

XII.

Recounts and Contests

A Report of the Task Force on Legal and Constitutional Issues

National Commission on Federal Election Reform

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Introduction

We have set out some general observations, with specific examples, of the various approaches states have taken to the construction of recounts and contests. In any state, of course, the statutes may speak clearly

to some issues, and less so to others. Issues not covered by statute are addressed by rule, decided by the time-honored discretion of local officials, or entrusted to the courts.

Since time did not permit a comprehensive review of all the sources of authority for the conduct of recounts or contests, our focus has been the statutes. The state speaks first by statute. If the statute is incomplete or vague on material points, this presents serious problems for the efficiency of the process and undermines public confidence in the result—even if a court or elections official ultimately decides the issue. If nothing else, the presidential recount controversy makes that point.

A survey or summary necessarily overlooks or minimizes significant issues or even differences in state approaches. The Federal Election Commission's National Clearinghouse for Election Administration, in its 1990 summary of state recount and contest statutes, stated then that these laws were “enormously complex” varying by type of elections, criteria and process. The discussion below isolates and summarizes basic issues of common concern that likely to be found in most state codes. These include:

- who may—and in what manner—initiate a recount or contest
- the grounds for seeking either recounts or contests
- timelines established for actions by the parties or state, including for the resolution of the contest
- the nature of the relief that may be requested—whether for partial counts, reaching some ballots and not others, or part but not all of the electoral jurisdictions (e.g. some precincts but not all)
- the provisions for bearing costs
- legal standards if any for deciding issues such as voter intent (to be covered in a separate chapter)
- rights of appeal
- remedies

Following a general overview on these points, the discussion turns to selected states with approaches sufficiently distinct, or illustrative of a certain approach, that their codes merit additional comment.

Overview

Review of Election Results

Election results are commonly subject to two different types of review: recounts and contests. Although their character can vary from state to state, recounts are typically administrative proceedings (often subject to judicial review) in which the votes are recounted—either mechanically or by hand—to determine whom they were cast for. Contests, on the other hand, are more exceptional judicial proceedings in which votes can be excluded as improper. A recount is only one possible remedy in a contest. Recounts precede contests when both are available.

Application to Federal Elections

Many states clearly include federal elections within the class of elections subject to recounts or contests. Others are less clear, and some provide for contests and not recounts, or vice versa. Some of this ambiguity about the availability of contests may reflect the awareness of states that the House and Senate are empowered under the Constitution to judge the returns of their members, and perhaps the belief that any “contest” properly lies with those bodies.

Initiation of Recounts and Contests

Recounts

States provide for a range of procedures for initiating a recount or contest. By and large, the largest numbers of states initiate recounts on petition or request of the candidate. A number of others provide for “automatic” or mandatory recounts in the event of a “tie,” where the margin is close (typically 0.5% or less), for all elections, or for federal elections in particular.

In some states, voters may initiate a recount. In certain of these states, including states the size of California and Florida, a single voter may request a recount, whereas in others, a larger number is required to initiate the action.

Provisions conferring on political parties the authority to seek recounts are rare and may also be limited in scope. For example, in Indiana, a party may seek the recount but only if a candidates does not.

Contests

Once again, the largest number of states confers on candidates the right to seek a contest. Voters may also initiate contests, and in a handful of states, a political party. In one state, Oregon, a county clerk may also do so.

Time for Requesting Initiation

The timeframes for initiating an action vary widely across the states and run either from the day of the election, the day the canvass is completed, or the day the result is officially certified. The canvass, which can vary from state to state, is a post-election process that usually begins with the initial counting of ballots and ends with the official report of the election results by the appropriate elections official. A review of the chart below tells the tale.

For recounts

On election night	OK
Within 2 days of canvass	MI, WV, WY
Within 3 days of election	NH
Within 3 days of canvass	AK (for Gov./Lt. Gov.), MD, NV, NH, ND, OK, WA, WI (within 3 rd day following the last meeting of the board of canvassers)
Within 5 days of official canvass/certification	AK (except Gov./Lt. Gov.), CA (a second voter may request a new recount within 24 hours of the completion of an initial recount), FL, GA, ME, MT, OH, PA, TX (5 days after election or 2 days after canvass)
Within 6 days of canvass	NM
Within 7 days after election	IN (by candidates-7; by party chairmen-10), MO, RI
Within 7 days of canvass	UT

Within 10 days of election	MA, SD, VT
Within 10 days of certification	VA
On or before 2 nd Saturday following election	NJ
Within 15 days of election	CO (within 14 days if initiated by state)
Within 20 days of canvass	ID
Within 5 days after the 29 th day following state election	CA
Within 35 days of election	OR (supplemental demand permitted until 50 th day)

For contests (focussing on general elections, with the caveat that time frames for primary contests could be shorter).

Within 5 days after canvass	GA, KS, SC
Within 7 days after canvass	MN
Within 9 days after election	LA
Within 10 days of state review or certification	AK, DE (for presidential electors), FL (or within 5 days of certification following a protest), IA, TN, WA
Within 13 days of election	TX
Within 5 days of recount, 14 days of election	NV, ND
Within 15 days of election	KY & WY. OH & VT (or within 10 days of recount).
Within 20 days of election	HI, MS (local offices), PA
Within 15 days of official proclamation	IL
Within 20 days of certification	AR (except within 15 days for election to Arkansas Home of Representatives), DE (and within 60 days before first day of court term)
Within 30 days of election	MA, MS (state offices), NJ, VA
Within 30 days of certification	MO, NM
Within 40 days of election	NE, OR, UT

Scope of Relief (Partial v. Complete Recount Ballots)

It is generally the case that where a state statute speaks to the question at all, candidates are expressly entitled to select for recount some but not all of the geographic voting units within a jurisdiction. California, Georgia, Idaho, Indiana, Massachusetts are just a few of the states that permit the candidate or initiator to designate individual precincts or counties for recount.

Many statutes are silent, though practice in this area suggests that candidates are encouraged to ask for the most limited geographic recount compatible with the grievance they have experienced or the relief they hope to obtain. Mandatory recounts, triggered by a close election, generally extend to all ballots for the election subject to recount.

Contest provisions are also not particularly detailed on the point, but it is fair to say that candidates or others initiating a contest would be looking to identify particular problems—specific “irregularities,” as many statutes refer to them—and it would be common that the relief sought would be tailored to those problems. So by its nature, a contest is selective.

Grounds for Recounts and Contests

The grounds for seeking a recount in various state codes may be classified as follows:

Belief of mistake or error	AK, CA, GA, IN, MA, MI, NJ, NM, NC, OK, PA, SD, TX, WY
Misconduct or fraud affecting outcome	CA, ID, MI, OK, PA, WY
Mechanical failure	IN, OK, TX

Close election	AK, AZ, CO, GA, MO, NC, ND, OH, SD, TX, UT, VT, VA, WY
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The grounds for contests are as follows:

Misconduct, fraud or corruption on part of election official	AL, AK, AZ, CA, CO, CT, DE, FL, GA, HI, IL, IA, KS, LA, MN, NE, NV, NJ, OK, OR, TX, UT, VT, VA, WA, WY
Ineligibility of candidate	AL, AK, AZ, CA, CO, DE, FL, GA, IA, KS, MN, NE, NV, NJ, ND, OR, UT, VA, WA, WY
Erroneous count sufficient to change the result of election	AZ, CA, CO, CT, GA, HI, IL, IA, KS, KY, LA, MN, NE, NV, NJ, NC, ND, OR, TX, UT, VT, VA, WA, WY
Illegal votes	AL, AZ, AR, CA, CO, CT, DE, FL, GA, IL, IA, KS, MN, NE, NV, NJ, NC, ND, OR, TX, UT, WA, WY
Rejection of legal votes	AL, CO, IA, KS, MN, NE, NJ, ND, OR, UT, WY
Bribery, intimidation or malconduct designed to prevent a fair election	AL, AK, AZ, CA, DE, FL, IA, KS, KY, LA, MN, NE, NV, NJ, OR, TX, UT, WA, WY
Candidate's prior felony conviction	IA, NE, NJ, WA
For any other reason casting outcome in doubt	CO, FL, GA, HI, IA, KS, LA, MN, MO, NE, NV, NJ, VT, VA

Financial Liability for Recounts and Contests

The question of who pays for recounts also varies widely by state and by type of recount. Typically, when states have mandatory recount provisions, the state or locality will pick up the tab. States in which candidates or individuals may request a recount may charge nominal filing fees, demand payment of the entire cost of the recount, or request posting of a bond for the possibility that the outcome does not change. Costs may also vary depending on the extent of the recount and the margin of votes cast.

Most contest statutes contemplate filing with a state court, and fees are typically handled by the courts in a manner consistent with allocation of costs and legal fees in civil procedure. Some states, however, do require payment of a bond by the initiator to cover contest contests in the event the outcome does not change.

Who Pays – Recounts

Paid by state/locality	AK, AZ, CO, ID & VA (if close). MA, MO, MT, NE, ND, OH & WA (if automatic), NC, OR (if requested by government), RI, SD, UT, VT
Paid by campaign/candidate	AR, NV, ID (\$100/precinct), ME & NH (fee varies by margin), NE (if not automatic), NM (\$50/precinct), VA (if margin >0.5% and no change in result), WI (no fee if close; \$5/precinct), WY (max \$500 if no change)
Paid by initiator (if not candidate)	AK (deposit req. unless close), CA (costs daily), CO (total estimate), IN (\$100 minimum), MI (\$10/precinct), MT, NJ (costs vary), OH (max \$10/precinct if not automatic), OK (costs vary), OR (\$15/precinct), TX (costs vary)
Bond or deposit required	MD, MT (if margin > 0.25%), NM (in lieu of advance), ND (if not automatic), PA (deposit or bond), WA (deposit of \$.05/ballot)

Who Pays – Contests

Paid by initiator	CA (daily advance), CO (post-judgment liability), GA (contestant and defendant post judgment liability), IL (\$15,000 fee—potential liability up to \$75,000), TN, WY (if result is confirmed)
Bond required from initiator in event outcome does not change	AZ, CT, DE, IA, KS, MN, MO, NE, OH, OK, PA, UT

Rights of Appeal

The process for appealing recount and contest decisions also varies widely. Generally, if a state lacks a separate contest procedure, a petitioner can appeal the final recount determination to state court. In the interest of expedition, recount decisions are generally not appealable when there exists a separate contest proceeding.

Contests conducted in court are generally appealable to the next highest court.

Recounts

To courts	AK, CO (for local elections/ballot measures), ID (within 24 hours of recount), ME (if disputed ballots sufficient to effect result, Secretary of State shall forward ballots to Supreme Judicial Court for determination), MD, NM, SD, WI
To legislature	AK
To Secretary of State	CO (for state elections)
Citizen-suit enforcement of election procedures	MD (court may declare election void or order other relief)

Contests

Higher courts	AR, CA, CT, GA, IL, KS, LA, MN, NJ, NM, NC, ND, OH, OR, PA, TN, TX, UT, WA. MO & NE (except from legislative hearing)
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Variations: Specific States

We offer a series of comments on specific states, less to establish a typology of approaches than to illustrate more concretely the differences among them. We do not believe that a model can be found in any one state, in the sense of an ideal type, but a model might be constructed from the different parts of several states' codes to reflect the best practices currently in place.

One additional note of caution, rooted in the experience of practitioners. Recount and contest statutes, particularly the former, typically work as well as the good faith and competence with which they are administered—and no more. Washington State, for example, was widely lauded last year for a United States Senate recount conducted for the most part free of complaints about fairness or impartiality. The Washington Code discussed below is constructed adequately in most respects. But more important to the successful outcome was (1) an administrative structure and staff that commanded respect and (2) an expectation within the state that the candidates and parties would not, without reason, fail to exhibit that same respect in their own legal and public responses to the recount.

Alaska

Alaska allows for recounts to be initiated by candidates or by 10 voters, and it mandates recounts where the margin of victory is .5% or 20 votes or less. One of its unusual features is a provision allowing formal participation by “organized groups,” as well as by candidates and political parties. Also of interest is the provision that requires the state to pay for the recount not only when the result changes (which is typical), but also if the applicant’s vote increases by 4% or more, even if the outcome does not change. Timelines for the conduct of the recount are tight: the recount must be completed within ten days, and an appeal to the courts, if any, must occur within five days thereafter. A court hearing an appeal must review all of the ballots in the election, not only a disputed subset.

California

Detailed provisions for the conduct of recounts in California include some of interest, particularly as they affect the right of voters seeking recounts to specify how they should be conducted. Any voter may ask for a recount, and the statute is clear that this right applies to federal offices and to the election of slates of presidential electors. For statewide elections, the Secretary of State may also ask for a recount but only within 5 days of the 29th day after the election.

For a statewide race, the initiator may seek a recount of all counties and may specify the order in which they will be counted. Where punch cards or computer systems are used, the initiator may specify either a manual or machine recount and may also request a recount of all ballots “whether voted or not.” Ballots may be challenged for “incompleteness, ambiguity or other defects.”

Florida

Attention has been paid to the recently enacted reforms in Florida, which include new requirements for the approval of electronic or electro-mechanical machines. The state also amended its recount procedures, providing that counties must direct machine recounts where the margin of victory is .5% or less and requiring that they be completed by the second day after the election. If the machine recount shows a difference of .25% or less, then a manual recount of undervotes and overvotes is required “in the entire geographic jurisdiction of such office....” Where the difference lies between .25% and .5%, the candidate is “entitled” to a manual recount if timely requested (by 5:00 p.m. of the second day after the election).

Florida also made changes to its counting rules, requiring that a vote be counted where there is a “clear indication...that the voter has made a definite choice.” The Department of State is charged with implementing this mandate with further rules, but it is enjoined from resorting to vague formulations, such as “catch-all provisions” that state, tautologically, that a vote is “any other mark or indication clearly indicating that the voter has made a definite choice.” The Department may also not promulgate a rule relying exclusively on the question of whether the voter “properly” marked the ballot.

Florida also made changes to its contest provisions, deleting certain open-ended language on the grounds for contests and the authority of the courts in disposing of them. The law had previously allowed for contestants to allege “[a]ny other cause or allegation” that the certified outcome was wrong, and this language was deleted in the recently enacted reform. Also courts considering a contest could “fashion such orders” as necessary to investigate each allegation, to “prevent or correct any alleged wrong,” or to “provide any relief appropriate.”

Michigan

Michigan offers considerable detail in the construction of its recount provisions. Of some interest are provisions intended to provide for “speedy and efficient means for the preservation of evidence of the intention of voters” in United States Senate and House elections. Recounts are provided for automatically in statewide elections when the margin of victory is 2000 votes or less. In all other instances, a recount may be ordered on the petition of a candidate, but only upon pleading fraud or mistake within 48 hours of an election. In addition to detailed pleading requirements, the Code provides clear timetables for notices to candidates and for hearings. The State Board of Canvassers, the administrative body which manages recounts, has broad investigative powers, including subpoena power, “in all matters relating” to the recount, and the power to make rules and regulations. The statute reflects an overall policy favoring uniformity, as well as fairness and impartiality, in the recount process.

New Hampshire

New Hampshire offers an example of an anomaly on one important issue. Its contest provisions do not appear to apply to federal elections. As noted, this may be a function of state deference to the constitutional process under which a “contest” may be brought directly to the U.S. House or Senate. In any event, the state provides at the same time for a specific process for the “resolution of ties” for U.S. Senate and House races.

Washington State

Washington State provides clearly in its recount process for federal candidates, who may file for recounts with the Secretary of State. The state has structured a two-tiered “mandatory” process. One applies where the margin of victory is less than .5%. The other, when the margin is still less--under .25% and fewer than 150 votes--calls for a full manual recount. Candidates, however, may agree on alternatives to the manual

process, if it is appropriate to the balloting system used and also involves the use of a vote tallying system. The Code also contains a provision allowing for no more than two recounts of the vote in any county, reflecting a statutory policy favoring “closure to the recount process.”

Contests in Washington are available upon petition by registered voters who must plead by affidavit “particular causes.” Grounds include official misconduct, bribes paid to voters or election officials, and illegal votes, and the asserted irregularity must be material. An illegal vote does not include a vote by an “improperly registered” voter who was not challenged in the first instance as authorized by law.

Concluding Comments

This survey is intended to provide only an overview of variations in state codes, with attention to basic issues and some of the more significant differences in approach. Many codes are remarkably similar in a number of respects—for example, the circumstances in which a mandatory recount is provided (where the margin is .5% or less) or the grounds for a contest. The differences reside in factors such as

- Detail or comprehensiveness on process, pleading requirements, and the like
- Clarity and internal consistency
- Reasonableness of timeframes, balancing the need for “closure” against the imperatives of accuracy and fairness
- Discretion afforded election officials and reviewing courts, and related coherence of the case law construing that discretion.

It is also true that to understand the state legal structures for recounts and contests in their entirety, attention must also be paid to administrative rules and judicial decisions, which this analysis has not focused on. One important and related question facing a legislature in considering its code is a basic one of responsibility—how much may the code reasonably prescribe, and where does the discretion of the courts and election administrators lie? This is a fundamental question with broad implications for democratic practice and for public acceptance of the outcome.