Indiana’s May 6th primary will be important to determining the Democratic nominee for President, and the state will likely see some very close races in the general election. While its 2004 and 2006 federal elections went fairly smoothly, Indiana does suffer from some vulnerabilities that could make the result of the 2008 elections less trustworthy. The state has a history of absentee ballot fraud that could corrupt the result of a close election and lead to litigation. It also has a very strict photo ID requirement that recently withstood a challenge in the U.S. Supreme Court but could create problems of uniformity if local officials fail to implement the law consistently. Finally, history shows there is a risk that some polling places might not open on time or operate correctly, a risk that is compounded by political disputes within the election administration system as well as difficulties with vendors.

But before discussing these issues in depth, it is appropriate to give the reader some background with the following nine-topic digest of the state’s election administration system.

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Institutional Arrangements

Indiana elections are run by county election boards under the direction of the Secretary of State and the Indiana Election Commission with assistance from the Election Division of the Secretary’s office.\(^3\)

The elected Secretary of State is the chief elections officer in the state.\(^4\) The current Secretary of State is Todd Rokita, a Republican in his second term as Secretary who also serves as president of the National Association of Secretaries of State and on the Board of Advisers to the Election Assistance Commission.\(^5\)

Co-directors of the Election Division are appointed to four-year terms by the governor and must be from different political parties.\(^6\) The Election Division’s duties, in addition to assisting the Secretary and the Commission with all ministerial duties, include: maintaining precinct maps for the state, issuing media watcher cards, providing registration and absentee voting information to uniformed service and overseas voters and reporting on this to the EAC, implementing Indiana’s state HAVA plan, and reporting to the EAC on the state’s use of HAVA funds.\(^7\) The Election Division performs routine election functions whereas the Election Commission sets policy, enforces campaign finance laws, approves official election forms, and certifies voting equipment.

The Indiana Election Commission consists of four members, two from each party, appointed by the governor.\(^8\) The governor appoints one member as the chairperson of the Board who must be of the same political party as the Secretary of State and one member from the other major political party as the vice-chairperson.\(^9\) The Commission is charged with administering elections, advising and supervising county election authorities and making final determinations where a county election board is deadlocked on an issue.\(^10\) The Commission may make rules that govern the fair, legal, and orderly conduct of elections but they have not done so. In addition, the Commission investigates when there is a suspected violation of Indiana election law and refers the case to the Attorney General or to a prosecutor if action is to be taken against the offender.\(^11\) The Commission can issue subpoenas, hold hearings and issue advisory opinions.
Institutional Arrangements

though there are no advisory opinions catalogued on the Secretary of State’s website.15

The county election boards are composed of the circuit court clerk and two persons appointed by the clerk from nominations submitted by the county party chairpersons.16 The circuit court clerk is elected to a four year term in the general election.17 The county boards of election are responsible for conducting all elections within the county. In addition, the boards prepare all ballots and distribute them to the precincts.18 The county boards also send reports after each election to the Election Division containing information about expenses, a statement of the votes cast in each precinct, and general information about the election and the board’s activities during the year.19 A provision in the law allows the circuit court clerk to act for the board “whenever the facilities of the office make it more reasonable and efficient for the clerk to do so.”20 It is not clear who decides whether these conditions exist. County boards may also appoint deputy election commissioners but must do so in equal numbers from each major political party.21 County boards may have employees but there is no requirement of equal bipartisanship in hiring them.22 County election boards may also subpoena witnesses, investigate election law violations, and refer matters to the attorney general or a prosecutor as needed. Appeals of county election board decisions may be made to county circuit courts.23

Lake and Tippecanoe counties each have a combined Board of Elections and Registration consisting of the circuit court clerk, two Democrats and two Republicans appointed by their respective county party chairpersons.24 The director is appointed from the two members of the same party as the Secretary of State and the assistant director is appointed from the other party’s Board members.25

The Election Division holds a meeting before each general or municipal election to instruct county election officials on their election duties.26 The election code does not specify any consequences for not attending. County election boards are responsible for training their precinct officials. The requirements in Indiana election law for such training are minimal. It must contain information about making the polling place accessible to the elderly and disabled and must be specific to the voting systems used in
that county. However, there are no detailed requirements in the code for how to train workers on these topics and other topics may be included “as determined by the county election board”.

The Secretary of State has training materials available on his web site for county administrators, poll workers, and the public to access. For example, there are checklists for each type of voting machine with detailed instructions on how to set up the machines. The election code does not, however, require local entities to use these training materials.

**Voter Registration/Statewide Database**

**Deadlines.** Indiana does not have election day registration. The deadline to register or transfer a registration to a new address is the 29th day before any election. Third parties are permitted to deliver registration forms to the circuit court clerk or Board of Registration. Mail registration applications will be accepted if post-marked by the 29th day prior to an election.

**Registration application processing by county.** The verification process as spelled out in Indiana law requires only that counties determine “if the applicant appears to be eligible to register to vote based on the information in the application”. As part of this process, officials will attempt to match social security numbers contained on incoming voter registration applications against information contained in social security administration databases. Officials will also attempt to verify driver’s license numbers against department of motor vehicle databases where the voter provides this information on the application. No publicly available information was found regarding the process used to make these match attempts. Voters are assigned unique identifying numbers if they indicate on their applications that they have not been assigned a social security or department of motor vehicles identification number. Counties must then send notice of approval or denial by non-forwardable mail to all registration applicants and must deny the registration application if the notice is returned undeliverable.
registration forms are not “fully or properly” completed, county registration officials must make one attempt by mail and one by phone to obtain the necessary information. The code permits, but does not explicitly require, local officials to update incomplete or incorrect applications with proper information any time before final certification of the voter list, which must occur at least 10 days before the election.

**Statewide voter registration database.**
The statewide voter registration database was completed in December 2005 with all 92 counties online. According to Indiana law, the database is “administered at the state level”. However, other provisions of the law require that the database only be updated by the counties with support from the Secretary of State when needed.

**List Maintenance – Inactive, Removal.**
Voter list maintenance is carried out by the counties. Names cannot be removed from the voter rolls within 90 days of an election except for voters who have died, been imprisoned or requested removal. Voters who are convicted of a crime and are imprisoned are ineligible to vote but have this right restored when they are no longer imprisoned. This information is provided to the election division by the Indiana Department of Correction and by county sheriffs who are required to report on disenfranchised voters in their county jails. Voter list maintenance involves first determining which voters may have moved from their registered address using information from the U.S. Postal Service National Change of Address service, jury duty notices, the bureau of motor vehicles, or returned mailings that were sent to all voters. Next, a mailing is sent to the voters suspected of moving. Mailings can also be sent annually to check that voters still reside where they have registered. If the voter does not return the mailing with the voter’s current address information, the voter’s status changes to inactive and the voter’s registration is cancelled 30 days after the second general election in which the voter does not show up to vote. Ten percent of Indiana voters are listed as inactive according to a document on the Secretary of State’s website dated November 2007.

As in most 2008 primaries, registration increased substantially in Indiana, stressing the staffs of voter
Challenges to voter eligibility

In Delaware County, a Republican registration official was arrested after an altercation with a reporter and a Democratic candidate for Congress over how the multitude of last-minute registration applications would be processed in time for poll books to be printed for the primary. A Republican vacancy on the registration board had gone unfilled for a while leaving the board understaffed. Registration officials around the state are dealing with tight deadlines mostly due to the slowness of the statewide registration database. Cross checks with other government databases cause the entries to take five minutes each to complete.

Provisional voting

Indiana does not have a high rate of provisional voting relative to other states but its counting rate is also quite low. In the 2004 general election, approximately 0.23% of votes were cast provisionally. Of those, 910 votes, or 16% of the provisional votes, were counted. In 2006, out of roughly 1.5 million votes, 0.13% of them were cast provisionally and 905, or 44%, of those were counted.

Voters who have moved must transfer their registration during the regular registration period and, therefore, most do not vote provisionally on election day. Voters who have moved within the 30 days before an election may vote once more at their previous precinct. Voters who moved more than 30 days before an election without updating their registration may also vote a regular
ballot at the same precinct if they have moved within it or once more at their former precinct if they have moved to a different precinct but within the same county and the same congressional district.

Counting of provisional ballots. Provisional ballots must be counted by noon 10 days after the election. County election boards determine whether provisional ballots are eligible to be counted. Ballots are deemed eligible for counting if the voter 1) properly executed an affidavit on election day, 2) was qualified to vote in that precinct, 3) provided proper ID, and 4) was properly registered to vote. Provisional ballots deemed ineligible for counting shall not be opened. Within the 10 day counting period, voters who cast provisional ballots because they lacked the required ID must bring proof of identification to the circuit court for their provisional ballots to be counted. Alternatively, voters may affirm that they are indigent and cannot obtain the required ID without paying a fee or that they have a religious objection to being photographed and their provisional ballots will be counted.

Convenience voting

All voters eligible to vote in person on election day are eligible to vote in person at an early voting location. In-person early voting is allowed and starts 29 days before an election. Voters may vote early at the county clerk’s office and at vote centers where they are in operation. However, voters must have a legitimate reason to vote absentee by mail, such as illness, work obligations, or advanced age. County election boards must receive absentee ballots before noon on election day.

Counties have absentee voter boards consisting of two people from opposite parties. The county election board is required to conduct a training session for the absentee board laying out its duties. Duties of the absentee boards include delivering absentee ballots to the precincts on election day and traveling to the residences of absentee voters who are entitled to vote at their homes.
Absentee ballots must be initialed by county election or absentee board members from both parties. A recent Muncie mayoral race result was overturned after 19 absentee ballots initialed by only one election worker were thrown out in a recount. Litigation over the race is still in progress.

**Voting technology**

Various voting machines are in use in Indiana. County election boards choose from a list of machines approved by the Election Commission. A VVPAT is not required by Indiana election law. According to the Secretary of State’s website, 40% of voters in 34 counties vote on optical scan systems with 60% of voters in the remaining 58 counties voting on DRE machines. The only publicly available voting machine requirements are in the election code and are not very detailed.

Indiana law establishes a “Voting System Technical Oversight Program” in which the Secretary of State is required to contract with an entity that will develop procedures for such things as security, training, testing and procurement. Public and private colleges and universities are invited by a Request for Proposal on the Secretary’s web site to enter a contract with the state to provide such oversight. A possible conflict of interest could arise if a public institution is charged with oversight of the state.

Indiana has had problems with vendors MicroVote and ES&S. MicroVote installed uncertified software on machines in 47 counties before the May 2006 primary and was heavily fined for it. The Election Commission has also banned MicroVote from selling machines in Indiana for five years. Counties using ES&S machines have had problems with them in nearly every election since the 2004 primary, including technicians surreptitiously installing uncertified software in 2004 and tabulation machines not working in 2006.
Polling place operations

Each polling location has a precinct election board chaired by an election inspector from the same party as the Secretary of State candidate who received the most votes in that county and having one election judge from each party as members. Precinct officers are appointed from nominations made by the county party chairpersons. The precinct election board decides on challenges and other matters that come up on election day. Other precinct officers include poll clerks, assistant poll clerks and election sheriffs, but county election boards may decide by unanimous resolution not to appoint these officers. When appointed, these additional officers are appointed in bipartisan pairs. The poll clerks and assistant poll clerks tally the precinct’s votes at the end of the day.

Training for precinct officers is conducted by the county election boards. Boards must require precinct inspectors to attend training but have discretion as to requiring the other poll officers to attend. Where counties have mandated training, boards may waive the requirement if the precinct officer cannot attend training for good cause. The Secretary of State provides extensive training materials to the counties but there is no requirement in the election code that the counties use them.

The polls are open from 6 a.m. to 6 p.m. and those who are at the polls by the closing hour are entitled to vote. If the poll hours have been extended, anyone arriving after the normal poll hours may cast a provisional ballot. Watchers and challengers are permitted to be at the polls during polling hours and for the precinct count where ballots are counted in-precinct.

Ballot security

The biggest issues for ballot security are the identification requirements for voting and whether the ballots are in a form that is recountable in the event of a recount or contest. Indiana does not require a VVPAT, and while many counties do use machines with paper audit trails,
roughly half of the 58 counties that use DRE machines use models that do not produce VVPAT’s.\textsuperscript{93} This means ballots from touch-screen machines that do not produce a paper record could only be recounted by again retrieving the tally from each machine’s removable memory cards or internal computer memory.

**Voter id.** In 2005, Indiana passed a law requiring voters to show state-issued photo identification at the polls.\textsuperscript{94} The voter’s ID must meet these four conditions: it must have been issued by the U.S. or Indiana and must contain the voter’s photo, a name which “conforms” to the name on the voter’s registration, and an expiration date.\textsuperscript{95} An expired ID is acceptable as long as it has expired only since the last general election. Voters who do not present acceptable ID may cast a provisional ballot but must bring the required ID to the county clerk or election board within 10 days after the election for that provisional ballot to count.\textsuperscript{96} There is a provision exempting the indigent from the photo ID requirement but it requires a trip to a county office to execute an affidavit after each election. The law requiring this ID was recently upheld by the United States Supreme Court.\textsuperscript{97}

**Voting Technology.** Indiana does not require its counties to use voting machines with a paper trail. As a result, roughly one third of the counties use touchscreen voting machines that produce no paper record. Returns from those machines could be called into question if there are any problems or errors with the machines on election day. Indiana law does, however, provide for local entities to handle problems that arise such as large turnout and ballot shortages. County election boards may decide to use paper ballots in addition to any voting system if a very large turnout is expected.\textsuperscript{98} Precinct boards may print ballots if none are available at the opening of the polls.\textsuperscript{99} They must conform as nearly as possible to official ballots and be treated the same as official ballots. To accommodate these extra ballots, each precinct should get a ballot box\textsuperscript{100} that is constructed “to prevent fraud” with two locks and an opening large enough for a single ballot.\textsuperscript{101}
Counting. Precincts count their ballots and deliver their tallies to the county election boards after the polls close. Circuit Court judges decide disputes among county election board members over how to count a precinct’s tally in the aggregate count and that determination is final. Counties must complete their canvass by noon on Monday following the election and the circuit court clerk must prepare a certified statement of the vote count by this time, which is delivered to the Secretary. The Election Division tabulates the votes cast for president, state offices other than governor and certain local offices by noon of the last Tuesday in November, and the Secretary of State certifies the winners to the governor immediately afterwards.

The Election Division and county election boards must correct errors in certified statements of the vote if caught before the deadline for recount request or contest. Any voter may bring a civil action against the division or a board for failure to make a correction within 5 days after the deadline for making corrections. The suit may be brought in Marion County or in the county where the election officials reside.

Recounts and Election Contests. Candidates have 14 days from the election to file a petition with the election division for a recount or to contest an election. If the candidate does not request a recount or contest, state party chairpersons have 17 days from an election for federal or statewide office to request a recount or to contest an election. For legislative offices, county party chairpersons also have 17 days to request recounts or contest elections.

The State Recount Commission presides over recounts and contests and consists of the Secretary of State as chairperson and two members of opposite political parties designated by their respective state party chairpersons. The State Board of Accounts and its staff conduct the actual recounts and contest proceedings under the guidelines adopted by the Recount Commission. The State Board
of Accounts is an entity that audits public offices and consists of the state examiner who is appointed by the governor and one deputy examiner from each of the two major political parties.\textsuperscript{111} Court action on any election that is being recounted or contested is stayed until final determination by the commission.\textsuperscript{112} Parties to a commission decision on a recount or contest may petition the Marion County circuit court for judicial review by noon 30 days after the determination.\textsuperscript{113} The court may set aside the commission’s result, remand for further proceedings and compel action by the commission. Special elections shall be ordered when mistakes or deliberate acts occur that make it “impossible to determine” the number of legal votes cast and take place in the precincts where the mistakes or deliberate acts took place.\textsuperscript{114} The Indiana Supreme Court has found this to be a tough burden to meet and stated that special elections are to take place only in rare circumstances where the integrity of the result has been substantially undermined.\textsuperscript{115}

**Audits.** Each county chairman for either of the major parties in the county may petition the county election board for confirmation of the vote cast on a ballot card (optical scan) voting system no earlier than the Saturday before an election and no later than the Thursday after an election. The petition may specify up to 5% of the precincts or 5 precincts, whichever is greater, to audit.\textsuperscript{116} The county election board “shall confirm that the votes cast in an election… were correctly counted by the system.”\textsuperscript{117}
Challenge #1: Combating absentee ballot fraud

Indiana has experienced many instances of absentee fraud in local races. It has been pervasive enough in some communities that some voters do not trust the results of any election. One may wonder what exactly is special about Indiana that it has seen so much of this type of fraud. Indiana law professor and election law scholar Mike Pitts suggests that Indiana is not special at all but rather is like several other states where similar instances of absentee ballot fraud and improper influence of voters have been seen. Absentee ballot fraud, even if minor, ought to be taken seriously as it taints the integrity of elections and feeds the easily spread idea that fraud is rampant in our country’s election system even where the evidence does not quite rise to that level. In addition, the attention received by instances of absentee fraud along with poor procedures and a lack of awareness of the requirements for legal handling of absentee ballots could lead to fear of harassment or prosecution among voters who rely on this important voting method to exercise their right to vote.

In 2003, absentee fraud in the East Chicago mayor’s race resulted in allegations against 53 individuals, including a police officer, for such violations as voting in the wrong precinct and handling a forged absentee ballot. In addition, political operatives were found to have had blank absentee applications and ballots. There had been absentee ballot fraud prior to 2003, but it had not been pursued as a priority by law enforcement. Following the East Chicago incident, a Joint Voter Fraud Task Force was formed and 45 of the 53 accused have been convicted of some election law violation to date. A key detail of this story is that it might have been avoided. In 2004, one of the candidates alerted a U.S. attorney to potential fraud before the election but the Department of Justice did not take action except in the aftermath. The candidate who initially lost the election, possibly as a result of the illegal absentee voting, eventually took office after winning the new election but the taint of the scandal lingers.

Investigations into absentee ballot fraud are ongoing in Clark County and Delaware County as well. In both situations, the attorney general was asked to join the effort to avoid the reality or appearance of partisanship influencing
the results. In Clark County, the May 2007 Jeffersonville Democratic mayoral primary is alleged to have been tainted by fraud. The election there will not be overturned if fraud is found to have occurred because it was not contested.123 In Delaware County, Muncie’s November 2007 mayoral race saw several problems including allegations of absentee voter fraud. The race was decided when a court flipped the result to the Republican candidate after a handful of absentee ballots were excluded during a recount because they lacked the initials of both Democratic and Republican poll clerks. Possible fraud with respect to those ballots from precinct 46 is not being investigated. However, there is an ongoing criminal investigation into alleged absentee ballot fraud throughout precinct 18 that is being conducted jointly by the Democratic county prosecutor and the state’s Republican attorney general.124

**Scenario #1: In a close election, a number of illegal absentee ballots are cast that exceed the margin of victory.**

When absentee ballot fraud occurs, the decision to throw out the ballots of entire precincts or to hold a special election depends on the severity of the fraud. There is no provision in Indiana law that allows all absentee ballots to be excluded. In the 2004 case involving the East Chicago mayor’s race, *Pabey v. Pastrick*, the Indiana supreme court articulated a tough standard for obtaining the remedy of special election requiring a challenger to show fraud that substantially undermines the integrity of the election and the trustworthiness of the outcome.125 The court ordered a special election in that case even though the number of absentee ballots shown to have perhaps been fraudulent did not exceed the margin of victory. The court in *Pabey* agreed with the trial court’s assessment that there was little in Indiana statutes or case law to guide it in how to resolve the situation at hand. It also noted a prior holding that elections do not belong to the political branch of government but, rather, to the people and that it is the duty of the court to “protect the sovereign people from fraud or unlawfulness…”126 Although the number
of absentee ballots that may have been illegally cast was smaller than the margin of victory, the court found that the integrity of the election had been substantially undermined by the fraud. The rule in *Pabey* has been applied in recent cases but with less challenging facts and hence has not been thoroughly tested.\textsuperscript{127} Given the court’s willingness to grant the special election remedy in *Pabey*, Indiana courts are likely to do the same where illegal ballots are cast in a number larger than the margin of victory.

Indiana election law allows the state recount commission, in its discretion, to exclude ballots of an entire precinct where there is fraud, tampering or misconduct that has been so pervasive that it is impossible to know the true outcome of the election in that precinct.\textsuperscript{128} This means that absentee fraud could cause the regularly cast ballots of a precinct to be excluded even though stricter controls are in place at the polls to prevent in-person voter fraud. It seems that recount commissions and courts are reluctant to exclude the votes of entire precincts. In a 1996 court of appeals case, a losing candidate sought to have the recount commission throw out votes of precincts where alleged misconduct occurred.\textsuperscript{129} The court determined that “misconduct” did not include negligent or reckless acts and therefore, mistakes in directing voters to the wrong precincts in this case were not misconduct as considered by the statute allowing exclusion of a precinct’s ballots. The court did find however, that the burden of proof for alleging misconduct, fraud, or tampering that could disqualify an entire precinct’s ballots is a preponderance of the evidence.\textsuperscript{130} In 2004, a Republican primary candidate attempted to have entire precincts’ votes excluded from a recount because of missing pre-printed signatures in poll books.\textsuperscript{131} The precincts had yielded more votes for his opponent and were ultimately counted by the recount commission resulting in that candidate’s loss.\textsuperscript{132} Even in the November 2007 Muncie mayoral race, the recount commission declined to exclude Precinct 18’s votes.\textsuperscript{133} Perhaps their decision would have been different had the victim of the alleged fraud not been named mayor for other reasons after the recount. It is not clear when this remedy would be used and no cases were found that definitively answer this question. In a presidential race, given the limited amount of time available for holding special elections – special elections must be held on the ninth
Tuesday after they are ordered but recounts and contests involving presidential electors must be completed by six days prior to the federal deadline — this statute might be invoked where egregious fraud has been committed to exclude entire precincts’ ballots from a recount.

**Challenge #2: Polling place operations**

Indiana elections are run by roughly 30,000 people with 5,500 precincts and have a history of serious polling place failures. In Marion County’s May 2007 municipal primary, County Clerk Beth White ran her first election with disappointing results. Approximately 150 poll workers did not show up for duty and last minute scrambling for workers led to five precincts never opening on election day and 45 precincts opening late. Additionally, ballots were delivered to incorrect precincts. The fall 2007 election went better but several memory cards were left in voting machines and others were misplaced resulting in vote count delays and leaving an impression that chain of custody procedures for ballots and memory cards are lax. Having been a big critic of the clerk she replaced the previous fall and now having to perform in the bright spotlight of the May, 2008 presidential primary, Clerk White faces a difficult challenge in overcoming the perceived incompetence of her office in election administration. Improvements have been made that will hopefully result in fewer problems on May 6. There are fewer precincts to manage this time and more ballots have been printed than will possibly be needed. Marion County just completed a special election in March where White came under criticism for not using the usual voting machines and for counting ballots centrally instead of at the precincts. While this election appears to have gone smoothly, one precinct opened in the wrong place. This would be a major problem were it to happen in the upcoming primary.

Politics also seems to be interfering with successful elections in Indiana and this is likely to continue. County election boards, although bipartisan, are not evenly so, nor are precinct election boards. Marion County Clerk Beth
White’s failures may be due in part to partisan sentiments in the community. White, a Democrat, campaigned on turning the office around and running sound elections after her Republican predecessor had problems administering elections during the prior four years. When one party is ultimately in charge of elections, it is easy for that party to be blamed for any problems and for resentments to grow between the parties as a result. In Delaware County this year, the county Republican chairwoman declined to fill a vacancy on the Delaware County voter registration board, leaving the board understaffed when a huge number of registration applications came in on the last day to register.\textsuperscript{142} Hundreds of voter registration cards were at risk of not being processed in time for the May primary. Entering registration applications into the statewide database is a slow process that can take about five minutes each. The chairwoman arguably was in violation of the law by not filling the vacancy, something she claimed to have done in order to save the taxpayers of the county the cost of employing another person. The strain of the situation ignited a physical fight between a Republican registration board member and a reporter outside an election board meeting about how to handle the increased workload.\textsuperscript{143} Had the local party chairwoman been taken to task by county or state officials for leaving the registration clerk position unfilled, this incident and risk to voters’ registrations could have been avoided. The registration board did pledge to get the applications processed but it remains to be seen what problems these voters encounter on election day.

Finally, there is good reason to think poor quality of service from vendors will interfere with polling place operations in this year’s elections. Voting machine issues have been prevalent in Indiana with the Secretary of State and county election administrators doing battle in recent years with vendors Microvote and ES&S over uncertified software and late or incorrect deliveries of ballots. In November 2006, operations in 75 precincts in Delaware County were delayed and voting hours subsequently extended due to misprogrammed “start cards” from MicroVote.\textsuperscript{144} In Randolph County in 2006, machines made by Voting Technologies International (VTI) malfunctioned giving inaccurate tallies.\textsuperscript{145} Since then, VTI has gone out of business and Randolph County has replaced its machines.
with MicroVote models. But the election commission has just revoked MicroVote’s certification for one of its systems and banned sales of all MicroVote systems for 5 years. Under the revocation order, MicroVote will still be allowed to provide support to counties using their machines. However, MicroVote’s attorney warned that the 5-year sales ban could possibly put them out of business which would leave 47 counties with machines from a defunct vendor. In LaPorte County in 2004, machines reported that there were exactly 300 voters per precinct although correct vote tallies exceeding that arbitrary number were and still are reported alongside the bizarre 300 number. Four counties in Southern Indiana in the May 2006 primary had major problems with ES&S tabulating machines that resulted in counties having to aggregate results manually.

**Scenario #2: In a close election, voters leave the polls without voting due to problems with polling place operations in a number exceeding the margin of victory.**

There is little in Indiana law to tell us what would happen if a large number of Indiana voters were unable to vote because of problems in the polling place on election day. The repetition of problems throughout the last several years means it is likely that similar problems in the polling place will occur in the primary and in the general election this fall. If the problems lead to large numbers of voters leaving the polls without voting, an election contest could be brought by a candidate or political party alleging that the true result of the election cannot be ascertained and seeking a special election as a remedy.

It would be difficult to obtain a special election because the Indiana Supreme Court has suggested that, where fraud is not involved, a contestant must demonstrate a number of illegal or affected votes sufficient to render the true outcome impossible to determine. This includes situations where mistakes are made in printing or distributing the ballot, electronic voting systems are mistakenly misprogrammed,
or where electronic voting machines malfunction. The dissenting opinion in Pabey surmised that this number of votes could be shown via statistical analysis and not solely by showing each and every vote that was lost. Still, it would be difficult for a plaintiff to prove how many or at what rate voters left because of polling place errors, delays or machine problems. Witnesses for one side could be refuted by witnesses for the other – indeed, any evidence presented by one side would be vigorously refuted by the other side in a hotly contested race. No cases could be found to instruct us on what courts would do in an election contest based on polling place operational failures but we can expect that the courts will be loathe to disturb election results without a very close margin of victory and substantial failures at the polls that would undermine the results.

A further complicating factor in election contests based on failures at polling places would be the possible extension of polling place hours on election day. Counties do not have the explicit power to extend polling hours but the law does provide for votes cast after hours under a court order or “other order” to be cast provisionally and kept separate leaving time for a full evaluation of the lawfulness of the decision to extend. Uniformity could be an issue if courts in different counties extend hours for different reasons. For example, a court in one county may find it reasonable to extend the close of polls for one hour because of a 30-minute delay in the morning while a court in another county may deny an extension of hours where polls were only two hours late in opening. Extended hours may not help those who are unable to return and may allow voters who would not have voted during regular polling hours to vote under these special circumstances. With little precedent and unclear or vague election laws, the courts would be forced to make up rules as it goes along on how to weigh the equities and come up with a fair and trustworthy outcome in an election contest based on polling place failures.
Challenge #3: Proper administration of Indiana’s voter ID law

Indiana passed a strict in-person voter ID requirement in 2005 that was recently upheld by the United States Supreme Court in a 6-3 decision. The law requires that those voting in person show a state-issued photo ID containing a name that “conforms” to the voter’s registration and an expiration date that is no later than the last general election. The law contains an exception for indigent voters but it requires a separate trip in most cases to the county circuit court where the voter, after voting in his or her polling place on election day, may execute an affidavit swearing that he or she is indigent. It is not hard to imagine that someone who is indigent such that he or she cannot obtain the required ID may also have trouble with this two-trip requirement to have his or her vote counted.

Lack of uniformity in the application of the law is the biggest risk. Some of the risk ironically comes from efforts to mitigate the impact of the law. For example, current Secretary of State Todd Rokita told a call-in radio show that locally-issued ID’s would be accepted, but it is not clear that any such ID’s are issued or would actually meet the law’s requirements. In addition, Rokita has published on his web site liberal examples taken from an election division memo of names that would conform to the name a voter used when he or she registered. The ID law has also been interpreted by officials to allow the indigent to vote in only one trip to an election office by voting early at the county election board and, in the same trip, executing their affidavit at the court. This option is not explicit in the law but is not prohibited. Another strange interpretation of the law is being considered by election division lawyers that would allow Purdue student ID’s to be used if it can be established with magnetic reader equipment that the ID is current even though it lacks an expiration date printed on its face. However, a Secretary of State spokesperson said it would be up to the individual counties to determine whether such information on the card would satisfy the expiration date requirement, an approach that would surely lead to a troubling lack of uniformity in applying the law statewide.
There is also a possibility that a new record clean-up program could affect implementation of the voter ID law on election day. As Indiana is gearing up for its primary and the November general election, the BMV has undertaken a project to match its records with the records of the Social Security Administration. As of the last BMV project update, approximately 32,000 people will have their ID’s revoked if they do not provide the BMV with updated information that matches their Social Security cards. It is unclear whether the BMV will update the Secretary of State’s office or county election boards so that registered voters set for ID revocation will be noted in the poll books. There is no statutory basis for the Secretary of State or the county election boards to receive such data from the BMV or notate it in the poll books. There are, however, parts of the election code that provide for the state to share and verify data in its statewide database with the BMV and SSA. It would not be a surprise if some counties notated voters whose ID’s have been revoked in their poll books or if other counties handled this situation in different ways, creating a lack of uniformity.

Scenario #3: Incorrect or non-uniform enforcement of the photo ID requirement leads to a greater number of provisional ballots and potential election contests based on the counting of these ballots.

If there is a high voter turnout in the November election, as there is likely to be, Indiana could have trouble managing a much larger number of provisional ballots than in years past. People who haven’t ever voted or haven’t voted since the 2004 election may be coming out to vote for the first time since the photo ID requirement was implemented. In the past, Indiana has had low numbers of provisional ballots and could face difficulty counting them in a uniform manner across the state. For example, a voter must have properly executed an affidavit on election day containing numerous pieces of information for his or her provisional ballot to be eligible for counting. The courts have not been called on to determine what exactly constitutes an improperly executed affidavit. Doris Ann Sadler, former Marion County Clerk, testified in the voter ID case in the lower court that one of the biggest reasons provisional ballots were counted...
at such low rates – only 15% were counted there in the 2004 general election – was “poll worker or voter error in filling out the paperwork.”\(^{161}\) In Lake County that year, only 13% of the provisional ballots were counted.\(^{162}\) Board Director, Sally LaSota claimed this was mostly due to poll worker error. The low rate of counting may be ameliorated by recent amendments to the election code that require provisional ballots to be counted “unless evidence of fraud, tampering, or misconduct affecting the integrity of the ballot is demonstrated. The act or failure to act by an election official is not by itself evidence of fraud, tampering, or misconduct affecting the integrity of the ballot.”\(^{163}\) However, election officials’ errors are not the only reason provisional ballots have not been counted in the past. In Porter County in 2004, none of the roughly 60 provisional ballots were counted but county officials cited voters’ voting in the wrong precincts as the main reason. In 2006, the rate at which provisional ballots were counted statewide only rose to 44%, up from 16% in 2004. The onerous second trip to verify one’s identity was the main reason for provisional ballots not being counted in Marion County’s 2007 primary. Of the 34 provisional ballots cast, only two voters traveled to the election board subsequently to provide proof of identification.\(^ {164}\) The voters who did not make the trip likely would have had their votes counted because they had voted in the correct precinct and their signatures matched their registration records. Even if counties take a liberal approach to counting the provisional ballots, the difficulty voters have making the second trip to the county board to show ID will still exist. However, the lack of a clearly defined counting standard and differences in application of any standard could disenfranchise voters and are still likely to be attacked on equal protection grounds, especially if victory margins are small.
Key Questions for Key States: Indiana

1  Web Analyst, Election Law @ Moritz (http://moritzlaw.osu.edu/electionlaw/).

2  IC 3-6-5-1. There has been talk in Indiana about a plan suggested by a governor’s panel in which county clerks would be appointed by a county executive instead of being elected. Marion County Clerk Beth White said that would go against the strong culture of local control in Indiana. DOWNSIZE IT, The Indianapolis Star, Dec. 12, 2007.

3  IC 3-6-4.2-2.

4  IC 3-6-3.7-1.


6  IC 3-6-4.2-3, 3-6-4.2-3.2.

7  IC 3-6-4.2-12.

8  Id.

9  IC 3-6-4.1-1, 3-6-4.1-2.

10  IC 3-6-4.1-6.

11  IC 3-6-4.1-14.

12  Id.

13  IC 3-6-4.1-21.

14  IC 3-6-4.1-19.

15  IC 3-6-4.1-21, 3-6-4.1-25. The election division did prepare a memo interpreting the meaning of “conform” with respect to matching the name on the ID’s to the names in the county registration records. The examples it came up with are published on the Secretary’s website and in training materials prepared by the division. There does not appear to be a direct link to the memo from the website and while the memo appears to be advisory and to carry some legal weight, the election commission is the body that is granted the authority to issue advisory opinions, not the election division. Memo at: http://www.in.gov/sos/elections/pdfs/PhotoIDAdvisory_4_30_06.pdf.

16  IC 3-6-5-2.

17  Ind. Const. Art. 6, § 2.

18  IC 3-6-5-14.

19  IC 3-6-5-17.

20  IC 3-6-5-19.

21  IC 3-6-5-20, 3-6-5-21.

22  IC 3-6-5-23.

23  IC 3-6-5-34.

24  IC 3-6-5.2-4.

25  IC 3-6-5.2-7.

26  IC 3-6-4.2-14.

27  IC 3-6-6-40.


29  IC 3-7-13-11.

30  IC 3-7-22-9.

31  IC 3-7-33-4.

32  IC 3-7-33-5(a).

33  IC 3-7-26.3-19.

34  IC 3-7-26.3-18.

35  IC 3-7-13-13(c).
Key Questions for Key States: Indiana

36 IC 3-7-33-6.
37 IC 3-7-33-5(e).
38 IC 3-7-34-2.
39 IC 3-7-34-4 suggests that county registration officials could accept corrections and additions to registration applications past the regular registration deadline of 29 days prior to an election up until 10 days before an election by which time the counties must certify their voter lists. Once the list is certified, any registration applications deemed to remain incomplete by the counties are rejected.

41 IC 3-7-26.3-4.
42 IC 3-7-26.3-8, IC 3-7-26.3-9.
43 IC 3-7-26.3-10.
44 IC 3-7-38.2-3.
45 IC 3-7-13-4, 3-7-13-5.
47 IC 3-7-38.2-2(c).
48 3-7-38.2-16.
49 IC 3-7-38.2-2, 3-7-38.2-14, 3-7-38.2-15.
50 Statewide Voter Counts by County and Status, at http://www.in.gov/sos/elections/pdfs/VotersByCounty.pdf (last visited Apr. 28, 2008).
54 IC 3-6-7-1.
55 IC 3-11-8-20, 3-11-8-21.
56 IC 3-5-4.5.
57 IC 3-11-8-23, 3-11-8-27.5.
60 IC 3-10-11.
61 IC 3-7-39-7.
62 IC 3-7-39-8, 3-10-12-3.4.
63 IC 3-11.7-5-1.
64 IC 3-11.7-5-2.
65 IC 3-11.7-5-2. This section refers to 3-10-1-9 or IC 3-11-8-23 which spells out the required content of a properly executed affidavit. 3-10-1-9 describes the requirement for voters in primary elections in general election years to affirm in an affidavit merely that they are voters in that particular precinct. 3-11-8-23 describes the contents required in an affidavit executed by a challenged voter in elections generally. The affidavit must contain
the following: “(1) A statement that the voter is a citizen of the United States. (2) The voter’s date of birth to the best of the voter’s information and belief. (3) A statement that the voter has been a resident of the precinct for thirty (30) days immediately before this election or is qualified to vote in the precinct under IC 3-10-10, IC 3-10-11, or IC 3-10-12. (4) The voter’s name and a statement that the voter is generally known by that name. (5) A statement that the voter has not voted and will not vote in any other precinct in this election. (6) The voter’s occupation. (7) The voter’s current residential address, including the street or number and if applicable, the voter’s residential address thirty (30) days before the election, and the date the voter moved. (8) A statement that the voter understands that making a false statement on the affidavit is punishable under the penalties of perjury. (9) If the individual’s name does not appear on the registration list, a statement that the individual registered to vote and where the individual believes the individual registered to vote during the registration period…” There has been no litigation stating whether a mistake in executing the affidavit, for example, leaving out one of the required pieces of information, would render it improperly executed causing one’s provisional ballot to not be counted.

66 IC 3-11.7-5-3.
67 IC 3-11.7-5-2.5.
68 IC 3-11-4-1.
69 IC 3-11-10-26.
70 IC 3-11-18-12.
71 IC 3-11-10-24.
72 IC 3-11.5-4-3, 3-11.5-4-7.
73 IC 3-11-10-36.
74 IC 3-11-10-13.
75 IC 3-11-10-25.
76 IC 3-12-1-2, 3-11-10-27, 3-11-4-19.
77 IC 3-11-7 et seq., 3-11-7.5 et seq., 3-11-15 et seq. List of currently approved machines at http://www.in.gov/sos/elections/voters/certifiedsystems.html (last visited Apr. 28, 2008).
78 IC 3-11-15.
79 IC 3-11-16-2.
80 IC 3-11-16-4.
85 IC 3-6-6-1; 3-6-6-8.
86 IC 3-6-6-30.
87 IC 3-6-6-38.
88 IC 3-6-6-33, 3-6-6-34.
89 IC 3-6-6-40.
90 IC 3-11-8-8.
91 IC 3-11-8-11.
92  IC 3-6-8-4, 3-6-9-13, 3-6-10-5.5. One strange provision of Indiana election law is a section prohibiting voters from conversing with anyone except the precinct election board while at the polling place. IC 3-11-8-18.


94  IC 3-11-8-25.1.

95  IC 3-5-2-40.5.

96  IC 3-11.7-5-2.5.


98  IC 3-11-3-3.

99  IC 3-11-3-28.

100  IC 3-11-3-33.

101  IC 3-11-3-34.

102  IC 3-12-2-1 et seq., 3-12-3-1 et seq., 3-12-3.5-1 et seq. The deadline is midnight for ballot card (optical scan) and electronic voting systems. This deadline is extended to “as soon as possible” if there are any difficulties with the machine. Paper ballots, those that are designed to be marked with a pen or pencil and counted by hand, are to be delivered to the county “immediately” after counting.

103  IC 3-12-4-16, 3-12-4-17.

104  IC 3-12-5-6.

105  IC 3-12-5-7. For congressional elections, there is no firm deadline in the code by which the count must be completed; the language used is “shall promptly execute”. IC 3-12-5-9.

106  IC 3-12-5-14.

107  IC 3-12-5-15.

108  IC 3-12-11-2.

109  IC 3-12-10-2.1.

110  IC 3-12-10-8.

111  IC 5-11-1-1.

112  IC 3-12-10-17.

113  IC 3-12-10-18. The law on judicial review states that the court will review the commission’s action for arbitrary or capricious action, abuse of discretion or for actions “otherwise not in accordance with the law”. The Marion County Circuit Court may set aside the commission’s decision, remand a case, and compel the commission to act. One case stated that claims will be heard that challenge how the election recount or contest was conducted by the Election Commission or State Board of Accounts. State ex rel. Jacobs v. Marion Circuit Court, 644 N.E.2d 852, (1994). It appears the court would give deference to the commission’s findings as long as proper procedures are followed, but it is not clear how deferential the court would be if a controversial recount or contest were involved.

114  IC 3-12-8-17 (local and school board elections), 3-12-11-18 (state, federal and legislative elections). Special elections are conducted under IC 3-10-8-1 et. seq.

115  Pabey v. Pastrick, 816 N.E.2d 1138, 1150 (Ind. 2004). Pabey was addressing absentee ballot fraud and, while the court articulated a standard that seems tough to meet, it may have violated its own standard by allowing a special election in this case. There was a 278-vote margin of victory and
the trial court had found 155 of those to be the possible result of fraud. The supreme court argued that the trial court was wrong to hold that, while the fraud was despicable, it had not made it impossible to determine the numbers of legal votes because the margin of victory exceeded the number of questionable ballots. The supreme court instead found that, because fraud can be difficult to quantify and because this number of questionable votes was high although not in excess of the margin, the fraud in this case rose to the level of “profoundly undermining the integrity of the election and the trustworthiness of its outcome”. The court agreed with the trial court that where deliberate acts such as fraud are not involved, contestors must indeed demonstrate that a mathematically sufficient number of ballots are invalid to obtain the remedy of special election.

116 IC 3-11-13-38.

117 IC 3-11-13-37. Such audits are to be completed by a body independent of the voting machine vendor according to standards set by the Election Commission. IC 3-11-13-39.

118 Attorney General News Release, East Chicago Fireman and Policeman Convicted of Vote Fraud, Apr. 14, 2008. The city of East Chicago in Lake County sits in northwest Indiana and has a population of 5000 people but an annual budget of about $100 million. It is known for its casino resort on Lake Michigan and has been the site of several fraud allegations and convictions.


122 Pabey Wins East Chicago Mayoral Primary, Indianapolis Business Journal, Oct. 27, 2004. After Pabey became mayor, he fired some employees and was sued by several of them for wrongful termination. Most of the cases were resolved in his favor but at least one is ongoing. See De La Cruz v. Pabey, 2007 U.S. Dist. LEXIS 78616 (N.D. Ind., 2007).

123 Ind. AG Joins Probe of Jeff Mayoral Primary, The Courier-Journal, Apr. 1, 2008. State officials also got involved in allegations of absentee fraud in Clark County going back to a 2003 Clarksville town council election. Secretary of State Rokita joined the citizens who first alleged fraud in 2006 by asking the prosecutor to pursue the complaint. The prosecutor, Steve Stewart, did not pursue it and the citizens then asked for a special prosecutor alleging Stewart was biased in favor of the beneficiary of the fraud. Clark County Prosecutor Objects to Voter-fraud Petition, The News and Tribune, Mar. 28, 2008. A magistrate denied the request however stating there was “no clear and convincing evidence that the appointment is necessary to avoid an actual conflict of interest.” Magistrate Denies Special Prosecutor in Voter Fraud Case, The Star Press, Mar. 29, 2008.

124 OUR VIEW, The Star Press, Feb. 21, 2008. There is a lot of racial tension over this case as members of Precinct 18, the largely black precinct whose votes the Republican side sought to exclude due to alleged pervasive fraud, feel unfairly targeted and angry about deceit during the investigation. Republican operatives allegedly identified themselves as election officials instead of as representatives for the Republican candidate. Investigation called ‘vicious’ at Friday’s rally, The Star Press, Dec. 8, 2007. The Secretary of State has reached out to the press to publish information


126 Id at 1141 (citing State ex rel. Nicely v. Wilday, 197 N.E. 844, 847, 209 Ind. 1 (1935)).

127 Gaddis v. McCullough, 827 N.E.2d 66, 70 (Ind. Ct. App. 2005) (finding that town election officials’ decision to combine three precincts into one was not a deliberate act or misconduct that undermined the integrity of the result and hence did not warrant a special election).

128 IC 3-12-11-17.7, 3-12-6-21.7. Absentee ballots are counted at the precinct with other ballots. 3-11-10-12.


130 Id. at 72.

131 Andy Gammil, Borst recount team eyes entire precincts; Brent Waltz, who won by several dozen votes, expresses his confidence in process, The Indianapolis Star, June 2, 2004.


134 IC 3-10-8-8.

135 IC 3-12-11-19.5.

136 Voting Off to Rocky Start in Marion, Delaware Counties, Sept. 17, 2007. The same thing happened in November 2006 when Doris Ann Sadler, a Republican, was Marion County Clerk. In addition to poll workers not showing up, paper ballots had to be used at 100 precincts due to machine problems.


138 Robert King, GOP chair: Prosecute No- show Inspectors, The Indianapolis Star, May 12, 2007. Twenty cards were mistakenly placed in boxes with other voting materials instead of in the special ballot card envelopes provided to the precincts. Certifying Election Results Starts with Close Races, The Indianapolis Star, Nov. 8, 2007.

139 Matthew Tully, Big Test Ahead for County’s Election Clerk, The Indianapolis Star, Apr. 9, 2008.

140 Tom John, Marion County GOP chairman, Editorial: Not using voting machines for special election was mistake, The Indianapolis Star, March 23, 2008. Most recently, Clerk White and Secretary of State Todd Rokita had a disagreement about the need to equip each polling place with a voting machine that was disabled accessible. She argued that a special election this soon before another regularly scheduled election was unprecedented calling for special measures and that the Secretary was giving her last minute instructions that were difficult to comply with given the special circumstances. She ultimately did include the accessible machines at every precinct. Brendan O’Shaughnessy, All polls to get touch screens for March 11, The Indianapolis Star, Feb. 14, 2008.

141 Wanted: Carson replacement; Democratic Party has until April 12 to fill Andre Carson’s 15th District seat on City-County Council, The Indianapolis Star, Mar. 16, 2008.

142 Megan Trent, Rush for Registration, Newslink Indiana, Apr. 10, 2008.

143 Rick Yencer, Statom draws three-day
Endnotes

144 Countdown to better voting centers begun, Journal and Courier, Nov. 14, 2006. Secretary Rokita advised the county to have after-hours voters cast provisional ballots in accordance with his arguable interpretation of HAVA. Ballots Cast During Extended Hours Ruled Provisional, Nov. 7 2006.

145 Voting ran smoothly in Wayne County, The Palladium-Item, May 3, 2006. This report also told of an Indiana precinct located in a gymnasium through which ran the Indiana-Ohio state line. Had the precinct board set up the voting machines too far east in the room, which state’s laws would have governed the dispute? There is a question that will hopefully never need to be answered!


149 Lesley Stedman Weidenbener, Primary Election 2006; State to Probe Computer Problems, The Courier-Journal, May 4, 2006, at 1B.


151 IC 3-12-8-17, 3-12-11-18.


153 IC 3-11-8-11.

154 Edward Foley, has analyzed the issue of court-ordered extensions of hours in a commentary series that can be read here: http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=381.

155 IC 3-11-8-25.1, 3-5-2-40.5.


157 Dorothy Schneider, Purdue student ID’s don’t pass early voting test, The Journal and Courier, Apr. 17, 2008.


159 IC 3-7-26.3-18, 3-7-26.3-19.

160 See Provisional Voting above, supra note 64.


163 IC 3-11.7-5-1.5.