



The Florida Senate

Interim Project Summary 2001-201

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Committee on Ethics and Elections

Senator Bill Posey, Chairman

REVIEW OF THE VOTING IRREGULARITIES OF THE 2000 PRESIDENTIAL ELECTION

SUMMARY

The 2000 General Election for President was one of the closest in the nation's history. Florida was in the forefront of this Presidential contest when early in the evening on election night the news media called the State of Florida for Vice-President Al Gore. Several hours later they rescinded that projection, and subsequently called the State for Governor George W. Bush. Finally, in the early morning hours, it was determined that Florida was just too close to call for either candidate. Not only was the difference in the votes only 1,784 out of a total of almost 6 million cast, but Florida's critical 25 electoral votes would determine the outcome of the election.

This project focuses on those issues that appear to be the most important for consideration during the 2001 Legislative Session so they will be in place for the 2002 elections; however, it is not intended to be an exhaustive list. There are a number of other areas that the Legislature may wish to review over the next few years.

This report analyzes the following issues:

- Confirmation of a person's eligibility to vote to insure that no registered voter is turned away from the polls;
- Review of the various voting systems now being used in the State and their ability to accurately reflect each vote cast;
- Guidelines that could be adopted to provide for the uniform recounting of ballots; and
- Clarification of the statutory time frames for the certification of voting results.

BACKGROUND

Confirmation of a Person's Eligibility to Vote

Florida law requires a person to meet certain eligibility requirements in order to vote. Supervisors of elections keep lists of all registered voters in their respective counties to insure that persons eligible to vote are allowed to do so and that those ineligible are not permitted to vote. The 2000 General Election highlighted flaws in our system. There were numerous reports of eligible voters being turned away and not allowed to vote and ineligible persons being allowed to cast ballots.

Review of Voting Systems

Types of Voting Systems

Florida used four different voting systems in the 2000 Presidential election: *optical scan* (41 counties: 26 precinct-count; 15 central-count); *punchcard* (24 counties: 15 Votomatic; 9 DataVote); *mechanical lever* (Martin County); and, *paper ballot* (Union County). A technology not certified for use in Florida but receiving a great deal of attention is *direct recording electronic* ("DRE"), where voters cast ballots on some form of touch-screen computer system.

The two most prevalent systems currently in use in Florida are *punchcard* and *optical scan*.

Punchcards came to Florida in the 1970's. Punchcard systems employ a card or cards and a device for punching a hole corresponding to the candidate or issue which is the voter's choice. After voting, the voter places the ballot into the ballot box. Ballots are transported to a central location for counting using a computer vote tabulating device. Twenty-four counties use some form of punchcard system. No county in Florida counts punchcard ballots at the precinct location.

Optical scan systems were introduced in Florida in the late 1980's and into the 1990's. These systems use a ballot card with names of candidates and descriptions of issues preprinted next to an empty rectangle, circle, oval or incomplete arrow. A voter indicates his or her choice by filling in the empty rectangle, circle, or oval or by completing the arrow. After voting, the voter either places the ballot in a sealed ballot box for counting at a central location (*central-count*) or feeds the ballot into a computer tabulating device at the precinct (*precinct-count*). There are currently 41 counties in Florida using optical scan voting systems. Fifteen of these counties use central-count systems and twenty-six use precinct-count.

Accuracy of Voting Systems

There was a wide variation in the rates of total ballots not counted for President in Florida's 2000 General Election, depending on the type of system used in a county.

| Voting System | Error Rate ¹ |
|-----------------------------|-------------------------|
| Precinct-count Optical Scan | .79% |
| Lever Voting Machine | .89% |
| Punchcard | 3.83% |
| Central-count Optical Scan | 5.69% |
| Paper Ballot | 6.32% |

There are two possible sources of voting inaccuracies: mechanical error and human error. Mechanical error is a function of the voting system design and system maintenance; human error relates to the voting system design, the ballot design, and to certain intangible factors beyond all design control.

From a *mechanical* standpoint, Florida requires that voting systems be accurate to no more than one counting error in one million ballots.

Ballot design is largely a matter within the discretion of local supervisors of elections. There is no formal process for review and approval of the ballot design.

Uniform Voting System/Technology

¹ It is important to note that these error rates represent the data from one Presidential election. The actual error rates may be different using a larger statistical sample from several elections.

Does the U.S. Supreme Court decision in *Bush v. Gore*, 121 S.Ct. 525 (2000), mandate that Florida must implement a uniform voting system/technology in order to guarantee equal protection and fundamental fairness to all its voters? By the explicit terms, it does not. While the case may be subject to differing interpretations by legal scholars, *Bush v. Gore* appears to stand for the limited proposition that recounts must utilize uniform recount standards and procedures for each voting system to insure fair treatment of *all* voters. However, the case does create a logic trap which the Court will have to navigate if the issue of a uniform election system is raised in some future case.

Recounts

There are several different recount provisions in Florida Statutes – automatic recounts (where the margin of victory is one-half of one percent or less of the votes cast), *limited* manual recounts (consisting of at least 1% of the votes cast), and *full* manual recounts.

In the case of *automatic recounts*, the canvassing board conducting the recount is required to examine the counters on the machines or the tabulation of the ballots cast in each precinct, and determine whether or not the returns correctly reflect the votes cast. Following the 2000 Presidential election, some counties ran their ballots back through the tabulators while other counties instead checked the memory cards on the automatic tabulating equipment for clerical or mathematical errors. Still others looked at the ballots to determine if votes not counted by the automatic tabulating equipment should be counted as a vote.

Up to 72 hours following the election, certain interested parties may ask the canvassing board to conduct a *limited manual recount*, consisting of at least 3 precincts (selected by the requestor) and 1 percent of the total votes cast. The county canvassing board has the sole and complete discretion as to whether or not to authorize the manual recount. There are no standards to guide the canvassing board's decision.

If the manual recount indicates an "error in the vote tabulation" which could affect the outcome of the election, the county canvassing board may order a *full manual recount* of all ballots.

The phrase "error in vote tabulation" was the subject of dueling legal opinions between the Secretary of State and the Attorney General in the 2000 Presidential election. The Secretary of State said that it meant that there must be an error in the vote tabulation *system*; some type of

error in the machinery or software to justify a recount. The Attorney General disagreed, saying that if enough votes changed to possibly alter the outcome, that was enough. The Attorney General's opinion thereby incorporated the concept of *voter error* into the meaning of "error in the vote tabulation."

The 2000 Presidential election highlighted a number of problems with the current recount provisions. These problems included:

- Even though the election was a statewide election, manual recounts were only requested in a few selected counties.
- Large counties conducting manual recounts were not able to meet the certification deadline prescribed by statute.

The United States Supreme Court in *Bush v. Gore* held that other problems with the Florida recount scheme violated equal protection and fundamental fairness:

- While the standard of effectuating the "intent of the voter" was an adequate starting point, there were inadequate substandards in effect prior to the recount as to what constituted a vote. The absence of substandards resulted in the use of varying standards both county-to-county and within the same county, where the same voting system was used.
- Some counties certified partial recounts while full recounts were certified in others.
- The Florida Supreme Court ordered all counties to count undervotes, but not overvotes.
- The county canvassing boards had to pull together "ad hoc" counting teams with no prior experience or training in interpreting/handling ballots.
- Observers were prohibited from objecting during the recount.

Certification of Voting Results

Florida law requires that each county canvassing board certify the results of all elections for a federal or state office no later than 7 days after the first primary and the general election. Returns for the second primary are due 3 days after the election. These deadlines are problematic because in many cases --- particularly those involving large counties --- manual recounts cannot be completed prior to the certification deadline. In addition, in *federal* general elections, *overseas absentee ballots* must be counted up to 10 days after the election --- after the certification deadline.

METHODOLOGY

In preparing this report, staff reviewed applicable news reports highlighting problems with the election; researched applicable legal cases; researched applicable Florida laws and administrative rules; researched election laws in other states and countries; conducted telephone and in-person interviews with representatives of numerous voting system companies to determine the costs, benefits, and drawbacks of various voting systems; interviewed supervisors of elections to solicit their suggestions and input on various voting procedures and practices; reviewed transcripts of testimony before the Governor's Task Force on Election Procedures, Standards, and Technology; reviewed preliminary recommendations of the Task Force; interviewed staff of the Florida Department of State, Division of Elections, concerning voting systems and certification issues; gathered sample ballots from county supervisors of elections, for the purpose of reviewing various ballot designs; consulted with ophthalmologists and vision experts in connection with the feasibility of the reverse ballot; and, performed other research, as necessary.

FINDINGS

Confirmation of a Person's Eligibility to Vote

In order to assure that all eligible voters who go to the polls are allowed to vote and to assure that no ineligible person is allowed to cast a vote, verification of the person's eligibility must be done prior to the person's ballot being counted. In addition to providing more phone lines for elections in which there is an anticipated high voter turnout, supervisors of elections should be encouraged to equip as many polling places as practicable with laptop computers so that poll workers can determine the eligibility of some individuals without the need to telephone the supervisor of elections' offices.

However, there will always be instances where the eligibility of a person cannot be readily determined. In these cases, Florida should provide a procedure for the person to cast a ballot, but for the votes not to be counted until the person's eligibility can be conclusively verified. To this end, it is recommended that Florida adopt a procedure for voting a provisional ballot. Provisional ballots are similar to absentee ballots in that the person votes the ballot, places it in a secrecy envelope, then places the secrecy envelope in another envelope containing a Provisional Ballot Voter's Certificate. The Voter's Certificate contains pertinent

information about the person to assist the supervisor of elections in determining the person's eligibility. Once it is determined that the person is entitled to vote, the ballot is counted. If the person is not entitled to vote, the ballot is never removed from the envelope containing the Voter's Certificate.

Review of Voting Systems

Accuracy of Voting Systems

How can you have an error rate as high as 12.38% in Gadsden County in the 2000 Presidential election when the system in use there, a central-count optical scan system, is certified accurate to one ballot error per million ballots? The answer is that the errors are not machine errors, they are human errors --- in most cases voter errors. That is not to say that the mistakes were entirely the voter's *fault*. Voters had a lot of help from *error-prone voting system designs* and confusing *ballot designs*.

The challenge, therefore, is a formidable one. If every vote is to count, the voting system design and ballot design must minimize the opportunity for voters to make a mistake.

It should be noted, however, that although there were many votes not counted in the 2000 Presidential Election, there were far more that were counted. An overwhelming majority of Florida voters were not unduly confused by the ballot design or voting system. Voters must take responsibility to become informed about the candidates and issues on the ballot as well as about the operation of the voting system used in their county. Informed voters, who pay attention to the details of the voting process, should have no problems regardless of the voting system being used.

1) Punchcard Systems

As evidenced in the 2000 Presidential election, the punchcard design invites mistakes. The problem can be summed up in a single word --- "chad." A chad is that little piece of paper that is supposed to be completely punched out of the ballot and that nobody except election types even knew had a name before the last election. Chads "hang," "dangle," and are "dimpled," all of which are a problem for canvassing boards trying to figure out post-election what the voter intended.

Voters simply don't take the time to check their ballots and completely remove chads, *as instructed*. Of course, this oversight may be corrected in the short-term as

voters going to the polls recall the lessons of this past election and make sure to dislodge all hanging chads. However, this lesson is likely to be lost over time.

Public confidence in the electoral process is the cornerstone of any democracy. Punchcards have become the main symbol of the problems Florida experienced in the 2000 Presidential election. The public has lost faith in the ability of the punchcard system to accurately record votes. Counties should be required to replace their punchcard voting systems before the 2002 elections.

2) DRE Systems

DRE (touch-screen) technology offers some tremendous advantages over other systems. However, no DRE system is currently certified by the Division of Elections for use in Florida, and there is a very real possibility none will be available for use in time for the 2002 elections.

On the plus side, DRE systems offer great opportunities to reduce voter confusion resulting from bad ballot design. DRE technology can also *eliminate* the problem of overvotes, voting for two or more candidates in the same race. Also, DRE systems are more "disability-friendly" than other systems.

Some of the disadvantages of DREs include:

- Most DRE systems do not include a paper trail (although there would be an audit trail). Therefore, these systems require a high level of confidence in the software and security procedures.
- There are still a number of Floridians who are not familiar with computers, particularly the elderly and those in lower economic brackets.
- DRE systems are significantly more expensive to purchase compared to other systems. (Conservative estimates for a basic system for all 67 counties are \$76 million to \$125 million. Actual costs could be higher.)
- DRE systems may not dramatically improve the accuracy of voting, at least not initially.
- Finally, counties using DRE systems are required to have a separate tabulating system for absentee ballots.

On balance, DRE systems offer some tremendous advantages over existing systems and may be the wave of the future. But the challenges faced by Florida's election system exist now and to date no DRE system is certified for use in this state.

3) *Optical Scan Systems*

Optical scan systems are currently the most technically-advanced, certified systems in Florida. Precinct-count optical scan systems offer excellent accuracy and are far less costly than equipping the entire state with DRE systems. It is estimated that it would cost approximately \$40 million to install precinct-count optical scan technology in the 41 counties in Florida not currently using that system.

a) Central-count vs. Precinct-count

Central-count optical scan systems were problematic in the 2000 Presidential election. The average central-count optical scan system error rate was 5.69%, far worse than the average punchcard error rate of 3.83%. This may be due, at least in part, to the fact that current optical scan ballot design affords voters more opportunities to make mistakes than on punchcard ballots. Strikingly, the error rate for *precinct-count* optical scan systems was a mere .79%, dramatically lower. This may be attributable to the fact that most of the supervisors in precinct-count counties programmed their precinct counters to kick back overvotes and ballots not recording a vote in any race, thereby allowing voters to correct mistakes prior to casting their ballot.

b) Improving Ballot Design

Poor ballot design likely created a great deal of voter confusion in the 2000 election and led to unnecessary optical scan errors. The Division of Elections should be required to adopt rules for uniform ballot design and instructions for optical scan systems along with *every other system* certified for use in the State. Rulemaking will allow all interested parties (supervisors of elections, county administrators, candidates, political parties, voters, etc.) a voice in developing highly technical, minimum standards for ballot design and instructions. Experimental ballots could be designed and tested on volunteers selected on the basis of age, gender, educational level, and other relevant demographic factors. Problems in filling out the ballots properly could be identified and the ballot re-designed to eliminate or reduce such problems. The result should be more “voter-friendly” ballots with fewer errors.

One of the ballot designs the Division should consider for optical scan systems is some form of “REVERSE BALLOT,” or “RB,” similar to what is currently used in Canadian national elections. The RB replaces the white space on the ballot with dark space, and transposes the

lettering to white (similar to a photo negative). The RB design could result in a dramatic reduction in errant marks responsible for many unintentional undervotes. A prototype of the RB is included in the full staff report.

Periodic Review of Voting Systems

Regardless of which type of voting system or systems are used in Florida, the supervisors of elections should be required to gather information regarding numbers of overvotes, undervotes, and spoiled or voided ballots, and do an analysis of the reasons for those votes. This information should also be transmitted to the Department of State so that an analysis can be done on a statewide basis indicating how each system operated under real conditions during the elections. This analysis should occur following each general election. The review and analysis should be used to identify reasons for voters not having votes counted so that appropriate remedies can be implemented.

Uniform Voting System/Technology

The demographics of the state require some flexibility in the kinds of voting systems used. Therefore, supervisors of elections and county commissioners should continue to be allowed to determine the system used in their county, as long as the system has been certified by the Department of State. By the same token, more standardization of the ballot design and instructions should be developed for each system in use in the state to help alleviate the confusion among voters in different counties using the same system.

Regardless of which systems are chosen by the counties, it will be critical for the supervisors of elections to provide more education for the voters on the use of the system. This should include written instructions through mailings to voters, as well as instructions at the polling place.

Recounts

Much of the litigation surrounding the 2000 Presidential election dealt with the lack of uniform recount standards and procedures.

Where to Recount

For national and statewide elections, recounts should be conducted in every county to insure fair and equal treatment of all Florida voters. For multicounty races, all counties comprising the district of the candidacy in question should be required to recount.

When & What to Recount

The State should adopt specific, concrete guidelines directing local canvassing boards when a recount is required and the scope of the recount. An *automatic machine recount* should be required if the margin of victory in a given race is between one-quarter and one-half of one percent. However, supervisors using optical scan systems should be required to run the ballots through the tabulating equipment a second time as opposed to simply re-adding the counters on the tabulators.² In races decided by one-quarter of one percent or less, the local canvassing boards should be required by statute to manually recount only the *overvotes* and *undervotes*.³

In addition, a manual recount of overvotes and undervotes on optical scan systems should be required if requested by a candidate provided: the margin of victory is between one-quarter and one-half of one percent; and, the candidate posts a bond to cover the costs of the recount, if unsuccessful.

How to Recount (Standards & Procedures)

General standards for what constitutes a vote should be prescribed in statute. The Legislature has a number of statutory options for general standards, including: reversing policy direction and making Florida a “no-voter-intent” state (improperly cast votes do not count); maintaining the current general statutory standard (intent of the voter); or, expanding upon and clarifying the current “voter intent” standard.

Regardless of which general standard is adopted in statute, the Division of Elections should be charged with adopting rules containing specific, uniform recount *substandards* and *procedures* for each type of certified voting system. Rulemaking will allow all interested parties to have input into the substandards and procedures developed, and offer an opportunity to challenge those substandards and procedures in administrative and judicial forums.

Recount substandards for DRE systems would be fairly straightforward. DRE systems are essentially electronic

lever machines. The recount standard for DRE systems would be to re-calculate the individual totals from each machine or tabulator, to insure there is no mathematical error. A uniform procedure might call for re-testing of all DRE equipment to insure it is working properly.

Optical scan systems present more of a challenge. Assuming the Legislature maintains some form of “voter intent” standard in statute, substandards for consideration by the Division might include counting the following as an indication of an intent to cast a vote for a particular candidate:

1. When the voter clearly indicates a voting choice by placing a mark, such as an “x” or a check mark, or punches a hole in the optical scan ballot, rather than voting the ballot in the specified manner.
2. When the voter writes corrected instructions anywhere on the ballot card **clearly** indicating a voting choice.
3. When the voter uses the write-in position on the ballot to indicate a choice for a candidate that is listed on the ballot.
4. When the voter uses the write-in space on the ballot to indicate a voting choice for a candidate listed on the ballot and also marks the ballot for that candidate.

Certification of Voting Results

Florida’s 7-day certification deadline for the *general election* is impracticable. The prospect of full manual recounts in large counties makes meeting the one-week certification deadline a practical impossibility. In federal general elections, numerous absentee ballots that must be counted under federal law are not received until after the current certification deadline. Finally, the notion of conducting a full-blown manual recount in a *second primary* with a 3-day certification deadline is a statutory fiction.

The certification deadlines should be established as follows:

- *First Primary*: 7 days after the election (maintains current law)
- *Second Primary*: 7 days after the election (currently 3 days)
- *General Election*: 11 days after the election (currently 7 days)

² Counties using DREs would have no paper to run through counters; the best that can be done is to verify the summary totals.

³ Software will need to be developed and approved by the Secretary of State for each optical scan system to separate out overvotes and undervotes.

The Secretary of State should be required to accept returns filed after the certification date in general elections (except the U.S. Presidential race, which involves certain constitutional considerations). The deadline for accepting late-filed returns would depend upon the office being certified. The Secretary should not be allowed to accept late-filed returns in primary contests since it would interfere with the effective administration of subsequent elections.

RECOMMENDATIONS

Based on the findings of this report, staff recommends the following courses of action:

Confirmation of Person's Eligibility to Vote

- The Legislature should provide by statute for a provisional ballot for Florida. The provisional ballot will assure that any person who arrives at the polls on election day and whose registration cannot be verified by the poll workers will be given the opportunity to vote, but the votes will not be counted unless the voter's eligibility is conclusively verified.

Review of Voting Systems

- Supervisors of elections and county commissioners should continue to be allowed to determine the voting system to be used in their counties, so long as the system has been certified for use by the Department of State.
- Counties using punchcard voting systems should be required to replace those systems prior to the 2002 First Primary Election.
- The Division of Elections should be required to adopt rules for uniform ballot design and instructions *for each system* certified for use in the State, for the purpose of minimizing voter error.
- Supervisors of Elections and the Division of Elections should be required to report on the performance of the voting systems following each general election, including the overall error rate and the causes of those errors.

Recounts

- Recounts should be conducted in the entire jurisdiction of the race being recounted, instead of in select precincts.

- Counties using optical scan systems should be required to run the ballots through the tabulating system again for automatic recounts. (Automatic recounts should be done when the margin of victory in a given race is between one-quarter and one-half of one percent.)
- In races decided by one-quarter of one percent or less, the canvassing boards should be required to manually recount only the overvotes and undervotes.
- A manual recount of overvotes and undervotes should be required in a race where the margin of victory is between one-quarter and one-half of one percent where: 1) the candidate or committee requests the manual recount; *and* 2) the candidate or political committee posts a bond to cover the costs of the recount.
- The Division of Elections should be required to adopt rules containing specific, uniform recount substandards and procedures for each voting system in use in the State.

Certification of Voting Results

- Certification deadlines should be established as follows:
 - First Primary – 7 days after the election (maintains current law)
 - Second Primary – 7 days after the election (currently 3 days)
 - General Election – 11 days after the election (currently 7 days)

- The Secretary of State should be required to accept late-filed returns in general elections. The deadline for accepting late-filed returns would depend upon the office being certified.

- Existing penalties should be increased for members of county canvassing boards who file returns late.

Other Issues

- The Legislature should direct further study on a number of other elections issues over the next several years. (For a detailed list of subjects, see the complete interim project report.)

COMMITTEE(S) INVOLVED IN REPORT *(Contact first committee for more information.)*

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MEMBER OVERSIGHT

Senator Posey