

1 COMMITTEE SUBSTITUTE

2 for

3 **H. B. 2438**

4 (By Delegates Miley, Hunt, Brown, Frazier,
5 Barker, Moore, Hamilton and Ellem)

6
7 (Originating in the Committee on the Judiciary)

8 [January 19, 2011]

9
10 A BILL to amend and reenact §3-1-2 of the Code of West Virginia,
11 1931, as amended; to amend and reenact §3-4-18 and §3-4-19 of
12 said code; and to amend and reenact §3-4A-9 and §3-4A-20 of
13 said code, all relating to independent voters; defining
14 independent voters; and reforming conflicts in voting
15 procedures.

16 *Be it enacted by the Legislature of West Virginia:*

17 That §3-1-2 of the Code of West Virginia, 1931, as amended,
18 be amended and reenacted; that §3-4-18 and §3-4-19 of said code be
19 amended and reenacted; and that §3-4A-9 and §3-4A-20 of said code
20 be amended and reenacted, all to read as follows:

21 **ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS.**

22 **§3-1-2. Scope of chapter; definitions.**

23 Unless restricted by the context, the provisions of this
24 chapter ~~shall~~ apply to every general, primary and special election
25 in which candidates are nominated or elected or in which voters
26 pass upon any public question submitted to them, except that the
27 provisions hereof shall be construed to be operative in municipal

1 elections only in those instances in which they are made expressly
2 so applicable.

3 Unless the context clearly requires a different meaning, as
4 herein used:

5 "Voter" ~~shall mean~~ means any person who possesses the
6 statutory and Constitutional qualifications for voting;

7 "Independent" means a registered voter who declined to state
8 a preference for party affiliation on their voter registration or
9 who listed a party affiliation which is not qualified as a
10 political party as defined in section eight, article one of this
11 chapter.

12 "Election" ~~shall mean~~ means the procedures whereby the voters
13 of this state or any subdivision thereof elect persons to fill
14 public offices, or elect members of a Constitutional convention, or
15 vote on public questions;

16 "Any election" or "all elections" ~~shall include~~ means every
17 general, primary or special election held in this state, or in any
18 of its subdivisions, for the purpose of nominating or electing
19 federal or state officers, or county, city, town or village
20 officers of any subdivision now existing or hereafter created, or
21 for the purpose of electing members of a Constitutional convention,
22 or for voting upon any public question submitted to the people of
23 the state or any of the aforesaid subdivisions;

24 "Office" ~~shall be construed to mean or~~ "public office" which
25 ~~shall include~~ means: (1) Any elective office provided for by the
26 Constitution or laws of the United States or of this state to which

1 a salary or other compensation attaches; ~~and~~ or (2) membership in
2 a Constitutional convention.

3 "Candidate" ~~shall mean~~ means any person to be voted for at an
4 election;

5 "Public question" ~~shall mean~~ means any issue or proposition,
6 now or hereafter required by the governing body of this state or
7 any of its subdivisions to be submitted to the voters of the state
8 or subdivision for decision at elections;

9 The term "minor" as used in article four, section one of the
10 State Constitution and as used in this chapter ~~shall mean~~ means a
11 person who has not become eighteen years of age.

12 **ARTICLE 4. VOTING MACHINES.**

13 **§3-4-18. Conducting voting machine elections generally; duties of**
14 **election officials.**

15 (1) The election officers shall constantly and diligently
16 maintain a watch in order to see that ~~no~~ a person ~~votes~~ does not
17 vote more than once and to prevent any voter from occupying the
18 voting machine for more than three minutes.

19 (2) In primary elections, before a voter is permitted to use
20 the voting machine, the election officer representing the party ~~to~~
21 of which the voter belongs, shall adjust the machine so that the
22 voter will be able to vote only for the candidates who are seeking
23 nomination on the ticket of the party with which the voter is
24 affiliated, unless the voter requests an alternative ballot of a
25 political party which has determined such a voter may participate

1 in its primary election voting.

2 ~~(3) If the machine is so constructed as to require adjustment~~
3 ~~after one person has voted before another person can vote, the~~
4 ~~election officers shall so adjust it after each person has voted.~~

5 ~~(4) The election officers shall issue to each voter when he~~
6 ~~signs the poll book a card or ticket numbered to correspond to the~~
7 ~~number on the poll book of such voter, and in the case of a primary~~
8 ~~election, indicating the party affiliation of such voter, which~~
9 ~~numbered card or ticket shall be presented to the election officer~~
10 ~~in charge of the machine.~~

11 **§3-4-19. Independent voting in primary elections.**

12 ~~If at any primary elections nonpartisan candidates for office~~
13 ~~and public questions are submitted to the voters and on which~~
14 ~~candidates and questions persons registered as "independent" are~~
15 ~~entitled to vote, as provided in section eighteen five(b)(3) of~~
16 ~~article two of this chapter, the Unless an independent voter is~~
17 ~~permitted to participate in the primary election of a political~~
18 ~~party, the following provisions apply to independent voters in~~
19 ~~primary elections that include non-partisan candidates or public~~
20 ~~questions:~~

21 (1) Election officers shall adjust the voting machines, if
22 mechanically possible to do so, so that such "independent" voters
23 may vote only those portions of the voting machine ballot relating
24 to the nonpartisan candidates and the public questions submitted.

25 (2) If the voting machines cannot be so adjusted for the
26 independent voters, then ~~such~~ independent voters, under the close

1 supervision of two commissioners of the election of different
2 political party affiliation, shall be permitted to use the voting
3 machines for voting only those parts of the ballot relating to such
4 nonpartisan candidates and public questions so submitted to the
5 voters.

6 (3) In lieu of using ~~the a voting machines machine~~, ~~such an~~
7 independent ~~voters voter~~ may request an official printed ~~ballots~~
8 ballot. ~~relating to such nonpartisan candidates and public~~
9 ~~questions. Such A ballots ballot~~, when signed on the back by the
10 poll clerks as in other elections, shall be voted and folded by the
11 independent voter and shall be delivered to one of the election
12 commissioners who shall secure same in a sealed or locked container
13 until canvassed and counted in the same manner as provided for
14 handling and recording absent voter ballots as provided in the
15 section next hereafter.

16 **ARTICLE 4A. ELECTRONIC VOTING SYSTEMS.**

17 **§3-4A-9. Minimum requirements of electronic voting systems.**

18 An electronic voting system of particular make and design may
19 not be approved by the State Election Commission or be purchased,
20 leased or used by any county commission unless it meets the
21 following requirements:

22 (1) It secures or ensures the voter absolute secrecy in the
23 act of voting or, at the voter's election, provides for open
24 voting;

25 (2) It is constructed to ensure that ~~no person~~, except in
26 instances of open voting as provided in this section, ~~can see or~~

1 ~~know for whom any~~ the contents of a ballot may not be seen or known
2 by anyone other than the voter who has voted or is voting;

3 (3) It permits each voter to vote at any election for all
4 persons and offices for whom and which he or she is lawfully
5 entitled to vote, whether or not the name of any person appears on
6 a ballot or ballot label as a candidate; and it permits each voter
7 to vote for as many persons for an office as he or she is lawfully
8 entitled to vote for; and to vote for or against any question upon
9 which he or she is lawfully entitled to vote. The automatic
10 tabulating equipment used in electronic voting systems is to reject
11 choices recorded on any ballot if the number of choices exceeds the
12 number to which a voter is entitled;

13 (4) It permits each voter to deposit, write in, affix upon a
14 ballot, card, envelope or other medium to be provided for that
15 purpose, ballots containing the names of persons for whom he or she
16 desires to vote whose names do not appear upon the ballots or
17 ballot labels;

18 (5) It permits each voter to change his or her vote for any
19 candidate and upon any question appearing upon the ballots or
20 ballot labels up to the time when his or her ballot is deposited in
21 the ballot box or his or her ballot is cast by electronic means;

22 (6) It contains a program deck consisting of cards that are
23 sequentially numbered or consisting of a computer program disk,
24 diskette, tape or other programming media containing sequentially
25 numbered program instructions and coded or otherwise protected from
26 tampering or substitution of the media or program instructions by

1 of unauthorized persons and capable of tabulating all votes cast in
2 each election;

3 (7) It contains two standard validation test decks approved as
4 to form and testing capabilities by the State Election Commission;

5 (8) It correctly records and counts accurately all votes cast
6 ~~each~~ for the candidate and for and against each question appearing
7 upon the ballots or ballot labels;

8 (9) It permits each voter at any election, other than a primary
9 ~~elections~~ election, ~~by one mark or punch~~ to vote a straight party
10 ticket, as provided in section five, article six of this chapter,
11 by one mark or punch;

12 (10) It permits ~~each~~ a voter in a primary ~~elections~~ election
13 to: (A) vote only for the candidates of the party for which he or
14 ~~she~~ the voter is legally permitted to vote; (B) vote for the
15 candidates, if any, for nonpartisan nominations or election; and (C)
16 vote on public questions; and precludes him or her the voter from
17 voting for any candidate seeking nomination by any other political
18 party unless that political party has determined that the voter may
19 participate in its primary election ~~permits him or her to vote for~~
20 ~~the candidates, if any, for nonpartisan nomination or election and~~
21 ~~permits him or her to vote on public questions;~~

22 (11) It, where applicable, is provided with means for sealing
23 or electronically securing the vote recording device to prevent its
24 use and to prevent ~~tampering with ballot labels, both before the~~
25 ~~polls are open or before the~~ operation of the vote recording device
26 for an election is begun and immediately after the polls are closed

1 of after the operation of the vote recording device for an election
2 is completed;

3 (12) It has the capacity to contain the names of candidates
4 constituting the tickets of at least nine political parties and
5 accommodates the wording of at least fifteen questions;

6 (13) (A) Direct recording electronic voting machines must
7 generate a paper copy of each voter's ~~votes~~ vote that will be
8 automatically kept within a storage container, that is locked,
9 closely attached to the direct recording electronic voting machine,
10 and inaccessible to all but authorized voting officials, who will
11 handle such storage containers and such paper copies contained
12 therein in accordance with section nineteen of this article.

13 (B) The paper copy of the voter's vote shall be generated at
14 the time the voter is at the voting station using the direct
15 recording electronic voting machine.

16 (C) The voter may examine the paper copy visually or through
17 headphone readout, and may accept or reject the printed copy.

18 (D) The voter may not touch, handle or manipulate the printed
19 copy manually in any way.

20 (E) Once the printed copy of the voter's votes is accepted by
21 the voter as correctly reflecting the voter's intent, but not
22 before, it will automatically be stored for recounts or random
23 checks and the electronic vote will be cast within the computer
24 mechanism of the direct recording electronic voting machine.

25 (F) Direct recording electronic voting machines with a
26 mandatory paper copy shall be approved by the Secretary of State.

1 The Secretary of State may promulgate rules and emergency rules to
2 implement or enforce this subsection pursuant to the provisions of
3 section five, article three, chapter twenty-nine-a of this code.

4 (14) Where vote recording devices are used, they shall:

5 (A) Be durably constructed of material of good quality and in
6 a workmanlike manner and in a form which makes it safely
7 transportable;

8 (B) Be constructed with frames for the placing of ballot labels
9 that the labels upon which are printed the names of candidates and
10 their respective parties, titles of ~~offices~~ office and wording of
11 questions are reasonably protected from mutilation, disfigurement
12 or disarrangement or are constructed to ensure that the screens upon
13 which appear the names of the candidates and their respective
14 parties, titles of offices and wording of questions are reasonably
15 protected ~~any~~ from modification;

16 (C) Bear a number that will identify it or distinguish it from
17 any other machine;

18 (D) Be constructed to ensure that a voter may easily learn the
19 method of operating it and may expeditiously cast his or her vote
20 for all candidates of his or her choice and upon any public
21 question;

22 (E) Be accompanied by a mechanically or electronically operated
23 instruction model which shows the arrangement of ballot labels,
24 party columns or rows, and questions;

25 (F) For electronic voting systems that utilize a screen upon
26 which votes may be recorded by means of a stylus or by means of

1 touch: (i) Be constructed to provide for the direct electronic
2 recording and tabulating of votes cast in a system specifically
3 designed and engineered for the election application;

4 ~~(G) For electronic voting systems that utilize a screen upon
5 which votes may be recorded by means of a stylus or by means of~~

6 touch, (ii) Be constructed to prevent any voter from voting for more
7 than the allowable number of candidates for any office, to include
8 an audible or visual signal, or both, warning any voter who attempts
9 to vote for more than the allowable number of candidates for any
10 office or who attempts to cast his or her ballot prior to its
11 completion and are constructed to include a visual or audible
12 confirmation, or both, to the voter upon completion and casting of
13 the ballot;

14 ~~(H) For electronic voting systems that utilize a screen upon
15 which votes may be recorded by means of a stylus or by means of~~

16 touch, (iii) Be constructed to present the entire ballot to the
17 voter, in a series of sequential pages, and to ensure that the voter
18 sees all of the ballot options on all pages before completing his
19 or her vote and to allow the voter to review and change all ballot
20 choices prior to completing and casting his or her ballot;

21 ~~(I) For electronic voting systems that utilize a screen upon
22 which votes may be recorded by means of a stylus or by means of~~

23 touch, (iv) Be constructed to allow election commissioners to spoil
24 a ballot where a voter fails to properly cast his or her ballot, has
25 departed the polling place and cannot be recalled by a poll clerk
26 to complete his or her ballot;

1 ~~(J) For electronic voting systems that utilize a screen upon~~
2 ~~which votes may be recorded by means of a stylus or by means of~~
3 ~~touch,~~ (v) Be constructed to allow election commissioners, poll
4 clerks, or both, to designate, mark or otherwise record provisional
5 ballots;

6 ~~(K) For electronic voting systems that utilize a screen upon~~
7 ~~which votes may be recorded by means of a stylus or by means of~~
8 ~~touch,~~ (vi) Consist of devices which are independent, nonnetworked
9 voting systems in which each vote is recorded and retained within
10 each device's internal nonvolatile electronic memory and contain an
11 internal security, the absence of which prevents substitution of any
12 other device;

13 ~~(L) For electronic voting systems that utilize a screen upon~~
14 ~~which votes may be recorded by means of a stylus or by means of~~
15 ~~touch,~~ (vii) Store each vote in no fewer than three separate,
16 independent, nonvolatile electronic memory components and that each
17 device contains comprehensive diagnostics to ensure that failures
18 do not go undetected;

19 ~~(M) For electronic voting systems that utilize a screen upon~~
20 ~~which votes may be recorded by means of a stylus or by means of~~
21 ~~touch,~~ (viii) Contain a unique, embedded internal serial number for
22 auditing purposes for each device used to activate, retain and
23 record votes;

24 ~~(N) For electronic voting systems that utilize a screen upon~~
25 ~~which votes may be recorded by means of a stylus or by means of~~
26 ~~touch,~~ (ix) Be constructed to record all preelection, election and

1 post-election activities, including all ballot images and system
2 anomalies, in each device's internal electronic memory and are to
3 be accessible in electronic or printed form;

4 ~~(O) For electronic voting systems that utilize a screen upon~~
5 ~~which votes may be recorded by means of a stylus or by means of~~
6 ~~touch,~~ (x) Be constructed with a battery backup system in each
7 device to, at a minimum, prevent the loss of any votes, as well as
8 all preelection, election and post-election activities, including
9 all ballot images and system anomalies, stored in the device's
10 internal electronic memory and to allow voting to continue for two
11 hours of uninterrupted operation in case of an electrical power
12 failure; and

13 ~~(P) For electronic voting systems that utilize a screen upon~~
14 ~~which votes may be recorded by means of a stylus or by means of~~
15 ~~touch,~~ (xi) Be constructed to prevent the loss of any votes, as well
16 as all preelection, election and post-election activities, including
17 all ballot images and system anomalies, stored in each device's
18 internal electronic memory even in case of an electrical and battery
19 power failure.

20 **§3-4A-20. Independent voting in primary elections.**

21 ~~If at any primary elections, nonpartisan candidates for office~~
22 ~~and public questions are submitted to the voters on which persons~~
23 ~~registered as "independent" are entitled to vote, as provided in~~
24 ~~section eighteen article two of this chapter, the Unless an~~
25 ~~independent voter is permitted to participate in the primary~~
26 ~~election of a political party, the following provisions apply to~~

1 independent voters in primary elections that include non-partisan
2 candidates or public questions:

3 (1) Election officers shall provide a vote recording device,
4 where applicable, or the appropriate ballot to be marked by an
5 electronically sensible pen or ink, or by means of a stylus or by
6 means of touch, so that independent voters may vote only those
7 portions of the ballot relating to the nonpartisan candidates and
8 the public questions submitted, or shall provide a ballot containing
9 only provisions for voting for those candidates and upon those
10 issues submitted common to the ballots provided to all voters
11 regardless of political party affiliation, or both.

12 (2) In counties utilizing electronic voting systems in which
13 votes are recorded by perforating, if vote recording devices are not
14 available for the independent voters, provisions are to be made for
15 sealing the partisan section or sections of the ballot or ballot
16 labels on a vote recording device using temporary seals, thus
17 permitting the independent voter to vote for the nonpartisan section
18 or sections of the ballot or ballot labels.

19 (3) After ~~the~~ an independent voter has voted, ~~the~~ temporary
20 seals may be removed and the device may then be used by partisan
21 voters.