

## CHAPTER 8:

# CANVASSING, CERTIFICATION, AND RECOUNTS

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## I. INTRODUCTION

Instead of conceding victory to their opponents, defeated candidates, their supporters, or those favoring the losing side of a ballot measure may decide to challenge the election results, especially if the margin of victory is small. Though procedures vary from state to state, the most common post-election challenges are (1) the recount, which reviews the initial vote count for errors, and (2) the election contest, which attacks the election's validity or integrity.

To properly contextualize post-election challenges, an understanding of what occurs after the last voter has cast a ballot and left the polls is helpful. Although the specific requirements vary by state, the following simplified description provides a generic overview of the three most common steps that begin after the polls have closed and end with certification of the official election results. The three steps are:

1. vote canvassing,
2. local review and certification of the results, and
3. state-level review and certification of the results.

During the first step, the votes are canvassed<sup>1</sup> (counted) to determine how many votes were cast for each candidate and for or against each ballot measure. Once the canvass is complete the results are “returned”<sup>2</sup> (submitted) to the local election board.<sup>3</sup> The initial announcement of the election results is based on these returns, which are unofficial.

After the original canvass ends, the ballots and voting equipment are secured and stored as state statutes or agency rules dictate. Secure storage ensures that the ballots and voting equipment remain in the same condition they were in at the end of the original canvass so that they can be recounted, if necessary.

The second step towards declaring the official election results occurs when the local election or canvassing board meets to review the returns and the paperwork submitted to it by precinct-level<sup>4</sup> canvassers (usually on election night). The local election board ensures that all precincts submitted returns and supporting documentation, and that the returns are without obvious mathematical or other errors. The local election board then combines the vote totals from each reporting precinct and announces the official local results. For purely local offices or ballot measures, the local board may also be authorized to issue certificates of election to the winners.<sup>5</sup> Finally, the local election boards submit their official local returns to the state for the final level of review, tabulation, and certification.

The third and final step begins when the state board of elections<sup>6</sup> convenes to review the localities’ returns and to certify the election at the statewide level in a process analogous to the one just concluded at the local level. The state board certifies all winners who were not certified at the local level. The certificate of election confers prima facie title to the office at issue.

If the election resulted in a decisive victory with few or no allegations of irregularities or illegal votes, the election’s outcome is unlikely to be challenged. If the margin of victory is small or if irregular or illegal votes allegedly affected the outcome, the likelihood of a challenge—a recount or election contest—is increased.

Recounts challenge the accuracy of the canvass. They allege that errors in the original vote counting led to the wrong candidate or ballot measure position being declared the winner. Recounts typically do not consider substantive problems—such as fraud or improper conduct—during the election because those types of allegations are reserved for election contests. Because recount results supersede those shown by the original canvass, when the recount shows a

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<sup>1</sup> Canvassing means to “thoroughly examine” or “scrutinize.”

<sup>2</sup> The results themselves are sometimes called the “returns.”

<sup>3</sup> This body, too, may go by different names, such as the board of elections, elections board, canvassing board, board of canvassers, etc. As used in this chapter, this body is made up of individuals who review the vote totals submitted by the original canvassers.

<sup>4</sup> As used in this chapter, “precincts” means the smallest voting area in which votes are separately recorded. These areas may be called “precincts” or “wards” or have another name.

<sup>5</sup> If the locality certified the results of local races, it may only need to send the state the winners’ names and a copy of the locally-issued certificate of election. See MICH. COMP. LAWS ANN. § 168.823 (West 2005).

<sup>6</sup> The board conducting the state-level review may be a canvassing board, elections board, or the Secretary of State.

different candidate or ballot measure position won, the recount winner becomes the certified winner.

This chapter describes the canvassing, certification, and recount processes and the legal issues that courts may be asked to resolve with respect to each. Chapter 9 discusses election contests and the legal issues that arise during them.

## II. CANVASSING

After the polls close, the ballots and voting equipment are canvassed in accordance with state law. Canvassing counts the votes for individual candidates and for or against ballot measures to determine who or which position won. State vote canvassing statutes may direct how votes are counted, who may count them, and what authority canvassers have. Additionally, state laws may specify how the ballots, vote recorders, and voting equipment should be secured post-canvass to preserve their integrity and evidentiary usefulness in case of a recount.

Canvassing occurs at the polling place, or at a different location to which the ballots or voting equipment have been transported. Paper ballots are counted manually,<sup>7</sup> while tabulating equipment counts machine-readable ballots, such as optical scan ballots. Votes cast on electronic voting machines are canvassed by printing out or electronically transmitting the results from the vote storage unit. After the ballots are canvassed, the unofficial returns are submitted to the local canvassing board for review and local certification.

The absentee and provisional ballot canvass frequently occurs later than the in-precinct canvass, if at all. Compliance with absentee ballot statutes must be verified before absentee ballots are counted. Verification may involve a facial review of the ballot's outer envelope to ensure that notarization, signature, witness, or attestation requirements have been met.

By their very nature, provisional ballots—which are used when the voter's eligibility cannot be verified at the polls—cannot be canvassed until after the voter's eligibility has been established. Because of the additional cost and time involved in verifying the voter's eligibility, some localities do not canvass provisional ballots unless their number exceeds the apparent margin of victory.

Statutes may require provisional and absentee ballots to be stored apart from in-precinct cast ballots so that challenges to the former can be resolved more quickly and accurately.

The canvass results are important for several reasons. First, the canvass determines the unofficial winners of both office and ballot measure elections. Being named the winner confers an advantage because runners-up who wish to challenge the results may have difficulty

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<sup>7</sup> Ballots should be counted in accordance with the voter's intent when it is fairly ascertainable. To facilitate determining the voter's intent when the vote markings do not fully comply with the ballot instructions, states may issue guidelines or instructions. See WASHINGTON SECRETARY OF STATE, ELECTIONS DIVISION, VOTER INTENT: STATEWIDE STANDARDS ON WHAT IS A VOTE (2006), available at [http://www.secstate.wa.gov/elections/pdf/Statewide\\_Standards\\_on\\_What\\_is\\_a\\_Vote\\_web\\_version.pdf](http://www.secstate.wa.gov/elections/pdf/Statewide_Standards_on_What_is_a_Vote_web_version.pdf).

satisfying the statutory requirements governing recounts and election contests. Second, the ballots reviewed and counted in the canvass frequently define the pool of ballots that are counted during a recount. Thus, some states may not allow ballots that were overlooked during the original canvass to be included in a recount, leaving these ballots unreviewable unless the challenger qualifies for an election contest,<sup>8</sup> which is a more difficult and expensive procedure to maintain than a recount.

The precinct-level returns are submitted to and reviewed by local canvassing boards, which check them for completeness and accuracy. Although the local canvassing board does not automatically review the actual ballots, state statutes may permit them to do so (or to question the precinct canvassers) if the local board has concerns about the submitted returns, if some returns were omitted, or if corrections are necessary.<sup>9</sup>

Once the local canvassing board verifies the precinct-level returns, it declares the official local results. If local canvassing boards certify the results of local office and ballot measure elections, they usually issue the certifications of election. As its final act, the local canvassing board submits its paperwork to the state canvassing board.

The state canvassing board conducts a statewide canvass in which it reviews all the locally certified returns and any locally issued certificates of election. State canvassing boards aggregate the local returns to determine the winners of federal, multi-district, and state offices, as well as statewide ballot measures.<sup>10</sup>

The amount of time between the original canvass and the final state certification varies from state to state, although it is usually several weeks. As an example, Michigan requires its local county-based canvassing boards to meet at 1 p.m. the day after a general election to canvass the local returns. The county canvassing board must complete its work within fourteen days, and transmit its results to the Michigan state board of canvassers within twenty-four hours thereafter. The state board of canvassers must then meet to review the county-submitted returns on or before the twentieth day following the election, and must finalize its results no later than the fortieth day after the general election.<sup>11</sup>

## A. LEGAL ISSUES

Vote canvassing is an official, ministerial act. The original precinct-level canvassers and the later reviewing canvassing boards perform narrow ministerial duties and operate under limited grants of authority, which they may neither abdicate nor exceed. Administrative remedies may

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<sup>8</sup> See *Washington State Republican Party v. King County Division of Records*, 103 P.3d 725 (Wash. 2004) and *McDonald v. Secretary of State*, 103 P.3d 722 (Wash. 2004) (finding the omission of ballots from a canvass or recount can be challenged if a contest is permitted).

<sup>9</sup> See MICH. COMP. LAWS ANN. § 168.823 (West 2005) (permitting local canvassing boards to review ballots and correct errors).

<sup>10</sup> See *Pullen v. Mulligan*, 561 N.E.2d 585, 608 (Ill. 1990) (discussing the meaning of “canvass” and how it applies to different boards at the local and state level). Note that regulations which govern the necessity of counting early, absentee and/or provisional ballots before a winner is announced vary by state.

<sup>11</sup> MICH. COMP. LAWS ANN. §§ 168.821 – 168.842 (West 2005).

be available to address canvassing failures. If available, a petitioner may need to exhaust those remedies before seeking redress in court. To the extent courts become involved, their involvement is likely limited to circumstances where a canvassing body:

1. fails to act,
2. acts in excess of its authority, or
3. seeks to amend its returns.

### 1. Fails to Act

A canvassing board abdicates its authority when it refuses to canvass votes or to submit its returns as statutes direct.<sup>12</sup> Under these circumstances, the court, if requested, may issue a writ of mandamus<sup>13</sup> ordering the board to complete its official duties.<sup>14</sup> Absent the canvassing board's failure to act, however, courts should not intervene in post-election disputes until the initial canvass concludes.

### 2. Acts in Excess of its Authority

Canvassing boards exceed their authority when they investigate allegations of fraud or irregularity, scrutinize tally sheets for evidence of tampering, or throw out the election results unless these actions are specifically authorized.<sup>15</sup> Courts can enjoin canvassing boards from acting in excess of their authority and issue writs of mandamus to compel them to perform their statutory duties.

### 3. Seeks to Amend its Returns

Occasionally, a canvassing board discovers errors in its initial canvass and may seek to recanvass the votes or submit amended returns without waiting for a candidate-initiated recount. The canvassing board's amendment of its returns may be challenged. In one instance, a court permitted several local canvassing boards to substitute amended returns for their originally certified ones because the canvassing boards voluntarily undertook the action to correct only "obvious errors" before the state board of elections meeting began.<sup>16</sup> In another case, a court allowed a local canvassing board to recanvass ballots that had been set aside for

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<sup>12</sup> State *ex rel.* Bodine v. Elkhart County Election Board, 466 N.E.2d 773, 776 (Ind. Ct. App. 1984) (holding canvassing boards have a statutory duty to conduct a canvass without being ordered to do so).

<sup>13</sup> Mandamus is an extraordinary writ issued to compel the performance of official, nondiscretionary duties. See *infra* Chapter 11: Extraordinary and Equitable Relief for additional information on writs of mandamus. Some states may use mandamus-equivalents rather than a writ mandamus, or may call the action by another name. When this manual refers to a writ of mandamus, it includes these other actions.

<sup>14</sup> See *Sears v. Carson*, 551 So.2d 1054, 1056 (Ala. 1989) .

<sup>15</sup> *Id.*

<sup>16</sup> See *Andersen v. Rolvaag*, 119 N.W.2d 1 (Minn. 1962) (noting, by two dissenting judges, that no reason existed to believe similar errors were not lurking in the results filed by the 3100+ other precincts and expressing concern that allowing voluntary amendments from some precincts would encourage partisanship amounting to selective recounts).

further review and then forgotten. The court first determined that the statutory language that authorized a canvass to correct inconsistencies or discrepancies in election returns was not limited to fixing only mathematical errors.<sup>17</sup>

Courts may issue writs of mandamus to order a board to withdraw its unauthorized amended returns.

### III. CERTIFICATION

The ministerial act of certification occurs after a local or state canvassing board finalizes the election results and declares an official winner. State statutes may authorize local canvassing boards to issue certificates of election for local offices. State canvassing boards or other state officials issue certificates of election for multi-district, state, and federal offices. The candidate holding a certificate of election has a prima facie right to the office, and takes office unless successfully challenged.

Because certification is a ministerial act, declared official winners should automatically receive them. If the announced official winner is not issued a certificate of election, the winner may need to pursue and exhaust any available administrative remedies before resorting to a lawsuit. If administrative remedies are unavailing, courts can issue a writ of mandamus to compel appropriate officials to issue the winner's certificate of election. If no winner has been officially declared, however, no duty to certify the election results exists and mandamus is unavailable.<sup>18</sup>

### IV. RECOUNTS

The narrower the margin of victory, the more likely the losing candidate or disappointed supporters of the losing ballot measure position will attempt to challenge the results through a recount or election contest. Recounts are typically administrative processes with limited or no court involvement. A recount challenges the accuracy of the vote canvass. The party requesting a recount alleges that counting or mathematical errors led to the wrong candidate being declared the winner. A recount does not consider claims of fraud or other voting irregularities. A recount may be the necessary first step before a losing candidate can file an election contest.<sup>19</sup>

A recount differs from an election contest. Recounts are intended to uncover specific instances of erroneous vote allocation or mathematical errors that led to the wrong candidate being

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<sup>17</sup> Washington State Republican Party v. King County Division of Records, 103 P.3d 725, 727-28 (Wash. 2004).

<sup>18</sup> Williamson v. State Election Board, 431 P.2d 352 (Okla. 1967).

<sup>19</sup> Miller v. County Commission of Boone County, 539 S.E.2d 770, 776 (W. Va. 2000) (noting that permitting losing candidates to directly file an election contest and by-pass the statutory recount procedure "would thwart the legislative purpose of the recount statute and essentially render [it] irrelevant.") (citation omitted).

declared the winner. Recounts are not “fishing expeditions”<sup>20</sup> to uncover general problems with the election. Although some states involve courts in recounts at the outset, recounts are typically administrative affairs in which all or a portion of the ballots counted in the original canvass are counted again to verify the accuracy of the initial canvass. Courts may play a role in a recount when state statutes direct their participation or when a candidate seeks court review of an administrative decision that granted or denied a recount or a decision made during the recount. In addition, the decisions made and ballots reviewed during a recount may form the base of an election contest, which is a judicial proceeding that focuses on how illegal or fraudulent votes or election administration failures influenced the election’s outcome.

Because a recount’s role and qualifying prerequisites vary greatly by state, a court that becomes involved in a recount request should ensure that it understands the role the recount plays in the state’s statutory scheme for post-election challenges.<sup>21</sup> For example, in some state, if the challenger is not eligible for an automatic recount, her petition may need to clearly assert that the recount will change the election results before she is recount-eligible.<sup>22</sup>

All candidates for the office being recounted and their agents can typically attend the recount, observe the process, and protest what they consider to be wrongly counted ballots. Recount statutes may also allow any candidate for the office subject to the recount to inspect the voting equipment. The information candidates gather while attending the recount or inspecting voting equipment may form the basis of an election contest.<sup>23</sup>

During a recount, elections officials, their employees, and designated assistants recheck vote tabulations, ensure votes were correctly attributed to the voter’s intended candidate, and verify the results were tallied correctly. State statutes may allow officials to duplicate bent or ripped ballots that the counting machinery would otherwise be unable to read.<sup>24</sup> Recount boards may need to ascertain the voter’s intent, which they do by looking at the ballot markings. Courts conducting contest proceedings may also need to ascertain voter intent, but, unlike most recount boards, they may also be able to use information extrinsic to the ballot, such as voter testimony.

The Supreme Court’s decision in *Bush v. Gore*<sup>25</sup> focused the nation’s attention on some of the important legal complexities of recounts.<sup>26</sup> State recount statutes typically set the level of

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<sup>20</sup> *Akaka v. Yoshina*, 935 P.2d 98, 104 (Hawaii 1997) (citation omitted).

<sup>21</sup> A recount may be required before an election contest can be filed, it may be one step in an election contest, or it may be a stand-alone procedure. Some states require “discovery recounts” in which a limited number of ballots are reviewed to search for irregularities before a full recount is available. See Jennifer A. Harris, Commentary, *The 2002 Gubernatorial Election Controversy: The Legality of a Pre-contest Recount in Alabama*, 55 ALA. L. REV. 193, Appendix (2003) (listing automatic recount provisions by state).

<sup>22</sup> *In re Contest of Election For Offices of Governor and Lieutenant Governor Held at Gen. Election on Nov. 2, 1982*, 444 N.E.2d 170, 176 (Ill. 1983).

<sup>23</sup> See *Miller*, 539 S.E.2d at 776 (stating that where a contest is premised on specific votes cast, the recount “plays an integral and indispensable role tantamount to fundamental principles of due process”)

<sup>24</sup> See WASH. REV. CODE. ANN. § 29A.60.125 (West 2007).

<sup>25</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (halting a manual recount conducted as part of an election contest after finding that its lack of specific standards for “voter intent” violated Equal Protection guarantees).

applicable review, which may vary depending on whether the vote was tabulated by a machine or by hand,<sup>27</sup> was cast in-precinct or absentee,<sup>28</sup> or was cast in a single-precinct or at a voting center.<sup>29</sup> Courts may also need to determine if ballot-marking statutes are mandatory or directory.<sup>30</sup> This section discusses:

1. types of recounts,
2. procedural prerequisites for recounts,
3. substantive issues involved in recounts, and
4. recounts in ballot measure elections.

## A. TYPES OF RECOUNTS

The common law did not recognize recounts. Thus, losing an election, by itself, does not confer recount eligibility on candidates. Instead, the availability of a recount is determined by state statutes, with most states allowing at least some losing candidates to request recounts.<sup>31</sup> States that allow recounts offer one or both of the two types:

1. an automatic qualification recount or
2. a discretionary or petition recount.<sup>32</sup>

<sup>26</sup> See *infra*, Chapter 8, Section 2: Substantive Issues with Recounts, Subsection 2: Standards for Ascertaining Voter Intent (discussing voter intent).

<sup>27</sup> See *Huber v. Reznick*, 437 N.E.2d 828 (Ill. App. Ct. 1982) (holding that standards for validly cast hand-marked ballots are more stringent than those for stylus-marked ballots).

<sup>28</sup> See *McDunn v. Williams*, 620 N.E.2d 385 (Ill. 1993) (holding the initialing requirement mandatory for valid in-precinct votes, but directory for absentee ballots). See Chapter 9: Election Contests for additional information on the distinction between mandatory and directory.

<sup>29</sup> *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990) (finding a vote valid which was marked as an out-of-precinct ballot in a polling location that served multiple precincts because it could have been mistakenly put in the wrong box, but finding votes invalid which was marked with another precinct label where votes for only one precinct were cast because they were out-of-precinct votes). *But see* *Bush v. Gore*, 531 U.S. 98 (2000) (finding that using inconsistent standards to determine voter intent gives rise to an Equal Protection violation where the standards could have been standardized but were not).

<sup>30</sup> See *Pullen*, 561 N.E.2d 585 (holding violations of mandatory provisions void ballots while violations of directory provisions do not void ballots).

<sup>31</sup> Daniel P. Tokaji, *The e-Book on Election Law: an Online Reference Guide, State Recount Laws*, ELECTION LAW @ MORITZ, (Sept. 12, 2004), available at

[http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures\\_recount.html](http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_recount.html). Hawaii, Louisiana, Mississippi, and Texas do not have recount statutes. Some states allow any losing candidate to petition for a recount, others limit recounts to the candidate who got the highest vote total that did not qualify for office, and some states allow tied candidates to seek recounts. *Id.*

<sup>32</sup> In some states, statutes require a number of randomly selected precincts or randomly chosen voting machines undergo a recount to spot verify the election results. This type recount has not played a significant role in post-election challenges, *id.* For example, California requires a public manual recount of voting-system cast ballots in a randomly selected 1% of the precincts using voting systems to count the ballots and Kentucky requires recounts of randomly selected precincts totally 3 – 5% of the ballots cast, *id.*

## 1. Automatic Qualification Recount

Under the automatic qualification recount, a candidate who loses by a statutorily specified amount—typically a percentage of the total votes cast for the office or a fixed number of votes<sup>33</sup>—automatically qualifies for a recount. Automatic qualification recounts may be self-executing, or the qualifying candidate may need to request that the recount proceed. Automatic qualification recounts may include all precincts or only select ones.<sup>34</sup> Losing candidates are generally not required to pay for the costs of automatic qualification recounts.

## 2. Discretionary or Petition Recount

Where recognized, discretionary or petition recounts allow candidates who do not qualify for an automatic recount to receive a recount if they successfully allege that specific errors in the vote counting or tabulation led to incorrect results in the original canvass.<sup>35</sup> The petitioner may be required to specify the precincts wherein the alleged canvassing errors occurred, post a bond, pay a fee,<sup>36</sup> or attach petitions of support signed by a specified number of registered voters. In some states, the petitioning candidate is refunded the recount fees if the recount changes the election's outcome.<sup>37</sup>

## B. PROCEDURAL PREREQUISITES FOR RECOUNTS

Strong election law presumptions favor the validity of the election's original results. This preference supports denying recounts to petitioners who fail to satisfy all of the recount

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<sup>33</sup> ARIZ. REV. STAT. § 16-661 (2007) (requiring a recount when no more than fifty votes separate the candidates in a state election in which fewer than 25,000 votes were cast, or if 200 or more votes separate the candidates in a state election in which more than 25,000 votes were cast); ALA. CODE § 17-13-12(a) (2007) (requiring a written waiver to halt the automatic recount provision when not more than ½% of the total votes cast in a candidate or ballot measure election separates the winner from the loser).

<sup>34</sup> See, e.g., 10 ILL. COMP. STAT. 5/22-9.1 (Supp. 2007). Illinois conducts a discovery recount of not more than 25% of the precincts that voted for the office being recounted, with at least one precinct recounted, if the margin of victory falls within established limits. The recount is limited to discovery only; it cannot change the election's results. If the discovery recount uncovers errors in vote tabulation that favor the losing candidate, a full recount, which can change the election's results, may be available.

<sup>35</sup> Massachusetts candidacy recount applications contain a preprinted statement that the applicant believes the election results are in error and a recount will affect them, although applicants are informed they need to list the particular reason for their recount request. See MASSACHUSETTS SECRETARY OF STATE, ELECTIONS DIVISION, HOW TO REQUEST A RECOUNT, [www.sec.state.ma.us/ele/elerct/rctidx.htm](http://www.sec.state.ma.us/ele/elerct/rctidx.htm) (last visited Sept. 26, 2006).

<sup>36</sup> IDAHO CODE ANN. § 34-2302 (2007) (requiring \$100 fee per recounted precinct); N.J. STAT. ANN. §19:28-2 (West 1999) (requiring \$25 per recounted district); OR. REV. STAT. ANN. § 258.161 (West 2007) (requiring \$15 per recounted precinct to a maximum of \$8000).

<sup>37</sup> See IDAHO CODE ANN. §34-2306 (2007) (allowing that if recount results, when projected across all precincts, indicate the results would be changed, the recount fees are refunded to the candidate and assessed against the locality or the state).

statutory procedural requirements.<sup>38</sup> Although procedural requirements vary by state, the most common ones include filing a recount request within the limitations period, paying a fee or posting a bond, filing with a designated official,<sup>39</sup> and detailing the reasons why the petitioner believes he is the election's true winner. Two of the most common procedural failings used to dismiss a recount petition are failing to file within the statute of limitations period and failing to meet the eligibility criteria.

The statute of limitations period for recount petitions is typically short,<sup>40</sup> and most commonly accrues from Election Day,<sup>41</sup> the last meeting day of a canvassing board,<sup>42</sup> or the date the results were certified.<sup>43</sup> Because final canvassing and certification for the various elected offices may occur at different times depending on whether the office is local or statewide, it is important to determine the triggering date. If the losing candidate does not petition for a recount in time, the court or administrative body cannot grant the request.

Eligibility for an automatic recount is based solely on the margin of victory and does not require the losing candidate to allege that counting errors changed the election's result. A losing candidate is ineligible for an automatic recount when the winner's margin of victory exceeds the statutory standards.<sup>44</sup> Losing candidates who do not qualify for an automatic recount may be eligible for a discretionary recount if they are able to make the specific allegations and pay the fees required.

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<sup>38</sup> For example, a court held that a petitioner's failure to notarize his recount petition as required created an incurable jurisdictional defect that warranted its dismissal. See *In re Recanvass of Certain Voting Machines and Absentee Ballots For Democratic Primary Election For Candidates For Council For City of Monessen*, 887 A.2d 330 (Pa. Commw. Ct. 2005).

<sup>39</sup> See IDAHO CODE ANN. § 34-2301 (2007) (requiring a recount petition to be filed with the state attorney general), MASSACHUSETTS SECRETARY OF STATE, ELECTIONS DIVISION, HOW TO REQUEST A RECOUNT, [www.sec.state.ma.us/ele/elerct/rctidx.htm](http://www.sec.state.ma.us/ele/elerct/rctidx.htm) (last visited Sept. 26, 2006) (town clerk or election commissioner), N.J. STAT. ANN. § 19:28-3 (West Supp. 2007) (judge) and OR. REV. STAT. ANN. § 258.161 (West 2007) (state Secretary of State)

<sup>40</sup> IOWA CODE ANN. § 50.48 (West 2007) (limiting the period to three days); W. VA. CODE ANN. § 3-6-9 (LexisNexis 2007) (limiting the period to 48 hours); WIS. STAT. ANN. § 9.01 (West 2007) (limiting the period to three business days).

<sup>41</sup> IOWA CODE ANN. § 50.48 (West 2007).

<sup>42</sup> WIS. STAT. ANN. § 9.01 (West 2007).

<sup>43</sup> W. VA. CODE ANN. § 3-6-9 (LexisNexis 2006).

<sup>44</sup> Automatic qualifying recount eligibility is easy to determine when the margin of victory is measured as a fixed number of votes separating the winning and losing candidates or positions. When eligibility is expressed as a percentage of the total votes cast for the office subject to the recount, however, the universe of votes included in the "total votes cast" pool can determine if the petitioner qualifies for the recount or falls short. One court, when faced with a decision as to which votes to include in the "total votes cast" pool, decided that only valid votes for validly declared candidates were included in the pool. This approach eliminated from the "total votes cast" pool the votes cast for a write-in candidate who failed to declare and register her candidacy as required. Because these votes were omitted, the second place finisher received ten votes more than the one-percent vote total difference allowed under the automatic qualifying recount statutes and was ineligible for this type of recount. See *State ex rel. Travers v. McBride*, 607 S.W.2d 851, 854 (Mo. Ct. App. 1980).

Petitioners desiring a discretionary recount must generally specify the precise reasons they believe the original canvass was incorrect. Thus, the petitioner seeking a discretionary recount may be required to specify the precincts wherein the mistakes occurred as well as their nature.<sup>45</sup> Courts should deny recount petitions that fail to make the required showing.<sup>46</sup>

## C. SUBSTANTIVE ISSUES WITH RECOUNTS

Even if a losing candidate meets the procedural prerequisites, a recount is not guaranteed. For it to proceed, the ballots<sup>47</sup> subject to the recount must have been kept in secure storage. Voter intent standards may need to be established and the scope and nature of the recount defined.

### 1. Ballot Security

After determining the petitioner is eligible for a recount, the court must determine if the ballots are able to be recounted, generally by determining if they were properly preserved as legally required. Because post-election fraud and vote tampering foreclose a recount,<sup>48</sup> election officials are obliged to comply with post-election ballot security and preservation statutes. Improper ballot preservation, which includes allowing unauthorized persons to have access to the ballots, casts suspicion on or destroys the ballots' integrity and may prevent a recount.<sup>49</sup> Properly preserved ballots are controlling evidence of how the electorate voted.<sup>50</sup>

Election officials' failure to comply with all ballot security requirements is not always fatal to a recount request because the violated statute may be evaluated under a directory rather than a mandatory construction. Although all election statutes are "mandatory" because compliance is required, courts are frequently able to use a directory construction—to overlook compliance failures that did not result in harm. This flexible approach protects the finality of elections as well as political stability because it protects elections from being voided for statutory lapses that do not affect the outcome. Courts generally utilize a directory construction for an election statute when the:

- violated statute does not specify a penalty for noncompliance,
- statutory deviation only becomes an issue post-election, and

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<sup>45</sup> Depending on the state, the petitioner may need to allege either that the recount will change the election's result or that the recount has a likelihood of changing the election's result.

<sup>46</sup> See *In re Van Noort*, 85 A. 813 (N.J. 1912). So essential is the requirement that the recount is based on the petitioner's belief that the recount will demonstrate the petitioner was the actual winner that one court based, in part, its decision not to expand a limited recount statewide—even though it had reserved the right to do so at the initial hearing—on the fact that when the limited recount increased the winner's margin of victory, the petitioner could not longer claim he believed the recount would show he was the actual winner. *Id.*

<sup>47</sup> "Ballots" may be physical hard copy ballots, voting machine vote recorders, or "paper trails" from electronic voting machines as statutes dictate.

<sup>48</sup> Or an election contest.

<sup>49</sup> *Henderson v. Maley*, 806 P.2d 626, 628 (Okla. 1991) (finding no trial court error in denying recount where evidence suggested ballot integrity was compromised through insufficient post-canvas security).

<sup>50</sup> *Id.* at 632.

- statute's purpose was upheld in spite of the deviation.

Post-canvass ballot security becomes an issue only if the winning candidate and the challenger do not stipulate that ballot security statutes were satisfied. When the candidates agree that the post-canvass ballot security satisfied the statutory requirements for a recount, court or administrative review of the security measures is unnecessary.

When courts evaluate post-election ballot security, they focus on:

1. whether the ballots have been adequately secured and,
2. if not, whether a recount is possible despite the security failures.

#### a. Adequacy of Ballot Security

State election codes frequently require election officials to follow detailed post-canvass ballot and voting machine security requirements that may include chain-of-custody,<sup>51</sup> vote recorder,<sup>52</sup> and ballot box sealing and recording<sup>53</sup> storage provisions. Whether these requirements have been satisfied is a factual question that courts determine from the evidence presented.<sup>54</sup>

The recount proponent bears the burden of proving that the ballots'<sup>55</sup> condition did not change after election officials secured them following the initial canvass.<sup>56</sup> The recount opponent overcomes the proponent's evidence by showing that actual ballot tampering occurred or that ballot storage conditions offered the possibility for tampering.<sup>57</sup> Because actual tampering can be difficult to demonstrate, courts often refuse to order a recount if the opportunity for ballot tampering existed.<sup>58</sup> Tampering opportunities exist when election officials have engaged in action that constitutes a "radical departure" from statutory ballot security requirements, such as tying the ballot box keys to the locks, failing to prevent the possibility that unauthorized persons could have access to ballot boxes or voting machines, and leaving ballots with individuals who had no legal obligation to protect them.<sup>59</sup>

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<sup>51</sup> See *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1204 (Ill. App. Ct. 2005) (nunc pro tunc) (determining prerequisites before three absentee ballots discovered in a different precinct's warehouse would be counted).

<sup>52</sup> Vote recorders store information on votes cast on electronic voting machines. Additional ballot security concerns center on vote tampering at the time the votes are cast so the voter's choice is recorded for a different candidate than the one selected, the security of computerized voting machines' memory units, and the extent that electronic transmission of voting results from the precinct to an administrative office is vulnerable to data corruption or hacking.

<sup>53</sup> See *Ryan v. Montgomery*, 240 N.W.2d 236, 237 (Mich. 1976) (noting that an unrecorded seal could not provide assurance that ballots had not been removed from or added to the ballot container).

<sup>54</sup> *McConnell v. Salmon*, 141 So. 73, 74 (La. 1932).

<sup>55</sup> For ease of reading, when this section refers to "ballots," the term is meant to include vote recorders, voting machine memory sticks, flash drives, or other vote recording and storage devices and sometimes the entire voting machine itself.

<sup>56</sup> *McConnell*, 141 So. at 74.

<sup>57</sup> See *id.* at 75 (discussing burdens of proof when ballot security and preservation is at issue).

<sup>58</sup> See *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1204 (Ill. App. Ct. 2005)..

<sup>59</sup> See *McConnell*, 141 So. at 76.

Statutory ballot security requirements, which vary by voting method and by state, are not always updated when voting technology changes. If ballot security requirements have not kept pace with changes in voting technology, courts must identify the applicable requirements before they can decide if the requirements have been met and the recount can proceed. For example, in the absence of specific statutes governing post-canvass security for machine-counted punch card ballots, one court decided that security statutes written for hand-counted paper ballots applied. Because these requirements were unmet, the court held that the recount was properly denied.<sup>60</sup>

b. Whether a recount is possible despite ballot security failures

Substantial compliance with ballot security statutes sometimes redeems imperfect compliance, such as when the statute's purpose has been satisfied and the non-compliance does not appear to have resulted in harm.

If proper ballot security procedures were followed in some precincts but not others, a recount can generally take place in those precincts where the ballots were properly secured. The recount results supersede the initial returns in the recounted area. The original canvass results remain in the areas that were not recounted.<sup>61</sup>

## 2. Standards for Ascertaining "Voter Intent"

Ascertaining voter intent so a vote can be properly attributed is a longstanding consideration in recounts.<sup>62</sup> Counting votes when the intended candidate or ballot position is clearly, if irregularly, expressed limits the number of voters who become disenfranchised because they made innocent minor deviations from statutory ballot marking requirements. If the voter's intent is not clear, however, the vote should not be counted.<sup>63</sup>

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<sup>60</sup> Henderson v. Maley, 806 P.2d 626 (Okla. 1991).

<sup>61</sup> Scholl v. Bell, 102 S.W. 248, 256 (Ky. Ct. App. 1907); McDunn v. Williams, 620 N.E.2d 385, 402 (Ill. 1993).

<sup>62</sup> O'Brien v. Board of Election Comm'rs [sic] of City of Boston, 153 N.E. 553, 556 (Mass. 1926) ("The cardinal rule for guidance of election officers and courts in cases of this nature is that if the intent of the voter can be determined with reasonable certainty from an inspection of the ballot, in the light of the generally known conditions attendant upon the election, effect must be given to that intent and the vote counted in accordance therewith, provided the voter has substantially complied with the requisites of election law; if that intent cannot thus be fairly and satisfactorily ascertained, the ballot cannot rightly be counted."); Bloedel v. Cromwell, 116 N.W. 947, 948 (Minn. 1908) ("Election laws are to be construed so as to secure to every voter reasonable opportunity to vote and to have his vote counted as cast, when his intention can be ascertained from the ballot without violating statutory provisions....The intent of the voter, accordingly, to be effective, must be shown and indicated by markings on the official ballot substantially in the manner provided by such law, and in bona fide attempt at compliance therewith.").

<sup>63</sup> Voter intent is determined on an election-by-election basis, where the "election" is each individual candidate race and each ballot measure. Thus, uncertain voter intent in one race only voids the vote for that particular race, it does not void the entire ballot.

Problems frequently arise when the legislature has not clearly defined “voter intent,” as the Florida recount following the 2000 presidential election demonstrated. In the situation that resulted in the United States Supreme Court’s *Bush v. Gore*<sup>64</sup> decision, the Florida Supreme Court ordered a manual recount during an election contest, but did not specify recount standards beyond the statutory “voter intent” standard. Thus, no standard definition of a legal vote uniformly applied throughout the state. The United States Supreme Court held that the absence of specific standards for ascertaining voter intent violated Equal Protection guarantees because identical votes were not treated equally.<sup>65</sup>

Although the Court limited its holding to the facts of the case, it nonetheless appears that if no standard definition of a valid vote exists, one should be established before the recount proceeds so that all recounted ballots are reviewed using the same standard.<sup>66</sup>

### 3. Defining Recount Procedures

The exact process by which the recount is conducted is defined by state statute or agency rules and may vary based on the method used to cast the ballot.<sup>67</sup> Many states count votes if the voter’s intent “can be determined with reasonable certainty.”<sup>68</sup> Paper ballots are usually reviewed manually to ascertain the voter’s intent under this standard. Recounts of machine cast or tabulated votes, however, may consist only of rereading or reviewing the vote recorder’s count.<sup>69</sup> If computerized voting machines provide a paper trail and state statutes do not indicate whether the machine count or the paper trail is the official recount ballot, the court may be asked to make this determination.

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<sup>64</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>65</sup> *Id.*

<sup>66</sup> See *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990) (identifying seven categories of contested ballots and noting that courts sometimes struggle to give effect to a voter’s intent); see also *Nagel v. Kindy*, 591 N.E.2d 516, 521 (Ill. App. Ct. 1992) (finding where write-in vote for candidate did not specify whether the candidate was selected for the two- or the four-year term, the lack of determinable intent invalidated the ballot, notwithstanding the fact the candidate filed for the four-year term).

<sup>67</sup> See Michael A. Carrier, *Vote Counting, Technology, and Unintended Consequences*, 79 St. John’s L. Rev. 645, 679 (Summer 2005) [hereinafter *Vote Counting Technology*] (noting Ohio’s requirement of a comparison between a hand count and a sample machine count to determine if the recount must be conducted manually or can be performed by machine). The inability of many types of voting machinery to provide an auditable trail to serve as an independent source on which to base a recount has led to an increased interest in voter verified paper ballots or audit trails. See *Verifiedvoting.org*, *Verified Voting: Mandatory Manual Audits of Voter-Verified Paper Records*, <http://www.verifiedvoting.org/index.php> (summarizing additional information on audit trails) (last visited May 22, 2006).

<sup>68</sup> See, e.g., MASSACHUSETTS SECRETARY OF STATE, ELECTIONS DIVISION, HOW TO REQUEST A RECOUNT, [www.sec.state.ma.us/ele/elerct/rctidx.htm](http://www.sec.state.ma.us/ele/elerct/rctidx.htm) (last visited Sept. 26, 2006) (explaining the recount process in Massachusetts).

<sup>69</sup> For machines without an auditable trail of some sort, this may be the best one can do. See *Vote Counting Technology*, *supra* note 67, at 681. If the machine produces an auditable trail, but the statute does not specify whether to use the machine tally or the paper trail during the recount, the court may be asked to decide.

Unless statutes direct otherwise, recount boards should determine the voter's intent only from the actual ballot and should not consider outside evidence in deciding whether, or how, to count the votes. One court held that a recount board exceeded its authority when it added forty votes to a candidate's totals after considering affidavits from voters who claimed a faulty voting machine prevented them from casting valid votes.<sup>70</sup> The affidavits constituted improper extrinsic evidence that the board should not have considered.<sup>71</sup> If a recount board uncovers fraud or irregularities while conducting the recount, it should refer its discovery to a court or grand jury rather than launch its own investigation or make accommodations for the problems.<sup>72</sup> The impact of fraud or irregularities on an election's results may be raised in an election contest proceeding, which is discussed in Chapter 9.

Courts may become involved in defining the nature of the recount when the statutes governing recounts reference different voting methods than those used during the election or when the statutes are silent or ambiguous. One court, when faced with a request to borrow recount language from another section of the election code and apply it to an electronic voting system, decided it could not do so because the self-contained nature of the electronic voting system statutes did not permit code borrowing.<sup>73</sup>

Courts may also be asked to decide if the recount statute allows review of ballots omitted from or rejected during the original canvass. State statutory language may limit the recount to previously tabulated votes and exclude from the recount votes omitted from the initial canvass because of irregularities.<sup>74</sup>

Finally, when recount boards fail to act, or act in excess of their authority, courts can issue writs of mandamus to compel them to perform, and limit their conduct to, their required duties.

## V. BALLOT MEASURE RECOUNTS

In some states, supporters of a losing ballot measure position may be able to petition for a recount. Not surprisingly, the requirements for a ballot measure recount vary by state. In a few states, a single voter can request the recount.<sup>75</sup> In other states, multiple voters must demonstrate their support by signing a petition requesting the recount before it will be granted.<sup>76</sup>

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<sup>70</sup> See *Duncan v. County Court of Cabell County*, 75 S.E.2d 97, 101 (W.Va. 1953).

<sup>71</sup> See *id.*

<sup>72</sup> *In re Van Noort*, 85 A. 812, 813 (N.J. 1912).

<sup>73</sup> See *Manchin v. Dunfee*, 327 S.E.2d 710 (W.Va. 1985).

<sup>74</sup> See *McDonald v. Secretary of State*, 103 P.3d 722, 723 (Wash. 2004).

<sup>75</sup> *E.g.*, NEV. REV. STAT. § 293.403 (West 2007), OKLA. STAT. ANN. tit. 26 § 8-111(b)-(c) (West 2007), and WIS. STAT. ANN. § 9.01 (West 2007).

<sup>76</sup> N.J. STAT. ANN. § 19:28-1 (West Supp. 2007) (ten voters); OHIO REV. CODE ANN. § 3515.01 (West 2007) (five "qualified electors"); UTAH CODE ANN. § 20A-4-401(2)(a) (any 10); VA CODE ANN. § 24.2-800(C) (fifty or more voters "qualified to vote on the question"); WYO. CODE ANN. 22-16-111(a)(1)(ii) (twenty-five electors registered in the district voting on the question, for ballot propositions only).

Ballot measure recount requests, where available, must also be filed within the statute of limitations period, with the proper office, and must allege an error in the original canvass. Ballot security is also a threshold question in ballot measure recounts.