Contested Elections and Recounts 1

Issues and Options In Resolving Disputed Federal Elections

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Introduction by the Clearinghouse

It is essential in a democracy to maintain public confidence in the election process by ensuring that election outcomes are valid and accurate. It is therefore necessary to provide legal mechanisms for contesting or recounting election results in order to resolve any legitimate doubts about them that may arise.

A contested election is, strictly speaking, a formal challenge to the outcome of an election—a charge that the declared winner is, for any of several possible reasons, not the true winner. A recount is one possible resolution to a contested election, normally employed when the challenge alleges improprieties in the tabulation of the votes. But because recounts can sometimes be requested short of formally contesting the election, and because of their frequency and importance, recounts warrant special attention.

It would be comforting to think that contested elections and recounts are a rare exception in the United States and that such cases as may arise are expeditiously resolved. And, in fact, contested elections in federal races *are* the exception. Ninety-nine percent of all races for federal office are decided firmly and finally on election day. The remaining one percent, however, have included three contested presidential elections, over 500 contests for House seats, and about two dozen contested Senate races since the direct election of Senators in 1913. This works out to a frequency of about five House seats every two years, one Senate race every four years, and one in every sixteen presidential elections. It would be a mistake to conclude, however, that their fairly steady occurrance has lead to anything like a standard, routine, and expeditious way of resolving them.

All too often, contested election and recount procedures come into question only when there is a crisis involving them—with the result that new laws and procedures are hastily adopted according to the chemistry of the moment rather than according to any overall rational scheme. Worse still, contests and recounts can delay other critical deadlines in the election process (such as ballot preparation and absentee voting in subsequent general elections) or delay the installation of members of Congress.

It is axiomatic in the election community that the best laws and procedures are carefully and deliberately designed to prevent crises rather than hastily contrived to resolve them. This report is therefore directed primarily to policy makers at the State level in an effort to assist them in conducting a comprehensive, dispassionate, step-by-step review of their own contested election and recount laws and procedures.

This report describes State methods for processing challenges to federal elections and addresses the major policy issues and alternatives involved. An examination of so fundamental a set of laws and procedures would seem, at first glance, to be a fairly straightforward task. Yet for many reasons, contested election and recount rules in the United States are enormously complex. They vary, for example,

- by State
- by type of election
- by type of criteria and procedures, and
- over time.

In an effort to convey such a complex body of information, we have divided the report into two volumes:

Contested Elections and Recounts 1: Issues and Options in Resolving Disputed Federal Elections provides a Constitutional, statutory, and judicial background. It also offers readers a step-by-step guide through contested election and recount procedures examining at each point alternative procedures.

Contested Elections and Recounts 2: A Summary of State Procedures for Resolving Disputed Federal Elections describes the processes employed by each State with regard to standing, grounds, filing forms, requisite conditions, forums, scope of review, costs, and types of relief available.

THESE DOCUMENTS ARE INTENDED ONLY AS GENERAL REFERENCE TOOLS. CANDIDATES OR OTHER PARTIES INTERESTED IN FILING A CONTEST OR REQUESTING A RECOUNT SHOULD IN ALL CASES REFER TO THE APPROPRIATE STATE ELECTION CODE OR STATE ELECTION AUTHORITY.

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Chapter 1: Introduction

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This volume is intended to provide State election officials, local election officials, State legislators, the Congress, and the courts with information to assist them in maintaining and improving the efficiency and integrity of the process whereby challenges to the outcome of primary and general elections for federal office are resolved.

Any such challenge is a formal charge that the declared winner of the election is, for one reason or another, not entitled to be the winner. If it is a primary election, the right of the declared winner to be the party nominee is questioned; if it is a general election, the right of the declared winner to assume office is challenged. We have categorized challenges as either "recounts" or "contests", although a recount can also be seen as one method of resolving a contest when the correctness of the vote-count is at issue.

The goals of this volume are to define and analyze the issues germane to resolving disputed federal elections, and to review the range of options employed by States in dealing with these issues.

Challenges to the outcome of federal elections are not common. Ninety-nine percent of all races for federal office are resolved firmly and finally in the original official certification When a challenge *does* occur, however, the process of resolving it is often onerous. Constituencies for federal offices are large, and reviewing the process through which the outcome was originally reached can be both time-consuming and expensive particularly if the review is as thorough as it should be. So the uncommon occurrence, the challenge, is nonetheless an enormous problem for those affected—the candidates, the government officials charged with conducting elections and certifying results, and the general public.

States vary greatly in their manner of processing challenges to federal elections. Each State's procedures are detailed in Volume II of this report and are referred to in Chapter 3 of this volume which identifies the issues involved in resolving challenges and discusses the diverse ways in which the States have addressed each issue. In general, however, it can be said that the methods for resolving federal election disputes vary:

- by State,
- by type of election, and office sought;
- by type of criteria and procedures, and
- over time.

Article I, Section 5 of the United States Constitution provides, in part, that "Each House shall be the judge of the elections, returns, and qualifications of its own members . . ." As a result of this provision, and of subsequent court decisions, the extent to which States have assumed jurisdiction in contested federal elections varies ***by State.*** Three States—Alabama, Illinois, and Kentucky —claim no jurisdiction at all and have determined that the provisions of their State codes for resolving election disputes do not apply to elections for federal office. Other States report that they would apply their statutory provisions for resolving State and local election contests to resolving challenges in federal elections even though their statutes do not specify that application. (But in doing so, they anticipate the possibility of being challenged in their own State courts). Even in States that do have statutory provisions for resolving challenges in federal elections, those provisions are more often than not incomplete, occasionally contradictory, and generally open to wide interpretation.

Table 1
CONTEST/RECOUNT PROVISIONS FOR FEDERAL ELECTIONS, BY STATE

State	None	Automatic Recount	Privately Initiated Recount	Contest
Alabama	■			
Alaska			■	■
Arizona		■		■
Arkansas			■	■
California			■	■
Colorado		■	■	■ 5
Connecticut		■	■ 2/	■
Delaware			■	■
Dist of Columbia			■ 3/	■ 5/
Florida		■ 1/	■	■
Georgia			■	■
Hawaii				■
Idaho			■	
Illinois	■			
Indiana			■	
Iowa			■	■
Kansas			■	■
Kentucky	■			
Louisiana			■	■
Maine			■	■
Maryland			■ 4/	■
Massachusetts			■	■ 5/
Michigan		■ 6/	■	■
Minnesota				■
Mississippi				■ 4/
Missouri			■	■
Montana			■	■
Nebraska		■ 1/	■	■
Nevada			■	■ 5/
New Hampshire			■	
New Jersey			■	■
New Mexico			■	■
New York		■	■	■ 4/
North Carolina			■	■
North Dakota		■	■	■
Ohio		■ 1/	■	■
Oklahoma			■	■
Oregon		■	■	■
Pennsylvania			■	■
Rhode Island			■	■
South Carolina		■ 1/		■
South Dakota		■ 7/	■	■ 5/
Tennessee				■
Texas			■	■
Utah			■	■
Vermont			■	■
Virginia			■	■
Washington		■	■	■
West Virginia			■	
Wisconsin			■	
Wyoming		■	■	■

1/ Can be waived by losing candidate.
2/ Described as a "discrepancy recanvass", but meets project definition for "privately initiated recount".
3/ Applies only to general elections for House of Representative or U. S. Senate.
4/ Applies to primary election only.
5/ Applies only to elections for Presidential Electors.
6/ Applies only to elections for U. S. Senate.
7/ Performed only in event of tie vote.

State methods for processing challenges to federal elections also vary by ***type of election*** and by ***the office in question.*** While most State procedures apply to both primary and general elections and to all federal offices, some are selective in their applicability: relevant for a primary but not a general election, or vice versa; relevant for Congressional offices but not Presidential Electors, or vice versa; relevant for U.S. Senate seats but not for seats in the U.S. House of Representatives, or vice versa.

Table 1 summarizes the variations amongst the States as to jurisdiction assumed, kind of resolution process, and elections and offices excepted. In all but three instances, one who takes issue with the declared result of a federal election has some recourse within the State system, although it may be limited:

- Three States claim no jurisdiction and have no process for resolving challenges to federal election results.
- Four States have no provisions for recounting any federal election but do have a contest process which could (and often does) grant a recount as relief.
- Five States will not permit a contest in any federal election, but do provide for recounts.
- In five States, the provisions for contesting federal elections apply only to the office of Presidential Elector, not to U.S. Senate or House of Representatives.

State provisions for challenging federal elections vary as well according to the ***criteria and procedures*** employed both in initiating and resolving a challenge.

With respect to initiating a challenge, States vary on such requirements as:

- who has standing to initiate;
- the grounds for initiation;
- the deadline for initiation;
- the form for filing;
- other requisite conditions for filing, such as bonds, deposits, fees, or the like; and
- the official or agency to which the request or petition should be directed.

With regard to reaching a determination, States vary in:

- the agency or forum which resolves the challenge;
- the detailed procedures to be followed, including particularly the scope of the review of the documentation from the election;
- the assessment of associated costs; and
- the types of relief available.

Finally, State provisions on challenged federal elections vary ***over time***. States revise their laws and procedures based on experience, and States that have faced challenged elections and found their law inadequate have occasionally been obliged to to enact statutes for future use.

This volume is intended to serve as an objective, step-by-step guide for the States in reviewing their contested election and recount laws and procedures as they apply to federal elections. Such a dispassionate review is likely to yield proposals for improvements far wiser than those arising from the partisan combat associated with most contested elections.

Chapter 2: Background

Chapter 2: Background

The whole body of law on contested federal elections and recounts lacks clarity and in many cases frustrates the ability to resolve disputes fairly and efficiently. Constitutional provisions, federal legislation, fifty varying State laws, and myriad court cases provide a range of answers as to whether the States, the courts, or the Congress have original jurisdiction in such matters and what the limits of that jurisdiction might be.

State Resolution of Contested Federal Elections

Disputed *federal* elections differ from those involving State or local offices in that non-federal contests are resolved entirely by State mechanisms whereas a challenge to the result of a federal election can be carried to a federal forum. From the State perspective, then, designing State laws and procedures for resolving contested *federal* elections poses an interesting problem since it raises some thorny Constitutional and federal statutory issues.

Yet both the Constitution and the legislative history of the Federal Contested Elections Act of 1969 appear to provide the States considerable lattitude in legislating procedures to be followed in resolving a contested federal election. Indeed, **States appear to have not only the right, but the responsibility to have comprehensive mechanisms in place for resolving challenged federal elections *provided* that they do not claim exclusive jurisdiction in the matter and *provided* that the State mechanisms terminate whenever the Congress asserts jurisdiction.**

Constitutional Issues

It is clear from Article 1, Section 5 of the Constitution that "Each House of Congress shall be the judge of the elections, returns, and qualifications of its own members." Moreover, in Article 1, Section 4, the Constitution states: "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." Thus, although the States may have substantial authority to develop procedures to be followed in federal election contests, the power of Congress to make the *ultimate* judgment on the election of its members is unquestionable.

Still, in the landmark case of *Roudebush v. Hartke*, 405 U.S. 15 (1972), the Supreme Court held that a State may conduct a ministerial recount for congressional offices without infringing upon the power of Congress to judge the elections, returns and qualifications of its members. The State-imposed recount procedure was deemed a valid exercise of the State's power under Article 1, Section 4 of the Constitution.

The Court in this case also gave an expanded definition of the State's power: "Unless Congress acts, Art. I, Sec. 4, empowers the States to regulate the conduct of senatorial elections. This Court has recognized the breadth of those powers: 'It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and pub-

lication of election returns; in short to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.' " *Smiley v. Holm*, 285 U. S. 355 (1932).

Long before *Roudebush* and *Smiley supra*, the Supreme Court provided insight concerning the interpretation of Article I, section 4 of the Constitution. In *Ex parte Siebold*, 100 U. S. 371 (1880), the Court stated: "The state laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress." This interpretation is also strengthened by a number of earlier opinions of the Supreme Court and State courts. In *Minor v. Happersett*, 88 U. S. 162 (1874), the U.S. Supreme Court concluded regarding Article I, section 4: "It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts."

In *Odegard v. Olson*, 264 Minn. 439, 119 N.W.2d 717 (1963), the Minnesota Supreme Court, in concurring opinions stated:

"It is true that the U. S. Constitution, Article I, section 5, vests final power in each house to determine who shall be seated as a member of Congress. However, the U. S. Constitution, Article I, section 4, by express language not only grants power but imposes a duty on the legislatures of the several states to enact laws governing the election process. This process surely includes laws by which it can be determined who received the highest number of votes legally cast. An election contest which permits a recanvass of the votes cast, under court supervision designed to insure accuracy and fairness, is as much a part of the election process as the initial counting of the votes by the election judges."

The foregoing cases, then, provide a Constitutional foundation for the States to assume jurisdiction in challenged federal elections by devising laws and procedures for their resolution provided that the Congress has not legislated to the contrary.

Some State courts, however, have taken a different view of the *Roudebush* rationale. In 1977, the Supreme Court of Texas interpreted it to apply only to recounts of congressional elections, not to contests (*Gammage v. Compton*, 548 S.W.2d 1 Tex, 1977). In 1988, however, the Texas election law was rewritten, and new language now explicitly provides a process to not only recount but also to contest a federal election. The Supreme Court of Illinois, in the case of *Young v. Mikva*, 363 N. E. 2nd 851, 66 Ill. 2d 579 (1977), ruled that Illinois circuit courts have no jurisdiction to hear and determine contests of elections of members of the United States Congress. And in Colorado, *Rogers v. Barnes*, 474 P. 2d 610 (Col, 1970), interprets the provisions of Article I, section 5 to include primary elections, thereby expanding Congress' scope of exclusive jurisdiction to include all congressional election contests, whether for nomination or election. Over the years other State courts have interpreted Article 1, section 5 in its broadest sense and Article I, section 4 in a most limited manner.

The fundamental issue, then, hinges on the Constitutional nicety of whether the *ultimate* right of each House of Congress to be the "judge of the elections, returns, and qualifications of its own members" is exclusive of State jurisdiction

or whether the States may assume original jurisdiction unless or until the Congress asserts its jurisdiction.

This issue has yet to be satisfactorily resolved in the courts. And, ironically, the federal courts seem to reserve to the States far greater authority in such matters than do the State courts.

Federal Statutory Issues

The Federal Contested Election Act of 1969 (P. L. 91-138, title II, 381 et seq.) completely revised the law governing contested federal elections and sought to provide a more efficient and expeditious means for the House of Representatives to resolve contested elections coming before it.

The Report of the Committee on House Administration (H Rept. 91-569) filed with the bill cited numerous inadequacies in the 1851 law it superseded. Specifically, these included: (1) ambiguity regarding who had standing to initiate a contest, (2) the absence of any requirement to file the action with the Clerk until testimony was taken—thereby preventing the House from being officially aware of the case until months after its inception, (3) the absence of any clear authority for a contestant to take testimony if the contestee fails to answer the notice of contest, and (4) the absence of any authority for the contestee to compel the contestant to furnish a more definitive statement of grounds for the contest if the original filing was vague or ambiguous.

Although the Federal Contested Elections Act of 1969, still in effect, includes provisions that address these issues and establishes some procedural framework for the disposition of election challenges, it does not begin to detail all the aspects of the election process that might be examined in a contest proceeding. And in this regard, it is important to note that the House Report also concluded that where the highest Court of a State has interpreted the State law, the House should be governed by this interpretation, though not consider itself bound by it.

It is apparent, then, that even the Congress anticipates that States will implement some mechanism for resolving contested federal elections which, even if it is not conclusive, will at least provide a firmer basis upon which each House might ultimately judge the "elections, returns, and qualifications of its own members."

Current State Law

Despite their evident authority to do so, a review of the State code summaries in Volume II of this report will show that many States do not presently provide mechanisms for resolving federal contested elections and recounts.

In three States (Alabama, Illinois, and Kentucky) there are no provisions that deal with *federal* election disputes. Other State codes mention the subject without any specifics on procedures. In still other States, the entire subject of contested elections is absent from the State code. And in no State do the provisions for resolving contested federal elections seem altogether adequate.

Congressional Resolution of Contested Federal Elections

Should the State decline jurisdiction, or should the losing candidate fail to get the relief he sought from the State, a challenge to the result of a federal election can be carried to the Congress.

The opportunity at the federal level for chal-

lenging an election either to the U.S. House of Representatives or the U.S. Senate is inherent in the constitutional provision that "Each House shall be the judge of the elections, returns, and qualifications of its own Members..." (Article 1, Section 5), which follows immediately on the constitutional mandate to the States to prescribe "the times, places and manner of holding elections for Senators and Representatives" (Article 1, Section 4).

Federal Resolution of Contested House Seats

There were far more election disputes brought to the U.S. House of Representatives for resolution in the first hundred years of the Republic than there are today. After a decade of trying to resolve such contests using ad hoc procedures, the House of Representatives in 1798 enacted its first law establishing procedures for handling election contests. That law lapsed in 1804, and not until 1851 was the process governing the disposition of contested elections in the House again codified. The act of 1851 (2 U. S. C. 201-226), as amended, was in effect until replaced by the Federal Contested Election Act of 1969 (FCEA, 2 U. S. C. 381 et seq.).

Currently, under the Federal Contested Elections Act of 1969, standing to bring a contest to the House is limited to the losing candidate (contestant). The declared winner (contestee) may, however, file a motion to dismiss the contest based on one or more of four affirmative defenses: (1) notification as to the challenge was insufficient; (2) contestant lacked standing to bring the claim; i. e., was not a losing candidate; (3) contestant failed to state deficiencies in the election which, if proved, would change the result; or (4) contestant failed to claim a right to the contested seat.

Contests to House elections may also be brought to the House by three other, but less commonly used, methods: (1) a protest or memorial filed by an elector of the district involved, (2) a protest or memorial filed by any other person, or (3) a motion by any other person.

Once received, election contests are referred to the Committee on House Administration which hears and investigates the complaint and then reports its own decision to the full House where the final decision is made.

Contests for House seats are well-documented in the Committee files. Beginning with *Tunno v. Veysey*, 1971, the first contest decided after the enactment of the FCEA, the House has built a record of precedents which have been applied with substantial consistency:

- the contestant must demonstrate that the allegations, if true, would change the result of the election.
- allegations made by the contestant must be supported with adequate evidence; errors by election officials will not be imputed without convincing evidence.
- the mere fact that the election was close is not grounds for denial of a motion to dismiss.
- considerable deference is extended to State election procedures and to the State's own procedures, if any, for resolving contests.
- the House will conduct an on-site investigation of the contestant's allegations if it deems such action appropriate.
- the House does not direct a State to conduct a recount, but may do so itself if it believes such action is justified.

Historically speaking, most contestees have been seated in the new Congress, sometimes conditionally, while the Committee investigates. And too, most contests have been dismissed after investigation, leaving the original winner to serve the full term.

Federal Resolution of Contested U.S. Senate Seats

No Act of Congress defines the process by which the Senate judges ". . . the elections, returns and qualifications of its own members." Nor has the Senate adopted any general rules or procedures for handling election cases because it is commonly believed that each dispute presents a unique case for adjudication.

Still, certain precedents and general principles have emerged from the cases heard since the first dispute was brought in 1793, and more particularly from the cases resolved since 1913 when Senators were first popularly elected:

- a petition for contest may be accepted from a private citizen, a private or public association, an organ of State government, or from a losing candidate.
- deadlines, forms, and particulars for filing do not exist. Typically, the person or persons contesting an election set forth the grounds for the challenge and present evidence to support those grounds.
- a committee is authorized to investigate the charges alleged. If the committee decides that the petition deserves consideration, it investigates the case, holds hearings, callswitnesses and even conducts recounts if necessary.
- the committee reports to the full Senate where the final decision is made.

As in the House, the Senate has historically seated the originally certified winner. Only once has a seated Senator been unseated, and three times a seat was declared vacant, necessitating a new election. The most recent such instance was *Wyman v. Durkin*, a close election for U.S. Senator from New Hampshire in 1974. After an exhaustive investigation by the Senate Rules Committee, including the review and recount of thousands of paper ballots, the Senate was unable to decide the winner and therefore declared the seat vacant.

Federal Resolution of Contested Elections for Presidential Elector

The 1787 Constitution gave Congress the power to count the electoral vote for President, but no statute was enacted to cover the resolution of any dispute that might arise over counting them. In 1887, following the debacle of the Hayes-Tilden election (in which three States returned two opposing sets of electoral votes to the Congress), the Electoral Count Act was enacted. Still in effect today, it places the primary burden of deciding its electoral votes on each of the States and requires a concurrent majority of both the Senate and the House to reject any electoral vote. It also codifies the procedures for counting electoral votes in the Congress.

The Electoral Count Act was a clear and unmistakable message to the States that the Congress did not want to assert original jurisdiction in election disputes involving Presidential Electors although they reserved the right to make an ultimate judgment.

The Eighth Congressional District of Indiana: A Case Study

Both illustrious and notorious, the disputed 1984 election for Representative in Congress from the Eighth District of Indiana is an object lesson in what happens when a very close election result is subjected to scrutiny, and the State's process is found wanting.

The structural setting for the election made it a high risk situation even before the voting started. Indiana's Eighth Congressional District comprised, in whole or in part, 15 different counties. Lever voting machines were used in six, votomatic punchcard ballots in six, and paper ballots in three. When the count was complete, delayed by litigation and error correction, Republican Richard D. McIntyre led Democrat Frank McCloskey by 39 votes out of 232,951 cast—less than 2/100 of one percent. On the basis of that count, McIntyre was certified the winner by the Secretary of State.

Loser McCloskey petitioned for a recount of about half of the district's 500 precincts; McIntyre cross-petitioned for a recount of the remaining precincts. By early December only one of the 15 counties had started its recount; by late January all had finished, but one had not yet reported. Court challenges to the recount procedures in three counties were under way. At issue were allegations of faulty vote-counting, uncertain punches (hanging chad) in punchcard ballots, and election official errors which invalidated ballots.

The total number of ballots invalidated by the recount was particularly troublesome: 48,990—21 percent—of the votes included in the original count were disallowed in the recount. The stricter standards for validation redounded to McIntyre's benefit; his margin of victory grew from 39 to 8,057 votes.

Before the State recount was completed, the 99th Congress convened on January 3, 1985. Democratic leaders in the House decided not to seat either McIntyre or McCloskey, and the Indiana 8 seat was declared vacant pending an investigation of the election by the House Administration Committee. During the investigation both parties to the contest were paid the full salary of a Representative, but the district had no vote in Congress and the Clerk of the House was charged with attending to constituent affairs.

The contest came to the House not through a filing by the losing candidate under the Federal Contested Election Act, but rather on a motion by Speaker Jim Wright. In his motion he stated that the House rejects a certification only under the most exceptional circumstances, "where the very ability of the State election procedure to determine the outcome accurately is put into serious question. Regrettably, the election in the 8th Congressional District of Indiana falls into this most narrow of exceptions." He further characterized the Indiana election procedures as "neither timely nor regular".

By late January the State recount was completed, and its result raised as many questions as did the original count—particularly with regard to the large number of invalidated ballots. The House Administration Committee then appointed a three-member Task Force to investigate the Indiana election. In so doing, the House found the State's election process to be "irregular, inconsistent and untimely", producing a result on which the House could not rely for

deciding entitlement to the seat. Two principal reasons were cited for assuming jurisdiction and directing that an investigation be conducted: (1) the invalidation in the State recount of thousands of ballots where the voter's intent was clear, but where election officials had made technical errors; and (2) numerous allegations that counting rules were neither uniform nor consistent from one county to another or even within individual counties.

The Task Force concluded within a few weeks that another recount should be conducted, this time under the auspices of the House. They drafted rules to govern the recount, and invited comment from the candidates and the House membership before adoption. Prominent among the rules was the decision to ignore certain Indiana technical requirements for making ballot validity judgments which were deemed unduly harsh, and to substitute instead the "intent of the voter" standard. All votes would be counted where election official error, rather than voter error, had rendered the ballots invalid in the State recount. Jim Shumway, the highly esteemed Arizona Director of Elections, was appointed Recount Director, and auditors from the General Accounting Office served as recount teams.

The House recount involved an exhaustive and detailed scrutiny of all ballots and votes, and of the procedures employed in both the original count and the State recount. Many problems and deficiencies were brought to light: tabunation errors, tally sheet errors; misreading of voting machines; inconsistent application of State law from county to county; election official errors in failing to record precinct numbers on ballots or to initial ballots as issued; irreconcilable differences between the numbers of people who signed in to vote and the numbers of ballots cast.

But when all such matters had been resolved by the application of the uniform set of rules throughout the 15 counties, the resolution of the contest came down to a problem that had not been foreseen when the rules were adopted—absentee ballots which were unsigned and unnotarized and, in accordance with Indiana law, should not be counted. The ballots fell into four categories: (1) those that had been sent to the precinct, opened, counted, and intermingled with all other ballots so that they could not be retrieved and withdrawn from the count; (2) those that had been sent to the precinct, opened, but not counted; (3) those that had been sent to the precinct, not opened, and not counted; and (4) those that had been retained, unopened and uncounted, in the county election office. By a two to one party line vote, the Task Force decided to count the ballots in categories (2) and (3), but not to count those in category (4), of which there were 32—a crucial 32.

The final result of the House recount showed McCloskey the winner by four votes. The House Committee on Administration reported its decision to the full House, on April 23. On April 30, following rancorous debate, the House by a straight party vote with the exception of five Democrats, rejected a Republican call for a special election to fill the vacancy. On May 1, 1985, the House seated Frank McCloskey as Representative of the 8th District of Indiana, and Republican members marched out of the House chamber to protest the decision.

Congressional Quarterly reflected the angry mood of the divided House when it reported:

> The Republicans' basic claim was that there was a cloud of uncertainty over a four-vote victory when there were still at least 32 uncounted ballots "on the table". But [Task Force Chairman Leon] Panetta said the 32 ballots were illegal under Indiana law and should not be counted. He said they were substantially different from the 62 other absentee ballots the task force did count because they were never sent to the precincts for counting. He said the decisions of the task force were fair and reasonable.

Republican members of the Committee on House Administration, in a dissent to the committee report, termed the Task Force conclusion "unsupportable" and cited a litany of objections to the process by which the House arrived at its decision, characterizing them as "unprecedented procedural irregularities that further undermine the fairness and propriety of this proceeding." Representative Bill Frenzel further observed that he could not "begin to express the depths of my disappointment. Those who have stolen the Congressional seat feel neither regret, nor shame."

After four months of partisan wrangling to decide entitlement to the Indiana 8 seat, and debate that took up more time than almost any other issue the House considered in 1985, the closest House race of the 20th Century ended. It left a bitter legacy which has not yet dissipated.

Chapter 3:
Issues and Options

Chapter 3: Issues and Options

Definition of Terms

Because election nomenclature varies amongst the States, we have established, for purposes of this report, the following definitions of certain frequently used terms.

Federal election. Election to the office of Member of the House of Representatives, United States Senator, or Presidential Elector.

Contest and Recount. We define these terms together because there is an overlapping in their definition. A contest is a judicial or quasi-judicial proceeding, based on one or more of a variety of grounds, among which could be a dispute over the correctness of the vote count. A recount is usually conducted by an administrative body, although sometimes under the supervision of a court, and is always grounded in a dispute over the correctness of the vote count. The term "recount," then, can also be considered a subset of "contest."

In our narrative we have also used the terms "disputed" or "challenged" elections when the subject matter is relevant for both a contest and a recount.

Canvass. The term used in many States to describe the process of vote counting, including aggregating the votes from all precincts to obtain the jurisdictional totals, and from all jurisdictions to obtain statewide totals. A recanvass is a repetition of the canvass.

Automatic Recount. A repetition of the vote count that meets the following criteria: (1) It is done by an election authority at its own initiative in certain defined circumstances, usually a close margin between winning and losing candidate; (2) No request for recount is required from any party; (3) It is conducted at government expense; and (4) It includes all ballots/votes cast for the office in question.

Privately Initiated Recount. A recount conducted as a result of a request. The initiator is usually a losing candidate, but can also be a voter, a public official other than an election authority, or even the election authority itself.

Precinct. The smallest administrative unit into which a jurisdiction is divided for the purposes of conducting elections. In some States it is called an election district, a voting district, or a district.

Petition/Affidavit/Statement/Application. The document used for requesting a recount or filing a contest.

Verified/Notarized. The term used by a State to describe the attestation required for the document which requests a recount or contests an election.

Voter/Elector. The individual citizen who participates in an election by casting a ballot, and who in some States has standing to request a recount or file a contest. There is sometimes further definition in the State code, such as "registered to vote" for the office in question; "eligible to vote" for the office in question; or "voted in the election" which is challenged.

Candidate. One who is seeking to be elected to a federal office. There is sometimes further definition in the State code, such as "listed on the ballot" or "received vote(s) for the office" in question.

Section 1: Matters of General Interest

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The Need for Clearly Defined and Well Documented Procedures

Any task, particularly one as important as demonstrating the correctness of a disputed election result, should be undertaken with a clear understanding of how the job is to be done. Unfortunately that is not the prevailing practice. Indeed, most States appear to lack clearly defined and well documented procedures for resolving challenged federal elections and rely instead on the recollections of staff members who were around for the last one.

The reasons for developing and documenting such procedures are multiple:

- Unless the State has statutory provisions regarding the resolution of challenges to federal elections, it loses the opportunity to exercise in full its rights and responsibilities to assure the correctness of federal election results. The candidates, moreover, lose the opportunity to have their election decided in their own State. For in the absence of State provisions, federal election challenges proceed directly to the United States Congress which, by the same token, is denied the firmer basis for making a judgment that State procedures provide.
- Election disputes should be settled as promptly as possible. Well defined and documented procedures assure that all officials involved know what has to be done so that precious time is not wasted interpreting law and writing a plan of action.
- Fairness demands that the parties to an election dispute know how to seek a resolution and by what means it will be reached.
- Legislatures and State election directors have an obligation to assure that local election administrators know the policies and procedures by which they must carry out their work, including validating results when appropriate to do so.
- Uniform standards, consistently applied, provide a basis for the equitable treatment of all parties, in all jurisdictions, and from one election to another.

Procedures for resolving challenged federal elections should be defined in three tiers. First they should be documented in ***State law***, where the State legislature should include in the election code both the right to challenge a federal election, and certain specific policy provisions relating to the recount and contest. The specifics should include most of the following, and probably additional ones which stem from the State's own traditions: standing; grounds; time and place of filing and hearing; costs and who pays them; rights of observers; ballot invalidation; security of materials; responsibilities of State and local election authorities; provisions for timely resolution.

Second, ***rules and regulations*** should be promulgated by the chief election authority of the State in order to both expand and effectuate the policy laid down in the statute. Rules have the force of law, but provide much more detail than is appropriate in a statute. Moreover, rules can be amended relatively easily when experience dictates, and there is often a provision for emergency amendment should that be necessary.

Third, ***procedures and guidelines*** should be promolgated as a means of organizing and pinning down the enormous volume of detail that is

inevitable but necessary in a process as complex as recounting votes and auditing other aspects of the conduct of an election. They can be modified even more easily than rules to improve their workability and efficiency. In traditional problem areas—ballot inspection and invalidation of ballots or votes; security of materials—the procedures should be quite detailed and include examples for illustration.

The Need to Document Activity

Just as the procedures for resolving election disputes need to be in writing, so too should a written record be kept of how each case is resolved. Of course, if the matter is resolved entirely by the courts, then there will automatically be a record of those proceedings. But should officials or agencies other than courts be involved in conducting a recount or deciding a contest, then their activities should be carefully recorded.

Such documentation is essential for a number of reasons: (1) it demonstrates compliance with the laws, rules, and procedures that govern the resolution process, (2) supervisory authorities State election agencies, for instance—may require documentation to confirm that their directives have been carried out, (3) the parties to the dispute will to some extent base their confidence in the outcome—and their decision regarding an appeal—on the documentation provided by those conducting the action, (4) if there is an appeal to higher authority, the case for upholding the original decision will be strengthened if the process by which it was reached is recorded in full, (5) an evaluation of the election agency's performance will be more meaningful if documentation is available on which to base it, and finally, (6) when the next recount or contest occurs—whether it is in the next election or in the next decade—a review of the most recent experience will provide valuable guidance for resolving it.

Documentation should be a record of everything that was done, and it is hardly possible for it to be too detailed. It should begin when the election administrators first become aware that a result may be challenged, and should not end until they render a final decision. It should include (but not necessarily be limited to) the following:

- A chronological log of all activities, indicating what actions were taken, starting and ending times, and who was responsible.
- A record of all materials and equipment secured, conditions of security, and sign-off documents by those responsible.
- Copies of all materials used for reference: rules, procedures, guidelines, legal opinions, memoranda, etc.
- Staffing information, including jobs and functions, assignments, sources of temporary employees, and a table of organization.
- Time records for all persons involved and the number of hours spent on each function.
- A list of all materials, equipment and supplies used, and the sources from which they were obtained.
- A record of all expenditures.
- A record of deliberations concerning challenges to the validity of ballots or votes, and decisions made regarding them.

- Written evaluations of the event, including problems encountered, solutions devised, and recommendations for modifying the process.

The Need for Securing Election Materials and Evidence

Anyone who doubts the outcome of an election, and considers challenging it, is immediately concerned about the security of the materials on which any challenge will depend. That concern may arise either during voting hours (because of suspicions of illegal votes cast, or legal votes turned away, for example) or else as the polls close and unofficial results indicate a very narrow margin. Such a concern over security is not limited to candidates, but is also shared by election administrators themselves whose goal is to achieve a fair and accurate count which, if need be, can withstand scrutiny to confirm its correctness. It follows, then, that the proper administration of elections should include provisions for securing election materials as part of standard operating procedures. Security should begin during the election preparation period and continue, through election day, until all possibilities of a challenge to the outcome have been foreclosed.

State policymakers have long recognized the need for securing election materials. Provisions in some State codes date back to the early 20th Century and require, variously, that paper ballot systems be so designed and administered as to prevent chain voting and ballot box stuffing; that voting machines be locked against further voting before pollworkers leave the polling place; and that polling place documents of all kinds be sealed and placed in locked containers when voting and tallying have been completed. It is also a longstanding tradition that pollworkers represent the two major political parties and that materials be transported by such teams of two rather than by a single individual.

Such basic security provisions were written into State laws at a time when the administration of elections within each State was almost fully decentralized to the local levels of government. State legislatures enacted statutes to govern the electoral process while local county, city, or village officials were expected to carry them out. Typically there was little or no supervisory authority on the part of the State government. As a result, and since statutes are written primarily to define policies rather than procedures, local variations in implementing State law were enormous.

Although the legislators of old have to be credited with recognizing security as an important aspect of election administration, the laws they wrote do not in most cases provide the necessary detail for ensuring effective security today. Moreover, new developments in elections (such as computerized vote counting and expanded absentee voting) have greatly increased the need for more comprehensive security measures and a more active State supervisory role.

Today, a meaningful security program should encompass a wide range of materials, measures, and documentation including (depending on the kind of voting system used in the jurisdiction):

- All documentation of the pre-election preparation of voting devices and systems including the testing of lever machines, electronic precinct tabulators, computer vote-counting programs, and memory packs.

- A record of all ballots—those voted and counted, those voted but disallowed, those spoiled, and those unused.
- The physical security of all ballot boxes.
- The locking, sealing, and physical security at the end of the voting day of all voting machines and any other kind of precinct tabulators (including their keys).
- Records of write-in votes, from lever machine rollers or on the secrecy envelopes or extended ballot stubs used with punchcard ballots.
- All documents used and produced by pollworkers including voter lists; voter assistance records; voter challenge records; and tally sheets, returns, or reports produced by electronic precinct tabulators.
- The physical security of all data processing materials including programs, memory packs on which votes are recorded, and all output from the system printer.
- All absentee voting materials including applications, records of ballots issued, affidavits, returned envelopes, and any related correspondence.

Security planning should be comprehensive not only with regard to the range of materials and documents encompassed, but also in certain other respects. It should be clear, for example, which personnel are responsible for which materials, and a written record should be required to confirm that these individuals have carried out their assigned functions. And too, adequate space and facilities for securing materials should be identified ahead of time and their availability assured.

Although some State laws and practices include some of the foregoing, few States specifically provide for securing *all* the materials relevant to establishing the correctness of an election result. And a few States have no provisions for any kind of security. Even those that do vary considerably not only in what is secured, but also in how it is secured. Currently, for example.

— In States that assign official responsibility for security, it is most often the chief local election official or agency (county clerk, county auditor, supervisor of elections, county board of elections, or the like). Less often, a State official is responsible. And a few States involve law enforcement officials (the sheriff or State police).

— A few States provide for impounding voting equipment whereby custody of the machines is taken over from the election authority by a law enforcement authority. Most other States require a court order for such an impoundment since the State law does not specifically provide for it. (When lever machines that do not produce a printed record at the close of polls are used in a primary election which is to be followed shortly by a general election, there is often some pressure to release the machines so they can be set up for the general election. In Georgia, these conflicting needs are met by photographing the counters of the machines).

— A variety of facilities are used as "secure storage" areas including court house vaults and locked jail cells. Most often, however, the "secure place" is the local election office or the State election office, with no specification as to how those quarters do indeed assure security.

Any discussion of securing materials used in a federal election is incomplete without some reference to the federal law on the Retention of Voting Documentation, enacted in 1960 and now codified as 42 USC 1974 through 1974e. Section 1974 of that law states that election administrators are required to preserve for 22 months "all records and papers which came into (their) possession relating to an application, registration, payment of a poll tax, or other act requisite to voting." It applies to any election in which candidates for Member of Congress, United States Senator and/or Presidential Elector are voted upon. With respect to the inclusiveness of the requirement, Craig C. Donsanto, Director of the Election Crimes Branch of the U. S. Department of Justice has observed that:

> ...the Department of Justice considers this law to cover all voting registration records, all poll lists and similar documents reflecting the identity of voters casting ballots at the polls, all applications for absentee ballots, all envelopes in which absentee ballots are returned for tabulation, all documents containing oaths of voters, all documents relating to challenges to voters or to absentee ballots, all tally sheets and canvass reports, all records reflecting the appointment of persons entitled to act as poll officials or poll watchers, and all computer programs utilized to tabulate votes electronically. In addition, it is the Department of Justice's view that the phrase "other act requisite tovoting" as it is used in Section 1974 requires theretention of the *ballots themselves*, at least in those jurisdictions where a voter's electoral preference is manifested by marking a piece of paper or punching holes in a computer card.

Section 2: Government Efforts to Ensure the Correctness of the Vote Count Before Deeming It Final

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Before requesting that an election be recounted or before filing an action to contest its result, anyone considering such a challenge should first ascertain what steps have been taken by local or State officials to verify the result. He may well find that although the outcome is not to his liking, there is no reason to believe that it is not correct.

States differ, of course, in the extent to which they attempt to verify the vote count before deeming it final. And therein lie a number of issues and options.

QUESTION: What verification of the vote count should be performed routinely by the official or agency responsible for counting the vote, before deeming that count final?

DISCUSSION: This issue is of primary concern to those responsible for certifying winners in federal elections, and, of course to the candidates in those elections. Certifying authorities want to be assured that the figures upon which they base their certification accurately reflect the will of the electorate. Defeated candidates, by the same token, are more likely to accept the certified results if they are convinced that the tabulation process included not only a careful count, but also a verification of that count to confirm its correctness.

Elections in the United States are conducted primarily by local officials who, in most States, exercise broad authority. Yet despite their relative autonomy, these local officials are bound, in varying degrees, by their respective State statutes regarding the manner in which votes are to be counted. At a minimum, their obligation to count and report the vote accurately, in an objective and impartial manner, is implicit if not explicit in law. And to minimize if not prevent partisan bias, these local bodies are usually required to be bipartisan—their membership sometimes augmented by nonpartisan "public" representatives.

Several State election codes specify in some detail the procedures local election officials are to follow in counting votes, and a few go further by specifying procedures for verifying the original count. But in addition to or in the absence of State statutory requirements, most local election agencies have incorporated into their vote counting procedures methods of validating the results beyond what is required by law. In some instances this has been done at the direction of a State supervisory authority; but in most cases, verification procedures have been devised either at the initiative of the local election authority or else by the inventiveness of voting equipment manufacturers eager to enhance their reputation for reliability and accuracy. Indeed, there is probably more voluntary pre-certification validation going on throughout the country than what is required either by State statute or by State regulation.

In sum, then, whether by State statute, State regulation, local initiative, or vendor ingenuity, there are a number of methods employed around the nation for verifying the vote count. The appropriateness of any one method depends, for the most part, on the voting system being used in the local jurisdiction.

Verifying Computerized Vote Counts

The advent of computerized vote counting, a

development of the 1960's, brought about demands for more stringent verification measures than had ever been required of the systems it replaced—mechanical lever machines and manually counted paper ballots. Although the older systems had manifold opportunities for error, they were never as widely distrusted as are computers, even to this day. For whatever reason—perhaps because so few people understand how computers work; perhaps because so many people have heard problems blamed on "computer error"; perhaps because of sensationalist movies or equally sensationalist claims by so-called "computer experts" unfamiliar with the election process; or perhaps just because people are less reluctant these days to question their public institutions—computerized vote counting has from its outset been subject to exceptional demands that the vote count it produces be demonstrably and provably correct.

The most common verification technique employed in computerized vote counting systems is the Logic and Accuracy test, in which a pre-audited group of punchcard or mark-sense ballots with a pre-determined number of votes recorded on them is processed through the vote-counting system. Jurisdictions using punchcard ballots almost invariably employ such a test, and some users of mark-sense ballots also do so. Usually the test is run both immediately before the count and immediately after.

An adequate Logic and Accuracy test provides a substantial level of confidence in the reliability of the system as well as demonstrating that there has been no tampering with it. The test's adequacy varies, however, with the quantity of ballots in the test deck, the inclusion of all possible voting combinations, the use of actual ballots drawn from election stock, the testing of all ballot styles and rotations, and other such technical specifications. But in short, the deck should reflect all possible parameters and permutations that could or would be encountered with actual ballots.

Logic and Accuracy tests are almost universally employed in centralized vote counting systems, where jurisdiction-wide totals are produced either from reading individual ballots or from reading memory packs taken from precinct tabulators. They are less often used to verify the accuracy of individual precinct tabulators. And in some jurisdictions, mark-sense ballots—and sometimes even punchcard ballots—are read only by precinct tabulators (indeed, States such as Illinois and North Carolina will not permit use of a voting system that does not produce a precinct count in the polling place at the end of the voting day). In these instances, unless a test deck is produced and used to establish the reliability of each and every tabulator, the usefulness of Logic and Accuracy testing to confirm accuracy of the vote-counting device is more limited.

In some States and localities, verifying the results of computer-based systems goes well beyond the Logic and Accuracy test. Sometimes a portion of the ballots are recounted by hand or else on another computer system. As a variation on this theme, Ohio requires that all punchcard ballots be reread and retabulated on the same system used for the original count. In still other jurisdictions, system logs are reviewed line by line to ensure that the ballot counting was not interrupted nor was the count distorted by unwarranted entry, and that the ballot-reading equipment read all the ballots fed to it.

Verifying Mechanical Lever Machine Vote Counts

Mechanical lever voting machines retain no record of individual ballot sets cast on them and, hence, provide no "audit trail". Jurisdictions using such machines cannot, therefore, either reconstruct nor fully recount each voter's choices. They must rely instead on comparing the aggregate vote totals cast for each office on each machine versus the aggregate numbers of voters who used each machine. Still in all, the most common source of error in reading lever machine vote totals is the pollworkers' misreading or transfiguration of numbers when copying down the vote totals after the polls close. Working in difficult circumstances (fatigue, poor lighting, the pressures of anxious observers and media, etc.), it is no real surprise that substantial errors can be made at this first stage of the vote count—the more so if ballot rotation requirements change candidate positions from one machine to the next.

In view of these potentialities, both vendors and users of mechanical lever voting machines recommend rereading (and thus verifying) each machine's vote totals. Accordingly, most lever machine users verify all vote totals originally reported by the pollworkers by comparing them against the original source—either the machine counters themselves, a printed record produced by the machine, or a photograph of the original machine counters.

Verifying Direct Recording Electronic (DRE) Vote Counts

Mindful that the absence of an individual ballot document makes it impossible to reconstruct or recount each voter's set of choices, the creators of DRE devices have provided other methods for verifying vote counts. Some devices are designed to store not only the aggregate totals of votes cast for each candidate (which then produces the printed "results tape"), but also to store, in a random fashion and in another location in the machine, the complete ballot set of each individual voter. These redundant records can be printed out and compared to confirm that they agree.

It must be said, however, that because DRE systems are relatively new and, thus, not yet widely used, it is impossible to define completely the verification features of all such machines. Nor is it yet possible to ascertain the extent to which users avail themselves of these capabilities. It is fair to say, however, that at this time of writing, no State statute or regulation makes reference to post-count verification on this kind of equipment (although New York may soon develop such regulations).

Verifying Paper Ballot Vote Counts

Paper ballot vote counts are seldom verified simply because such a labor-intensive process is so time consuming and costly. This is not to say that paper ballot counting errors or number transfigurations are infrequent. Rather, it suggests that paper ballot counting errors are the least likely to be detected or corrected.

GENERAL TRENDS: As the use of computers in vote counting grows, so too will concerns about the accuracy of the count. This trend is evidenced by recent media stories on the relia-

bility of computerized vote counting which focus, *inter alia*, on the reliability of post-count verifications; on the potentialities for erroneous vote counts as a result of either malfeasance or misfeasance; and on the increasing number of contested elections involving computerized election results. In response to these concerns, the Federal Elections Commission's National Clearinghouse on Election Administration has, at the direction of the Congress, recently published a set of voluntary Design and Performance Standards for mark-sense, punchcard, and direct recording electronic voting devices. State and local election authorities may wish to obtain a copy of these standards and apply them appropriately.

However unfounded or exaggerated, recent questions about the reliability and veracity of computerized vote counting systems have, at least, generated equally pertinent questions about the reliability and veracity of older vote counting technology which has, for so long, enjoyed a level of confidence that is probably unwarranted.

Yet in view of the questions raised by researchers, by the media, by losing candidates, and by the general public, it behooves State and local election officials to build into their standard operating procedures a variety of methods to ensure the veracity of election results. It is neither too soon nor too much for them to do so.

QUESTION: Following any routine verification of the count, in what circumstances should a recount be automatically performed?*

DISCUSSION: Provisions for an automatic recount reflect a State's determination to confirm the correctness of any vote count that, on its face, raises questions about the surety of the outcome, even if that outcome was confirmed by routine verification procedures.

In all but one of the States that have such provisions, an automatic recount is triggered by a close result. The closeness threshold is usually defined as a percentage difference in the number of votes between winning and losing candidates computed on a specified base. The percentage range is 0.1 to 2.0 percent; it is variously computed on the total vote cast for that office, on the

* Preliminary note:

In this study we have defined "automatic recount" to mean one that meets the following criteria:

1. It is done by an election authority at its own initiative in certain defined circumstances—usually a close margin between winning and losing candidate.
2. No request for the recount is required from any party.
3. It is conducted at government expense.
4. It includes all ballots/votes cast for the office in question.

By this definition, then, an automatic recount is distinguishable from a routine verification of the vote count which, as noted immediately above, is conducted for the purpose of confirming the reliability of whatever vote counting system is in use (even though such routine verifications are sometimes referred to in state codes as "automatic recounts").

Fourteen (14) States currently provide for an automatic recount as we have defined it: Arizona, Colorado, Connecticut, Florida, Michigan, Nebraska, New York, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Washington, and Wyoming. New York's automatic recount is done after every election, and involves a repetition of the count of all votes cast for all offices. In South Dakota, an automatic recount is triggered only by a tie vote.

total cast for the two top-ranking candidates, or on the vote for the winning candidate. In one State the margin is defined as an absolute number of votes separating the winner and loser—Michigan, 2,000 votes, and the only federal election to which it applies is that for U. S. Senate, a closeness margin of 1/20 of one percent of the statewide vote in 1988. In South Dakota, the automatic recount is triggered only when the vote is tied, which could be described as the ultimate close result.

The margin required to trigger an automatic recount is sometimes higher for a primary election than for a general election (as in Colorado and North Dakota), or higher for a seat in the U.S. House of Representatives than for a seat in the U.S. Senate (as in Ohio).

Some States permit an election official to order the vote recounted before the formal certification of results if he is uncertain as to the correctness of the original count. This, however, cannot be deemed an "automatic" recount since the official exercises discretion in opting for the action, and "uncertainty as to the correctness" is open to wide interpretation. Nonetheless, such a provision does provide another option for ensuring the correctness of questionable results.

GENERAL TRENDS: A requirement to automatically recount the results of close elections reflects a recognition that vote counting is complex and offers many opportunities for error even when the process is free of corruption and conducted by competent personnel. And it seems perfectly reasonable to expect election officials to confirm the correctness of the vote count when even minor errors may make a difference in the outcome.

Some States perform a recount at public expense when the margin is close (comparable to the trigger in the automatic recount States), but only if the losing candidate formally requests it. Although such a procedure does not, in a formal sense, constitute an "automatic" recount, it is another reasonable option for resolving the doubts that inevitably arise in very close outcomes.

QUESTION: Should any party, particularly the one who would benefit if the result of the election were changed by the automatic recount, have the opportunity to waive the recount?

DISCUSSION: Most automatic recounts are mandatory and irrevocable in that if certain circumstances prevail, the election officials have no choice but to recount the vote. But in a few States—five of the fourteen—the recount can be waived by the losing candidate. The rationale for permitting such a waiver is obvious: recounts are expensive, and if the loser accepts the result of the election why shouldn't everybody else?

There are, however, some important arguments for making an automatic recount mandatory despite the preferences of the losing candidate. State authorities, who certify the winners based on the results reported by local election officials, have good reason to want a recount done when the result looks uncertain on its face. And just as importantly, the Congress, to whom a close federal election result is likely to be appealed, has a decided interest in the correctness of the numbers.

QUESTION: Who should have the authority to make a correction in the vote count if an error is discovered?

DISCUSSION: Most States have some formal provision for correcting the official vote count when an error in the original count is discovered. Usually that power is vested in the local election authority as the entity responsible for the original vote count. But sometimes the State election authority is responsible, sometimes the correction is made by the State only after consultation with local officials, and sometimes it is made by the local officials at the direction of the State.

In the few States where the political parties conduct their own primary elections and report the nominees to the State, the parties are responsible for correcting any errors in the vote count.

GENERAL TRENDS: Providing formal procedures for correcting identifiable errors in the official vote count is desirable not only because it is incumbent on those charged with determining the result of an election to ensure that the results reported indeed reflect the will of the electorate, but also because correcting an identified error could avoid the prospect of an onerous recount or contest. State participation in correcting vote counts is also desirable since such supervision minimizes confusion and ensures greater accuracy in reporting results.

QUESTION: What role should the State election authority play in ensuring the accuracy of election results? Should the State authority review the work of the local election authorities with respect to the vote count before aggregating and certifying the results?

DISCUSSION: There are a number of reasons why State officials should play a role an ensuring the accuracy of local vote counts. The chief State election official should serve as a supervisory authority over local election administration. And assessing performance is an essential function of supervision. In addition, since the State must designate the winners of federal elections, it is dependent on accurate local election results to produce accurate totals.

The extent of State participation in verifying local vote counts varies from State to State, and may include one or more of the following:

- issuing directives or regulations for post-count verification,
- producing the test decks which must be used by local authorities for confirming the logic and accuracy of a computerized vote counting system,
- reviewing documents and tabulations submitted by local authorities,
- retabulating the vote count records submitted by local authorities,
- requiring that documentation be submitted by local authorities to confirm that certain verification procedures have been followed,
- supervising, or even directly conducting, a pre-certification automatic recount.

The Secretary of State in Oregon issues detailed

directives for the post-election testing of computerized vote counting systems. Virginia's State Electoral Board, before certifying the results of federal elections, thoroughly and punctiliously scrutinizes and verifies all aspects of the canvass work done by local boards, including retabulating all vote-totalling. When an error is found, the local authorities are directed to make the correction. In Louisiana, the State owns all voting and vote-counting equipment; the State Commissioner of Elections is responsible for its maintenance and thus guarantees its performance. The Com-missioner's office also creates the test decks to be used for logic and accuracy testing of the systems on which absentee (punchcard) ballots are counted. Arizona and Ohio State offices supervise local officials in the conduct of any automatic pre-certification recount. Rhode Island municipalities conduct federal elections, but the State Board of Elections counts the votes, checks the addition of machine totals for each poll, rereads machine counters if the numbers are unclear, and corrects errors where discovered.

GENERAL TRENDS: While there is a great deal of autonomy accorded local election administrators throughout the States, local vote counts are not accepted without question by most State election authorities. Moreover, many States find that providing local authorities with directives and instructions regarding verification, and requiring the documentation to be submitted as evidence of local compliance, raises the level of accuracy and ensures uniformity in the application of State laws and procedures.

Section 3: Initiating a Recount or Contest

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When State and local election officials have completed all verification functions, and doubts still persist as to the correctness of the result, most States provide for questions to be resolved through a recount or a contest initiated by someone other than those responsible for conducting the election. Thirty-six (36) States and the District of Columbia allow *both* recounts and contests while twelve (12) States allow *either* a recount or a contest, although in a few instances, provisions do not apply equally to both primary and general elections, or equally to all federal elections—President, U.S. Senate, and U.S. House of Representatives. Alabama, Illinois, Kentucky have no statutory provisions for resolving a disputed federal election.

In designing (or in redesigning) the laws and procedures governing privately initiated contests or recounts in federal elections, a number of issues and options arise.

QUESTION: Who should have standing to request a recount or to contest the result of a federal election?

DISCUSSION: The opportunity to raise valid questions about the outcome of an election, and to have those questions answered, should be afforded to those who have a stake in a correct result. Losing candidates certainly have such an interest, but so may others—voters in the election, political parties, and the community's governing officials. If a request is granted to one candidate for a recount of a portion of the votes cast, then the opposing candidate should have the opportunity to request a recount of the remainder of the votes. In a contest action, which allows a party to obtain judicial resolution of a an election result he believes to be incorrect, the forum which hears the case will ensure that the interests of the plaintiff, the defendant, and the public will be considered in the decision-making process.

GENERAL TRENDS: State requirements for standing reflect the belief that those with a stake in the result are entitled to be assured that it is correct. But States vary somewhat in who has standing to *contest* a federal election and in who has standing to request a *recount* in a federal election.

The defeated candidate has standing to *contest* an election in all the States that have such provisions relating to federal offices. Depending on the State, others who may have standing to contest a federal election include: any elector, any taxpayer, a specified number of eligible voters, and officers of political parties. In Virginia, if there has been a recount that changes the winner, the new unsuccessful candidate may file a contest action. Only one State, Pennsylvania, makes a distinction between standing qualifications to contest a U.S. Senate election versus a U.S. House of Representatives election, requiring filing by 100 electors for the Senate and by only 20 electors for the House.

Standing to obtain a *recount* in a federal election is similarly varied. In every State with such provisions the defeated candidate has that option. In some States, standing to request a recount is also granted to *any* candidate for the office (as distinct from just the next closest losing candidate). And a few States grant such standing to a candidate's representative or counsel and,

less commonly, to a political party or to one or more voters. In California, a recount may be requested by a local election official, by the District Attorney on behalf of the county Board of Supervisors or grand jury, or by a single voter. In Georgia, when the winning margin is one percent or less, either the losing candidate or the County Election Superintendent has standing to request a recount. When the margin is greater than one percent, standing varies with the type of voting system used: for paper ballots and electronic voting systems, either a candidate or a political party; for mechanical voting machines, three electors of each precinct to be recounted.

QUESTION: What grounds should be required to obtain a recount or to contest a federal election? What level of specificity should be necessary in stating the grounds? If a close margin constitutes grounds, what should the margin be?

DISCUSSION: Recounts are expensive. Moreover, they delay the final determination of the election and, hence, the definition of nominees after a primary or the accession to office after a general election. Contests are also expensive in that they absorb the professional resources of the court or other quasi-judicial body, and they require the defendant to obtain representation, assemble witnesses, and pay other costs associated with litigation. They also cause the same delays and uncertainties as recounts.

States have a strong interest, then, in restricting the opportunity for privately initiated challenges to only those elections in which there is a valid question as to the correctness of the outcome. Requiring that there be some plausible reason for challenging an election is one means of limiting their number.

Yet despite the need to avoid numerous and frivolous recounts and contests, this purpose is not best served by unduly limiting the grounds for such actions but rather by assessing costs on a petitioner who does not prevail. In many States, the various grounds that suffice for obtaining a recount or contesting an election include some that are pretty low threshold. But the petitioner accepts the risk of bearing the cost if his complaint is found to be insufficient to change the result of the election.

GENERAL TRENDS: As in most other aspects of election administration, States have approached this problem in different ways. Most State codes specify the grounds for *contesting* an election. Among the commonly listed grounds are: misconduct, fraud, or corruption on the part of election officials; ineligibility; bribery; illegalities; or felony conviction of the incumbent (although most States include a catch-all category such as "any other reason which would cause the result of the federal election to be invalid"). Some State codes specify no grounds for filing a contest.

Similarly, some States specify no grounds for requesting a recount, though in these States the requester invariably bears the cost of the *recount* unless it changes the winner. In States where grounds are required, the most common are: error, mistake, fraud, irregularities, and, less commonly, an allegation of illegal votes cast. A few States require, along with the statement of grounds, a demonstration that the acts charged could or would affect the outcome of the election.

In some States, the closeness of the election margin is a factor in determining adequacy of grounds for requesting a recount. In Colorado, which has an automatic pre-certification recount if the margin is less than two percent in the primary or one percent in the general election, a losing candidate may request a recount whether or not there has been a previous automatic recount. Delaware grants a recount request only when the margin is 0.5 percent or less, and has no provision for contesting the election. In Virginia, a recount is not granted when the margin between winning and losing candidate is more than one percent of the vote cast for both candidates. Utah grants a recount only to the losing candidate, and only if he lost by no more than one vote per voting district.

A distrust of computers may be evident in States where the grounds for obtaining a recount of electronically counted ballots are more lenient than for other kinds of voting systems used in the State. Louisiana, for example, grants a recount of votes cast in its polling places only on the grounds of mechanical problems with the voting machines, but will recount absentee ballots, all of which are punchcards, on an allegation of error.

Seldom do State statutes detail the level of *specificity* required in establishing grounds for a recount. In a number of States, however, the request is heard and assessed either by an administrative body or by a court, and the adequacy of the grounds is the major determinant in that forum's decision to order a recount or not.

North Carolina, in its comprehensive process for resolving election disputes, grants a request for a recount to any losing candidate in a federal election where the margin is 0.5 percent or less of the total vote. In addition, a recount request from any registered voter is entertained, but the grounds for granting such a request are limited to errors in tabulation, or illegal votes cast in a number sufficient to change the election result. In the latter instance, the petitioner must identify the unqualified voters by name.

Arizona, Hawaii, Mississippi, South Carolina and Tennessee have no provisions for a privately initiated recount of a federal election, although all have a process for contesting the election, which could result in a recount as the relief granted (In Mississippi it applies only to primaries.) It should also be noted that Arizona does have an automatic recount when the margin is not more than 0.1 percent. Maryland grants recounts only for primary elections; disputes of general election results must be resolved by the contest process. New York grants no recounts, but does perform an automatic recount of every election before certification.

There is no route for either contesting or recounting a federal election in the three States whose statutes have been deemed inapplicable to resolution of disputes in federal elections—Alabama, Illinois, and Kentucky.

QUESTION: What should be the deadline for initiating a recount or contest once the election result is known?

DISCUSSION: Setting a deadline for initiating a challenge to the outcome of an election requires balancing the interests of the State against those of the parties to the dispute. The State has an obvious interest in resolving the

dispute expeditiously in order to certify the election result. The parties to the dispute, on the other hand, need time to prepare and file the necessary documents.

In States with contest or recount procedures, filing deadlines are usually explicitly stated in the election code and typically reflect the State's urgency in resolving disputes.

GENERAL TRENDS: Some States require that a recount or contest petition be based on unofficial returns, setting a deadline such as "before the canvass is completed and the result is announced", or "before the Board of Canvassers adjourns." Others require that the action be initiated within a certain period after election day. In most instances, though, the request deadline is tied either to the completion of the canvass or to the declaration of the official count.

In Michigan, Maryland, North Carolina and Wyoming, recount applicants must file within two days of the official count; in Iowa and North Dakota, within three days. Other States allow a period of up to 25 days.

In States where the election day is the point from which the recount filing deadline is computed, the allowance is usually longer—30 days in Colorado, 35 days in Oregon. In Rhode Island, on the other hand, the recount request must be received by the State Board of Elections by 4 p. m. on the day after a primary election, or the seventh day after a general election. Pennsylvania's deadline for recounting votes cast on mechanical lever voting machines is 20 days after the election, but a request for recounting paper ballots is accepted for up to four months after the election. A contest in California must be filed within five days after the primary election, but can be filed as late as 30 days after the general election. The State extends the deadline further, to six months, when the grounds allege a bribe.

QUESTION: Should there be a special form for filing a challenge? What should be the content of the filing document? What guidance should election officials provide to those who wish to initiate a challenge?

DISCUSSION: The formal document required for requesting a recount or for filing a contest (normally called a "petition") should identify the requester, his standing for making the request, the election in question, and the relief sought. If a recount is requested, the jurisdictions to be recounted should be specified. And, of course, the document should include any and all other information required by State law. If grounds are required, they should be described in sufficient detail and particularity as to support the case and meet the level of specificity required by the State.

GENERAL TRENDS: In the vast majority of States, substance takes precedence over form in the document required to initiate either a recount or contest, whether it is filed with a court of law, or with an election official or agency. Very few States require a special form, although the contents of the request are generally specified in law.

The Georgia code, which contains comprehensive requirements for contesting an election, requires the petition to contain the contestant's

qualifications to institute the contest, the name of the office which was on the ballot, the name of defendant, the names of all candidates in the race, the grounds for contest, the date of the official declaration of the result in dispute, what relief is sought, and such other facts as petitioner deems relevant. New Jersey requires that the petition be signed by at least 25 voters in the State, and that it include the number of illegal votes allowed or legal votes disallowed along with the names of those voters and the district where each voted or attempted to vote. Oklahoma requires a petition for a "fraud or irregularities hearing" which must include an allegation of fraud, identify the precincts or absentee ballots involved, specify the acts of fraud alleged, and identify the alleged perpetrators.

A recount petition filed with a body other than a court—usually the election agency or canvassers —must ordinarily be notarized or verified. In a few instances, the State supplies guidelines for requesting a recount or provides a specimen request that meets all requirements.

Since most challenges to an election outcome are made under tight time constraints, and since the law is often both complex and illucid, the public interest is well served when States provide clear guidelines and specimen formats for filing recount or contest petitions and make them available in both State and local election offices.

QUESTION: To whom should the petition be directed? What forum should resolve the challenge? Should it be possible to initiate a multijurisdictional challenge with a single filing?

DISCUSSION: Petitions for either contesting or recounting an election are filed, depending on the State and on the action requested, either with an election agency or official, a court of law, or a body that exists specifically for resolving election disputes. In the few States where political parties conduct their own primary elections, recount or contest petitions are filed either with a State or local party official.

In some States, recount requests are granted automatically provided the requisite conditions (usually a close margin) are met. In other States, the official or body with whom the request is filed makes an assessment of the request based on its content and the requirements of law, and decides whether the recount will be conducted.

For both contests and recounts, there are sometimes requirements for notifying other parties—opposing candidates or political parties—that an action has been filed or that a recount has been requested.

A contest is usually heard by the court or body with which the petition was filed, and State codes are quite specific regarding jurisdiction. Among the forums used for hearing contests are: the trial court for the jurisdiction in which the petitioner resides, or in which the defendant lives, or in which the State Capitol is located; the court where the filing took place; the court in any county in the which votes were cast for the office; the State's highest court; or, in North Carolina, a county or State board of elections. Only in Tennessee does the forum to hear a contest depend on whether the election is a primary or a general, and whether it is a race for U.S. Senate, U.S. House of Representatives, or Presidential Electors.

Some States place what seems like an undue burden on the requester by requiring multiple

filings—one in each local jurisdiction involved. And since federal constituencies usually extend beyond local boundaries, they sometimes involve a multitude of counties and municipalities, each with its own autonomous election authority. Requiring petitions to be filed in each of these jurisdictions during the brief time between the election result and the filing deadline seems both unrealistic and unreasonable.

Although the requirements for filing a petition should be sufficiently restrictive to discourage frivolous challenges, there is no interest served in needlessly burdening a petitioner. Accordingly, most States permit a recount or contest petition to be filed with a single action. For recounts, the site is usually the chief election official of the State who, after evaluating the request, orders the local jurisdictions to conduct the recount. For contests, the place of filing and the forum for hearing the challenge is usually a trial court located either in the county where the State Capitol is located, in one of the counties in the constituency of the office, sometimes in the jurisdiction where the petitioner resides or where the contestee resides, or the one in the largest jurisdiction in which votes were cast for the election in question.

Besides reflecting fairness to the contestant, a single filing and hearing site ensures maximum uniformity and consistency in applying judicial standards throughout the constituency and avoids a waste of judicial resources.

GENERAL TRENDS: Most State provisions for filing and hearing challenges are clear, specifically defining the place for filing it and the jurisdiction for hearing it. Most provide a convenient and workable single-site filing and hearing process. But some States still require that actions be initiated separately in each jurisdiction where a recount is requested or a result is contested. In Kansas, a recount request for a U.S. Senate election could require a separate filing in each of the State's 105 counties. In Maryland, 24 separate petitions would be required for a statewide recount or contest, all in a period of 48 hours.

QUESTION: Who should bear the cost of a recount or contest? Should a deposit or bond be required at time of filing? In what circumstances should a deposit be refunded? How should cost estimates be made? When government bears the cost, should it be borne by the State or the localities involved? Does the prospect of substantial cost have a chilling effect on parties who seek to challenge the result of an election?

DISCUSSION: Resolving a disputed federal election is expensive. Although the cost of a recount varies with the size of the constituency, the kind of voting system used, whether computer-tabulated ballots are recounted by hand or by machine, and whether the process is limited to a verification that the votes were counted correctly or also includes a review, examination, and assessment of other materials, recounts are never inexpensive. A contest, by the same token, imposes on the petitioner the cost of bringing the action and of hiring representation, and on government the cost of the resources of the judicial system to hear and decide the case.

It is reasonable, then, that the States should be concerned with these costs and assign them in such a way as to discourage frivolous challenges

while not discouraging legitimate ones. It also seems reasonable to provide that where a recount or a contest action demonstrates that the State originally produced an incorrect count, or designated the wrong candidate as winner, the requester should not have to pay for the process by which the State corrects the count or determines that the originally designated winner did not deserve to be so.

Moreover, given the complexity of the vote counting process and its susceptibility to minor errors, when the margin between winner and loser is very close (and particularly if there has been no automatic recount) it also seems appropriate for the government to pay the cost of a recount, regardless of whether or not it changes the winner of the election.

When a candidate for federal office loses an election by a very close margin, or when he is convinced and can demonstrate that there was an error or misfeasance in the conduct of the election, he would probably request a recount or file a contest without hesitation were it not for the cost. But a losing candidate, even one with a very strong case for challenging the outcome, seldom has many funds on hand at the end of the campaign, and usually faces a deficit. The potential costs of a challenge can thus be daunting.

A recount for a U.S. Senate election in Washington State would, for example, cost the requester in excess of $65,000, and there would be no refund unless it produced a different winner than the original count. The cost of the December 1989 recount for Governor of Virginia was estimated before the action started at "upward of $200,000", the figure on which a candidate liable for cost would have to base his decision. (The after-count actual cost was $70,000.)

In the Virginia election for the U.S. Senate in 1978, John Warner defeated Andrew P. Miller by a margin of only 0.3 percent of the total vote cast. Miller sought a recount for which, under the law of that time, he would have had to pay unless the result were reversed. The court required a bond of $80,000 before the recount would be ordered. Miller could raise only $27,000, so he conceded the election and dropped his recount request. (The following year Virginia amended its election law to provide a recount at public expense on request of a losing candidate when the margin is less than 0.5 percent).

The 1984 Democratic primary for the U.S. Senate nomination in Texas was even closer—467 votes out of almost a million cast. Loser Kent Hance asked for a recount, for which he paid $60,000. Although there was some change in the numbers, the winner was not changed. Hance was satisfied in the correctness of the result and did not continue the challenge.

Where a State grants a recount that will not be publicly funded, it is customary to require a bond or deposit in advance from the petitioner. In most such instances, the deposit is refunded or the bond is not forfeited if the requester prevails. In Maryland, the deposit is returned if the petitioner's vote total increases by at least two percent as a result of a primary recount even if he was not found to be the winner, and a general election recount (which can be conducted only by court order as a result of a contest action) is done at no cost to the petitioner.

In some States, the cost of a recount is set in the code—usually a dollar amount for each precinct to be included in the recount, varying from $10 to $100. Maine has a sliding scale for pre-recount deposit, based on the number of

votes cast and the margin between the winner and loser. The Washington deposit is five cents for each ballot cast, and Pennsylvania requires $50 cash or a $100 bond for each ballot box or voting machine to be involved in the process.

In other States, the recount cost is not set until the request is filed, and is then based on an estimate by the court with whom the petition is filed, by the State election authority, or by the local election official in each jurisdiction included in the recount. In making estimates, the officials take into account the scope of materials to be included, the kind of voting system, the possibility of recounting of computer counted ballots by hand, etc.

GENERAL TRENDS: Most States rule that the party who requests the recount or brings the contest bears the cost, and they usually require a deposit or bond as a precondition to starting the action. If the result of the election is reversed, the deposit or bond is refunded, and in most cases the cost is absorbed by government—usually the local governments involved.

In a few States, a privately initiated recount is done at public expense if the case meets the requisite criteria—usually a close margin. Virginia, Vermont, Delaware, South Dakota, Georgia, North Carolina, and Massachusetts are in this category. (Utah is not included in this group because its close margin threshold is so ungenerous—a loss by one vote.) In Rhode Island any recount conducted is done at State expense. Adding to these the fourteen states that do an automatic recount, a total of 22 States fund the cost of resolving an uncertain election when a strong case is made that only a recount will establish the true winner.

Section 4:
The Recount Process

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QUESTION: What agency should conduct the recount?

DISCUSSION: It makes sense that recounts should be conducted by those who conducted the original count—usually the local election authorities. Both the requisite materials and trained staff are situated there. However, it extremely important that either the State election authority or else a court play a supervisory, directive role in the recount. Even if they do not actively participate in or monitor the process, they should at least have representatives on site, thereby bringing to the occasion an independent, objective judgment that was not there for the original count.

In the interests of professional performance, equitable treatment of all parties, and the uniform application of State laws and procedures, it is equally important that the State election authority (1) supply, ahead of time, written procedures on how the recount is to be conducted, and (2) confirm that such directives were carried out. The latter can be achieved by requiring documentation on each step in the process or by monitoring the recount in progress.

GENERAL TRENDS: Some States have specific provisions for designating the personnel who will conduct the recount. In Iowa, it is under the direction of a special board consisting of a designee of the recount requester, a designee of the apparent winner, and a person jointly chosen by them. In Texas, a Recount Coordinator is in charge; for primary elections, it is a State or county political party chairman and for general elections, the Secretary of State (for a multi-county race) or a county judge (for a single-county race). For multi-county districts in Michigan, the State Board of Canvassers exercises direction, supervision and control over the work of the county Boards of Canvassers. Recounts of federal elections in Indiana are now conducted by a State Recount Commission. This distinguished bipartisan body, established after the travails of the 1985 contest in Indiana's Eighth Congressional District, is chaired by the Secretary of State, has broad authority to determine which materials, documents and equipment will be included in the recount, and ensures the uniform and exacting application of State law in all jurisdictions involved in the recount.

In other States, judicial authorities appoint the recount staff: Missouri courts designate persons "to assist" local election authorities; a Virginia recount is supervised by a three judge court appointed by the Chief Judge of the Supreme Court; in Vermont, the court appoints personnel from lists submitted by political parties and candidates.

Connecticut, Maryland, Michigan, Ohio, Oklahoma, Oregon, South Dakota Virginia, Washington, and Wisconsin are among the States with clearly defined procedures for conducting recounts (documented either in rules or administrative guidelines) which are applied by local election authorities throughout the State. Copies of their procedures may be obtained from the chief election official of each State.

QUESTION: Should all votes cast for the office in question be included in the recount, or

only a portion of them? Should the scope of the recount be limited to a retabulation of votes only, or should it involve a review of other election materials, such as voting machines, vote recorders, tally sheets, computer software and hardware, memory packs. etc.?

DISCUSSION: Recounts are conducted because the numerical result of the election is in question. It is appropriate, therefore, that the recount process focus on all the factors that contribute to the correctness of the count, some of which will not be tested by a simple recounting of ballots or votes. Is there evidence, for example, that voting machines malfunctioned? Did pollworkers record correct vote totals from each machine or from tally sheets? Did the original count exclude the votes of legally entitled voters, or include illegal votes? Does the total number of voters balance with the total number of ballots cast? Can all ballots that were printed be accounted for—voted, unvoted, spoiled, disallowed? In computer-based systems, did the hardware function reliably? Can the software be relied on to produce a correct result?

Any experienced election administrator will confirm that these questions are relevant to obtaining a correct count. Such matters should therefore be included in the recount process to ensure that it is as comprehensive as time and cost constraints permit.

GENERAL TRENDS: Many of the concerns identified above are reflected in the laws and procedures of the States that provide for recounts in federal elections.

- States that conduct an automatic recount of close elections prior to certifying the results recount *all ballots and votes* cast in that election. Those that grant privately initiated recount requests in the event of a close margin do likewise. In other privately initiated recounts, the requester may often specify what portion of the votes he seeks to have recounted. Moreover, where only a portion of the vote is the subject of the recount request, some States specifically provide for a cross-petition or counter-appeal by the opposing candidate, covering the remainder of the votes. In West Virginia, all candidates in the race to be recounted are notified and then have 24 hours to reserve their right to demand a recount of precincts not included in the recount request. In Indiana, the State Recount Commission can extend the reach of the recount by adding precincts to those specified by the requester. In Rhode Island, which grants any request for a recount and conducts it at State expense, the process is limited to polling place votes and excludes absentee ballots.
- Some State recount laws or procedures specifically require a review and examination of *materials other than votes and ballots*, while others expressly limit the process solely to ascertaining whether the votes were counted correctly. In a few States, the statutory provisions give the responsible agency broad authority to expand the scope of the recount to include "any . . . relevant materials" or "any and all election materials". In still other cases, the State has no provisions regarding the scope of the recount, and has no established practices.

Statutes that detail other materials to be encompassed by a recount typically include: revisiting decisions made on allowing or disallowing ballots or votes (and responding to challenges thereto); auditing the ballot count to confirm that all ballots printed can be accounted for; verifying that the correct ballot was used in each precinct; and reexamining write-in materials, absentee voting records (including applications and envelopes), tally sheets, and spoiled ballots.

Connecticut, which conducts an automatic recount in close elections, also provides for what is called a "discrepancy recanvass" on the motion of a local election authority. This recanvass includes not only the recounting and retabulation of all votes cast, but also a careful scrutiny of write-in voting records, absentee voting documents, tally sheets and returns, as well as notes and worksheets from the original canvass. The discrepancy recanvass process is detailed in a Recanvass Manual produced by Connecticut's Secretary of State.

A Virginia recount involves reviewing voting machines, poll books, invalidated ballots, and other materials at the discretion and direction of a special three-judge Court which is responsible for the process. The Court defines the scope and components of the recount after consulting with the State Electoral Board, which supervises the recount.

Maryland regulations direct that a recount must verify that the correct ballot was used in each precinct, and must also include ". . . an examination of machines, ballots and any and all documentation of the election necessary for establishing the accuracy of the vote count."

Oklahoma law specifically provides that electronic devices be tested for accuracy during a recount.

QUESTION: Should observers be permitted at the recount? Should their number be limited? How should prior notice of the recount be given?

DISCUSSION: Keeping the election process open is the best way of ensuring public confidence in the outcome. Openness is especially important when the result is close and its verification will thus be of great interest—to the parties in the race, to the public, and to the media. Observers serve this purpose and should be included in the conduct of any recount.

It would be ideal if everyone interested in observing a recount could do so. But space, in most election facilities, is not unlimited. And the staff must be permitted enough room (not to mention peace and quiet) to carry out their work undistracted and unhindered by a milling crowd of observers. Thus, regrettably, the number of people admitted as observers must sometimes be limited. In such instances, it seems appropriate that those with the greatest stake in the outcome —the candidates or their representatives— should have preference.

The number of observers a candidate will need in order to follow the process is dictated largely by the procedures followed in the recount. When voting machines are reread by a number of teams simultaneously, the candidate might want to have one observer with each team. Similarly, if ballots are hand counted, or other documents are examined, the candidate should have an observer with each team. The election office should brief the interested parties before the recount so they will understand the process and can recruit the necessary observers. Certainly it should be

made clear that the authorities in charge will establish and enforce guidelines to ensure an orderly atmosphere necessary to reach an accurate count.

Although candidates have to be given preference for available space, election authorities should not use the excuse of limited space to exclude others, and especially news media, who serve as representatives of and conduits to the entire community and who bring an objectivity to the procedure not characteristic of those deeply involved in the election.

Candidates, news media, and other interested parties should be informed of the time and place for the recount, the policies regarding observers, and, to the extent possible, the procedures that will be followed in the recount. They should be asked to specify who will represent them; the election office staff should keep written records of observers designated and admitted; and while the recount is under way these people should be identified as such, probably by badges.

GENERAL TRENDS: All States permit at least some observers at recounts. In some instances the provisions do not address the number and affiliation of observers, simply stating that the process is "conducted in public". Other States limit observers to candidates, their representatives, or political parties.

Where the number of observers is specified, it varies from one per candidate per county (as in Nebraska), to one per candidate per counting team or tabulating unit (as in Ohio), or to one per candidate at each site (as in Oregon). Unwisely, several States do not admit the press to the counting room despite the important role of the media in serving as the eyes and ears of the general public.

In Washington State, the Secretary of State's very admirable guidelines for conducting a congressional recount include "Suggested Instructions for Observers, Media and Public", which strike an admirable balance between the need for order and the need for openness. In addition, county election officials are urged to send the prior notice of recount not only to the candidates (a statutory requirement), but also to "the press, political parties campaign organizations and other interested groups or individuals."

System-specific Procedures for Computer Counted Ballots

QUESTION: Should the recount be done on the same system used for the original count, on a different computer system, or by hand? Should a hand count of any portion of the ballots be required? Should the requester have the opportunity to choose whether the recount is done by machine or by hand?

DISCUSSION: Recounting ballots by a system different than what was used in the original count assures a degree of accuracy that cannot be attained by simply repeating the original process. Indeed, at least two esteemed studies of computerized vote counting recommended just such a practice—*Effective Use of Computing Technology in Vote-Tallying* (1978) and *Accuracy, Integrity, and Security in Computerized Vote-Tallying* (1988), both by Roy G. Saltman of the Institute for Computer Sciences and Technology of the

National Bureau of Standards (now called the National Institute for Science and Technology).

Using a different system, however, requires either (1) duplicate computer facilities or (2) many staff hours if a hand count is the "different system". Either alternative is, unfortunately, more costly than most election authorities can or are willing to bear.

A workable and meaningful balance between cost and verification is to do a hand count only on a *portion* of the ballots; if the results of the hand count do not agree with the machine count for the same batch of ballots, then additional hand counting should be done to verify the system's reliability.

GENERAL TRENDS: The possibility of using a different computer system to recount punchcard or mark sense ballots is mentioned in the regulations of only one State, Maryland, which provides that at the request of petitioner the recount will be conducted on a different system *if such a system is available* (emphasis supplied), an option that has never been employed since the regulation was first adopted in 1986. Most States recount their ballots on the same system used in the original count, although Arizona provides that its automatic recount be conducted using a different program than that used for the first count.

Where State provisions reflect a concern with the reliability of the computer, the options for achieving this purpose include:

- a mandatory full hand count (Oregon);
- a hand count of a portion of the ballots to be followed by full hand count if the result does not agree with the machine count for the corresponding ballots (Ohio, Nevada and Connecticut);
- use of the same system as was used for the original count, but if there is a discrepancy between the two totals follow up with a hand count (Nebraska);
- requester's choice of hand or same machine count, with the requester's cost differing to reflect the labor-intensive nature of the hand count.

Georgia does not permit hand counting in a recount.; North Carolina does so only "in extraordinary circumstances". In Texas the choice of hand or machine count is made by the requester, who also may specify that a machine recount be conducted using a "corrected program" and/or "other equipment" if the logic and accuracy test of the equipment prior to the recount is unsuccessful. After a machine count, the requester may obtain a manual count if he pays for it in advance.

QUESTION: When a tabulator is used in the polling place to accumulate votes on a memory pack, should the ballots be retabulated on the same kind of device as part of the recount? Should this be done on the same tabulator as used in the original count?

DISCUSSION: The memory pack that is programmed to record and total the votes cast in a precinct is certainly a potential source of error. If, during a recount, precinct ballots are reread using the same pack and the same tabulator as

in the original count, the measure of verification achieved will not be as great as rereading them on a different tabulator.

GENERAL TRENDS: There are apparently no statutory provisions relating specifically to testing or verifying precinct tabulators, and very few States report doing so. Perhaps this reflects the relative newness of the precinct tabulator, which was introduced long after the central count method and is used for only a small portion of all computer counted ballots. (It might also be noted at this point that the mechanical lever machine, which has been in use since the turn of the century and on which a third of the country's votes still are cast, is also a kind of precinct tabulator; and there is little in State laws or procedures regarding the testing of these machine for reliability, either).

North Carolina, which requires any voting system used in the State to produce a precinct total at the end of the voting day, tests ten percent of them for accuracy during the pre-certification validation of the vote count, and certain units are sent to the vendor for post-election accuracy testing. Oklahoma, which encountered malfunctions in their precinct tabulators early on in their use, now requires the four counties that use such tabulators with mark sense ballots to verify the precinct's vote count—again during the precertification period—if the number of unprocessed ballots is greater than two percent of the total. Each county in Oklahoma has the authority, but is not required, to process those precincts' ballots on different tabulators than those one used on election day.

QUESTION: Should the system logs be reviewed?

DISCUSSION: Any software certified for vote counting in a State should automatically produce a hard copy record of all activity on the system from the time vote counting begins until it is completed.

This record will be more complete in some systems than in others. Whatever documentation is provided by the system should be used by the election agency to verify its work. The log can confirm which batches of ballots were read, and that none were mistakenly missed or read twice. It can also identify any access to the system, by whom, and for what purpose. It is thus both a means for verifying accuracy and for demonstrating that there has been no unwarranted access to or tampering with the system. Indeed, the system log is well accepted as an essential component of any data processing system, and is the first place the user should look to ascertain what went on during the operation—particularly if the result seems somehow suspicious.

GENERAL TRENDS: Although no State laws or procedures specifically mention the examination of system logs as part of a recount, such a review should be done as a matter of course both on the original count and on any recount. Indeed, States which require a review of "other documents" or "any materials deemed relevant", may well include the system log under those headings.

Moreover, many election offices now include skilled data processing personnel, and a review

of the system log is standard operating procedure in their profession.

System-Specific Procedures for Mechanical Lever Machines

QUESTION: Should the recording work of the pollworkers on election night be verified by rereading each machine's vote totals, either directly from the counters on the machine or from a printed or photographic record of those counters made at the closing of the polls?

DISCUSSION: Working conditions in most polling places at the end of the voting day are hardly conducive to accuracy. Pollworkers have been on duty for twelve to fifteen hours, usually without relief; lighting is often poor. Ballot rotation requirements further complicate the process. It would be unreasonable to expect that in such a context numbers will be accurately read and recorded. It is therefore imperative that this process be verified.

In States that use lever machines, and where procedures are established by law or practice, each machine's individual vote totals are always reread, using the printed sheets produced by some machines or rereading directly from the machine counters when such a record is not produced or is illegible.

GENERAL TRENDS: In some States, detailed procedures for each recount are established by a judicial authority; these are instances where the request for recount is filed with a court, or obtained as relief in a contest action. They include Florida, Louisiana, Minnesota, Utah and Virginia. In other States, the State or local election authorities have discretion in establishing recount procedures.

In Colorado and Connecticut, the recount starts de novo and repeats the original count; Connecticut calls this a "recanvass".

In all cases, however, the original mechanical lever machine totals should be reread—preferrably in the course of the original count as well, but certainly in any recount.

QUESTION: Should all totalling tabulations be verified—machine totals yielding precinct totals; precinct totals yielding local jurisdiction totals; local jurisdiction totals yielding multi-jurisdiction, including statewide, totals?

DISCUSSION: Ensuring that the correct numbers are obtained from the machine counters is just the first step in verifying the count from lever machines. Since the original numbers were subsequently aggregated (some, no doubt, manually by pollworkers in precincts where more than one machine is used; and others, no doubt, in the election office by adding machine or by entering them into a computer-based tabulating system) all of these subtotals and totals should be reentered and recomputed in order to verify the final result.

GENERAL TRENDS: In States with procedures for recounting lever machines, all but one—Maine—verify the totalling tabulations.

System-specific Procedures for Direct Recording Electronic (DRE) Machines

QUESTION: Should the results produced on the paper tape be verified against the results stored elsewhere in the machine?

DISCUSSION: In order to confirm original vote counts, DRE user jurisdictions should take advantage of whatever opportunities for verification their voting system provides. The new DRE machines, for example, store results in more than one location in the machine. From one of these sources a paper tape of the results is produced. As part of verifying this printout prior to its certification, the redundant results should be compared with the printed results to ensure the correctness of the figures. Such comparisons should be repeated as part of any recount, especially because—like mechanical lever machines—DRE systems involve no hand-recountable ballot document.

GENERAL TRENDS: DRE machines are so new that not all users have developed procedures for employing the verification capabilities they provide. At least five States—Colorado, Kansas, North Carolina, North Dakota, and Pennsylvania—do verify results report by using multiple internal sources.

QUESTION: Should all totalling tabulations be verified?

DISCUSSION: A DRE machine system produces subtotals and totals, up to the entire local jurisdiction level, by machine tabulation of the memory packs taken from the individual machines. In a recount, this process should be repeated.

A further check on the accuracy of the system's tabulation could be made by replicating a portion of the aggregation on another tabulating system, using spread-sheet software or adding machines.

GENERAL TRENDS: No State using DRE systems thus far reports verifying the subtotals and totals from those machines, although, as previously noted they have as yet limited experience with those devices.

System-Specific Procedures for Paper Ballots

QUESTION: Should individual votes be retallied?

DISCUSSION: Hand tallying paper ballots, while probably the most publically trusted of all vote counting systems, is probably prone to the grossest errors. The work is tedious, even mind-numbing, yet exacting in its requirement. It is usually the custom to tally in teams, and to provide a watcher for each reader and one for each tallier to be sure that what is on the ballot is correctly read and what is read is correctly tallied. Even so, mistakes occur. The recount, therefore,

must include a careful, monitored repetition of the tally of votes cast on paper ballots.

GENERAL TRENDS: States that still use paper ballots, invariably retally them in recounts.

QUESTION: Should totalling tabulations be verified?

DISCUSSION: Getting the correct count from each batch of paper ballots is just the first step in proving the election result. The tabulations of subtotals and totals, as with the process for mechanical lever machines, must be repeated.

GENERAL TRENDS: In all States with established paper ballot recount procedures, paper ballot tallies are retotalled as part of the process.

Section 5: Validating and Invalidating Ballots

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QUESTION: In resolving an election challenge, should all ballots be reviewed for validity?

DISCUSSION: Anyone who has ever been involved in a recount knows that when the vote count has been verified and found to be correct, or at least not changed so much as to have reversed the results, there is still a chance that the count could be affected by ballot invalidation. Were votes disallowed that should have been included in the count? Were votes allowed that should have been excluded? These are areas of prime concern to the parties of an election dispute, especially when the margin between winner and loser is narrow.

The only way to answer those questions and to eliminate the remaining doubts about the correctness of the result is to review ballots individually. It is a time-consuming, labor-intensive process, and fraught with controversy since each party to the dispute will be urging an assessment that will benefit his interests. Those charged with resolving the questions, whether a court or recount officials, must apply specified criteria with consistency and impartiality. It is the only way to determine the winner when the arithmetic of the count has been confirmed and the result is still so close that a few ballots in or out could make the difference.

Computer-counted ballots present a special problem. Some votes may not be counted by the machine either because they were not marked in the proper way or in the proper place for the machine to read them. Yet the voter's intent can often be readily determined by human eyes. By the same token, votes counted by the machine may occur on ballots that are marked or defaced in such a way that they should be excluded—again a decision that can be made only by manual inspection.

Absentee ballots pose still other kinds of problems since their validity may depend upon legal requirements such as a signed oath; a witness or notary; a timely postmark or arrival; etc.

In a hand recount of either paper or computerized ballots, their validity is normally reviewed simultaneously with the recounting. If the recount is by machine, however, then such a review has to be conducted by hand either before or after the machine count, preferably before.

In order to reexamine ballots that were invalidated in the original count (so as determine if they should be included in the recount), the election authority must be able to produce those ballots and all the documentation associated with them. All of these materials should, of course, have been in secure storage since they were used in the original count.

GENERAL TRENDS: Most States that provide for a recount are not very specific about how ballots are reviewed for their validity during that process but do employ standards for ballot validity which certainly could not be applied unless the ballots are reviewed by hand.

QUESTION: What should be the standards for invalidating a ballot? Should the standards be in writing? Should they be made available to parties and observers before the recount begins?

DISCUSSION: The standards or criteria

applied for determining whether a ballot is valid can make a difference in the outcome of a close election. This is a critical and sensitive area in election administration. If the universal franchise is to be meaningful, then certainly no vote should be disallowed without compelling reason.

In order to be clearly understood by both the ballot assessors and the parties to the dispute, standards for ballot validity should be in writing. They should be established at the State level, and employed in resolving federal election recounts and contests throughout the State. The State authority should also periodically review the standards in light of experience, court decisions, or changes in law. When an amendment is made to them or an interpretation changed, local authorities should be informed and instructed in the application of the revised version.

Before a recount, parties and observers should be given copies of the standards, and the recounting officials should answer any questions posed regarding their application.

GENERAL TRENDS: Despite the fact that the validity of ballots or votes often becomes *the* crucial element in the process by which the winner of a close election is determined, a substantial number of the States have no statutory provisions or administratively established practices in this area.

In States that do establish criteria for invalidating a vote, the most common are: either that the intent of the voter is unclear or that the voter has failed to satisfy the legal requirements in casting an absentee ballot. And in a few instances, these are the *only* grounds for disallowing a vote. This policy reflects a very creditable conviction that the citizen's voice in the selection of those who govern must take precedence over technical minutia driven by partisan interests.

A recent contest for city office in St. Paul, Minnesota, illustrates the importance of this principle. The city uses mark sense ballots, which require the voter to fill in (darken) a rectangular area (a break in the shaft of an arrow) with a pencil. Each ballot is fed into a precinct tabulator which reads a correctly made mark in a valid voting position. A visual review of the ballots indicated that a number of voters marked the ballot differently, putting an "X" at the end of the voter's name, or circling the name. In these instances voter intent was clear and thus met the requirements of State law even though the machine did not count the votes because the appropriate rectangles were not darkened. After reviewing all the ballots and including those where the voter's intent was clear, even though they were incorrectly marked, the candidate who lost the original count by two votes was certified the winner by 47 votes.

Similarly, the District of Columbia reviews all punchcard ballots before a recount. Those on which the voter intent is clearly marked with a pencil or pen, rather than punched with a hole which the machine can read, are deemed valid and included in the recount.

States that do not have a "voter intent" standard in their statutes tend to be almost puritanically restrictive in assessing ballots for validity. In a number of such States, the voter is instructed to mark a paper ballot with an "X." Votes cast with a check mark are disallowed, even though they may comply with law in all other respects and even though the voter's intent is hardly in doubt. South Dakota law requires either an "X" or a check mark, but rules adopted by the Secre-

tary of State, which include graphic examples, interpret the law as broadly as possible.

Absentee ballots are typically invalidated either because of lack of notarization or voter signature, because of other problems with the outer envelope, or because they were received too late to meet the deadline set in the statute. California reports "incompleteness, ambiguity or other defect" as grounds for invalidation, and Oregon's standards include "vote not cast on official ballot".

The second most common criterion States employ for invalidating a ballot is whether or not it contains an "identifying " or "distinguishing" mark, or otherwise "reveals the identity" of the voter.

Ballot secrecy is certainly an important tenet of the American electoral ethic, but one wonders what kind of mark is deemed to be identifying. Does the squiggle made in the corner of the page with a ball point pen to get the ink flowing constitute an identifying mark? Under this standard are votes capriciously disallowed without due concern for other important public policy considerations? Does the question of who the vote was cast for enter into the decision-making where this much discretion is permitted?

In this regard, the explicit instructions provided in rules issued by the Michigan State Board of Canvassers regarding ballot invalidation because of revealed identity are commendable:

"The following criteria must be met to find a mark or mutilation to be distinguishing:

a. It must be clearly evident
b. That the mark or mutilation was placed on the ballot by the voter
c. For the purpose of distinguishing it."

The Michigan criteria properly impose a strong burden of proof on the canvassers.

Standards of ballot validity that are less commonly employed include defacement, mutilation, or a tear (presumably because they might identify the voter).

Computer-read ballots impose special constraints in order that the equipment used to read them will not be disabled. For that reason, Oregon bans stickers on punchcards, and Maryland prohibits the use of either stickers or cellophane tape (which the absentee voter sometimes uses to replace a punched out position when he changes his mind on whom to vote for). New Mexico, among other States, prohibits stickers, labels, or the use of rubber stamps (which are sometimes used to indicate a write-in vote).

QUESTION: What techniques should be used to ensure maximum consistency in making ballot validity decisions?

DISCUSSION: Once fair standards are established, equity demands that they also be applied consistently—throughout a jurisdiction, in all jurisdictions in the State, and from one election to another.

The State election authority can enhance their consistent application by establishing standards, instructing local authorities in their application, and monitoring or even participating in the recount process.

Local officials conducting recounts often set aside any questions of validity, gathering them all at the end for adjudication at one time by the decision-making authority, thereby enabling con-

sistent application of standards.

Finally, the resolution of ballot validity questions should be fully documented, so that a record of precedents can be established to serve as guidelines for resolving similar questions in future.

GENERAL TRENDS: Statutory provisions relating to ballot validity in recounts and contested elections vary greatly amongst the States. In some there are none, and others impose exceedingly strict limits on courts and electign administrators who are in charge of resolving challenges. In Washington State questions of ballot validity in a recount are banned altogether as expressed in a ruling by the Attorney General that

> . . . state law makes no provision for the challenge of ballots or voters . . . during a recount. The recount procedure provided for by statute is a mechanical function of retallying the ballots cast and accepted as valid by the precinct election officers or the canvassing board during the canvass of the election. The decision of the precinct election officers or canvassing board with respect to inclusion or exclusion of a particular ballot during the canvass is not a question during the recount.

Where their law includes clear policy guidelines, some State election authorities have translated them into detailed guidelines and provide substantial support to local officials in applying them. State officials often monitor, supervise, or even conduct the recount and are thereby involved in ballot validation. In other States, however, the State election agency has a limited grant of authority, and its influence is therefore confined to its persuasive powers.

Alaska's Director of the Division of Elections has developed written standards which are available to the parties before the recount begins; the Director also reviews all absentee ballots and "questioned" ballots to determine whether they should be included in the recount.

In other States the process is not designed for consistency. Each New Jersey county election board sets its own criteria. In many States recounts are granted only through petition to a court, and in such instances the court prescribes the entire process of the recount, including ballot invalidation. If the statute is silent or imprecise on the subject, there is little likelihood for consistency from one recount to another.

QUESTION: Who in the course of a recount should be able to challenge a ballot's validity?

DISCUSSION: Since a recount should be and usually is a public process, with the parties involved and other citizens observing, it follows that those observers should be able to question any part of the process that could be crucial to its conclusion.

GENERAL TRENDS: In most States, those conducting the recount (usually the local election officials) can challenge a ballot's validity. Parties to the dispute—candidates and their representatives—are also frequently permitted to do so. Where State officials have any authority in the recount, they too can challenge a ballot's validity.

And in some States any observer can raise the question.

QUESTION: Who in the course of a recount should make the determination as to the validity of a ballot (regardless of whether it was deemed valid or invalid in the original count)?

DISCUSSION: Those conducting the recount most often make the decision regarding ballot validity. Usually this is the local election authority, a special recount board, or a court. Both Maryland and New York require that any ballot invalidation must be by unanimous vote of the bipartisan local election board. In Michigan the decision is made by the local election authority, but can be appealed to the Board of State Canvassers.

Where State officials have a broad grant of authority in the recount area, those officials make the decisions. In Idaho, only the Attorney General, with whom a request is filed and who monitors each recount, can do so.

Appeals from ballot validity decisions are sometimes possible—by going to the State election authority, to a State trial court, or by filing an election contest under State law. Several States, however, allow no challenge to or appeal from the validation decision.

Section 6: Ensuring the Timely Resolution of Contested Elections and Recounts

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QUESTION: What factors determine the degree of urgency for resolving a challenge to an election result? How can their timely resolution be ensured? Should deadlines be incorporated into the State election code?

DISCUSSION: Once the result of a federal election has been challenged, by requesting a recount or contesting it, there are a number of compelling reasons why it should be resolved as promptly as possible.

Needlessly extending the uncertainty of who won is unfair to candidates, to election administrators, and to the public alike. In a primary election, nominees have to be identified so that ballot production, other election preparations, and the general election campaigns can proceed.

In a general election, winners must be decided so that they may assume their public duties and responsibilities as soon as possible. Each new Congress convenes in the early days of January following the election, so that any delay in resolving a challenge may cost a jurisdiction full representation at the outset. By the same token, since the Electoral College meets on the second Monday after the first Wednesday in December (barely six weeks after the election in which they are chosen) undue delay in resolving a challenge to that office could deprive a State its voice in selection of the next President of the United States.

States can ensure, or at least enhance, the timely resolution of disputed elections in a number of ways:

- Promptly considering and responding to requests for recounts or petitions to contest.
- Clearly defining the resolution process. The statute should be clear, lucid, and specific in certain important policy areas; and there should be further detailed rules, regulations, and written procedures.
- Establishing ahead of time how and when the appropriate parties are to be notified of the impending resolution action and their rights and obligations in it—including any cross-petition or counter-appeal options.
- Identifying ahead of time the resources necessary for conducting a recount—personnel, materials, space—and assembling them quickly once it is determined they are needed.
- Permitting no delay in starting the recount or hearing, once the necessary preparatory steps have been taken.
- Expediting any court proceedings by a "first on the docket" rule, possibly including a direct appeal to the highest judicial authority.
- Ensuring that the recount or hearing proceeds without interruption until a conclusion is reached.

GENERAL TRENDS: Some States make statutory provisions for the timely resolution of election result disputes. In others, the administrative and judicial authorities charged with resolving the matter, absent statutory mandate for timeliness, often take it upon themselves to complete the recount or contest promptly so that subsequent functions of government are not delayed. Less frequently do statutes set deadlines on the courts. But courts on their own initiative often expedite the scheduling, hearing,

and rendering of judgment in election disputes. Indeed, when scheduling actions, judges often confer with election officials to be sure that the timetable is realistic.

While the States invariably have specific deadlines when a contest or recount must be initiated, fewer have provisions for when the hearing or recount should start and fewer still for when it should be completed. Moreover, in a few States the timeline created by the maximum deadlines of the statute is such that a resolution could be delayed long enough to seriously impede the preparation for the general election or prevent the newly-elected federal official from taking office at the beginning of the term.

Maryland regulations require that a recount start within 48 hours of receipt of the petition and "continue daily until completion, eight hours per day, six days per week". The regulations further mandate that the board conducting the recou.t develop detailed procedures for its conduct, and that the process be fully documented. Contests in South Carolina are heard by a political party executive committee (in a party primary) or by the State Election Commission (in a general election), who are required to remain in session until a conclusion is reached.

A few State statutes, in providing for the court resolution of contested federal elections, include explicit requirements which contribute to the prompt completion of such actions. Sometimes the case is heard directly by the highest court, rather than starting at the trial court level and working through the appellate courts. Sometimes direct appeal is permitted from the trial court to the highest court. In Virginia, the contest takes precedence on the docket of the court and is heard "on its merits, not on technicalities." Maryland's contested election law provides that the trial court hear and decide a contest "as expeditiously as the circumstances require." Appeal is direct to the highest court where the statute again mandates that it be heard and decided "as expeditiously as the circumstances require."

When specific completion dates for recounts or contests appear in statutes, they include:

- *Deadlines that are tied to subsequent deadlines.* In Arkansas, a general election recount must be finished before the statutory deadline by which the certification of results must be made to the Secretary of State. Tennessee and Texas contests in Presidential Elector results, and Iowa and Connecticut contests in all federal elections, are tied to the meeting of the Electoral College, which is the first Monday after the second Wednesday in December. In Tennessee the completion date is the last day of November; in Texas, the seventh day before the Electoral College meets; in Iowa, the sixth day before the meeting; in Connecticut, the day of the meeting.
- *Deadlines that provide a specified period.* A Nevada recount must be completed in five days. The Connecticut "discrepancy recount" must be done within ten days of election. Louisiana law requires that a contest of a federal election begin at 10 a.m. on the fourth day after filing, and the court's judgment be given within 24 hours after the case was submitted to the judge. In Washington, an affidavit for contest is filed no later than ten days after certification and must be heard and disposed of by the court no later than five days

after the filing. Washington law further provides that no affidavit shall be dismissed for want of form if the particular causes of contest are alleged with sufficient certainty. A Wisconsin recount must be completed 13 calendar days from its start, and an Iowa recount 15 days after filing.

In contrast, some State schedules for resolving challenges are unhelpful or unrealistically vague. Contests in Missouri primary elections must be decided "before the general election," but if the parties were permitted to run the process out to the maximum, it is hard to know how ballots could be ready for the general election or how candidates could conduct their campaigns. A recount can be filed in Pennsylvania as late as four months after the election if voting machines were not used; any contest of a federal election can be filed as late as 20 days after election and the hearing can last as long as 30 days—a schedule which would run to the end of December, well after the Electoral College meeting and right up to the January swearing-in of the new Congress. The Utah statutory contest schedule is by far the lengthiest: a filing up to 40 days after the official returns; a hearing as late as 30 days after the filing; and a hearing that can last up to 20 days—in all, a period of more than three months after the election, extending into early February of the following year, without even allowing time for the appeal which is permitted by law!

Section 7: Granting Relief as a Result of an Election Contest

Section 7: Granting Relief as a Result of an Election Contest

QUESTION: What forms of relief can be granted by the forum which hears the contest?

DISCUSSION: The range of relief available from courts or quasi-judicial bodies includes (1) ordering a recount, of all or a portion of the votes cast in the election; (2) voiding the result and either ordering a new election or thereby creating a vacancy to be filled as provided by State law; and (3) changing the result and designating a new winner.

The relief available may be specified in the statute, or may come in the course of hearing and deciding the case under the State's rules of civil procedure.

Where the statute is specific regarding forms of relief, a court is accordingly restricted in its disposition.

- The authority to void an election and order a new one is, for example, sometimes circumscribed. A Kansas court can do so on grounds of "ineligibility, illegality or bribery." In Louisiana the court must find itself unable to determine the result, or that the number of either illegal votes cast or qualified voters excluded is enough to change the result. A Washington court may annul and set aside an election only if the irregularity or improper conduct of any member of the election board or the number of illegal votes given to the contestee was sufficient to change the result. The State Board of Canvassers which hears federal election contests in Michigan may void the election in a particular precinct or precincts and order a new election in them if (1) an elector could not cast a valid vote in a precinct for a petitioning candidate because of a defect or mechanical malfunction, and, (2) based on the available canvass, the number of electors who could not cast valid votes for this reason is greater than the margin by which the winning candidate was elected.
- The Maryland contested election law, on the other hand, gives broad mandatory authority to the court which is ordered to grant relief "upon a finding that the act or omission involved materially affected the rights of interested parties or the purity of the elections process, and might have changed the outcome of the election." Such relief may be an order for a full or selective recount, voiding the result of the election and ordering a new one, or granting "any other relief that will provide an adequate remedy."

QUESTION: Should an appeal be permitted from the decision of the forum?

DISCUSSION: The system of justice in the 50 states and the District of Columbia includes the right to take one's complaint to the highest court, and that tenet is reflected in the provisions for appealling decisions in contested federal elections.

In a number of States the case is heard by the State's highest court, so there is no appeal within the State system. The most usual provision among the States is for the action to be heard first at the trial court level, with opportunity for appeal to the highest court either directly or through the appellate ladder. (In Montana the

trial court hears the contest and no appeal is permitted.) Where contests are heard by administrative or quasi-judicial bodies, an appeal of their decision is to the State court system.

Two States set up special courts to hear contests and permit no appeal from their decision: Virginia, a three-judge panel of trial court judges is appointed by the Chief Justice of the Supreme Court; Iowa, a panel composed of four trial court judges and the Chief Justice of the Supreme Court.

Variants of appeal provisions in other States include:

- Minnesota: The appellate court judge may take evidence regarding points beyond the recount of ballots, but cannot make findings or conclusions of law based on it. This evidence is to be sealed and forwarded to the President of the U.S. Senate or Speaker of the House of Representatives, as appropriate to the office involved.
- Tennessee: There is no appeal from a primary contest, which is heard and decided by the political party executive committee. A general election for House of Representatives or U. S. Senate may be appealed directly from the trial court to the State Supreme Court.
- Georgia: Appeal involving a constitutional issue is direct to the State Supreme Court, but a nonconstitutional issue reaches the highest court through the intermediate appellate court.
- Rhode Island: The State Board of Elections hears and decides the contest. There is no appeal "as a matter of right", but the candidate may appeal for writ of certiorari to the state Supreme Court.

In the final analysis, of course, the results of all contests and recounts for seats in the U.S. Senate or the U.S. House of Representatives can be appealed to the respective chambers of the Congress.