



Office of Research & Policy Analysis

DECISION POINTS

HJR 8 Subcommittee on Voting Systems
of the State Administration and Veterans' Affairs Interim Committee

Meeting #4
Adopting Final Recommendations
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How to Provide Equal Protection of Votes

Allowing counties to choose different voting systems means that the statistical probability that your vote will be lost depends on your county of residence.

Threshold Decision Point...

Should local jurisdictions continue to have a choice about what voting system to use?

YES

NO

Followup Decisions

? What is the "rational basis" for allowing different voting systems and thus abiding the statistical reality that some votes will be "residual" (lost) when counted by one type of machine, while the votes of others will be counted correctly? Does the rational basis represent a state interest that is compelling enough to overcome arguments that allowing such differences violates 14th Amendment equal protection and due process clauses?

? If rational basis and compelling interest exist, then what statutory language will provide a "sufficient" guarantee that one vote will not be valued over another?

Followup Decisions

? What technology should be selected as the system for all counties to use? *(Related factors to consider in making this selection: expense, availability, practicality, training, transitional phase.)*

? How should the legislation address the fact that many counties still use manually counted paper ballots (i.e., not a "system" at all)? Should they, too, be required to use the selected technology, or is that level of difference acceptable? If it isn't, what is the common denominator? Should counties be moved "up" to optical scan or "down" to only manual counts? Is there a middle ground?

Staff analysis on following pages

Where will the "YES" road lead?

Introduction

A "yes" decision means there will be different voting systems among jurisdictions. The challenge will be to craft legislation that meets constitutional standards for equal protection and due process despite those differences. Some of the legal "tests" involved are:

- ? having a "**rational basis**" for differences;
- ? ensuring the rational basis reflects a "**compelling interest**" sufficient to overcome the Constitutional questions; and
- ? providing that uniform procedures, to the extent possible with different systems, provide a "**sufficient guarantee**" of equal protection.

In other words, the Subcommittee will need to debate: How sound is the rationale? How compelling is the interest? How sufficient are the guarantees?

After such a debate, a "yes" vote by the Subcommittee means that it has established: "yes" there is a rational basis; "yes" the state's interest compels this course of action; and "yes" there will be sufficient guarantees.

Setting a benchmark standard

One approach to answering sufficient guarantee questions is to establish a benchmark performance standard that all systems must meet with respect to a residual vote rate.

*LC 8882: Directs the Secretary of State to adopt a benchmark performance standard as a minimum. The bill does not specify the standard.
(Sec. 61(2): pg. 66, line 17)*

Pros

Under the current draft of LC 8882, the Secretary of State would have the discretion to set a benchmark as an acceptable error rate. A benchmark, such as a 2% residual vote rate in a national test, could result in precluding, by rule, systems with higher statistical error rates, such as punchcard systems.

****OR...Subcommittee decision point...** LC 8882 could be amended to specify in law a particular standard. For example, the bill could read: "A voting system must prove a residual vote rate of 1.5% or less in national tests before being approved by the Secretary of State." The Subcommittee may or may not want to coordinate this standard with the acceptable margin of error that triggers recounts in close elections, which is now a 0.25% margin of difference. Of course, the realistic capabilities of available technologies will have to be considered. (See Sec. 53, amending Section 13-16-201, MCA.)

Cons

A benchmark will only reduce the probability that a vote will be "lost" or "miscounted". It will not provide uniformity statewide. The statute remains permissive, and an argument could be made that giving counties a choice of systems will still result in some systems being more and some systems being less prone to statistical error. This may not pass the test of a sufficient guarantee of equal protection.

Providing uniform procedures

Whether the standard is set by rule or by statute, uniformity in practice will be essential to ensure that the jurisdictions using the same voting system use that system in the same way.

LC 8882: Requires the Secretary of State to develop, by rule, statewide uniform procedures on how each system

is to be used by each jurisdiction. (Sec. 3, page 5)

Pros

To provide a sufficient guarantee of equal protection, counties using the same system would be required to follow a uniform procedure for the voting system. Under the current draft of LC 8882, the Secretary of State would have to adopt rules to establish uniform procedures.

****OR... Subcommittee decision point...** If there were concerns that a directive to adopt rules does not provide a sufficient guarantee because the rules may or may not provide sufficient procedures to ensure equal protection, details could be added to the bill to put specific procedures in statute. This would preclude the possibility that the rules would allow local jurisdictions too much discretion and thus allow too much variance in how the system is used jurisdiction to jurisdiction.

Cons

Counties will still be selecting different systems. Uniform procedures among counties using the same system will not address the underlying disparity between counties using different systems. In addition, if details are to be added to the bill, more time and effort will have to be put into fleshing out the particulars of these procedures for each and every system approved.

Standardizing how questionable votes are treated

At the heart of this debate is what is or is not counted as a vote. Providing a standard procedure for counting questionable votes may be one way to minimize the disparity among systems.

LC 8882: Provides a standard procedure for counting questionable votes. (Sec. 2, new law on determination of a valid vote, and Sec. 49 - Sec. 52, amending counting board procedures)

Pros

If all questionable votes are set aside and determined as valid or invalid in the same manner (i.e., manually), this may provide some sufficient guarantees that, regardless of the voting system used, all questionable votes will be evaluated by a counting board using the same standards for determining voter intent.

****OR... Subcommittee decision point...** If this procedure by itself is not sufficient because voting systems may not "kick out" questionable votes equally, detail could be added to LC 8882 requiring that each approved voting system has similar operational parameters so that each system will "kick out" all questionable votes equally. (Presuming this is technologically possible.)

Error detection technology

Another option would be to require that any voting system approved must have an error detection capability to ensure that voter errors are fixed by the voter at the polling place. This would go even further toward minimizing disparate treatment of votes by dramatically cutting down on the number of questionable votes that would need to be considered.

Note: The current draft of LC 8882 defines a valid vote as any vote that is counted as valid by the automatic tabulation equipment. The only questionable votes would be those cast on ballots that, for whatever reason (e.g., bent or torn), could not be automatically processed. This provision could also be characterized as a sufficient guarantee of equal protection. (See page 3, lines 16-18.)

Cons

The Subcommittee will need to walk a tightrope of technical issues about system capabilities and whether different systems can identify questionable votes equally. If voting systems are required to have error detection capabilities at the polling place, what about counties that have manually counted paper ballots? Voters in those counties would not be given the opportunity to correct their ballots before leaving the polling place. Thus, equal protection is still an issue.

Conclusion

If the Subcommittee votes "Yes", the next questions are:

- ? What is the rational basis for allowing the use of different voting systems?
- ? Based on that rationale, is the state compelled to take this action despite the Constitutional concerns?
- ? What changes should be made, if any, to LC 8882 to ensure that the uniform procedures will be tight enough to provide a sufficient guarantee of equal protection?

NOTE: A recent Illinois District Court ruling identifies strong arguments **against** allowing local jurisdictions to select from among approved voting systems. What remains to be argued, however, is where the lines should be drawn. There are practical implications for counties, who are being asked to conduct not only county elections, but also statewide and federal elections. At what point, assuming there is one, do those arguments compel the state to allow different voting systems? The Illinois ruling, although it acknowledges that there is a line somewhere, did not actually engage this question.

Post Script: Section 13-17-305, MCA, allows Montana voters to request a paper ballot in lieu of casting a nonpaper ballot. However, optical scan and punchcard ballots are paper ballots. So this statute applies only if nonpaper-based systems are used. *** ... **Subcommittee decision point...** The Subcommittee could discuss whether section 13-17-305 should be amended to allow a voter to "opt out" of a machine count of their vote. This action would, of course, raise additional issues. ?

Where will the "NO" road lead?

Introduction

If the Subcommittee decides "no", that local jurisdictions should not have a choice about what voting systems to use, then the Subcommittee will be recommending that the same voting system should be used statewide.

LC 8882 would be adjusted in the key sections of the bill (Sec. 59, amending 13-17-101, Sec. 62, amending 13-17-104, and others.)

Analysis

Pros

Under this course of action, most of the equal protection and due process questions will have been resolved. What would remain, however, is deciding first, what system, and second, what standard operational procedures to use. Having one system to provide training and standard procedures for simplifies matters.

Unfunded mandate?

With respect to "unfunded mandate" concerns, Section 1-2-112(4), MCA, exempts from the unfunded mandate prohibition mandates considered necessary for the operation of local governments and due process and equal protection mandates. Providing for elections and for the equal protection and due process for voting rights is already a duty of local governments. So the Subcommittee need not engage in the "unfunded mandate" debate.

O.K., but, whose election is it anyway?

There is, however, a larger issue. An argument could be made that, if it were not for the need to conduct elections for statewide offices and state legislative positions for districts that cross county lines, counties would be well within their right to choose their own voting system. It is the state, therefore, so the argument could go, that should be responsible for choosing the voting system

and for paying the associated price.

Cons

Aside from the politics involved in imposing one system on all jurisdictions, the Subcommittee will need to consider the following questions:

- ? What technology should be selected as the system for all counties to use? (*Related factors include expense, availability, practicality, training, transitional phase, etc.*)
- ? What will it cost?
- ? How should that bill be split among the federal, state, county, and local jurisdictions that conduct elections?

Moving to the bottom line

The "no" road will move the Subcommittee quickly to the bottom line, but Congress and the courts are still engaged in the debate, so to get on with the business at hand (i.e., conducting elections), the Subcommittee would have to develop its own formula for determining the best system to use and for sharing costs.

State vs. Federal

Finally, after the state/county debate is the federal/state debate. Presidential elections are nationwide. If there is a compelling interest in providing a uniform voting system statewide, does that same interest compel the same voting system nationwide? This, of course, takes us back to the question of where the line is to be drawn between sufficient and insufficient guarantees of equal protection and due process.

Possible courses of action

Option A

Considering the scope of the matters yet to be resolved, to move down the "no" road, but slowly, the Subcommittee could decide to draft a bill

setting up a special commission to determine which technology is most suitable to Montana, to determine standard procedures, and to decide how the costs will be shared. The commission could also develop an implementation plan to get us there from here.

perhaps desirable in another jurisdiction. Should the common denominator be to bring jurisdictions up or to bring them down to the set standard?) ?

Option B

The "just do it" option is to amend LC 8882 to specify a certain type of technology already in use in a majority of counties (30 counties already use the optical scan technology). Uniform standards could be based on the lowest common denominator in terms of that system's performance and minimizing additional costs. For example, even if the optical scan system in some counties had an error detection capability, in consideration of those counties without the error detection capability, the bill could require that error detection capabilities be disabled so all systems would operate on an equivalent level. As an alternative, the common denominator could be to go to the higher standard of requiring error detection capability on the optical scan equipment. This would simplify matters, but would no doubt raise polling procedure questions.

What about counties that still manually count paper ballots?

Because 20 counties still use manually counted paper ballots (i.e., not technically a "system"), the question is should these counties, too, be required to use the selected technology? This is a question that will need to be addressed early in the Subcommittee's decisionmaking process.

Conclusion

A "no" decision will remove a layer of debate about equal protection and due process, thus simplifying the remaining issues. However, the remaining issues are:

- ? Whose responsibility and whose cost? *(If it were not for elections for offices crossing county lines or federal elections crossing state lines, would we be having this debate?)*

- ? What should the common denominator be? *(What is affordable and desirable in one jurisdiction is not affordable nor*

SUBCOMMITTEE WORK PLAN

Subcommittee members may or may not be ready to take all the necessary actions at their April 25 meeting, which is the last planned meeting of the Subcommittee this interim. The Subcommittee could consider having one more meeting in May or June.

If the Subcommittee desires another meeting, it will be important for Subcommittee members to be specific about what additional information the Subcommittee needs and what items need to be placed on the agenda at that meeting to ensure that those questions are answered and that final action will be taken. The change to the study plan would also need to be approved by the Chairman of the full Committee.

Current Laws for Reference

13-17-104. Providing voting machines or devices -- payment. (1) The county governing body may provide approved voting machines or devices as practicable.

(2) Funds for voting machines or devices may be provided by the same methods available for other capital equipment purchases by the county.

(3) The governing body of a county may put the question of purchasing voting machines or devices or the question of which type of voting machine or device to purchase to the registered electors of the county by the same method that any other question is referred to the electors.

13-17-101. Secretary of state to approve voting machines and devices. (1) Before any voting machine or device can be used for any election in this state, the secretary of state shall:

(a) examine the machine or device to determine if it complies with the requirements of this chapter;

(b) within 30 days after examining a machine or device, file a report of the examination in his office;

(c) include in the report the reasons for approval or disapproval of the use of the machine or device and his opinion of the economic and procedural impact of the use of the machine or device by the various classes of counties of this state; and

(d) within 5 days after filing the report, transmit to the election administrator of each county a copy of the report.

(2) Voting machines and devices may not be used unless approved by the secretary of state 60 days or more prior to the election at which they will be used.

13-17-103. Required specifications for equipment. A voting machine or device may not be approved unless:

- (1) an elector can vote in secrecy;
- (2) an elector is prevented from voting for any candidate or upon any ballot issue more than once and is also prevented from voting on any office or ballot issue for which he is not entitled to vote;
- (3) an elector can secretly select the party for which he wishes to vote in a primary election and the machine or device will count only votes for the candidates of that party by the elector in the primary election;
- (4) an elector can vote a split ticket in a general election if he desires;
- (5) every valid vote cast is registered and recorded;
- (6) the machine or device is constructed so that it cannot be tampered with for a fraudulent purpose and is also constructed so that during the progress of the voting no individual can see or know the number of votes registered for any candidate or on any ballot issue;
- (7) it allows write-in voting; and
- (8) a guarantee to provide training and assistance to election officials is included in each contract for purchase of the machine or device.

13-17-305. Request to use paper ballots. (1) (a) Where voting machines are used, an elector

may request to vote by paper ballot instead of using the machine. The election judges shall provide the elector with a paper ballot when requested.

(b) Where voting devices are used, the election administrator, with approval of the governing body of the county if the election administrator is an appointed official, may provide paper ballots if the election administrator believes such ballots are necessary. However, if more than 5% of the electors voting in the last preceding general election voted using paper ballots, the election administrator shall provide paper ballots. The printing of paper ballots provided pursuant to this subsection is an allowable election cost under the provisions of 13-1-302.

(2) Paper ballots shall be cast and counted by the election judges in the manner provided by law.

(3) For the purposes of this section, "voting machine" means a mechanical apparatus which is used for voting by using levers which provide a tabulating system within the machine.

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