

MINUTES OF COMMISSION MEETING
April 18, 2002

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Commissioners Albert Burstein, Hugo Pfaltz, Jr., Vito Gagliardi, Jr., and Peter Buchsbaum. Professor Bernard Bell, Rutgers Law School, attended on behalf of Commissioner Stuart Deutsch, Professor William Garland, Seton Hall Law School, attended on behalf of Patrick Hobbs, and Grace Bertone, McElroy, Delvaney & Deutsch, attended on behalf of Rayman Solomon.

Also attending were: Eric A. Fischer, Library of Congress; Robert Garrenger and Noreen Giblin, Office of Governor's Counsel; and Rebecca Moll, Sills Cummis Radin Tischman Epstein & Gross.

Minutes

The minutes of March 26, 2002 were accepted subject to a correction offered by Commissioner Buchsbaum regarding the definition of "commercial property" contained in the Terms and Definitions section of the Distressed Property Act. Commissioner Buchsbaum suggested that the minutes did not accurately reflect the comments of the Commissioners regarding the definition of that term.

Election Law

At the February meeting of the Commissioner, the Commissioners had indicated that they were interested in hearing about the future of voting technology and related matters. At that time, it was determined that staff would find someone to present relevant information at the April meeting. Eric Fischer, Senior Specialist in Science and Technology, Resources, Science and Industry Division of the Library of Congress, was contacted and agreed to speak at the April meeting. Mr. Fischer arrived with general documentation addressing various issues pertaining to voting for the Commissioners and staff to review at their convenience, and focused his presentation on issues related to the status of the proposed federal legislation in the area of voting, the status and contents of the bills, and the potential impact on the states.

Initially, Mr. Fischer advised that the House of Representatives had passed its version of the Help America Vote Act in December 2001, and that the Senate had passed its version on April 11, 2002. A Conference Committee will be necessary because of the significant differences between the bills. Apparently, the goal is to have a bill passed by Memorial Day. Although there are significant differences between the bills, both were described as strongly bi-partisan, both were passed by lopsided margins, and both provide for federal funding for the states. The House bill proposes to offer that funding by way of formula grants, while the Senate bill proposes categorical grants.

Both bills contain required minimum standards for the states. In the House bill, for example, there are minimum standards dealing with things like second chance voting and provisional ballots. The Senate bill also contains standards concerning second chance voting. The term "second chance voting" was said to describe the degree to which a voting system affords the voter the opportunity to correct an error before casting the ballot. Generally "second chance" systems are punch card or optical scan districts with precinct tabulation. The three types of errors addressed are over-voting, under-voting, and "spoiled" ballots. It was explained that whether a system will accept deliberate under-voting depends on the manner in which the system is programmed. It was noted that most of the newer systems afford the voter the opportunity for a complete ballot review before casting the vote. With regard to the minimum standards, Mr. Fischer explained that according to the House bill, if a *new* voting system is put in place, it has to permit second chance voting. The Senate bill does not presently include such a requirement; instead, it offers "opt-out" provisions for states which use central counting methods. In such a district, a state may meet the requirements of the bill by way of voter education, for example. It was noted that the Senate has grant programs available to provide funding to assist the states in meeting the requirements set out in the bill, and that any state can apply for a grant. If the grant is approved, the state gets four to six years to meet the requirements.

Both bills require state-wide voter registration, but there are differences in the treatment between the bills. The only opposition that Mr. Fischer was aware of was based on the cost, plus the potential of the state encroachment on traditionally county functions. The House bill provides for a networked system and a matching grant program with a 25% match required of the states. The bill provides block grants by voting age population, and the manner in which the state uses the grant funds are largely left up to the discretion of the individual state. In the Senate bill, the federal government is to fully fund the requirement and provide a lengthy period of time within which to comply. The states are required to provide a plan for the implementation of a compliant system, and the federal government is committed to funding it; each of the states is eligible for 1% of the total appropriation, which is anticipated to be \$11 million. Apparently, during the floor debate on this issue, the question was raised as to what happens if Congress decides to appropriate less than the funds required to implement the various systems. It appears that, in its present incarnation, the Senate version of the bill presents more of a risk of an unfunded mandate. It was noted that there are not many states that presently have a statewide registration system.

Another requirement found in both bills is the capacity to audit individual ballots cast. Mr. Fischer mentioned that most current systems have the capacity to audit each ballot cast, with the exception of lever machines.

With regard to the issue of security concerns, Mr. Fischer noted that with an electronic system, votes are generally recorded in three separate 'registers' or databases – a counter, a redundant record, and an area for recording the entire ballot. The difficulty

appears to be that despite the use of these three different 'registers', there is only one conduit for all of the information maintained, and computer experts suggest that it is not difficult to alter votes. One proposal to address this issue was the printout of a paper ballot that is produced simultaneously with the recordation of the vote, or immediately beforehand to provide a dual record. It was suggested that machines can be programmed to transfer data with or without any human intervention, and that it can be physically carried from one location to another via a "smart card" or transferred via a direct modem connection. It was noted that in light of the number of transcription errors in transferring data from one source or format to another, the best way to deal with fraud is to permit individuals from both parties to observe the processing of the date, and that there is no way to do that with a strictly electronic transmission.

In light of the importance of the software utilized for any electronic system, Mr. Fischer explained that another approach that has been proposed is the "open source" system, devoid of proprietary software and available to be examined by the public to determine the extent to which any such system is subject to being "hacked". On the other side of the argument is the suggestion that an "open source" system makes it easier to learn about the security of a system, or lack thereof, and that a proprietary system, where information about the system is not publicly available, is best. There is also the related economic issue that the proprietary systems are where the money is made, this none of the big companies are willing to engage in "open source" projects in this area. The question of whether voters will trust a "black box" system, the workings of which they do not understand seems to be answered in the affirmative since that is what happens now. Mr. Fischer indicated that this was a legitimate question that had not yet been fully addressed, and that the most significant danger seems to be a situation in which someone manages to program a machine or machines to record votes in a manner differently from the manner in which they appear to do so. It was noted, however, that this same concern had been raised about punch-card systems and that even with entirely electronic systems, if each machine was programmed to record its votes separately, there would have to be some form of systematic fraud to cause a widespread effect in any given election.

In response to a question about the secrecy of the ballot and the extent to which voting information can be used to identify patterns in voting, Mr. Fischer explained that this was certainly possible with any paper ballot system, but that it was easier with computer systems that permit the voting information to be transferred to electronic media to facilitate comparisons and other examinations of the data. Mr. Fischer noted that other privacy issues have come up and been addressed from both sides, including the criticism of the "Motor Voter" Act that it encourages fraud.

Mr. Fischer indicated that there was no federal mandate for uniformity within a state. As concerns voting by mail, Mr. Fischer indicated that there were questions about the identification of the voter, and the manner in which voters would be identified in states with large populations of individuals without driver's licenses, for example. Concerns have also been raised about a drop in voter turnout in Oregon, where voters

vote exclusively by mail, if the voters are required to provide a copy of their identification with their ballot.

Apparently, early voting was not addressed in either of the current bills but the bills do create a separate commission responsible for developing and promulgating regulations and conducting studies on absentee voting and, potentially, early voting. In the Senate bill, a separate committee is contemplated to address Internet or related voting issues. It was noted that the impact of early voting on elections has not been definitively determined. In Texas, polling place early voting is available, and it appears to have been successful, but there is no indication that it has increased voter turnout. In Oregon, where the voters may vote 14 days before the election, it is claimed that there has been no negative impact on the electoral process. While voting by mail seems to have created at least an initial increase in voter turnout in Oregon, there was no indication that early polling place voting increased voter turnout.

With regard to the impact of technology moving forward, it was suggested that things like Internet voting may be an option, and that one of the problems in this area has historically been a lack of funding for research. The House bill includes money for research; the Senate bill does not. For many years, new voting machines have simply been newer versions of the old machines. Recently, some attention has been paid to things like a human factors analysis of the current machines and technologies. It was suggested that a new bill coming out of Congress in this area would increase the incentive, including the market incentive, to update the technological aspects of the voting process.

Both bills apparently have provisions regarding accessibility of voting, for the blind, for example. As a result, in part, of the lobbying efforts of the disabled community, there have been efforts to design more accessible voting technologies, and to have those technologies implemented for all voters. Concerns were raised by some of the spokespersons for blind voters, for example, that they do not wish to have to all blind voters vote on a single machine, because they do not want information readily available on the voting record of blind voters. In the context of this discussion, it was noted that some voting machines now cost approximately \$3000 per machine, but that the cost is anticipated to decrease if a bill passes.

As concerns the most efficient manner to keep registration databases current, Mr. Fischer advised that the senate bill includes some language regarding different databases being able to "talk to" each other within the state, and to federal databases. Mr. Fischer also noted that a significant number of government record databases have not taken advantage of the technological tools available at this time.

With regard to state practices and standards, the National Association of State Election Directors has apparently developed a compendium of state practices.

The Commissioners determined that the Draft of the Election Law Revisions would not be addressed at this meeting, but that they would review it in light of the information presented at this evening's meeting, and would be discussed next time. In the interim, staff and the Commissioners will reach out for sponsors for the proposed revisions to the law.

Distressed Property

The Distressed Property Act is to be discussed at the next meeting.

Games of Chance

Mr. Cannel advised that the Attorney General's Office has requested additional time to review the Games of Chance Report, and that they expect to have detailed comments available for the next meeting.

Commissioner Gagliardi noted that the issue of referendums allowing amusement games had been resolved differently from the manner in which it was reflected in the current draft of Section 5-2. The draft language includes a provision that games are permitted unless a municipality opts out of coverage of the law. The Commission, intended that games not be permitted without a municipal referendum. The pertinent language will be revised for the next meeting. Commissioner Buchsbaum requested that language be included in the introduction indicating that municipal review of licenses is being eliminated even though no one had objected to this change.

Miscellaneous

The next Commission meeting is tentatively scheduled for Thursday, May 23, 2002, at 4:30 p.m.