

Statement of Daniel P. Tokaji  
Cuyahoga County Board of Elections  
December 17, 2007  
Electronic Voting Systems

My name is Daniel Tokaji. I am an Associate Professor of Law at the Ohio State University's Moritz College of Law and the Associate Director of *Election Law @ Moritz*, a nonpartisan project whose mission is to provide reliable information and analysis on federal, state, and local election law issues.<sup>1</sup> My main areas of research are election administration and voting rights, and my "Equal Vote" blog (<http://moritzlaw.osu.edu/blogs/tokaji>) is devoted to these topics.

I also served as cooperating counsel with the ACLU of Ohio on *Stewart v. Blackwell*, a federal lawsuit challenging Ohio's central-count optical scan and punch card voting equipment.<sup>2</sup> A Sixth Circuit panel concluded that these systems violated the Equal Protection Clause of the U.S. Constitution, because they result in more lost votes than other available technology. 444 F.3d 843 (6th Cir. 2006). The Sixth Circuit subsequently ordered this case dismissed as moot, after Ohio's old equipment was replaced with new technology that provides voters with notice and the opportunity to correct errors. 473 F.3d 692 (6th Cir. 2007).

My purpose in appearing before you today is to caution against the hasty elimination of the current voting technology. I am aware of the well-documented problems that occurred in this county's 2006 elections, as well as the recent EVEREST report from Secretary of State Jennifer Brunner, and do not discount the security concerns surrounding existing optical scan and direct record electronic voting technology. What I wish to emphasize is that there is more to the story than this.

In determining what voting technology is best, it is essential to consider not just security but also the values of *accuracy* and *equality*. The current voting technology has significant benefits in these respects, reducing the number of lost votes and the racial gap in lost votes. The county should avoid precipitous action that would imperil these benefits. It is also important to remember that, while technology is important, it is just one component of an election system. In terms of preparing for 2008, the focus should be on the human element, including procedures and training for those working at the polls.

Let me try to put the security issues surrounding voting technology in perspective. On a national level, the transition to direct record electronic and precinct-count optical scan has had substantial benefits. Unlike the equipment mainly used before 2006 (punch card and central-count optical scan systems), the current equipment provides voters with *notice and the opportunity to correct errors*. As explained in the attached letter sent to the board on Monday, December 10, 2007, social science data reveals that this equipment has markedly decreased the number of votes lost due to inadvertent "overvotes" (marking more choices than is allowed) and "undervotes" (failing to mark

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<sup>1</sup>My institutional affiliation is provided for purposes of identification only.

<sup>2</sup>In addition, I am a member of the ACLU of Ohio's board.

a choice that can be read) throughout the country.<sup>3</sup> One national study estimated that one million votes were saved in 2004, due to new voting technology and better procedures.<sup>4</sup>

Precinct-count optical scan and direct record electronic systems thus reduce the number of votes lost due to inadvertent overvotes and undervotes. On the other hand, non-notice systems (such as the punch card and central-count optical scan systems that predominated before 2006) perform much worse in terms of accuracy. Given this evidence, this county and others should avoid moving away from notice technology. The likely result would be an increase the number of uncounted ballots. That is especially true in communities with larger numbers of minority and low-income voters, who tend to benefit most from notice technology.<sup>5</sup>

Switching back to non-notice equipment would also revive the constitutional issues that were at stake in the *Stewart* litigation. In particular, moving to a central-count system would raise serious questions under the Equal Protection Clause of the U.S. Constitution, as well as Section 2 of the Voting Rights Act of 1965 (42 U.S.C. § 1973), which prohibits practices that result in the disproportionate denial of minority votes.

Let me touch briefly on the report of Project EVEREST, which Secretary of State Brunner's office released last week. There can be no doubt of the need to examine carefully the vulnerabilities of existing technology, as the EVEREST report purports to do. At the same time, there is a danger of overreacting. Decisions should not be made based on panic, nor should decisions be made in a manner that will lead to panic on the part of voters. As my Moritz colleagues and I observed in a five-state report released earlier this month, there are dangers in changing too much too quickly without thinking through all the consequences.<sup>6</sup>

Making hasty changes to voting technology before the 2008 election is, in my view, especially hazardous. The EVEREST report suggests that Ohio counties could switch to a central-count optical scan while making scanners available at each polling place for voters to check their work. As I explained in a blog post on Saturday (attached to this testimony), it is not at all clear that this would reduce the number of lost votes typically associated with central-count systems. It is also doubtful that it will enhance security.

The reality is that any system is vulnerable, if adequate procedures are not in place or if able and well-trained people are not running elections. In the short time that remains between now and the 2008 elections, this county and others would do better to focus on people and procedures, rather than attempting a risky and expensive overhaul of voting equipment.

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<sup>3</sup>See, e.g., Henry E. Brady & Iris Hui, University of California, Berkeley, *Let's Not Forget About Accuracy* (2007); Henry E. Brady & Iris Hui, *Accuracy and Security in Voting Systems* (2007); David C. Kimball, et al., *Unrecorded Votes and Political Representation* (2004); David C. Kimball, *Summary Tables on Voting Technology and Residual Vote Rates*.

<sup>4</sup>Charles Stewart III, *Residual Vote in the 2004 Election*, 5 ELECTION L.J.158 (2006).

<sup>5</sup>See Kimball, *Summary Tables*, at 4-6.

<sup>6</sup>STEVEN F. HUEFNER, DANIEL P. TOKAJI, & EDWARD B. FOLEY, *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES* (2007).