



NEW YORK STATE
BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Task Force on Voting Rights and Democracy**

June 2022

New York State Bar Association
Voting Rights and Democracy Task Force
May 2022

Report as Amended by Executive Committee – June 17, 2022

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[THE TASK FORCE’S REPORT AND RECOMMENDATIONS WILL BE ISSUED IN TWO PARTS. PART I, WHICH FOLLOWS, FOCUSES UPON ELECTION ADMINISTRATION IN NEW YORK. PART II, WHICH WILL BE PUBLISHED IN THE FALL OF 2022, WILL FOCUS UPON VOTING REFORMS]

Executive Summary

The Task Force recommends six reforms to improve election administration in New York State:

- (1) Professionalize Hiring**
- (2) Professionalize the Training Process**
- (3) Adopt Ethics Rules**
- (4) Make Access to Information Easier**
- (5) Appoint an Elections Inspector General**
- (6) Funding of the Recommendations**

Preface

In a republican form of government, election administration lies at the heart of the rule of law. Its purpose is to regulate the laws enacted for electing state and local public officials, and the hallmarks of successful election administration are independence, fairness, transparency, and efficiency. Unfortunately, the United States is undergoing a period of democratic backsliding, where many states are passing laws that restrict voting rights, facilitate partisan influence over election results, and disincentivize civic

participation in election administration.¹ Although Supreme Court Associate Justice Louis Brandeis famously opined that states are laboratories of democracy² today we are living through an era of states acting as showcases for anti-democratic impulses. At least two dozen states have enacted laws that weaken independent election administration by empowering partisan poll watchers and sanctioning partisan purges of local election boards.³ And in the face of serious threats of violence, many longtime election administrators across the country have left election work altogether.⁴ Indeed, as a bipartisan group of one hundred and fifty of the nation’s leading democracy scholars recently warned in a public letter urging federal action to protect elections, the “politicization of what has long been trustworthy, non-partisan administration of elections represents a clear and present threat to the future of electoral democracy in the United States.”⁵

These new laws, and the two big lies of 2020 -- that widespread voting fraud exists and the presidential election was somehow stolen from the former president -- are also having an impact on Americans’ confidence in election administration. A whopping 40% of Americans now doubt that their votes will be cast and counted accurately, a precipitous deterioration in voter confidence compared to the same poll just two years earlier.⁶

What is at Stake for New Yorkers

Like all Americans, New Yorkers have a stake in national elections and a particular interest in how elections are run in our own state – and New York lawyers, of course, have a specialized focus on the rule of law, as well as on the fair and accurate implementation of our election laws. Despite recent legislative progress, however, our state has become somewhat of a poster child invoked by other states to justify some of their restrictive laws.⁷

¹ Charles Homans, *Where Does American Democracy Go From Here?* N.Y. Times (March 20,2022), Magazine Section, p. 28.

² *New State Ice Co. v. Lieberman*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting).

³ <https://www.nytimes.com/2021/06/19/us/politics/republican-states.html>

⁴ See Rachel Kleinfeld. *The Rise of Political Violence in the United States*, 32 J. Democracy 161 (2021); see also <https://www.justice.gov/dag/page/file/1406286/download>; <https://www.cbsnews.com/news/election-officials-threats-2020-election/>

⁵ <https://newamerica.org/political-reform/statements/statement-in-support-of-the-freedom-to-vote-act/>

⁶ <https://news.gallup.com/poll/196976/update-americans-confidence-voting-election.aspx>
<https://news.gallup.com/poll/321665/confidence-accuracy-election-matches-record-low.aspx>

⁷ See, e.g., <https://www.nbcnews.com/politics/elections/republicans-defending-voting-restrictions-point-finger-blue-states-laws-they-n1263205>

Recent New York elections have been marred by problematic administration,⁸ confusion at the polls,⁹ and lengthy delays in vote counting¹⁰ – issues that have undermined voter confidence and exacerbated longstanding complaints by New Yorkers. While New York State has made some important progress recently, such as in the access to and counting of absentee ballots,¹¹ it is time for Albany to conduct a comprehensive review of New York election administration – both to protect the interests of New York voters, and to establish itself as a model for ensuring the fair and accurate election administration nationwide.¹²

Many commission studies, elections research, and reform efforts in the United States and in democracies worldwide in recent years point to a set of best practices from which New York can benefit. Embracing a commitment to principles of professionalism, impartiality and transparency, New York can adopt essential reforms without the need to amend the State Constitution, or abandon New York’s long tradition of bipartisan supervision of election administration.

Election Administration in New York

While the great majority of democracies in the world rely on some form of politically independent election authority to manage and administer elections, the United States is among the minority that continues to rely on partisan election administration – different models of which today operate in most of our states.¹³ In New York, authority for administering elections is shared among a State Board of Elections and various local boards.¹⁴ Under Article II, Section 8 of the New York State Constitution, the officers of all such boards must be nominated by representatives of the two political parties who receive the highest number of votes for governor in the previous election, and “shall secure equal representation” of both parties. New York State Election Law has, in turn, given local boards discretion to appoint, remove, and otherwise fix the duties and terms of employment of their staffs – which must also reflect equal representation of the two major political parties.¹⁵

⁸ <https://www.nytimes.com/2020/10/26/nyregion/nyc-voting-election-board.html>; Edward-Isaac Dove, *The Chaos in New York Is a Warning*, ATLANTIC (July 24, 2020),

<https://www.theatlantic.com/politics/archive/2020/07/new-york-election-failure-mail-in-voting/614446/>

⁹ <https://www.commoncause.org/new-york/wp-content/uploads/sites/20/2021/02/Reforming-New-Yorks-Elections.pdf>

¹⁰ <https://www.brennancenter.org/our-work/policy-solutions/how-fix-new-york-city-board-elections>

¹¹ N.Y. Elec. Law § 9-209 (McKinney).

¹² See, e.g., <https://www.scientificamerican.com/article/what-will-2022-bring-in-the-way-of-misinformation-on-social-media-3-experts-weigh-in/>; see also

<https://www.propublica.org/article/facebook-hosted-surge-of-misinformation-and-insurrection-threats-in-months-leading-up-to-jan-6-attack-records-show>; <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/09/21/disinformation-may-be-the-new-normal-election-officials-fear>

¹³ Daniel P. Tokaji, *Comparative Election Administration: A Legal Perspective on Electoral Institutions* (Edward Elgar Publishing, 2022).

¹⁴ In addition to the State Board of Elections, each county has its own board, consisting of either two or four commissioners, depending upon the population, divided equally by members of the two major parties. New York City is a special case – the Board of Elections in the City of New York consists of two commissioners from each of the five boroughs (counties), one from each of the two major parties.

¹⁵ N.Y. Elec. Law § 3-300 (McKinney).

Although New York was the first state in the nation to enact its own civil service system in 1883, replacing the spoils system for public workers with the requirement that hires be based on merit and workers insulated from political influence,¹⁶ the New York Civil Service Code was amended in 1958 to make clear that “all members, officers and employees of boards of election” were to be excluded from its coverage.¹⁷ As it stands, although state law now includes training and examination requirements for on-the-ground election inspectors, poll clerks, and election coordinators,¹⁸ it contains no uniform requirement that election board members or senior staff demonstrate any specific qualifications or receive any specialized training. And while board members are prohibited by state law from holding or running for public office while serving as commissioners,¹⁹ neither board members nor their staffs at any level are subject to any uniform code of ethics, and only commissioners have the authority to discipline or remove staff.²⁰

State law also imposes a set of operational requirements on the boards of elections. Canvassers have defined duties.²¹ Boards must remain open after polls close to “make such unofficial results available to the media and the state board of elections, and shall post running totals in a public place and on the internet as the results become known to it.”²² In addition, state law requires the boards to maintain an electronic absentee ballot tracking system to allow a voter who has submitted an application for an absentee ballot to track the status of an application and any ballot filed on the state or local board website.²³

The law also provides that board proceedings are public, requiring all election boards to prepare an annual report of the board’s “affairs and proceedings.”²⁴

A History of Problems

Despite these and other laws, and a set of regulations governing the boards, there have been a series of problems with election administration. These have led to critical stories over the years,²⁵ as well multiple critical reports by government and non-

¹⁶ Bennett Liebman, *Protecting the Deep State: Making Sense of Section 107 of New York’s Civil Service Law*, Albany Law School Government Law Center (2018).

¹⁷ N.Y. Civ. Serv. § 35 (f) (McKinney).

¹⁸ N.Y. Elec. Law § 3-412 (McKinney).

¹⁹ N.Y. Elec. Law § 3-200 (McKinney).

²⁰ N.Y. Elec. Law § 3-300 (McKinney).

²¹ N.Y. Elec. Law § 9-209 (McKinney).

²² N.Y. Elec. Law § 9-126 (McKinney).

²³ N.Y. Elec. Law § 8-414 (McKinney).

²⁴ N.Y. Elec Law § 3-212 (McKinney).

²⁵ See, e.g., Editorial, *Reform New York City’s Board of Elections Now*, N.Y. Times (Oct. 30, 2021)(describing city investigations have consistently found the agency “rife with waste, neglect and incompetence”), <https://www.nytimes.com/2021/10/30/opinion/nyc-elections-board-reform.html?referringSource=articleShare>; Sean Morales-Doyle and Chisun Lee, *New York’s Worst-in-the-Country Voting System*, ATLANTIC (Sept. 13, 2018),

governmental organizations.²⁶ In the 2018 elections, for example, jammed machine scanners led thousands of voters to wait in line for hours because, among other reasons, “no election worker told them that the two perforated pages needed to be separated and fed into the machine one at a time.”²⁷ New Yorkers experienced long lines again in 2020, with some voters describing the scene as “mass confusion,” with “no signs that said end of line, start of the line,” and a lack of clarity to many voters as to what the procedure at the polling place was for voters to cast their already-completed absentee ballots.²⁸ Moreover, too many voting sites had chronic problems complying with baseline federal

[https://www.theatlantic.com/ideas/archive/2018/09/new-yorks-worst-in-the-country-voting-system/570223/;](https://www.theatlantic.com/ideas/archive/2018/09/new-yorks-worst-in-the-country-voting-system/570223/)

https://timesmachine.nytimes.com/timesmachine/1940/12/05/91589775.pdf?pdf_redirect=true&ip=0 (1940); <https://www.nytimes.com/1985/03/14/nyregion/inquiry-faults-election-board-in-ballot-snags.html> (1985). See also Brian M. Rosenthal and Michael Rothfeld, *Inside Decades of Nepotism and Bungling at the N.Y.C Elections Board*, N.Y. Times (Nov. 2, 2021),

<https://www.nytimes.com/2020/10/26/nyregion/nyc-voting-election-board.html>, in which the following was reported:

As the June primary approached [in 2020], the NYCBOE — despite assuring the state it could handle a surge in residents seeking to vote by mail — grew so overwhelmed that it called two upstate companies for help printing absentee ballots on the weekend before the election, officials acknowledged. It did not send the companies the names of voters who still needed ballots until late afternoon that Sunday, less than two days before the vote. The companies worked through the night. But in all, 34,000 ballot packages were not mailed to voters until the day before the primary, and many likely did not arrive in time to be returned and counted. Ultimately, about one-fifth of primary ballots were thrown out for arriving late or other defects; in other states, the rate was 5 percent or less.

One should not think all or most of the problems occur in the New York City area, however. After the 2020 election in what had been the 22nd congressional district, the United States Department of Justice commenced an action against one New York county for large scale errors in the counting of paper ballots. The board’s commissioners were replaced and new procedures were put into place to prevent a recurrence. See <https://www.justice.gov/opa/pr/justice-department-and-board-elections-oneida-county-new-york-reach-agreement-under-national>

²⁶ See, e.g., Rose Gill Hearn, *Report on the New York City Board of Elections’ Employment Practices, Operations, and Election Administration*, New York City Department of Investigation (Dec. 2013), https://www1.nyc.gov/assets/doi/reports/pdf/2013/2013-12-30-BOE_Unit_Report.pdf; https://www.brennancenter.org/sites/default/files/2021-09/2021_08_NYC_BOE_Reform_Final.pdf; Common Cause Report; Black Institute Report, [https://d3n8a8pro7vnm.cloudfront.net/theblackinstitute/pages/1449/attachments/original/1516904743/Mississippi_on_the_Hudson_\(TBI_Report\).pdf?1516904743](https://d3n8a8pro7vnm.cloudfront.net/theblackinstitute/pages/1449/attachments/original/1516904743/Mississippi_on_the_Hudson_(TBI_Report).pdf?1516904743).

²⁷ <https://www.nytimes.com/2018/11/06/nyregion/nyc-voting-machines.html>

²⁸ https://www.washingtonpost.com/national-security/early-voting-lines-new-york/2020/10/30/0e3a212c-1ad1-11eb-82db-60b15c874105_story.html

standards ensuring access for people with disabilities.²⁹ And procedures for counting a burgeoning number of absentee ballots have caused results to be delayed.³⁰

The legislature deserves great credit for addressing some of these issues. It has enacted laws that require signs to be placed on polling places that have been moved, and has established an expedited canvassing process of absentee ballots to permit speedy results of elections.³¹ Yet the chronic recurrence of problems points to a deeper underlying issue of deficient training and preparedness. At recent hearings by the New York State Senate, poll workers and trainers on the front lines reported that training was too limited to prepare them for the reality of election day operations.³² They noted that there was insufficient opportunity for hands-on practice with voting machines and canvassing procedures, and that qualifying exams they are currently required to take have little to do with the skills and information essential to fulfilling their duties.³³ They further testified that trainings and printed manuals do not always reflect the most recent changes in the law.³⁴

These accounts make clear that additional corrective measures are required.

Best Practices and Recommendations

Beyond the risk that such election administration problems undermine the fairness and legitimacy of election administration in the eyes of New Yorkers, civic tensions might be heightened in an already polarized time. As political scientists have long reported, countries whose governments who have difficulty running professional, impartial, and transparent elections face an increased risk of political violence, a trend already becoming visible in other parts of the United States.³⁵ That has not occurred in New York, but it is prudent to be forewarned, especially after the violent attacks on the United States and Michigan Capitols during the 2020 election cycle.

²⁹ According to the Black Institute, between 2012 to 2017, many polling places closed in neighborhoods with a higher rate of Black and Latino residents, while nearby white wealthy neighborhood polling places were left. *See* The Bronx Chronicle, January 30, 2018, <https://thebronxchronicle.com/2018/01/30/the-black-institute-releases-new-york-city-voter-suppression-report-mississippi-on-the-hudson-exposes-suppression-tactics/>

³⁰ *See* Gregory Krieg and Evan Simko-Bednarski, 'It's embarrassing': Why New York is still waiting for full election results, CNN Politics (Nov. 18, 2020), <https://www.cnn.com/2020/11/18/politics/new-york-california-election-delay/index.html>

³¹ N.Y. Elec. Law § 9-209 (McKinney).

³² *Public Hearing: To Solicit Testimony on Voting Experiences and Issues from Voters in New York City*, New York State Senate (July 28, 2021), <https://www.nysenate.gov/calendar/public-hearings/july-28-2021/public-hearing-solicit-testimony-voting-experiences-and-issues> (link to archived video of the senate hearing and links to copies of all written testimony at the bottom of the page); *see also id.*, *Public Hearing Before the Senate Standing Committee on Elections*, New York State Senate (July 28, 2021) (written testimony of Marianne Barcellona, poll worker), https://www.nysenate.gov/sites/default/files/marianne_barcellona_testimony.pdf.

³³ *Id.*

³⁴ *Id.*

³⁵ *See, e.g.*, Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. Democracy 161 (2021); *see also* Barbara F. Walter, *HOW CIVIL WARS START AND HOW TO STOP THEM* (2022).

After the 2000 presidential election, the study of election administration has grown dramatically in the United States, along with an understanding of best practices for election administration in the United States and democracies around the world.³⁶ While these studies differ in some recommendations, there is strong consensus around the importance of professionalism, impartiality, and transparency. Drawing upon their consensus guidance and proffered best practices, as well as our observations of New York elections, we offer the following general recommendations for improving election administration in New York.

1. Professionalize Hiring. New York’s constitutional requirement that election board officers be nominated by representatives of the two political parties does not and should not be understood to preclude the state Legislature from requiring that nominated candidates satisfy a certain baseline set of qualifications, nor does it preclude appointing authorities from conducting a rigorous evaluation process before selecting from among recommended candidates who best satisfy these requirements.

It should be encouraged that senior election board staff should be hired in a way consistent with best professional practices.³⁷

2. Professionalize the Training Process. Further, state law should mandate appropriate training for board members, senior staff, and polling place workers. Responsibility for maintaining up-to-date training programs and materials should be managed by specific, identified, and sufficiently senior officials to ensure these remain an organizational and budgetary priority. Such training is consistent with internationally recognized best practices,³⁸ and is already reflected in the laws of other states including Ohio, North Carolina, and Virginia.³⁹ For administrative staff, the training already provided for specific tasks such as voter registration, poll working, and canvassing would be more effective if supplemented with simulation exercises and required self-evaluation of the training sessions. We believe this would lead to improved training and better performance.

3. Adopt Ethics Rules. Although current New York law appropriately prohibits board members from holding or running for public office while serving as commissioners,⁴⁰ this restriction does not go far enough to mitigate the influence of politics in election administration. Election officials and their staffs should be bound by

³⁶ See, e.g., Carter-Baker Commission Report 2005, https://assets-global.website-files.com/603d9c89eaaf7b52bb36352d/6047fae77590e5af63d357f0_2005-Report-Carter-Baker-Commission-on-Election-Reform.pdf (“Carter-Baker Commission Report”); International IDEA Election Management Design, <https://www.idea.int/sites/default/files/publications/electoral-management-design-2014.pdf>; see also Daniel P. Tokaji, *Comparative Election Administration: A Legal Perspective on Electoral Institutions* (Edward Elgar Publishing, 2022) (summarizing literature), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500868

³⁷ <https://www.idea.int/sites/default/files/publications/electoral-management-design-2014.pdf> at 199; see also Brennan Center Report, at 10.

³⁸ <https://www.idea.int/sites/default/files/publications/electoral-management-design-2014.pdf>.

³⁹ Brennan Center Report, at 13 (citing examples).

⁴⁰ N.Y. Elec. Law § 3-200 (McKinney).

an ethics code of conduct. Multiple election reform initiatives in recent years have recommended a range of proscriptions to guard against untoward political influence in election operations. Voting rights bills currently pending in the United States Congress also contain several ethics provisions that New York should adopt whether or not the federal legislation passes, including a provision barring election officials from sharing any information concerning an official count, recount, or audit with one candidate or campaign without also disclosing the same information to other candidates or campaigns.⁴¹ Maryland law also provides a useful model, including a provision that election officials are prohibited from using their “official authority for the purpose of influencing or affecting the result of an election.”⁴² These or similar restrictions would significantly bolster voter confidence in the fairness and impartiality of election administration.

4. Make Access to Information Easier. To facilitate transparent election administration, public information about the boards’ procedures and operations must not only be available to voters, but easy to navigate.⁴³ Currently, the State Board of Elections and the various county boards maintain separate websites, some of which are less intelligible than they should be, inconsistent with each other, or out-of-date. Voters should have current and accurate information, and be able to easily find the information they need.

Toward this end, there should be established by the State Board for each of the county boards one standard site which is easy to navigate following plain-language guidelines in multiple languages. This would make it significantly easier for voters to understand and participate in the electoral process in a meaningful way.⁴⁴

5. Appoint an Elections Inspector General. As with many state and municipal agencies, there should be an Inspector General for the State and county Boards to monitor personnel and how the law is being implemented. An Inspector General, appointed by and under the auspices of the New York State Office of the Inspector General, would have the capacity to ascertain how inevitable problems arise and the independence to make recommendations to cure such instances of deficient election administration.

6. Funding of the Recommendations. For any recommendation that requires funding to be implemented, the New York State Bar Association recommends that this funding be provided by New York State.

⁴¹ See, e.g., H.R. 1, For the People Act of 2021, § 1821 (prohibiting state election officials from the “sharing of information concerning an official count, recount, or audit with respect to any primary, special, or general election for Federal office with a candidate for such office or with an authorized committee of such a candidate, unless the same information is provided to all other candidates for such office in such election”).

⁴² MD Code, Elec. Law § 2-301.

⁴³ See generally Wendy Wagner with Will Walker, INCOMPREHENSIBLE!: A STUDY OF HOW OUR LEGAL SYSTEM ENCOURAGES INCOMPREHENSIBILITY, WHY IT MATTERS, AND WHAT WE CAN DO ABOUT IT (2019).

⁴⁴ See, e.g., <https://www.plainlanguage.gov/guidelines>.

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COMMITTEE ON LEGAL AID

June 6, 2022

TO: Task Force on Voting Rights and Democracy

FROM: Committee on Legal Aid

RE: Support of the Report and Recommendations of the task Force on Voting Rights and Democracy

The Committee on Legal Aid has voted in support of the Report of the Task Force on Voting Rights and Democracy as long as the extent of the report has a positive impact on the communities that the Committee on Legal Aid represent.