Pennsylvania’s April 22nd primary will be important to determining the Democratic nominee for President, and many analysts believe that Pennsylvania will be important to determining the result of the general election as well. While its 2004 and 2006 federal elections went fairly smoothly, Pennsylvania does suffer from some vulnerabilities that could make the result of the 2008 election less clear. The state suffers from a history of absentee ballot fraud that could corrupt the result of a close election and lead to litigation. It also suffers from a lack of central control that allows local officials to follow inconsistent procedures, heightening the likelihood of disenfranchisement flowing from administrative error. Finally, Pennsylvania relies heavily on controversial touchscreen voting machines that have been attacked as unreliable. 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.

[Editor’s Note: The following is an analysis of Pennsylvania’s election system going into the 2008 Presidential election. Part I digests nine key areas of the law that together cover the entire administrative system. Part II analyzes three challenges faced by the system and attempts to predict the outcome of three hypothetical post-election lawsuits that might arise as a result of these challenges.]
Institutional arrangements

Pennsylvania’s chief election authority is the Secretary of the Commonwealth. The Secretary is appointed by the governor and confirmed by a simple majority of the Senate. The Secretary tests and certifies voting machines, canvasses county returns, certifies the winners of multi-county elections, develops a poll worker training program that county officials may (but are not required to) use, and orders certain statewide recounts. The Secretary presides over a Voting Standards Development Board that defines what does and does not count as a vote for each type of voting machine. The Secretary also develops a state plan for HAVA compliance with the advice of the State Plan Advisory Board, a board with fifteen members, some of whom are appointed by the Secretary. Except with respect to voter registration databases, Pennsylvania’s Secretary has not issued any administrative regulations with respect to elections and has no explicit statutory authority for so doing. The Secretary does issue memoranda to local boards advising them on correct procedures, but it is not clear whether they carry any formal weight outside the realm of voter registration.

At the local level, elections are administered by county boards of election. By default, these boards consist of the three-member, elected county legislature, but counties may move to an appointment system by varying local law. Where there is no minority-party representation, the county legislature will appoint a minority representative from lists submitted by the minority party. The board is responsible for equipment of polling places and storage of election equipment, training poll workers “whenever deemed advisable,” investigating fraud, estimating county election expenses, submitting reports of voter registration to the Secretary, making recommendations regarding precinct changes, canvassing precinct returns, and making local rules to regulate poll workers and polling place activity that are not inconsistent with other rules. With certain exceptions, the board cannot take action without first obtaining a majority vote.

Practically speaking, while the Secretary has a lot of power to make decisions with respect to voter registration and certification of voting machines, he has little formal power over most other areas of election administration. Nevertheless, there is evidence that some local officials see him as a threat to their autonomy and resist efforts that might increase statewide uniformity. There have also been allegations that the true aim of these efforts is to obtain partisan advantage.

Voter registration/statewide database

Pennsylvania’s voter registration system is operated at the local level, though the Secretary does have some power. Specifically, the Department is authorized to promulgate regulations governing the database. The regulations standardize procedures for identifying and removing duplicates and identifying
and removing the names of voters who have changed addresses. They also mandate that local personnel attend training programs whenever the Secretary requires.

Pennsylvania does not allow voters to register on election day. The deadline for registering is 30 days before the election (mail-in applications are timely if postmarked by this day and received at least 25 days before the election). Applications are entered into the system by county voter registration commissions. Regulations require that administrators notify applicants of incomplete application forms that are received and give the applicants the opportunity to correct them. The statute does not state whether such applications would be effective for the upcoming election if the corrections are submitted only after the registration deadline. The Brennan Center reports that Pennsylvania does not have a standardized definition of what should be considered a “match” for purposes of HAVA-mandated verification of incoming applications against outside SSA and motor vehicle databases. Instead, it allows local commissions to decide what they consider a match. Unmatched applicants have the right to notice and 40 days to provide matching information. Registrations can be cancelled when the US Post Office indicates a voter has moved, when postcards sent to the voter’s address are returned undeliverable, when a physical canvass shows the voter has moved, or when the voter has failed to vote for five years. The registration cannot be cancelled unless notice is sent and the voter fails to respond. The statute also permits removal for death or by the request of the elector. As with all statewide databases, Pennsylvania’s has experienced some glitches, but they have been minor.

By default, the three-member elected legislature of each county constitutes the county voter registration commission, although that can be changed by local option to move to a system of appointments. These commissions must include at least one member of the minority party and generally cannot take action except by majority vote.

In 2004, Pennsylvania Democrats alleged that a Republican third-party registration group accepted completed registration applications from Democrats and then destroyed them without ever submitting them. However, this issue appears to have gone unresolved and there have been no further allegations of this kind.

Challenges to voter eligibility

There are two types of pre-election day challenges: one that occurs by mail, and one that occurs in person. Any qualified elector in the jurisdiction may initiate a mail-based challenge by filing an affidavit with the registration commission stating the reason for challenge. The challenged individual must respond in writing, at which point the county registration commission decides whether to cancel or keep the disputed registration. The in-person challenge may be filed by any qualified elector up to the tenth...
day preceding an election. The challenged voter is entitled to 24 hours notice of the hearing and the commission may cancel the challenged voter's registration unless the voter appears and shows it would be error. A massive short-notice challenge of this kind was enjoined in Ohio prior to the 2004 election on due process grounds, but no reports of such challenges occurring in Pennsylvania were found.

On election day, challenges may be brought by any voter against another at the polls. Challenged voters may cast an ordinary ballot, but only if they can find another registered voter to "vouch" for their identity in an affidavit. Voters cannot be challenged as to party affiliation, because the affiliation on the precinct list is conclusive. In 2004, hundreds of Pittsburgh college students were challenged, causing long lines in some polling places. Republicans also threatened to make thousands of such election-day challenges in Philadelphia, but those challenges never materialized.

**Provisional voting**

First-time voters who registered by mail who fail to produce HAVA-required ID may cast provisional ballots only. Voters whose names are not found in precinct lists and whose registrations cannot be confirmed by officials must also cast provisional ballots. Provisional voters must sign an affidavit containing name, date of birth and address information before voting. Ballots will not be counted where the voter failed to sign the affidavit, where the signature on the affidavit does not match the one on file, where the "secrecy envelope" is missing from the ballot packaging, where the voter was not registered, or where the voter cast another ballot in the election. With respect to individuals who voted provisionally because of ID problems, the statute does not explicitly require them to later return with ID, but instead it appears their ballots will be counted if they are otherwise valid. Ballots unwittingly cast in the wrong precinct will be counted if they were cast in the correct county, but only for offices that were on the ballot that would have been voted in the correct precinct. The county board of elections determines whether to count the ballots, with appellate review available from the local trial court upon petition filed within two days of the determination. In 2006, Pennsylvania saw only 12,345, or 0.41%, of in-precinct ballots cast provisionally. Of those, 63.1% were counted. Given the small number of provisional ballots cast, litigation is less likely than in other states with a high volume of such ballots.

**Convenience voting**

Pennsylvania does not have early voting, and does not permit absentee voting without an "excuse." Absentee voting is permitted for military voters, voters who expect to be out of town on Election Day, and those with disabilities who otherwise have difficulty voting in person. Absentee ballots are counted as long as they are received by the county board of elections before 8pm on Election Day. Absentee voting is not allowed on Election Day without an "excuse."
the jurisdiction on election day, sick or disabled voters who cannot make it to the polls, election workers who will be too busy on election day to vote, and voters who will be observing a religious holiday\textsuperscript{35}. With exceptions for emergencies, requests for ballots must be received between 50 days before the primary and not later than 5 p.m. on the first Tuesday prior to the election\textsuperscript{36}. Also with exceptions, absentee ballots must be received by the county board of election prior to 5 p.m. on the Friday preceding the election\textsuperscript{37}.

Voting technology

Pennsylvania has 67 counties. As of March 20, 2008, the Pennsylvania Department of State's website showed that 25 of those counties used ES&S iVotronic touchscreens, sixteen used Premier Accuvote TSX touchscreens, six used touchscreens manufactured by Danaher, and four used touchscreens by other manufacturers. Although sixteen counties did use some type of optical scan system, 8 of Pennsylvania's 10 largest counties used touchscreens as their primary voting system (see Figure 1, below). Pennsylvania's heavy reliance on touchscreens could prove problematic both because of security concerns and because Pennsylvania law does not require touchscreens to produce a paper trail. The Secretary of the Commonwealth is currently being sued for certifying machines without such trails, and more trouble may lie ahead. The state claims that it is impossible to modify any of the machines used in the state in a way that will produce a paper trail without violating state laws that protect voter privacy\textsuperscript{38}. It claims that the chronological voting records produced by VVPAT printers could be compared with the log of voter's signatures to identify how each person voted. The state Voting Standards Development Board is authorized to promulgate rules providing a definition of a vote for each type of voting system and has done so\textsuperscript{39}. Current law requires that voting machines prevent overvotes, but no law was found requiring that they prevent undervotes\textsuperscript{40}. However, most if not all machines currently used in Pennsylvania do prevent undervotes, unless the voter specifically confirms he or she does not want to vote for the subject office.

Polling place procedures

In Pennsylvania, key poll workers are elected in municipal elections and serve four-year terms. The key poll workers are the head judge, the majority inspector, and the minority inspector\textsuperscript{41}. The “minority inspector” is not necessarily of the minority political party, but is simply whoever received the second-highest number of votes in the previous election for inspector. Thus, the statute creates no explicit requirement of bipartisanship (except where courts appoint poll workers to fill vacancies)\textsuperscript{42}. Because poll workers are elected officials and not just employees,
they generally cannot be removed without filing a lawsuit\textsuperscript{43}. The three core poll workers may employ other clerks and helpers as needed. Concerns about the lack of inherent bipartisan structure in poll worker teams are somewhat alleviated by the ability of any candidate to appoint two watchers to each polling place where voting occurs for the contested office\textsuperscript{44}. Bipartisan teams of overseers can also be appointed to observe elections upon application to the proper trial court\textsuperscript{45}. Where “voting machines” (an undefined term) are used, poll workers cannot serve without first having passed a training program developed by the county board of elections\textsuperscript{46}.

In 2003, a federal court held that Berks County violated the Voting Rights Act by providing only English-language ballot materials, failing to recruit enough Spanish-speaking poll workers, and employing poll workers who were hostile to Hispanic voters and illegally demanded identification from them\textsuperscript{47}. In 2007, Philadelphia settled a DOJ suit based on the same kinds of complaints by agreeing to provide more Spanish-speaking poll workers and training poll workers to avoid discrimination\textsuperscript{48}.

**Ballot security**

Most Pennsylvania voters do not have to show ID. However, pursuant to HAVA, first-time voters who registered by mail must present one of the following forms of photo ID if voting at the polls: driver’s license or other ID card issued by the state or the US government, US passport, student ID, employee ID, or military ID\textsuperscript{49}. If those are not available, the following forms of non-photo ID are sufficient if they contain a current address: ID issued by US government or the state, firearm permit, current utility bill, current bank statement, paycheck, or government check. Failure to present one of these forms of ID means the voter may only cast a provisional ballot.

Pennsylvania law includes a number of security procedures governing both precincts where ballots are used and precincts where voting machines are used\textsuperscript{50}. The precinct canvass occurs in plain sight and the ballots and other materials are locked and sealed in a ballot box. However, in the absence of some allegation of fraud or evidence of a changed result, these procedures are generally treated as directory rather than mandatory, and their violation will not cause a court to grant a remedy after the fact\textsuperscript{51}. 
Post-Election Processes

Post-election processes

Counting. Precinct returns should be submitted to the county by 2 a.m. the day following the election. County returns should be submitted to the Secretary of the Commonwealth within 5 days of completion of the official canvass or recount, and “no later than the third Monday” following the election. The Secretary then canvasses the returns and certifies the winners of multicounty elections, though no deadline is stated.

Recounts. Recounts can happen upon request, automatically, or by decree of election officials. Recounts upon request occur when any three voters in an election district file a petition with the local trial court. The petition must be filed within twenty days of the election or five days after the county canvass is completed, whichever is longer. This type of recount is conducted by persons designated by the court and can begin any time within four months of the election. Unless it is completed before certification or influences the outcome of an election contest, the results of these recounts do not affect the official results of the election, but are only evidence. Automatic recounts are available for statewide offices only and are triggered by any margin of victory of less than 0.5%. Such recounts must be completed by noon on the Tuesday following the third Wednesday after the election. Results must be submitted by noon the day following completion. The third type of recount is ordered by county officials when they believe there is a problem with the count. This type of recount can occur only before certification and becomes part of the certified returns.

Election contests. Pennsylvania election contests are divided into five classes, and the type of entity that hears each contest depends on the class. Gubernatorial contests are heard by the state legislature. Contests for other statewide offices (including President and Presidential nominations) are heard by the Commonwealth Court, a type of intermediate appellate court. State legislative contests are heard by the local trial court as well, but may be appealed to the proper house. Contests for judge and contests for any other office are heard by local trial courts. The filing deadline to bring most types of contests is generally twenty days after the election, regardless of whether a recount occurs. For gubernatorial contests, the deadline is ten days after the next convention of the legislature. No further deadlines are stated, but the court may expedite proceedings as it sees fit.

Unfortunately, in the event that an important election contest made it to the state Supreme Court, it is not clear that the court’s elected judges would have enough credibility to persuade the public that their decision did not hinge on politics. Candidates are feeling increasing pressure to raise money and conduct legislative-style campaigns, and one candidate recently spent $600,000 on a
bid for the Supreme Court\textsuperscript{70}. Furthermore, out-of-state interests are becoming involved in fundraising and advertising efforts\textsuperscript{71}. The candidates have smeared not only one another in their campaigns, but also the Secretary of State\textsuperscript{72}. As of April 1, 2008, the Supreme Court is evenly divided between Democrats and Republicans, with one seat vacant from retirement. The governor has appointed James Colins, a Democrat, to fill the open seat, but the GOP-controlled Senate has resisted confirmation\textsuperscript{73}. The court’s Chief Justice, a Republican, has complained that the confirmation process has been “highly political” and is interfering with the court’s work.

**Challenges and Scenarios**

**Challenge #1: Combating absentee ballot fraud**

Pennsylvania has a history of voting fraud, and a significant amount of fraud continues to occur to this day. While problems have been reported all over the state\textsuperscript{74}, the worst problems concern absentee ballot fraud in and around Pittsburgh\textsuperscript{75} and Philadelphia\textsuperscript{76}. In 1994, a federal judge ordered a special election after ruling that Philadelphia’s top election officials had colluded with Democratic operatives to cast hundreds of fraudulent absentee ballots in a key 1993 state Senate race\textsuperscript{77}. Twenty people, including some poll workers, were charged with fraud in the investigation, and fourteen were convicted\textsuperscript{78}. The judge found that the board of elections failed to verify signatures on ballot applications with those on registration cards\textsuperscript{79} and board members Margaret Tartaglione and Alexander Talmadge personally distributed blank absentee ballots to party workers who then used them to commit fraud\textsuperscript{80}. The Philadelphia board also accepted absentee ballots past the deadline\textsuperscript{81}. However, for reasons that are unclear, prosecutors did not press charges against either of the board members, and Tartaglione continues to hold that office to this day. While nothing on the order of what happened in 1993 has happened since then, the system remains vulnerable to fraud.

Part of the problem is that the penalties for committing fraud might not be harsh enough. Fraudulent completion, tampering or destruction of election paperwork and ballots are only misdemeanors\textsuperscript{82}. Because of this and the way that the criminal justice system works, none of the fourteen individuals convicted after the 1993 debacle received a harsher penalty than a suspended sentence or probation\textsuperscript{83}. Furthermore, many of those implicated were never indicted or even investigated, perhaps sending a message that fraud is not taken very seriously. Indeed, it is not clear that the case would have gotten any serious attention at all except for the fact that the balance of power in the state Senate depended on the outcome. Fraud charges arising from less critical elections might fall upon deaf ears.
Another problem may be Pennsylvania’s culture. Election scholars have discussed how in many ways the election system of a state is a reflection of its culture, and Pennsylvania’s culture, like all cultures, is imperfect. The renowned scholar of political culture Daniel Elazar classified Pennsylvania’s culture as “individualistic,” meaning that it views government not as a collective effort to enhance the community, but as a game that is played to advance purely private ends. While this characterization may not be totally fair, it does seem to fit with the stories of fraud and machine politics that emerge from Philadelphia in particular. The city just elected a new mayor who campaigned against machine politics and promised reform, but many Philadelphians remain skeptical that real change is going to occur.

A third and final problem is that local election officials and poll workers do not always follow procedures that safeguard the vote from absentee ballot fraud. In 1993 the Philadelphia board of elections allowed political operatives access to blank absentee ballots despite the fact that, fifteen years earlier, the local DA had written a letter to the board advising it that this practice was illegal. When a judge condemned these practices and ordered them to stop, a board of elections member said that he took the election code “too literally.” The board also saw nothing wrong with allowing political operatives to return completed absentee ballots, and later it was learned that many of them had been thrown into the trash. Despite the scandal, the Allegheny County board of elections continued, as it had for decades, to allow this very same practice until 2003, when the Pennsylvania Supreme Court put an end to it. Given this attitude towards handling of absentee ballots, it is not unfair to question whether these and other boards of elections are being similarly lackadaisical with respect to other safeguards such as signature verification, reporting suspected fraud for criminal investigation, posting the names of those who have requested absentee ballots to facilitate challenges, and the requirement that absentee ballots be voted in secret and without intimidation. It is not clear that the Secretary of State has the means to standardize and enforce these procedures, or even determine whether they are being followed.

Preventing absentee ballot fraud is important not only because fraud can corrupt election results and impair the credibility of the system, but also because it gives ammunition to those who would claim fraud where none actually occurred. Such claims can give rise to frivolous election lawsuits, but can also enter the public debate as justifications for identification requirements and other security requirements that may be unnecessary or even counterproductive. Although requiring ID at polling places does nothing to prevent absentee ballot fraud, that distinction is mostly lost in the public debate and Pennsylvania leaders who oppose voter ID need to take absentee ballot fraud seriously if they want their view to prevail. Concerns about fraud...
have also been used as a justification for rejecting proposals for election day voter registration in the state\textsuperscript{96}.

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

There are at least two ways that absentee ballots can be cast illegally. The first way occurs when the voter should know from circumstances that the activity is illegal. Examples of this category include multiple voting or voting in exchange for a bribe. In cases like this, the obvious remedy is to remove the illegal ballots from the count\textsuperscript{97} and recalculate the winner (but see the discussion of commingled ballots, below). This is in line with the general rule that, in an election contest, the candidate whom the court finds received the greatest number of legal votes should be installed into office\textsuperscript{98}. The second way occurs when a reasonable voter might not know that the activity is illegal. Examples include when the voter chooses to vote only after being illegally solicited to do so, allows a political operative to monitor and influence the casting of the ballot, or gives a completed ballot to a political operative for return to the counting location—a type of unauthorized access that can lead to ballot tampering or ballots that become “lost.” As the Third Circuit has recognized\textsuperscript{99}, principles of fairness make the second type of case more complex. Should we really throw out a person’s vote just because they allowed an unauthorized individual to return their ballot? Should we really throw out their ballot just because a party operative tricked them into thinking they were eligible to vote absentee when they really were not? Should we really throw out their ballot just because a party operative tricked them into allowing the operative to illegally assist them in casting their vote?

The Pennsylvania Supreme Court answered the first question with an unequivocal yes. The court said that a statute requiring non-disabled voters to return absentee ballots either by mail or personally was mandatory and that ballots returned by third parties were ineligible to be counted, even where election officials themselves told voters this procedure was acceptable\textsuperscript{100}. But in *Marks v. Stinson*, 19 F.3d 873, the Third Circuit has suggested, without actually holding, that courts should attempt to effectuate the will of tricked voters, even if their votes cannot be counted\textsuperscript{101}. In that case, which arose out of Philadelphia’s infamous 1993 state Senate race, party operatives tricked some voters into requesting absentee ballots for which they were ineligible by telling the voters that it was a “new way to vote\textsuperscript{102}.” They also took blank ballots into voters’ homes and, among other things, “instructed the voter to check certain places on the ballot….\textsuperscript{103}” Commissioners on the Philadelphia board of elections “were aware of the absentee ballot campaign” and “assisted that campaign by delivering hundreds” of blank ballots to party workers in order to “aid the…[candidate’s campaign] in obtaining more votes through personal contact between the electors” and campaign workers\textsuperscript{104}. Despite the fact that the ballots of the tricked voters were clearly cast in violation of law, the Third Circuit said that it was improper to totally ignore those ballots in a way that would have put the plaintiff in office. Instead, the proper remedy was to void the election, because that
remedy recognized that although voters who supported the plaintiff were cheated, voters who supported the defendant and intended to vote legally for him were also cheated when they were tricked into following illegal procedures. While most election contests occur in state courts and those courts are not necessarily obligated to follow the Marks decision, state courts are likely to look to Marks for guidance and therefore may analyze absentee ballot fraud using not just black-letter law, but also a host of equitable factors that depend on the circumstances of the case.

The problem becomes even more nuanced when one considers that, unless illegal absentee ballots are impounded together with their identification envelopes immediately after the election, the counting process will remove the ballots from those envelopes and make it impossible to identify what voter cast what ballot. The illegal votes become unidentifiable and inseparably commingled with legal ballots that should be counted. Under these circumstances, the Florida Supreme Court has approved of invalidating the entire absentee vote\textsuperscript{105}, but a federal appellate court in Pennsylvania rejected that approach\textsuperscript{106}. Another approach is to determine, if possible, how many illegal votes were cast, and then deduct votes from the totals of each candidate in proportion to the overall vote they received until a number of votes are eliminated that is equivalent to the number of illegal votes. An ancient state Supreme Court case affirmed this approach\textsuperscript{107}, but no modern Pennsylvania court has. Indeed, because this approach would probably have the effect of eliminating many legal votes on an almost random basis, it is not clear that Pennsylvania courts would support it. Unfortunately, there is no way to “fix” the problem of commingled ballots that is not unfair to someone. This may increase the likelihood that the courts in frustration would simply order a new election, as they did after the scandal in 1993.

Challenge #2: Achieving uniformity

Achieving uniformity across jurisdictions in an election system is always difficult, but Pennsylvania faces some special challenges in this area. One challenge identified by former Secretary of the Commonwealth Michael Weaver is Pennsylvania’s highly decentralized administration:

Pennsylvania is a textbook example of a decentralized election system. Its Election Code places the responsibility for the conduct of elections with the 67 county boards of election across the Commonwealth. Although the Secretary of the Commonwealth holds the title of Pennsylvania’s chief election official, until a recent act of the General Assembly (Act 3 of 2002), he had limited ability to remedy any inconsistent applications of the Code. As a result, Pennsylvania’s counties have
each developed some unique processes with regard to election... 

In fact, the system is even more decentralized than Weaver admits: Act 3 of 2002 did not give the Secretary any expansive enforcement powers, but only authority over voter registration and certain aspects of absentee balloting that are managed using the voter registration software. That means that provisional balloting, management of poll workers, election day procedures, counting and recounting, and some areas of absentee balloting remain almost wholly local affairs. Uniformity is made still more difficult by the fact that the Secretary has few, if any, “field agents” out monitoring local election procedures to ensure procedures are followed correctly, and few direct powers of enforcement when irregularities do come to light. Indeed, in 2004, Pedro Cortés, the current Secretary, expressed concern that county and local election officials would not follow procedures uniformly. When Cortés attempted to send one agent to each county to help on Election Day, Northampton and Montgomery counties criticized the program as an unnecessary intrusion on county officials who have run elections for decades, and vowed to confine the state officials to areas open to members of the public. State Republicans also charged that the true aim of the agents was to help Democrats identify and bring lawsuits based on voting irregularities. Until the state gets past this type of territorialism and partisan bickering, it will have difficulty achieving true uniformity, or even determining what level of uniformity currently exists.

In truth, Pennsylvania elections are even more decentralized than the above analysis suggests. While the Secretary may feel frustrated about his lack of control over county election officials, that pattern is repeated again at the local level: County election officials have little direct control over poll workers because those poll workers are themselves elected officials. While the law requires that poll workers pass a one-time training program developed by the county board of elections, the board generally cannot remove poll workers without going to court and otherwise has no formal power to compel poll workers to follow the proper procedures on election day. One court has even held that evidence that poll workers have illegally assisted voters by “helping” them cast their ballots in prior elections is insufficient justification for barring those poll workers from working in future elections; the court must remove poll workers on election day itself, or not at all. This means that if county election officials are too busy on election day to monitor poll workers and run to the court when irregularities are found, then poll workers are accountable to no one except the voters who elect them—voters who themselves might not have any qualms with an irregularity occurring from time to time, especially when it tends to favor the candidates of their choice. Voters continue to re-elect one Philadelphia elections board
member, Margaret Tartaglione, despite the fact that a federal judge found that she knowingly participated in a 1993 absentee ballot scheme that violated literally dozens of election laws.

Aside from this two-tiered decentralization at the state and local level, another challenge in achieving uniformity is the lack of checks and balances in the polling place. Most states have laws requiring that at least one poll worker in each polling place represent the minority political party, but Pennsylvania does not.\textsuperscript{116} In fact, in areas dominated by one political party, the system of electing poll workers may effectively guarantee that there is \textit{not} any poll worker representing the minority political party. This is a concern because, even where poll workers do their best to be fair and follow correct procedures, the lack of any minority voice may cause certain incorrect assumptions about procedures to go unquestioned. The lack of any minority voice also increases the likelihood of deliberate poll worker misconduct of the kind that happened in Philadelphia in 1993.\textsuperscript{117} In fact, there has been at least one proven case in 1987 of a poll worker committing fraud specifically for the purpose of keeping himself in office as a poll worker.\textsuperscript{118}

The present level of uniformity is difficult to estimate. However, the Secretary’s expression of concern in this area suggests the lack of uniformity is at least non-trivial. Furthermore, on its face the extreme degree of administrative decentralization in Pennsylvania suggests problems with uniformity, and arguably places the burden of proof on those who would argue that the current degree of uniformity falls within acceptable levels. Achieving an acceptable degree of uniformity is important because it serves the basic value of fairness, but also because it helps protect voters’ constitutional rights to Equal Protection and the interest that the administration has in avoiding unnecessary lawsuits. Pennsylvania should take a look at the administrative structure of its election system and consider whether there are not some reforms that could make things more coordinated and efficient. Sometimes even modest reforms can improve things greatly.

\textbf{Scenario #2: Operational breakdowns at polling places}

The lack of uniformity that exists in Pennsylvania could cause operational breakdowns in polling places that cause voters to leave in frustration. This could occur if, for instance, poll worker training programs are of inconsistent quality and fail to prepare all poll workers adequately. Operational failure could also result from inconsistent quality of pre-election-day configuration and testing of voting machines. These types of problems led to extended voting in two Pennsylvania counties in 2006 and seven in 2004.\textsuperscript{119} Furthermore, even if quality is uniformly adequate, concerns that it might not be could motivate efforts to challenge the eligibility of voters on election day—a practice that has itself caused delays.\textsuperscript{120} While voters do not have the right to expect voting to be an instantaneous process, expecting them to endure excessive
delays is not realistic and in a close election a losing candidate might file an election contest claiming that he or she would have won but for voters who left because of the delays.

Unfortunately, only one case could be located concerning the issue of disenfranchisement flowing from operational failure in the polling place, and it is so old and so harsh in its rule that modern courts probably would not follow it. Given this, all that can be said is that a candidate bringing such a suit would have the same burden carried by the plaintiff in any election contest: the burden of proving that the irregularities changed the result of the election or called it into doubt. This would be a difficult burden to meet because concrete evidence of exactly how many voters turned away in frustration and how those voters would have cast their ballots would be difficult to obtain. Evidence in the first category would likely consist of the unsystematic observations of eyewitnesses who could be easily contradicted by other witnesses or attacked as biased. The second category of evidence presents another obstacle because, in order to protect the secrecy of the ballot and prevent bribery and intimidation, Pennsylvania Courts have in most circumstances prohibited voters from testifying, even voluntarily, as to the content of their votes. While Pennsylvania courts might be willing to carve out an exception to this rule to allow individuals to testify how they would have voted, they also might not. Furthermore, as courts in other states have recognized, there is a risk with testimony of this kind that it will not reflect how voters really would have voted. For these reasons, a plaintiff hoping to change the result of an election based on operational difficulties would almost certainly be unsuccessful. The most he or she could hope for would be to persuade the court that the true result was unclear and that a new election should be ordered.

Challenge #3: Conducting touchscreen elections without a paper trail.

The overwhelming majority of Pennsylvania voters in the 2008 Presidential election will vote on touchscreen voting machines with no paper backup. This raises the question of whether Pennsylvania might experience something like what happened in Florida’s 13th Congressional District (where Sarasota is located) race during the November, 2006 election. In that race, touchscreen voting machines recorded 18,000 undervotes in a race where the margin of victory was only 369 votes. Because the machines were not equipped with printers, there was nowhere to look for evidence of the true result except within the machine itself. Some said the undervotes were caused by a combination of poor ballot design and voter error, while others argued that the touchscreen had malfunctioned in a way that could only be revealed by an examination of the machine’s source code. However, the true
cause of the undervote was never determined because the vendor of the affected voting machines succeeded in persuading the court that its interest in preserving the trade secret of its source code outweighed the value of further examination.

Activists have used the Florida example to predict that Pennsylvania will be the next Sarasota, and their predictions are not without foundation. Pennsylvania has had trouble with touchscreens\textsuperscript{127}, the most serious instance involving machines manufactured by a company called UniLect that, according to a State department analysis, lost some 10,000 votes in three counties in the November, 2004 general election\textsuperscript{128}. This equated to a residual vote rate of about 7%. While the Secretary decertified those machines, the fact that they had been certified in the first place does raise questions about whether the certification process is sufficiently rigorous. Furthermore, the fact that local officials failed to catch the problem ahead of time indicates that their own pre-election testing may need improvement. The Secretary is currently being sued on the allegation that the machines currently certified are unreliable, but it is unlikely that this litigation will be resolved in time for local election officials to safely make technology changes for the 2008 Presidential election.

**Scenario #3:** What if, after a close election, the apparent loser argued that touchscreen vote totals were inaccurate? The first step for the plaintiff in this case would be to request a recount (a recount would be ordered automatically in a statewide election if the margin of victory fell below half a percent). Pennsylvania law does not specify exactly how to conduct such a recount\textsuperscript{129}, but because there would be no paper record the recount would probably amount to a review of aggregated results and screen captures of voters’ electronic ballots contained on memory cards. No law was found specifying whether and how the machines should be retested prior to this recount. The vote total might change due to errors in merging the totals from all of the machines, but the total reported by each machine should not change. This makes it less likely that the recount would change the result.

The next move would be to file an election contest alleging that the screen captures and aggregated results were inaccurate. Except for gubernatorial contests, which are heard by the state legislature, the contest must be filed within twenty days of the election, regardless of whether any recount has been completed at that time\textsuperscript{130}. At this point, a hostile court might throw the election out for failure to state a claim. Most courts, including those in Pennsylvania\textsuperscript{131}, do not take lightly the idea of disturbing an election and some courts have proven themselves quite creative in finding reasons to avoid doing so. Nevertheless, assuming the allegations are stated with the greatest level of specificity, precedent suggests that they would pass muster\textsuperscript{132}. The struggle would then center around efforts to examine the voting machine’s source code as well as potential efforts to examine witnesses who
claim their votes were not recorded accurately. Here, the court would have the power to order discovery just as in any other civil case including, presumably, the power to order examination of the machine’s source code\textsuperscript{133}. However, the vendor of the voting machine would probably object to such an examination on the basis that, as in Florida, it would compromise the vendor’s rights to trade secrets. At that point, the plaintiff would have to show that there was a compelling need for the information and that the necessity for obtaining the information outweighed the harm from the disclosure\textsuperscript{134}. Whether the court would find these conditions were satisfied would not depend on black-letter law so much as upon the context of the case and the temperament of the court. Even if the source code is opened, this is more likely to lead to a confusing battle between the parties’ expert witnesses rather than the discovery of a “smoking gun” that resolves the case conclusively.

The general burden of proof in a Pennsylvania election contest is to show that the plaintiff obtained the most legal votes\textsuperscript{135}. However, in the case of a machine malfunction, assuming no “smoking gun” evidence is found, this would be difficult. About the best that the plaintiff could expect to do would be to persuade the trial court that malfunction could have affected the outcome of the election. Under those circumstances, the Third Circuit has said that it is improper to certify the plaintiff as the winner, even where deliberate fraud was found to have benefitted the defendant\textsuperscript{136}. Instead, the proper remedy is to order a new election. Whether the plaintiff could actually persuade the trial court to do this would again depend on context and the court’s temperament. Chances would be increased where the margin of victory was very close. In the case of a residual vote, the court would be unlikely to openly use speculation as to how the disenfranchised would have voted as the basis of finding that the result was sufficiently inconclusive. Nevertheless, it is likely that that type of speculation would affect the court’s analysis in unacknowledged ways. For instance, where a Democrat lost by 500 votes and the 10,000 residual votes occurred in areas where 90% of voters are registered Democrats, the court would be more likely to order a new election. It would be less likely to order a new election if the residual votes occurred in an area that was 90% Republican.
Endnotes

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

2 25 P.S. § 2621.

3 Const. Art. 4, § 8; 71 P.S. § 67.1.

4 25 P.S. § 2621.

5 25 P.S. § 2624.

6 25 P.S. § 2625.

7 These memoranda are not publicly available.

8 25 P.S. § 2641.

9 16 P.S. § 401; 25 P.S. § 2641.

10 25 P.S. § 2641.

11 25 P.S. § 2642.

12 25 P.S. § 2643.

13 See Uniformity, below.

14 See Uniformity, below.


16 4 PA ADC § 183.6.

17 4 PA ADC § 183.9.


19 4 PA ADC § 183.4.

20 4 PA ADC § 183.5.

21 Just prior to the 2004 election, Delaware County, outside of Philadelphia, agreed to process 600 registration applications it had previously rejected for failure to indicate party preference after Democrats complained. Voting access, challenges debated with hours to go, Philadelphia Inquirer, November 2, 2004.


23 The main problem seems to be slowness in the system that existed in 2005. New voter database has rolled out, but questions of viability linger, Morning Call, September 26, 2005; System to prevent voter fraud will be used in Nov. 8 election, Morning Call, October 27, 2005. It is not clear that this remains an issue.


29 25 P.S. § 3050.

30 25 P.S. § 3050.


33 25 P.S. § 3050.

34 2006 Election Day Survey.

35 25 P.S. § 3146.1.

36 25 P.S. § 3145.2a.

37 25 P.S. § 3146.8.


39 25 P.S. § 2624.

40 25 P.S. § 3007.

41 25 P.S. § 2671.

42 25 P.S. § 2675.


44 25 P.S. § 2687.

45 25 P.S. § 2685.

46 25 P.S. § 2684.


25 P.S. § 3050.

25 P.S. § 3050 et seq.

In re Fish’s Election, 273 Pa. 410 (Pa., 1922).

25 P.S. § 2642.

25 P.S. § 2642, 3154.

25 P.S. § 2621, 3159.

25 P.S. § 3261.


25 P.S. § 3261.

25 P.S. § 3263.

25 P.S. § 3154.

25 P.S. § 3154.

25 P.S. § 3291.

25 P.S. § 3312.


25 P.S. § 3401.

25 P.S. § 3376, 3431.

25 P.S. § 3456; In re Petition to Contest General Election for Dist. Justice, 670 A.2d 629, 636 (Pa., 1996); In re Election of Tax Collector, Horsham Tp., 51 A.2d 692 (Pa., 1947). However, note that contests may be filed after the deadline if the complaining candidate had no reasonable way of knowing about the irregularities until after the deadline. In re Petition to Contest General Election for Dist. Justice, 670 A.2d 629, 636 (Pa., 1996).

25 P.S. § 3313.

25 P.S. § 3471.


Changing political landscape has judges acting like candidates, Morning Call, November 3, 2007.


When the current Secretary of State sued to stop a Republican Supreme Court candidate's ad that allegedly violated campaign finance laws, the state Republican party attacked him for "using a frivolous lawsuit as a smokescreen to steer public debate away from...[the opposing candidates'] record of allowing drug dealers back on the streets and...ineexperience and absence." Pennsylvania GOP: Democrats Try to Steal Election and Fail, US Federal News, November 2, 2007.

High court seeks end to rift, Philadelphia Inquirer, February 14, 2008.

In a 1991 Washington County judicial race, a court found that the ballot applications of four absentee ballots had been forged. Appeal of Orsatti, 578 A.2d 1341, 1343 (Pa.Cmwlth., 1991). In 1997, a former congressman forged absentee ballots and cast a number of ballots in Fayette County under the names of nursing home residents. Election fraud indictment credited to minor official, Pittsburgh Post-Gazette, May 22, 1999. Also in 1997, a judge ordered 440 absentee ballots impounded after charges were filed against a Scranton-area mayor who allegedly helped his brother’s judicial campaign by committing fraud. Scranton-area mayor charged over ballots, Philadelphia Inquirer, May 20, 1997. In 2007, a state judge appointed observers in three Fayette County precincts where absentee ballot fraud was alleged to have occurred. Judge names monitors to Brownsville polls, Pittsburgh Tribune Review, November 3, 2007. Courts also concluded that the votes recorded on dozens of non-absentee ballots were changed in a 1993 Beaver County judicial race. In re Petition to Contest General Election for Dist. Justice, 670 A.2d 629 (Pa., 1996).

A handwriting analysis of signatures on absentee ballots in a 1997 Allegheny County (where Pittsburgh is located) race indicated that more than 24 signatures had been forged, triggering an FBI investigation, although one that was ultimately inconclusive. Wagner Replacement is Sought, Pittsburgh Post-Gazette, December 6, 2004. Also in Allegheny County, two individuals were convicted of an absentee ballot scheme committed during a May, 1999 primary. Groups protest leniency in election fraud cases, Pittsburgh Post-Gazette, November 14, 2000. The same year, an Allegheny judge threw out the result of a local school board election after...
hearing testimony that an estimated 83 names had been forged on ballot applications in three polling places. Fixing elections—unusual, but possible, Pittsburgh Post-Gazette, August 22, 1999.


78 In the End, 20 People Charged with Fraud, Philadelphia Inquirer, March 17, 1996.

79 Ruling Delivers Devastating Criticism of Board of Elections, Philadelphia Inquirer, January 10, 1995.


81 Ruling delivers devastating criticism of Board of Elections, Philadelphia Inquirer, April 27, 1994.

82 25 P.S. §§ 3505, 3517, 3553, 3554. In contrast, most forms of in-precinct fraud are felonies. 25 P.S. §§ 3525, 3527.

83 In the End, 20 People Charged with Fraud, Philadelphia Inquirer, March 17, 1996.

84 See From Registration to Recounts: The Election Ecosystems of Five Midwestern States, by Steven F. Huefner, Daniel P. Tokaji, and Edward B. Foley, with Nathan A. Cemenska.

85 Two little engines that just could not, Philadelphia Inquirer, May 17, 2007.


89 Awash in Tall Tales and Bogus Ballots, Philadelphia Inquirer, December 4, 1994.


91 See In re Canvass of Absentee Ballots of November 4, 2003, 843 A.2d 1223, 1231, an unanimous decision interpreting the language of 25 P.S. § 3146.6: [The statute] unequivocally provides that the elector shall send [the absentee ballot] by mail or deliver it in person to the board of election. The word shall carries an imperative or mandatory meaning. Third-person hand-delivery of absentee ballots is not permitted.

92 Verification of signatures contained on absentee ballot paperwork against those contained in registration records is not explicitly required by the code, but the code requires that the information contained in the two sets of records be compared. 25 P.S. § 3146.8. Using this code section, courts have sustained the practice of verifying signatures. Appeal of McLaughlin, 45 Pa. D. & C.2d 333, 336 (Court of Common Pleas, 1968). In 1993, a Philadelphia board of elections member testified that the board had a practice of comparing signatures in this way, although the judge who ordered a new election found that the board did not actually follow that practice. Ruling Delivers Devastating Criticism of Board of Elections, Philadelphia Inquirer, January 10, 1995.

93 25 P.S. § 3146.2c. A federal court ordered the Philadelphia election board to post this information after it was sued for failure to do so prior to the 2004 election. See Meehan v. Philadelphia
Endnotes

County Board of Commissioners, Case No. 2:04-cv-05123-WY (E.D.Pa., 2004).

94 25 P.S. § 3146.6.

95 Pennsylvania Governor Ed Rendell already vetoed one voter ID bill in March of 2006. Pennsylvania Governor Rendell Signs Veto Message Protecting Fundamental Right to Vote of PA Citizens, PR Newswire, March 15, 2006. However, the Pennsylvania House passed another, similar bill just six months later. House passes voter ID bill, Bucks County Courier Times, September 20, 2006. The bill has not become law but Pennsylvania voters continue to debate the issue and efforts at passing an ID requirement may resume after the United States Supreme Court comes down with a decision in the Indiana voter ID case.


98 25 P.S. § 3352.


100 In re Canvass of Absentee Ballots of November 4, 2003 General Election, 843 A.2d 1223, 1234 (Pa., 2004)

101 Marks v. Stinson, 19 F.3d 873, 887 (3rd Cir., 1994): Throwing out the absentee ballots would fail “to take into account the will of electors who would have voted at the polling places but who unknowingly cast illegal absentee ballots relying on the assurances that were an integral part of the scheme which ‘the Board participated in and later tried to conceal.’”

102 Id. at 877.

103 Id. at 877.

104 Id. at 877-878.


107 In re Sheppard’s Contested Election, 77 Pa. 295 (Pa., 1875).


110 Cortés: Counties free to turn away state election watchers, AP Alert – Political, October 26, 2004.

111 Cortés: Counties free to turn away state election watchers, AP Alert – Political, October 26, 2004.

112 Specifically, Republican leaders claimed that the governor, who appoints the Secretary of State, was trying to use the monitors for political purposes. This allegation arose because the program’s chief legal advisor, Mark Aronchick, raised $100,000 for John Kerry, had just quit as Kerry’s legal advisor in the state, and publicly stated that President Bush had “a contemptible pseudosincerity” and a “heart of darkness.” Rendell blasts critics of election watch plan, Morning Call, October 21, 2004. Another reason was that many of the monitors were attorneys authorized by the Secretary to report irregularities to party officials, potentially facilitating lawsuits.

113 25 P.S. § 2684. Thereafter, the Board should train poll workers whenever deemed advisable. 25 P.S. § 2642.

114 See “Polling place procedures,” above.


116 See “Polling place procedures,” above.

117 See “Combating absentee ballot fraud,” below.


120 In 2004, lines were up to five hours long in some locations. Pa. Voters wait hours at polls, but few major problems reported, AP Alert – Political, November 2, 2004; Few problems reported in Pa. voting, AP Alert – Political, November 3, 2004.

121 In 2004, hundreds of Pittsburgh college students were challenged using this procedure, causing long lines in some polling places. Problems plague Pennsylvania voters, Morning Call, November 3, 2004.
In this case, the Pennsylvania Supreme Court did not reach the issue of what to do about operational failure because it resolved the issue on other grounds. Id. at 6. However, in so doing, it did state in dicta that the entire vote of a precinct that opened eight hours late should be rejected and the votes not counted. It seems that this approach would make the problem of disenfranchisement worse, not better.

Exceptions exist for where the voters voted illegally or where fraud disenfranchised them and their testimony is needed to go back and determine how to count their votes. In re Petition to Contest General Election for Dist. Justice, 670 A.2d 629, 640 (Pa., 1996); Appeal of Orsatti, 598 A.2d 1341, 1344 (Pa. Cmwlth., 1991).

Disenfranchisement flowing from operational failure “is an error which there is no mode of correcting… since it cannot be known with certainty, afterwards, how the excluded electors would have voted; and it is obvious that it would be dangerous to receive and rely upon their subsequent statements as to their intentions, after it is ascertained precisely what effect their votes would have had upon the result.”

See “Voting Technology,” above.

Sarasota voters likely confused, Expert says, Palm Beach Post, December 21.

In Berks County, where Reading is located, in 2005 111 ballots cast on a Danaher machine were never recorded due to a programming error. Special election request denied, Reading Eagle, June 29, 2005.


See 25 P.S. §§ 3031.18, 3262.


See In re Contest of Election for Office of City Treasurer, 152 A.2d 363, 366 (Pa. 1960)(“An election is not to be held void for mere irregularities in the conduct of the election, even though the election officers may be subject to punishment for misconduct….”);

See In re General Election of Nov. 4, 71 Pa. D. & C.2d 68, 80 (Pa.Com.Pl., 1975), sustaining a petition “based solely on the allegation that the malfunction of a voting machine allegedly caused a failure to record all votes cast for… [the plaintiff].”