CHAPTER 4: ILLINOIS' ELECTION ECOSYSTEM
FROM ILLEGALITIES TO INCONSISTENCIES

WHEN IT ADOPTED its current state constitution in 1970, Illinois transferred responsibility over its elections from the secretary of state to a newly created state board of elections.[1] The secretary of state at the time, Paul Powell, was a colorful figure in state politics with a less than sterling reputation.[2] Illinois of course has a storied history of political corruption, which at least in previous eras has sometimes been accepted as a cost of doing business there.[3] But by taking election administration out of the hands of a powerful central figure, the revised constitution injected two new characteristics into the Illinois election system. First, in doing away with the secretary of state's role as Illinois' chief election officer, the constitution diffused the real power over elections through a patchwork system of county clerks and municipal elections boards, and left the new state board of elections comparatively weak. The result was a highly decentralized system. Second, the absence of a powerful central authority opened the door to inconsistent procedures across jurisdictions, a problem some Illinois election administrators complain about today.

Furthermore, in recent decades the absence of a strong state elections authority to pull local election officials together seems to have allowed a culture of suspicion and lack of cooperation to develop between many individual jurisdictions, encouraged by the state's history of election fraud and abuse. The presence in the state of both Chicago and Cook County – two huge, separate election jurisdictions that face a level of complexity in administering elections unsurpassed elsewhere in the Midwest – compounds the difficulty of developing consistency in Illinois election administration.

Accordingly, this chapter discusses in turn the following features of Illinois' election ecosystem: (1) decentralized administration, (2) a legacy of fraud that, while diminishing, remains a concern and has helped foster distrust and lack of cooperation among election officials, (3) the presence of mammoth Cook County, as well as Chicago, (4) inconsistencies across jurisdictions, and (5) a substantial risk of litigation attacking these locally divergent practices, as well as other problems that may occur in the state's voting administration. Whether or not any deliberate disregard of established standards or other mismanagement is present in Illinois' current election ecosystem, what is clear is that Illinois needs to achieve greater uniformity in its election administration, built upon improved relationships among its various election administrators. The state's biggest challenge is to find a way to put the past aside and work together to create a consistent experience for every voter and a consistent treatment of every ballot. If Illinois is unable to foster this teamwork and consistency, the state is likely to experience one (or both) of two unfortunate consequences. First, election administrators could be impaired by the financial and management inefficiencies that come from lack of logical coordination. This in turn could lead to concrete problems at the polling places on Election Day. Second, inconsistent election procedures and an uneven quality of election

administration across jurisdictions could trigger lawsuits alleging that voters' constitutional rights to Equal Protection have been violated.

DECENTRALIZED ADMINISTRATION

One of the most prominent features of Illinois' election ecosystem is its decentralized administration, coupled with the comparatively weak role played by state election officials. At the state level, the Illinois State Board of Elections ("SBE") is the body responsible for supervising elections.[4] The eight members of the state board are appointed by the governor,[5] subject to the advice and consent of the state Senate.[6] The board must consist of two members from Cook County who are of the governor's political party, two members from elsewhere who are of the governor's political party, and two members from each of these regions who are of the other leading political party.[7] The members serve staggered terms.[8] Five out of eight votes are needed in order for the board to take any action.[9] The board has staff in both Springfield and Chicago.

Nevertheless, the real power in Illinois' election system resides in local jurisdictions, many of which function almost independently of the state board of elections. This is not just because the state board has modest formal power, but also because it has relatively limited resources, as well as little credibility among local administrators of many of the larger jurisdictions. The board has the authority to supervise elections, but its executive director characterized this supervision as "indirect." Its principal power derives from its authority to certify (and decertify) election equipment. As a result, the board functions mainly as a clearinghouse of information for local election officials.

At the local level, Illinois election administration occurs in a few large jurisdictions and about one hundred smaller jurisdictions. In most parts of the state, the county is the primary unit of election administration, and in all counties except DuPage County an elected county clerk is in charge of elections.[10] However, Illinois' "City Election Law" also allows cities to choose to govern their own elections independently of their county.[11] Eight out of Illinois' 110 election jurisdictions, including Chicago, use this system.[12] Cities that have opted into this system govern elections through a three-member board of elections appointed by the county circuit court.[13] At least one representative of each of the two leading political parties must sit on this municipal board.[14] The circuit court may remove board members upon filing of a proper complaint, but the code does not specify what would be sufficient to justify such removal.[15] An appointed executive director oversees day-to-day operations.[16]

Large Jurisdictions. By far, Illinois' two most important election jurisdictions are Chicago and Cook County. Both jurisdictions serve about 1.4 million registered voters,[17] and together represent about thirty-seven percent of the state's registered voters.[18] Though Chicago is in Cook County, it operates elections independently from the county because it has opted to use the state's City Election Law. Chicago and Cook County are both heavily Democratic, and have worked successfully together in many instances, but they also disagree about matters both practical and philosophical, which sometimes has created tension. Their place in Illinois election administration is discussed in greater detail below.

Another important large jurisdiction is DuPage County, a wealthy predominantly Republican jurisdiction west of Chicago. DuPage County, like Chicago, has opted out of the county clerk-based system but, unlike Chicago, uses a county, rather than municipal, board of elections.[19] Historically, DuPage County wielded great influence in state election policy, but it lost much of that influence after Democrats came into power in the 2000 elections. Nevertheless, DuPage County remains a leader in election administration and is particularly strong in the area of election technology. For instance, its executive director explained that it uses a custom-built electronic flow-chart system to help election workers process incoming voters to determine if they are eligible to vote an ordinary ballot or must cast a provisional one. DuPage County also paid to develop a computer system that creates records (not recordings) of incoming election hotline phone calls on Election Day.[20] The system keeps track of who made the call, what election administration question was asked, who handled the call, what solution was provided, and other matters. The system allows administrators to analyze their operations after the election and identify areas for improvement. Most other jurisdictions simply cannot afford this level of technology.

Other large jurisdictions include Lake County, a wealthy suburban area of about 650,000 people just north of Cook County; Will County, with a population of about 500,000 just south of Cook County, and Kane County, just west of Cook County, with a population of about 400,000. The next largest election jurisdiction is McHenry County, northwest of Cook County, with a population of about 260,000. (Winnebago County, in the western part of the state, has about 280,000 residents, but this includes Rockford, which is its own separate election jurisdiction.)[21]

Smaller jurisdictions. While much of Illinois' population is concentrated in Chicago and its immediate suburbs, a significant number of people live in smaller jurisdictions in the more distant Chicago suburbs, as well as farther downstate. While any bright-line distinction between small and large jurisdictions is arbitrary, if we define a small jurisdiction as any county with fewer than 300,000 residents, then approximately 3.2 million registered voters, or forty-three percent, come from such jurisdictions.[22] These jurisdictions are important not only because collectively they represent a significant number of voters, but also because they face different obstacles than those faced by large urban and semi-urban jurisdictions like Chicago and Cook County.

One problem of smaller jurisdictions is a lack of quality control in leadership. As in Cook County, the chief election administrator in most small jurisdictions is an elected county clerk.[23] However, unlike in Cook County, where the clerk position offers comparatively great power and visibility, in smaller jurisdictions the position of county clerk may not attract the same number or caliber of candidates. County clerk candidates are not required to have any training in running elections, or even to be high school graduates. Accordingly, the level of professionalism and experience in election administration varies widely between county clerks. Newly elected clerks are especially unlikely to have any relevant elections experience and, unlike in Cook County, they do not have access to a vast professional elections staff that can get them up to speed. Some state

elections officials, although expressing confidence in Illinois election administrators as a whole, are of the view that the lack of any formal check against maladministration at the county level is a notable flaw in the state's election system.

Another problem is a lack of legal sophistication in the smaller jurisdictions. Unlike Chicago and Cook County, most of the state's election jurisdictions do not have in-house legal advisors. Rather, state law designates the local state's attorneys as their legal advisors.[24] In most cases, this means someone with little or no training or experience with election law, and furthermore someone who may be more concerned (perhaps rightly) about bringing an important murder case to conclusion than rendering opinions about such matters as post-election chain-of-custody rules for provisional ballots. There is no guarantee that state's attorneys in different parts of the state will provide the same legal advice, thus opening the door to inconsistency in the administration of state election laws. Additionally, some Illinois election officials expressed the opinion that because state's attorneys are themselves elected officials, they have an interest in staying out of election matters so as not to disturb the system that has brought them and their political allies to office. Yet smaller jurisdictions simply have nowhere else to turn because the SBE does not offer legal advice, and indeed is admonished to avoid doing so by a state attorney general opinion issued in 1987.[25] Accordingly, one obvious reform would be to create a "legal office" within the Illinois State Board of Elections, and require local election administrators to go there, instead of to their local state's attorneys, for legal advice and representation in the conduct of elections.

The resources of these smaller jurisdictions are also limited in other ways. Unlike Chicago, Cook County, and other large jurisdictions, small jurisdictions do not have information technology departments versed in the intricacies of how to configure voting machines and manage the statewide voter registration database. In fact, until Illinois implemented the Help America Vote Act in a way that required the statewide voter registration database to be updated by local jurisdictions, some of these offices did not have even one computer for use in elections.[26]

Devoid of in-house technical savvy and lacking strong leadership from the SBE, these jurisdictions often fall into a condition known as "vendor dependency." When administrations do not have the sophisticated staff necessary to administer technical matters, they rely primarily on vendors to maintain and configure their voting machines. Administrators stuck in this position sometimes find that the vendors, having already sold their machines and service contracts, have little to gain by giving the local officials their utmost attention. Instead, the profit-maximizing strategy is to save costs by providing no more support than is necessary to avoid a lawsuit, leaving the administrators in the lurch. This is particularly a problem with direct recording electronic ("DRE") vendors because DRE machines must be configured and tested before each election to accommodate the numerous ballot styles across all precincts. This problem most affects smaller jurisdictions, whose contracts represent smaller dollar amounts and whose future business vendors decide they can therefore afford to lose.

All of this is not to say that smaller jurisdictions are unable to run procedurally satisfactory

elections. In fact, despite their challenges, many smaller communities may have an easier time running elections than their larger counterparts, especially where their county clerk or elections director does possess election administration experience. Smaller communities are typically more tight-knit than larger communities, making it easier to recruit, train, and retain poll workers from year to year. They also tend to be more politically homogenous than larger jurisdictions, creating an environment of trust that frees administrators to implement policies, rather than expending resources in an effort to justify those policies to the media and various stakeholders. Concerns about voter impersonation and double voting are lessened in a small precinct where "everybody knows your name."

Weak State Board of Elections. Statutorily, the Illinois State Board of Elections has the power to disseminate information to and consult with election authorities, prescribe the use of standardized registration and ballot forms, certify voting equipment, require elections statistics from local authorities, make recommendations to the legislature, determine the validity and sufficiency of petitions to amend the state constitution, maintain a public library of elections information with precinct maps, and generally supervise elections.[27] Nevertheless, as a practical matter its power is somewhat limited. One limitation is that the evenly bipartisan eight-member board requires a majority vote of five members in order to act. Therefore, like the Federal Election Commission (which has a similar evenly bipartisan structure), the board is susceptible to partisan deadlock and thus unlikely to adopt any decisive policy that might provoke partisan disagreement. In addition, with the exception of HAVA funds, it does not have control over the purse strings of local election administrators. It also does not have the ability, like some secretaries of state elsewhere, to remove local officials who do not perform satisfactorily. Without these powers, it is doubtful whether the SBE has the ability to compel the use of correct practices, short of going to court for a writ of mandamus. Moreover, it does not even have adequate resources to monitor the procedures used by local jurisdictions and to identify problems ahead of time. With respect to large jurisdictions, it appears unable to exercise even informal types of power, such as the power of persuasion.

Indeed, almost every large jurisdiction administrator with whom we spoke expressed doubt about whether the state board had either the necessary resources or expertise. Poll worker training affords a good example. Although the SBE currently offers its own free training for poll workers, most of the local administrators whom we interviewed choose not to take advantage of that training, but instead to conduct their own. Part of the reason they reject the free training is that the SBE does not have the detailed, working knowledge of local technology that each jurisdiction has developed from experience. The SBE also offers free training materials on some (but not all) Election Day procedures, but only two of the five jurisdictions whose administrators we interviewed (both from smaller jurisdictions) currently use those materials. One of these jurisdictions had previously used training materials provided by the jurisdiction's voting machine vendor, and only switched to SBE materials after state legal requirements concerning absentee voting made the vendor's manual obsolete.

Furthermore, partially because of past political disputes, the SBE has lost the respect and trust of many if not all of the powerful local administrators, and dialog between them today is in some cases limited. For instance, although the board's power increased slightly as a result of its control over HAVA funds, it subsequently lost a fight to control implementation of the state's voter registration database and, in the process, further alienated itself from the rest of the Illinois election administration community. Local administrators resisted the board's effort to oversee the database in part because they were concerned that if the state were given responsibility for the database, the project would be "dumbed down."

The weakness of the SBE is also suggested by the relative dearth of resources it commands when compared to jurisdictions such as Cook County and Chicago. Cook County has close to 120 employees working on elections and Chicago has about 180, while the SBE has about sixty-five. The budgets are also disproportionate: For the coming year, Chicago is proposing an annual elections budget of about $31 million and Cook County is seeking about $27 million,[28] while the SBE works on a statewide budget ranging from $8.5 to $10.5 million (not counting HAVA funds), depending on whether it is an off-year. Given these limitations, the SBE's former director said the entity is simply incapable of performing the kind of widespread compliance audits that would be necessary to verify that local jurisdictions are following procedures correctly. Part of this lack of resources comes from the fact that SBE staff has been reduced by about forty percent since its creation in the 1970s, while HAVA has only added to its responsibilities.

Moreover, although the state board of elections has the authority to promulgate regulations, as well as to issue other types of guidance for local election administrators, it currently does not have on the books a single administrative regulation concerning provisional voting, early voting, ballot security, recount procedures, or most areas of absentee voting and Election Day polling place procedures.[29] Nor does it have any plans to issue a uniform manual for local administrators. In the absence of any comprehensive written instructions from the board, local authorities have chosen to create their own manuals and procedures, either from whole cloth or using materials provided by voting machine vendors. The SBE does have the power to review these local manuals and require changes, but the SBE's current executive director could not think of a time that the SBE had ever done so. This opens the door to variation in procedures across jurisdictions.

One important power the SBE does have and makes use of is its ability to certify voting machines. Vendors must survive this testing in order to market their machines and services to local jurisdictions in the state.[30] Although the SBE takes pride in its testing, some local election administrators viewed the SBE's testing as neither as rigorous nor as meaningful as the SBE would like to think. Nevertheless, these administrators acknowledged that the SBE's certification power does give it leverage over some aspects of local election administration.

Despite the weakness of the Illinois State Board of Elections compared to the chief elections authorities in other states, the SBE nevertheless does play an essential role for many of Illinois' smaller jurisdictions. Our sense from a relatively small sample size of election

administrators from smaller jurisdictions was that the majority of them probably could not function without the SBE's guidance. The executive director of the East St. Louis Board of Election Commissioners, for instance, could hardly have spoken more highly about the SBE or its director of elections information, whom we also found to be highly competent and committed to helping local administrators. Furthermore, some of the criticisms that the larger jurisdictions directed at the SBE may be partly a consequence of policy decisions supported by these same large jurisdictions to limit the funding, staff, and formal power of the SBE, and accordingly may also be a reflection that the larger jurisdictions do not want a stronger central authority.

Indeed, the key problem may be less that Illinois law creates a weak state board of elections than that the state's culture has shaped it to be toothless. While the law on the books also could be improved, it is primarily the culture that needs to change. It is fair to say that Illinois administrators are more independent and individualistic than administrators in a state like Minnesota, for instance, and their politics are more divisive. HAVA implementation only exacerbated those divisions. For instance, problems implementing a joint agreement to cooperate in choosing and administering HAVA voting machines have created significant tension between Chicago and Cook County. Many local administrators also have lingering resentments over the battle with the SBE to determine whether the statewide database would be operated on a top-down or bottom-up basis. The SBE itself undoubtedly could do more to bring people together and create consensus, especially given some administrators' perceptions that the SBE tends to act unilaterally and without input. The governor and the state legislature also need to provide leadership to make the SBE a more effective institution.

A LEGACY OF SIGNIFICANT BUT DIMINISHING FRAUD

Illinois is a state with a dispiriting history of election fraud and public corruption.[31] Although a powerful statewide elections official may once have provided one set of opportunities for fraud, the lack of a strong central authority since 1970 has created another breeding ground for potentially corrupt elections. According to news reports, in the last twenty-five years some fifty separate election fraud prosecutions have occurred, many of them involving multiple offenders. Although most of these prosecutions occurred in areas in or around either Chicago or East St. Louis, they have affected the entire state.

For instance, after the 1982 gubernatorial elections, widespread allegations of fraud in Chicago led to almost sixty convictions and caused a civil grand jury to conclude that 100,000 illegal ballots had been cast (although one former state election administrator cautioned us that the 100,000 figure might have been overblown for political reasons).[32] When similar allegations surfaced after the 1987 Chicago primary, the then-chairman of the Chicago Board of Election Commissioners estimated that between 36,000 and 52,000 votes had been cast by unregistered voters.[33] In 2003, the Cook County Clerk quashed an apparent attempt to cast some 250 illegal votes in Cicero and Chicago Heights, south of Chicago.[34] In *Qualkinbush v. Skubisz*,[35] an appellate court all but accused a mayoral candi-

date in Calumet City, south of Chicago, of personally overseeing a program of improperly influencing absentee voters in the 2003 election. In East St. Louis, nine individuals, including some local political leaders, were convicted of vote-buying in the November 2004 general election.[36]

Nevertheless, many of today's Illinois election administrators believe that the state's election ecosystem is so different today than it was twenty-five years ago that it is highly unlikely that Illinois would suffer a repeat of the widespread voting fraud that happened in the 1982 governor's race. According to these administrators, a number of important reforms and changes in voting technology have made election fraud more difficult to accomplish, especially on a massive scale. And the recent prosecutions described above may themselves reflect that the ecosystem has now developed better means of catching the perpetrators.

Illinois election administrators are correct to note that it is much more difficult to accomplish in-person voting fraud today, especially if polling places meet the legal requirement that poll workers from both political parties be present at all times. But we nevertheless are not fully sanguine about the risk of insider fraud committed by an election official determined to steal an election. Meanwhile, absentee fraud is a different issue entirely, as Illinois administrators also acknowledge. It is not a matter of whether such fraud occurs, but how often and in what magnitude. Still, Illinois elections are more secure today than in the past. What follows is a short discussion of developments since 1982 that have helped reduce fraud, and the vulnerabilities that continue to exist.

Improvements in voter registration. Part of the problem in the 1982 gubernatorial race was the Illinois registration system, which left the door wide open for fraud. No identification was required to register to vote,[37] and canvassing for outdated or otherwise invalid registrations was done using a cumbersome door-to-door process that effectively ensured that many such registrations would remain on the rolls.[38] The canvassing had to occur on an unrealistically short timeline, and in many cases required canvassers to get past security into apartment buildings, which they often could not do.[39] Frustrated canvass workers often failed to perform a thorough canvass.[40] Nonperformance was particularly high in areas perceived to be dangerous.[41] Lingering numbers of bad registrations became a vehicle for corrupt election judges and others to cast fraudulent ballots in the polling place at the end of Election Day.

Today, voter registration reforms have reduced the risk of fraud, both by reducing the chance that invalid registrations will make it onto the rolls, and by making the canvassing process more efficient at removing such registrations from active lists. The law now requires two pieces of identification for in-person registration,[42] and HAVA identification for mail-in registration.[43] By late 2007, Illinois anticipates that it will have a fully functioning system for verifying incoming applications against records from the Social Security Administration. It also hopes that its system for verifying registration applications against state motor vehicle databases will be fully implemented in the near future. These systems should further lessen the likelihood of improper registrations reaching the official rosters.

Once the registrations are in the database, officials will continue to remove invalid registrations with the help of improved canvassing procedures. Since 1982, officials have been sending out postcards to all voters automatically once every two years,[44] and to registrants who have not voted for four years.[45] Pursuant to the National Voter Registration Act, when the postcards are returned as undeliverable, the state can begin a process that may lead to these registrations being removed once an additional four-year cycle elapses without any contact or activity by the voter.

Nevertheless, by some estimates Illinois has almost one million "inactive" names on its statewide database, some sizable portion of which certainly reflect voters who have moved or died (a figure comparable to Ohio's number of "inactive" voters).[46] Because the public has a right to see the names of those voters who have not responded to a confirmation notice, potential wrongdoers still have some ability to determine names that could be used to perpetrate fraud.[47] Election judges in each polling place also have the ability to identify inactive voters,[48] and could theoretically use this information to forge ballot applications and cast fraudulent ballots, as in 1982. Although this type of fraud also could be accomplished with active registrations, the inactive registrations could facilitate misconduct both by eliminating the need to wait until the end of the day and by providing more names under which fraudulent votes could be cast, provided election judges have an opportunity to do so (for instance, if real bipartisanship is lacking among the judges at a particular polling place).

Increased prosecutions of vote fraud. Officials also cite heightened law enforcement efforts as a factor reducing the risk of fraud. Election administrators describe both an increased presence of plain-clothed police officers at many polling places, and significant law enforcement support from the state attorney general and local U.S. Attorneys, who since 1982 have been more aggressive in investigating and prosecuting election crimes. In March 2002, for instance, Chicago and Cook County each stationed about 300 investigators in polling places and received support from the local U.S. Attorney, FBI, and U.S. Marshals Service.[49] Officials dispatched over 200 prosecutors and investigators to polling places in the February 2007 election.[50] In 2000, the U.S. Justice Department obtained permission to monitor Cicero, a west Chicago suburb with a reputation for fraud, for a five-year period.[51] DOJ also has made a point over time to target other areas known for fraud.[52] In addition, the state attorney general has sent investigators out into the field to detect election fraud.[53]

Of course, these efforts themselves are some evidence of the continuing need for vigilance in controlling election fraud. Meanwhile, it is not clear how completely potential improprieties observed during an election are pursued by prosecutors and other officials after an election is over. For instance, on at least one reported occasion, the SBE has indicated that it will not investigate suspicious activity unless someone files a formal complaint.[54] Other improprieties presumably go undetected altogether.

Institutional weaknesses as a remaining source of vulnerability to fraud. As discussed above, Illinois' highly decentralized election system heavily depends on the work of more than one hundred county clerks, all of

whom are elected, as well as a handful of city officials and appointed local elections directors. Having an elected county clerk run elections presents an obvious potential conflict of interest if that clerk or the clerk's political allies are in a close election. While that risk is present in many states, it is a bigger risk in states with a demonstrated history of fraud. In one recent instance, a county clerk was "opening absentee ballots and replacing ballots in favor of [one candidate] with ballots naming her opponent."[55] The institutional arrangements of the Illinois election system leave it more vulnerable to fraud than it should be.

One current weakness in Illinois's election law is the authority, in most jurisdictions, of a single elected county clerk to compile vote totals received from the various precincts, for the purpose of reporting those totals to the state elections board.[56] This is the result of a recent amendment to the state election code that abolished local canvassing boards because some of the party representatives on these boards often would fail to appear for the canvass. Where the statute used to specify that county clerks should conduct the canvass "with the assistance of the chairmen of the county central committee of the Republican and Democratic parties of the county,"[57] it now provides simply that the "election authorities of the respective counties" are to conduct the canvass.[58]

Despite the administrative convenience of letting the canvass proceed with only the local "election authority," reposing this responsibility in a single partisan official obviously increases the risk that these elected clerks may be tempted to misreport the returns to the state board in order to change the result of an election. Party leaders are still entitled to receive copies of the abstracts of votes immediately after the clerk completes them,[59] but to the extent that party leaders were failing to attend the canvass even when they were part of the canvassing board, it would seem that they would be even less likely to be present now. Some argue that the canvass is increasingly ministerial, given that in a recount, an aggrieved candidate could go back and look at the original "tapes" or vote totals from each voting machine to check the validity of the canvass, making any fraud in the canvass obvious. But it is not unrealistic to imagine some daring clerk taking the risk, and seeking to defend the error as a mistake if it is subsequently discovered. In any event, when the canvassing process does not structurally ensure bipartisanship, candidates and the public will understandably have less confidence that the job has been done correctly. In contrast, Michigan,[60] Wisconsin,[61] and Ohio[62] use bipartisan boards to canvass precinct returns.

This particular structural problem does not apply to Chicago, East St. Louis, or the other cities whose "election authority" under state law is a separate multi-member election board, rather than a clerk (although some members of these boards also could choose not to participate in their duties to assist with the canvass). Yet even the few local jurisdictions with bipartisan representation on local election boards may be susceptible to the risk of partisan domination. In East St. Louis, the one Republican board member, who was required by law to vote Republican, nevertheless voted Democratic in a primary, suggesting that the local election board was in fact composed of three Democrats, with no Republican representation.[63] The likelihood that this one board

member was truly a Democrat, masquerading as a Republican simply to satisfy the legal requirement that there be Republican representation on the three-member board, is increased by the circumstantial evidence that her husband is a prominent local Democratic leader. Despite the fact that she was eventually removed from the board, this may have been an example of a legal safeguard that arguably is neither sufficiently robust, nor meaningfully enforced even to its limited extent. Illinois needs to consider election law reforms that would do more to assure that the canvassing of vote totals is conducted in a transparently bipartisan or nonpartisan manner.

The system does have some safeguards built into it to decrease the likelihood of fraudulent conduct. In particular, in the wake of the 1982 gubernatorial election Illinois established a mandatory five percent post-election audit of voting machine accuracy, hoping to deter fraud by ensuring that precinct returns reflected the counts recorded on the voting machines themselves.[64] This requirement obligates the SBE to randomly select five percent of precincts for auditing, and local officials then are expected to verify that the precinct vote totals are accurate, either by comparing them against the DRE paper audit trail,[65] or by rerunning optical scan ballots through the machine.[66] Unfortunately, this requirement may not be uniformly followed or enforced, as the SBE could not confirm for us that all jurisdictions are consistently conducting or reporting the results of their audits. A good audit procedure, coupled with bipartisan control and enforcement, can substantially help reduce the risk of fraud.

Another institutional problem is that the appropriate party balance is not present in all polling places, despite improvements in the law governing this issue. In 1982, the law required that election judges from both of the leading political parties be assigned to each polling place,[67] but at that time the judges were required to reside in the precinct in which they served.[68] Because some wards are dominated almost entirely by one political party, this requirement ensured in practice that some polling places could not achieve the appropriate party balance.[69] The law has since been changed to allow importation of poll workers from anywhere in the subject county, and administrators do their best to use this provision to stock polling places with members of both parties.[70] Nevertheless, election officials do not deny that they continue to experience some difficulties in achieving the appropriate party balance. In our opinion, the state needs to do more to ensure that local authorities have the resources to bring polling place operations into compliance with this important legal requirement. The state also needs to do more to ensure that the requirement is monitored and enforced. Noncompliance with this requirement is of particular concern in areas where the election administrator is of the same party as the judges in the imbalanced precincts, and therefore in a position to overlook suspicious activity.

Increased concern about absentee ballot fraud. Given the improvements in election integrity since 1982, absentee ballot fraud is a much more promising way to steal elections today than traditional polling place fraud. Our informal review of the most recent cases of alleged election fraud in Illinois showed that eleven out of fifteen instances since 1990 involved the absentee voting system, while only

one clearly involved in-precinct ballot-box stuffing.[71] This is a marked change from the problems in 1982, which mostly consisted of precinct captains, party workers, and election judges looking in the poll book at the end of Election Day for the names of those who had not voted, and then forging ballot applications and casting ballots in the names of those voters.[72]

A number of policies and procedures are designed to discourage absentee ballot fraud. As a primary tool, Illinois continues to limit the grounds for voting by absentee ballot,[73] rather than allowing any voter to vote absentee, as other states have done. With limited exceptions, Illinois then requires that absentee ballots be returned personally by the voter or an immediate family member.[74] In addition, under Illinois law it is a felony to solicit individuals to vote absentee, subject absentee voters to undue influence, tamper with absentee ballots, or return another's absentee ballot without authorization.[75]

To the extent that these legal provisions do not prevent absentee ballot fraud, at least some administrators make an effort to detect the presence of absentee fraud by looking for "spikes" in the number of absentee ballot applications coming from certain precincts or addresses. Cook County targets such spikes and places phone calls to every voter who requests an absentee ballot in the target precinct or address to ensure that the voter is not being manipulated into participating in an absentee balloting scheme. As Illinois' newly created (since March 2006) early voting program picks up steam, it will reduce the number of legal absentee ballots cast and could cause such spikes to stand out in even starker relief. Chicago makes similar phone calls to some portion of voters who have requested absentee ballots. In addition, state law requires administrators to verify absentee voters' signatures both at the ballot request stage and upon ballot return,[76] and if rigorously enforced these requirements may help to identify some forms of absentee voting fraud.[77] Despite these safeguards, however, the potential for absentee ballot fraud remains more than just theoretical.

CHICAGO AND COOK COUNTY

As suggested above, Chicago and Cook County dominate the world of Illinois election administration. Not only do they represent roughly thirty-seven percent of registered voters, but they also carry the greatest weight with the legislature and have substantial influence over what state election laws are adopted. In addition, Illinois has a history of treating Chicago and its suburbs as separate from the rest of the state in most matters, and that treatment also applies to election administration. Indeed, the law itself exempts the giant Chicago suburbs from the ordinary voter registration laws,[78] and Chicago has opted out of the general election laws by adopting the City Election Law.

Cook County, like most Illinois jurisdictions, runs elections through an elected county clerk, presently David Orr. Orr is a popular, progressive Democrat who started his political career as a Chicago alderman and has been the Cook County Clerk since 1990.[79] His office consists of approximately 120 employees in its elections division. Currently, Orr's division of elections operates on an annual budget of about $21 million and is seeking about $27 million for the coming fiscal year.[80] Among other policies, Orr supports

expanded access to voting and aggressive reporting of potential voting fraud.

By comparison, the Chicago Board of Elections has about 180 employees (including some forty who are seasonal) and expects to have a budget of $31 million for the upcoming fiscal year.[81] Chicago's current elections director is Lance Gough, an expert in voting technology who has been with the board since 1988.[82] Like David Orr's office, the Chicago board is Democratic,[83] but with a more conservative orientation focused less on expanding voter participation than on running smooth elections. According to Gough, the history of fraud in Chicago pushes the board to work hard to maintain a clean, professional image, and the board will go to great lengths to avoid embarrassment. Indeed, as another board official related to us, the board once persuaded the local fire department to use a fire engine to rip the doors off of a polling place when its owner failed to show up on time to unlock them.

By themselves, both Chicago and Cook County are more populous than many states,[84] and the scale of their elections operations is commensurate. The difference in these jurisdictions' operations and those of smaller jurisdictions therefore is not merely one of degree, but becomes a difference in kind. For instance, Chicago has 2,600 precincts and 3,000 DRE voting machines, which can take up to four hours each to calibrate and test. The logistics of such an undertaking are immense, as are the logistics of storing and delivering this equipment to thousands of precincts, all in a secure process that protects against tampering. Cook County's operations are similarly complex. Other election administrators reflecting on these types of complexity praise Orr and Gough for tackling an "impossible" job. In the face of these types of challenges, Chicago and Cook County understandably desire a free hand to administer elections in the way they think is best and are skeptical of proposals that favor centralization and bureaucracy.

Although they remain separate entities, Chicago and Cook County frequently must work together to run elections. For instance, because Chicago voters are eligible to vote for Cook County offices, vote totals for both jurisdictions must be combined before determining winners in those races. Furthermore, the two jurisdictions have gone beyond the degree of cooperation that is strictly necessary by entering into joint agreements with equipment vendors to supply uniform technology through all areas of Cook County. But some of the natural tension between the two offices was exacerbated by the implementation of this technology, which was initially flawed and caused delays in precinct reporting in the 2006 primary and general elections.[85] By some accounts, the relationship between the two jurisdictions has soured after these difficulties.

INCONSISTENT APPLICATION OF LAWS AND STANDARDS

Given the lack of central direction over Illinois election administration, some (but not all) Illinois election officials to whom we spoke thought that the state faced a problem of inconsistent procedures in different jurisdictions. Unfortunately, only anecdotal evidence exists upon which to base such conclusions, as the state has no systematic auditing program for evaluating the performance of election personnel.[86] The variance in opinions on this issue may say more about political attitudes than

about actual reality, making things even less clear. Nonetheless, we are inclined to credit those who express concern about the existence of significant local variation in election administration practices, as they speak with a vividness and specificity that suggests a basis in fact, and the inherently decentralized structure of voting administration in the state of course invites just such local disparities.

Illinois's two largest elections offices, in Cook County and Chicago, were the least concerned about inconsistency across jurisdictions. Cook County officials admitted that some degree of inconsistency existed, but thought that it was not so severe as to justify large-scale reform, and tended to involve relatively minor matters. One official proposed that it would be enough for the SBE to start offering formal training for local election administrators themselves, as opposed to only offering training for poll workers.[87] A representative of the Chicago Board of Elections thought that inconsistency was even less of an issue and did not seem to think that Illinois' decentralized system raised any concerns about different jurisdictions taking different approaches.

Elsewhere, election administrators to whom we spoke did think that inconsistency was a real concern, albeit one that was not yet quantifiable. An elections official in DuPage County thought that important ambiguities and inconsistencies existed in a number of legal requirements and practices, including: (1) whether jurisdictions would accept a partially flawed voter registration application, (2) whether to count absentee ballots lacking postmarks,[88] (3) whether jurisdictions were performing the mandatory five-percent post-election audit of voting system accuracy (described above) (4) whether poll workers were requiring HAVA-mandated identification from first-time mail-in registrants voting at the polls, (5) procedures used to perform "logic and accuracy" tests on DRE voting machines before and after elections and recounts, (6) whether suspicious circumstances are reported to authorities for investigation and prosecution, (7) whether paper notice of cancellation is sent to a voter when a voter's registration is removed from the statewide database, and (8) the circumstances in which voter registrations are removed from the database. Because of ambiguity in the law governing recount proceedings, at least one local official thought that a statewide recount of ballots would likely devolve into a Florida-like debacle. One official at the state board of elections, whose job it is to field procedural questions from local administrators, said that he knew from firsthand experience that some jurisdictions were following inconsistent procedures in the areas of concern identified by DuPage County. The past director of the SBE agreed that the inconsistency concern is real.

Some of these officials felt that Illinois election administrators have pressured the legislature to make laws deliberately ambiguous. Illinois election jurisdictions are not integrated or accountable to a powerful central authority, they argued, but are accustomed to doing things their own way. They do not want strong, precise laws that force them to use the same practices as the neighboring jurisdiction. Therefore, when new legislation is being drafted, local election officials sometimes put pressure on legislators to leave enough "wiggle room" in the statute to allow them to do as they see fit. These officials also felt that inequality of resources and legal and technical expertise

between jurisdictions and lack of meaningful monitoring and enforcement from the SBE contributed to the problem of inconsistency.

A good example of the "wiggle room" phenomenon is the Illinois provisional ballot statute, which provides that provisional ballots should be counted when it is at least equally likely as not that, based on information available to the administrator, the provisional ballot was cast by a voter properly registered in the precinct.[89] The decision is to be made based on the "totality of the circumstances."[90] As one administrator observed, this law leaves the administrator to make too many assumptions. However, another administrator felt that, in practice, the evidence will usually point obviously one way or the other, and that there would be few gray areas that would leave an administrator in doubt.

But even where wiggle room does not exist, some administrators felt that certain procedures would not be followed or taken seriously. One example is the mandatory five-percent audit of voting machine accuracy described above, which is required to occur after each election, before the results are announced. This procedure was initially adopted after the infamous 1982 election, and officials hoped that it would help deter fraud. It could also be used to catch malfunctioning voting machines that fail to record votes correctly. However, in practice, it appears that some election officials may not be completing the audit. The SBE, to which local officials are supposed to report the results of their audits, informed us that some jurisdictions have not reported all of their results all of the time. These omissions could be merely failures to report (the generous interpretation given by the SBE official to whom we spoke), but they could also represent failures to complete the audits themselves. But even a failure to report the results is a cause for concern, especially if the information in those results would have revealed or suggested irregularities.

Major inequalities in funding also exist across the state. These are not merely financial concerns, but have a real impact on voters' experiences. Today, the biggest financial problem appears to be the costs associated with maintaining new HAVA-compliant voting machines.[91] In East St. Louis, the city's election director worries that there will be no funding for performing required voting machine maintenance in his jurisdiction before the 2008 presidential primary and general elections – a concern echoed elsewhere in the state. This is a serious problem looming on the horizon. Our nation has previously seen proof of what should be obvious anyway, namely, that poorly maintained technology can lead to lost votes.[92] In contrast, the relatively wealthy DuPage County can often forgo expensive repairs because the county has a stock of extra voting machines on hand that can be swapped out for a malfunctioning machine when necessary.

RISK OF LITIGATION

The variations in local practices described above could serve as the basis for potentially contentious and costly litigation, thereby further eroding public trust in the state's voting system. A lawsuit with this premise might appear in the form of an election contest between candidates as in the *Bush v. Gore* litigation, but it might also appear as a general civil rights lawsuit alleging violation of voters' Equal Protection or other constitutional rights.[93] For the

time being, Illinois may be insulated from such litigation because it is not perceived by most analysts to be a battleground state. However, insofar as Illinois becomes more prominent on the national scene – something it has attempted to do by moving up the date of its primary from mid-March to early February[94] – it risks having its election system critically scrutinized, and perhaps upended, in litigation. Similarly, if Illinois has a close statewide election for governor, as it did in 1982, or another important elected state office, litigation would be likely, and election attorneys could find an ample number of issues to raise. Such an election contest would almost certainly include claims that provisional ballots were not counted properly, and would also probably include a host of other claims related to chain of custody procedures, voting machine configuration, spoiled ballots and ballots with distinguishing marks, and other irregularities.

Precedent already exists for litigation attacking such inconsistencies: In 2002, a federal district court held that voter allegations that the voting machines in some Illinois jurisdictions generated more residual votes (ballots cast but not counted, either because no candidate is selected, or because ballot markings appear to select two candidates for a given office, resulting in no vote being counted) were sufficient to state a claim for violation of the U.S. Constitution's Equal Protection Clause and other rights.[95] It is not hard to analogize the problem of the disparate impact of different voting technologies to many of the other types of inequalities and inconsistencies in election administration discussed earlier, creating fertile ground for litigation. For example, if (as has been alleged by several election officials in the state) some jurisdictions adopt more lenient standards for the verification of provisional ballots than other jurisdictions, that inequality in vote-counting procedures would serve as an obvious basis for an Equal Protection challenge, whether filed in federal court or as part of a state-court election contest proceeding.[96]

If these issues do emerge in state-court litigation, it is not clear that Illinois courts will be able to put them to rest in a way that prevents the reputation of the state's entire election system from suffering. Illinois judges are elected, and in recent years special interest groups supporting and opposing tort reform have poured unprecedented amounts of money into judicial campaigns, especially in the southern part of the state,[97] as well as on the state's supreme court. One poll found that eighty-five percent of Illinois voters believe that judges are influenced by campaign contributions,[98] and the reputation of the judiciary suffered further erosion as a result of Operation Greylord, a 1984 investigation of corruption in the Cook County judicial system that resulted in the conviction of thirteen judges and fifty-one attorneys.[99] In this politicized environment, voters are likely to see the judicial resolution of any such litigation as political and therefore illegitimate, even if judges do their best to remain impartial.

The contest over the 1982 gubernatorial election[100] does not give one much reason for optimism in this regard. There, the Illinois Supreme Court split 4-3, largely on partisan lines (one Democrat joined three Republicans in dismissing the contest filed by the Democratic candidate). The reasoning of the majority opinion is legally dubious, striking down the state's contest law as unconstitutional because the special court assigned to hear the contest

was not a conventional "court" within the meaning of the state constitution. A second and alternative ground offered by the majority opinion seems no more defensible, as contrary to precedent, it refused to let a claim go forward because there were insufficient allegations to cast doubt on the result of the election. Yet the complaint alleged facts that, if true, did just that. The dissenting opinion was livid in response. Right or wrong, the supreme court's resolution of that contest does not inspire confidence that, were another major statewide election contest to reach the supreme court again, the court would be able to render a decision that would be viewed as resting on law rather than politics.

Furthermore, if litigants begin bringing several of these types of Equal Protection claims, lower state courts could easily take differing approaches to the legal issues, creating a fractured jurisprudence that makes election administration even less uniform. This has been the trend in other areas of Illinois election litigation, where courts have not been content to follow precedent but have continually modified it and sometimes defied it. For instance, Illinois law includes twenty-two cases dealing with how to treat ballots that are ineligible to be counted when those ballots have become intermingled with eligible ballots and cannot be separated. Despite the high number of published opinions, no clear rule has emerged. Even the Illinois Fifth District Court of Appeals itself has issued a number of potentially conflicting rules: It once deducted a known number of ineligible ballots from a candidate's vote total after election judges testified that the absentee ballots at issue had been cast for that candidate;[101] in another case it reduced both candidates' vote totals in proportion to the percentage vote each candidate obtained in the precinct;[102] and in a third instance it used information about party affiliation contained in primary records to determine percentages to be used in reduction.[103]

Likewise, the state supreme court's legally dubious decision resolving the 1982 gubernatorial election has spawned considerable confusion concerning what is necessary for an election contest petition to survive a motion to dismiss for failure to state a claim.[104] This type of confusion may be exacerbated when political affiliations of courts change over time, creating an incentive for them to find reasons to deviate from precedent in order to achieve a desired political result. As any litigator will acknowledge, confusion in case law is an invitation for further litigation. Thus, the legal landscape in Illinois, combined with variations in local practices concerning vote-counting procedures, provides fertile ground for election litigation, if an election is considered sufficiently important and sufficiently close to be worth contesting. The prospect of major election litigation in Illinois, before a judiciary lacking in sufficient neutrality to appear "above the fray," is highly unsettling yet regrettably realistic.

Administrators, for their part, voiced a greater fear of litigation over voting technology than over inconsistencies in the voting process, although some of their own comments seem internally inconsistent. Some shared with us the view that the most likely basis for litigation in the 2008 presidential election would be technology failure, specifically attacks on the fundamental accuracy of voting machines. Most administrators, however, seem to think that in the event of a recount the technology would ultimately be vindicated.

They are less confident that the actions of those using technology would be similarly vindicated. Administrators we spoke to identified poor planning and poor training of poll workers and staff as key threats to well-run elections. These root causes can lead to almost any kind of problem, and particularly problems that administrators identified as likely: failure to follow Illinois' complex chain of custody rules for elections materials; failure to follow the rules governing whether to issue an ordinary or provisional ballot; errors in the counting of provisional votes; going too far to "help" voters cast their ballots; failure to properly configure DRE machines; failure to set aside defective ballots or ballots with identifying marks; failure to include grace period, absentee, or early voting returns in final results; failure to reset voting machines before the election; and allowing individuals to vote without first signing the poll book. Most of the items on this list are those that we, as election law scholars, would identify as exposing the state to risks of significant litigation in any important close election (and most items on this list do not concern technology at all).

Furthermore, the failure of local officials to follow rules in any of these respects could easily be converted into a plausible Equal Protection claim, simply by observing that local officials elsewhere did follow the rules.[105] Consequently, our conversations with some election officials in the state lead us to believe that they are insufficiently prepared for the threat – and consequences – of major election litigation in Illinois, in a way analogous to Florida's failure to prepare for the problems in its 2000 election.

REFERENCES

1. *See* ILL. CONST. art. III, § 5; Samuel K. Gove & James Nowlan, ILLINOIS POLITICS & GOVERNMENT 76 (1996).

2. Most famously, when Powell died of a heart attack shortly after the 1970 constitution was drafted (but before it had been ratified), $800,000 in cash was found in his office and Springfield hotel room. *See id.* at 224; George Tagge, *Find Paul Powell Hoard*, CHICAGO TRIB., Dec. 31, 1970, at 1.

3. *See* Samuel K. Gove & James Nowlan, *supra* note 1, at 223-26.

4. ILL. CONST. art. III, § 5; 10 ILL. COMP. STAT. 5/1A-1.

5. 10 ILL. COMP. STAT. 5/1A-3(7).

6. 10 ILL. COMP. STAT. 5/1A-4.

7. 10 ILL. COMP. STAT. 5/1A-2.

8. 10 ILL. COMP. STAT. 5/1A-3.1.

9. 10 ILL. COMP. STAT. 5/1A-7.

10. 55 ILL. COMP. STAT. 5/3-2001.

11. 10 ILL. COMP. STAT. 5/6-1 *et seq*; 10 ILL. COMP. STAT. 5/14-1 *et seq*.; 10 ILL. COMP. STAT. 5/18-1 *et seq*.

12. The other municipal jurisdictions are East St. Louis, Aurora, Galesburg, Bloomington, Peoria, Danville, and Rockford.

13. 10 ILL. COMP. STAT. 5/6-21.

14. 10 ILL. COMP. STAT. 5/6-22.

15. 10 ILL. COMP. STAT. 5/6-23.

16. 10 ILL. COMP. STAT. 5/6-25.

17. Email from James P. Allen, Communications Director, Chicago Board of Election Commissioners, Aug. 27, 2007; email from Peter McLennon, Policy Analyst, Cook County Clerk's Office, Aug. 3, 2007.

18. As of the Nov. 6, 2006, general election, Cook County, including Chicago, had 2,710,118 registered voters, out of 7,375,688 registered voters statewide. Email from Mark Mossman, Director of Election Information, Illinois State Board of Elections, Aug. 29, 2007.

19. 10 ILL. COMP. STAT. 5/6A-1 *et seq.* allow counties to opt to use a Board of Election Commissioners, rather than a county clerk, to run elections.

20. Cook County reports having a similar system.

21. Email from Mark Mossman, Director of Election Information, Illinois State Board of Elections, Aug. 29, 2007.

22. Figures in this paragraph were calculated from numbers provided by Mark Mossman, Director of Election Information, Illinois State Board of Elections, by email on Aug. 29, 2007.

23. County clerks are elected every four years. 10 ILL. COMP. STAT. 5/2A-16.

24. 55 ILL. COMP. STAT. 5/3-9005.

25. 1987 Ill. Atty. Gen. Op. 230 (Ill. A.G.).

26. Edwards County, a county of about 7,000 residents in southeast Illinois, had one computer but it was not used for election work. Email from Mark Mossman, Director of Election Information, Illinois State Board of Elections, Aug. 29, 2007. Tiny Calhoun County, with 3,983 registered voters, did not have a computer at all. *Id.*

27. 10 ILL. COMP. STAT. 5/1A-8, 5/24A-16.

28. The budget for Cook County's current fiscal year is about $21 million. Email from Peter McLennon, Policy Analyst, Office of Cook County Clerk David Orr, Aug. 3, 2007.

29. *See* 26 ILL. ADMIN. CODE 100.10-216.10.

30. *See* 26 ILL. ADMIN. CODE 204.10.

31. *See*, *e.g.*, Samuel K. Gove & James D. Nowlan, *supra* note 1, at 134-36, 161-63, 223-25.

32. *See* Mark Eissman, *U.S. to Probe Primary Vote Fraud, Federal Laws May Have Been Broken*, CHICAGO TRIB., Mar. 11, 1987, Chicagoland, at 1.

33. *See id.*

34. *See* Mickey Ciokajlo, *Clerk Halts 250 Trying to Vote as Absentee*, CHICAGO TRIB., Mar. 20, 2003, Metro, at 3.

35. 357 Ill.App.3d 594 (Ill.App. 1 Dist., 2004).

36. *See* Mike Fitzgerald, *Ex-committeeman Given 10 Months, $3,000 Fine Imposed in Vote-fraud Scheme*, BELLEVILLE NEWS DEMOCRAT, Mar. 11, 2006, at 1B.

37. *See* Roberta Baskin, Investigative Reporter, WLS-TV News, Testimony Before the United States Senate Committee of the Judiciary, Subcommittee on the Constitution, Chicago, Illinois, Sept. 19, 1983, S. Hrg. 98-672, at 52. Ms. Baskin described getting six voter registration cards under six different names and addresses in half an hour, without providing identification.

38. *See* Jay Mikesell, Canvasser, Testimony Before the United States Senate Committee of the Judiciary, Subcommittee on the Constitution, Chicago, Illinois, Sept. 19, 1983, S. Hrg. 98-672, at 113.

39. *See id.* at 112.

40. *See* J. Robert Barr, Chairman, Cook County Republican Central Committee, Testimony Before the United States

Senate Committee of the Judiciary, Subcommittee on the Constitution, Chicago, Illinois, Sept. 19, 1983, S. Hrg. 98-672, at 110.

41. *See id.*

42. 10 ILL. COMP. STAT. 5/4-10; 5/5-9; 5/6-37.

43. 10 ILL. COMP. STAT. 5/1A-16.

44. 10 ILL. COMP. STAT. 5/4-30; 5/5-25.

45. 10 ILL. COMP. STAT. 5/4-17; 5/5-24; 5/6-58.

46. *See* U.S. Election Assistance Commission, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT, 2005-2006, at 27 (2006 Election Administration and Voting Survey).

47. 26 ILL. ADMIN. CODE 216.40.

48. *Id.*

49. *See* Chinta Strausberg, *Feds, PUSH to Monitor Vote Fraud Complaints*, CHICAGO DEFENDER, Mar. 19, 2002.

50. *See* Carlos Sadovi, *4 in Cook Face Vote-fraud Charges, Former Election Judge Cited in Hoax at Polls with her Husband,* CHICAGO TRIB., Feb. 23, 2007, Metro, at 5.

51. *See* Editorial, *Making Cicero Safe for Democracy,* CHICAGO TRIB., Nov. 2, 2000, at 22.

52. *See* Evan Osnos, *U.S. Watchdogs to Keep Eye on Cicero Elections*, CHICAGO TRIB., Oct. 26, 2000, News, at 1.

53. *See* John McCormick, *High-tech Vote Put to Test, New Machines Set for Their Big Debut*, CHICAGO TRIB., Mar. 21, 2006, News, at 1.

54. *See* George Pawlaczyk, *Challenger Ousts Greenwood as Democratic Committeeman*, BELLEVILLE NEWS DEMOCRAT, Mar. 18, 2004, at 4B.

55. *See Hileman v. Maze*, 367 F.3d 694, 694 (7th Cir., 2004).

56. 10 ILL. COMP. STAT. 5/22-1.

57. For a comparison of the old and new versions of this provision, see 2005 Ill. Legis. Serv. 3316, 3325.

58. 10 ILL. COMP. STAT. 5/22-1.

59. *Id.*

60. *See* MICH. COMP. LAWS ANN. §§ 168.30; 168.24.

61. *See* WIS. STAT. ANN. § 7.60.

62. *See* OHIO REV. CODE § 3505.32.

63. *See* Mike Fitzgerald, *Official May Have Voted Twice, Complaint Says*, BELLEVILLE NEWS DEMOCRAT, Apr. 26, 2006, at 1B.

64. *See* Michael Lavelle, then-Chairman of the Chicago Board of Elections Commissioners, Testimony Before the United States Senate Committee of the Judiciary, Subcommittee on the Constitution, Chicago, Illinois, Sept. 19, 1983, S. Hrg. 98-672, at 24.

65. 10 ILL. COMP. STAT. 5/24C-15.

66. 10 ILL. COMP. STAT. 5/24B-15.

67. 10 ILL. COMP. STAT. 5/13-1; 5/13-2; 5/14-1.

68. *See* Jay Mikesell, Canvasser, *Testimony Before the United States Senate Committee of the Judiciary, Subcommittee on the Constitution*, Chicago, Illinois, Sept. 19, 1983, S. Hrg. 98-672, at 113.

69. *Id.*

70. 10 ILL. COMP. STAT. 5/13-1; 5/13-2; 5/14-1.

71. The in-person or absentee nature of the other occurrences could not be determined from the articles. One article described registration fraud, which could be the first step of an in-person or absentee scheme.

72. *See* Dan Webb, then-U.S. Attorney for the Northern District of Illinois, Testimony Before the United States Senate Committee of the Judiciary, Subcommittee on the Constitution, Chicago, Illinois, Sept. 19, 1983, S. Hrg. 98-672, at 17. Webb testified that to "accomplish this illicit process, the precinct captain needs a pool of registered voters whose names he can forge. Persons who have died or who have moved are prime candidates for this pool. It is therefore imperative to assure an honest election that these names be removed from the voting rolls prior to each election." *Id*. at 18.

73. 10 ILL. COMP. STAT. 5/19-1, 19-5.

74. 10 ILL. COMP. STAT. 5/19-6.

75. 10 ILL. COMP. STAT. 5/29-20.

76. 10 ILL. COMP. STAT. 5/19-4, 5/19-8.

77. A Cook County official described that on multiple occasions the county clerk had reported apparent instances of absentee ballot fraud to law enforcement authorities, and never heard back. Meanwhile, these signature verification requirements do not prevent problems of coerced or bought absentee votes.

78. Compare 10 ILL. COMP. STAT. 5/4-1 *et seq.*, which applies to counties with fewer than 500,000 residents, to 10 ILL. COMP. STAT. 5/5-1 *et seq.*, which applies to counties with populations of 500,000 or more. The codes are substantively similar, but feature different structures and language that could cause courts to interpret them differently.

79. *See Orr Seeks 5th Term as County Clerk in 2006*, CHICAGO TRIB., Dec. 9, 2005, Metro, at 3.

80. Email from Peter McLennon, Policy Analyst, Office of

Cook County Clerk David Orr, Aug. 3, 2007.

81. Email from James P. Allen, Communications Director, Chicago Board of Election Commissioners, September 25, 2007.

82. *See* R. Bruce Dold, *Election Board's Likely Choice for Director Carries Baggage*, CHICAGO TRIB., May 26, 1988, Chicagoland, at 4.

83. Two of the three board members are Democratic. Langdon Neal, its chair, is a Democrat, while Richard Cowen, its Secretary, is a Republican. *See* Mike Dumke, *The Men Behind the Curtain*, CHICAGO READER, Jan. 26, 2007, at 1. The final commissioner, Marisel Hernandez, is a Democrat. Email from James P. Allen, Communications Director, Chicago Board of Elections Commissioners, Aug. 23, 2007.

84. According to the 2000 census, Chicago had a population of 2,896,016 and Cook County, exclusive of Chicago, had a population of 2,480,725. *See* Illinois Census 2000, http://illinoisgis.ito.state.il.us/census2000/censusData/2000/ildata.asp.

85. *See Equipment Blamed for Sluggish Local Returns*, CHICAGO TRIB., Nov. 9, 2006, at 8.

86. The State Board of Elections does have the power to "supervise elections," and sometimes will send a small team of individuals into an election jurisdiction as observers. 10 ILL. COMP. STAT. 5/1A-8. However, board staff explained to us that the SBE does not have enough staff or sufficiently defined standards to perform thorough audits.

87. The SBE does currently answer questions posed to it by local administrators, and also offers free seminars to help familiarize administrators with the SBE, its departments, and the types of help it has to offer. Email from Mark Mossman, Director of Election Information, Illinois State Board of Elections, Sept. 24, 2007.

88. However, the state legislature has just enacted a provision that resolves this ambiguity. *See* 10 ILL. COMP. STAT. 5/18A-15.

89. 10 ILL. COMP. STAT. 5/18A-15.

90. *Id.*

91. Because most jurisdictions purchased machines only recently using newly acquired HAVA funds, disrepair has not yet become a major issue. However, there will be no HAVA funds for repairs and, according to Illinois officials, the cost of repairing these machines once they start breaking down may be prohibitive for many jurisdictions.

92. *See Legal Skirmishes Go On; Bush Gore Lawyers Argue New Hand Recounts*, RICHMOND (VIRGINIA) TIMES-DISPATCH, Dec. 3, 2000, at A1. The article describes testimony presented in one of the *Bush v. Gore* proceedings that failure to maintain Florida's Votomatic machines may have caused some votes to go unrecorded.

93. A paradigmatic example of this type of general civil rights suit is *League of Women Voters v. Blackwell*, described in more detail above in Chapter 3, in which plaintiffs alleged that then-Ohio Secretary of State Kenneth Blackwell and other defendants "promulgate and maintain a voting system in Ohio… that has wholly inadequate systems, procedures, and funding necessary to ensure the meaningful and equal exercise of the right to vote."

94. 10 ILL. COMP. STAT. 5/2A-1.1.

95. *See Black v. McGuffage*, 209 F.Supp.2d 889, 899 (N.D.Ill., 2002).

96. *See, e.g.,* Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L. J. ____ (forthcoming 2007).

97. In 2004, political parties and special interest groups spent about $9 million to vie for a state supreme court race, labeled as the most expensive state supreme court race in American history at the time. See John Chase, *Politics a Means to End on Court, Justices Say Party Ties That Helped Them Get on Bench Don't Lead to Biased Rulings*, CHICAGO TRIB., Apr. 7, 2006, Metro, at 1. A 2006 appellate court race in the southern part of the state saw $3.3 million raised. *See* Michael Higgins, *State Judge Race Nets Record Funds*, CHICAGO TRIB., Nov. 10, 2006, Metro, at 4.

98. *See* Stephanie Potter, *Money Taints Judiciary, Panel Warns,* CHICAGO DAILY LAW BULLETIN, Feb. 13, 2006, at 1.

99. *See* John Patterson, *Is Illinois Really That Corrupt? Ryan Case Adds New Chapter,* DAILY HERALD, Apr. 23, 2006, News, at 1.

100. *See In re Contest of the Election for the Offices of Governor & Lieutenant Governor Held at the General Election on November 2, 1982*, 444 N.E.2d 170 (Ill., 1983).

101. *See Webb v. Benton Cons. High School Dist. No. 103*, 264 N.E.2d 415 (Ill. App. 5th Dist., 1970).

102. *See Jordan v. Officer,* 525 N.E.2d 1067 (Ill. App. 5th Dist., 1988).

103. *See Leach v. Johnson,* 313 N.E.2d 636 (Ill. App. 5th Dist., 1974).

104. *See Andrews v. Powell*, 848 N.E.2d 243 (Ill. App. 4th Dist., 2006).

105. *See* Edward B. Foley, *supra* note 96 (analyzing this kind of Equal Protection claim in the wake of *Bush v. Gore*).

Illinois:
NINE AREAS

INSTITUTIONAL ARRANGEMENTS

Illinois administers its elections in a highly decentralized fashion. Although Illinois has a State Board of Elections ("SBE"), consisting of eight members appointed by the governor, 10 ILCS (Illinois Compiled Statutes) 5/Art. 1A, this board plays a fairly limited role. Primarily, it shares information and offers assistance to local election officials, who have the real power. Illinois has 110 local election jurisdictions, consisting of the state's 102 counties, plus eight cities that have chosen to run their elections independently of their county. Each of these eight cities, including Chicago, governs elections through a three-member Board of Elections appointed by the county circuit court. DuPage County similarly uses a County Board of Elections to oversee its voting processes, while in the remaining 101 counties the elected county clerk is in charge of elections. The State Board of Elections has authority to promulgate statewide regulations and guidance for these local jurisdictions, but at present it does not use this authority.

VOTER REGISTRATION/STATEWIDE DATABASE

Illinois is one of the states that has not fully complied with HAVA's requirement that its statewide voter registration database match incoming voter registration applications with pre-existing databases. The SBE has entered into agreements to bring the database into compliance, however, and the current database is matched against state databases of deaths and of felony convictions. Registrations are automatically canceled when either form of match occurs. 10 ILCS 5/4-14.1; 5-9.1; 6-55; 10 ILCS 5/6-55; 26 IL ADC (Illinois Admnistrative Code)216.50 The database is managed primarily at the local level, and Illinois has no uniform procedures governing how localities should process and verify incoming registration applications, instead empowering local authorities to promulgate their own procedures. 10 ILCS 5/1A-16. The SBE does help different jurisdictions to coordinate the adding and purging of entries.

In addition to the typical in-person and mail-in forms of registration, see 10 ILCS 5/4-10; 5-9; 6-37; 10 ILCS 5/1A-16 Illinois also permits grace period registration, which allows voters to register until the fourteenth day before the upcoming election by appearing in person at a designated voter registration location. 10 ILCS 5/4-50; 5/5-50; 5/6-100. Otherwise, the regular registration deadline is twenty-eight days before the election. 10 ILCS 5/4-6; 5/5-5; 5/6-29. Voters who use grace period registration may not vote at the polls on Election Day, but may vote only using special procedures established at the discretion of the local election authority. 10 ILCS 5/4-50; 5/5-50; 5/6-100.

CHALLENGES TO VOTER ELIGIBILITY

Challenges to a voter's eligibility may be filed either before an election or at the polls. Pre-election challenges may be filed by any voter. 10 ILCS 5/4-12; 5-15; 6-44. Challenged voters defend their eligibility by appearing at a hearing scheduled by the county clerk. 10 ILCS 5/4-12; 5-15; 6-44. The clerk's decision may be appealed to the circuit court. 10 ILCS 5/4-13; 6-47; 6-52. At the polls, challenges may be brought by poll watchers, and are decided by the majority vote of judges of elections (poll workers). 10 ILCS 5/7-34; 17-23; *Gribble v. Willeford*, 190 Ill.App.3d 610, 617 (Ill.App. 5 Dist., 1989). Voters challenged on Election Day may defend themselves by answering questions to the satisfaction of the judges or, if that is unsuccessful, by signing an affidavit and providing either identification or an affidavit from another voter that the voter is qualified. 10 ILCS 5/7-45; 17-9; 17-10; 18-5. Voters who cannot overcome a challenge may cast a provisional ballot. 10 ILCS 5/18A-5.

PROVISIONAL VOTING

Illinois provides provisional ballots to challenged voters, voters whose names are not on the statewide database, and first-time voters who are not able to provide the identification required under HAVA, but only if the voters are in the correct precinct. 10 ILCS 5/18A-5. To determine whether to count a provisional ballot, county clerks and boards of election use a "totality of the circumstances" test to determine whether it is at least equally likely that the voter is eligible to vote in the precinct. 10 ILCS 5/18-15. In the November 2006 election, SBE figures that show thirty-seven percent of the 15,875 provisional ballots cast in Illinois were counted, compared to fifty-one percent of 43,464 provisional ballots cast in November 2004.

EARLY AND ABSENTEE VOTING

Illinois permits absentee voting only if the voter asserts he or she will be out of town, will be observing a religious holiday, or for other reasons will be unable to vote in person. 10 ILCS 5/19-1, 19-5. The state recently adopted an early voting program. The early voting program is not precinct-specific, but allows any voter to cast a ballot at any early voting location maintained by the relevant election authority. Early voting begins on the twenty-second day before each election, and continues until the fifth day before the election. 10 ILCS 5/19A-15. The 2008 election will be the first presidential election to feature early voting, and local election officials expect the number of individuals casting absentee ballots to decline as a result of early voting.

VOTING TECHNOLOGY

The overwhelming majority of Illinois' election jurisdictions use optical scan machines, except in providing disability access and early voting. Roughly forty jurisdictions use the ES&S M100

optical scan readers, and roughly sixty use Diebold Accu-vote optical scan readers. Chicago and Cook County, the two largest jurisdictions, use Sequoia Optech Insight optical scan machines. Only a few jurisdictions use DRE equipment, which must be capable of producing a paper audit trail. 10 ILCS 5/24C-11. While individual administrators appreciate the selection they have when shopping for voting machines, the variety of machines in use in Illinois makes it more difficult for the SBE, given its limited resources, to remain abreast of the technology and to provide the smaller jurisdictions with the support they need.

POLLING PLACE OPERATIONS

With certain exceptions, polling places are staffed by five poll workers, no more than three of whom may be from the same political party. 10 ILCS 5/13-1; 5/13-2; 5/14-1. Using lists submitted by the political parties, election administrators select poll workers, and these selections then must be confirmed by the county circuit court. 10 ILCS 5/13-1. County clerks or county or municipal Boards of Election Commissioners, rather than the SBE, are responsible for developing and implementing training courses for these poll workers. 10 ILCS 5/13-2.1; 5/14-4.1. However, the SBE does offer free training, which many smaller Illinois jurisdictions use to save time and money. The training must consist of at least four hours of instruction and an examination that tests reading skills, ability to work with poll lists, ability to add, and knowledge of election laws governing the operation of polling places. 10 ILCS 5/13-2.2. Failure to attend this course "shall subject such judge to *possible* removal from office at the option of the election authority" (emphasis added). 10 ILCS 5/13-3; 10 ILCS 5/14-5. Insufficient poll worker training was blamed for the most severe problem experienced in the 2006 elections, when 136 out of 223 precincts in Kane County, south of Chicago, failed to open on time. *See Human Error Gets Blame in Kane County Elections*, CHICAGO TRIBUNE, Nov. 17, 2006; *Voting Troubles Mar Clerk's Re-election*, CHICAGO TRIBUNE, Nov. 9, 2006.

BALLOT SECURITY

Illinois' chain-of-custody rules for ballots and voting materials are complicated, with separate provisions for jurisdictions that do and do not have Boards of Election Commissioners, 10 ILCS 17, 10 ILCS 18, jurisdictions that use "voting machines," 10 ILCS 24, jurisdictions that use "electronic, mechanical, or electric voting machines," 10 ILCS 24A, jurisdictions that use precinct-count optical scan voting machines, 10 ILCS 24B, and jurisdictions that use DRE machines, 10 ILCS 24C. The code provides inadequate definitions for many of these terms and, where the different sets of rules appear to overlap, it is often unclear which one of them controls. Because of this statutory complexity, and also because the code cannot keep up with changes in technology, some administrators worry that chain-of-custody rules are misunderstood and loosely followed. However, Illinois courts will not invalidate an election for failure to follow chain-

of-custody statutes unless the failure affects the election's fairness. *See Andrews v. Powell*, 365 Ill.App.3d 513, 523 (Ill.App. 4 Dist., 2006).

POST-ELECTION PROCESSES

Illinois election law does not provide for automatic recounts. Instead, it provides for recounts only in connection with an election contest. Initially, a losing candidate who received at least ninety-five percent of the votes cast for the winner may petition for a "discovery" recount of up to a quarter of the precincts, but must pay the costs of this recount. The discovery recount has no impact on the official election results and serves only to determine whether evidence exists to support a formal election contest. If this evidence suggests a reasonable likelihood that a recount would change the result, a court can order a full recount. 10 ILCS 5/22-9.1; 10 ILCS 5/23-23.2. Some Illinois courts appear to have ignored the statute's "reasonable likelihood" language, dismissing contest petitions unless from the pleadings it appears that going forward would either *certainly or probably* change the result of the election. *See Andrews v. Powell*, 848 N.E.2d 243, 246 (Ill. App. 4 Dist., 2006). Because the statutes do not explicitly authorize them, the Illinois Supreme Court has concluded that no court has jurisdiction to hear federal election contests. *See Young v. Mikva*, 66 Ill.2d 579, 582-583 (Ill., 1977).