Tennessee and Ohio Enact Major Bipartisan Election Reform

**Tennessee:** Tennessee's legislature recently passed the [Tennessee Voter Confidence Act](http://example.com) (House Bill 1256) with strong bipartisan support. In the House, the bill passed 92-3, and in the Senate it passed unanimously 33-0. The bill was signed into law on June 5, 2008 and follows from recommendations made in a report released earlier this year by the Tennessee Advisory Commission on Intergovernmental Relations. Sponsored by Representative Gary Moore and Senator Joe Haynes, the bill requires all of the state's counties to convert to precinct-based optical scan voting by November 2010. It also requires that any voting machine bought or leased after January 1, 2009 be able to create a voter-verifiable paper trail, which can be used in recounts and audits. By 2010, all counties will have to have voting machines in place that create a paper trail. Importantly, the bill also provides that each election commission shall conduct mandatory hand count audits of the voter-verifiable paper ballots of at least the top race in federal, state and local elections. The hand count audits would include 3 percent of the votes cast prior to the election by absentee and at in-person early voting sites. The audits would be conducted in at least 3 percent of the precincts, comprising at least 3 percent of voters in the election. The audit provision details the random selection of precincts, the timing of the audits, and the public announcement of the results of the audit. Implementation of the legislation will cost the state approximately $9.54 million.

**Ohio:** Last October, Ohio, like many states, anticipated a potential shortage of poll workers in 2008. Ohio state Representative Larry Wolpert had an idea -- mobilize qualified high school and college students to mitigate the problem. The Columbus-area legislator had already authored a law permitting one high school senior to serve as a poll worker in each precinct. Given the enthusiastic feedback received from election administrators and his constituents, he decided to up the ante; he introduced House Bill 350 (HB 350) to increase high school poll workers per precinct and to expand the program to include certain college students.

HB 350 passed the Ohio House 95-0 on April 2, 2008. The Senate expanded the House version transforming it into a major election reform bill, which passed the House 90-6 and the Senate 32-0. The bill's transformation and the events behind the legislation offer an interesting
perspective on the collision between legislative and executive authority in election administration.

Background: As reported in the April issue of *The Canvass* in December 2007, Ohio Secretary of State Jennifer Brunner urged immediate conversion to optical scan voting systems in response to a study commissioned by her department. The study found that Ohio's touch screen (direct recording electronic or DRE) machines were unacceptably vulnerable to malfunction and tampering. Secretary Brunner recommended that optical scan voting systems with centralized tabulation would eliminate vulnerability created by the multiple hands used to transport DRE memory cards. Optical scan systems use paper ballots marked by hand. Completed ballots are then fed into a computer for tabulation. (These systems resemble the standardized test model used in many schools.)

The security problems discovered in Ohio's DREs were particularly disturbing because Ohio's presidential primary was scheduled for March 4, 2008 -- leaving the state's election officials just over two months to respond. Realizing the hurdles involved, Secretary Brunner used her broad administrative authority to order that Ohio's 53 counties using touch-screen machines provide paper ballots to any voter not wishing to cast a ballot on the DRE. She further ordered counties to print back-up paper ballots equivalent to 10 percent of the people who voted in the last presidential election.

Several counties balked. Union County in central Ohio challenged Brunner's mandate to print back-up ballots. Arguing that it would cost the county's taxpayers $68,000 to comply, Union County filed suit in county court and won a restraining order, which was subsequently overturned. The Ohio Supreme Court refused to hear the case. In Ohio, the Secretary of State possesses significant powers to preempt local decision making by issuing administrative directives having the force of law. The Secretary also can remove for cause the executive leadership of local Boards of Elections, their board members (2Rs and 2Ds), or refuse to reappoint certain individuals. She also casts tie-breaking votes, which she did when Union County's Board deadlocked on the paper ballot issue, which in turn prompted its lawsuit.

The March elections went forward, albeit with multiple problems. Bomb threats, ballot shortages, storms, floods, power outages and higher than expected turnout delayed final returns until well into the day after election day. In Cuyahoga County, many voters complained their privacy was compromised as they turned in their paper ballots. Optical scan ballots were collected at the polls, placed in boxes, and delivered to a county warehouse where they were centrally tabulated using 15 high speed scanners. Brunner released a report on the election, which she evaluated as a "vast improvement" in comparison to the presidential primary election in 2004. Full report here: Ohio 2008 Primary Report.

Following the March primary, Brunner continued to push for optical scan systems in every county and asked the legislature to fund the $64 million conversion plan saying she would not require counties to switch unless state or federal money paid for it. Like most states, Ohio has budget problems with a predicted shortfall of over $700 million. With state Medicaid expenses exceeding expectations and revenues on the decline, the Republican-led legislature strongly opposed the plan. Senator John Carey, chair of Senate Finance Committee, said the debate came down to fiscal policy:

Many counties made the decision to purchase costly new DREs to comply with the Help America Vote Act (HAVA) of 2002 and Ohio's voter-verified paper audit trail requirement. The DRE machines have performed well with no documented incidents in Ohio. The Board of Elections Members I've spoken with felt that it just didn't make sense to throw them out. Even if we had a surplus, it would not be a wise use of the taxpayer dollars to spend millions to purchase optical scan machines.
Unable to justify the cost of replacing DREs throughout Ohio, the legislature began to work on a comprehensive piece of legislation, that would have minimal fiscal impact and address other problems with the Ohio election process. The legislature saw a solution in enacting Representative Wolpert's HB 350.

The Provisions in HB 350: In addition to authorizing more students to serve as poll workers, HB 350 makes major changes to Ohio's election system. Secretary Brunner had advocated uniform conversion to optical scan systems, but HB 350 essentially preserves existing law giving county election boards control over choice of voting systems. The bill requires that any voting equipment certified or acquired after December 1, 2008, meet the most current voting system standards promulgated by the U.S. Election Assistance Commission. Voting equipment already in use would be subject to 2002 standards set by the Federal Election Commission.

HB 350 further provides that all paper ballot and electronic voting results be tallied at the precinct level. This was a somewhat controversial provision. Senator Teresa Fedor, a member of the State and Local Government and Veterans Affairs Committee that drafted the bill, offered an amendment to allow three counties (Cuyahoga, Mercer and Van Wert) to centrally count ballots using optical scan systems. Her amendment failed 5-2 in committee on a party line vote. It similarly failed on the Senate floor. This was "a very sad outcome," she said, because her amendment would have protected those counties from a sizeable unfunded mandate. The three counties now must purchase scanners for each precinct to comply with HB 350. In Cuyahoga County, Ohio's largest, this will cost approximately $13.4 million. Senator Fedor described HB 350 as a "tourniquet" remedy to prepare Ohio for November's critical elections. She argues for a federal solution to election reform:

Just because Congress threw money at the problem to replace punch card machines with new touch-screens (using HAVA funds), it doesn't mean the problem is fixed. Congress needs to get the Election Assistance Commission (EAC) moving toward clear certification guidelines; we'll just have to wait until that happens before federal dollars will become available to replace touch-screens with more reliable optical scan systems.

HB 350 also provides that ballots and results must be officially sealed and delivered to the election board by a bipartisan transport team -- the precinct's presiding judge and an oath-sworn employee or appointee of the board of elections who is a member of a different political party than the presiding judge. The legislation amended absentee ballot law to provide that absent voter's ballots and military absent voter's ballots be counted as long as they are postmarked prior to election day and received within ten days.

Sources in Ohio note that HB 350 was designed in part to protect Ohio's county election officials from abrupt and sweeping election changes by the Secretary of State. According to a recent report by Cleveland State University's Center for Election Integrity, roughly half of Ohio county Boards of Elections have only two employees, which could compound problems in reacting to swift administrative changes and may have made those counties more dependent on private vendors for tech support. HB 350 sets bright line limits for the Secretary's authority to issue directives. First, it mandates that the Secretary establish a process to allow public review and public comment of proposed permanent directives. Secondly, it prohibits the Secretary from issuing a permanent directive during the period beginning 90 days prior to the election and ending on the 40th day following the date of election. Temporary directives may only be used during the period beginning 90 days prior to election day and ending on the 40th day following the day of election. Finally, the bill makes the Ohio Board of Voting Machine Examiners a bipartisan panel. The panel's composition was changed from three to four members with two members appointed by the Secretary and two by the General Assembly.
Impact: HB 350 represented an effort to restore confidence in DRE systems through federal certification requirements and greater bipartisanship in election administration.

Senate President Bill Harris emphasized the overwhelming bipartisan support behind the bill:

Through House Bill 350, we made a number of changes that will help to maintain the bipartisan integrity of Ohio’s system and to ensure a smooth election this November. HB 350 required that there be a Republican and Democrat present when ballots are being transferred to the Board of Elections and brought partisan balance to the Board of Voting Machine Examiners. The legislation ensured that all permanent directives issued by the Secretary of State will have the opportunity for public review and comment, while preserving flexibility for the Secretary of State to respond to any issues that may arise around an election. Most importantly, we ensured that as long as they are postmarked prior to Election Day and received within 10 days after Election Day, absentee ballots from Ohioans serving their country overseas will be counted.

After having encouraged voluntary post-election audits, performed by 11 counties in March, Secretary of State Brunner is now working to make post-election audits uniform in all Ohio counties. According to Patrick Gallaway, Secretary Brunner's Director of Communications, the office is also "requiring each county to submit a security mitigation plan that outlines how voting equipment will be managed securely and monitored." Additionally, she is working to promote no-fault absentee voting and back up paper ballots as a way to prepare for record high turnout in November. "Boards of Election are reimbursed for the back-up paper ballot expense," he said. She estimates that as many as 80% of registered voters could turnout on November 4 at a time when the nation will once again have the Buckeye State under a microscope. Ohio will undoubtedly be a key battleground in this year's presidential election. Ohio has picked the winner in every presidential election since 1964. Prior to that, its choice differed from the Electoral College winner only twice: 1944, when it favored Dewey over Roosevelt, and 1960, when it selected Nixon over Kennedy.
Statistical Update on State Election Legislation

1,770 bills dealing with election reform have been introduced this year. To date, 127 of these bills (7.2%) have been passed into law. Six were vetoed, and 382 remain pending in the 8 legislatures still in session. The remaining 1,255 bills failed to pass. If 2008 is consistent with recent trends, about 50-70 of the pending bills will be enacted into law before the end of the year.

How does this compare to previous years?

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<th>Year</th>
<th>Introduced</th>
<th>Passed</th>
<th>Failed</th>
<th>Vetoed</th>
<th>Carried Over</th>
<th>Pending</th>
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*Data for 2006 is incomplete.
**At press time, 8 legislatures are still in session (CA, MA, MI, NJ, NY, NC, OH and PA)

Source: National Conference of State Legislatures, July 2008

A snapshot of some of the new election laws enacted in 2008:

- Procedures for conducting special elections when extraordinary circumstances result in 100 or more vacancies in the U.S. Congress: Arizona, Colorado, Georgia, Nebraska, New Mexico, South Dakota
- Pilot project to test ranked-choice voting: Colorado
- No-excuse absentee voting: Georgia
- Military/overseas absentee voting procedures: Kentucky, Minnesota, Tennessee, Virginia, West Virginia
- Permanent absentee status: Hawaii (pending gubernatorial action)
- Permanent absentee status for elderly and disabled voters: Louisiana (pending gubernatorial action)
- Early voting: Louisiana
- National Popular Vote interstate compact: Hawaii, Illinois, Rhode Island (pending gubernatorial action)
- Vote centers: Indiana, Iowa, Tennessee
- Precinct-based vote counting: Iowa, Ohio, Tennessee
- Optical scan voting system: Iowa, Tennessee
- Recount procedures: Maine, Minnesota, Virginia
- Post-election audit procedures: Minnesota, Tennessee and Virginia Ω
Update On The Voting Information Project

by Doug Chapin, Director, electionline.org

CANVASS readers should ask their state election offices about participation in a new partnership between election officials, Pew’s Make Voting Work, the JEHT Foundation and Google, Inc. on an exciting new effort to put voting information in the hands of voters nationwide.

The 2008 election is already drawing historic levels of interest; by November, polling places nationwide are likely to see a huge wave of voters - many first-time voters will have questions about how to navigate the process. Answering questions, therefore, will be a key priority for election officials this year.

The Voting Information Project (VIP) seeks to meet those needs by building on the foundational principle that an effective democracy needs a well-informed electorate. Unfortunately, findings from previous years indicate that voters often struggle to get answers to three basic questions:

• Where do I vote?
• What's on the ballot?
• How do I register or find out if I'm registered?

Much of this information is available at the state and local level on election management systems and voter databases. Election officials use this information to manage the registration of new voters, select polling locations, and prepare ballots for the millions of voters who go to the polls each year.

However, the data are not consistently available to primary information providers, such as newspapers, civic organizations and other reference sources. Often, the data are also not readily accessible to the millions of Americans who rely on search engines to look for government information online.

VIP has worked with state election officials to develop and implement a technical standard, known as an "open format," by which state and local election officials can more efficiently disseminate voting information. Through this open format, every address in America can be linked to its polling place. And with this link, voters will be able to gain access to the full range of voting information, including:

• Links to information about voter registration;
• Polling place address, directions and accessibility;
• Procedures governing voting, e.g. identification requirements;
• Type of voting equipment;
• Official information about candidates and issues on the ballot; and
• Polling place alternatives, such as absentee voting, early voting and vote centers.

More details – including the availability of funds to assist states with creating VIP feeds - are available at the VIP website at http://votinginfoproject.org.
School and Library Safety on Election Day

The use of schools as polling places has been scrutinized by several state legislatures and has led to the passage of at least one new law. In May, Oklahoma passed SB 1941, a comprehensive school security law. Among its many provisions, it removes a mandate that boards of education provide space in schools for polling places. Instead, the bill makes this an option.

At least four other states considered legislation dealing with polling places in schools this year. Bills in Illinois, Massachusetts and New York would require or permit schools to cancel student classes on election day if the school is used as a poll site. The Illinois bill failed to pass; the Massachusetts and New York bills are still pending. Several pending bills in New Jersey would limit the use of schools as polling places and require that a written security plan be in place for schools serving as polling places.

In February, Massachusetts Representative Demetrius J. Atsalis, Vice Chair of the Joint Committee on Election Laws, introduced House Bill No. 4546 to protect children from sexual predators on election day. This legislation would require that level 3 sex offenders -- convicts deemed most likely to re-offend -- vote by absentee ballot to keep them away from school and library polling places where they might encounter children. Representative Atsalis said that although no particular case prompted the proposal, he said school and library polling places can become "chaotic," giving a sexual predator an opportunity to strike. "This is a case of the Legislature being proactive instead of reactive," Atsalis said. "We're not taking away anyone's rights, we're just changing the way they vote."

The bill received unanimous bipartisan support from the Committee and on May 27 was sent to the full House. Representative Atsalis (picture below) hopes for a positive vote before the end of the legislative session.

Legislatures in Illinois and California have recently considered various election reform proposals designed to protect children and the community at large. An Illinois bill would have required a registered sex offender whose polling place is a school to vote by absentee or early ballot, and would have made it a class 4 felony for such a person to enter a school polling place. A California bill would have prevented a sex offender from serving as a poll worker, and prohibited the use of a sex offender's residence as a polling place. Neither bill passed this year.

Massachusetts Representative Demetrius J. Atsalis
Can Where You Vote Affect How You Vote?

Polling location may affect how you vote according to a new research report by Jonah Berger, Assistant Professor, University of Pennsylvania. Professor Berger and his colleagues studied voting patterns in Arizona during the 2000 general election and found that voters who cast ballots in a school were more likely to vote in favor of a funding increase for education. Fifty-four percent of voters at other locations supported the education measure, but this number increased to 56 percent for those who voted at schools. The study controlled for other factors such as political views, demographics and other characteristics. The researchers concluded that subtle environmental factors can impact decision-making.

Although the study indicated that polling locations can influence voting behavior, "further research is necessary to determine when they will do so, and how large an effect they may have," according to the report.

"Top-Two" Primary Systems

Oregon: At press time, a grass roots effort, sponsored by a bipartisan team of former Secretaries of State Phil Keisling and Norma Paulus, is planning to soon file approximately 120,000 signatures to qualify their top-two primary ballot initiative for the November ballot. Under Oregon citizen initiative law, 82,769 valid signatures are required on or before July 3 for a measure to qualify for this fall's ballot. Since instituting primary elections in the early 1900's, Oregon has allowed only voters registered with major political parties to take part in "closed" nominating primaries. Although Democrats and Republicans in a few instances opened their primaries to unaffiliated voters, they have not done so in recent years. As a result these voters have generally had access to only nonpartisan contests (e.g., judges and district attorney races). The measure that may be before Oregon voters this fall is similar to Louisiana's so-called "Cajun" primary. The top-two primary allows voters to choose from a full list of candidates, regardless of party affiliation, for a specific office. The two candidates who receive the most votes advance to the general election. The Canvass will continue to monitor the status of the Oregon initiative.

Washington: As reported in the April issue of The Canvass, the U.S. Supreme Court recently upheld Washington's top-two primary in the Washington State Grange case (Washington State Grange v. Washington State Republican Party et al. - No. 06-713). August 19 primaries will be the first time the new system is used in Washington.
Indiana Photo Voter ID


In May, the Congressional Research Service released a new 6-page report on the U.S. Supreme Court's opinion in Crawford. The report was written by L. Paige Whitaker, Legislative Attorney in the American Law Division. Ms. Whitaker is well known to the Capitol's Supreme Court observers and her report offers a thorough discussion of the facts, prior history, opinions and implications of High Court's decision upholding Indiana's photo identification law. For more information on the Crawford opinion, please see the front page story we published in the May issue of The Canvass.

♦ New Legal Challenge Filed Against Indiana's Photo ID Requirement

The League of Women Voters of Indiana recently filed a lawsuit challenging the same law at issue in Crawford. The post-Crawford challenge is in state court and asserts a violation of the Indiana Constitution, naming Indiana Secretary of State Todd Rokita as defendant. For more information, go to Election Law @ Moritz -- a blog written by Ohio State University's College of Law.

NOTE: NCIL provides links to other Web sites from time to time for information purposes only. Providing these links does not necessarily indicate NCIL's support or endorsement of the site.
FROM THE EDITORS’ DESK:

How secure is your state’s e-voting system? “This is not the year to be complacent,” said Stark County Election Board Director Jeff Matthews. Matthews spoke at a session entitled "Summit on Voting Security" at a statewide meeting of Ohio election board directors and members. Optical scan systems are viewed by many as more reliable, and legislatures in Iowa, Maryland and Tennessee have recently switched to them.

If your state is using DREs, a fresh review of security procedures at polling places may be needed to determine whether prophylactic administrative changes or enabling statutes are appropriate. Consistency, documentation and access standards are key elements in a security plan. Ohio will require board employees to wear ID badges, limit access to where ballots and machines are stored, and will document the use or movement of such equipment. For more information on Ohio's preparations for elections in November, see our story on page one.

In Arizona's Pima County, this lesson was learned the hard way. After a year-long court battle with the Pima County Democratic Party, the County was forced to produce electronic databases from past county elections dating back to the late 1990's. The Democrats sought discovery to check for security flaws in election software and possible tampering with votes or ballot tabulations in those elections. Now the county administrator is implementing an "elections integrity reform" plan. Some components of his security upgrade plan are:

- Separation of control: transferring oversight of software and computers used to count votes from the elections division to the information technology division;

- Background checks and fingerprinting for all elections staffers, contract employees and elections volunteers. Elections observers with political parties are exempt;

- Discontinuation of phone line modem transmissions of vote results from individual precincts to the county's elections headquarters.

- The formation of an Elections Integrity Commission with members appointed by the county board of supervisors, the two major parties and the county administrator.

Again, process security, logic and accuracy testing, and post-election audits are best practices. If your legislature has not already reviewed the election process from a security perspective, it may be a preemptive effort worth considering. Ω