

CURRENT VOTING SYSTEMS

Ralph Mohr

Thank you, very much. Steven has pretty much described the state of the law plus the position that each of the local Boards of Elections find themselves in. I have been Election Commissioner since 1993, not 2003, which makes me the longest serving administrator in this panel, and I think I want to approach this, not going back to the law as it stands and faces us now, but giving more of an historical perspective. The Erie County Board of Elections, has many rural areas, very small towns, which each have one or two election districts, compared to the City of Buffalo, which has 300, and at that time when I came into office in 1993, had 500 election districts. I find myself somewhere between Onondaga County and New York City.

Both Steve and Ed had mentioned the Election Commissioners' Association, and their involvement in it as well. Since 1993, I have been fairly involved with the Election Commissioners' Association, serving both as an officer on the Executive Committee and as Caucus Chair of my respective party, so I have been involved with it as well. We have seen a tremendous change in the Election Commissioners' Association to get us to the point where we can have someone like Steve Richman present the case for Election Commissioners across the State of New York. I know that in a recent meeting that we had a telephone conference in the Western District of New York, because we break up in regions, we went through all our concerns, and we said "[p]ass it on to Steve," because we know he will present it properly. And we very much appreciate that because in 1993, when I joined as an Election Commissioner, we did not have the participation of the New York City Board of Elections in that Election Commissioners' Association, other than a fleeting or passing commissioner coming up once or twice to attend the conference. Since, you know, the late 1990s and 2000s, they have been a full partner in the Election Commissioners' Association, very actively involved, and many of, I know as far as my county goes, and many of the smaller counties,

which you think would have nothing in common with New York City, utilize Steve, and the New York City Board of Elections, as a resource on how we are going to do it.

When I came into office in 1993, the Board of Elections in Erie County was very much the old closed political process that you saw before. We had the World War II era metal desks, we had the big file cabinets, and we had octogenarian election inspectors carrying poll books that weighed more than they did out to the polling sites. Now you come and look at the Erie County Board and you'll see that we are computerized, we have cubicles. Some of our election inspectors are actually under 70 years old, and we have moved ahead to optical imaging and other systems that we utilize.

When we talk about the voting systems that we utilize in Erie County, we use, of course, the lever machines, which are utilized across New York State. The use of voting machines, as opposed to paper ballots or other forms, is required by the Election Law Section 7-203, which requires the use of voting machines in general, primary, and special elections. We also utilize the AutoMARK, the ES&S AutoMARK Ballot Marking Device, pursuant to the stipulation of the Federal Court Order. Unlike many of our surrounding counties, we purchased one AutoMARK Machine. We borrowed one from Chautauqua County, and we just recently, for this past election, purchased a second AutoMARK Machine. Not because of the use, because in this past election we had four individuals throughout all of Erie County utilize the AutoMARK Machine, but because of the failures that we had within that machine and in the transportation. It works beautifully until you try to move it, and once it is moved, as many of the other ones—and I don't want to put down the AutoMARK Machine, because we have looked at the other system, that the AutoMark is the best that works for our county, but it still takes a tremendous amount of resources and effort to put this into place.

And what we have done in Erie County is, we have completed extensive education among the disabled community - we had extensive outreach. We hired, because we do not have an expansive public transportation system outside the City of Buffalo - one of the things that the NFTA still does, is it still believes the center of Erie County and Niagara County is the City of Buffalo, where it is actually sprawled out into the suburban areas - we hired a private cab company who cut us a very good deal to standby and charge us per ride. And we had one person in the past two years utilize that service to go to the polling place to utilize the

AutoMARK Machine. In addition to the lever and the ballot marking device, we have Sequoia Absentee Ballot Optical Scanning Device. We purchased three of them back, probably, in the mid-1990's, to try to go through and automate our absentee ballot system.

I have been blessed, as Election Commissioner since I've been in, to have, for the vast majority of that time, my counterpart, who started working at age 18 at the Board of Elections working on voting machines, and moved himself up to the point of being the Commissioner; so he had a practical experience and practical knowledge as to what worked. He also had the daring that I did coming into it, ignoring the state law when it didn't make sense and trying new and innovative items. I still have in my possession, in my archive files, a 1996 letter from the State Board of Elections chastising myself, in particular, and the Erie County Board, for daring to go into something other than the square absentee ballots that were set out in the Election Law. And how we arrived at that is, we looked at it. At that time, there was, there was the advent of the lottery, the State Lottery was doing a great deal of promotion and you had the little color ovals. We went back on our experience in the school days and said, well, we took all our tests by filling in the little ovals, and we changed our absentee ballots. We first initiated with the filling in of the arrow in the presidential election in 1996, and then we transferred to the absentee ballots having the little optical scan with the little ovals that we filled in, which allowed us then to bring in equipment that could read an optical scan. Of course that is in violation of the Election Law, which says that we take the absentee ballots, send them out to the polling locations, and then have the inspectors count them, then hope that all the ballots come back, and then count them again in the recanvas.

We had done that in 2003, and we began that practice in the mid-1990s, by retaining the absentee ballots, running them through, and providing them to the media outlets for an unofficial tally on election night. That remained unchallenged until 2003, when we had a budget cut which cut half of the staff of the Erie County Board. We found that it was physically impossible to set up voting machines in each of the jurisdictions which had races.

Erie County, has a great deal of primary ballots. It is not unusual for us to have in a committee, over 1,000 committee fights, and in a general primary, having somewhere between four to six hundred different ballot styles for a primary election. And that is

something that, at least in Western New York, we don't have anywhere around, and no other county faces. So certainly ballot security and keeping track of ballots is very important to the Erie County Board.

When we had the budget cuts and we were not able to set up all of the voting machines, we had somewhere in the neighborhood of about a third of the jurisdictions in Erie County voting on paper ballots. The candidates took us to court and pulling out all of these statues which said you have to send the ballots out; they have to be counted at the polling site, and, first of all, you have election inspectors that arrive at 5:30 in the morning. They conduct the election until 9 o'clock, and then they are supposed to sit there and open up and count ballots, some of which could be two, three hundred ballots in a particular district, which would take them well past midnight. We argued that, practically, this was not a feasible solution, and the court sided with us citing back to how we had not sent out absentee ballots, even though it was in violation of law, you know, for, at that time, about seven, eight, years.

We do utilize provisional and absentee ballots. What Steve and Ed had said about presidential elections is certainly attainable, or is certainly recognizable in Erie County. In a normal election year, in which you have a local election, we would have somewhere in the neighborhood of eight to nine thousand absentee ballots. In a gubernatorial year, that number of absentee ballots would rise to 16,000, and for a president, in the last presidential election, 2004, we sent out 24,000 absentee ballots. So it is a tremendous amount of ballots which we have to count.

Again, when you take a look at the provisions in the Election Law, and particularly when you look at the 2004 election, I have to warn you that Erie County does do things a little unorthodox, to the point where we will go and try to franchise the voter as opposed to follow the strict confines of the Election Law. We have emailed ballots to Iraq and Afghanistan. We have emailed ballots to truck stops in North Carolina. We have emailed and faxed applications out to people in hospitals. We have done a number of things that technically do not fall within the provisions of the Election Law, and when they have been challenged, the courts have generally looked at the practicality of it, saying it allowed the person to vote. And they would let it slide even though it does not comply with the particular requirements of the Election Law.

One of the things that we have also done, in an attempt to franchise the voter, when the State came out in response to the

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Federal Government with the voter identification requirements, and there was a great deal of confusion from the initial State directives, which came out as to what identification we would need. Both Erie County Commissioners called a meeting of the Monroe County Commissioners, and the Onondaga County Commissioners. We got together at a restaurant and we said, look, let us figure out what we are going to use as a standard, because if it is going to go to court, and it is going to go to the Fourth Department, they are not going to overturn the three largest counties in their jurisdiction. And that is the way we have generally done many of the things that have allowed us to advance beyond the Election Law.

So what we have been looking at, even though it has been federally required under the HAVA Legislation, I can say that the process of looking at the system to see if there is a better way of doing it, at least in the Erie County Board, and if there is a better voting system, has been occurring probably since 1996, and it was well before HAVA. We took a look at the lever machines, and generally Election Commissioners across New York State have a great deal of fondness for lever machines. There are a lot of benefits to the lever machines. You don't need electricity; you don't need special facilities, and probably the best explanation I've heard, that came from Steve, when you spoke as to what particular requirements you have when you move a machine into a building that does not have power cord, or adequate power supplies; which doesn't have the adequate facilities. I mean, we have some locations where we put it under a light because there is no cord there, and, you know, that is a practical and real concern that we have.

Inspector familiarity. We have 4,000 election inspectors that we utilized on Election Day. Certainly you are not over changing 4,000 people to get to learn a new system all at once, and when you do have election inspectors that drop off, you get these election inspectors, one or two at a time, in a district, and you're able to go and rely on the experience. So the election inspectors, particularly in areas where the State Legislature has now said that instead of municipalities setting the rate of pay for the election inspectors, the county does, and in Erie County, many of the election inspectors received a cut in pay from what they had because they standardized, they increased the rate of pay, which increased it for inspectors in the City of Buffalo, many of the wealthier suburban areas, and even some of the not-so-wealthy suburban areas, those

election inspectors received a \$50 - \$60 cut in pay to \$132 a day. And we are open from six o'clock until nine, both primary day and the general election day as opposed to noon to nine, as most of the counties in New York State are for primary day. So we lost election inspectors with regard to that, so familiarity was important to that.

Steve had mentioned the resistance to vote tampering. And the previous speaker talked about, well I don't know exactly how the lever machine works. You don't, as an election inspector, or as an Election Commissioner, or an administrator, I don't necessarily have to know how the lever machine works, but I can certainly open up the back of the machine, and on the lever machine, you know if it has been tampered with; you know if it has been broken; you know if the public counter is stuck between 199 and 200 and hasn't gone any further. It is readily visible, and that is one of the things you don't see on the DREs. And I think in that regard, there is a familiarity with that, and it causes election administrators to say that they like those lever machines.

Lever machines are not easily misplaced. Since 1993, I have lost one machine, and it was only for a day. The janitor had locked it into a closet. They weigh 680 pounds. They are not easily transported off. You don't have boxes of ballots missing. You could drop them down a flight of stairs, which we have done, and the counters still remain. We have dropped them off the back of trucks; the counters still stay. And you can check the public counter versus the counters on each of the wheels on the vote tally. They all add up with what the inspectors have written down, so it prevents overvotes. And they have, not only verifiable counters, but the familiarity with the public.

Every once in a while you will hear stories where people come in and they don't know how to vote on a lever machine. We had one lady that would come in, she would pull down all the levers, and then before she pulled the lever back to open the curtain, she would push them all up so nobody would go and look. Well, our machines don't open up unless there is a vote that is cast. So unless the lady forgot to push one back up, she is not able to get out and we are able to correct it.

Despite those benefits, we recognize there are limitations. One is the transportation and the weight of those machines. Those are 680 pound machines, they are very difficult to maneuver around, they cost a lot to transport, and they are not easily stored.

Voter assistance in the voting booth. The lever machines are not

readily accessible to disabled persons with special need. The number of public offices and the parties are limited. In our case, you have the shoot machines which go down, we go across, we are limited to 30 columns. And we have a number, I had mentioned before, the number of primary fights we have.

The Judicial Conventions. We routinely put judicial convention delegates and alternate delegates on paper in conjunction with the voting machine because it cannot all fit. We have had a number of ways where we have used yokes and things that, you know, some we have not used since 1950, to go back and rig the machines so we are able to get as much as we can onto a voting machine.

The ballot position limitations is another situation where you have multiple offices and the lining up of the candidates. You have to use these channels on the voting machines, and, you know, despite the number of attempts that have been made to show where the vote declines as you go right across the voting machine and down the voting machine, and I think by reviewing the absentee ballots that we have, by reviewing the counts that we have, I truly believe that does occur. You know, there is an attempt by candidates, and I was a candidate for ten years in the County Legislature, to be in the best position possible on that voting machine, and it is very important, and that is one of the requirements of the full-face ballot in New York. State Senators and State Assemblymen are certainly cognoscente that they do not want to be the 13th next button that you have to hit before their screen comes up.

Mechanical breakdowns. We have had three mechanical breakdowns of counters. Fortunately, during my term as Election Commissioner, none of them were a factor as to the outcome of the race, but in a close race, it certainly can be. And prior to my becoming Election Commissioner, I litigated a case in which the counter stuck in the candidate's home district, who lost by five votes, between 199 and 200. The column before had 40-some votes more than the total of the columns that he was on, and the column after had 30-some votes more, so you know votes were cast on that column, and it is very, very difficult to prove. And you have to have a judge who is going to understand the mechanisms of it as you try to explain it to him, and be sympathetic to call a new election, and that is very difficult in some instances to do.

Because the voting machines were owned by the municipalities as opposed to the County Board, you would find that some alterations had been made on the machines. And in one of the

large municipalities in Erie County, the election workers, election custodians out there, were tired of going back out when the election inspectors accidentally turned down the number two key and locked the voting machine, which would normally be the procedure at the end of the day. So they filed off the restriction so you could open and close that voting machine all day long. We inherited those machines, and there is no way of really going back to fix it, and certainly not when we are going to scrap them in a year, or as we have been thinking. And certainly alternative language and accessibility are restrictions of the lever machines.

When we go and look for what system we are going to go to now, and I have vacillated. I vacillated between DREs, to optical scans, to going flat on paper. We did half the county on paper in 2003, and that certainly has difficulties in and of itself. You take a look at the machines. I have children that are ages 7 to 16, they have no problem walking into a DRE at one of the Election Commissioner Conferences, hitting whatever buttons they need to hit to vote, and walking out and not thinking twice about it. Certainly, you know, other people have a great deal of difficulty just because it is new; it is different. It is something that they are not familiar with.

When we looked at the court challenges that we have had in response to the lever machines, we want to purchase a machine that will not repeat those types of instances we have had. We have certainly had challenges to mechanical breakdowns. I mentioned the case that I handled, plus the challenges that we have had with the candidates coming in where their public counter has been broken. I find in a lot of instances, challenges depend on how it is handled by the administrators. As I said, in 1993 I came in, and it was a very closed system. As a candidate, I didn't know the vote until the Election Commissioners announced it, because they opened the ballots in the back room. They did everything they could to stop you from going back there, and one of the first things that we did is open up that process. And once we made it very transparent, when we invited all of the candidates in, their representatives in, when we explained the process to them, it helped us make all these other changes. Because I would go to the candidates in my party, my counterpart would go to the candidates of his party, and they had trust in the administrators. We had a race that was decided county-wide by five votes. When we finished counting the votes, neither candidate was there. They trusted us to call them up and tell them who won. I mean that is the process,

and it did not go to court following that. So a large extent of it is that.

The challenge of ballot placement. I was involved in a case, and what occurred, it was a multiple office election. It was a vote for three offices, but because of the way the minor party endorsements went, it stuck somebody out into the fourth column. I only know of one instance, and I think in 40-some years, where a person in the fourth column won. I mean it is almost a certain death. When we went to all the parties, with the right to life, with the green party, we had to modify the channels on the back of the voting machine. That modification of the channels, which allowed for those multiple parties, also then allowed for you to change the ballot layout and not do a typical ballot layout, but take somebody from the fourth column and move them within the pack. He may not be under the same columns. That went to court. The courts were very, very leery about doing anything to upset that, and what they did do is, they relied upon a section of the Election Law that said that the State Board of Elections has to certify modifications and devices which are used on the mechanical voting machine. Well, heck, they didn't certify those devices, but if they didn't certify them and we didn't use them, we could not have run the election anyway to accommodate the other parties.

So, you know, that is one of the things we are looking at with the new machines. Certainly, with optical scan you can place names anywhere you want on the ballots. With computerization on DREs, you could probably place names where you want, and that is something that is, certainly to candidates, very important, and we have seen a number of candidates give up endorsements so they are not thrown out in that final column.

And we have had challenges to the absentee counting, even though those are optical scan. We have used the Sequoia Optical Scanning Ballots. What we have done is, we have gone through and found that they are not perfect. They will run through and they will miss certain marks. What we have found is, when we introduced the filling in the oval, the first year you did have people that put X's down that made marks outside the oval. And if we followed the strict construction of the Election Law, we would not have counted those votes, but we adopted, from the beginning, a voter intent item. And then we communicated to the voter: "[w]e counted your vote, but next time, you know, fill in the oval." And we found, year after year after year, when we started out reviewing as Commissioners by hand, three hundred the first year. By the

third year, we were reviewing ten, fifteen. People caught on to how it went, and the problems that we experienced came down.

And what we did, in any of the close races, as the ballots run through the optical scan, we looked to see if ballots were not counted, and then we manually counted by hand. And there are a number of races where we do have to go back, and there are ballots missed, so that is not a perfect system either.

Yes, I had wanted to touch briefly on the requirements that are now in the Election Law as to what the ballot marking devices or the voting machines need to have. Certainly we are looking at that, and you need those requirements to be met, but also, what we are trying to do is to draw upon the experience that we had in the past and see how those two can mesh so we don't go and end up in a situation where ten years from now we are thinking about replacing the machines that we have.