

Commissioner, I served as a member of the Union County Board of Elections and supervised its work. I am also a former President, Vice President and Treasurer of the County Commissioners Association of Pennsylvania (CCAP); and since 1999 I have been appointed to a number of leadership positions with the National Association of Counties (NACo).

6. As Commissioner of the Bureau, I served at the pleasure of the Secretary, who heads the Department of State; and with the assistance of personnel assigned to the Bureau and other officials and employees of the Department, I performed such powers and duties as the Secretary delegated to the Bureau.

7. Subject to his supervision and authority or the supervision and authority of his deputies, the Secretary has assigned to the Bureau the following responsibilities relevant to the above-captioned action:

- The general administration of the Commonwealth's responsibilities under the Help America Vote Act of 2002 (HAVA).
- The administration of the responsibilities imposed by law upon the Secretary or the Department in the administration of elections in the Commonwealth of Pennsylvania, including elections for Federal office.
- The administration of the powers and duties of the Secretary respecting the examination and approval of electronic voting systems under Article XI-A of the Pennsylvania Election Code (25 Pa. Stat. Ann. §§ 3031.1—3031.22).

8. I make this declaration based on my personal knowledge and based on information provided to me in the ordinary course of the business of the Department by other officials, employees and agents of the Department.

The Roles of the Secretary and the Counties in Ensuring That Pennsylvania’s Elections Are Fair, Orderly and Inclusive

9. The Secretary of the Commonwealth heads the Department of State. In addition, the Pennsylvania General Assembly has charged him “with the general supervision and administration of Pennsylvania’s elections laws.” 25 P.S. § 2621(b). Among other activities, the Secretary has responsibility for overseeing aspects of Pennsylvania’s electoral process. In Pennsylvania, however, much of the statutory responsibility for administering elections is delegated to the county boards of elections. Those responsibilities include selecting, from among those certified by the Secretary, the particular voting system that will be used in the county; preparing and supplying ballots for use in the election districts and polling places within the county; and appointing and training poll workers. These duties are expressly set forth in the Pennsylvania Election Code, which provides that the “[p]owers and duties of county boards [of elections]” include the following:

- (b) To select and equip polling places that meet the requirements of this act.
- (c) To purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines, and to procure ballots and all other supplies for elections.
- (d) To appoint their own employees, voting machine custodians, and machine inspectors.
- ...
- (f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.
- (g) To instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

- (h) To prepare and publish, in the manner provided by this act, all notices and advertisements in connection with the conduct of primaries and elections, which may be required by law.
- (i) To investigate election frauds, irregularities and violations of this act, and to report all suspicious circumstances to the district attorney.

...

- (k) To receive from district election officers the returns of all primaries and elections, to canvass and compute the same, and to certify, no later than the third Monday following the primary or election, the results thereof to the Secretary of the Commonwealth, as may be provided by law, and to such other authorities as may be provided by law. The certification shall include the number of votes received in each election district by each candidate for the General Assembly.
- (l) To publicly announce by posting at its office the results of primaries and elections for county, city, borough, township, ward, school district, poor district, election offices, and party offices, if any; to provide the results to the Secretary of the Commonwealth; and to issue certificates of election to the successful candidates for said offices.
- (m) To prepare and submit, within twenty days after the last day to register to vote in each primary, municipal and general election, a report to the Secretary of the Commonwealth in the form prescribed by him, which shall contain a statement of the total number of electors registered in each election district, together with a breakdown of registration by each political party or other designation. Copies of said statement shall be furnished, upon request, to the county chairman of each political party and political body. The Secretary of the Commonwealth shall forthwith submit such information to the Legislative Data Processing Center and shall publicly report the total number of registered electors for each political party or other designation in each county not later than five days prior to the primary, municipal or general election.
- (n) To annually prepare and submit to the county commissioners or other appropriating authorities of the county an estimate of the cost of primaries and elections and of the expenses of the board for the ensuing fiscal year.

25 P.S. § 2642(b)-(d), (f)-(i), (k)-(n).

10. Among other activities, the Secretary has undertaken the following to prepare for the 2008 General Election. He has (i) asked each county to submit sample ballots to ensure that the ballot design is appropriate; (ii) been in contact with county officials everyday providing guidance regarding preparations for the General Election; (iii) surveyed the various

counties to ensure that they have sufficient pollworkers; (iv) established a single contact person and emergency number to address problems during the General Election; (v) ascertained that each county has an adequate supply of provisional ballots; and (vi) received assurances that the county has conducted the required pre-election testing of election systems.

11. The Secretary and the Department also work with electronic voting machine vendors to ensure that they are available to provide technical assistance to counties in case there are any breakdowns of voting machines requiring their assistance.

12. As demonstrated by the foregoing, although the counties are primarily responsible for the management of the election on Election Day, the Secretary and the Department are taking additional efforts to ensure that every eligible voter can fully and effectively participate in the upcoming election.

13. Most, if not all, county board of elections have completed the following tasks in preparation for the 2008 General Election: tested machines; ordered ballots; advertised ballots; and trained their poll workers. In fact, most counties try to train all of their pollworkers by the middle of October so that they will have sufficient time to attend to other duties that may arise, including requesting absentee ballots, testing machines and dealing with requests for poll watcher certificates.

14. Not surprisingly, the final week leading up to the election is a busy time for county boards of election around the Commonwealth. Among other tasks, they need to complete the following tasks in time for the election: distribute machines; distribute provisional ballots; and issue and collect absentee ballots.

Plaintiffs Exaggerate the Potential for DRE Failures

15. I understand that Plaintiffs focus their efforts on lines caused by breakdowns of Direct Recording Electronic (“DRE”) voting machines. Such machines are used as the primary method of voting in 50 of the Commonwealth’s 67 counties. Twenty-four counties use the ES&S iVotronic as their primary voting machine; one county uses the Hart InterCivic eSlate; two counties use the Sequoia Advantage; six counties use the Danaher 1242; one county uses the Sequoia Edge; and 16 counties use the Premier AccuVote TSX — all of which is reflected in the Department of State’s map of voting systems attached as Exhibit A hereto.

16. Plaintiffs make allegations in paragraph 54 of their Complaint regarding the number of inoperable voting machines in Philadelphia County, Allegheny County and Delaware County during the April 2008 General Primary, including the following allegation: “Approximately thirty-five different polling places in Philadelphia alone experienced one or more inoperable voting machines, approximately sixteen of which were reported as having all machines inoperable. Approximately ten polling places in Allegheny County experienced one or more inoperable voting machines, approximately nine of which were reported as having all voting machines inoperable. Approximately seven polling places in Delaware County experienced one or more inoperable voting machines, approximately six of which were reported as having all voting machines inoperable.”

17. According to Department of State data, in April 2008 there were 1681 precincts in Philadelphia County; 425 precincts in Delaware County; and 1321 precincts in Allegheny County. Doing simple division, this means that based on Plaintiffs’ own allegations, there was at least one inoperable voting machine in just 2% of Philadelphia County precincts,

less than 1% of Allegheny County precincts (approximately 0.7%), and less than 2% of Delaware County precincts (approximately 1.6%). I recognize that there may be slight distinctions between precincts and the “polling locations” referred to in Plaintiffs’ papers, but I am unable to resolve this issue without more information from Plaintiffs; and, regardless, I do not believe it would materially change these low rates of inoperability.

18. Daniel Lopresti sets forth hypothetical, projected failure rates — such as a likelihood of 18-32% that one machine will fail on Election Day in a division with two machines — that simply do not comport with information the counties have provided to the Commonwealth. (Declaration of Daniel P. Lopresti, attached as Exhibit F to the Declaration of Jonathan S. Abady, at ¶¶ 18-20.) DREs are simply not failing at anywhere close to those rates in the field in Pennsylvania, regardless of what Dr. Lopresti might be projecting based on a hearsay report conducted in 2005 on one type of voting machine that is not used in Pennsylvania in the manner in which it was configured for the test.

19. Moreover, although Plaintiffs claim that there were widespread problems in Philadelphia during the General Primary, when Voter Action – whose in-house attorney serves as Plaintiffs’ counsel in this matter – requested a two-hour extension from the Philadelphia Court of Common Pleas to extend polling hours, that court denied the request. In other words, I believe that the reports of problems in the Complaint are either untrue, based on misperceptions or unreliable hearsay, or are cherry picked outlier circumstances that do not reflect what has happened on the ground.

20. Over 25,000 DREs were deployed in the Commonwealth for the April 2008 primary. In most precincts in Pennsylvania in which DREs are used, there are more than two (2) DREs at a particular voting location. This is because the iVotronic, which is the most

frequently used DRE in Pennsylvania, is not a full-faced system such as the Danaher system used in Philadelphia. This means that it takes longer to vote on the iVotronic, and county boards of election try to provide more than two iVotronic machines at a location so that voting can occur as expeditiously as possible. The iVotronic is used in Allegheny County, which is Pennsylvania's second largest county.

21. Based on its discussions with the county boards of elections and their representatives, the Department of State believes that the counties are getting better and better at each election at using DREs and have fewer problems. The use of DREs expanded greatly in 2006 because of deadlines imposed by the Help America Vote Act, and counties continue to improve their ability to implement and use them.

22. Both the poll workers and the voters themselves are more familiar with the DRE systems and how they operate. Often times issues relating to DREs are due to the confusion of inexperienced pollworkers at the time that the voting machines are "booted up" and voter confusion; thus increased familiarity with DREs should result in fewer issues and problems with voting systems at the polls.

After Considering the Views of the Public – Including those from at Least One Plaintiff – and the Counties, the Secretary Issued the Directive to Provide Clear Guidance to the Counties and to Further Pennsylvanians' Right to Vote in the November 4, 2008 General Election

23. In approximately Spring 2008, the Department of State began to reconsider the circumstances in which emergency paper backup ballots should be used.

24. At that time, the Department of State did not require a county to begin using emergency paper backup ballots in the event all machines at a precinct were not functioning.

25. There was public interest in this issue, including interest expressed by the Advancement Project, Common Cause, and the Committee of Seventy. Representatives of the Department of State met with some of these groups in or about June 2008. The Department also had more general meetings with the public during 2008 in which the issue was raised as to when emergency paper backup ballots should be used. There was also public interest in the number of emergency paper backup ballots that are distributed by the counties to their polling places.

26. The counties also sought greater guidance from the Department of State regarding the circumstances under which paper ballots may be used on an emergency basis. We learned that there was a lack of uniformity across the Commonwealth regarding when counties – or even precincts within counties – would resort to paper ballots, and various counties and precincts had used different standards.

27. The Department of State appreciated and gave serious consideration to public commentary on these issues, including those made by the Advancement Project and plaintiff Election Reform Network in a statement they submitted (along with other signatories) to the Department's Chief Counsel on August 26, 2008 ("August 26 Statement"). (The referenced document was attached to the Declaration of Andrew Celli as Exhibit 23.)

28. On September 3, 2008, the Department issued a "Directive Concerning the Use, Implementation and Operation of Electronic Voting Systems by the County Boards of Elections" ("Directive," a true copy of which is attached as Exhibit B), which was made publicly available on the Department of State's website

<http://www.dos.state.pa.us/elections/cwp/view.asp?a=1370&q=448878&electionsNav>.

29. The Directive incorporated some of the items requested in the August 26 Statement, including that provisional ballots used as emergency paper ballots “must be clearly distinguished” from other provisional ballots. Directive, ¶ 7.

30. The Secretary’s Directive did not, however, adopt the proposed standard that “[e]mergency paper ballots must be offered to voters as soon as at least half of the voting machines in a precinct are not functioning.” August 26 Statement. I will refer to this proposal as the “50% Standard.” Instead, the Directive states, in pertinent part;

[I]f all electronic voting machines in a precinct are inoperable, ‘paper ballots, either printed or written and of any suitable form,’ for registering votes (described herein as ‘emergency back-up paper ballots’) shall be distributed immediately to eligible voters pursuant to section 1120-A(b) of the Election Code. Emergency back-up paper ballots shall be used thereafter until the county board of elections is able to make the necessary repairs to the machine(s) or is able to place into operation a suitable substitute machine(s).

Directive, ¶ 7. I refer to this aspect of the Directive as the “100% Standard.”

31. The Secretary considered the 50% Standard and rejected it because he believes the 100% Standard is consistent with the Pennsylvania Election Code and does a better job than the 50% Standard of securing a voter’s right to vote and administering elections.

32. The 100% Standard in the Directive advances the ability of voters to vote. For example, because the directive requires the immediate usage of paper ballots when all machines in a division are not operating, there should no longer be situations in which all machines are down and paper is not being used, which has been the case in the past due to ambiguity. In particular, some precincts may have preferred to continue to try to work on getting at least one machine back in service, rather than immediately to start using paper ballots as soon as all machines in the precinct were down. The Secretary’s directive removes any ambiguity; if all machines are down, a precinct is now directed to begin using paper.

33. The 50% Standard could reduce waiting times if one machine were down in a precinct with two machines. However, the implementation of the 50% Standard would itself create confusion that would exacerbate delays and would increase the likelihood that voters would be deprived of the ability to vote for other reasons. These considerations inform the Secretary's considered decision to adopt the 100% Standard.

The Secretary, Relying on his Institutional Expertise, Made a Considered, Reasonable Decision to Minimize the Use of Paper in Pennsylvania Elections

34. The 100% Standard is in accordance with the preference expressed in federal policy through the Help America Vote Act ("HAVA"), 42 U.S.C § 15301 *et seq.*, which requires various things of jurisdictions that choose to continue to use paper based systems. HAVA provides that if a jurisdiction uses a paper-based voting system that does not include automated protections against overvoting, the jurisdiction must "(i) establish[] a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office [*i.e.*, overvoting]; and (ii) provid[e] the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error). HAVA, § 301(a)(1)(B), 42 U.S.C. § 15481(a)(1)(B). This consideration informed the Secretary's decision to avoid the use of a paper-based system to the maximum extent possible consistent with other compelling needs of election administration. Specifically, the Secretary views the 100% Standard as more consistent with the Commonwealth's overall plan for compliance with HAVA; and, further, the Secretary takes seriously the dangers of disenfranchisement that purely paper based voting systems (like the emergency backup paper ballot) pose to voters.

35. Moreover, the Secretary's determination was based on his consideration that paper ballots pose inherent risks to the voter. For example, whereas DRE voting machines discretely limit the manner in which a voter may mark the electronic ballot and thereby protect the voter from making mistakes, such as overvoting or making stray marks, the number of ways in which a voter may mark a piece of paper in an attempt to cast a vote is limited only by the creativity of the human mind.

36. Indeed, HAVA requires each state to develop a statewide uniform definition of what constitutes a vote for each form of voting system used in the state. 42 U.S.C. §15481(a)(6). Accordingly, on July 1, 2003, Pennsylvania established guidelines and, as required by the Election Code, published them as a notice in the *Pennsylvania Bulletin*, 33 Pa. Bull. 3935. That document is entitled "What Constitutes a Vote." A true copy of "What Constitutes a Vote" is attached hereto as Exhibit C.

37. As one can see in reviewing the "What Constitutes a Vote" guidelines, there are many rules that attempt to cover the possible ambiguous ways in which voters might mark paper ballots. These rules exist to determine whether those votes should be counted as valid votes. Those rules might not always coincide with what the voter intended.

38. For example, "Paper Ballot 8" in "What Constitutes a Vote" illustrates situations in which voters appear to have made an initial mark for one candidate, then crossed that mark out, and then voted clearly for another candidate. Such votes are not counted, even though the voters likely subjectively believed that they cancelled their initial decision and validly altered it to a different candidate. Further, in order to protect the secrecy of the ballot, it is impossible for this problem to be caught at the polling place unless the voter asks for a new

