

OUR VOTING RE-PUBLIC

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“ The threat of election privatization raises a fundamental question: Who owns our vote? ”

The struggle for the right to vote has never stopped in the United States. During our 200-plus-year history, we have traveled from a time when only white male property owners could vote, to the abolition of slavery and the passage of the 15th Amendment, and the prohibition of discrimination in voting based on race. The women’s suffrage movement in the early 20th century led to the enactment of the 19th Amendment, prohibiting discrimination in voting based on gender. The civil rights movement ended the legalized system of racial segregation and brought about the landmark Voting Rights Act of 1965.

But the past few election cycles are evidence that our struggle for equal voting rights continues. Certain legal barriers to voting continue (i.e., laws prohibiting ex-felons from voting), and new barriers have emerged that disproportionately target historically disenfranchised communities (i.e., photo identification requirements to vote). But a

quieter threat has emerged that further undermines the integrity of our electoral process.

Election privatization

Since the 2000 presidential election that was decided by the Supreme Court's decision in *Bush v. Gore*, we have seen an alarming increase in the influence and control of private companies over our elections. In a rush to respond to what happened in Florida, the United States Congress passed the Help America Vote Act (HAVA) in 2002. HAVA has provided more than three billion public dollars to states across the country to upgrade their voting systems. As a result, a small handful of private companies (including, but not limited to, The Election Systems & Software Company, Diebold Election Systems, now known as Premier Election Solutions, and Sequoia Voting Systems) have gained enormous profit and influence marketing their electronic voting systems to states and municipalities as the answer to the "hanging chad" fiasco in Florida.

There's only one problem. The electronic voting machines do not work. They are unreliable and insecure, and pose a serious threat to the integrity of our elections. A growing body of evidence, including two separate studies commissioned by the California and Ohio Secretaries of State, demonstrates that these machines are fundamentally flawed for counting and recording our votes. As a result, some states have shifted to a system of paper ballots with optical scan machines. In addition, voters with disabilities are increasingly using non-tabulating ballot marking devices that allow them to vote in an independent and private manner. But more than thirty states still use electronic voting machines. These machines have turned the election disaster of 2000 into something exponentially worse.

I saw firsthand the dangers of these machines as lead counsel for

a coalition of candidates and voters seeking a full and meaningful recount of the 2004 presidential election in Ohio. There was no way to conduct a recount in the Ohio jurisdictions that had used electronic voting machines. There were no paper ballots from which to derive voter intent. We were simply told to trust the machine as it reported again its original tally.

The threat of election privatization raises a fundamental question: Who owns our vote? The danger of electronic voting is best illustrated by the 2006 congressional election in Sarasota County, Florida. In that hotly contested race for Florida's 13th congressional district, 400 votes separated the declared winner, Republican candidate Vern Buchanan, from the Democratic candidate, Christine Jennings. However, 18,000 votes were lost by the electronic voting machines. Jennings filed a lawsuit contesting the outcome of the election, and a group of Florida voters filed a separate suit. [Voter Action, the organization for which I work, helped to bring the voters' case, with other public-interest organizations, and served as co-counsel in the litigation.] Jennings and the voters independently sought the source code, other key software, and the machines themselves in their investigation of the disappearance of nearly twenty thousand votes. The Election Systems & Software Company, which had manufactured the electronic voting machines in question, argued that neither Jennings nor the voters had a right to the requested materials on the grounds that they constituted trade secrets. The Florida courts agreed, allowing the alleged proprietary rights of a private company to trump election integrity and the right to vote. In other words, the election was ultimately under private control.

Electronic vote counting is part of a broader trend in the outsourcing of key election functions to private vendors. Many jurisdictions have privatized electronic poll books and voter registration databases to determine whether people are eligible to vote. In the Georgia presidential primary on February 5, 2008, numerous voters reported that

electronic poll books, made by Premier Election Solutions, were crashing and inoperable, leading to long lines and citizens leaving polling sites without casting ballots. In the New Mexico Democratic presidential caucus that same day, a flawed voter registration database prepared for the state by the Elections Systems & Software Company led to thousands of voters casting provisional ballots when their names did not appear on the voting rolls. Voters in other states have reported similar problems using these systems.

Seven Ways To Reclaim Public Control of Our Elections

The following list outlines changes that we can make to ensure that our public elections are publicly controlled.

Voter-marked paper ballots. Voters must be guaranteed that their votes will be properly counted. This can only be guaranteed via voter-marked paper ballots which reflect voter intent and which can, therefore, be recounted or audited. Electronic voting machines, with or without “paper trails,” should be banned, and the private companies that have marketed this defective product across the country should be held accountable. Paper ballots, marked either by hand or by a non-tabulating ballot-marking device, will ensure that the vote-counting process is controlled by the people and not by private corporations.

Mandatory audits of our elections. Anything of value should be audited, and that includes our votes. We should not rely on candidates to demand a recount to determine whether our votes are being properly counted. Every jurisdiction in the United States should be required to conduct rigorous audits after every election to guarantee that our voting systems are transparent and verifiable.

Public financing of our public elections. We ought to have a system of public financing open to all qualified candidates and their

voter-supporters, and the system ought to apply to all elections at the federal, state, and local level. In Arizona and Maine, where such systems are already in place for state elections, public support, not private money, is what counts. As a result, voters will exercise greater control over the electoral process.

Open-source voting systems. Even with voter-marked paper ballots, citizens must know that their right to vote overrides any alleged trade secret of a private corporation. When votes are counted in secret by private companies, the integrity of the process suffers. All voting systems in the United States should be required to adhere to open-source standards.

Public oversight. Public control of our elections is dependent upon an active, engaged citizenry monitoring the electoral process. Grassroots networks across the country have already helped to expose key voting-rights barriers that threaten the integrity of our elections. With even greater sunlight, we can help ensure that our elections are open, transparent, free and fair.

Election-day registration. Voters should be able to register and vote on the same day. States that use this system experience a higher voter turnout and avoid the barrier of voter registration. The elections industry relies on that barrier to market its privatized electronic poll books and voter registration databases. Election-day registration helps to restore public control of how we access the ballot.

Constitutional amendment guaranteeing the right to vote. Congressman Jesse Jackson, Jr. has proposed an amendment to the United States Constitution to guarantee the right to vote for all citizens. One hundred and eight democratic nations in the world have explicit language guaranteeing the right to vote in their constitutions. The United States, along with only ten other nations, does not. How can this country claim to have an equal right to vote when the way we administer our elections changes from state to state, from county

to county, from locality to locality? In our ongoing struggle for democracy, we must go to the foundation of our political system: the US Constitution, the social contract between “We the People” and our government. It is this, our supreme legal document, which establishes the consent by which we agree to be governed. A constitutional amendment guaranteeing the right to vote will provide a powerful means to reclaim public control of our public elections.

At the end of the Constitutional Convention of 1787, a woman asked Benjamin Franklin, as he left Independence Hall, “Well, Doctor, what have we got—a Republic or a Monarchy?” Franklin responded, “A Republic, if you can keep it.” Today, the question is not so much whether we can keep it but whether we can take it back. History has shown that organized as a movement we have the power to do so. As we fight to end voter suppression, we must also wage a new fight for our time: the struggle to reclaim public control of our public elections. The power resides in each of us to take control of our vote and our democracy.

About the Author

John Bonifaz is the founder of the National Voting Rights Institute and the Legal Director of Voter Action, a national legal advocacy and public education center dedicated to fighting for election integrity throughout the United States.