

Local Government & Public Finance Law

What's Old Is New Again: Exploring The Push for Paper Ballots

By Daniel E. Zwillenberg

The earliest voting in the United States was carried out by voice vote. In some early towns, voters would drop corn kernels into buckets designated for their candidate. As the electorate grew, the use of “party ticket” balloting — in which voters deposited a paper ballot listing the candidates of a single party into the ballot box — was replaced with the Australian (or blanket) voting ballot. This new ballot listed all of the candidates and parties for election, and is familiar to many voters today. Despite efforts to ensure ballot security, paper ballots were famously subject to fraud and questions of voter intent. Stories of ballot-stuffing and altered ballots permeate our nation’s history. William “Boss” Tweed famously stated that “the ballots made no result. The counters made the result.”

Through design of new ballots and invention of new ballot boxes, election officials (or at least some election officials) tried to eliminate — or at least mitigate

Zwillenberg is an attorney with the law firm of DeCotiis, FitzPatrick & Cole in Teaneck.

— these problems. Patented in the late 1890s, mechanical gear-and-lever voting machines were the next step in the effort to ensure the security of the vote. By the middle of the 1900s, they became the official method of voting in many states, including New Jersey. These machines were lauded for the privacy they provided the voter, as well as the apparent certainty they provided regarding the results of the election. In New Jersey, mechanical voting machines remained in use until fairly recently. As with any machine, however, they were prone to wear and tear. They would break down, and when they did, it was often difficult to determine how many votes had been lost. Because they created no paper record, a vote-by-vote recount was impossible. The machines were also accused of being inaccessible to voters with disabilities or alternative language needs. Even voters of less than average height could have trouble viewing or reaching levers near the top of the machines.

The invention of early computers led to the development of punch-card ballots and computerized ballot reading machines in the 1960s. These new machines provided speed and apparent

reliability. They also provided a paper record of individual voter intent — a noted deficiency of the mechanical machines. By 1982, approximately half of the electorate voted by punch-card systems. Their use would continue until the weaknesses of the punch-card ballot were revealed in rather spectacular fashion.

In the fall of 2000, Americans watched with a mix of bemusement and disbelief as election officials in Florida held punch-card ballots up to the light, judges examined them with magnifying glasses, and television reporters debated the import of the hanging chad. Eleven individuals arguably watched with far greater interest. Five of them eventually declared the winner to be President-elect of the United States. In the aftermath, election officials and legislators across the nation scrambled to avoid a repeat performance. One reaction was the federal “Help America Vote Act of 2002” (HAVA). In addition to imposing new requirements, such as statewide voter registration and provisional balloting, HAVA provided federal funds to states for the purpose of replacing gear-and-lever and punch-card voting machines.

In an attempt to meet HAVA’s requirements for funding, New Jersey replaced its gear-and-lever voting machines in all 21 counties with direct recording electronic (DRE) voting machines. These machines are designed to generate an accurate vote count without the uncertainties and inaccuracies

witnessed with punch card and gear-and-lever machines. Since their introduction, however, legislators and members of the public have argued that their success in that goal is unverifiable because the machines do not produce a paper record of each vote cast. According to their detractors, DRE machines are vulnerable to programming errors, malicious software and hardware attacks that could jeopardize the integrity of the results. Documented Election Day malfunctions and voter confusion are believed by many to have resulted in lost votes. However, without the paper record, they argue, no means exists to verify the accuracy of the machines' count or to determine whether votes have been lost due to malfunction or voter error.

In 2004, New Jersey Assemblyman Reed Gusciora and others filed a lawsuit to force the state to retrofit all DRE machines with equipment to produce a voter verified paper audit trail (VVPAT). This system would produce a paper record, visible to the voter, which would both allow the voter to verify that his or her vote was recorded accurately, and provide a contemporaneous record of that vote, which could be examined as part of any recount of the election. While the case was pending, the Legislature enacted and the Governor signed P.L. 2005, c. 137, which required that all DRE voting machines used in New Jersey produce a VVPAT by Jan. 1, 2008. Due to funding and logistical problems, this deadline was extended repeatedly until it was extended indefinitely by P.L. 2009, c. 17. As of the date of this article, New Jersey's DRE machines do not produce a VVPAT.

Some opponents of DRE machines argue that the only solution to the black-

box mystery of the voting machines is to go back to a simpler time by eliminating them altogether. These advocates trumpet the simplicity of combining paper ballots with optical scanners. According to their supporters, paper ballots are the epitome of a VVPAT, as the actual ballot cast may be reviewed as part of any recount or audit of the results. They argue that the technology is trusted, and has been used in standardized testing for years. Anyone who has filled out those bubbles with a No. 2 pencil is familiar with the process.

However, advocates of DRE are quick to point out that paper ballots bring with them many of their own problems, including lost ballots, finding more ballots than voters, and unreadable ballots — precisely the problems voting machines were designed to remedy a hundred years ago. Furthermore, the system's strength — that the ballot is official record — is also its weakness. Each time a ballot is handled, the chance of some misfortune befalling the ballot — be it intentional or accidental — increases. Greater access to the ballots creates greater opportunity for ballots to be damaged, altered, replaced or lost. And even though the ballots are analog, the scanners used to count them in the first instance are digital. Those scanners, according to DRE advocates, are vulnerable to corrupt manipulation in the same way as the DRE machines, and are in some ways more vulnerable. Regardless of the potential drawbacks, optical scanners are in use in all but three New Jersey counties (Burlington, Camden, and Cumberland) for Vote-By-Mail (formerly "absentee") ballots. New Jersey has not chosen, however, to require their use for all voting. Instead, in January, Judge Linda Feinberg, A.J.S.C.,

ruling on remand in *Gusciora v. Corzine*, held that the Sequoia DRE machines in use in 18 of New Jersey's counties, even without VVPAT, are "safe, accurate, and reliable," absent premeditated criminal activity. Judge Feinberg found no evidence of tampering with any DRE machine in any election in New Jersey.

The Court did, however, recommend that improved antivirus software be installed in the machines, that security surrounding the machines be improved, including requiring all new employees, vendors and consultants with access to the machines to undergo criminal history background checks, and that the state implement statewide training for clerks, boards, superintendents, technicians, warehouse personnel and poll workers. In addition, the Court ordered that protocols for consistent use of tamper-evident seals on the machines be implemented and that Internet connectivity of the machines be eliminated.

Based upon the Court's decision, it appears DRE machines are here to stay in New Jersey, but regardless of whether DRE machines or optical scanners become the voting method of choice, the most important, and oftentimes overlooked, factor is the people involved. As the Court recognized, the poll workers and machine operators are at least as important as the technology in use. The officials charged with responsibility for the care and security of the election machinery and materials must faithfully perform their duties to ensure the integrity of the election. But even then, if history is any indicator, unforeseen problems will creep into the system, and new methods and technologies will be developed, studied and implemented to solve them. ■