

HR 811 (as amended by House Admin Committee) FAQ

Q: Does the bill ban direct recording electronic (DREs) voting machines?

A: No. The bill bans voting systems that do not produce or require the use of a durable voter-verified paper ballot that is created by or made available for inspection and verification before the voter's vote is cast and counted. Voter-verified paper ballots may be made by hand or created through the use of an assistive device (such as a ballot marking device or a DRE). Assistive devices are necessary to facilitate language access and access for the disabled. Under the bill, all such "voter-verified paper ballots" are treated as the vote of record in recounts and audits.

Q: Does the bill address performance issues that are unique to DREs?

A: Yes. Recent experience in elections makes it clear that DREs can create certain increased risks of disenfranchisement as compared to optical scan voting systems.

- When a DRE fails, even if it is equipped with a voter-verified paper ballot printer, voters cannot vote at all. In contrast, if an optical scan system fails, voters can continue to mark ballots (although there is the possibility of votes being lost because of stray marks, over voting and under voting). To allow all voters to continue voting despite machine failure, the bill mandates that emergency paper ballots be provided upon the event of failure of any voting equipment that causes a delay, and that such emergency paper ballots be counted as regular ballots rather than provisional ballots (unless the voter would otherwise have been required to vote provisionally). An amendment agreed to in Committee also enables voters in DRE jurisdictions to receive a paper ballot upon request, regardless of machine failure (this requirement applies in 2010, and does not apply to early voting).
- The bill requires that voters be instructed that their paper ballot shall serve as the vote of record in all recounts and audits and that they should not leave the voting booth until they have confirmed that it is accurate.
- Some printer retrofits for DREs currently use paper that is too flimsy to stand up to recounts, and generally much flimsier than that used by optical scan ballots. Thus the bill requires that all paper ballots be "durable," and "capable of withstanding multiple counts and recounts by hand."

Q: What is the vote of record in recounts and audits?

A: -- The voter verified paper ballots "shall be used as the official ballot for purposes of any recount or audit . . . and shall be counted by hand in any recount or audit." In addition, in the event of any discrepancy between the electronic tallies and the hand count of the paper ballots, the "voter-verified paper ballots shall be the true and correct record of the votes cast." The only way to challenge the use of the paper ballots as the vote of record in recounts and audits is to prove, by "clear and convincing evidence," that a sufficient number of them (that is, a number exceeding the margin of victory, in which case the outcome supported by the count could change) have been compromised, in

which case the determination of the appropriate remedy will be made in accordance with State law, “except that the electronic tally shall not be used as the exclusive basis for determining the official certified vote tally.”

Q: What is the basis for the tiered audit?

A: -- During the two months following the November 2006 elections, the Brennan Center for Justice at New York University School of Law convened a panel of experts to analyze the audit language in the bill as introduced in the 109th Congress, and make recommendations. The end result of that effort is the 3-tier audit recommendation incorporated into the bill, which calls for an audit of 3% of precincts in all federal races except very close races. In the case of races decided by between a 1% and 2% margin of victory, the percentage of precincts audited would be 5%, and in the case of races decided by a less than 1% margin, the percentage of precincts audited would be 10%. In only a handful of instances in the last three federal election cycles would the higher audit percentages have been called for. A group of the panelists concluded that “the tiered audit scheme adopted by the Holt Bill reasonably balances a number of interests: confidence in election results, deterrence of electoral fraud, audit cost, innovation in new audit designs, and the burdens of administrability and frequency of increased percentage audits.” http://www.brennancenter.org/dynamic/subpages/download_file_48231.pdf

Q: What happens if a recount has been already triggered, as frequently happens in close elections?

A: -- Audits under HR 811 must be completed before certification, and in some States, recounts may also take place before certification; should an audit and a recount take place at the same time, the results would be chaos and confusion with respect to ballot custody. HR 811 prohibits an audit (especially a large audit due to a close margin of victory) from taking place at the same time as any recount that that would take place prior to certification (such as a recount automatically triggered due to a close margin). However, the recount must still be done by a hand count of the voter-verified paper ballots, and it must be at least as comprehensive and transparent as the audit it is being done in lieu of would have been.

Q: Does the bill fund the requirement for durable paper ballots and accessible ballot verification?

A: -- Yes. The bill authorizes \$1 billion to the States to fund the meeting of those requirements. The funds may be used to reimburse states if they already paid to meet the requirements, and may be used to purchase new equipment even if they are replacing equipment purchased with Help America Vote Act Funds. The figure constitutes an increase from the introduced bill and is based on a calculation of the number of precincts nationwide that will require equipment replacement or upgrade, and the average cost of the equipment available to meet the requirement, as set forth in testimony delivered to the House Administration Committee in hearings on the bill. The majority of the funding is to be distributed to “remedial precincts,” which are those that use no paper ballots at all,

or do not use durable paper ballots, or do not use technology that allows for accessible verification of the paper ballot. As of January 2007, 15 states use systems that neither produce nor use paper ballots.

Q: Does the bill ban the use of wireless devices in and Internet access to voting machines?

A: -- Yes. The bill prohibits voting systems from containing, using or being accessible by wireless devices, and prohibits connecting to the Internet a device upon which votes are cast or tabulated or ballots are programmed.

Q: Does the bill compromise the secrecy of military and overseas ballots?

A: -- No. Military and overseas ballots are included in HR 811's audits, but other than that, all military and overseas voting is governed by UOCAVA and State law. The bill in any case prohibits the possibility of "associat[ing] a voter with the record of the voter's vote . . . at any time after the voter's vote has been cast."

Q: Will the States/Counties have enough time to implement the legislation?

A: -- Yes. If enacted promptly, there would be more than enough time to implement it. All jurisdictions that used DREs equipped with thermal-reel-to-reel printers or accessible voting systems that used or produced a paper ballot in 2006 may continue to use them as is until 2010. Only the jurisdictions that used voting systems that did not use or produce any sort of voter-verified paper ballot in 2006 must replace or upgrade those systems by November 2008. Examples of jurisdictions that transitioned to new systems in mere months include:

- New Mexico, which enacted a law on March 2, 2006 requiring conversion from a mixed system with paperless electronic voting machines to a uniform statewide system using paper optical scan ballots with accessible ballot marking devices. All 33 counties fully deployed the new system eight months later, in time for the 2006 mid-term election.
- Nevada's then-Secretary of State, now Representative Dean Heller, mandated in December 2003 that the state would obtain new voting systems with voter-verified paper records. By the following August (again, eight months later), 16 of 17 counties deployed voter-verified paper record systems county-wide in time for the primary, and all counties had them for November 2004's presidential election.
- North Carolina enacted a law requiring voter verified paper records on August 26, 2005. Eight months later, in time for the May 2006 primary, the entire state had completed the conversion process—including RFP, testing, certification and training—to new systems.
- West Virginia enacted a law requiring voter-verified paper records in May 2005; every county had new voter-verified paper record equipment in place for the primary the following year.

To delay implementation beyond 2008 in jurisdictions that have no paper ballots at all would reduce trust in the process of democracy. Consider what is at stake: yet another unverifiable federal election, potentially a Presidential Election, the results of which might depend on one State, and the results in that state might not be independently verifiable because there are no voter verified paper ballots. Any State without voter-verified paper ballots could be the next Sarasota.

It is true that in the primary in Cuyahoga County, Ohio in 2006, where thermal paper printer retrofits were used, approximately 10% of the ballots were lost, missing or destroyed; however, thermal paper ballot printers used in (for example) Mississippi and Nevada did not experience similar failure rates. Therefore, because elections in those jurisdictions can be independently audited (even if the technology is too uneven in its reliability to be used in U.S. elections without requiring an upgrade), jurisdictions using thermal reel-to-reel paper printers may continue to use them as is until 2010.

Q: What is the relationship between usage of the term “paper ballot” and requests for a “DRE ban?”

A: -- There is some confusion. Some activists are insisting upon the use of the term “paper ballot” (which H.R. 811 does use) and some are simply requesting a “DRE ban” (which HR 811 does not do).

Some, however, are arguing that using the term “paper ballot” should not be applied to DRE print-outs, because it gives “false” gravitas to something made by a machine vs. something marked by hand. Of course, thousands of voters *require* the assistance of a machine to create a paper ballot, and using different terminology to refer to a “hand marked” ballot than is used to refer to a “machine-marked” or “machine printed” ballot would create two classes of ballots; the “ballots” of the able-bodied and those not seeking language assistance could come to be treated differently than the “records” of the disabled and language minorities under the law.

Whether DREs are banned or not, the term “paper ballot” must apply to any machine-marked or machine-printed ballot, just the same as it applies to a hand-marked ballot, so that the “paper ballots” of *all* voters are treated the same.

Q--Some activists are circulating critiques about the bill that suggest that the paper ballots called for by the bill “don’t need to be counted” are “are not tabulated.” Is that true?

A – The entire purpose of the bill is to require that the paper ballots be “tabulated.” Granted, on election night, no matter what system one is using (op scan or DRE), software counts are permissible. And as any reputable computer scientist would tell you, the software does not care what it is translating from -- paper ballots fed into an op scanner are “inputs” just the same as touches on a screen are “inputs,” and the software will – in either case – translate and tally those inputs correctly or incorrectly. After election night, *every* federal election (except those determined by a landslide) *will* be audited, and in every audit the paper ballots from somewhere between 3% and 10% of the

precincts in the relevant jurisdiction will be counted by hand. Thus, no matter what system you use, software counts are permissible on election night and in every audit or recount thereafter, the paper ballots must be counted by hand.

Q – So what do they mean when they say the paper ballots “are not tabulated?”

A – They mean, with respect to DRE print-outs, that the DRE printouts are not fed through an op scanner on election night, or even after election night (although in each case they will be required to be scannable under HR 811), and therefore the paper printouts (themselves) are not “tabulated.” Oddly, they acknowledge that an op scanner might count incorrectly, but they still insist that feeding all of the paper ballots into an op scanner *that counts incorrectly* somehow constitutes a “tabulation” of *all* of the paper ballots. And they conclude that an *incorrect software count* of all the paper ballots from an op scanner is better than *any* software count from a DRE. However, if the op scan software counts incorrectly, the ballots are no more “tabulated” by running them through the op scanner than they would be tabulated by running them through a paper shredder.

The other fallacy is the suggestion that there is any difference at all in the number of paper ballots required to be counted by hand under HR 811 depending on the voting system used. Under HR 811’s audit requirement, you would count somewhere between 3% and 10% of the paper op scan ballots by hand (depending on the margin of victory) and compare them to the software-produced op scan tally, or you would count between 3% and 10% of the DRE printouts by hand and compare them to the software-produced DRE tally. The exact same percentage of paper ballots would be hand counted (“tabulated”) either way.

Q – Doesn’t it make a difference (as between op scans and DRES) that there is a digital ballot in the DRE, which has not been verified by the voter?

A – Digital records will produce the results on election night no matter what you use, and after election night, under HR 811, they are irrelevant no matter what you use, because the paper ballot is the vote of record in all audits and recounts. During audits and recounts, the digital data in the op scan memory cards are of no more relevance than the digital data in the DRE – because in all audits and recounts it is the voter-verified paper ballots themselves that are being counted, by hand.

Q: How do requests for a “DRE ban” relate to H.R. 811?

A: -- H.R. 811 does not ban DREs, nor does it require the use of DREs. It removes the problem presented by unauditible DREs. The other requirements of H.R. 811 – the paper ballot requirement, the audit requirements, the security requirements, etc., always apply. H.R. 811 establishes the principle of auditability that must be observed in every federal election, but H.R. 811 does not specify or certify individual equipment, systems or designs for achieving the principle. It requires only that whatever system is provided for the voter requires the use of durable paper ballots and must be fully accessible to individuals with disabilities.

Q – Doesn't it make a difference (as between op scans and DRES) that there is a digital ballot in the DRE, which has not been verified by the voter?

A – Digital records will produce the results on election night no matter what you use, and after election night, under HR 811, they are irrelevant no matter what you use, because the paper ballot is the vote of record in all audits and recounts. During audits and recounts, the digital data in the op scan memory cards are of no more relevance than the digital data in the DRE – because in all audits and recounts it is the voter-verified paper ballots themselves that are being counted, by hand. ***See also this technical analysis:*** http://www.votetrustusa.org/index.php?option=com_content&task=view&id=2460&Itemid=26