

HB 98

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WEST VIRGINIA LEGISLATURE
SEVENTY-EIGHTH LEGISLATURE
REGULAR SESSION, 2008

COMMITTEE SUBSTITUTE

FOR

ENROLLED

Senate Bill No. 494

(SENATORS KESSLER, OLIVERIO, WHITE, PLYMALE AND
JENKINS, *original sponsors*)

[Passed March 5, 2008; in effect from passage.]

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AN ACT to amend and reenact §3-4A-2, §3-4A-10, §3-4A-13, §3-4A-16, §3-4A-17, §3-4A-19, §3-4A-28 and §3-4A-33 of the Code of West Virginia, 1931, as amended, all relating to allowing election officials to use an electronic poll book containing voter registration information to verify that registered voters are eligible to vote in an election; defining terms; providing for storage, protection and maintenance of electronic poll books by county clerk; providing for use of

electronic poll book to verify eligibility of voter; requiring election official to notify person not shown in electronic poll book to eligible to vote of the correct precinct; requiring preelection examination of electronic poll books; and requiring use of printed poll book if electronic poll book is not in working order.

Be it enacted by the Legislature of West Virginia:

That §3-4A-2, §3-4A-10, §3-4A-13, §3-4A-16, §3-4A-17, §3-4A-19, §3-4A-28 and §3-4A-33 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 4A. ELECTRONIC VOTING SYSTEMS.

§3-4A-2. Definitions.

1 As used in this article, unless otherwise specified:

2 (1) "Automatic tabulating equipment" means all
3 apparatus necessary to electronically count votes
4 recorded on ballots and tabulate the results;

5 (2) "Ballot" means a tabulating card or paper on
6 which votes may be recorded by means of perforating
7 or marking with electronically sensible ink or pencil or
8 a screen upon which votes may be recorded by means of
9 a stylus or by means of touch;

10 (3) "Central counting center" means a facility
11 equipped with suitable and necessary automatic
12 tabulating equipment, selected by the county
13 commission, for the electronic counting of votes
14 recorded on ballots;

15 (4) "Electronic poll book" means an electronic device
16 containing the same voter registration information
17 maintained by the county clerk in a printed poll book.

18 (5) "Electronic voting system" is a means of
19 conducting an election whereby votes are recorded on
20 ballots by means of an electronically sensible marking
21 ink, by perforating or are recorded on equipment that
22 registers votes on a computer disk, or by touching a
23 screen with a stylus or by means of touch, and votes are
24 subsequently counted by automatic tabulating
25 equipment at the central counting center;

26 (6) "Program deck" means the actual punch card deck
27 or decks, or a computer program disk, diskette, tape or
28 other programming media, containing the program for
29 counting and tabulating the votes, including the
30 "application program deck";

31 (7) "Application program deck" means the punch card
32 deck or equivalent capacity in other program medias as
33 provided, containing specific options used and
34 necessary to modify the program of general application,
35 to conduct and tabulate a specific election according to
36 applicable law;

37 (8) "Standard validation test deck" means a group of
38 ballots wherein all voting possibilities which can occur
39 in an election are represented; and

40 (9) "Vote-recording device" means equipment in
41 which ballot labels and ballots are placed to allow a
42 voter to record his or her vote by perforating or
43 equipment with a screen upon which votes may be
44 recorded by means of a stylus or by means of touch.

§3-4A-10. County clerk to be custodian of vote-recording devices, tabulating equipment and electronic poll books; duties.

1 (a) When an electronic voting system is acquired by
2 any county commission, the vote-recording devices,
3 where applicable, and the tabulating equipment shall
4 be immediately placed in the custody of the county
5 clerk and shall remain in his or her custody at all times
6 except when in use at an election or when in custody of
7 a court or court officers during contest proceedings.
8 The clerk shall see that the vote-recording devices and
9 the tabulating equipment are properly protected and
10 preserved from damage or unnecessary deterioration
11 and shall not permit any unauthorized person to tamper
12 with them. The clerk shall also keep the vote-recording
13 devices and tabulating equipment in repair and of
14 preparing the same for voting.

15 (b) When a county commission elects to acquire and
16 use electronic poll books in lieu of printed poll books,
17 the clerk of the county commission shall immediately
18 take custody of the electronic poll books, which shall
19 remain in his or her custody at all times except when in
20 use at an election or when in the custody of a court or
21 court officers during contest proceedings. The clerk
22 shall ensure that the electronic poll books are properly
23 protected and preserved from damage or unnecessary
24 deteriorations and the clerk shall not permit any
25 unauthorized person to tamper with the electronic poll
26 books. The clerk shall also keep the electronic poll
27 books in good repair and the clerk shall prepare the
28 electronic poll books for election day.

§3-4A-13. Inspection of ballots, electronic poll books and

vote-recording devices; duties of county commission, ballot commissioners and election commissioners; records relating to ballots and vote-recording devices; receipt of election materials by ballot commissioners.

1 (a) When the clerk of the county commission has
2 completed the preparation of the ballots and of any
3 electronic poll books and vote-recording devices as
4 provided in sections eleven-a and twelve-a of this
5 article and as provided in section twenty-one, article
6 one of this chapter, and not later than seven days before
7 the day of the election, he or she shall notify the
8 members of the county commission and the ballot
9 commissioners that the ballots and any electronic poll
10 books and devices are ready for use.

11 (b) The members of the county commission and the
12 ballot commissioners shall convene at the office of the
13 clerk or at such other place at which any vote-recording
14 devices or electronic poll books and the ballots are
15 stored, not later than five days before the day of the
16 election, and shall inspect the devices, electronic poll
17 books and the ballots to determine whether the
18 requirements of this article have been met. Notice of
19 the place and time of the inspection shall be published,
20 no less than three days in advance, as a Class I-0 legal
21 advertisement in compliance with the provisions of
22 article three, chapter fifty-nine of this code. The
23 publication area is the county involved.

24 (c) Any candidate and one representative of each
25 political party on the ballot may be present during the
26 examination. If the devices and electronic poll books
27 and ballots are found to be in proper order, the

28 members of the county commission and the ballot
29 commissioners shall endorse their approval in the book
30 in which the clerk entered the numbers of the devices
31 opposite the numbers of the precincts.

32 (d) The vote-recording devices, the electronic poll
33 books and the ballots shall then be secured in double
34 lock rooms. The clerk and the president or president
35 pro tempore of the county commission shall each have
36 a key. The rooms shall be unlocked only in their
37 presence and only for the removal of the devices,
38 electronic poll books and the ballots for transportation
39 to the polls. Upon removal of the devices, the electronic
40 poll books and the ballots, the clerk and president or
41 president pro tempore of the county commission shall
42 certify in writing signed by them that the devices, the
43 electronic poll books and packages of ballots were
44 found to be sealed when removed for transportation to
45 the polls.

46 (e) Vote-recording devices used during the early
47 voting period may be used on election day if retested in
48 accordance with all the provisions of this section,
49 including public notice between the close of early
50 voting and prior to precinct placement for election day.
51 Vote-recording devices containing a personal electronic
52 ballot (PEB), a programable memory chip and a printed
53 paper trail must comply with the applicable
54 requirements of section twenty-six of this article.

55 (f) Not later than one day before the election, the
56 election commissioner of each precinct previously
57 designated by the ballot commissioners shall attend at
58 the office of the clerk of the county commission to
59 receive the necessary election records, books and

60 supplies required by law. The election commissioners
61 shall receive the per diem mileage rate prescribed by
62 law for this service. The election commissioners shall
63 give the ballot commissioners a sequentially numbered
64 written receipt, on a printed form, provided by the clerk
65 of the county commission, for such records, books and
66 supplies. The receipt shall be prepared in duplicate.
67 One copy of the receipt shall remain with the clerk of
68 the county commission and one copy shall be delivered
69 to the president or president pro tempore of the county
70 commission.

**§3-4A-16. Delivery of vote-recording devices and electronic
poll books; time, arrangement for voting.**

1 The clerk of the county commission shall deliver or
2 cause to be delivered each vote-recording device,
3 electronic poll book and the package of ballots to the
4 polling place where they are to be employed. The
5 delivery shall be made not less than one hour prior to
6 the opening of the polls and in the presence of the
7 precinct election commissioners. At the time of the
8 delivery the device and electronic poll books are to be
9 sealed to prevent any use prior to the opening of the
10 polls and the ballots are to be packaged and sealed to
11 prevent any tampering with the ballots. Immediately
12 prior to the opening of the polls on election day, the
13 sealed packages of ballots are to be opened, where
14 applicable, and the seal of the vote-recording device
15 and the seal of the electronic poll book is to be broken
16 in the presence of the precinct election commissioners,
17 who shall certify in writing signed by them to the clerk
18 of the county commission that the devices, where
19 applicable, and the ballots have been delivered in their
20 presence, that the devices and packages of ballots were

21 found to be sealed upon delivery and that the seals have
22 been broken and the devices opened in their presence,
23 as may be appropriate. The election commissioners
24 shall then cause the vote-recording device and booth to
25 be arranged so that the front of the vote-recording
26 device will not be visible, when the vote-recording
27 device is being operated, to any person other than the
28 voter. The poll clerks shall ensure that the vote-
29 recording device is placed in a location that maintains
30 voter privacy through the entire period of voting.

**§3-4A-17. Check of vote-recording devices and electronic poll
books before use; corrections; reserve vote-
recording devices.**

1 (a) In counties utilizing an electronic voting system
2 where votes are to be recorded by means of perforating
3 or by touching a screen with a stylus or by means of
4 touch before permitting the first voter to vote, the
5 election commissioners shall examine the vote-
6 recording devices to ascertain whether the ballot labels
7 are arranged as specified on the facsimile diagram
8 furnished to the precinct. If the ballot labels are
9 arranged incorrectly, the commissioners shall
10 immediately notify the clerk of the county commission
11 of the foregoing facts in writing, indicating the number
12 of the device, and obtain from the clerk a reserve vote-
13 recording device and thereafter proceed to conduct the
14 election.

15 (b) Any reserve vote-recording device so used is to be
16 prepared for use by the clerk or his or her duly
17 appointed deputy and the reserve vote-recording device
18 is to be prepared, inspected and sealed and delivered to
19 the polling place wherein the seal is to be broken and

20 the device opened in the presence of the precinct
21 election commissioners who shall certify in writing
22 signed by them to the clerk of the county commission,
23 that the reserve vote-recording device was found to be
24 sealed upon delivery to the polling place, that the seal
25 was broken and the device opened in their presence at
26 the polling place. The vote-recording device found to
27 have been with incorrect ballot labels is to be returned
28 immediately to the custody of the clerk who shall then
29 promptly cause the vote-recording device to be
30 repaired, prepared and resealed in order that it may be
31 used as a reserve vote-recording device if needed.

32 (c) In counties using electronic poll books, the election
33 commissioners shall examine the electronic poll books
34 to ascertain whether the poll books are in working
35 order before allowing any voters to enter the polling
36 location. If the electronic poll books are not in working
37 order, the election commissioners shall contact the
38 county clerk who shall immediately authorize a printed
39 poll book to serve in place of the electronic poll book
40 for that election. A printed poll book shall accompany
41 the electronic poll book to each precinct.

**§3-4A-19. Conducting electronic voting system elections
generally; duties of election officers; penalties.**

1 (a) The election officers shall constantly and
2 diligently maintain a watch in order to see that no
3 person votes more than once and to prevent any voter
4 from occupying the voting booth for more than five
5 minutes.

6 (b) In primary elections, before a voter is permitted to
7 occupy the voting booth, the election commissioner

8 representing the party to which the voter belongs shall
9 direct the voter to the vote-recording device or supply
10 the voter with a ballot, as may be appropriate, which
11 will allow the voter to vote only for the candidates who
12 are seeking nomination on the ticket of the party with
13 which the voter is affiliated or for unaffiliated voters in
14 accordance with section thirty-one, article two of this
15 chapter.

16 (c) The poll clerk shall issue to each voter when he or
17 she signs the poll book a printed card or ticket
18 numbered to correspond to the number on the poll book
19 of the voter and in the case of a primary election,
20 indicating the party affiliation of the voter, which
21 numbered card or ticket is to be presented to the
22 election commissioner in charge of the voting booth.

23 (d) One hour before the opening of the polls the
24 precinct election commissioners shall arrive at the
25 polling place and set up the voting booths in clear view
26 of the election commissioners. Where applicable, they
27 shall open the vote-recording devices, place them in the
28 voting booths, examine them to see that they have the
29 correct ballots or ballot labels, where applicable by
30 comparing them with the sample ballots, and determine
31 whether they are in proper working order. They shall
32 open and check the ballots, the electronic poll books, if
33 applicable, supplies, records and forms and post the
34 sample ballots or ballot labels and instructions to
35 voters. Upon ascertaining that all ballots, supplies,
36 electronic poll books, if applicable, records and forms
37 arrived intact, the election commissioners shall certify
38 their findings in writing upon forms provided and
39 collected by the clerk of the county commission over
40 their signatures to the clerk of the county commission.

41 Any discrepancies are to be noted and reported
42 immediately to the clerk of the county commission. The
43 election commissioners shall then number in sequential
44 order the ballot stub of each ballot in their possession
45 and report in writing to the clerk of the county
46 commission the number of ballots received. They shall
47 issue the ballots in sequential order to each voter.

48 (e) Upon entering a precinct which is using an
49 electronic poll book, each voter shall be verified by use
50 of the electronic poll book to be a registered voter. If
51 the voter is not registered according to the electronic
52 poll book within that precinct, the poll clerk is to
53 inform the voter of the proper precinct in which the
54 voter is registered.

55 (f) Where applicable, each voter shall be instructed
56 how to operate the vote-recording device before he or
57 she enters the voting booth.

58 (g) Where applicable, any voter who spoils, defaces or
59 mutilates the ballot delivered to him or her, on
60 returning the ballot to the poll clerks, shall receive
61 another in its place. Every person who does not vote
62 any ballot delivered to him or her shall, before leaving
63 the election room, return the ballot to the poll clerks.
64 When a spoiled or defaced ballot is returned, the poll
65 clerks shall make a minute of the fact on the poll books,
66 at the time, write the word "spoiled" across the face of
67 the ballot and place it in an envelope for spoiled ballots.

68 Immediately on closing the polls, the election
69 commissioners shall ascertain the number of spoiled
70 ballots during the election and the number of ballots
71 remaining not voted. The election commissioners shall

72 also ascertain from the poll books the number of
73 persons who voted and shall report, in writing signed
74 by them to the clerk of the county commission, any
75 irregularities in the ballot boxes, the number of ballots
76 cast, the number of ballots spoiled during the election
77 and the number of ballots unused. All unused ballots
78 are to be returned at the same time to the clerk of the
79 county commission who shall count them and record
80 the number. All unused ballots shall be stored with the
81 other election materials and destroyed at the expiration
82 of twenty-two months.

83 (h) Each commissioner who is a member of an election
84 board which fails to account for every ballot delivered
85 to it is guilty of a misdemeanor and, upon conviction
86 thereof, shall be fined not more than one thousand
87 dollars or confined in jail for not more than one year, or
88 both.

89 (i) The board of ballot commissioners of each county,
90 or the chair of the board, shall preserve the ballots that
91 are left over in their hands, after supplying the
92 precincts as provided, until the close of the polls on the
93 day of election and shall deliver them to the clerk of the
94 county commission who shall store them with the other
95 election materials and destroy them at the expiration of
96 twenty-two months.

97 (j) Where ballots are used, the voter, after he or she
98 has marked his or her ballot, shall, before leaving the
99 voting booth, place the ballot inside the envelope or
100 sleeve provided for this purpose, with the stub
101 extending outside the envelope, and return it to an
102 election commissioner who shall remove the stub and
103 deposit the envelope, if applicable, with the ballot

104 inside in the ballot box. No ballot from which the stub
105 has been detached may be accepted by the officer in
106 charge of the ballot box, but the ballot shall be marked
107 "spoiled" and placed with the spoiled ballots. If an
108 electronic voting system is used that utilizes a screen on
109 which votes may be recorded by means of a stylus or by
110 means of touch and the signal warning that a voter has
111 attempted to cast his or her ballot has failed to do so
112 properly has been activated and the voter has departed
113 the polling place and cannot be recalled by a poll clerk
114 to complete his or her ballot while the voter remains
115 physically present in the polling place, then two
116 election commissioners of different registered party
117 affiliations, two poll clerks of different registered party
118 affiliations or an election commissioner and a poll clerk
119 of different registered party affiliations shall spoil the
120 ballot.

121 (k) The precinct election commissioners shall prepare
122 a report in quadruplicate of the number of voters who
123 have voted and, where electronic voting systems are
124 used that utilize a screen on which votes may be
125 recorded by means of a stylus or by means of touch, the
126 number of ballots that were spoiled, as indicated by the
127 poll books, and shall place two copies of this report in
128 the ballot box or where electronic voting systems are
129 used that utilize a screen upon which votes may be
130 recorded by means of a stylus or by means of touch,
131 shall place two copies of this report and the electronic
132 ballot devices in a container provided by the clerk of
133 the county commission, which thereupon is to be sealed
134 with a paper seal signed by the election commissioners
135 to ensure that no additional ballots may be deposited or
136 removed from the ballot box. Two election
137 commissioners of different registered party affiliations

138 or two special messengers of different registered party
139 affiliations appointed by the clerk of the county
140 commission, shall forthwith deliver the ballot box or
141 container to the clerk of the county commission at the
142 central counting center and receive a signed numbered
143 receipt therefor. The receipt must carefully set forth in
144 detail any and all irregularities pertaining to the ballot
145 boxes or containers and noted by the precinct election
146 officers.

147 The receipt is to be prepared in duplicate, a copy of
148 which remains with the clerk of the county commission
149 who shall have any and all irregularities noted. The
150 time of their departure from the polling place is to be
151 noted on the two remaining copies of the report, which
152 are to be immediately mailed to the clerk of the county
153 commission.

154 (l) The poll books, register of voters, unused ballots,
155 spoiled ballots and other records and supplies are to be
156 delivered to the clerk of the county commission, all in
157 conformity with the provisions of this section.

**§3-4A-28. Post-election custody and inspection of vote-
recording devices and electronic poll books;
canvass and recounts.**

1 (a) The vote-recording devices, electronic poll books,
2 tabulating programs and standard validation test
3 ballots are to remain sealed during the canvass of the
4 returns of the election, except that the equipment may
5 be opened for the canvass and must be resealed
6 immediately thereafter. During the seven-day period
7 after the completion of the canvass, any candidate or
8 the local chair of a political party may be permitted to

9 examine any of the sealed materials: *Provided*, That a
10 notice of the time and place of the examination shall be
11 posted at the central counting center before and on the
12 hour of nine o'clock in the morning on the day the
13 examination is to occur and all persons entitled to be
14 present at the central counting center may, at their
15 option, be present. Upon completion of the canvass and
16 after the seven-day period has expired, the vote-
17 recording devices, test results and standard validation
18 test ballots are to be sealed for one year: *Provided*,
19 *however*, That the vote-recording devices, electronic
20 poll books, and all tabulating equipment may be
21 released for use in any other lawful election to be held
22 more than ten days after the canvass is completed and
23 any of the electronic voting equipment or electronic poll
24 books discussed in this section may be released for
25 inspection or review by a request of a circuit court or
26 the Supreme Court of Appeals.

27 (b) In canvassing the returns of the election, the board
28 of canvassers shall examine, as required by subsection
29 (d) of this section, all of the vote-recording devices,
30 electronic poll books, the automatic tabulating
31 equipment used in the election and those voter-verified
32 paper ballots generated by direct recording electronic
33 vote machines, shall determine the number of votes cast
34 for each candidate and for and against each question
35 and, by this examination, shall procure the correct
36 returns and ascertain the true results of the election.
37 Any candidate or his or her party representative may be
38 present at the examination.

39 (c) If any qualified individual demands a recount of
40 the votes cast at an election, the voter-verified paper
41 ballot shall be used according to the same rules that are

42 used in the original vote count pursuant to section
43 twenty-seven of this article. For purposes of this
44 subsection, "qualified individual" means a person who
45 is a candidate for office on the ballot or a voter affected
46 by an issue, other than an individual's candidacy, on
47 the ballot.

48 (d) During the canvass and any requested recount, at
49 least five percent of the precincts are to be chosen at
50 random and the voter-verified paper ballots are to be
51 counted manually. Whenever the vote total obtained
52 from the manual count of the voter-verified paper
53 ballots for all votes cast in a randomly selected
54 precinct:

55 (1) Differs by more than one percent from the
56 automated vote tabulation equipment; or

57 (2) Results in a different prevailing candidate or
58 outcome, either passage or defeat, of one or more ballot
59 issues in the randomly selected precincts for any contest
60 or ballot issue, then the discrepancies shall immediately
61 be disclosed to the public and all of the voter-verified
62 paper ballots shall be manually counted. In every case
63 where there is a difference between the vote totals
64 obtained from the automated vote tabulation
65 equipment and the corresponding vote totals obtained
66 from the manual count of the voter-verified paper
67 ballots, the manual count of the voter-verified paper
68 ballots is the vote of record.

**§3-4A-33. Tampering with vote-recording devices, electronic
poll books, ballot labels, ballot or ballot cards,
program decks, standard validation test decks
or other automatic tabulating equipment; other**

dishonest practices; attempts; penalty.

1 (a) Any person not an election officer or other public
2 official who shall tamper or attempt to tamper with any
3 vote-recording device, electronic poll book, ballot label,
4 ballot or ballot card, program deck, standard validation
5 test deck or automatic tabulating equipment or in any
6 way intentionally impair or attempt to impair their use
7 and any person who shall be guilty of or shall attempt
8 any dishonest practice upon any such devices or
9 equipment, or with or by their use, shall be deemed
10 guilty of a felony and, upon conviction thereof, shall be
11 confined in a correctional facility for not less than one
12 year nor more than ten years or fined not less than five
13 thousand dollars, or both.

14 (b) Any clerk of a county commission, county
15 commissioner, ballot commissioner, election
16 commissioner, or poll clerk, or any custodian,
17 technician or other public official authorized to take
18 part in the holding of an election or in preparing for an
19 election, who, with intent to cause or permit any vote-
20 recording device, electronic poll book, program deck,
21 standard validation test deck or other automatic
22 tabulating equipment to fail to record, test or tabulate
23 correctly all votes cast thereon or tabulated therewith,
24 tampers with or disarranges such device in any way, or
25 any part or appliance thereof, or who causes or
26 consents to the use of such device or equipment for vote
27 recording, testing or tabulating at any election with
28 knowledge of the fact that the same is not in order, or
29 not perfectly set and adjusted so that it will correctly
30 record, test or tabulate all votes cast or who, with the
31 purpose of defrauding or deceiving any voter or of
32 causing it to be doubtful for what ticket or candidate or

33 candidates or proposition any vote is cast, or of causing
34 it to appear on said device or devices that the votes cast
35 for one ticket, candidate or proposition, were cast for
36 another ticket, candidate or proposition, removes,
37 changes or mutilates any ballot, ballot card or ballot
38 label on said device or any part thereof, or does any
39 other thing intended to interfere with the validity or
40 accuracy of the election, shall be deemed guilty of a
41 felony and, upon conviction thereof, shall be confined
42 in a correctional facility for not less than one year nor
43 more than ten years, or fined not less than five
44 thousand dollars or both.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signature]
.....
Chairman Senate Committee

[Signature]
.....
Chairman House Committee

Originated in the Senate.

In effect from passage.

[Signature]
.....
Clerk of the Senate

[Signature]
.....
Clerk of the House of Delegates

[Signature]
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

The within *is approved* this
the *18th* Day of *April*, 2008.

[Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

MAR 26 2008

Time 10:05 am