

BILL ANALYSIS

C.S.S.B. 9
By: Hughes
Elections
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Concerns have been raised that, as efforts to identify and prosecute election crimes have intensified, certain bad actors have taken advantage of the electoral process, especially at the local level. It has been suggested that, at the same time, advances in technology have increased the threat of electronic interference with elections as well as the tools available to prevent that interference. C.S.S.B. 9 seeks to address these concerns by requiring a risk-limiting audit for a statewide race or measure, instituting a pilot program to use that audit to ensure that the tabulated results match the votes cast with increased certainty, limiting the most common fraudulent practices, and providing better and more timely evidence in investigations into alleged voter fraud.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the secretary of state in SECTIONS 4.03 and 5.01 of this bill.

ANALYSIS

Criminal Provisions

C.S.S.B. 9 amends the Code of Criminal Procedure to include a felony offense under the Election Code among the offenses for which felony indictments may be presented within five years from the date of the commission of the offense and not afterward.

C.S.S.B. 9 amends the Election Code to clarify the applicability of certain Penal Code provisions to offenses prescribed by the Election Code by specifying that all provisions of Titles 1, 2, 3, and 4 of the Penal Code are applicable to the prescribed Election Code offenses. The bill increases the penalty for the offense of making a false statement on a voter registration application from a Class B misdemeanor to a state jail felony. If conduct that constitutes such an offense also constitutes an offense under other law, the actor may be prosecuted under the bill's offense provisions, the other law, or both.

C.S.S.B. 9 creates a Class B misdemeanor offense for a person who impedes a walkway, sidewalk, parking lot, or roadway within 100 feet of a polling place in a manner that hinders a person from entering the polling place. The bill establishes that it is a defense to prosecution for such an offense that at the time of the offense, the person was performing an official duty as a first responder.

C.S.S.B. 9 creates a Class B misdemeanor offense for a person who takes from a voter without the voter's permission a ballot that was provided at the polling place to the voter and enhances the penalty to a Class A misdemeanor if the person is serving as a poll watcher at the time of the offense. The bill establishes that it is a defense to prosecution for such an offense that the person was an election officer performing an official duty at the time the person took the ballot.

C.S.S.B. 9 establishes that, for the purpose of the offense of illegal voting involving a person who votes or attempts to vote in an election in which the person knows the person is not eligible to vote, it is sufficient to establish that the person had knowledge of the person's ineligibility to vote if the person was aware of the facts or circumstances causing the person's ineligibility under the Election Code. The bill establishes that it is an affirmative defense to prosecution for such conduct that the voter cast or attempted to cast a provisional ballot. The bill establishes that it is not a defense to prosecution for the offense of illegal voting that the ballot was not finally counted.

C.S.S.B. 9 increases the penalty for the offense of unlawful assistance, in regard to a voter, from a Class A misdemeanor to a state jail felony.

C.S.S.B. 9 requires the presiding election judge, before opening the polls for voting, to confirm that each voting machine has any public counter reset to zero and to print the tape that shows the counter was set to zero. The bill requires each election judge present, and a representative from each political party required to nominate candidates by primary election present at the polling place, to sign such a tape. The bill authorizes the commissioners court of a county that participates in the countywide polling place program to apply to the secretary of state for a waiver of these requirements in a form prescribed by the secretary of state. If the secretary of state grants such a waiver, these requirements do not apply to the county for which the waiver was granted. The bill creates a Class B misdemeanor offense for a presiding election judge who is required to, but fails to, comply with these requirements.

C.S.S.B. 9 requires the presiding judge, before closing the polling place on election day, to verify and document the number on the public counter of each voting machine and to print a minimum of three copies of each tally tape. The bill requires the presiding judge to sign each copy to certify its accuracy and distribute the tapes in accordance with the Election Code. The bill requires any watcher present at the polling place to be allowed to inspect and sign each copy of the tally tape before any voting system equipment is removed from the polling place and authorizes any watcher to request an additional copy to be printed for the watcher's records. The bill authorizes the commissioners court of a county that participates in the countywide polling place program to apply to the secretary of state for a waiver of these requirements in a form prescribed by the secretary of state. If the secretary of state grants such a waiver, these requirements do not apply to the county for which the waiver was granted. The bill creates a Class B misdemeanor offense for a presiding judge who is required to, but fails to, comply with these requirements.

C.S.S.B. 9 establishes that it is a defense to prosecution of an offense under the Election Code that a person employed by a law enforcement agency in the commission of the offense is engaged in the investigation or prosecution of a violation of a law under that code or in official activities investigating a weakness in the electoral process. The bill establishes that this defense to prosecution does not apply to a person employed by a law enforcement agency that engages in such an activity that results in casting a vote for an eligible candidate or for or against a measure. The bill enhances from a third degree felony to a second degree felony the penalty for an offense of retaliation against a voter for a person who is serving as a poll watcher at the time of the offense.

Voters, Assistants, and Watchers

C.S.S.B. 9 prohibits a voter registration application from being accepted if, at the time the applicant received the application, a box on the application was marked to indicate that the applicant is a U.S. citizen or will be 18 years of age or older on election day.

C.S.S.B. 9 extends the applicability of certain provisions relating to the appointment of poll watchers to apply also to a signature verification committee and certain provisions relating to the hours of service at an early voting ballot board meeting to apply also to a signature verification committee meeting. The bill repeals provisions prohibiting a poll watcher from being accepted for service if the watcher has possession of a device capable of recording images or sound unless the watcher agrees to disable or deactivate the device. The bill requires the affidavit executed by a poll watcher and contained in the watcher's certificate of appointment to state that the watcher will not use a device capable of recording images or sound while serving as a watcher except as permitted by provisions relating to recording near a voting station.

C.S.S.B. 9 entitles a poll watcher serving at the meeting place of an early voting ballot board or signature verification committee to inspect a form for a person assisting a voter submitted in accordance with the bill's provisions. The bill excepts a watcher solely recording the counting of ballots from the prohibition against a person using any mechanical or electronic means of recording images or sound within 100 feet of a voting station.

C.S.S.B. 9 requires a person who assists at least three voters unable to enter a polling place at the same time by providing the voters with transportation to the polling place to complete and sign a specified form that includes certain information and requires the secretary of state to prescribe the form. The bill exempts such a person who is a family member of all voters that the person provides with transportation to the polling place. The bill defines "family member" for purposes of this exemption.

C.S.S.B. 9 requires a person, other than an election officer, before the person assists a voter to complete a form and sets out the required contents of the form and certain other requirements relating to the form, including a requirement for the secretary of state to prescribe the form. The bill requires the form to be incorporated into the official carrier envelope if the voter is voting an early voting ballot by mail and receives assistance or to be submitted to an election officer before the voter may be accepted for voting if the voter is voting at a polling place or is unable to enter a polling place. The bill requires the official prescribed application form for an early voting ballot to include a statement informing the applicant that expected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote early by mail.

C.S.S.B. 9 entitles a person who is a poll watcher to be present in a room where a recount is conducted.

Election Contests

C.S.S.B. 9 establishes that the venue of an election contest for a statewide office is, as an alternative to Travis County, in any county where a contestee resided at the time of the election and establishes that a contestee's residence is determined under Government Code public integrity unit provisions relating to residence. The bill establishes that its provisions relating to an election contest involving alleged fraud are applicable to an election contest in which the contestant alleges in the petition that an opposing candidate, an agent of the opposing candidate, or a person acting on behalf of the opposing candidate with the candidate's knowledge committed certain Election Code offenses, as specified by the bill, and requires a contestant to prove such an allegation by a preponderance of the evidence. The bill makes a contestee liable to the state for a civil penalty of \$1,000 for each violation if the court in its judgment finds that the contestee, an agent of the contestee, or a person acting on behalf of the contestee with the contestee's knowledge committed one or more such specified Election Code offenses. The bill requires the penalty to be deposited in the state treasury to the credit of the general revenue fund

and authorizes the court to award reasonable attorney's fees to the prevailing party in an election contest to which these provisions apply.

State and County Officers

C.S.S.B. 9 specifies that the election officials in the state to whom the statewide computerized voter registration list must be available through immediate electronic access includes the attorney general. The bill requires the appropriate state or local officials and agencies to provide technological security measures to prevent unauthorized access to the list.

C.S.S.B. 9 authorizes the secretary of state to disclose a voter's social security number or date of birth to other states and jurisdictions for the voter registration list purposes of participating in an interstate voter registration crosscheck program.

C.S.S.B. 9 requires the secretary of state to adopt rules establishing best practices for the following:

- maintaining the physical and digital security of elections infrastructure and systems; and
- restricting access to elections infrastructure and systems to authorized personnel.

C.S.S.B. 9 sets the minimum number of countywide polling places selected by a county participating in the countywide polling place program for an election held on the November general election date in an even-numbered year at 80 percent of the number of precinct polling places that would otherwise be located in the county for that election. The bill requires each county participating in the program to post a notice of the four nearest countywide polling place locations by driving distance at each countywide polling place. The bill revises the requirement for such a county to ensure certain conditions in adopting a methodology for determining where each polling place will be located by requiring each county to ensure that:

- in a county with a population of less than one million, each county commissioners precinct contains at least one countywide polling place and the percentage of the total number of countywide polling places located in each commissioners precinct must be as equal as mathematically possible to the percentage of registered voters of the county whose registrations are effective on the date of the election residing in each commissioners precinct; and
- in a county with a population of one million or more, the percentage of the total number of countywide polling places located in each state representative district in the county containing territory in which the election is held must be as equal as mathematically possible to the percentage of registered voters of the county whose registrations are effective on the date of the election residing in each state representative district.

The bill removes the requirement that a county, in adopting such a methodology, ensure that the total number of permanent branch and temporary branch polling places open for voting in a county commissioners precinct does not exceed more than twice the number of permanent branch and temporary branch polling places in another county commissioners precinct.

C.S.S.B. 9 requires the county clerk, not later than 24 hours after completing county election returns for each election for a statewide or district office, a statewide measure, or president and vice-president of the United States, to post the following on the county's website, if the county maintains a website:

- the number of votes that were cast in the county; and
- the number of registered voters in the county.

C.S.S.B. 9 requires a counting station manager and the presiding judge of the counting station to develop a protocol under which no electronic device capable of being connected to the

Internet is permitted inside a central counting station and authorizes the protocol to permit a cellular telephone or the equipment necessary to count votes to be present in the central counting station if the devices are not connected to the Internet.

C.S.S.B. 9 requires the designated canvassing authority to initiate an automatic recount for that precinct if the results of an election show that the number of votes cast in an election precinct exceeds the number of registered voters in the precinct.

Auditable Voting Systems

C.S.S.B. 9 requires the general custodian of election records, for an election that occurs after August 31, 2024, that contains a race or measure that is voted on statewide, and in which an auditable voting system, as defined by the bill's provisions, is used, to conduct a risk-limiting audit for a selected statewide race or measure not later than 24 hours after all ballots have been counted in an election. The bill requires the secretary of state to select, in accordance with rules adopted by the secretary, the precincts to be counted and the office or proposition to be counted. The general custodian of election records must complete the audit not later than 24 hours before the time for conducting the canvass of the election. The bill sets out provisions relating to posting notice for the risk-limiting audit, the presence of a watcher for such an audit, and the delivery of a certificate of appointment that meets certain conditions to the general custodian of election records at the time the watcher reports for service. The bill authorizes the secretary of state to appoint personnel to assist with the audit, including applicable voting system technicians or representatives and persons who have assisted with the design and implementation of the audit. The bill requires the secretary of state to adopt rules prescribing procedures necessary to implement these provisions and requires such rules to include a rule, using widely accepted statistical methods, that provides for the number or percentage of paper records that must be counted in a risk-limiting audit and provides for the publication of the audit's results.

C.S.S.B. 9 requires the secretary of state to conduct a pilot program, beginning with the election taking place November 3, 2020, of the risk-limiting audit program created under the bill's provisions. The bill sets out provisions relating to the selection of certain counties to participate in the program and a certain detailed report by the secretary of state sent to each member of the legislature evaluating the program's success and making a recommendation regarding statewide implementation of the program. The bill requires the secretary of state to adopt rules as necessary to implement the pilot program. These provisions expire August 31, 2024.

Repealed Provisions

C.S.S.B. 9 repeals Section 33.051(c), Election Code.

EFFECTIVE DATE

September 1, 2019.

COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE

While C.S.S.B. 9 may differ from the engrossed in minor or nonsubstantive ways, the following summarizes the substantial differences between the engrossed and committee substitute versions of the bill.

The substitute changes from 500 feet to 100 feet the distance from a polling place within which certain conduct constitutes the offense, as created by the bill, of impeding access to a polling place.

The substitute includes an affirmative defense to prosecution for an offense of illegal voting involving a person who votes or attempts to vote in an election in which the person knows the person is not eligible to vote.

The substitute does not include a change to the required number of copies of precinct returns to be prepared, includes certain requirements for a presiding judge of a polling place before closing the polling place on election day, and replaces a reference to returns with a reference to a tally tape. The substitute does not include a requirement for the presiding judge to publicly post one of the copies of the returns.

The substitute includes a provision making the defense to prosecution of an offense under the Election Code inapplicable to a person employed by a law enforcement agency that engages in an activity, with respect to the investigation or prosecution of a violation of a law under that code or official activities investigating a weakness in the electoral process, that results in casting a vote for an eligible candidate or for or against a measure.

The substitute does not include a provision entitling a watcher serving at a polling place to inspect any identifying documentation presented by a person assisting a voter.

The substitute does not include revisions to the statutory provision regarding the observation of the preparation of a voter's ballot when a voter is being assisted, with respect to revisions:

- entitling an election officer to be present at a voting station when a voter is being assisted by a person who is not a family member and entitling an election officer to examine the applicable ballot before it is deposited in the ballot box; and
- prohibiting an election officer from being present at the voting station when a voter is preparing the voter's ballot or is being assisted by a family member.

The substitute does not include a requirement for the form completed and signed by a person who assists, at the same time, at least three voters unable to enter a polling place by providing the voters with transportation to the polling place to require the person to affirm that the voters are physically unable to enter the polling place without personal assistance or likelihood of injuring their health. The substitute revises the bill provision providing for the definition, by reference, of "family member" for purposes of the exemption from the requirement to sign such a form for a person who is a family member of all the voters that the person provides with transportation to the polling place.

The substitute revises the contents of the form required to be completed by a person before assisting a voter by not including a requirement that the form state the manner in which the voter requires the assistance and state the reason the assistance is necessary.

The substitute does not include a requirement for an application for a ballot to be voted by mail on the ground of disability to require the applicant to make a certain affirmative indication regarding a sickness or physical condition.

The substitute includes provisions that revise the procedures for selecting, and adopting a methodology for determining, countywide polling places under the countywide polling place program. The substitute does not include a provision requiring a commissioners court of a county with a population of more than one million to select countywide polling places using the same methodology that the county would use to select polling places if it were not participating in the countywide polling place program.

The substitute revises provisions relating to the risk-limiting audit and the selection of counties for the pilot program. The substitute makes the bill's definition of "auditable voting system" applicable to the risk-limiting audit, but the substitute does not include provisions regarding a paper audit trail that set out a prohibition, and certain exceptions, against the use of a voting

system that consists of direct recording electronic voting machines in an election unless the system is an auditable voting system.

The substitute does not repeal provisions prohibiting the entity that owns or controls a public building being used as a polling place or an early voting polling place from prohibiting electioneering on the building's premises outside of a certain area at any time during the voting period.