

An aerial, black and white photograph of a storm's eye over the ocean. The eye is a large, dark, circular area in the center, surrounded by a thick, white ring of clouds. The surrounding ocean is dark and turbulent, with white-capped waves and a swirling pattern of clouds extending outwards from the eye.

THE PERFECT STORM

VOTING IN NEW JERSEY IN THE WAKE OF SUPERSTORM SANDY

**A Report Prepared by the
Constitutional Rights Clinic
Rutgers School of Law – Newark**

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INTRODUCTION

On October 29, 2012, eight days before the 2012 Presidential Election, Superstorm Sandy left 8.2 million households without power in 15 states and the District of Columbia.¹ Power outages were the most severe in New Jersey, affecting 2.4 million homes and businesses. In New York, 1.9 million homes and business were affected. In Pennsylvania, 1.2 million homes and businesses lost power.²

One hundred forty-nine people died, including 12 in New Jersey and 49 in New York.³ The storm displaced an estimated 161,000 families in New Jersey,⁴ where 346,000 homes were damaged or destroyed, and 22,000 housing units were rendered uninhabitable. Even today, not all residents rendered homeless by Sandy have been able to return to their still-damaged homes.⁵ New Jersey's Transportation infrastructure experienced \$2.9

¹ Ari Berman, *How Hurricane Sandy Will Impact the Election*, THE NATION (Nov. 1, 2012, 11:58 AM), <http://www.thenation.com/blog/170952/how-hurricane-sandy-will-impact-election#>.

² *Id.*

³ Tim Sharp, *Superstorm Sandy: Facts About the Frankenstorm*, LIVE SCI. (Nov. 27, 2012, 10:50 AM), <http://www.livescience.com/24380-hurricane-sandy-status-data.html>.

⁴ Wayne Parry, *6 months after Sandy, thousands homeless in NY, NJ*, YAHOO! NEWS (Apr. 27, 2013, 9:55 PM), <http://news.yahoo.com/6-months-sandy-thousands-homeless-ny-nj-154507020.html>.

⁵ See Erin O'Neill, *NJ's \$1.1B Sandy housing grant program distributes just \$133M so far*, NJ.COM (July 20, 2014, 10:08 AM), http://www.nj.com/news/index.ssf/2014/07/sandy_housing_grant_program.html#incart_river.

billion in damages, and hospital and health service facilities suffered \$153 million in damages.⁶

On November 1, 2012, five days before Election Day, the Secretary of the State of New Jersey, the State's top election official, Lieutenant Governor Kim Guadagno⁷ began issuing a series of emergency voting measures.⁸ There were five emergency measures in total. The State began posting those measures on its website starting on November 3, 2012.⁹ The emergency measures are described in Section I below, and are contained, in full, in Appendix A.

Some of Secretary of State Guadagno's measures made sense and facilitated displaced voters' access to the polls. Those measures included an extension of the deadline by which ballots would be processed,¹⁰ an expansion of the hours of operation at

⁶ Congressman Chris Smith, Floor Statement on Sandy Supplemental, U.S. House of Representatives (Jan. 2, 2013), available at http://chrissmith.house.gov/uploadedfiles/floor_remarks_on_sandy_jan_2_2013.pdf.

⁷ In New Jersey, the Lieutenant Governor also serves as the Secretary of State, the State's top election official. N.J. CONST. art. V, § I, ¶ 10.

⁸ *Directive Easing Restrictions on Voters In the Aftermath of Hurricane Sandy*, THE OFFICIAL WEBSITE FOR THE ST. OF N.J. (Nov. 1, 2012), available at <http://nj.gov/state/elections/2012-results/signed-directive-hurricane-sandy-110212.pdf>.

⁹ *Id.*

¹⁰ Bob Sullivan, *New Jersey's e-mail voting suffers major glitches, deadline extended to Friday*, NBC NEWS (Nov. 6, 2012, 1:25 PM), http://usnews.nbcnews.com/_news/2012/11/06/14974588-new-jerseys-e-mail-voting-suffers-major-glitches-deadline-extended-to-friday?lite.

polling sites and processing centers, and notification to the public about changes in voting procedures.¹¹

Other measures, such as the Secretary of State's unilateral implementation of e-mail and fax voting, however, made voting severely vulnerable and, as this report discusses, violated the law.

This report will discuss and evaluate the State's emergency voting measures. The Rutgers Constitutional Rights Clinic was able to assess the State's emergency voting policies' effectiveness by analyzing thousands of documents obtained from all the counties and the State through the Open Public Records Act (OPRA). Almost all documents received through OPRA requests will be made available by the Clinic on the Rutgers Law School website.*

I. THE SECRETARY OF STATE'S EMERGENCY VOTING MEASURES.

In the days immediately following Superstorm Sandy and leading to Election Day, Secretary of State Kim Guadagno issued five directives changing the way New Jersey elections are

¹¹ *Directive Easing Restrictions on Voters In the Aftermath of Hurricane Sandy, supra note 8.*

* To protect voter privacy and confidential information, such as social security numbers and signatures, the Clinic has decided not to make available any documents it received through its OPRA request that reveal that information. For this reason, no documents related to Morris County are being made available.

typically conducted. All emergency voting measures, ostensibly, were issued pursuant to Governor Christie's October 27, 2012, Executive Order 104. That order authorized "the executive head of any agency . . . to waive, suspend, or modify any existing rule the enforcement of which would be detrimental to the public welfare during [Hurricane Sandy]." ¹² The Executive Order explicitly states that any rule contrary to "existing law" is "subject to [the Governor's] prior approval." ¹³ Based on the information received by the Clinic, there is no evidence that Governor Christie authorized any of the Lieutenant Governor/Secretary of State's Directives. That means that Lieutenant Governor Guadagno unilaterally altered New Jersey election law in the wake of Superstorm Sandy.

Guadagno's Directives are listed directly below, in chronological order. They are discussed in detail in Sections One, Two, and Five of this Report.

A. FIRST DIRECTIVE: NOVEMBER 1, 2012 "DIRECTIVE EASING RESTRICTIONS ON VOTERS IN THE AFTERMATH OF HURRICANE SANDY."

On November 1, 2012, five days before Election Day, Robert Giles, the Director of the New Jersey Division of Elections, sent an e-mail to election officials that there would be changes

¹² Gov. Chris Christie, N.J. Exec. Order No. 104 (Oct. 27, 2012), available at <http://nj.gov/infobank/circular/eoccl04.pdf>.

¹³ *Id.*

in election procedures throughout the State. "The Directive Easing Restrictions on Voters in the Aftermath of Superstorm Sandy" was posted on New Jersey's Division of Elections website on November 3, 2012.

This Directive¹⁴ instructed County Clerks and Election Officials to:

- Extend the time for accepting mail-in ballot applications from the close of business on Tuesday, October 30, 2012, to Friday, November 2, 2012;¹⁵
- Remain open "at a minimum" between 8:30 a.m. - 4:30 p.m. on Friday November 2, 2012, through Monday November 5, 2012;¹⁶
- "Take all reasonable measures" to inform voters of these extended office hours;¹⁷
- "Make all reasonable efforts" to immediately ascertain by noon on November 2, 2012, which polling places will be inaccessible or without power on Election Day;¹⁸
- Designate alternate voting sites¹⁹ and notify the Division of Elections and Assistant Attorney General of appropriate determinations.²⁰

¹⁴ *Id.*

¹⁵ See N.J. STAT. ANN. § 19:63-3(b) (2009) (According to this statute, passed in 2009, any voter in New Jersey may vote, via mail-in paper absentee ballot, without first obtaining permission to do so.).

¹⁶ *Directive Easing Restrictions on Voters In the Aftermath of Hurricane Sandy, supra note 8.*

¹⁷ *Directive Easing Restrictions on Voters In the Aftermath of Hurricane Sandy, supra note 8.*

¹⁸ *Directive Easing Restrictions on Voters In the Aftermath of Hurricane Sandy, supra note 8.*

¹⁹ *Directive Easing Restrictions on Voters In the Aftermath of Hurricane Sandy, supra note 8.*

The November 1, 2012, Directive also waived other restrictions mandated by statute, including:

- The 10-ballot limitation established in N.J. Stat. Ann. § 19:63-4(a), which permits an individual to act as authorized messenger for no more than ten qualified voters wishing to apply for a mail-in ballot;
- The requirement that a member of the District Board of Registry and election be a resident of the county in which he or she works;
- Eased the restrictions on polling place locations by permitting polling places to be more than 1,000 feet distant from the boundary line of the district, if there is no other suitable polling place.²¹

This first Directive made sense and in no way compromised the integrity of the ballot. The State issued four more Directives in the following days, which were not well thought out, and put votes at great risk of manipulation.

B. SECOND DIRECTIVE: NOVEMBER 3, 2012 DIRECTIVE PERMITTING FAX AND E-MAIL VOTING FOR DISPLACED VOTERS.

The second Directive²² gave domestic application to New Jersey's "Overseas Residents Absentee Voting Law,"²³ which

²⁰ *Directive Easing Restrictions on Voters In the Aftermath of Hurricane Sandy, supra note 8.*

²¹ *Directive Easing Restrictions on Voters In the Aftermath of Hurricane Sandy, supra note 8.*

²² *Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters, THE OFFICIAL WEBSITE FOR THE ST. OF N.J., (Nov. 3, 2012), available at <http://nj.gov/state/elections/2012-results/directive-e-mail-voting.pdf>.*

²³ N.J. STAT. ANN. § 19:59-1 (2008), et seq.

permits citizens living abroad and serving in the military to cast ballots by e-mail or fax as long as they submit a voted paper ballot. As will be discussed in detail below in Section V, this Directive was the most far-reaching, controversial and legally unsupportable of all the implemented emergency measures. It designated any voter displaced from his primary residence by Superstorm Sandy as an "overseas voter."

Displaced voters were therefore permitted to vote by e-mail or fax to as long as they transmitted a signed waiver of secrecy form along with their e-ballot by November 6, 2012.

The Directive did not mirror the overseas voter statute, however. The November 3, 2012 Directive did not require a back-up paper ballot, required of overseas/military voters to protect ballot integrity.

According to the Directive, voting via Internet or fax was a three-step process. Each step required use of the Internet or fax discussed below.

- 1. Applying for and Submitting "Applications" for E-mail and Fax Ballots.**

Before being able to submit an electronic ballot/vote, voters were required to download and print New Jersey's standard "Vote by Mail Application" from the New Jersey Division of Elections website or county clerk website. Those websites were

supposed to provide "specific instructions for e-mail/fax voting."²⁴

Voters were then directed to "complete the application, print it, scan it, and transmit the application to the appropriate County Clerk by fax or e-mail."²⁵ Those applications requested very detailed personal information such as social security numbers. As discussed in Section V below, the State's requests that such personal information be transmitted to non-encrypted e-mail addresses violated New Jersey law on its face.

County Clerks were then supposed to match registered voters' signatures that were on record in various counties with the faxed/e-mailed application, to determine voter eligibility.²⁶ Only after voter eligibility was confirmed were County Clerks supposed to send electronic e-mail/fax voting instructions and ballots to voters.

2. Receipt and Remission of E-mail and Fax Ballots.

Once County Clerks determined that a voter was eligible to vote, they were instructed to send each voter two items: the ballot, and a waiver of secrecy form.

²⁴ *Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters, supra note 22.*

²⁵ *Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters, supra note 22.*

²⁶ *Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters, supra note 22.*

3. Return of Ballots and Waiver of Secrecy Forms for E-mail and Fax Ballots.

Voters were originally told to return their completed ballots and waiver of secrecy forms by e-mail or fax by November 6, 2012, at 8 p.m.²⁷ On November 6, 2012, the Secretary of State extended that deadline to Friday, November 9 at 8:00 p.m.²⁸ because of "an avalanche of requests" for e-mail ballots.²⁹

C. THIRD DIRECTIVE: NOVEMBER 3, 2012 "DIRECTIVE EXPANDING ABILITY OF DISPLACED VOTERS TO VOTE."

The third directive³⁰ instructed County Clerks and election officials to permit voters displaced by Superstorm Sandy to vote by provisional ballot at any polling place in the State. If a voter cast a ballot in a county other than the voter's county of registration, then the Board of Elections where the provisional ballot was cast was instructed to deliver the ballot to the voter's county of registration by overnight mail or hand

²⁷ *Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters*, *supra* note 22.

²⁸ *Directive to Accommodate Processing of Electronically Transmitted Mail-In Ballot Applications and to Preserve Displaced Voters' Right to Vote*, THE OFFICIAL WEBSITE FOR THE ST. OF N.J. (Nov. 6, 2012), available at <http://nj.gov/state/elections/2012-results/directive-volume-and-extension.pdf>.

²⁹ Sullivan, *supra* note 10.

³⁰ *Directive Expanding Ability of Displaced Voters to Vote*, THE OFFICIAL WEBSITE FOR THE ST. OF N.J. (Nov. 3, 2012), available at <http://nj.gov/state/elections/2012-results/directive-displaced-voters.pdf>.

delivery. This Directive instructed County Clerks and election officials to count the votes of all eligible registered voters.

D. FOURTH DIRECTIVE: NOVEMBER 3, 2012 "DIRECTIVE REGARDING NOTICE AND COMMUNICATION."

The fourth Directive³¹ instructed County Boards of Election to make all efforts to inform voters of where they could vote. This included updating available information on county websites; making reverse 911 calls to residents to advise them of polling place location changes; making public service announcements on local cable and radio stations; printing notices in daily newspapers; and posting notices at former polling places rendered out of service by the storm.³²

E. FIFTH DIRECTIVE: NOVEMBER 6, 2012 "DIRECTIVE TO ACCOMMODATE PROCESSING OF ELECTRONICALLY TRANSMITTED MAIL-IN BALLOT APPLICATIONS AND TO PRESERVE DISPLACED VOTERS' RIGHT TO VOTE."

This Directive,³³ issued on November 6, 2012, extended the deadline for e-mail/fax voting. It acknowledged that County Clerks were unable to process all the electronic ballots that they received by the original deadline. Therefore, in order to

³¹ *Directive Regarding Notice and Communication*, THE OFFICIAL WEBSITE FOR THE ST. OF N.J. (Nov. 3, 2012), available at <http://nj.gov/state/elections/2012-results/directive-notice-communication.pdf>.

³² *Id.*

³³ *Directive to Accommodate Processing of Electronically Transmitted Mail-In Ballot Applications and to Preserve Displaced Voters' Right to Vote*, *supra* note 28.

facilitate voter participation and allow for more processing time, the Directive specifically allowed for the following:

- The deadline for voters to submit a mail-in ballot via e-mail or fax remained 5 p.m. on November 6, 2012;
- County Clerks must continue processing these applications until 12 p.m. on Friday, November 9, 2012;
- Voters must follow all instructions included with the ballot;
- Voters must send the signed waiver of secrecy and the voted ballot by e-mail or fax to the appropriate county Board of Elections by 8 p.m. on Friday, November 9, 2012³⁴ (an expansion of the November 6 deadline set out in the previous Directive);³⁵
- The County Board of Elections must verify that the voter voting via e-mail or fax did not also cast a vote in a voting machine, and that the voter did not submit any other paper ballot.³⁶

II. THE SECRETARY OF STATE EXCEEDED HER STATUTORY POWERS IN IMPLEMENTING THE EMERGENCY DIRECTIVES.

The Lieutenant Governor cited Governor Christie's Executive Order 104, and her capacity as Chief Election Officer of the

³⁴ *Directive to Accommodate Processing of Electronically Transmitted Mail-In Ballot Applications and to Preserve Displaced Voters' Right to Vote, supra note 28.*

³⁵ *Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters, supra note 22.*

³⁶ *Directive to Accommodate Processing of Electronically Transmitted Mail-In Ballot Applications and to Preserve Displaced Voters' Right to Vote, supra note 28.*

State, as her authority to expand voting measures.³⁷ The Order empowered "the executive head of any agency or instrumentality of the State government with authority to promulgate rules to waive, suspend, or modify any existing rule the enforcement of which would be detrimental to the public welfare during [the] emergency."

The Order itself violated state law. By law, the Order is limited by "any law to the contrary," and subject to the Administrative Procedure Act (APA). The APA requires a written explanation from both the rulemaking agency and the Governor where rule changes are made or rules promulgated with less than 30 days' notice.³⁸

The Lieutenant Governor bypassed the Legislature and exceeded her authority in broadening the statutory definition of "overseas voter" under the "Overseas Residents Absentee Voting Law," N.J. Stat. Ann. § 19:59-2. That statute defines an overseas voter as:

³⁷ *Directive Easing Restrictions on Voters In the Aftermath of Hurricane Sandy*, *supra* note 8.

³⁸ N.J. STAT. ANN. § 52:14B-4(c) (2008) (providing that a rule may be adopted upon fewer than 30 days' notice if "an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule").

[A]ny person in military service who, by reason of active duty or service, is absent on the date of an election from the place of residence in New Jersey where the person is or would be qualified to vote, and any citizen of the United States residing abroad who (1) immediately prior to his departure from the United States was domiciled in New Jersey and (a) was registered to vote, or had all the qualifications to register and vote, in New Jersey; or (b) had all the qualifications to register and vote in New Jersey other than having attained 18 years of age but has since attained that age; or (c) would, but for residence, have the qualifications to register and vote in New Jersey; (2) does not maintain a residence in the United States and is not registered or qualified to vote elsewhere in the United States; and (3) holds a valid passport or card of identity and registration issued under authority of the Secretary of State of the United States. N.J. Stat. Ann. § 19:59-2.

The Executive Order explicitly states that any rule contrary to "existing law" is "subject to [the Governor's] prior approval" ³⁹ There is no evidence that prior approval was granted here. "[W]hen the provisions of the statute are clear and unambiguous, he [an administrator] may not make rules and regulations amending, altering, enlarging or limiting the terms of the legislative enactment." ⁴⁰ The definition of overseas voter exclusively applies to military personnel and citizens outside

³⁹ Christie, *supra* note 12.

⁴⁰ Hotel Suburban Sys., Inc. v. Hodlerman, 42 N.J. Super. 84, 90 (App. Div. 1956) (emphasis added); N.J. St. League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211 (1999) (finding that a regulation was valid because the statutes contained confusing and ambiguous provisions).

of the United States who cannot physically go to a polling place in New Jersey to cast their ballots.

The Lieutenant Governor did not possess the authority to expand this definition. Doing so usurped the power of the legislature and violated the separation of powers required by our State Constitution.

III. NEW YORK DID NOT IMPLEMENT FAX/E-MAIL VOTING, EVEN THOUGH IT ALSO SUFFERED GREAT DAMAGE BY SUPERSTORM SANDY.

New York State, which was also hit hard by Superstorm Sandy, also initiated emergency voting measures. Most notably, in contrast to New Jersey, New York State explicitly and publicly rejected fax and e-mail ballots.

According to New York Board of Elections Co-Chair Doug Kellner, e-mail and fax ballots are "completely insecure" and could enable "wholesale" vote tampering.⁴¹ Kellner cited absence of encryption software in e-mail voting, and noted that e-mailed ballots could be manipulated without altering the sender's signature.⁴² The result, he said, is an inability on the part of both voters and election officials to detect ballot

⁴¹ Joel Schectman, *Critics Say Ballots Cast by Email Are Vulnerable to Tampering*, WALL ST. J. (Oct. 31, 2012, 5:06 PM), <http://blogs.wsj.com/cio/2012/10/31/critics-say-ballots-cast-by-email-are-vulnerable-to-tampering/>.

⁴² *Id.*

manipulation.⁴³ Kellner stated clearly that Governor Cuomo lacked authority to implement e-mail voting even under his emergency powers.⁴⁴ Kellner criticized states' use of e-mail voting as "not adequately thought through."⁴⁵

As in New Jersey, New York State authorized voters in any federally declared disaster county to vote by "affidavit ballot" at any poll site in New York State, regardless of where they are registered.⁴⁶ An emergency order stipulated that every board of elections in New York State send affidavit ballots, once received, to the board of elections where the voter is actually registered, so that the vote is "counted in the correct place."⁴⁷ Significantly, New York's affidavit ballots constituted a one-for-one voting equivalent to standard ballots. The affidavits

⁴³ *Id.*

⁴⁴ Larry Greenemeier, *Election 2012: Sandy Prompts N.J. to Extend E-mail Voting*, SCI. AM. (Nov. 5, 2012), <http://blogs.scientificamerican.com/observations/2012/11/05/election-2012-sandy-prompts-n-j-to-extend-e-mail-voting/>.

⁴⁵ Schectman, *supra* note 41.

⁴⁶ See N.Y. EXEC. LAW § 29-a (2012) (New York's directive was issued by the Governor, pursuant to section 29-a of Executive Law Article 2-B, which empowers the Governor to temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster. The measure is limited by "the state constitution, the federal constitution and federal statutes and regulations.").

⁴⁷ *Governor Cuomo Signs Executive Order to Facilitate Voting for New Yorkers Who Were Affected by Hurricane Sandy*, GOV. ANDREW CUOMO (Nov. 5, 2012), <http://www.governor.ny.gov/press/11052012Facilitating-Voting>.

accommodated "any other candidate and ballot initiative that appears on the official ballot where the voter is registered."⁴⁸

The New Jersey affidavit ballots included only the Presidential election and statewide contests.⁴⁹ The more competitive local and Congressional races did not appear on the ballots.⁵⁰

IV. NEW JERSEY'S INTERNET/FAX VOTING WAS RIFE WITH PROBLEMS.

In response to Superstorm Sandy, the Secretary of State took unprecedented action by bypassing the Legislature and instituting fax and Internet voting. By all accounts, Internet voting was not successful. A report by Pew Charitable Trusts found that New Jersey ranked 37th in the nation for how it conducted its 2012 elections.⁵¹

New Jersey's decision to permit voters to cast a ballot by e-mail or fax, in contrast to New York, left counties inundated

⁴⁸ *Id.* (emphasis added).

⁴⁹ David M. Halbfinger et al., *Officials Rush to Find Ways for the Storm-Tossed to Vote*, N.Y. TIMES (Nov. 5, 2012), <http://www.nytimes.com/2012/11/06/nyregion/after-hurricane-sandy-efforts-to-help-the-displaced-vote.html?pagewanted=all>.

⁵⁰ *Id.*

⁵¹ *Elections Performance Index: New Jersey*, THE PEW CHARITABLE TRUSTS (Apr. 8, 2014), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/elections-performance-index> (select "State Profiles"; select "New Jersey"); Matt Friedman, *NJ ranked 37th in the nation for how it ran 2012 election, study finds*, NJ.COM, (Apr. 8, 2014, 7:41 AM), http://www.nj.com/politics/index.ssf/2014/04/nj_ranked_37th_in_the_nation_for_effectiveness_in_running_2012_election_study_finds.html#incart_river_default.

with requests for e-mail ballot applications that they could not process.⁵² It added multiple steps to the voting process at a time of crisis, when portions of the State lacked power and there was mass displacement and infrastructure damage. This heightened the risk of errors and delays in processing votes.

For example, Essex County received more than 4,000 fax and e-mail ballot applications, many of which were duplicates of unanswered applications and, in some cases, even third attempts.⁵³ On November 7, 2012, after Election Day, approximately 1,500 applications to cast votes electronically were still pending in the county system.⁵⁴ That means that voters were never sent actual ballots and most likely did not vote. In Hudson County, eight staff members worked to process 3,000 ballot applications (not even actual ballots) on Election Day itself.⁵⁵

⁵² Beth Fouhy & Maryclaire Dale, *Voting in New York, New Jersey After Hurricane Sandy: Officials Assist Displaced Voters For Tuesday's Election*, HUFFINGTON POST (Nov. 6, 2012, 11:01 PM), http://www.huffingtonpost.com/2012/11/06/new-york-voting-hurricane-sandy-tuesday-election_n_2081759.html.

⁵³ Christopher Baxter, *N.J. sees record-low turnout in wake of Hurricane Sandy*, NJ.COM (Nov. 7, 2012, 9:11 PM), http://www.nj.com/politics/index.ssf/2012/11/nj_sees_record-low_voter_turno.html (discussing New Jersey's lowest voting turnout in state history in the aftermath of Superstorm Sandy).

⁵⁴ *Id.*

⁵⁵ Sullivan, *supra* note 10.

In Essex County, county e-mail addresses were at capacity and fax/e-voting applications could not get through.⁵⁶ As a proposed solution, Essex County Clerk Christopher Durkin offered his personal "Hotmail" e-mail address to voters requesting e-mail/fax ballots.⁵⁷ One Internet security researcher discovered that Durkin's password could be reset by entering his mother's maiden name; so if anyone had access to that information they could have intercepted voters' ballot requests.⁵⁸

By using the Open Public Records Act ("OPRA"), the Rutgers Constitutional Rights Clinic sought information about the November 2012 election to which the State and counties were privy that otherwise was not publicly accessible. New Jersey enacted the Open Public Records Act (OPRA) in 2001 to give the public access to records maintained by public agencies.⁵⁹ OPRA covers paper records, printed records, electronically stored records and other documents kept in the course of a public agency's business.⁶⁰ Anyone may file an OPRA request.⁶¹ The

⁵⁶ Timothy B. Lee, *E-voting chaos: NJ voters sent to official's personal Hotmail address*, ARSTECHNICA (Nov. 6, 2012, 11:34 AM), <http://arstechnica.com/tech-policy/2012/11/e-voting-chaos-nj-voters-sent-to-officials-personal-hotmail-address/>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ N.J. STAT. ANN. § 47:1A-1 (2002).

⁶⁰ N.J. STAT. ANN. § 47:1A-1.1 (2013).

requests must be in writing. Upon receiving a valid OPRA request, custodians have seven business days in which to provide the requestor with a response.⁶² If the custodian fails to respond, this constitutes a denial and could subject the custodian to a fine if it is determined that the conduct was knowing, willful, and unreasonable in the totality of the circumstances.⁶³

A. THE STATE'S AND COUNTIES' RESPONSES TO RUTGERS CONSTITUTIONAL RIGHTS CLINIC'S OPRA REQUESTS.

Between November 26, 2012, and November 28, 2012, the Clinic sent the State and all twenty-one counties an identical OPRA request asking for documents related to: (a) how counties processed requests for applications of fax and electronic ballots; (b) how the counties processed received and completed applications; (c) how counties sent ballots to persons who had requested fax/e-mail ballots; (d) how ballots were received via e-mail and fax; (e) whether paper ballots were requested and received; (f) whether paper ballots were compared to ballots received via fax and e-mail.

⁶¹ N.J. GOV'T RECS. COUNCIL, THE NEW JERSEY OPEN PUBLIC RECORDS HANDBOOK FOR RECORDS CUSTODIANS 5-6 (Jan. 2011), available at [http://www.nj.gov/grc/pdf/Custodians%20Handbook%20\(Updated%20January%202011\).pdf](http://www.nj.gov/grc/pdf/Custodians%20Handbook%20(Updated%20January%202011).pdf).

⁶² *Id.*

⁶³ *Id.*

In addition, between February and May 2013, the Clinic sent the State and all twenty-one counties an updated OPRA request and letters of inquiry for documents, and made telephone calls requesting information. Some counties were more willing than others to provide the documents we requested. Some counties, such as Morris County, claimed that they suffered no problems. Yet, documents submitted by Union County and other counties contradicted their assertions by detailing problems with processing electronic ballots faced by all counties.

Most of the counties sent some documents. Two counties, Warren and Atlantic, and the State failed to provide any documents. But document provided by other counties revealed how the State and all counties implemented the emergency produces.

All documents submitted to the Clinic will be posted on the Rutgers Law School webpage. Discussed directly below are common and notable themes in the OPRA documents the Clinic received.

B. OPRA DOCUMENTS RELATED TO THE 2012 GENERAL ELECTION DEMONSTRATE THAT THERE WAS A TOTAL LACK OF COORDINATION STATE-WIDE OVER HOW TO IMPLEMENT THE DIRECTIVES AND NOTIFY VOTERS OF THE LAST-MINUTE CHANGES IN ELECTION PROCEDURES.

1. The State was Unresponsive to the Counties' Concerns About Implementing the Emergency Directives and Offered Almost No Guidance to County Officials.

Although the November 1, 2012 "Directive Easing Restrictions on Voters in the Aftermath of Superstorm Sandy,"

the State's first Directive, was rather limited (mostly dealing with extending office hours for County Clerks, as well as extending the deadline for receipt of mail-in ballots), it caused significant frustration and confusion for county election officials. This is most apparent in the OPRA documents Union County provided.

Union County's documents were very comprehensive. A large portion of those documents was comprised of e-mail correspondence between the State and election officials from multiple counties. These e-mails make it clear that county officials were very confused about how to implement the Lieutenant Governor's Directive. As Joanne Rajoppi, the Union County Clerk, stated in a November 1, 2012, e-mail response to Robert Giles, "to report and/or issue a directive and not to entertain questions or discussion is an absence of leadership and direction. It is quite literally shameful."⁶⁴

Mary Melfi, Hunterdon County Clerk, also sent an e-mail to Robert Giles at 4:49 p.m. on November 1, 2012, containing a list of questions from both Hunterdon and Somerset Counties.⁶⁵ These

⁶⁴ E-mail from Joanne Rajoppi, Union County Clerk, to County Clerks and Robert Giles, Director, New Jersey Division of Elections (Nov. 1, 2012, 4:44 PM) (available on Rutgers Law School website, Union County File).

⁶⁵ E-mail from Mary Melfi, Hunterdon County Clerk, to Robert Giles, Director, New Jersey Division of Elections, and County Clerks (Nov. 1, 2012, 4:49 PM) (available on Rutgers Law School Website, Hunterdon County File).

questions required immediate responses from the State.

Specifically, officials in the two counties asked and/or pointed out:

- How a County was to handle a closed post office that could not post-mark ballots;
- How a mail-in ballot was supposed to “help a voter that will be unable to return that ballot by the close of the polls”;⁶⁶ and
- “How does a county communicate [to the public] when they have no e-mail, no internet, no phone?”⁶⁷
- Whether the Statewide Voter Registration System (SVRS) would permit more than ten ballots per authorized messenger to be issued, pursuant to N.J. Stat. Ann. § 19:63-4(a);⁶⁸
- That the Directive did not address the deadline (seven days before the election) for voters to apply for a mail-in ballot, pursuant to N.J. Stat. Ann. § 19:63-3(b);
- That the Directive did not address the deadline (3 p.m. on the day before the election) for voters to apply for a mail-in ballot in person, pursuant to N.J. Stat. Ann. § 19:63-3(d);

Mr. Giles did not answer the clerks’ questions, and Ms.

Rajoppi e-mailed him again on November 2nd asking when they

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ N.J. STAT. ANN. § 19:63-4(a) (2009) (permitting an individual to act as authorized messenger for no more than ten qualified voters wishing to apply for a mail-in ballot).

would be getting responses.⁶⁹ These questions appeared to go unanswered until Mr. Giles sent an e-mail to the clerks at 3:42 p.m., informing them that the Lieutenant Governor wanted to hold a conference call with the County Clerks that evening.⁷⁰

Some of the clerks' questions were addressed during the call. However, it is clear that there were unanswered questions after the call, as revealed in another e-mail sent by Joanne Rajoppi that evening.⁷¹ Ms. Rajoppi's e-mail referenced the conference call and later stated: "[p]lease answer those questions the clerks sent you"⁷²

The following day, November 3rd, Mr. Giles sent an e-mail at 2:13 p.m. stating that the Lieutenant Governor was holding another conference call two minutes later, at 2:15 p.m. that day.⁷³ Although he apologized for the extremely short notice, it

⁶⁹ E-mail from Joanne Rajoppi, Union County Clerk, to Robert Giles, Director, New Jersey Division of Elections, and County Clerks (Nov. 2, 2012, 11:20 PM) (available on Rutgers Law School website, Union County File).

⁷⁰ E-mail from Robert Giles, Director, New Jersey Division of Elections, to County Clerks (Nov. 2, 2012, 3:42 PM) (available on Rutgers Law School website).

⁷¹ E-mail from Joanne Rajoppi, Union County Clerk, to Robert Giles, Director, New Jersey Division of Elections, and County Clerks (Nov. 2, 2012, 7:51 PM) (available on Rutgers Law School website, Union County File).

⁷² *Id.*

⁷³ E-mail from Robert Giles, Director, New Jersey Division of Elections, to County Clerks (Nov. 3, 2012, 2:13 PM) (available on Rutgers Law School website, Union County File).

is unclear whether all clerks could participate in the call on such short notice.

The Clinic is not privy to what was discussed during the conference call. However, it is clear from the OPRA documents that the Clinic received that the clerks learned about additional directives during that call.

The "Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters," the "Directive Expanding Ability of Displaced Voters to Vote," and the "Directive Regarding Notice and Communication" were issued on November 3, 2012. These new directives caused even more confusion among county officials.

Dennis Kobitz, Administrator for the Union County Board of Elections, e-mailed Mr. Giles to point out problems. Kobitz was concerned that, because many mail-in ballots are not postmarked, election officials would be unable to tell whether a voter's mail-in ballot was actually sent out by the extended deadline of November 5.⁷⁴ Mary Melfi of Hunterdon County sent another e-mail with more questions.⁷⁵ Specifically, she asked Mr. Giles:

⁷⁴ E-mail from Dennis Kobitz, Administrator, Union County Board of Elections, to Robert Giles, Director, New Jersey Division of Elections, Kim Guadagno, New Jersey Lieutenant Governor, and Donna Kelly, New Jersey Assistant Attorney General (Nov. 3, 2012, 8:17 PM) (available on Rutgers Law School website, Union County File).

⁷⁵ E-mail from Mary Melfi, Hunterdon County Clerk, to Robert Giles, Director, New Jersey Division of Elections, and County Clerks (Nov. 2, 2012, 8:52 AM) (available on Rutgers Law School website, Union County File).

- To confirm that county officials were to "process mail-in ballot applications and issue ballots beyond the 3 p.m. deadline on Monday;"⁷⁶
- to "[p]lease confirm or deny the media report that ballots "postmarked" November 5 will be counted after the November 6th deadline up to November 19th"; and
- to "[p]lease advise if we are able to accept faxed or scanned/e-mail applications for voters who temporarily relocated out of the state."⁷⁷ This final question seemed to predict the route the State would ultimately take in its emergency procedures.

In the days following the conference call, the State was largely unresponsive to requests from the counties for clarification and guidance on how to implement the emergency directives.

On November 5, just one day before the election, Joanne Rajoppi of Union County complained in an e-mail to an individual referred to as "Jac" (last name unknown):⁷⁸ "I called Giles cell phone and no answer. What are we supposed to do [sic] Once again

⁷⁶ *Id.* (referring to the deadline (3 p.m. on the day before the election) for voters to apply for a mail-in ballot in person, pursuant to N.J. STAT. ANN. § 19:63-3(d) (2009)).

⁷⁷ *Id.*

⁷⁸ Based on the e-mail address, the Clinic believes that "Jac" is actually John Carbone, Esq. who serves as counsel to the Constitutional Officers Association of New Jersey--an association of New Jersey County Clerks, surrogates and sheriffs; *See Officers and Section Chiefs*, CONST. OFFICERS ASS'N OF N.J., <http://www.coanj.com/services.php#> (last visited July 29, 2014).

no direction from state.”⁷⁹ In the absence of guidance from the State, Jac forwarded Ms. Rajoppi’s e-mail to Secretary of State Kim Guadagno and Assistant Attorney General Donna Kelly on November 5. He stated: “the Clerks have asked questions Bob [Giles] has been unable to reply to. Please instruct.”⁸⁰

Jac also sent an e-mail to the County Clerks on November 6, 2012, under the subject heading: “What do [sic] say to court where SOS gives no guidance or direction.”⁸¹ The e-mail advised the County Clerks to “assert no position that blocks a voter’s right to vote,” and that the clerks “must follow rules of SOS and have no discretion to waive them.”⁸²

On November 5, Wade Hale, Burlington County Clerk, frustrated at the lack of guidance from the State, sent an e-mail to Robert Giles and County Clerks throughout the State. He complained about the large number of non-displaced voters who

⁷⁹ E-mail from Joanne Rajoppi, Union County Clerk, to ussrecount@aol.com (Nov. 5, 2012, 10:23 AM) (available on Rutgers Law School website, Union County File).

⁸⁰ E-mail from ussrecount@aol.com to Donna Kelly, New Jersey Assistant Attorney General, Kim Guadagno, New Jersey Lieutenant Governor, Robert Giles, Director, New Jersey Division of Elections, and Mary Melfi, Hunterdon County Clerk (Nov. 5, 2012, 10:30 AM) (available on Rutgers Law School website, Union County File).

⁸¹ E-mail from ussrecount@aol.com to County Clerks, Donna Kelly, New Jersey Assistant Attorney General, Kim Guadagno, New Jersey Lieutenant Governor, and Robert Giles, Director, New Jersey Division of Elections (Nov. 6, 2012, 1:39 PM) (available on Rutgers Law School website, Union County File).

⁸² *Id.*

were requesting to vote via fax or e-mail. He also complained that the e-mail instructions issued with the ballot only included the fax numbers for the Federal Voter Assistance Program, and not the more relevant fax number for ballot submission.⁸³ He said, in exasperation:

This is simply a nightmare turned upside-down, then inside out and dropped in our laps to deal with and the only direction we get is an Advisory 24 hours into the process.⁸⁴

There were complaints of unresponsiveness from the State as late as November 13, when Dennis Kobitz sent an e-mail to Robert Giles stating: “[f]irst of all, I hope you answer this e-mail since the last two were not.”⁸⁵

2. It is Not Clear How (and if) the Counties Limited Fax and E-mail Voting to Voters Displaced by Superstorm Sandy.

The November 3, 2012, “Directive Expanding Ability of Displaced Voters to Vote” specifically limited electronic voting to people who were displaced by Superstorm Sandy. This directive,

⁸³ E-mail from Wade Hale, Burlington County Clerk, to County Clerks (Nov. 5, 2012, 6:56 PM) (available on Rutgers Law School website, Union County File).

⁸⁴ *Id.*

⁸⁵ E-mail from Dennis Kobitz, Administrator, Union County Board of Elections, to Robert Giles, Director, New Jersey Division of Elections, Donna Kelly, New Jersey Assistant Attorney General, and Joanne Rajoppi, Union County Clerk (Nov. 13, 2012, 12:53 PM)(available on Rutgers Law School website, Union County File).

however, did not specify how county officials were to determine whether someone was indeed a displaced voter.

The State did not provide any guidance or guidelines to make that determination, even after the County Clerks expressed concern that voters requesting to vote electronically were not displaced. Mary Melfi of Hunterdon County complained that, "[t]he majority of applications are college kids seeing an easy way out and too lazy to have applied in time or those who do not want to stand in line at the polls that are filling the faxes and e-mail."⁸⁶ Wade Hale of Burlington County also stated: "For every voter who is displaced, we get three ignorant college kids or worse yet, their mommies telling us how a kid at school less than an hour away is completely unable to come in over the weekend or to come on Election Day to vote."⁸⁷

News reports about non-displaced voters echo the Clerks' concerns. For example, Heather Haddon of the *Wall Street Journal* reported that non-displaced voters were planning on voting

⁸⁶ E-mail from Mary Melfi, Hunterdon County Clerk, to Robert Giles, Director, New Jersey Division of Elections, and County Clerks (Nov. 5, 2012, 6:35 PM)(available on Rutgers Law School website, Union County File).

⁸⁷ See E-mail from Wade Hale, Burlington County Clerk, to County Clerks and Robert Giles, Director, New Jersey Division of Elections (Nov. 5, 2012, 6:56 PM) (available on Rutgers Law School website, Union County File).

electronically from their homes.⁸⁸ "If you're going to do something like this, you have to do it right," said Jason Tanz, an Essex County voter.⁸⁹ "It's really maddening. I've sent in my application three times now, and I still don't know if I'm going to get a chance to vote tomorrow.'"⁹⁰

Lacking guidance and no express requirement to do so from the State, it seems that most counties did not verify whether voters requesting to vote electronically were actually displaced due to Superstorm Sandy. Even Union County, which was one of the best organized counties throughout the post-storm election cycle, does not seem to have asked voters whether they were displaced.

Camden County seems to have misinterpreted the Directives and extended the right to vote electronically to the Storm's first responders.⁹¹ This violates New Jersey law. It does not fall within the Lieutenant Governor's Directives allowing electronic voting only for those displaced by Superstorm Sandy.

Additionally, Middlesex County sent "Electronic

⁸⁸ Heather Haddon, *New Jersey and New York Change Voting Plans to Cope With Storm*, WALL ST. J. (Nov. 5, 2012, 9:11 PM) <http://online.wsj.com/news/articles/SB10001424052970204755404578101394128049534>.

⁸⁹ Ben Smith, *E-Mail Voting Fails Some New Jersey Residents*, BUZZFEED NEWS (Nov. 6, 2012, 3:48 AM) <http://www.buzzfeed.com/bensmith/email-voting-fails-some-new-jersey-residents#lv4ldvz>.

⁹⁰ *Id.*

⁹¹ INSTRUCTION ON HOW TO RETURN YOUR BALLOT FOR HURRICANE SANDY DISPLACED VOTERS AND FIRST RESPONDERS (available on Rutgers Law School website, Camden County File).

Transmission Sheets,"⁹² along with the e-mail and fax ballots, to voters requesting to vote electronically. Each transmission sheet included a section for voters to indicate why they were voting electronically. One of the options was "other." "Other" is not a reason to vote electronically under the Directive. A few of the transmission sheets indicated that the voter was "displaced" or stated things such as "hurricane." But, the vast majority of voters left that section blank. One form even states "disabled." This clearly indicates that Middlesex County did not limit fax or e-mail voting to displaced persons. Since no indication of why a voter was voting by e-mail or fax was included on most of these transmission sheets, it appears that Middlesex County let individuals vote electronically without first confirming that they were in fact displaced.

Based on the OPRA documents submitted to the Clinic, the only county that attempted to ensure the status of displaced voters was Mercer County. The officials in Mercer County asked voters requesting to vote electronically to sign a sworn federal form that asked whether they were displaced by the hurricane. This is apparent in an e-mail that Paula Sollami-Covello, Mercer County Clerk, sent to all of the County Clerks as well as

⁹² The Electronic Transmission Sheet is a form letter that appears to be what Middlesex County generally uses for overseas and military voters (available on Rutgers Law School website, Middlesex County File).

Assistant Attorney General Donna Kelly, Robert Giles, and Kim Guadagno.⁹³ “[W]e are asking people if they are victims of hurricane [sic]. If they say yes and are willing to sign a sworn federal form (application), then we send it.”⁹⁴

Another difficulty arising from the November 3, 2012, Directive was raised in an e-mail to Robert Giles by Dennis Kobitz of Union County. Kobitz stated that he received six provisional ballots that had been sent from Ocean County.⁹⁵ All six voters had an Ocean County address, but had previously lived in Union County. In frustration, Mr. Kobitz asked Mr. Giles: “[c]an you please tell me why if a person fills out a form saying that their current address is one thing we should be calling them a liar and sending it back to their old address?”⁹⁶ Robert Giles acknowledged this problem in an e-mail where he stated:

[i]n many cases it is not possible to determine if a voter has temporarily moved

⁹³ E-mail from Paula Sollami-Covello, Mercer County Clerk, to County Clerks, Kim Guadagno, New Jersey Lieutenant Governor, Donna Kelly, New Jersey Assistant Attorney General, and Robert Giles, Director, New Jersey Division of Elections (Nov. 6, 2012, 1:44 PM) (available on Rutgers Law School website, Union County File).

⁹⁴ *Id.*

⁹⁵ E-mail from Dennis Kobitz, Administrator, Union County Board of Elections, to Robert Giles, Director, New Jersey Division of Elections (Nov. 17, 2012, 10:29 AM) (available on Rutgers Law School website, Union County File).

⁹⁶ *Id.*

due to the storm or has permanently moved based on the information provided on the provisional ballot affirmation statement. In an effort to treat all voters equally the State will prepare a standard letter that the counties will send to these voters to determine their current address for voter registration purposes.⁹⁷

No county provided the Clinic with this "standard letter." Given the level of frustration and confusion experienced by county officials in their correspondence with the State, there is no indication that such a letter was ever drafted or sent.

3. It is Highly Unlikely That Most Displaced Voters Were Ever Informed of the Statutory Requirement to Send in a Paper Ballot After Casting Their E-mail or Fax Ballot.

The November 3, 2012, "Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters" expanded the "Overseas Resident Absentee Voting Law," N.J. Stat. Ann. § 19:59-1, to voters who had been displaced by Superstorm Sandy. This law allows U.S. citizens living abroad to vote electronically in U.S. elections, provided they send the original paper ballot to election officials in the U.S. once they cast their ballots electronically. The statute makes clear that election officials must match the hard copy of the ballot to the ballot received

⁹⁷ E-mail from Robert Giles, Director, New Jersey Division of Elections, to County Board of Elections Officials (Nov. 19, 2012, 12:57 PM) (available on Rutgers Law School website, Union County File).

electronically.⁹⁸

The November 3, 2012, Directive that permitted displaced voters to vote electronically like overseas voters, however, did not state that displaced voters were required to mail a paper ballot along with the electronic ballot.

The State seems to have eventually informed county officials that voters were indeed required to send in paper ballots after casting electronic ballots. But this was only after U.S. Congressman Rush Holt, New York Board of Elections' Doug Kellner, the Rutgers Constitutional Rights Clinic, and advocacy groups such as Verified Voting and Common Cause held a press conference to pressure New Jersey to require a back-up paper ballot for any vote transmitted via fax or e-mail, and all major news outlets began calling the Secretary of State and Governor to discuss the matter. As a result, Robert Giles sent out an e-mail to all the counties at 3:18 p.m. on November 5, 2012 (hours before the election), telling them to "[p]lease inform all displaced voters that a first class mailing or equal of their e-mailed or faxed ballot will be sufficient."⁹⁹

Notably, the paper ballot verification requirement was sent as an e-mail message to the County Clerks and not as a formal

⁹⁸ N.J. STAT. ANN. § 19:59-15(d)(1) (2008).

⁹⁹ E-mail from Robert Giles, Director, New Jersey Division of Elections, to County Clerks (Nov. 5, 2012, 3:18 PM) (available on Rutgers Law School website, Union County File).

directive. Moreover, Mr. Giles did not send out the e-mail until 3:18 p.m., only hours before Election Day. Documents discussed above already show that preparing for the election with daily changes in procedures from the State caused chaos and confusion, especially as the election drew closer. County Clerks, scrambling to get ready for Election Day, either did not see this e-mail, or did not pay adequate attention to it.

Indeed, OPRA documents received indicate that most counties did not inform voters who voted electronically of the statutory requirement to mail in a back-up paper ballot. Voters who requested permission to cast votes via fax and Internet before Mr. Giles sent the November 5th e-mail to the counties¹⁰⁰ telling them about the paper ballot request most likely were never informed of this requirement. Moreover, voters who were made aware of this paper ballot requirement after the receipt of this e-mail would have needed to air mail their paper ballots¹⁰¹ that very day, in order for their paper ballot to be postmarked by November 5, 2012, and counted in the election.¹⁰²

OPRA documents show that only three out of twenty-one counties informed voters of the need to mail in a paper ballot,

¹⁰⁰ *Id.*

¹⁰¹ N.J. STAT. ANN. § 19:59-15(a) (2008).

¹⁰² *Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters, supra* note 22.

as required by the "Overseas Residents Absentee Voting Law." Union County, for example, sent an e-mail to all voters who requested to vote electronically containing: a waiver of secrecy form, a mail-in ballot, and specific instructions to "send the original voted ballot and signed Certificate Waiver to . . . the Union County Board of Elections."¹⁰³

Bergen County also specifically instructed voters to send in the paper ballot. A large enough number of Bergen County voters indicated in their e-mail correspondence with the election officials that they were also sending in a paper ballot.¹⁰⁴

Also, although Burlington County denied the Clinic's OPRA request, Union County provided the Clinic with a document that the Burlington County Clerk sent to all the other counties as a response to Robert Giles's e-mail about first class mailing of ballots.¹⁰⁵ In the e-mail, the Clerk included a copy of the instructions that Burlington County sent to its voters. Those

¹⁰³ E-mail from Nicole DiRado, Union County Deputy Clerk, to voter (Nov. 6, 2012, 11:29 PM) (available on Rutgers Law School website, Union County File).

¹⁰⁴ E-mail from Bergen County Election Division to voter (Oct. 13, 2012, 12:31 AM) (available on Rutgers Law School website, Bergen County File).

¹⁰⁵ E-mail from Wade Hale, Burlington County Clerk to County Clerks, Robert Giles, Director, New Jersey Division of Elections, and Donna Kelly, New Jersey Assistant Attorney General (Nov. 5, 2012, 5:47 PM) (available on Rutgers Law School website, Union County File).

instructions specifically told voters to mail a paper ballot along with their electronic ballot. In the same e-mail, Burlington County's Clerk refers to sending e-mail voters "notice about mailing the ballot back by first class" ¹⁰⁶

Other counties' instructions on mailing in a paper ballot were either non-existent or confusing. Camden County voters received an instruction sheet provided by the County that informed voters of the paper ballot requirement. But very different instructions were on the County's website. The website instructed voters that the deadline for requesting a mail-in ballot was 5 p.m. on November 6, while the deadline to submit the ballot electronically was 8 p.m. on the same day. Nowhere on the website were the voters informed of the need to mail in a paper copy of the ballot if they wanted to vote electronically. Thus, voters who got instructions from the County on how to vote via fax or e-mail were not directed to also send in confirming paper ballots.

Ultimately, given the general confusion among the Clerks and the lack of direction provided by the State, it is extremely likely that some County Clerks did not even realize that there was a paper back-up requirement. Only three out of twenty-one counties provided any documentation showing that they told

¹⁰⁶ *Id.*

voters to submit paper ballots after casting e-votes.

4. There is No Indication That Counties Matched Paper Ballots They Received with the Fax/E-mail Ballots, as Required by Law.

County election officials are required by law to match all mailed-in paper ballots received under the "Overseas Residents Absentee Voting Law" with the ballots that are submitted via fax or e-mail.¹⁰⁷ This step was especially critical, since there was chaos surrounding the November 6, 2012, elections in New Jersey.

Most counties did not provide the Clinic with any documentation showing that they matched the mail-in ballots with the electronic ballots. And one county admitted that it did not follow the law. Election officials in Morris County responded to the Clinic's OPRA request by sending a letter in which they openly admitted to counting all electronic ballots, whether they were matched to a paper ballot or not. The letter states that hard copies of voted ballots "were not compared to faxed or e-mail ballots for consistency of voting," and that "any ballot that was not received via hard copy the [sic] faxed or e-mail ballot was counted." This directly violates not only Secretary of State Guadagno's Directive, but also N.J. Stat. Ann. § 19:59-15(d)(1), which specifically states that election officials are

¹⁰⁷ N.J. STAT. ANN. § 19:59-1 (2008).

required to match the electronic vote with the original paper ballot sent by the voter.¹⁰⁸

Additionally, in Camden County, officials failed to provide voters with a deadline for mailing their paper ballots. Since there was no date by which the paper copies of the electronic ballots were to be received, it is very likely that Camden County did not match the electronic ballots with the corresponding paper ballots.

The same inference can be drawn from the documents provided by Monmouth County. Although officials there informed voters that the deadline for receipt of the electronic ballot was 8:00 p.m. on November 6, they failed to inform voters of the deadline by which they were to return corresponding paper ballots. Although Monmouth County provided the Clinic with an internal memorandum distributed to the county election officials on how to process requests for e-mail and fax ballots,¹⁰⁹ the instructions do not contain information about how to process paper ballots.

Finally, Monmouth County provided the Clinic with documents showing the number of e-mail and fax ballots that were rejected, and the reasons why they were rejected.¹¹⁰ None of the reasons

¹⁰⁸ N.J. STAT. ANN. § 19:59-15(d)(1) (2008).

¹⁰⁹ Available on Rutgers Law School website, Monmouth County File.

¹¹⁰ *Id.*

stated were due to the lack of a corresponding paper ballot. (The majority of them were rejected because they were received after the deadline.)

5. Cumberland and Camden Counties Seemed to be More Disorganized than the Rest of the Counties that Submitted OPRA Responses to the Clinic.

Cumberland County seemed to be particularly disorganized after Superstorm Sandy. In a statement it made to the Clinic, the County admitted that it did not know exactly which e-mail addresses it had provided to voters requesting to vote via e-mail:

[T]he County states that vote by mail requests could have been to the following e-mail addresses: `votebymailrequest@co.cumberland.nj.us`; `kellyec@co.cumberland.nj.us`; and `barbarafo@co.cumberland.nj.us`. In addition, other e-mail addresses could have possibly been used but it is impossible to ascertain what, if any, additional e-mail addresses may have been used to transmit requests. However, all requests that were received by whatever means were addressed and all who requested applications were provided with them.

It seems that two of the e-mail addresses that the county provided to voters were actually the personal e-mail accounts of election officials. This could have led to e-mail ballots becoming infected with viruses that may have been present on the personal computers of the holders' of these accounts.¹¹¹ "[E]-mail transmission and delivery are inherently insecure. E-mail

¹¹¹ See Lee, *supra* note 56.

can conceivably be intercepted at numerous points along its route of transmission, and it is stored briefly at several different servers along the way before it is delivered, again giving rise to security concerns.”¹¹²

Camden County also seemed to suffer more than other counties from a lack of organization. As mentioned above, it extended electronic voting not only to displaced voters, but to first responders as well. This violated the Secretary of State’s Directive, which extended that right only to voters who were displaced by Superstorm Sandy.

V. THE EMERGENCY DIRECTIVES VIOLATED NEW JERSEY LAW.

The previous section discussed the mass confusion created by the Secretary of State’s emergency directives. This section will discuss how some of those measures were, in fact, not authorized by New Jersey law.

A. INTERNET VOTING IS NOT PERMITTED IN NEW JERSEY.

Gusciora v. Corzine, filed in 2004, challenges New Jersey’s paperless voting machines on constitutional and statutory grounds. The case is still pending after ten years. One issue in the case was resolved long ago, however. In 2010, after two

¹¹² Daniel S. Coolidge, *E-Mail Disclaimers and E-Mail Security*, GPSOLO, (Dec. 2008), available at http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/emaildisclaimers.html.

trials, the Gusciora court, addressing the security of New Jersey's voting machines, categorically stated that "[a]s long as computers, dedicated to handling election matters, are connected to the Internet, the safety and security of our voting systems are in jeopardy."¹¹³ Testimony was given by multiple experts at trial discussing the dangers of connecting any voting equipment to the Internet.

The Gusciora trial court set forth guidelines to ensure that at no point in the vote tabulation or transmittal process should a New Jersey voting machine be exposed to the Internet. After considering extensive testimony from computer experts demonstrating the vulnerabilities of such exposure, the court required all County Clerks to "conduct an examination of the means in which election data is transmitted" to ensure complete disconnection from the Internet. The Clerks were also ordered to "develop action plans to ensure the integrity of the transmittal of voting data between the Municipal Clerks' offices" and the Department of Elections. In the event secure means are not developed, voting machine cartridges must be physically delivered to the Department of Elections for tabulation to ensure their absolute security.¹¹⁴

¹¹³ 2010 N.J. Super. Unpub. LEXIS 2319, 353 (Law Div. Feb. 1, 2010).

¹¹⁴ Gusciora v. Corzine, 2010 N.J. Super. Unpub. LEXIS at 353 (Law Div. Feb. 1, 2010.)

Secretary of State Kim Guadagno's directive permitting voting through e-mail ballots violated the letter of the court's ruling that the Internet cannot be used in any way for elections.

B. THE NOVEMBER 3, 2012 INTERNET AND FAX VOTING DIRECTIVE DOES NOT DISCUSS THE STATUTORY REQUIREMENT THAT ALL E-BALLOTS MUST ALSO BE SUBMITTED AS PAPER BALLOTS.

No Directive states that displaced persons voting as "overseas voters" were required to submit a paper ballot to accompany the e-mail or faxed ballot.¹¹⁵ The November 3rd Directive establishing electronic voting makes no mention of a paper ballot. Subsequent directives also make no mention of the paper ballot requirement. The Director of the Division of Elections, Robert Giles, informed County Clerks about the paper ballot request only by e-mail, on November 5, 2012, at 3:18 p.m., hours before the election.¹¹⁶ As discussed above, by that time thousands of voters had already cast their ballots electronically throughout the State.

The statutory requirement for a paper ballot is clear and unambiguous in the "Overseas Residents Absentee Voting Law." While statutory authority may be implied in order to uphold a regulation in the absence of "an express statutory

¹¹⁵ N.J. STAT. ANN. § 19:59-15(a) (2008) ("[t]he overseas voter shall place the original voted ballot in a secure envelope . . . and send the documents by air mail to the appropriate county board of elections.").

¹¹⁶ E-mail from Robert Giles, *supra* note 97.

authorization,"¹¹⁷ in this case the express statutory requirement of a supplemental paper ballot is clear and no implication to the contrary would be proper. The paper ballot back-up is an essential part of the military overseas statute. The paper ballot is necessary to ensure that there is a means to independently verify a voter's intent apart from the voter's electronic submission. Moreover, there is no evidence that if a county did receive paper ballots that it actually matched those ballots with corresponding e-mail/fax ballots as required by statute.

C. IN EXTENDING THE OVERSEAS BALLOT LAW TO OTHER VOTERS, THE SECRETARY OF STATE COMPLETELY DISREGARDED THE NEED FOR BALLOT SECRECY, IN VIOLATION OF NEW JERSEY LAW.

"The secret ballot is one of a set of democratic institutions—e.g., freedom of speech, freedom of association (allowing competing political parties), universal suffrage, and due process of law—designed to foster competitive and legitimate democratic elections."¹¹⁸ Secretary of State Kim Guadagno completely disregarded the importance of ballot secrecy when she issued the First and Second Directives on November 1, 2012.

¹¹⁷ N.J. St. League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 223 (1999).

¹¹⁸ Alan S. Gerber et al., *The Voting Experience and Beliefs about Ballot Secrecy*, 2-3 (2012) available at http://huber.research.yale.edu/materials/33_paper.pdf.

Although the secret ballot has existed since the time of the earliest democracies, it was not adopted in the United States until shortly after the heavily contested presidential election of 1884. Before then, voters were required to vote *viva voce*, or by voice, at their local polling places.¹¹⁹ In 1888, Massachusetts was the first state to adopt the secret ballot statewide.¹²⁰ That law served as a model for the rest of the states. Kentucky was the last state to adopt the secret ballot voting method in 1891.¹²¹ New Jersey adopted the secret ballot in 1890.¹²²

When ballot secrecy is eliminated, the opportunity for voter bribery and intimidation increases.¹²³ Indeed, before voting by secret ballot became the norm in the United States, vote-buying was a serious problem.¹²⁴ As a historian noted in 1891,

¹¹⁹ ELDON C. EVANS, *A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES* 1-16 (1917).

¹²⁰ *Id.* at 19.

¹²¹ Oddly, in 1888, Louisville, Kentucky was the first city in the United States to attempt the vote by using the secret ballot method. This new system, also known as the "Australian ballot" system, mandated that ballots be provided by the State and distributed only at the polling places, which voters would then fill out in secret. *Id.* at 28-35.

¹²² ROY G. SALTMAN, *THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE* 100 (2006).

¹²³ Gerber, *supra* note 118.

¹²⁴ EVANS, *supra* note 119.

This sounds like exaggeration, but it is truth; and these are facts so notorious that no one acquainted with the conduct of recent elections now attempts a denial--that the raising of colossal sums for the purpose of bribery has been rewarded by promotion to the highest offices in the government; that systematic organization for the purchase of votes, individually and in blocks, at the polls has become a recognized factor in the machinery of parties; that the number of voters who demand money compensation for their ballots has grown greater with each recurring election; . . . men of standing in the community have openly sold their votes at prices ranging from fifteen to thirty dollars¹²⁵

Voter bribery was thought to have been widespread enough to have affected the outcome of major elections.¹²⁶ For example, the presidential election of 1876 was very controversial and tainted by allegations by each party of fraud and voter bribery.¹²⁷

Intimidation of voters by people with authority over them was also a serious problem before the secret ballot.¹²⁸

According to a report of a committee of the Forty-sixth Congress, men were frequently marched or carried to the polls in their employers' carriages. They were then supplied with ballots, and frequently compelled to hold their hands up with their ballots in them so they could easily be watched until the ballots were dropped into the box. Many labor men were afraid to vote and remained away from the polls. Others who voted against their employers' wishes frequently lost

¹²⁵ EVANS, *supra* note 119 (quoting JAMES LINDSAY GORDON, *THE PROTECTION OF SUFFRAGE*, 13 (1891)).

¹²⁶ EVANS, *supra* note 119.

¹²⁷ Michael F. Holt, *The Contentious Election of 1876*, THE GILDER LEHRMAN INST. OF AM. HIST. (Fall 2012), <http://www.gilderlehrman.org/history-by-era/reconstruction/essays/contentious-election-1876>.

¹²⁸ *Id.* at 11-13.

their jobs. If the employee lived in a factory town, he probably lived in a tenement owned by the company, and possibly his wife and children worked in the mill. If he voted against the wishes of the mill-owners, he and his family were thrown out of the mill, out of the tenement, and out of the means of earning a livelihood. Frequently the owner and the manager of the mill stood at the entrance of the polling place and closely observed the employees while they voted. In this condition, it cannot be said that the workingmen exercised any real choice. The need of a secret ballot to protect debtors and the laboring class was especially urgent.¹²⁹

Since its adoption, courts have protected the secret ballot as a fundamental right of voters and an essential component of legitimate elections. For example, in Taylor v. Pile, 154 Colo. 516 (1964), the Colorado Supreme Court voided elections for the incorporation of a town in Arapahoe County because marked ballots were used.¹³⁰ The ballots were numbered in such a way as to permit election officials to clearly see how each voter had voted,¹³¹ violating a proposition "so fundamental to our system of government."¹³²

Additionally, in McCavitt v. Registrars of Voters, 385 Mass. 833 (1982), the Massachusetts Supreme Judicial Court overturned the decision of a lower court judge compelling absentee voters to disclose the candidates for whom they voted, in an attempt to

¹²⁹ EVANS, *supra* note 119.

¹³⁰ Taylor v. Pile, 154 Colo. 516, 520 (1964).

¹³¹ *Id.*

¹³² *Id.* at 673.

perform a manual recount of an election.¹³³ The Court instead ordered a new election, stating that

[A] voter who has cast an absentee ballot in good faith may not be asked to reveal for whom he or she voted. Such a requirement burdens the fundamental right to vote and strikes at the heart of the American tradition of the secret ballot. If the outcome of an election depends on good faith absentee voters whose facially valid ballots must be rejected because of procedural mistakes, we believe that a new election is preferable to compelling those voters to disclose the candidate for whom they voted.¹³⁴

New Jersey law, N.J. Stat. Ann. § 19:15-26, requires ballot secrecy. The November 3rd Directive permitting e-mail and Internet voting for voters displaced by Superstorm Sandy eliminated the secret ballot by executive fiat.¹³⁵ It required voters who wished to vote electronically to also submit a signed waiver of secrecy form¹³⁶ that permitted election officials to view how those individuals had voted. Indeed, the OPRA documents that the Clinic received from various counties contain the names, addresses, signatures, and partial or, in some instance, full social security numbers of voters along with their actual voted

¹³³ McCavitt v. Registrars of Voters, 385 Mass. 833, 847 (1982).

¹³⁴ *Id.* at 835.

¹³⁵ *Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters*, *supra* note 22.

¹³⁶ *Directive Regarding E-mail Voting and Mail-in Ballots for Displaced Voters*, *supra* note 22. Although the expansion of electronic voting was technically limited to displaced voters, there was no way of knowing if voters who voted by fax or e-mail were displaced or not, and the Directive provided no guidance on the matter.

ballots.

Secretary of State Kim Guadagno overstepped her authority by unilaterally expanding the "Overseas Residents Absentee Voting Law," N.J. Stat. Ann. § 19:59-1 et seq., lifting the ballot secrecy requirement without legislative approval. Although she cited Governor Chris Christie's Executive Order 104 for her authority to issue this directive, she was limited by the Administrative Procedure Act (APA), which requires a written explanation from both the rulemaking agency and the Governor for rule changes that are made with less than 30 days' notice.¹³⁷ The Executive Order also required the Governor's prior approval for any changes made to existing law.¹³⁸ There is no evidence that the Secretary of State obtained such permission.

D. THE STATE VIOLATED NEW JERSEY LAW BY REQUIRING VOTERS TO SUBMIT THEIR SOCIAL SECURITY NUMBERS AND OTHER SENSITIVE IDENTIFYING INFORMATION THROUGH THE INTERNET.

The "waiver of secrecy and electronic transmission cover sheets" that the State required voters to complete if they wished to vote via Internet or fax requested personal information, including a voter's:

¹³⁷ N.J. STAT. ANN. § 52:14B-4(c) (2008) (providing that a rule may be adopted upon fewer than 30 days' notice if "an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule.").

¹³⁸ *Directive Easing Restrictions on Voters In the Aftermath of Hurricane Sandy*, supra note 8.

- full name;
- full address;
- personal e-mail;
- phone number;
- date of birth;
- social security number; and
- signature.

The State's request that this information be transmitted electronically violated New Jersey law.

Under N.J. Stat. Ann. § 56:8-164, "No person, including any public or private entity, shall . . . require an individual to transmit his Social Security Number over the internet, unless the connection is secure or the Social Security number is encrypted . . ." There is no evidence that any of the statutorily required safeguards were in place before the State requested and collected social security numbers from voters. Indeed, the websites to which social security numbers were sent were most certainly not encrypted. Rather, they were websites the counties use for public correspondence. And as discussed Section IV above, in Essex County, the County Clerk gave out his personal "Hotmail" e-mail address. As discussed in Section IV(B)(5), Cumberland County asked voters to send in e-mailed ballots to a variety of personal e-mail addresses of employees.

Cumberland County could not even identify which e-mail address it actually used to receive ballots. This means that none of them were secured in the ways required by law.

In addition to violating New Jersey law, requiring voters to submit sensitive identifying information via the Internet also put them at risk of identity theft. The State exposed voters' social security numbers, birthdays, and signatures to hackers.

As such, to protect the privacy of voters, the Clinic has decided not to include copies of voted ballots that it received through OPRA requests on the website that it created as an accompaniment to this Report.

VI. NEW JERSEY NEEDS TO DEVELOP EMERGENCY PROCEDURES FOR VOTING IN THE EVENT OF A NATURAL DISASTER.

In the aftermath of Superstorm Sandy, it is imperative for New Jersey to implement emergency voting procedures to be used in the event of a natural disaster. Given the level of destruction that Superstorm Sandy caused and New Jersey's proximity to the Atlantic Ocean, it would be naïve to assume that similar disasters will not occur in the State again.¹³⁹

¹³⁹ John McQuaid, *Hurricanes and Climate Change*, NOVA (Nov. 15, 2012), <http://www.pbs.org/wgbh/nova/earth/hurricanes-climate.html> (The overall destructive potential of hurricanes may increase by 30% by the year 2100. Sea levels on the Northeast Atlantic coast have been rising at three to four times the global average since 1950. Rising sea levels lead to higher storm surges and increased destruction.).

In fact, the 2014 National Climate Assessment report released by the federal government found that, as a result of global warming, Northeastern states like New Jersey are at serious risk of heavy rain and flooding in coming years.¹⁴⁰ The report advises these states to incorporate the risk of climate change into their development and planning strategies to preclude major disruptions in governmental functions when future storms hit.¹⁴¹

A number of states have developed emergency voting procedures to be used in the event of a natural disaster.¹⁴² In addition, in the wake of Sandy, the National Association of Secretaries of State created a Task Force on Emergency Preparedness for Elections. The Task Force's stated mission is to "support state election officials in their efforts to effectively establish/enhance sound administrative election practices in preparation for, and response to, emergency conditions."¹⁴³

¹⁴⁰ *Northeast Highlights*, NAT'L CLIMATE ASSESSMENT (2014), available at <http://nca2014.globalchange.gov/highlights/regions/northeast>.

¹⁴¹ *Id.*

¹⁴² *Emergency Situations That May Affect the Conduct of Elections in California*, CAL. SEC'Y OF ST. DEBRA BOWEN (Jan. 2013), available at <http://www.sos.ca.gov/elections/emergency-procedures.htm>; *Summary of State Laws Concerning Emergency Authority and Contingency Plans for Elections*, NAT'L ASS'N. OF SECRETARIES OF ST., http://www.nass.org/component/docman/?task=doc_download&gid=1387&Itemid= (last visited July 29, 2014).

Notably, none of the states with established natural disaster voting plans had procedures that included voting by e-mail or fax. Moreover, none of the Task Force's materials discussed e-mail or fax voting as a viable alternative during a natural disaster.

A. CALIFORNIA'S NATURAL DISASTER EMERGENCY VOTING OPTIONS ALLOW FOR CHANGES IN POLLING LOCATIONS, EXTENSIONS OF VOTING TIMES, EXPANSIONS OF VOTING BY MAIL, AND OUT-OF-COUNTY VOTING, BUT NOT INTERNET VOTING.

California law provides several good options for voting in emergencies.¹⁴⁴ These options are divided into actions permitted under current law and actions that are not permitted under current law, but could be enacted under Government Code § 8567 during a state of emergency.

The options currently permitted under law are: setting up satellite voting locations; designating a replacement polling place as late as on Election Day; setting up new voting locations in a precinct if the normal location cannot be used;

¹⁴³ *NASS Task Force on Emergency Preparedness for Elections*, NAT'L ASS'N. OF SECRETARIES OF ST., <http://www.nass.org/elections-voting/nass-task-force-on-emergency-preparedness-for-elections/> (last visited July 29, 2014).

¹⁴⁴ *Emergency Situations That May Affect the Conduct of Elections in California*, *supra* note 142.

and allowing vote-by-mail voters to vote in person at any precinct on Election Day.¹⁴⁵

Among the options that could be implemented by the Governor in the event of a natural disaster are: extending voting times and accepting ballots after the deadline; permitting out-of-county voting; requiring the election to be conducted entirely by mail; and cancelling and rescheduling the election.¹⁴⁶ Notably, California law never recommends any emergency measure that would allow voters to vote by e-mail or fax in the event of a natural disaster.

B. FLORIDA'S NATURAL DISASTER VOTING OPTIONS INCLUDE THE RESCHEDULING OR SUSPENSION OF ELECTIONS, BUT NOT INTERNET VOTING.

Florida law outlines procedures that the Governor can implement in the event of a natural disaster.¹⁴⁷ After the Governor declares a state of emergency, he can suspend or delay any election.¹⁴⁸ The Governor, after consulting with the Secretary of State, can then reschedule any election as long as

¹⁴⁵ *Emergency Situations That May Affect the Conduct of Elections in California*, *supra* note 142.

¹⁴⁶ *Emergency Situations That May Affect the Conduct of Elections in California*, *supra* note 142.

¹⁴⁷ FLA. STAT. § 101.733 (2014).

¹⁴⁸ *Id.*

it is held within 10 days of the regular election.¹⁴⁹ There is nothing in the emergency measures that allows the Governor to change in any way the legal methods of voting outlined in the State's legislation. The Florida emergency measures do not permit voting by e-mail and fax in the event of a natural disaster.

VII. INTERNET VOTING IS NOT SAFE, SHOULD NOT BE MADE LEGAL, AND SHOULD NEVER BE INCORPORATED INTO EMERGENCY MEASURES.

Although there have been calls to make Internet voting legal,¹⁵⁰ Internet voting for all elections is permitted only in Alaska and for disabled voters in Utah.¹⁵¹ Under controlled circumstances, Internet voting is available only to overseas voters and military voters.¹⁵²

A voted ballot sent through the Internet is exposed to many security threats, including cyber-attacks, modification of the

¹⁴⁹ *Id.*

¹⁵⁰ *Internet Voting - Not Ready for Prime Time?*, THE CANVASS (Feb. 2013), available at http://www.ncsl.org/Portals/1/Documents/legismgt/elect/Canvass_Feb_2013_no_37.pdf.

¹⁵¹ *Electronic Transmission of Ballots*, NAT'L CONFERENCE OF STATE LEGS. (June 26, 2014) <http://www.ncsl.org/research/elections-and-campaigns/internet-voting.aspx>

¹⁵² Pamela Smith et al., *Counting Votes 2012: A State by State Look at Voting Technology Preparedness*, 84 (Aug. 2013), available at http://countingvotes.org/sites/default/files/CountingVotes2012_Final_August2012.pdf.

ballot in transit, denial of service, spoofing, automated vote buying, and viral attacks on voter PCs.¹⁵³

In 2011 and 2012, the National Institute of Standards and Technology (NIST) released a white paper entitled *Security Considerations for Remote Electronic UOCAVA Voting* (covering several forms of Internet voting). The NIST report concluded that: (1) Internet voting from personal computers currently poses severe risks extremely difficult to mitigate but commonplace on the Internet: risks to ballot secrecy, ballot security, and to theft of voters' authentication credentials; (2) remote electronic voter authentication is a difficult problem and any solutions may be hard or expensive to deploy; and (3) auditability of Internet voting cannot match auditability of polling place voting.

In a March 2012 *Wall Street Journal* op-ed, top cyber security official Bruce McConnell, of the Department of Homeland Security, and Pamela Smith, of Verified Voting, warned that it is "premature to deploy Internet voting in real elections at this time," citing the increased vulnerability of connecting voting systems to the Internet.¹⁵⁴ Indeed, according to Princeton

¹⁵³ See DOUGLAS W. JONES & BARBARA SIMONS, *BROKEN BALLOTS: WILL YOUR VOTE COUNT?* 269-70 (2012).

¹⁵⁴ *Id.*; see also Bruce McConnell & Pamela Smith, *Hack the Vote: The Perils of the Online Ballot Box; More than 30 states and territories already allow some form of Internet voting. They might want to reconsider*, WALL ST. J. (May 28, 2014, 6:47 PM), <http://online.wsj.com/>

University Professor of Computer Science and Public Affairs, Edward Felten, in order for Internet voting to be secure, Internet voters need end-to-end encryption, which requires software to be installed on both the sending and receiving ends of the vote transmission.¹⁵⁵ Most voters would not be able to setup up this end-to-end e-mail encryption.¹⁵⁶

A. INTERNET VOTING INITIATIVES IN THE U.S. ARE VERY LIMITED.

Since the 2010 mid-term Congressional election, there have been a number of efforts to expand Internet voting domestically. Only two have passed. Since October 2012, Alaska has allowed any voter to vote "absentee" by electronic transmission for any reason.¹⁵⁷ Alaska Stat. Ann. §§ 15.20.010, 15.20.066 allow for any voter to vote absentee by electronic transmission for any reason, as long as the regulations applicable to the delivery of the electronic ballots and receipt "ensure the accuracy and, to

articles/pamela-smith-and-bruce-mcconnell-hack-the-vote-the-perils-of-the-online-ballot-box-1401317230 ("[O]nline voting is fraught with danger. Hackers could manipulate enough votes to change the results of local and national elections. And a skilled hacker can do so without leaving any evidence."). Bruce McConnell is Senior Vice President at the EastWest Institute and the former Deputy Under Secretary for Cybersecurity at the U.S. Department of Homeland Security. Pamela Smith is President of the Verified Voting Foundation.

¹⁵⁵ Email from Princeton Professor Felten to Rutgers Law School - Newark Clinical Professor Penny Venetis (March 11, 2014).

¹⁵⁶ Id.

¹⁵⁷ *Absentee Voting by Electronic Transmission*, ST. OF ALASKA DIV. OF ELEC. WEBSITE, http://www.elections.alaska.gov/vi_bb_by_fax.php (last visited July 28, 2014).

the greatest degree possible, the integrity and secrecy of the ballot process.”¹⁵⁸ It is unclear, however, how Alaska ensures security and accuracy, as Internet voting is undoubtedly unsafe. Alaska is the first and only state to offer this option to all voters, not just disabled or overseas voters.¹⁵⁹

On March 29, 2014, Utah passed legislation that would allow disabled voters to use electronic voting.¹⁶⁰ The new law “allows a covered voter [uniformed service voter or overseas voter registered in Utah] or a voter with a disability . . . to register to vote, and vote electronically.”¹⁶¹ This new law went into effect on May 13, 2014.¹⁶² As of July 22, 2014, Utah is researching ways to expand Internet voting to all Utah voters.¹⁶³

Additionally, although California has not yet approved Internet voting, some municipalities have attempted to employ online voting for local issues.¹⁶⁴ The City of San Francisco

¹⁵⁸ ALASKA STAT. ANN. § 15.20.066(a)(2) (2014).

¹⁵⁹ *Electronic Transmission of Ballots*, NAT’L CONF. OF ST. LEG. (June 26, 2014), <http://www.ncsl.org/research/elections-and-campaigns/internet-voting.aspx>.

¹⁶⁰ UTAH CODE ANN. § 20A-6-103 (West 2014).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Lee Davidson, *Utah to study expansion of e-voting*, THE SALT LAKE TRIBUNE (July 23, 2014, 6:26 PM), <http://www.sltrib.com/sltrib/politics/58211029-90/voting-committee-expansion-utah.html.csp>.

¹⁶⁴ Nathan Olivarez-Giles, *San Francisco wants to let residents vote on the city’s budget online next year*, THE VERGE (Sept. 13, 2013, 7:28 PM),

recently announced that it would implement online voting for residents to participate in the discussion of the City budget.¹⁶⁵ San Francisco residents would have the ability to propose and vote on city budget items online as the city council discusses the issues.¹⁶⁶ However, the City is still uncertain how it would run this system.¹⁶⁷

Maryland is also exploring the possibility of offering an online ballot-marking device for disabled voters.¹⁶⁸ The marked ballot would have to be mailed to election officials.¹⁶⁹ The parameters of that provision are being litigated in federal court.¹⁷⁰

At a May 2014 Democratic National Committee rules meeting, Iowa Democratic Party Chairman Scott Brennan proposed allowing the use of Internet voting in the 2016 Iowa Caucus.¹⁷¹ Brennan

<http://www.theverge.com/2013/9/13/4728096/san-francisco-test-online-participatory-budgeting-voting>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Ian Duncan, *Judge orders Maryland to adopt online voting tool*, THE BALTIMORE SUN (Sept. 4, 2014), http://articles.baltimoresun.com/2014-09-04/news/bs-md-blind-voting-case-20140904_1_absentee-ballot-tool-disabilities-act.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ David Catanese, *An Iowa Caucus Via the Internet?* U.S. NEWS WORLD & REP. (May 2, 2014, 5:41 PM), <http://www.usnews.com/news/blogs/run->

said that the Iowa Democratic Party is actively exploring this option.¹⁷² The DNC allowed Internet voting as an option for party-run state primaries in 2008, but no state has used the option.¹⁷³ In order for the Iowa Caucus to be conducted online, the DNC would have to amend the rule to allow caucus states to use Internet voting.¹⁷⁴

B. MANY INTERNET ELECTIONS THAT HAVE BEEN ATTEMPTED HAVE BEEN HACKED.

Thus far, many online elections have been hacked.

1. The Paris Online Mayoral Election Allowed People to Vote Multiple Times.

France's first online election was marred with accusations that the system could be easily defrauded.¹⁷⁵ The "ultra-secure" online system required a name, some personal information and credit card number in order for a person to vote. During the primary race for the center-right party's candidate for Mayor of Paris, reporters from France's *Metronews* discovered that it was

2016/2014/05/02/democratic-national-committee-discusses-rules-iowa-thinks-internet-options.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ John Lichfield, *Fake votes mar France's first electronic election*, THE INDEP. (June 2, 2013), <http://www.independent.co.uk/news/world/europe/fake-votes-mar-frances-first-electronic-election-8641345.html>.

possible to vote multiple times using the same name and credit card information (including using the name for former French President Nicolas Sarkozy).¹⁷⁶

2. A Test Run of Washington, D.C. Internet Voting was Hacked Completely Within a Matter of Hours.

In 2010, the Washington D.C. Board of Elections and Ethics tested its new Internet-based voting system, which would have allowed overseas voters to cast ballots without the need for a mail-in paper ballot.¹⁷⁷ The Board was so confident that its system was secure that it invited computer experts and the general public to hack it.¹⁷⁸

The system was quickly compromised when Alex Halderman, a University of Michigan professor, working with his students, infiltrated the system.¹⁷⁹ They replaced every legitimate ballot that had already been cast with a modified ballot that contained

¹⁷⁶ *Municipales à Paris: comment metronews a fraudé à la primaire de l'UMP*, METRONEWS (May 31, 2013, 7:10 PM), <http://www.metronews.fr/paris/municipales-a-paris-comment-metronews-a-fraude-a-la-primaire-de-l-ump/mmeD!jk3goaowk8DkQ//>.

¹⁷⁷ Mike DeBonis, *Hacker infiltration ends D.C. online voting trial*, WASH. POST (Oct. 4, 2010, 2:14 PM), http://voices.washingtonpost.com/debonis/2010/10/hacker_infiltration_ends_dc_on.html.

¹⁷⁸ *Digital Vote By Mail*, D.C. BD. OF ELEC. & ETHICS (June 21, 2010), available at http://dcboee.org/pdf_files/nr_423.pdf.

¹⁷⁹ Alex Halderman et al., *Attacking the Washington D.C. Internet Voting System*, PROC. 16TH CONF. ON FIN. CRYPTOGRAPHY & DATA SEC. (Feb. 2012), available at <https://jhalderm.com/pub/papers/dcvoting-fc12.pdf>.

a vote for the candidate that they had selected.¹⁸⁰ They were also able to manipulate the system into modifying future votes in the same way.¹⁸¹

Additionally, they installed a program that allowed them to view each vote that was being cast, including the name and information of the person casting it.¹⁸² They were even able to gain access to security webcams, which allowed them to have a real-time view of the network operations facility, and the D.C. election system administrators themselves.¹⁸³ While the professor and his students used the webcams to watch the administrators' reactions when they revealed their hack, actual hackers could use the webcams for more sinister reasons. Hackers could use the cameras to identify the security patrol patterns at the election facility and manipulate the client-server models that are used to run the voting system.¹⁸⁴ The hack remained completely undetected. It was only detected after the hackers rigged the system to play the University of Michigan "fight song" every

¹⁸⁰ *Id.* at 7.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 11-12.

¹⁸⁴ *Id.*

time a vote was cast.¹⁸⁵ Internet voting in D.C. was quickly suspended after this hack.

3. Cyber Attack of Absentee Ballots in the August 14, 2012 Florida Primary Elections.

In July 2012, hackers attacked the Miami-Dade, Florida, Election Division website by flooding it with online absentee ballot requests. The State and County did not have the resources to trace the location of the original computers that perpetuated the attack.

On July 7, 2012, the Miami-Dade Election Department website began receiving large numbers of absentee ballot requests at a very rapid speed which was not humanly possible. The requests were for absentee ballots relating to the August 14, 2012, primary elections, for Democrats in Congressional District 26 and Republican voters in the 103 and 112 Florida House districts.¹⁸⁶ Between July 7, 2012, and July 24, 2012, there were a total of 2,552 absentee ballot requests, which came from 15 different Internet Protocol (hereinafter "IP") addresses.

Every time the Elections Department discovered that a large

¹⁸⁵ *Id.* at 8.

¹⁸⁶ Patricia Mazzei, *The case of the phantom ballots: an electoral whodunit*, MIAMI HERALD (Feb. 23, 2013), <http://www.miamiherald.com/2013/02/23/3250726/the-case-of-the-phantom-ballots.html>.

number of absentee ballot requests originated from a particular IP address, the Elections Department blocked it from submitting the requests. The hackers then instantly engaged another IP address to submit even more requests, until the Elections Department discovered large numbers of requests originating from the second IP address and shut it down.¹⁸⁷ This cycle continued until the hackers stopped submitting absentee ballot requests. The Elections Department blocked a total of 15 IP addresses.

The Elections Department randomly telephoned voters who allegedly requested absentee ballots, and determined that these individuals had not made requests for absentee ballots.¹⁸⁸ Investigators determined that the hackers devised a computer program to submit fraudulent absentee ballot requests. A total of 2,552 requests were submitted.¹⁸⁹

a. The Miami-Dade State Attorney Did Not Locate the Origin of the Hacks.

On December 19, 2012, the Florida State Attorney filed a Grand Jury Report (hereinafter "Report") of its findings about the July 2012 cyber attack relating to the August 14, 2012,

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ FLA. ATT'Y GEN., FINAL REP. OF THE MIAMI-DADE GRAND JURY (Spring 2012), available at http://bradblog.com/Docs/miami-hack-grand-jury_2012.pdf.

primary elections. The Report states that law enforcement officials failed to uncover the location of the IP addresses that made the online requests for absentee ballots. The Miami-Dade State Attorney's office determined that the computers requesting absentee ballots had used "anonymizers" to mask their location.¹⁹⁰ Although the specific computers generating the attack could not be located, their locations were traceable. Law enforcement officials traced several of the IP addresses to as far as England, Ireland and India.¹⁹¹

The hacks were generated by three domestic IP addresses, which the Grand Jury Report failed to mention.¹⁹² At least two of the IP addresses are located within Miami-Dade County.¹⁹³ Since these IP addresses are domestic, the Prosecutor had power to subpoena the Internet Providers who host the IP addresses to obtain more information about the hacker's identity.¹⁹⁴

The State Attorney closed its investigation on January 15, 2013, after not being able to locate the computers from which the cyber attacks were made. Since then, in response to media

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Mazzei, *supra* note 186.

¹⁹⁴ Mazzei, *supra* note 186.

reports that at least three of the attacks were generated by computers that had domestic IP addresses, the State Attorney has reopened its investigation.¹⁹⁵

b. Investigative Journalism by Patricia Mazzei of the Miami Herald Uncovered Some of the Sources of the Attack.

Patricia Mazzei, a Miami Herald reporter, subsequently found that the three domestic IP addresses that launched attacks were not discussed in the Report.¹⁹⁶ Mazzei discovered that at least two of the IP addresses were located within Miami-Dade County.¹⁹⁷ The Election officials never communicated the three domestic IP addresses to the State Attorney's office for further investigation. According to Mazzei, the Deputy Elections Supervisor failed to send the three domestic IP addresses to the State Attorney to be investigated. When the Elections Official discovered the mistake, he e-mailed the three domestic IP addresses Miami-Dade Prosecutor on December 12, 2012. However, nobody in the Prosecutor's office pursued these IP addresses before the State Attorney's office filed the Grand Jury Report.

Ms. Mazzei explained that the hackers obtained information

¹⁹⁵ Editorial, *Absentee Ballots are real threat to voting integrity*, TAMPA BAY TIMES (Mar. 8, 2013, 4:30 AM) <http://www.tampabay.com/opinion/editorials/editorial-absentee-ballots-are-real-threat-to-voting-integrity/2107809>.

¹⁹⁶ Mazzei, *supra* note 186.

¹⁹⁷ Mazzei, *supra* note 186.

to submit fraudulent online absentee ballot requests through the Florida voter file, a digital public record containing voter registration information, which is available for only \$5.00.¹⁹⁸ Ms. Mazzei indicated that the hackers must have had a copy of the voter file because the fraudulent requests were concentrated in specific areas corresponding to Florida Congressional Districts.¹⁹⁹

The hacks uncovered by the *Miami Herald* serve as a glaring example that State and county governments are ill-equipped to protect against hacks. Here, a reporter was able to find out more about the hacks to the online absentee ballot system than the county or the State.

4. Hacks of Internet Elections in Estonia.

Estonia's I-voting system was introduced in 2005, making it the first country to offer Internet voting for all elections.²⁰⁰ Professor Alex Halderman and his research team found that Estonia's system was vulnerable to attack. Estonia's I-voting

¹⁹⁸ See FLA. STAT. § 97.0585 (2013).

¹⁹⁹ In Congressional District 25, 466 of 472 fraudulent online absentee ballot requests targeted Democrat voters. In House District 103, 864 of 871 requests targeted Republican voters, as did 1,184 of 1,191 requests in House District 112.

²⁰⁰ J. ALEX HALDERMAN ET AL., SECURITY ANALYSIS OF THE ESTONIAN INTERNET VOTING SYSTEM (May 2014), available at <http://estoniaevoting.org/wp-content/uploads/2014/05/IVotingReport.pdf>.

system "implicitly trusts the integrity of voters' computers, server components, and the election staff."²⁰¹ During a glitch in the tabulation phase, an election worker used a personal USB stick, containing non-election files, to transfer the election files to an Internet-connected laptop.²⁰² Professor Halderman's team was disturbed by "the high degree of trust" the I-voting system requires of "the election servers, client software, and the election workers themselves."²⁰³ "Malware present on the laptop could potentially have altered the unsigned ballots, or malware on the USB stick could have been transferred to the trusted counting server."²⁰⁴

After reproducing Estonia's I-voting system in their lab, Professor Halderman's team was able to develop attacks that steal the votes from voters' computers, bypass all safeguards, and introduce malware that alters votes between the decryption and tabulation stages.²⁰⁵ "By introducing malware in this server, a foreign power or dishonest insider could alter votes between decryption and tabulation, shifting results in favor of the

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

attacker's preferred candidate."²⁰⁶

5. USRowing Online Board of Directors Election was Hacked.

In March 2013, the Board of Directors of USRowing (the body that governs the sport of rowing in the United States) issued a press release stating that the online voting system used for its annual Board of Directors elections had been hacked.²⁰⁷

Fraudulent ballots had been cast in the election for Mid-Atlantic Regional Director of the Board of Directors. The ballots directly affected the election, and the results were discarded.²⁰⁸

VoteNet—the company that supplied the voting system for the election—did not make any statements regarding the matter. USRowing's voter login site, however, indicates that hacking into the system might not have been very difficult. All that an individual needed to manipulate the election was a member number and password in order to log in to vote.²⁰⁹ A potential hacker needed only to access a list of USRowing members and their

²⁰⁶ *Id.*

²⁰⁷ *USRowing Announces Review of 2013 Election*, ROW2K NEWS (Mar. 27, 2013), <http://www.row2k.com/news/3-27-2013/USRowing-Announces-Review-of-2013-Election/79179/#.U2varq1dX9Q>.

²⁰⁸ *USRowing Board Announces Results of the 2013 Election Investigation*, USROWING (May 7, 2013), http://www.usrowing.org/News/13-05-07/USRowing_Board_Announces_Results_of_the_2013_Election_Investigation.aspx.

²⁰⁹ *USRowing eballot*, USROWING, <https://eballot4.votenet.com/usrowing/login.cfm> (last visited July 29, 2014).

corresponding member numbers in order to log into their accounts and vote on their behalf. The Board of Directors issued a final statement on October 17, 2013, announcing that the Association would be adopting new protocols for increased election security.²¹⁰

6. California College Student Rigged Online Student Election.

In California, a 22-year-old student nearly succeeded in rigging the online election for student body president.²¹¹ By using small, inexpensive devices called keyloggers—which secretly record a computer user’s keystrokes—he was able to steal the passwords of nearly 750 students and cast votes for himself in their names.²¹²

University administrators caught him when they noticed an unusual amount of voting activity originating from a single computer on campus.²¹³ He was arrested on the spot, but not before he had already cast over 600 votes for himself and gained access to the e-mails, financial information and social accounts

²¹⁰ *Letter to USRowing Members*, USROWING (Oct. 17, 2013), http://www.usrowing.org/News/13-10-17/Letter_to_USRowing_Members.aspx.

²¹¹ *Election Hack Stealing Votes the Cyber Way*, FED. BUREAU OF INVESTIGATION (Aug. 5, 2013), <http://www.fbi.gov/news/stories/2013/august/election-hack-stealing-votes-the-cyber-way/election-hack-stealing-votes-the-cyber-way>.

²¹² *Id.*

²¹³ *Id.*

of nearly 750 students.²¹⁴ He was subsequently charged with wire fraud, unauthorized access of a computer and identity theft, and sentenced to a year in prison.²¹⁵

Although both this election and the USRowing were minor ones that seem insignificant beyond their small constituencies, they illustrate that every election is a high-stakes election to someone, and that even seemingly unimportant elections are vulnerable to hacks.

VIII. INTERNET ATTACKS ON U.S. INFRASTRUCTURE AND BUSINESSES ARE SO PREVALENT THAT IT IS NAÏVE TO BELIEVE THAT U.S. ELECTIONS WOULD NOT BE OF INTEREST TO HACKERS.

Since Superstorm Sandy, almost on a daily basis *The New York Times* and *Washington Post* front pages have reported major hacking incidents that affect our governmental infrastructure as well as our economy. Indeed, this section of the report has been difficult to finalize because there is breaking news on this topic every day. For example, on October 3, 2014, *The New York Times* reported that JPMorgan Chase, the nation's largest bank, had been compromised by a hack to its computer systems, and that information related to more than 83 million households and small

²¹⁴ *Id.*

²¹⁵ *Cal State San Marcos Student Sentenced for Rigging Campus Elections*, FED. BUREAU OF INVESTIGATION (July 15, 2013), <http://www.fbi.gov/sandiego/press-releases/2013/cal-state-san-marcos-student-sentenced-for-rigging-campus-elections>.

businesses was stolen.²¹⁶

In September 2014, Home Depot confirmed a breach of credit card data by hackers that put over 56 million customers at risk.²¹⁷ The hackers broke into the company's cash registers to obtain credit card information.²¹⁸ They relied on custom-made software that had not been previously used in other major cyber attacks.²¹⁹ Also in July 2014, the Secret Service arrested prolific Russian hacker, Roman Seleznev, for stealing 232,000 credit card numbers from December 2009 to February 2011 and earning \$2 million from the underground sale of 140,000 credit card numbers.²²⁰

On May 1, 2014, the Department of Justice indicted five members of the Chinese People's Liberation Army on charges of

²¹⁶ Matthew Goldstein, Nicole Perlroth, and David E. Sanger, *Hackers' Attack Cracked 10 Financial Firms in Major Assault*, N.Y. TIMES (Oct. 3, 2014, 9:39 PM), <http://dealbook.nytimes.com/2014/10/03/hackers-attack-cracked-10-banks-in-major-assault/>.

²¹⁷ Ben Elgin, Michael Riley, and Dune Lawrence, *Home Depot Hacked After Months of Security Warnings*, BLOOMBERG BUSINESSWEEK (Sept. 18, 2014), <http://www.businessweek.com/articles/2014-09-18/home-depot-hacked-wide-open#p1>

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Nicole Perlroth, *Russian Arrested in Guam on Array of U.S. Hacking Charges*, N.Y. TIMES (July 7, 2014, 5:23 PM), <http://bits.blogs.nytimes.com/2014/07/07/russian-arrested-in-guam-on-array-of-u-s-hacking-charges/?ref=technology>.

hacking into the networks of prominent U.S. companies.²²¹ From 2006 until April 2014, "the hacking unit invaded the networks of American corporate targets, systematically copying their e-mails and, in some cases, infecting their computers with malware."²²² Westinghouse Electric was targeted so that the Chinese could "learn the company's strategy for negotiating with one of China's state-owned enterprises. The hackers stole roughly 700,000 pages of e-mails, including some from its chief executive."²²³

Similarly, a group of Iranian hackers compromised the computers of 2,000 users beginning in 2011,²²⁴ and stole the identity of former American ambassador to the United Nations, John R. Bolton.²²⁵ The Iranians "created a fake LinkedIn account and engaged in chats with people who believed they were exchanging thoughts with a man who some conservatives hope will

²²¹ Michael S. Schmidt & David E. Sanger, *5 in China Army Face U.S. Charges of Cyberattacks*, N.Y. TIMES (May 19, 2014), http://www.nytimes.com/2014/05/20/us/us-to-charge-chinese-workers-with-cyberspying.html?_r=0.

²²² *Id.*

²²³ *Id.*

²²⁴ *Iran hackers spy on U.S. leaders, Israel lobby using phony Facebook profiles*, HAARETZ (May 29, 2014, 7:19 AM), <http://www.haaretz.com/news/middle-east/1.595949>.

²²⁵ David E. Sanger, *Iran Hackers Dangle a Familiar Name to Fish for Data*, N.Y. TIMES (May 30, 2014), http://www.nytimes.com/2014/05/31/world/middleeast/iran-hackers-dangle-a-familiar-name-to-fish-for-data.html?_r=5.

run for president.”²²⁶ This is a very common type of “phishing” scam. The Iranians directed similar attacks toward the Council on Foreign Relations and the Aspen Institute.²²⁷

In 2013, the U.S. Government recorded at least 3,000 hacks of U.S. companies, both large and small.²²⁸ The majority of those companies had no idea they had been hacked.²²⁹ Hackers have breached data systems containing the personal and financial information of millions of consumers. From late November through early December 2013, hackers compromised 40 million Target customers’ credit and debit card accounts.²³⁰ Neiman Marcus suffered a similar hack, and both companies testified before the House of Representatives Energy and Commerce Committee’s Commerce Subcommittee that the hundreds of millions that the companies spent in cybersecurity did not protect their systems from hacks.²³¹ Neiman Marcus testified to the U.S. House of

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Ellen Nakashima, *U.S. notified 3,000 companies in 2013 about cyberattacks*, WASH. POST (Mar. 24, 2014), http://www.washingtonpost.com/world/national-security/2014/03/24/74aff686-aed9-11e3-96dc-d6ea14c099f9_story.html.

²²⁹ *Id.*

²³⁰ Scott Wilson & Ricardo Lopez, *Target account breach one in long string of consumer-data hacks*, L.A. TIMES (Dec. 19, 2013), <http://articles.latimes.com/2013/dec/19/business/la-fi-mo-target-account-breach-among-largest-cyber-hacks-20131219>.

²³¹ Grant Gross, *Target, Neiman Marcus executives defend security practices*, PC WORLD (Feb. 5, 2014, 12:25 PM), <http://www.pcworld.com/>

Representatives Energy and Commerce Committee's commerce subcommittee that no antivirus software would have been able to prevent the hack because the hackers rewrote the data software to target the company.²³²

In February 2014, a severe bug in Apple's OS X and IOS security library was revealed, which led to the possibility of man-in-the-middle attacks on Internet applications secured by TLS (Transport Layer Security).²³³ A man-in-the middle attack occurs when a hacker interrupts the relay of messages in a public key exchange. The hacker uses his own encrypted key to modify the message before retransmitting it, so he changes the content and corrupts the message without the other party finding out.²³⁴ In March 2014, a similar bug was discovered in a similar place in the GnuTLS library used to secure many Linux applications.²³⁵ This bug made it so that part of the code, which

article/2094820/target-neiman-marcus-executives-defend-security-practices.html.

²³² *Id.*

²³³ Molly Wood, *Apple Issues Fix for Security Problem on Macs*, N.Y. TIMES (Feb. 25, 2014, 5:15 PM), http://bits.blogs.nytimes.com/2014/02/25/apple-issues-fix-for-security-problem-on-macs/?_php=true&_type=blogs&_r=0.

²³⁴ Margaret Rouse, *Man in the Middle Attack (fire brigade attack)*, SEARCHSECURITY (June 2007), <http://searchsecurity.techtarget.com/definition/man-in-the-middle-attack>.

²³⁵ Dan Goodin, *Critical crypto bug leaves Linux, hundreds of apps open to eavesdropping*, ARSTECHNICA (Mar. 4, 2014, 1:56 PM), http://arstechnica.com/security/2014/03/critical-crypto-bug-leaves-linux-hundreds-of-apps-open-to-eavesdropping/?utm_source=feedburner&

was required to establish a secure connection, was terminated.²³⁶ This made it very easy for attackers to pose as the legitimate operators of websites' that were victims to the bug and decrypt the websites protected communications.²³⁷

This has important implications for Internet voting. Both the Apple and GnuTLS bugs would allow someone to put up a phony website that looked and behaved exactly like an official online voting site, and would be accepted as authenticated by the voter's browser. But the voter's choices could be modified in transit, with neither the voter nor the election officials being able to detect the modification.

The end-to-end "military grade" encryption that Internet voting vendors tout so heavily is either TLS itself or depends upon TLS working properly. The Apple bug and the GnuTLS bug can defeat that encryption through essentially undetectable man-in-the-middle attacks. Furthermore, most voters are not equipped to setup end-to-end encryption. The implication of this is that there is no unilateral action that a county could take to make e-mail ballot communication between the voter and the county secure.

utm_medium=feed&utm_campaign=Feed%3A+arstechnica%2Findex+%28Ars+Technica+-+All+content%29.

²³⁶ *Id.*

²³⁷ *Id.*

This vulnerability, like Apple's, was in open source software, available to anyone. Yet, the weakness was not detected by extensive testing, or by people in the open source community. This underscores the point that security vulnerabilities can go undetected even in the face of extensive testing and with many eyes (potentially) looking at the code.

Another recent development was the discovery of the Heartbleed Bug, which hacked into "OpenSSL" software that is used by thousands of companies and government agencies.²³⁸ The Heartbleed bug was active for two years before the bug was discovered on April 8, 2014.²³⁹ Research shows that no one realized that the systems had been compromised until the bug was exposed.²⁴⁰ Computer scientists at the University of Michigan estimate that 1.4 million web servers are still "vulnerable to a Heartbleed attack."²⁴¹

These hacks are not confined to businesses. Hackers have also invaded the most secure federal government websites. In

²³⁸ Nicole Perlroth, *Study Finds No Evidence of Heartbleed Attacks Before the Bug was Exposed*, N.Y. TIMES (Apr. 16, 2014, 6:49 PM), <http://bits.blogs.nytimes.com/2014/04/16/study-finds-no-evidence-of-heartbleed-attacks-before-the-bug-was-exposed/?module=BlogPost-Title&version=Blog%20Main&contentCollection=Security&action=Click&pgtype=Blogs®ion=Body>.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

November 2013, it was revealed that Anonymous, an international hacking network, infiltrated the computers and websites of multiple government agencies for almost one year.²⁴² Information from the Department of Energy, Health and Human Services, and other federal agencies, including the U.S. Army, was compromised in this hack.²⁴³ Personal details of at least 104,000 employees were stolen from the Department of Energy, alone.²⁴⁴

Anonymous' ability to defeat the high security programs of U.S. agencies is particularly concerning because, logically, those security features would be used if Internet voting were established in the United States.

In July 2014, a Chinese group called "DEEP PANDA" hacked Middle East experts working at U.S. think tanks, just as events in Iraq began escalating. These hacks were performed to possibly "give adversaries access to sensitive communications about international strategy—and potentially allow them to use compromised e-mail accounts to get at other targets."²⁴⁵

²⁴² Stephanie Mlot, *Report: Anonymous Hacked Multiple Government Websites*, PC MAG (Nov. 18, 2013, 12:12 PM), <http://www.pcmag.com/article2/0,2817,2427273,00.asp>.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Andrea Peterson, *Chinese cyberspies have hacked Middle East experts at major U.S. think tanks*, WASH. POST (July 7, 2014, 7:36 PM), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/07/07/chinese-cyberspies-have-hacked-middle-east-experts-at-major-u-s-think-tanks/>.

As these examples make clear, neither our government nor our largest corporations have been able to protect themselves from hackers. If our military and multi-national corporations that devote millions of dollars to system security cannot prevent hacks from occurring, it is unreasonable to assume that under-funded county governments can prevent hacks of election results. The hack of Florida's online absentee ballot systems demonstrates this point perfectly.

Permitting online voting would jeopardize our most precious Constitutional rights. There is too much at risk to permit online voting in any form.

IX. VOTER-VERIFIED PAPER BALLOTS ARE NEEDED TO PROTECT THE RIGHT TO VOTE; THOSE BALLOTS CAN BE COUNTED EVEN IN EMERGENCY SITUATIONS WHEN THERE IS NO POWER.

Scientists universally agree that the best way to verify votes cast on DREs is through a voter-verified paper ballot ("VVPB," also known as a Voter-Verified Paper Audit Trail or "VVPAT").²⁴⁶ VVPBs can take a number of forms, such as an actual paper ballot, or a paper ballot that the voter fills out before it is scanned and counted by a voting computer, or a lottery-ticket-size mini-ballot that the computer generates and the voter reviews before casting his or her vote. In all cases, the

²⁴⁶ See *Ad Hoc Touch Screen Task Force Report*, CAL. SEC'Y OF ST. DEBRA BOWEN, http://www.sos.ca.gov/elections/taskforce_report_2.htm (last visited July 29, 2014).

paper ballots count as the official ballots in the event of a challenge to the election results, or a voting machine malfunction.

But VVPBs, in and of themselves, cannot detect fraud. To fully ensure that the voting computers are not cheating, it is necessary to audit a certain percentage of voting machines in each election precinct by manually counting the paper ballots and comparing the hand-counted results with the computer-generated results.²⁴⁷

Finally, to ensure that votes are counted accurately, it is imperative that totals be counted and announced at the precinct level. This protects against tampering with voting machines and paper ballots while they are being transported to centralized tabulation locations.

At the writing of this Report, thirty-five states require the use of VVPBs.²⁴⁸ Additionally, more states are switching from paperless DREs to VVPBs when they purchase new voting machines in the next few years. The decision to transition from DREs to

²⁴⁷ DOUGLAS W. JONES & BARBARA SIMONS, *supra* note 153 at 334.

²⁴⁸ *Voter Verified Paper Record Legislation*, VERIFIED VOTING, <https://www.verifiedvoting.org/resources/vvpr-legislation/> (last visited July 29, 2014).

verifiable paper-based voting stems from concerns over the vulnerabilities inherent in paperless DREs.²⁴⁹

Although New Jersey has two of the best laws in the nation, requiring that all voting machines produce a voter-verified paper ballot and are audited,²⁵⁰ the State has never implemented these requirements. But, New Jersey's 11,000 aging DREs will need to be replaced soon. In August 2013, the National Conference of State Legislatures found that "voting technology [is] the coming crisis in elections."²⁵¹ The Presidential Commission on Election Administration found that this crisis is attributable, in part, to aging DREs.²⁵²

The approximate lifespan of DREs is ten years.²⁵³ Voting machines in New Jersey are nearing, and some have already surpassed, this ten-year lifespan. Due to an absence of data on reliability of DREs after their anticipated lifespan, use beyond

²⁴⁹ See Martha T. Moore, *Digital voting machines are aging out of use*, USA TODAY (Feb. 2, 2014, 8:03 AM), <http://www.usatoday.com/story/news/politics/2014/02/02/voting-technology-already-obsolete/5034567/>; RIT INT'L, MARYLAND VOTING SYSTEM STUDY FINAL REPORT 2-2 (Dec. 2, 2010), available at <http://marylandreporter.com/wp-content/uploads/2013/04/2010-Voting-Systems-Study-Report.pdf>.

²⁵⁰ N.J. STAT. ANN. § 19:48-1 (2009).

²⁵¹ THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 62 n. 195 (Jan. 2014), available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

²⁵² *Id.*

²⁵³ RIT INT'L, *supra* note 249, at 3-40.

this period is not advisable.²⁵⁴ Indeed, many outdated DREs have already begun to break down.²⁵⁵ Additionally, Sequoia, the manufacturer of nearly 11,000 DREs in New Jersey was acquired by Dominion Voting Systems in 2009.²⁵⁶ Dominion no longer manufactures DREs and only produces optical scan voting machines.²⁵⁷

The Lawyers' Committee for Civil Rights Under Law found that DREs that malfunctioned on Election Day in the 2012 Presidential Election in Ohio, Pennsylvania and Virginia were at least nine years old.²⁵⁸ These DRE malfunctions caused long lines and frustration among voters.²⁵⁹ During the 2012 President Election, voters in several counties in Pennsylvania reported that DRE touch screens would not allow them to select the candidate of their choice, and instead registered a selection

²⁵⁴ RIT INT'L, *supra* note 249, at 3-40.

²⁵⁵ LAW. COMM. FOR CIV. RTS. UNDER LAW, THE 2012 ELECTION PROTECTIONS REPORT: OUR BROKEN VOTING SYSTEM AND HOW TO REPAIR IT 39 (2012), *available at* <http://www.866ourvote.org/newsroom/publications/document/EP-2012-Full-Report.pdf>.

²⁵⁶ *Sequoia Voting Systems Assigns New York State Voting System Contract to Its New York State Partner and ImageCast Equipment Developer, Dominion Voting Systems*, BUSINESSWIRE (July 16, 2009, 10:30 AM), <http://www.businesswire.com/news/home/20090716005590/en/Sequoia-Voting-Systems-Assigns-York-State-Voting#.VDbpEildVYA>.

²⁵⁷ *See Our Products*, DOMINION VOTING, <http://www.dominionvoting.com/products>.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

for a different candidate.²⁶⁰ Similar "vote flipping" problems occurred in other states, such as Texas and North Carolina.²⁶¹

Dr. Barbara Simons, a computer science expert on the Board of Advisors of the U.S. Election Commission, stated that this error is common in old DREs. "This phenomenon can occur when a machine goes out of calibration. The need to re-calibrate frequently is an important reason for discarding these aging, unreliable and inaccurate machines and replacing them with paper ballots."²⁶²

During the 2012 Presidential Election in Ohio, counties using nine-year-old voting machines experience significant problems as "many of the original machines [purchased in 2003] went out of service."²⁶³ Election officials are concerned there will be an increase in malfunctions as old machines continue to be used.²⁶⁴

Most DREs in New Jersey were purchased between five and ten years ago. They should be replaced with the most secure voting systems, which are precinct-based optical scan systems. For the

²⁶⁰ *Id.*

²⁶¹ Eric Shawn, *Claims increase of machines switching votes in Ohio, other battlegrounds*, FOX NEWS (Nov. 2, 2012), <http://www.foxnews.com/politics/2012/11/02/claims-increasing-switched-votes-in-ohio/>.

²⁶² *Id.*

²⁶³ LAW. COMM. FOR CIV. RTS. UNDER LAW, *supra* note 255, at 39.

²⁶⁴ Moore, *supra* note 249.

reasons discussed in Section VII, they should not be replaced with any Internet-based voting system.

CONCLUSION

After Superstorm Sandy, there was no structure in place to make sure that emergency voting directives were followed. There was mass confusion among county officials and voters, alike. Emergency measures such as Internet and fax voting not only violated New Jersey law, but also left votes vulnerable to on-line hacking. Internet voting should never be permitted, especially in emergencies when governmental infrastructure is already compromised.

As the May 2014 National Climate Assessment issued by the U.S. government makes all too clear, New Jersey is highly likely to be impacted negatively by more Superstorm Sandy-like disasters in the near future.²⁶⁵ This means that it is critical for New Jersey to enact and implement emergency voting procedures that comply with existing election law, and that protect every vote. As such, those emergency measures should not include Internet and fax voting as an option, under any circumstance.

²⁶⁵ NAT'L CLIMATE ASSESSMENT, *supra* note 140.

