disabilities, et al., Plaintiffs, vs. Kevin Shelley, Defendant. Peter Benavidez, Et Al., Plaintiffs, vs. Kevin Shelley, Defendant." July 6, 2004 324 F. Supp. 2d 1120; U.S. District Court For The Central District Of California.

In its Feb. 9, 2005 testimony to the House Administration Committee, the EAC conceded that any recommendations it makes on VVPBs will be strictly voluntary. It stated:

“HAVA Section 221 calls for the establishment of a Technical Guidelines Development Committee (TGDC)³ to assist the Commission in the development of voluntary voting system guidelines (also referred to as voluntary standards). These guidelines, or standards, are characterized as voluntary because EAC does not have the regulatory authority to issue mandatory standards. Consequently, each State retains the prerogative of deciding whether to adopt these standards for the procurement of voting systems.”⁴

In short, Connecticut is free to enact legislation requiring VVPBs without the worry of losing federal funding. To date, there has never any statement or directive that suggests otherwise.

COMPELLING STATE INTEREST AND THE 14TH AMENDMENT

In its July 2004 ruling, the federal district court in California cited a 1992 Supreme Court decision in the election case, *Burdick v. Takushi*. In 1989, Hawaii prohibited the use of write-in ballots and was sued. The Supreme Court ruled in favor of Hawaii saying that the state’s nominating procedures were open and accessible, and that any serious candidate for office could easily petition onto the ballot. In its landmark ruling, the Court stated:

“We have developed (although only recently) a framework for assessing the constitutionality, under the First and Fourteenth Amendments, of state election laws. When a State’s rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review, and a State’s important regulatory interests are typically enough to justify reasonable restrictions.”⁵

In its ruling the federal court in California wrote that the state’s decision “to modify DREs to include VVPAT technology is a reasonable one.” The court agreed with California that:

1. The DRE voting systems currently in use do not produce an accessible voter-verified paper audit trail which would permit voters to independently verify the accuracy of their votes;
2. they do not permit meaningful recounts;
3. they may not permit a contest to be decided by a meaningful recount;
4. it is extremely difficult, if not impossible, to determine whether software has been compromised;
5. the technology is difficult to operate and repair; and

⁴ “Testimony Before The House Administration Committee,” United America United States Election Assistance Commission, Feb. 9, 2005

⁵ *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d. 245 (1992)

6. the machines may be subject to erroneous programming, tampering, or manipulation.⁶

Connecticut Common Cause, advocates for democracy and scores of legislators have agreed that given the track record of electronic voting machines, the state has a compelling interest to ensure that any recount of DREs be as accurate as possible. The best way to measure accuracy is to use the voter-verified paper ballots.

CONCLUSION: SENATE BILL 55 REASONABLE AND EFFECTIVE

The GAE Committee approved, 19-1, Senate Bill 55, "Voter Registration, Certain Nominating Procedures, Campaign Accountability, A Voter Guide, Push Polling and Electronic Voting." The section that addresses VVPBs requires direct recording electronic voting machines (DRE) approved by the Secretary of the State for an election or primary held on or after July 1, 2005 to:

- Display a printed ballot that voters can verify as accurate. In the event of a recount, elections officials would tally the printed ballots and not merely read a number off a computer screen.
- Provide an audio confirmation of the votes cast on the machine and announce the printing of a paper ballot for individuals who are visually impaired.
- Require a mandatory manual audit of at least one machine in each polling location even in the event of no recount.

There have been suggestions that a voter-verified paper receipt be used as a record of evidence in the event of a disputed election before a state court. Although the proposal seems reasonable, it relegates the VVPB to be one of possibly several election records that a judge is left to interpret. Connecticut Common Cause does not believe elections should be decided in the courts but at the polls using the most accurate method of tallying. The only way to guarantee accuracy is through VVPBs.

⁶ "American Association Of People With Disabilities, et al., Plaintiffs, vs. Kevin Shelley, Defendant. Peter Benavidez, Et Al., Plaintiffs, vs. Kevin Shelley, Defendant." July 6, 2004 324 F. Supp. 2d 1120; U.S. District Court For The Central District Of California.

Because plans to purchase \$5 million worth of voting machines have been set into motion, it is critical that the Legislature enact Senate Bill 55 this year or risk being burdened with machines that provide no measure of safeguarding the integrity of elections. Connecticut Common Cause urges the Legislature to approve the VVPB legislation as soon as possible to guide the Secretary of the State's office in its selection of the next generation of voting machines.

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