

Recounts and Contests Study

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Introduction

Purpose and Goal of the Study

This study focuses on the aspects of election administration related to the definition of a valid vote, recounts, and contesting elections.

Each of the 55 States and Territories has its own unique valid vote, recount, and contest policy and procedure contained within defined statutes and regulations; there are few Federal laws that guide these election administration practices at the local level. The Federal laws serve to outline the general requirements in which a jurisdiction might conduct a recount or contest.

The *Recounts and Contests* study includes some suggested practices that State and local election officials may find useful for recounts and contests. The practices applicable to defining a valid vote are aimed at State policymakers, as the definition is typically a component of a State's election administration statute.

States bring different experiences, legal requirements, and political cultures to the election process. The U.S. Election Assistance Commission (EAC) is sensitive to the political and social differences that exist across the States.

The examples of State policies and procedures in this document are intended only as a general informational tool. Jurisdictions are reminded to implement these voluntary best practices only after reviewing State and local laws and regulations. Local election officials should contact their State election officials with questions about the legality of a specific policy or procedure in their State. EAC is not endorsing any State practice referenced in this report as the official standard for what constitutes a valid vote, recount process, or election contest procedure.

Section 241(b)(13) of the Help America Vote Act (HAVA)¹ requires the EAC, on such periodic basis as the Commission may determine, to conduct and make available to the public studies regarding the election administration issues, including:

- (A) The laws and procedures used by each State that govern—
 - (i) recounts of ballots cast in elections for Federal office;
 - (ii) contests of determinations regarding whether votes are counted in such elections; and
 - (iii) standards that define what will constitute a vote on each type of voting equipment used in the State to conduct elections for Federal office.
- (B) The best practices (as identified by the Commission) that are used by States with respect to the recounts and contests described in clause (i).
- (C) Whether or not there is a need for more consistency among State recount and contest procedures used with respect to elections for Federal office.

Background

In 2005, EAC contracted with the University of Utah to conduct research and produce a study to comply with HAVA Section 241(b)(13). The data were collected originally in 2006 by inspecting each State's election statutes and regulations. After the November 2006 election, all State election offices were asked to examine the information collected on their State. Corrections and updates provided by the States through March 2007 were incorporated. The data were updated again in the summer of 2008 by reviewing changes made to State laws and regulations

¹ 42 USC 15381

since the review in early 2007. In September 2009, the contractor provided the EAC a final report, which contained detailed information about State valid vote definitions, recount processes, and contest policies and procedures. The contractor's report also included examples of best practices in the States for each component of the required study. The EAC's *Recounts and Contests* study builds on the contractor's draft by organizing the report into a review of valid vote definitions, recount processes, and contest policies and procedures that can be used by election officials, State and Federal policymakers, and voters.

This study is separated into four parts:

- **The Ballot.** There are numerous steps in election administration prior to recounts and contests can be conducted. This short review of a ballot's life cycle – from design until vote counting – will help the reader to understand the different definitions for a valid vote. Similarly, the summary will discuss States' considerations for recount and contest statutes and regulations.
- **A Valid Vote.** Federal law directs States to define what constitutes a legally cast and countable vote on each type of ballot it uses. The statutes and regulations regarding what constitutes a vote typically have two components. This section will explain those components and how States operationalize their valid vote laws for real-life situations.
- **Recounts.** Recounts of ballots are generally allowed in close elections to corroborate or overturn the certified election results. This section will outline the two different types of recounts—automatic and initiated—and discuss some of the processes involved in conducting a recount.
- **Contests.** Election contests occur when one candidate or citizen is dissatisfied with the outcome of an election. Contests are generally handled by courts of law and not by election administrators. States have varying guidelines for contests regarding timeframes, legal standing, available relief to the petitioners, the costs, and substantial vs. strict compliance to statutes and regulations. This section discusses some of the considerations States make when implementing election law regarding contesting an election.

The EAC is an independent, bipartisan commission created by the HAVA. Its mission is to assist State and local election officials with the administration of Federal elections. The EAC provides assistance by disbursing, administering, and auditing Federal funds for States to implement HAVA requirements; conducting studies and other activities to promote the effective administration of Federal elections; and serving as a source of information regarding election administration.

The Ballot

The ballot is the very core of the election process. Americans have a few basic expectations for their ballots. First, Americans cherish the privacy of their votes. The privacy extends to marking the ballot, and HAVA is the most recent Federal statute designed in part to promote an individual's independence in marking the ballot.² Second, Americans expect their ballots to be counted efficiently and accurately. Thirdly, and to guarantee that accuracy, Americans expect a transparent process for vote counting, recounting, and contesting the outcome of an election.

The EAC begins the *Recounts and Contests* study with a description of the ballot in order to offer the reader some context for the decisions States made when crafting their statutes and regulations for defining valid votes, recount processes, and contest policies and procedures. A short description of a ballot's life cycle follows the discussion about the different types of ballots.

Types of ballots

There are primarily three types of ballots used during Federal elections: paper ballots, optical scan ballots, and ballots cast on direct-recording electronic (DRE) voting systems.

Paper ballots are the least commonly used type of ballot in contests for Federal office. Still, according to the EAC's 2008 Election Administration and Voting Survey, at least 14 States and Territories used paper ballots in some jurisdictions during the November 4, 2008 Presidential election.

The Federal Election Commission previously defined a paper ballot system as one that "employs uniform official ballots of various stock weight on which the names of all candidates and issues are printed. Voters record their choices...by marking the boxes next to the candidate or issue choice they select and drop the voted ballot in a sealed ballot box."³

An **optical scan** system, as defined by the instruction manual of the EAC 2008 Election Administration and Voting Survey, is one that records votes by marks in voting response fields on ballot cards that are read by an optical scanner or similar sensor; and referred to as "mark-sense" voting systems. According to the Survey, at least 43 States and Territories employ optical scan ballots in some of their jurisdictions.

The Survey defines a **DRE** system as one that records votes by means of a ballot display provided with mechanical or electro-optical components actuated by the voter and where voting data is stored in a removable memory component. DRE is also referred to as an "electronic" voting system. According to the Survey, at least 31 States and Territories employ DREs in some of their jurisdictions.

Life Cycle of a Ballot

All of the steps during the life cycle of a ballot affect the counting, recounting, and contesting of votes cast in an election. The EAC provides resources for election officials to assist with each part of the cycle. The general points of the life cycle are:

- Design and Testing
- Accounting and Reconciliation
- Counting
- Recounts (if necessary)

² 42 USC 15481

³ Accessed 3/1/2010 - <http://www.fec.gov/pages/paper.htm>

- Contests (if necessary)

Design and Testing

A ballot – whether paper, optical scan, or electronic – must be designed by an election official. In 2007, the EAC released *Effective Designs for the Administration of Elections*, which details best practices for ballot design. State laws vary from general to specific in describing how a ballot can be designed.

After design, a ballot is subjected to various testing before it is approved for distribution to early voting sites, absentee voters, and Election Day polling places. Some jurisdictions conduct simulated usability testing on the ballots with individuals outside the elections office to see how voters are likely to use the ballot on Election Day. Jurisdictions also conduct logic and accuracy testing to ensure that all machines count the ballots accurately. In many jurisdictions, the testing is a public process performed in front of political party representatives, other interested organizations and the public.

Accounting and Reconciliation

The next step in the ballot life cycle is accounting and reconciliation. It is critical that the correct number of legitimate votes be counted for each candidate. Election officials account for every ballot—those cast, not voted, and spoiled—in order to ensure that the number of ballots cast coincides with the number of individuals who voted legally.

For example, Montana has a law controlling accounting and reconciliation at the Election Day polling place. In short, it states that the precinct election officials (more generally called “poll workers”) shall count all of the ballots cast in the polling place to ensure that the total number of ballots cast corresponds with the total number of voters’ reflected as having voted in the poll book. If the precinct election officials cannot reconcile these two totals, they submit to the jurisdiction’s chief election official a written report stating how many ballots are missing or in excess and any reason of which they are aware for the discrepancy.⁴

Counting

All valid ballots submitted for counting are counted after reconciliation. Ballot counting can happen a few different ways depending on the type of ballot. The most common type of counting is electronic, either a DRE printout of results or by running optical scan ballots through a counter. Some jurisdictions count their ballots by hand. If a jurisdiction counts the ballots by hand, it likely has clear guidelines about what constitutes a valid vote for the type of ballot it uses.

Recounts

A recount is “a retabulation of the votes cast in an election.”⁵ Recounts are generally allowed or mandated by State law in close elections to corroborate or overturn the certified election results. A close outcome is often part of an election. Especially in local elections, traditionally with lower voter turnout, it is not uncommon for a handful of votes to determine the outcome of the election. Of course, in recent years, there have been exceedingly close margins in much higher

⁴ Mont. Code. Ann. § 13-15-201

⁵ U.S. Election Assistance Commission, *2005 Voluntary Voting System Guidelines*, Volume 1, Version 1.0., A-16, available at the EAC website at www.eac.gov.

turnout elections too. For example, the gubernatorial election in Washington State in 2004, an election in Florida's 13th Congressional District in 2006 and the Minnesota Senate election in 2008 included millions of votes and winning margins under 0.011% of the total vote. A recount provides an opportunity to ensure that all the ballots cast are counted accurately and that the correct candidate or ballot issue wins the election.

Each State has specific laws for conducting recounts. A recount can be initiated either automatically or by an individual or group of individuals with legal standing in accordance with State statute and regulation. Some States require an automatic recount when the margin of victory reflected by the canvass of votes falls within a predetermined percentage, such as 0.5 or 1 percent of the vote. A candidate or group of voters may also initiate a recount, as allowed by State law. These types of recounts usually require the initiator to pay the cost of the recount if the outcome is unchanged at the end of the process.

Contests

An election contest occurs after the certification of results, usually after a recount is conducted pursuant to any State or local laws or regulations. Jurisdictions vary on who may initiate an election contest and the relief available to the aggrieved party. Contests are usually adjudicated in State or Federal courts.

On rare occasions election contests can be filed with the U.S. House of Representatives and U.S. Senate. The Committee on House Administration investigates contested elections to the House of Representatives. In the Senate, the Committee on Rules and Administration investigates the contests. Each house of Congress is the final arbiter of an election.

A Valid Vote

Section 301 of HAVA requires “[e]ach State...[to] adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.”⁶ Guidelines for what constitutes a valid vote ensure that each local and State election official with responsibility for administering an election makes the same determination about ballots during the vote counting, recounting, and election contest processes.

The statutes and regulations regarding what constitutes a vote typically have two components. First, there may be requirements about the way in which the ballot is to be marked. Second, there may be language regarding how the total vote count for each election is to be determined.

Votes on each type of ballot

Paper ballots are not a common method of voting in Federal elections. A hand-counted paper ballot law focuses on clear voter intent standards for local election officials to follow. It typically defines a valid vote as a mark in the correct box next to the voter’s candidate of choice. The law generally also specifies what a local election official is to do in various scenarios.

Michigan law (168.803) provides a clear example of a paper ballot vote count standard.

First, a ballot is checked for distinguishable marks that can make a ballot uniquely identifiable: “if...there has been placed on the ballot some mark, printing, or writing for the purpose of distinguishing it, then that ballot is void and shall not be counted.”

Second, a specific mark in a specific location is the only way to cast a ballot: “A cross, the intersection of which is within or on the line of the proper circle or square, or a check mark, the angle of which is within a circle or square, is valid. Crosses or check marks otherwise located on the ballot are void.”

The Michigan law is clear in explaining exactly what a valid vote is—one without distinguishing marks—and then how a valid ballot is counted—looking for a cross in the proper circle or square.

Optical scan ballots are ballots cast by marking a paper based ballot either by filling in a bubble or by connecting two arrows next to the name of a candidate/ballot issue. The ballot is then scanned electronically, during which the scanner “looks” for marks on the ballot in pre-set spots and records those marks as votes for a specific candidate or ballot issue. Assuming the voter marks the ballot appropriately, the ballot will be counted correctly. However, voters may engage in other activities – such a circling candidate names as opposed to filling in the bubble – that will result in a ballot not being scanned correctly. With paper ballots, the legal framework for how these marks are interpreted is critical for the counting process.

Colorado’s statute for optical scan ballot counting includes a good example of how to include the definition of a valid vote in State law. The first part of the statute addresses the physical act of marking the ballot, stating that the voter “shall clearly mark or stamp in the appropriate square or place a cross mark opposite the name of the candidate or names of the joint candidates of the [voter’s] choice” (CO-1-7-503). The law then defines how votes are counted: “[T]he return printed by the electronic vote-tabulation equipment... [shall]... constitute the official return of each precinct” (CO-1-7-507).

⁶ 42 U.S.C. § 15481(a)(6).

In this case, the functional part of the voting process—marking the ballot—is clearly defined for the voter. The valid vote is then determined by the tabulation equipment, which produces the official return after summing the counted marks on the ballots.

Electronic voting statutes and regulations tend to deal less with the physical act of voting, largely because voter intent does not have to be interpreted. The direct recording of the vote by the voting machine is intended to ameliorate the problem of interpreting intent. The voter intent in vote counting, therefore, is typically addressed by language that identifies the electronic totals as being the official vote count but also recognizes the need for there to be a second, auditable count available.

For example, under California law (19253) voter intent is clearly defined: “On a direct recording electronic voting system, the electronic record of each vote shall be considered the official record of the vote.” However, if any difference is discovered during the one percent manual tally between the electronic record and the voter verified paper audit trail, which would suggest that the technology is not rendering the voter’s intent correctly, then the paper trail is to be used for totaling the votes.

Voter Intent

Once cast, a ballot can never be linked to a specific voter. The voter cannot be asked how he or she intended to vote if the marks are unclear. In some States, these unclear ballots are automatically invalid. In others, ballots are evaluated using voter intent standards.

An objective standard means that a valid vote must conform exclusively to the requirements set by statute and regulation. Any deviation from the written statutes or regulations results in an invalid vote.

Some States allow an election official – or canvass board or other statutorily-defined entity – to interpret the unclear marks on a paper ballot. These States have voter intent standards for what constitutes a valid vote. In States with more expansive voter intent laws, the voter may not have followed all of the directions exactly but still may have his or her ballot counted.

In the case study below, the EAC examines the vote count standards in the Commonwealth of Virginia, which provide an example of effective practices in specific areas of voter intent and determining what constitutes a vote on a ballot.

CASE STUDY: Voter Intent in Virginia

In Virginia, the vote count standards for paper ballots are included in the documentation for election recounts.⁷ Although contained within the recount standards, the Virginia Board of Elections explicitly notes that “in the interest of uniformity whenever paper or paper-based ballots must be counted manually for whatever reason (outside of a recount), the local election officials shall use the ‘Ballot Examples for Handcounting Paper or Paper-based Ballots for Virginia Elections or Recounts’ as guidance for such handcounts.”⁸ The *Virginia Recount Standards* are illustrative of a best practice for defining voter intent for several reasons.

First, the regulations make clear whether, for paper or optical scan ballots, the ballots should be counted electronically or by hand. In general, voter intent is determined by the voting machine. The regulations state that “[f]or optical scan tabulators...[t]he result calculated for ballots

⁷ Virginia information found at: http://www.sbe.virginia.gov/cms/Misc/Election_Laws.html

⁸ Cited in the “Standards for Recounts of Virginia Elections” page 2.

http://www.sbe.virginia.gov/cms/documents/Election_Laws/RecountStandards_RevisedSept8_2008_ADOPTED.pdf

accepted by the tabulator during the recount shall be considered the correct determination for those ballots unless the court finds sufficient cause to rule otherwise.”⁹

Second, when ballots are to be counted by hand, the regulations define clearly the process by which election officials are to determine voter intent. The process starts by defining clearly the parts of the ballot for the election officials. The “target area” is the oval or square next to the candidate’s name that the voter is supposed to mark and the “candidate area” is the area separating candidate names. With these definitions, the Board can discuss what are (or are not) voter intent markings using a standard terminology.

The Board of Elections does not stop with verbal descriptions, though. Instead, it provides 12 pages of documentation containing over 100 visual examples of what does or does not constitute a valid vote in the Commonwealth of Virginia. The “Virginia Recount and Handcount Ballot Examples” (Appendix A in the *Virginia Recount Standards*) are exceedingly clear for all types of markings what is or is not a vote; the key points in the handbook are summarized below.

- The guidance begins with 18 examples (in section 3 of the guidance) of how a voter might properly mark a ballot in the target area, with a check, cross, line, black mark, or X mark.
- The guidance (Section 5) then provides 10 examples of overvotes that may not be counted because there are too many marks on the ballot. However, the guidance also identifies 10 examples of how a voter might overvote and then correct the overvote with an additional clarifying mark. Election officials can use the visual examples for the regulatory guidance to see if the voter did or did not make a mark that made their vote valid.
- Sections 6 through 12 of the guidance cover marks made on the ballot in the candidate area – such as circling the candidate’s name – or marks near the target circle for a given candidate – such as circling a candidate’s target circle – and stating if a given mark is a vote. (Both examples are valid votes in Virginia). The visual guidance in these sections covers most of the permutations that a voter might mark his or her ballot and explains how such marks should be interpreted in a hand count.

Finally, the Virginia regulations also discuss DRE electronic tabulation. On DRE machines, voter intent cannot be interpreted. Instead, the most common term for “voter intent” is “machine intent.” Virginia’s intent standard for DREs is typical of many States: “For direct recording electronic machines (DREs), the recount officials shall open the envelopes with the printouts and read the results from the printouts. If the printout is not clear, or on the request of the court, the recount officials shall rerun the printout from the machine or examine the counters as appropriate.”¹⁰

Many other States outline the acceptable boundaries of voter intent in statewide manuals. Sometimes this information is included in a separate voter intent publication, and in other States the information can be found in the statewide recount manual.

Washington State also has some of the most comprehensive voter intent guidelines. The publication, *Washington’s Voter Intent Statewide Standards on What is a Vote (June 2009)*, describes nineteen unique rules – and their exceptions – that pertain to such cases as identifying marks on the ballot, messy marks, overvotes, write in votes, etc. Each rule is

⁹ IBID, page 4.

¹⁰ IBID, page 3.

explained with text and a visual example. The manual can be found on the Washington Secretary of State's website.¹¹

Wisconsin's Recount Manual for November 4, 2008 contains a section devoted to determining voter intent. Each step in the manual includes a citation to State code:

Determining Voter Intent

When counting paper or optical scan ballots, questions often arise concerning the intent of the elector. Poll workers have a duty to attempt to determine voter intent and give effect to that intent if it can be determined. Poll workers are expected to use common sense to determine the will of an elector based on the marks made by the elector on the ballot. The decisions of the poll workers may be reviewed by the board of canvassers conducting the recount. Wis. Stat. §§ 7.50, 7.51, 9.01(1)(b)¹¹.

Even if an elector has not fully complied with the provisions of the election law, votes should be counted as intended by the elector to the extent that the elector's intent can be determined.¹⁵ The Government Accountability Board has a manual, "Counting Votes," which is designed to assist the board of canvassers in determining voter intent. A copy of the "Counting Votes" manual is included in the Appendix. See Wis. Stat. § 5.01(1).¹²

Questions about voter intent may arise any time a voter casts a ballot on paper. Since all States use paper for absentee voting, each State should consider defining clearly its valid vote standards.

Table 1: Valid Vote Standards is the EAC's determination of the type of standard each State uses to define what constitutes a valid vote. Currently, 34 States and the District of Columbia outline voter intent standards for what constitutes a valid vote. Nine States define an objective standard for what constitutes a valid vote. For 7 States, the EAC could not determine the valid vote standard from State code or regulation.

Table 1: Valid Vote Standards		
	Voter Intent	Objective
Alabama	X	
Alaska	X	
Arizona	X	
Arkansas	X	
California		X
Colorado	X	
Connecticut		X
Delaware	X	
District of Columbia	X	
Florida		X
Georgia	X	
Hawaii		X
Idaho	X	
Illinois	X	
Indiana	X	

¹¹ Washington's Voter Intent Statewide Standards on What is a Vote (June 2009), <http://www.sos.wa.gov/assets/elections/2009StatewideStandardsonWhatisaVote.pdf>, accessed March 1, 2010.

¹² Wisconsin's Recount Manual for November 4, 2008, <http://elections.state.wi.us/docview.asp?docid=2127&locid=47>, accessed March 1, 2010.

Iowa	X	
Kansas	X	
Kentucky		
Louisiana		X
Maine	X	
Maryland	X	
Massachusetts		
Michigan		X
Minnesota	X	
Mississippi	X	
Missouri		
Montana	X	
Nebraska		X
Nevada	X	
New Hampshire	X	
New Jersey		X
New Mexico		X
New York		
North Carolina	X	
North Dakota	X	
Ohio		
Oklahoma		
Oregon	X	
Pennsylvania	X	
Rhode Island	X	
South Carolina	X	
South Dakota	X	
Tennessee	X	
Texas	X	
Utah	X	
Vermont	X	
Virginia	X	
Washington		
West Virginia	X	
Wisconsin	X	
Wyoming	X	

Recounts

A recount is “a retabulation of the votes cast in an election.”¹³ Recounts are generally allowed in close elections to corroborate or overturn the certified election results. A close outcome is often part of an election. Especially in local elections, traditionally with lower voter turnout, it is not uncommon for a handful of votes to determine the outcome of the election. Of course, in recent years, there have been exceedingly close margins in much higher turnout elections too.

Each State has specific laws for conducting recounts. A recount can be initiated either automatically or by an individual or group of individuals with legal standing in accordance with State statute and regulation. Some States require an automatic recount when the margin of victory reflected by the canvass of votes falls within a predetermined percentage, such as 0.5 or 1 percent of the vote. A candidate or group of voters may also initiate a recount, as allowed by State law. These types of recounts usually require the initiator to pay the cost of the recount if the outcome is unchanged at the end of the process.

Automatic recount: If the margin between the winning and losing candidate or ballot issue falls within a certain hard number or percentage of ballots, a State’s automatic recount statute requires a recount. Twenty-one States and the District of Columbia have automatic recounts in some elections. See *Table 2: Types of Recounts* on the following page for more information.

Most States that have automatic recount provisions require the State to pay for the recount costs. At the end of a contest, many candidates cannot afford to pay for the high cost of a recount, and these automatic recount provisions make it possible for jurisdictions to take a second look to check for the accuracy of the results. Additionally, automatic recount provisions do not require a candidate to meet a high burden before a recount is ordered. As long as the candidate is defeated within a certain number of ballots, the automatic recount statute requires a recount. Lastly, an automatic recount reassures the electorate that the correct candidate or ballot issue has won the election.

Statutes and regulations about automatic recounts vary by State. The most common practice is that an automatic recount provision is triggered if the canvass of returns shows that the margin between two candidates (or two sides in a ballot initiative or constitutional amendment) is within a defined small margin. For example, under Arizona law an automatic recount is started when the vote totals meet the following qualifications:

- One-tenth of one percent of the number of votes cast for both such candidates or upon such measures or proposals;
- Two hundred votes in the case of an office to be filled by State electors and for which the total number of votes cast is more than twenty-five thousand;
- Fifty votes in the case of an office to be filled by State electors and for which the total number of votes cast is twenty-five thousand or less;
- Two hundred votes in the case of an initiated or referred measure or proposal to amend the constitution; and
- Fifty votes in the case of a member of the legislature. Ten votes in the case of an office to be filled by the electors of a city or town or a county or subdivision of a city, town, or county.¹⁴

The State of Colorado, conversely, has a much simpler standard governing automatic recounts. The threshold is a margin of victory within a specific percentage for all types of elections: “A

¹³ U.S. Election Assistance Commission, *2005 Voluntary Voting System Guidelines*, Volume 1, Version 1.0., A-16, available at the EAC website at www.eac.gov.

¹⁴ Ariz. Rev. Stat. Ann. § 16-661

recount of any election contest shall be held if the difference between the highest number of votes cast in that election contest and the next highest number of votes cast in that election contest is less than or equal to one-half of one percent of the highest vote cast in that election contest.”¹⁵

The second type of recount is the **initiated recount**. Candidate-initiated recounts allow candidates to petition for a recount within a specified time period after certification of election results. Thirty-nine States and the District of Columbia have statutes or regulations authorizing candidate-initiated recounts.

Citizen-initiated recounts are allowed in 27 States and the District of Columbia. In these jurisdictions, citizens may petition for a recount but a recount is not guaranteed. After the certification of results, any voter may file a request for a recount of the votes cast in a specific election.

	Automatic	Candidate Initiated	Citizen Initiated
Alabama	X		X
Alaska	X	X	X
Arizona	X		X
Arkansas		X	
California			X
Colorado	X	X	
Connecticut	X		
Delaware	X	X	
District of Columbia	X	X	X
Florida	X		
Georgia		X	X
Hawaii			
Idaho	X	X	
Illinois		X	X
Indiana		X	X
Iowa		X	
Kansas		X	X
Kentucky		X	
Louisiana		X	
Maine	X	X	
Maryland		X	X
Massachusetts		X	X
Michigan	X	X	X
Minnesota	X	X	
Mississippi			
Missouri		X	X
Montana		X	X
Nebraska	X	X	
Nevada		X	X
New Hampshire		X	X
New Jersey		X	X
New Mexico		X	
New York			

¹⁵ Colo. Rev. Stat. § 1-10.5-101(b)

North Carolina		X	
North Dakota	X	X	
Ohio	X	X	X
Oklahoma		X	X
Oregon	X	X	X
Pennsylvania	X		X
Rhode Island		X	
South Carolina	X		
South Dakota	X	X	X
Tennessee			
Texas	X	X	X
Utah		X	X
Vermont		X	
Virginia		X	X
Washington	X	X	X
West Virginia		X	
Wisconsin		X	X
Wyoming	X	X	X

Timelines for Recounts

In a perfect environment, every election jurisdiction would have the unlimited time and resources to guarantee absolute accuracy that every ballot cast is counted correctly. However, recounts are expensive and statutorily-imposed deadlines for determining the winner of an election require hard decisions. For example, ballots cast in an election for the office of president of the United States must be counted in time for the Electoral College meetings. If a State has not resolved any recounts by that date set by Federal statute, it risks losing its vote in the Electoral College.¹⁶ States must take into consideration all other election-related deadlines when considering acceptable timelines to conduct a recount.

The comparative example of Washington State and the Commonwealth of Virginia demonstrates that States can create different timelines for conducting recounts in their jurisdictions and be equally successful in reaching a conclusion to the election.

Representatives from the Commonwealth of Virginia and the State of Washington discussed their respective experiences with recounts and election contests at an EAC Public Meeting in 2006.¹⁷ The testimony revealed clear differences in the approach to recounts in each State. The testimony also demonstrated that both States were successful in balancing the interests of their voters and timeframes for completing an election.

The testimony also highlighted several common issues that arise during recounts that all States might consider including in their recount statutes:

Are the standards clear about what constitutes a recount?

In Washington, there was some disagreement during the 2004 recount regarding whether the counties should engage in a recount – that is, re-tabulate the ballots counted initially – or a re-canvass, which requires re-examining ballots that were previously excluded by the canvassing

¹⁶ More information about the Electoral College is available on the EAC website at www.eac.gov.

¹⁷ More information about the April 2006 EAC Public meeting is available at <http://www.eac.gov/News/meetings/04-20-06-public-meeting>.

board. Virginia’s procedure is more straightforward; only those ballots in the initial count are included in a recount.

What is the scope of the recount?

In Virginia, there is a requirement that there be evidence that the machines that tabulated the initial count were compromised or problematic. This standard resulted in only a handful of precincts being recounted during the 2005 statewide recount. Washington State recounted all votes in its more expansive recount in 2004.

Are the costs defined in statute and/or regulation in line with modern costs?

Many States that allow candidate-initiated recounts have not adjusted the costs of conducting a recount to reflect the modern wage and time costs. Consequently, elections offices at the State and local level absorb the balance out of their budgets, which do not always include contingency funds for these activities.

If an election contest occurs during a statewide election, what is the venue for the recount?

In Washington in 2004, the challenging candidate was able to select the venue for the recount. Virginia establishes a single venue for recounts and then empowers that court to enlist assistance from other local courts, if necessary, during the recount.

Conducting a Recount

The requirements for conducting a recount are outlined in State statutes and regulations. Local jurisdictions in some States then clearly define their administrative processes for conducting a recount.

Who conducts the recount?

Some States allow the challenging candidate to choose the venue for the recount. Other States establish a single venue for recounts and then empower the courts to enlist assistance from other local courts, if necessary. Either way, once the venue is decided, States outline different procedures for the person or organization charged with conducting the recount.

Eighteen States require the local election official to conduct the recount; 17 States and the District of Columbia require that a recount commission or canvass board conduct the recount; 9 States require the court to conduct a recount; and, two States require the secretary of State to conduct the recount.

Table 3: Who Conducts a Recount			
Election Official	Court	Recount Commission/ Canvass Board	Secretary of State
Alaska	Delaware	Alabama	Arizona
California	Illinois	Arkansas	New Hampshire
Georgia	Kentucky	Colorado	
Idaho	Louisiana	Connecticut	
Kansas	Missouri	District of Columbia	
Maine	New Jersey	Florida	

Maryland	Pennsylvania	Indiana	
Massachusetts	Vermont	Iowa	
Nevada	Virginia	Michigan	
New Mexico		Minnesota	
New York		Montana	
North Carolina		Nebraska	
North Dakota		Oregon	
Ohio		South Carolina	
Oklahoma		Washington	
South Dakota		West Virginia	
Texas		Wisconsin	
Utah		Wyoming	

The method of recount will affect the type and quantity of staff a recount coordinator will need to conduct a recount. Recounts of paper ballots, for example, can sometimes be recounted by re-tabulating through electronic scanners. If the jurisdiction must conduct a hand recount, however, more staff will be necessary. If the jurisdiction requires some sort of determination about voter intent, the staff conducting the recount will also need specialized training to ensure uniformity of decisions during the recount.

The total number of individuals needed for conducting a recount also depends on the number of ballots to be recounted, the timeframe, and the budget. If the recount coordinator is hiring staff from outside the elections office, he or she might recruit a few alternates for the various positions in the event of cancellations during the recount process.

When is a recount started and by when must it be completed?

Depending on which types of initiated recounts a jurisdiction allows, a candidate or citizen may file with the Secretary of State (or the appropriate official) a written request for a recount for a given election or ballot initiative following completion of the official canvass. The filing deadline can be up to 30 days after the election considering that some canvasses do not start until a week or so after Election Day. If the petition for a recount is granted, State statute and regulation often require that the recount start quickly, typically “as soon as practical.” Once the recount is started, some States have completion deadlines or requirements for completion. For instance, in California (Cal. Elec. Code § 15626), a recount has to be conducted for at least six hours per day, every business day, until the recount is complete.

For almost all elections, the jurisdiction has enough time to conduct the recount because the office for which the election was conducted can be left vacant until the conclusion of the process. The same is not true for an election for the office of president of the United States. If a State has a disputed outcome in the presidential election, it must meet the “safe harbor” deadline¹⁸ set by Federal law, or risk having its disputed electoral votes decided by Congress. Meeting the safe harbor deadline guarantees to States that Congress will accept their election results without argument. If an election dispute is not resolved by the State before the safe harbor deadline, Congress can decide to award the State’s electoral votes in a manner of its choosing.

¹⁸ The safe harbor deadline was created by the Electoral Count Act of 1887 following the disputed Hayes-Tilden election of 1876. It is codified in law as 3 U.S.C. § 5

What is recounted?

Election officials may recount the ballots tabulated initially or re-canvass all of the ballots submitted for counting. The latter usually requires re-examining ballots that were previously excluded by the canvassing board.

Some States require evidence that the voting system that tabulated the initial count was compromised or problematic in order to authorize a recount. If only a handful of precincts or polling places were compromised, only those ballots will be recounted. Other jurisdictions allow for more expansive recounts.

The extent of a recount can also vary by jurisdiction. In some States, one of the candidates chooses the extent of the recount. It is common for the Secretary of State to order a recount or re-canvass in any and/or all counties in which voters cast ballots for a given office. In several jurisdictions, the courts or the State board of canvassers determines the extent of the recount.

Some States require a uniform standard for recounts; others allow the requesting parties (in an initiated recount) some discretion in choosing the scope. For example, in New Hampshire, the statute reads, “[i]f the candidate obtains a recount, the scope includes all ballots in the district.”¹⁹ By contrast, Oregon statute allows, “the person making a demand for a recount may, in the first demand, specify a partial or a full recount. A person making a demand for a partial recount has to specify the precincts in which a recount should be conducted and office or measure to be recounted. If in the first demand the person requested a partial recount, the person may file a supplemental demand for a recount of all the remainder of the precincts.”²⁰

How is a recount conducted?

Once a recount is authorized, it is important to consider which methods should be used, who pays for the costs, and how the process is recorded. Procedures for recounts vary across States, but the Florida²¹ and Virginia²² statutes summarized below include the key components of effective recount practices. The EAC does not endorse any one State’s policies and procedures over another State’s.

The following is a general explanation of how a recount might be conducted:

- First, before the recount starts, there should be clear information available to all parties regarding the time and place of the recounts, how the recount proceedings will be recorded and reported, how the chain of custody of all materials will be maintained, and how candidates can participate in the process.
- Second, any voting equipment – such as ballot tabulators – that will be used in the recount should be tested for logic and accuracy to ensure that they are prepared to recount the election outcome in dispute.
- Third, counting teams will be appointed. Counting teams generally include at least two members, typically from different political parties. Other jurisdictions have tripartisan recounts.
 - When hand recounting paper ballots, the recount officials count the ballots using the valid vote standards established before the election.
 - For DREs, the recount officials open the envelopes with the printouts and read the results from the printouts. If the printout is not clear, the recount

¹⁹ N.H. Rev. Stat. Ann. 660

²⁰ ORS 258.161(4)

²¹ Fla. Stat. Ann. §102.166

²² Va. Code Ann. § 24.2-802

officials should rerun the printout from the machine. In jurisdictions with a voter verifiable paper audit trail, the paper can be recounted to ensure that the machine printout totals reconcile with the paper. In some jurisdictions, the paper record may be the ballot of record for any discrepancies.

- Fourth, there should be clear rules for how parties and interested individuals can observe the process.

The process for conducting a recount will vary by State. Jurisdictions are reminded to implement these voluntary best practices only after reviewing State and local laws and regulations. Local election officials should contact their State election officials with questions about the legality of a specific policy or procedure in their State.

	Hand/Manual	Machine Re-tabulation	Varies
Alabama	X		
Alaska	X		
Arizona			
Arkansas			
California			X
Colorado			X
Connecticut			
Delaware			
District of Columbia			X
Florida	X	X	
Georgia			
Hawaii			
Idaho			
Illinois			X
Indiana	X		
Iowa	X		
Kansas			X
Kentucky			
Louisiana	X		
Maine			
Maryland			X
Massachusetts			X
Michigan	X		
Minnesota			
Mississippi			
Missouri			X
Montana	X	X	
Nebraska			
Nevada	X	X	
New Hampshire	X		
New Jersey			
New Mexico	X	X	
New York	X		
North Carolina		X	
North Dakota			
Ohio			X

Oklahoma		X	
Oregon	X		
Pennsylvania			
Rhode Island		X	
South Carolina			
South Dakota			
Tennessee			
Texas	X		
Utah			
Vermont	X		
Virginia	X	X	
Washington			
West Virginia	X		
Wisconsin			X
Wyoming		X	

Paying for the Recount

There are many costs associated with conducting a recount, and cost is often a concern for a recount coordinator conducting a recount. The following are costs that are common to conducting recounts in many jurisdictions:

- Full-time staff salaries and benefits and overtime hours;
- Part-time staff salaries;
- Location rental;
- Tables and chairs rental;
- Transcription;
- Legal expenses;
- Vendor support;
- Security;
- Additional printing, storage boxes, and other supplies used in the jurisdiction for the recount.

There are no common practices across States associated with what entity pays these costs. For automatic recounts, it is usually the State or local government that pays for the recount. For initiated recounts, there are many different ways States cover the costs of the recount. Currently, 27 States have a statute that requires the petitioner to pay the actual costs of the recount, one State requires petitioners to pay a pre-determined estimated cost, and 17 States have a fixed fee as determined by their individual statutes. Two States give the court or government discretion in assessing the costs of a recount, and in one State, the law is not clear regarding how the actual cost of a recount is determined. In some States, the outcome of the initiated recount can affect the payment requirement. If the petitioner is declared the winner, he or she often does not have to pay for the recount.

Table 5: Who Pays for a Recount		
	Government	Petitioner
Alabama		X

Alaska		X*
Arizona	X	
Arkansas		X
California		X
Colorado		X
Connecticut		
Delaware	X	
District of Columbia		X
Florida		
Georgia	X	
Hawaii		
Idaho	X	X
Illinois		
Indiana		X
Iowa		X
Kansas	X	
Kentucky		
Louisiana		X
Maine		X
Maryland		X
Massachusetts		
Michigan		X
Minnesota		X
Mississippi		
Missouri		X
Montana	X	
Nebraska		X
Nevada		X
New Hampshire		X
New Jersey		X
New Mexico		X
New York		
North Carolina		
North Dakota		X
Ohio		X
Oklahoma		X
Oregon		X
Pennsylvania		X
Rhode Island		
South Carolina		
South Dakota		
Tennessee		
Texas	X	
Utah		
Vermont	X	
Virginia		X*
Washington		X
West Virginia		X
Wisconsin		X
Wyoming		X*

X* indicates that the petitioner pays if the recount does not

change the outcome of the election.

Observers and Monitors

Transparency is critical when conducting recounts. Voter confidence is predicated on a transparent recounting process. Many jurisdictions allow various groups to observe different parts of the election administration process. The most common thread in State and local statute and regulation is to allow representatives of the candidates or parties to observe the process. Some States allow any interested members of the public or media to observe.

Given advances in technology, there are many ways that election administrators can utilize new communication technologies, especially the Internet, to increase transparency during the recount process. A number of election jurisdictions around the nation are innovators in this area, and the EAC highlights below the recent developments in Orange County, California to give a sense for what might be seen as evolving best practices for the transparency of recounting.

Orange County, California is an example of a jurisdiction that uses the Internet to promote transparency in all aspects of election administration. The county uses a “Web Reporting” webpage,²³ which allows anyone with an Internet connection to obtain live webcam images of operations in the central election facility before, during, and after the election. Technology like this can be used to allow an unprecedented level of public access to all aspects of the vote counting and recounting process, especially aspects like the pre-election procedures of setting up voting equipment or conducting logic and accuracy tests, which generally have not been subject to widespread public attention.

Transparency is an area in which much innovation is possible. The Orange County, CA example is one that shows the promise of how new electronic communication technologies can increase the transparency of election administration. Election officials might consider exploring further uses of these technologies for areas of the process of vote counting and recounting that the public has not been generally involved in the past, including the setup and maintenance of voting equipment, transportation and location of ballots and balloting materials, monitoring of election sites (especially early voting locations or vote centers), observation of election-night vote auditing and tabulation, observation of ballot storage, and observation of vote recounting and canvassing practices.

The table below is a State-by-State analysis of statutes and regulations that govern observing a recount. Currently, 29 States and the District of Columbia allow candidates and/or party representatives to observe a recount; 11 States allow the public to observe; and, 7 States allow the media.

	Candidate/Party	Public	Media
Alabama	X		
Alaska	X		
Arizona	X		
Arkansas			
California	X	X	
Colorado	X		X
Connecticut	X		
Delaware			
District of Columbia	X		
Florida		X	

²³ <http://www.ocvote.com/live>

Georgia	X		
Hawaii			
Idaho	X		
Illinois	X		
Indiana	X		X
Iowa		X	
Kansas			
Kentucky	X		X
Louisiana			
Maine			X
Maryland		X	
Massachusetts	X		
Michigan	X	X	
Minnesota			X
Mississippi			
Missouri	X		
Montana	X	X	X
Nebraska	X		
Nevada	X		
New Hampshire	X		
New Jersey		X	
New Mexico		X	
New York	X		
North Carolina			
North Dakota	X		
Ohio	X		
Oklahoma	X		
Oregon	X		
Pennsylvania	X		
Rhode Island	X	X	X
South Carolina			
South Dakota	X		
Tennessee			
Texas			
Utah			
Vermont		X	
Virginia	X		
Washington	X		
West Virginia			
Wisconsin	X	X	
Wyoming			

Election Contests

Election contests occur when one candidate or citizen is dissatisfied with the outcome of an election. Contests are generally handled by courts of law and not by election administrators. States have varying guidelines for contests regarding timeframes, legal standing, available relief to the petitioners, the costs, and substantial vs. strict compliance to statutes and regulations.

Most States require election contests to be filed within a defined period of time. For example, the state of Missouri requires all election contests to be filed within 30 days of the official announcement of election results. The most common practice is that the petitioner shall file a complaint with the clerk of the circuit court within 10 days after midnight of the date the last board responsible for certifying the results officially certifies the results of the election being contested.

Forty-seven States' statutes and regulations require election contests to be made in a court of law, two States do not, and one State's regulations are unclear.

States generally require the petitioner of an election contest to reach a high burden of proof in order for an election result to be overturned. The general sentiment is expressed in the Louisiana election contest case of *Newsom v. Temple*, in which the court stated that “[c]ourts are loathe to thwart the result of an election after votes have been cast and fairly counted, and will not act to change that result except for grave and sufficient reasons, clearly and amply supported by law.”²⁴ In order to overcome this high burden, petitioners contesting the outcome of an election must usually meet certain conditions.

The petitioner usually must show by clear and convincing evidence that there was some act of irregularity in the election administration process. If proven, the petitioner must prove that the irregularities actually changed the outcome of the election. There is a *de facto* presumption in favor of valid elections.

Several people or groups of people have legal standing to initiate an election contest. Generally, State law gives legal standing to the candidates, political parties, and/or to voters. Currently, 27 States afford the candidate or party legal standing to contest an election outcome; 35 States and the District of Columbia give legal standing to individual voters to contest the outcome of an election.

	Candidate/Party	Voter
Alabama		X
Alaska	X	X
Arizona		X
Arkansas	X	
California		X
Colorado		X
Connecticut	X	X
Delaware	X	X
District of Columbia		X
Florida	X	X
Georgia	X	X
Hawaii	X	X
Idaho	X	
Illinois	X	X

²⁴ *Newsom v. Temple*, 66 So.2d 357 (La.App. 1 Cir. Jun 30, 1953).

Indiana		
Iowa	X	
Kansas		X
Kentucky	X	
Louisiana	X	X
Maine		
Maryland		X
Massachusetts	X	
Michigan	X	X
Minnesota	X	X
Mississippi		X
Missouri	X	X
Montana		X
Nebraska		
Nevada	X	X
New Hampshire		X
New Jersey		X
New Mexico	X	
New York		X
North Carolina	X	X
North Dakota	X	X
Ohio	X	X
Oklahoma	X	X
Oregon	X	X
Pennsylvania		
Rhode Island		
South Carolina	X	
South Dakota		X
Tennessee	X	
Texas	X	X
Utah		X
Vermont		X
Virginia	X	
Washington		X
West Virginia		X
Wisconsin		
Wyoming		X

There are two common forms of relief available to victorious petitioners of election contests. First, a court can declare as nominated, elected, or as eligible to compete in a run-off primary or election the person (or ballot question) who the court finds received the requisite number of votes. Second, if a person (or ballot question) that has received the requisite number of votes for nomination, election, or to compete in a run-off primary or election is determined to be ineligible for the nomination (or to be on the ballot), the court can declare that the election was invalid (for that race or issue) and call for a new election to fill the nomination or office.

The costs of the election contest are borne generally by the petitioner and the defendant. If the election outcome as certified is confirmed, the petition dismissed, or the prosecution fails, judgments are typically rendered against the petitioner for all costs associated with the petition. If the judgment is rendered against the defendant or the election outcome as certified is set aside, the defendant usually pays the costs of the contest, at the discretion of the court. After

entry of judgment, the costs may be collected by attachment or otherwise. Currently, 26 States have regulations outlining that the petitioner of the election contest is responsible for the cost, five States publicly fund the election contest, and one State requires the party to pay.

Once the petitioner succeeds in having the court hear the election contest, States vary on strict or substantial compliance to election law. When courts find that a ballot is in substantial compliance, the court is usually finding that the intent of the voter is clear but the ballot did not meet all the requirements of the election code. Still, the vote is valid. Strict compliance courts, on the other hand, only examine whether all the provisions of the election code have been met. If all provisions are not met exactly as outlined in the statute, the ballot is not valid.

In substantial compliance jurisdictions, courts act under the assumption that the legislature passed the election code to facilitate a fair election in which the true intent of voters is recorded. Substantial compliance courts examine the violation of the election code and determine if that portion of the election code is mandatory or not. If it is a mandatory section, the ballot will be invalidated. For example, if the election code requires a voter to include his or her signature on the outer envelope of an absentee ballot, but the voter fails to do so, the ballot will be invalidated under a strict compliance approach. A substantial compliance jurisdiction will evaluate whether or not the signature on the outer envelope of the absentee ballot is required; if not, the ballot can be counted.

Consistency Among State Recount and Contest Procedures

It is clear from the *Recounts and Contests* report that there are many components in State election law that effect recount processes and contest policies and procedures. For example, if a State does not emphasize the need for a quick resolution to the election it may allow more time for jurisdictions to conduct canvassing and certification activities. The longer a State allows for canvassing and certification, the longer the time between Election Day and the beginning of recount and contest provisions must be. A Federally-mandated consistent standard, therefore, which requires the States to conduct recounts or contests within a short period of time after Election Day will upend longstanding election laws in many States across the country.

The policies and procedures for conducting recounts and election contests are tied closely to the specific ballot media and design. As States can use paper, optical scan, or DRE machines created by different companies, it will be difficult to determine a best practice consistent standard for all recounts and election contests across the country. For example, States like Minnesota have spent a lot of time developing recount manuals for determining valid votes. The creation of such a manual is identified in this report as a best practice idea for all jurisdictions to consider. However, Minnesota's manual would not work in Washington State and vice versa because the information contained therein is consistent only with the technology available for use in Minnesota. Without a Federally-mandated ballot design for each ballot media (and none now exists), prescribing recount and election contest procedures for all States with different ballot media and designs will prove cumbersome.

Moreover, the Federal government does not have an interest in expediting the timelines of the process nor mandating specific policies and procedures for the conduct of recounts and/or election contests, as it is the State's responsibility to administer elections and do what is in the best interest for their voters. Even in elections for Federal office, the only parties harmed by slow, inefficient, or otherwise non-best practice policies and procedures for recounts and election contests are the States themselves as they will be without some of their representation in the Federal government. If States want to ensure continuous representation in elected offices, they will create policies and procedures that work in their States and are accepted by their electorates.

The risk of creating havoc in State election laws leads the EAC to believe that no Federally-mandated consistent standard for recounts and election contests will necessarily improve election administration.

Recommendations

- 1) **States should continue to define for each type of ballot employed in contests for Federal office what constitutes a valid vote.** Many States have outlined all plausible scenarios for what mistakes and fixes voters may make to their ballots. Clear guidelines with visual examples serve to ensure uniformity in processes across the individual State.
- 2) **States should make clear all policies and procedures for requesting a recount.** Some States do not make it easy for candidates or citizen groups to request recounts in the event that they need to do so. In fact, in some cases, the EAC was unable to determine what the policies and procedures (per State statute and regulation) were for certain aspects of the process.
- 3) **States should strive for transparency when creating recount policies and procedures.** As outlined in the EAC's Election Management Guidelines chapter on "Conducting a Recount" and in numerous other EAC publications, transparency is essential for successful election administration. Everyone benefits from being able to follow the processes in real-time.

Appendix

The following federal laws affect recount processes and election contest policies and procedures in State and local jurisdictions.

The Voting Rights Act

The Help America Vote Act (HAVA)

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)

Federal Election Records Retention (42 U.S.C. §§1974 through 1974e)

Electoral Count Act of 1887

The Federal Contested Elections Act of 1969 (FCEA)