PUBLIC HEARING

STATE OF CALIFORNIA

SECRETARY OF STATE

IN THE MATTER OF:)
)
CHANGES TO RECOUNTS OF)
ELECTIONS IN CALIFORNIA,)
REGARDING SECTIONS 20810)
THROUGH 20823, 20830)
THROUGH 20834 AND 20840)
THROUGH 20842 OF THE)
CALIFORNIA CODE OF)
REGULATIONS.)
_____)

SECRETARY OF STATE BUILDING

1500 11TH STREET

AUDITORIUM

SACRAMENTO, CALIFORNIA

WEDNESDAY, MARCH 4, 2009

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STAFF

Mr. Lowell Finley, Deputy Secretary of State

Ms. Laura Baumann, Elections Counsel

ALSO PRESENT

Ms. Kim Alexander, California Voter Foundation

Mr. Paul Allen, Voting Rights Task Force

Mr. John Bass, Election Advisory Committee for Alameda County

Ms. Judy Bertelsen, Voting Rights Task Force

Ms. Michelle Gabriel, Voting Rights Task Force

Ms. Gail Pellerin, California Association of Clerks and Elections Officials

Mr. Jim Soper, Voting Rights Task Force

Mr. Stephen Trout, Election Solution Providers

Mr. John Tuteur, Napa County Registrar of Voters

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PROCEEDINGS

DEPUTY SECRETARY OF STATE FINLEY: Okay. Good morning. I'm sorry to have to go through the formality here, but it's part of the process.

I am Lowell Finley, Deputy Secretary of State and the contact person on the proposed election recount regulation package. To my right is Laura Baumann, Staff Counsel with the Elections Division with the Secretary of State. We'll be conducting this hearing today. It's 10:05 a.m. on Wednesday, March 4th, 2009. And we're meeting in the auditorium of the California Secretary of State building located at 1500 11th Street, Sacramento, California to receive public comments on a proposed rule-making action by the Secretary of State.

The Secretary of State has proposed new regulations governing the conduct of voter-requested recounts of elections held in this state. The new Secretary of State regulations we are concerned with today are Title 2, Sections 20810 through 20823 consecutively; 20830, 20831, 20832, 20834, and 2083 -- 20840, 20841 and 20842 of the California Code of Regulations.

Under the rule-making provisions of the California Administrative Procedure Act, this is the time and place set for the presentation of statements, arguments and contentions, orally or in writing, for or

against the Secretary of State's regulations, notice of which has previously been both published and sent by mail and Email to interested parties.

This is a quasi-legislative hearing, in which the Secretary of State carries out a rule-making function delegated to it by the Legislature. Witnesses presenting testimony at this hearing will not be sworn in nor will we engage in cross examination of witnesses. We will take under submission all written and oral statements submitted or made during this hearing. We will not respond to these comments today, but we'll do so in writing in the final Statement of Reasons.

This entire Administrative Procedures Act rule-making hearing will be recorded by a Certified Shorthand Reporter. The transcript of this hearing and all exhibits and evidence presented during the hearing will be made part of the rule-making record. If you brought written comments with you to submit during the hearing today, please give them to Ms. Baumann, at this time, if you have not already done so.

The record for this hearing will be kept open until close of business on March 13th, 2009 in order to receive additional relevant evidence in writing from interested parties.

Written comments will be accepted until 5 p.m. on

March 13th, 2009 at the reception counter on the 6th floor. Written comments submitted today or through the 13th at the reception counter should be made to my attention, Lowell Finley.

ELECTIONS COUNSEL BAUMANN: And as you entered the room, you were all offered an attendance sheet to enter your name and a space to indicate if you wish to stand up and make oral comments on the proposed regulations. We will listen to oral comments from persons in the order they signed the attendance sheet. After we hear from everyone who signed in, we will hear from any latecomers or anyone else who wishes to be heard.

Oral comments will be limited to no more than five minutes per person. Speakers will be notified when one minute remains and when their time is up.

We strongly encourage all persons attending the hearing to complete the attendance sheet, even if you do not intend to testify today. Anyone on the attendance sheet will receive notice of any changes to the proposed regulations prior to the final adoption.

Any such notice will be sent, one, to everyone who submits written comments during the written comment period, including those written comments submitted today; two, to everyone who testifies today; and, three, to everyone who asks for such a notification. While no one

will be excluded from participation in these proceedings for failure to identify themselves, the names and addresses on the attendance sheet will be used to provide the notice.

If you have not yet signed the attendance sheet and you now wish to do so, please raise your hand.

(Thereupon hands raised.)

DEPUTY SECRETARY OF STATE FINLEY: Robbie, would you bring in the attendance sheet for this gentleman so he can sign.

Thank you.

ELECTIONS COUNSEL BAUMANN: When you come up to speak, we ask that you do certain things so that the audience and court reporter may hear you and so that your comments are entered in the record.

First, we ask you to come to the podium where you are -- when you're called to speak. Second, please begin by stating your name and identifying the organization you represent, if any. And tell us the section number of the particular regulation you want to discuss. Lastly, please speak clearly at a regular speed and loud enough for the court reporter to hear you.

DEPUTY SECRETARY OF STATE FINLEY: At this point, the rule-making record includes three exhibits, A, B and C. Exhibit A is the notice of the proposed action, which

was published in the California Regulatory Notice Register. Exhibit B is the expressed terms of the proposed action to make additions to the California Code of Regulations. And Exhibit C is the Statement of Reasons for the proposed rules. And Exhibit D will be created, which will contain all written comments that are submitted today and up through the 13th of March.

These regulations were duly noticed more than 45 days prior to today's hearing. Copies of the notice, together with the regulations and the Statement of Reasons, were mailed and Emailed to all interested parties who had requested rule-making notices.

ELECTIONS COUNSEL BAUMANN: May I have the attendance sheet once he's finished. We will now take oral arguments -- oral comments, I'm sorry -- on the proposed regulations. In the interests of time, if you agree with comments made by a prior speaker, simply state that fact and add any new information you feel is pertinent to the issue.

And the first speaker is Gail Pellerin.

DEPUTY SECRETARY OF STATE FINLEY: And we are not going to impose any kind of time limit, in light of the small number of commenters.

MS. PELLERIN: Is this the podium I'm to use?

DEPUTY SECRETARY OF STATE FINLEY: Yeah, the main

thing is just the microphone. You can move that around however it's convenient.

MS. PELLERIN: Can you hear me?

DEPUTY SECRETARY OF STATE FINLEY: Yes.

MS. PELLERIN: All right. Well, good morning. Thank you for the opportunity to be here today. My name is Gail Pellerin. And I am here on behalf of the California Association of Clerks and Elections Officials. Our president, Rebecca Martinez, is sorry she could not be here today and has asked me, the vice president, to present our association's comments.

The association has prepared comments and suggested changes section by section color coded by voting system on the proposed recount regulations, which I have handed in to the desk with Mr. Lowell Finley.

A little background. On January 23rd, the CACEO board of directors met by conference call to discuss the proposed recount regulations that were released in CCROB number 08331 on December 30th, 2008. It was duly noted that the CACEO President, Rebecca Martinez, had requested input on the regulations when they were in draft form back in August 2008. Unfortunately, many counties were unable to participate, at that time, and due to the impending Presidential general election.

It was concluded that additional feedback was

vital and that the impacts of the regulations could vary significantly by voting system. As a result of that meeting, the CACEO President Martinez appointed a special committee to review the proposed recount regulations by voting system. Each committee chairperson was directed to contact counties specific to their voting system to gather and solicit input. The chairperson submitted proposed changes and comments, which were then compiled into the report that you have before you.

I wanted to publicly thank Janice Atkinson for -- our correspondence secretary to the Association's Ledge Committee, for compiling all the various notes and comments. I'm sure this was no easy task and took up much of her weekend.

While the concerns specific to each voting system are listed on our report, I believe it's important to focus on the recurring theme throughout. That is, these regulations overstep the nature and purpose of a recount, and instead blur the line between recount and an election contest.

There are four distinct processes to ensure the accuracy of the vote count and election outcome under California law. Each serves as a separate and distinct purpose and should remain separate from the other. The first process is the official canvass of the vote, a

mandated audit process, wherein the elections official compares and reconciles the numbers of ballots cast with the number of voters, either at the polls or requesting a vote-by-mail ballot.

The second process that is included as part of the official canvass, is the one percent manual tally. This process came about when jurisdictions converted from hand-counted paper ballots to automated vote count systems to verify that the equipment is recording votes as it is designed to do.

It is somewhat of a misnomer, in that more than one percent of the votes are tallied, as the statute has been amended, to require that in addition to the one percent of the precincts, and the -- that the corresponding vote-by-mail ballots also be counted and added to the one percent manual tally.

The tally process differs from a recount, in that the precincts are chosen at random and the voter intent is noted, but the count is not altered.

The third process is the recount. And it is the same avenue available to ensure that votes have been counted according to voter intent. This is the appropriate avenue when one suspects that the vote count does not accurately reflect the intent of the voters and is most frequently requested in the case of close

outcomes.

While the machine recount is allowable, it is rarely requested. A recount is generally accomplished by a hand count of the votes with an eye toward voter intent. In the case of a hand recount, the equipment used to cast or tally the votes, video surveillance, et cetera, have no relevancy to this procedure. The items listed are appropriate to an election contest, wherein it can be determined that there are other factors that could have affected the election outcome.

The fourth process is an election contest. It is a judicial proceeding and it is the final venue for determining the outcome of an election. There are specific grounds for contesting elections, including an error in the vote count programs or submission of ballot counts.

In an election contest, the equipment used to cast or tally the votes, video surveillance and auto logs, et cetera, can be germane to the outcome of the election.

There was significant concern noted that the proposed recount regulations blurred the distinction between the recount and an election contest. Most pointedly were those materials identified as relevant materials in Section 20813 of the proposed regulations. Comments from county representatives of each voting

system, including Los Angeles county, asked that the definition of "relevant materials" be clarified and restricted to those materials directly related to a recount of votes cast, not including materials appropriate to an election contest.

There was also considerable discussion regarding the cost of a recount conducted under the proposed regulations. There are concerns that the proposed regulations could drive the costs of a recount to a prohibited level for candidates and campaigns. Because the requester has to pay in an estimated daily deposit to cover the cost of the recount, and does not receive a refund unless the outcome of the election changes, the cost is of great importance. If only well-funded campaigns are afforded the opportunity for a recount, an injustice has been done.

Finally, it is imperative that the regulations be inclusive of all voting systems certified for use in California. The practical and logistical limitations of each voting system must be recognized and the regulations should not place counties in a position of noncompliance due to limitations of the voting system utilized.

Once again, I appreciate the opportunity to address these issues with you on behalf of the California Association of Clerk's and Elections Officials.

Thank you for your time.

DEPUTY SECRETARY OF STATE FINLEY: Thank you.

ELECTIONS COUNSEL BAUMANN: I believe the next name was something like Mike Zaple. I don't have the sheet in front me. Mike Zaple, if you'd like to come up to the podium.

And the name after that is John Tuteur.

DEPUTY SECRETARY OF STATE FINLEY: Where is the sign-in sheet now?

ELECTIONS COUNSEL BAUMANN: Okay. Once again, Mike Zaple?

John Tuteur.

MR. TUTEUR: Good morning. I'm John Tuteur, Napa County Registrar of Voters. And I am speaking solely on my own behalf.

The proposed recount regulations will lead to a perversion of the recount process and should be withdrawn for a complete rewrite. The proposed regulations ignore the legal and statutory difference between a recount, as set forth in California Election Code Section 15620, et seq., and an election contest, as set forth in California Election Code Section 16000 et seq.

A recount of the ballots cast is meant to be a smooth and efficient first step in determining the final outcome of a race under the supervision of the election

official. An election contest is meant to be a thorough review of the conduct of the entire election under the supervision of a judge.

If the proposed regulations are adopted in their current form, any voter requesting a recount, as well as the election official responsible for the recount, will be mutually frustrated in their desire to make a determination of the outcome as attorneys take over the process.

While not required by law, a recount is usually the first step in determining the outcome of an election. If issues arise during the recount, an election contest is the next step. Given the "election contest" nature of the proposed regulations, Napa County would need to request a deposit of $50,000 under proposed 20815(a), which would equal our costs in an election contest that we had to defend over a supervisor race on the March 2004 primary ballot. No recount of that election was ever requested.

A recount is defined in Section 15620 as, "...a recount of the votes cast." Section 15625 states, "The recount shall be conducted under the supervision of the elections official..." Section 15630 says, "All ballots, whether voted or not, and any other relevant material may be examined as part of any recount, if the voter filing the declaration requesting the recount so requests."

It is important to remember that the request for "relevant material" as part of the recount is by the voter who asked for the recount. However, the extent of the relevant material to be requested should be limited to those materials relevant to recounting votes in a manner consistent with the original counting process and to address questionable ballots cast.

Section 15630 should not be broadly interpreted to allow the person requesting the recount to require production of materials that are only relevant in an election contest.

Section 16100 sets forth the grounds for an election contest. And I should say those are all references as to the California Elections Code. The relevant materials in support of any of these various grounds for challenging an election are substantially different from materials relevant to a recount.

16100(a), "That the precinct board or any member thereof was guilty of malconduct."

16100(b), "That the person who has been declared elected to an office was not, at the time of the election, eligible to that office."

16100(c), "That the defendant has given to any elector or member of a precinct board any bribe or reward or has offered any bribe or reward for the purpose of

procuring his election or has committed any other offense against the elected franchise defined in Division 18, commencing with Section 18000."

16100(d), "That illegal votes were cast."

16100(e), "That eligible voters, who attempt to vote in accordance with the laws of the State, were denied their write to vote."

16100(f), "That the precinct board in conducting the election or in canvassing the returns, made errors sufficient to change the results of the election, as to any person who has been declared elected."

And finally, 16100(g), "That there was an error in the vote counting programs or summation of ballot counts."

A voter's request for materials relevant to a recount should not be confused with the parameters and materials that are relevant in an election contest under Section 16100. A recount should not determine whether there were errors in conducting the election or canvassing the returns. A recount should not determine whether there was an error in the vote counting programs or summation of the ballot counts. And parenthetically the superior court's findings concerning relevant material in Americans For Safe Access versus County of Alameda are contrary to the logic of the recount versus election contest

structure, and hopefully will be overturned on appeal.

A recount should be limited to the ballots cast and the interpretation made by the election official of the voter's intent on any questionable ballot. If the voter requesting the recount is not satisfied with the recount process, that voter can become the contestant in an election contest under Section 16000 et seq.

Finally, the Election Code makes specific reference to a recount that is not part of an election contest in Section 15610. "If no election contest is pending, wherein a recount of the ballots in a precinct has been or will be ordered, the election's official may order that the ballots voted in the precinct be publicly recounted."

Thus, a recount carried out under the provisions of 15620 is shown to be of a different nature than a recount as part of an election contest. I would respectfully request that the proposed regulations be withdrawn and rewritten to reflect the true nature of a recount as opposed to an election contest.

Thank you very much.

DEPUTY SECRETARY OF STATE FINLEY: Thank you.

ELECTIONS COUNSEL BAUMANN: Thank you. Our next speaker is Kim Alexander. Could you please come forward.

MS. ALEXANDER: Good morning. I'm Kim Alexander

of the California Voter Foundation. Unfortunately, I haven't had a lot of time to look at the actual substance of these regulations, because I only found out about them last week. And I would like to request to be put on your notice of interested persons for rule-making list please.

So I'm just going to make some general comments about this process, in general, which is that, first, I want to say that I appreciate the Secretary of State's efforts to create uniform recount procedures. And I would hope that while there may be disagreement regarding the substance of the regulations, that there would be consensus among all election officials in the state that uniformity and standardization in recount procedures and, in fact, all election procedures is desirable.

We have a serious problem in California when it comes to elections, where there is a great deal of discretion at the county level. And, as a result, it's very difficult for voters in the state to know exactly what their rights are, because so many of their voting rights are interpreted at the county level.

So by elevating the recount procedures to a statewide level, you will be creating equal rights for all voters in the state, when it comes to accessing recounts. And that would be a huge benefit for voters in California.

I also just want to say I've been involved with

the Secretary of State's office here for 15 years now. And it is very unusual, for over those five administrations that I've worked with, to have the regulatory process be utilized, which I think is unfortunate. And I think that too often the nitty-gritty details in elections are worked out at the Legislature, which is not always the best place to work out those details, or that they appear in these CCROB memos, which while well intentioned, give voters absolutely no protection whatsoever that the items listed in those memos will be followed by the counties, because the counties are under no legal obligation to do so, unlike regulations.

So I hope that we can take a closer look at these regs and maybe get some comments about the specifics before the close of your comment period on the 13th.

Thank you.

DEPUTY SECRETARY OF STATE FINLEY: Thank you.

ELECTIONS COUNSEL BAUMANN: We are waiting for the list.

Thank you, sir.

And our next speaker is Stephen Trout.

MR. TROUT: Good morning. I'm Steve Trout with Election Solution Providers. I'm an election attorney. I'm here in the area. And I want to echo what Ms. Alexander had to say regarding the regulation process. I

want to thank the Secretary for going forward and following the statutory duty to go forward and bring forth these regulations and go through the formal process. I'm a little concerned with Mr. Finley's opening comments that he was apologizing for having to have this formal process. But this is really the only way that the people can have their rights protected and that we don't have legislation by memo as we've unfortunately had previously.

DEPUTY SECRETARY OF STATE FINLEY: I just meant having to read through that script. I'm very happy that we're conducting the regulatory process.

MR. TROUT: I'm glad to hear that.

And so I want to -- you know, because I think the value in this process is to make sure that we can have these discussions and to be able to glean from the experience of the election experts in the room that actually administer this. I've got a unique position that I've been in the registrar's office side and also been on the candidate ballot measure side going in and participating in recounts. And so I understand the frustrations from both sides.

I want to echo the sentiments of Mr. Tuteur and Ms. Pellerin as far as the breadth of the election materials definition. And I think there's a lot of work that can be done there.

What I want to focus on is in Section 20823 regarding the challenges. Because, in my experience, the biggest point of contention in an election recount is ambiguity of the ballots.

And, you know, in Election Code 15631, really the only reasons for a challenge are incompleteness, ambiguity, and defects. And, in my experience, ambiguity is the biggest concern, you know, whether voter intent is clear, whether a machine read the ballot correctly, whether there were, you know, errant marks, what have you. And so, in that regard, I think the Challenges Section needs to have much more detail in the regulations.

That being said, I appreciate Ms. Alexander's comments about the need for uniformity. But in California, where we have so many different voting systems, I think that's not possible in order to give the detail that is necessary to make a decision whether a vote is going to count or whether it doesn't count.

I know the Secretary had that problem in coming up with a uniform definition of a vote under HAVA. It's hard to come up with a uniform definition when you have five or six different voting systems to apply.

You know, there's different rules whether you're filling in an oval, whether you connected a head and a tail on the arrow, whether you've got an electronic

machine, what have you. And so I think in order to have the best understanding, the best results to give the best structure for resolving these ambiguities that are the biggest issue that come about in recounts, that these regulations have to be voting-system specific.

You know, we need to get the details there of the voting systems and the marks there, because those are what the lawyers are going to argue over. That's what we go in an argue over. There's a handful of ballots that there's a question of voter intent. And so that detail needs to be there, as far as if you circle half of the names and fill in the oval correctly on half of the names, you know, is voter intent clear for those that were circled but not filled in the dot and vice versa.

And I think, you know, those are all requirements that need to be in the voting system specifications. And that's something that needs -- that we need to have that detail, I believe, in these regulations in order to truly give both the candidates -- you know, the lawyers for candidates, the registrars and county counsel the true opportunity to have concrete examples, so that we don't have people just having to make judgment calls on the fly.

So I would strongly encourage that, you know -- that the regulations be made voting-system specific or, at a minimum, that they reference somehow the

voting system procedures that are approved when the voting systems are certified, because those should have all of those details as far as what to count, what not to count, those basic count, no-count, decisions. That I know the CACEO has spent many hours and different settings and over the many years trying to come up with what counts and what doesn't count. And it's very specific to the voting system. I think that needs to be included in these Challenge Sections.

And then specifically in 20823(c), it says, "Challenges shall be resolved every day." And I think this is just part from my history, I had a situation where I was representing a candidate and the registrar made some of the decisions and the assistant registrar made other decisions as far as ambiguity of different ballots. They had a different standard. And I think, you know, even the best intentioned people, and as close as they are and as much as they communicated, everyone of us is different and is going to have a little bit of a variance in what we would count and what we wouldn't count.

And so I would just, you know, ask that you provide some flexibility there. You know a lot of our registrars wear many hats as county clerk's and treasurers and auditors and you have, you know, board meetings and budget hearings to go to. And perhaps to give a little

bit of flexibility to say, you know, every other day or as often as possible, so that you can have that one person or have the same person or people making that decision every day.

Because, again, in my experience, when you have different people making those decisions, you get different results and that just further muddies the water.

So, in conclusion, again, I applaud the Secretary for coming forward with these regulations. I think there's a lot more work that can be done to make them better, to be able to take in the comments and the experience of our election experts, which are the county election folks. That a one-size-fits-all, while it's a good idea in theory, just really doesn't work with the varied voting systems that we have here in California.

And thank you again for your time.

DEPUTY SECRETARY OF STATE FINLEY: Thank you.

ELECTIONS COUNSEL BAUMANN: Thank you.

Our next speaker is John Bass.

MR. BASS: Thank you.

I guess that will work.

Thank you very much for having these hearings today. I'm John Bass. I actually am on the election advisory committee for Alameda County, appointed by Supervisor District 4, as well as worked as a precinct

inspector and precinct coordinator for multiple elections. And I currently am also the president of the Castro Valley Democratic Club, as well as serve on the Democratic Central Committee with the 20th Assembly District.

And my feeling is that recount is pretty much the heart of really looking at an election. We want to have elections that are safe, that are secure, that are transparent, that we know the person who won, won; the person who lost, lost. And I think it's mainly important for the person who lost or the proposition that lost that they know that they lost fair and square.

The recount or audit is really important. If it's a DRE machine or if it's a, you know, hand-counted paper ballot at the precinct level. Whatever it is, these procedures, I think, are essential and important. I personally am coming here today taking vacation time today to come here to say, I have been frustrated with three different registrar of voters in Alameda county trying to get clarity on the recount procedures and also audit procedures.

What happens at the county level is that things get interpreted a little bit differently. There's different vendors. And in terms of public access and the public really knowing who won, won; who lost, lost; it becomes unclear.

I think these procedures will help greatly in terms of making sure that the candidates, the propositions, the organizations and the public at large has some real sense of what is going on, how it happens, and how it can be a clear transparent process that works across the state.

So I really want to urge having these proposals put in place and clarified. And I'd also like to see basically teeth with it. Because what I've heard before is a lot of times there's competing -- and this is really difficult for any election official -- competing laws, competing things in terms of we have the federal regulation and we have the State regulation, we have, you know, our vendor contract, we have all these things and they get into almost a competition mode.

So I think it's really important that they're not just like, this would be a nice guideline. But if it's really something that's helpful to the recount, the audit procedure, the recount procedure, that it has some teeth. That this is really what needs to happen and has to happen by law.

If there's gaps in the Election Code, I really want to strongly urge the Secretary of State to forward that to the Legislature to make sure that those gaps are clarified or straightened, because this is really

essential and this really is the heart of our democracy, of course, is having elections that we know that are fair, that are transparent, that work and the recount is a big part of it.

So that's really all I have to say today, but I really thank you and looking over these it is really important.

Also, I do feel that the recount can be a great opportunity. And I do want to say that as well, because typically when there's an election, if there are red flags or something doesn't seem right, and the recount is actually a way that that can be really seen. If something didn't happen right, it's an opportunity to really find out what really did happen and to hopefully rectify the situation, so all the ballots are counted accurately and fairly.

And just, again, thank you very much for your time.

DEPUTY SECRETARY OF STATE FINLEY: Thank you.

ELECTIONS COUNSEL BAUMANN: Thank you.

Our next speaker is Michelle Gabriel.

MS. GABRIEL: Hi. My name is Michelle Gabriel. And, like John, I'm also on the Alameda County Election Advisory Committee, appointed by Supervisor Keith Carson. I'm also part of the Voting Rights Task Force of the

Wellstone Democratic Renewal Club. And we're a group of election integrity advocates.

And we're really interested in making sure, as John stated before, that election results are accurate. Not on who wins, but that the person who was voted in actually wins and the votes are counted correctly and accurately and that the votes are secure. And in this respect, we really appreciate and support of the Secretary of State clarifying these recount procedures and trying to make them more uniform across the State.

One of the issues that we've seen about uniformity across the state as a -- which we'd like the Secretary of State to address -- and it's not really addressed in this -- is the cost of doing the recount. That it's totally at the discretion of each County how much they charge.

And to give you an example, if you look at how much the counties said that it cost for them just to do the one percent manual tally, they range from the wages that they pay, the variable costs of the people they had tied to labor to $98 an hour.

Obviously, everybody in the state is doing exactly the same task. They're counting ballots. It doesn't make any sense that the cost can range so much. And the same thing holds for recounts, that each county is

allowed to come up with whatever their costs are.

So this is the State of California. We have a number of basic systems that are certified and the same basic process used everywhere across the state. And it would be great if there was some uniformity about how the costs could be exactly determined.

The second thing I'd like to ask is -- which I know you can't answer questions, but I wish would be addressed is, what happens if these regulations aren't followed? What happens -- what is the enforcement policy for these regulations?

For example, there's security measures in here about what's going to happen during the recount that there are tamper evidence seals. So what happens if the tamper evidence seal shows that there is evidence of tampering? What is the follow-up action? And what are the repercussions of this?

We've seen this numerous times also in the one percent manual tally. And the security procedures, okay so there are a number of machines that showed that the seals were tampered or that the numbers don't match like they're supposed to and there's no follow up about what happens now. It's totally up to the discretion of the county election official and there is no prescribed process for this or to find out what happened.

When people say, "Oh, you should trust the results of the election. There's all these checks and balances in place to make sure that the results are accurate." The recount is mentioned numerous times. The one percent tally and the recount are basically the major avenues by which we're supposed to know that the election results are accurate.

As we've seen numerous times, the one percent manual tally is totally inadequate for this. You can see the certified results from Humboldt County that were wrong. And the one percent tally doesn't catch that. So we're left with the recount. Recounts are tremendously expensive and a lot of effort. And that's why having relevant material is so crucial.

I'm so thankful that the State has taken the case of County of Alameda -- or Safe Access Now versus the County of Alameda and the definition of "relevant material" and have included that specifically as what should be relevant to look at.

When you're doing a recount, my understanding is that you want to keep your costs down. You want to target exactly which ballots you want recounted. So wouldn't it make sense that you look at this relevant material and say, "Oh, the chain of custody was broken. Maybe that's where I want them recounted." So these are extremely

relevant materials to a recount.

In fact, the law says "relevant material". It doesn't just say "ballots". So I'm really thankful that the Secretary of State has explicitly stated that those are relevant materials. And now you can have that uniformly across the state and not at the whim of each and every county election official about what can or can't be seen.

Because once again, if we are really trying to find out, as election advocates, what the results of the election are -- and this is one of the ways to do it -- it shouldn't be that the only way to find out what the results of an election are, are having to be partisan towards a specific candidate. There should be ways to make sure that it's accurate. And this is one of those that's constantly brought up. So the more uniform it is, the better it is for everybody to do this.

So I'd like to thank you once again for putting these regulations out. I strongly support them.

Thank you.

DEPUTY SECRETARY OF STATE FINLEY: Thank you.

ELECTIONS COUNSEL BAUMANN: Thank you.

Our next speaker is Judy Bertelsen.

MS. BERTELSEN: I'm Judy Bertelsen. I'm also associated with the Voting Rights Task Force. And I have

volunteered as an elections worker in Alameda county.

I'm especially interested in the interface between the escalation procedures -- escalation of the regular one percent manual tally to a higher percent in close races, the interface between that and the recounts.

In actual practice, there's a very short timeframe. And candidates and public observers, such as myself, often find ourselves unable to get the information we really need to determine whether we should be pushing for a recount. And when we're considering this, we're also considering raising the money that would be required in order to have a recount.

And all this has to happen very quickly. And in some cases, people have not asked for recounts when, in retrospect, one of the things maybe they should have. Sometimes candidates concede before it appears that there really is conclusive evidence as to who the true winner is. And those decisions are sometimes made under pressure of having to raise money.

So certainly we need to be able to have access to these relevant materials, so that both candidates and also people who observe elections can look to see whether there is -- as Michelle suggested, whether there are particular areas that need attention. And this has to be able to be done very quickly. We can't wait for months to get the

stuff and requests and file legal papers and so forth. We need to have this stuff just routinely available.

And also the business about cost. We need to be able to know what the approximate cost will be of asking for a recount of a certain size, so that we can realistically be raising that kind of money and be prepared to make the decision in an effective timeframe.

I think the recent events around the Humboldt County GEMS problem highlight for us that problems are going on and can surface that no one anticipated, even where the equipment has been looked at and checked and certified. We can find that it isn't working the way we thought it was.

So we need to be prepared and we need to also be auditing. We need to have routine looking at election results, recounting. We need to have that be routine. It shouldn't be just something that's done in a very rare extreme case, where the requirement to raise large sums of money may seem appropriate.

This kind of thing should just be routine. Again, this isn't about -- this set of regulations isn't about auditing. But ideally our election should be audited at least as carefully as our casino's are. It's not our casinos. But their casinos are audited better than our elections are, and that really needs to change.

I, nonetheless, want to really thank the Secretary of State for putting these regulations forward and I think that's a big step in the right direction.

DEPUTY SECRETARY OF STATE FINLEY: Thank you.

ELECTIONS COUNSEL BAUMANN: Thank you.

Our next speaker is Jim Sopes.

DEPUTY SECRETARY OF STATE FINLEY: Soper.

ELECTIONS COUNSEL BAUMANN: Soper. Sorry.

MR. SOPER: Good morning. Again, thank you for being here. And I thank the Secretary for having these public hearings about recounts, because they are important.

My first -- my name, by the way, is Jim Soper, S-o-p-e-r.

My first comment is not directly addressing regulations, but the recount in Minnesota took two months. And if we had a statewide recount in California, I think it would take even longer. And, by the way, they're not even done in Minnesota with the lawsuits. I think the law needs to be adjusted to meet this reality, at least in everything but the Presidential election and then it's up for the Congress to deal with that.

I will go on then to echo, one, Judy Bertelsen's comments that I would hope that the auditing process, when you get to close races, escalates up to effectively handle

a recount when it's appropriate when you have a close race. The recounts -- the cost of recounts are very high and even prohibitive for people who have felt that sometimes their elections were stolen, but they couldn't afford to mortgage their house to get a recount.

And then I'll go through a couple sections here. On Section 20811(g), there's a definition of system redundant vote data. And this includes some of the information from the court case of Measure R in Alameda County.

I would suggest that it would add in ballot definition files; that it would add in translation tables. In the Sequoia system, you have tables saying how to translate one candidate's name into Chinese and so on and these could be played with. And it could be used to influence votes.

And it should, in my opinion, include a copy of the central databases. These are by and large standard SQL databases. They're not corporate secrets. They are run in Microsoft Access, Microsoft SQL. These are standard databases.

The recount requester should have access to those databases. And there's a court case fought in Alaska over this type of stuff. Do you plan as one? I think here that should happen too.

At a minimum, Mr. Finley is aware of my effort to get some structured electronic data out of the databases made available to the public starting on election night. Insofar as the machines are not -- are able to produce those kinds of reports, in structured electronic format, they should be able to do that for the requester of the recount. The major concern here is in situations like Los Angeles county, where there are four and a half thousand precincts, and you get precinct-by-precinct totals of how many votes each candidate got.

But, in general, people are not hand -- will not want to hand enter four and a half thousand numbers per candidate to make sure that the countywide total is correct. There's an easy way to do it, it's to get the data out of the database.

Another thing just on this 20811(g). In general, there was some mention in the Humboldt county situation of logs that I hadn't even heard of. I'm a computer specialist. Anything called a log should be considered relevant material. And I would do a review of some of those other things that they found. I'll try to send Mr. Finley another Email about anything else here. I hadn't heard of some of these things.

In 20813(b), there is a mention of system logs. And there's no definition of what a system log is. Again,

anything called a log should be included. And I would include here the phrase "event log", which is a technical thing of anything that happens to the computer, should be recorded as an event. Again, in Humboldt county, it was noted that some of these -- the data in some of these logs have been erased. And it's a separate issue, but that should not happen.

Section 20815 deals with the cost of a recount. And I'm referring to paragraphs A, B, C and D. They duplicate each other without making clear what's going on, What I think is intended -- at least it's not clear to me. What I think is intended is that the requester has offered -- will need to pay for, ahead of time, for recount one day at a time and not for the entire recount up front. And if you just read the first couple of paragraphs, it might be interpreted that you have to pay for the whole recount up front and then it goes on in the next two -- and I think it's -- what is it? C and D talk about well, one day at a time, and this gets a little confusing. I think that could be clarified.

And then a more general statement. There aren't paragraphs or sections on how to proceed with a manual count, how to proceed with an automatic count, how to proceed scanning the -- the scanning VVPATs. It's not clear to me. Maybe it's somewhere else in the

regulations, but it wasn't clear to me that the procedure done is the choice of the requester, because otherwise it could be interpreted that the election's official will decide how to do it. And I think that needs to be made explicit.

And then I think it's the last one here. 20813(c), there's a statement that says, "That the election's official will be establishing reasonable guidelines for the production and examination of the relevant material." "Reasonable" is a loose term. And what we've seen coming out of the lawsuit with Alameda County is that certain county officials may want to abuse any interpretation when they can.

And I think one protection that could be introduced is that any reasonable interpretation here -- reasonable guideline must include the ability of the requester or the representatives to copy the information, including photograph the information or video the information.

So that gives you a bottom line of what reasonable is. They need to be able to get a copy of that information. And I think that would help clarify.

So that's it. I thank you for your time. Again, I would emphasize I hope we can extend the time, allow for recounts. Somehow, I think this has to be done by the

judicial process.

Yeah, I have one more note. And this may not be in the scope of the regulations, but I noticed that there was nothing in the procedures dealing with is there runoff voting for ranked choice voting and doing those. That may not be in the scope of this. San Francisco does have ranked choice voting. And it may or may not be the State's place to say how that you conduct that.

Thank you very much.

DEPUTY SECRETARY OF STATE FINLEY: Thank you.

ELECTIONS COUNSEL BAUMANN: Thank you.

And next will be Paul Allen.

MR. ALLEN: Hi. My name is Paul Allen. I'm with the Voting Rights Task Force as well.

I just have one comment regarding observations of the recount. And I realize we're talking about recounts here. But I had an experience recently with an audit in Alameda county.

And my experience was that I observed -- I was allowed to observe the audit, take pictures and so forth. But I was about 20 -- at least 20 feet away from some of the tables. I had to stand -- you know, sit behind a cord. And from that position, I couldn't really see what people were doing. I'd like the law to be specific to allow people in recount or in audit, you know, to --

without interfering with the process to be able to actually visually observe what is going on, specifically what people are doing when they're marking their tabulations.

So that's all.

Thank you

DEPUTY SECRETARY OF STATE FINLEY: Thank you.

ELECTIONS COUNSEL BAUMANN: Thank you.

Is there anyone who wishes to testify on the regulations that has not already done so?

Hearing no requests, I hereby close this public hearing to oral testimony. However, we will accept written comments at the Reception Center on the 6th floor of this building until 5 p.m. on March 13th, 2009.

DEPUTY SECRETARY OF STATE FINLEY: And thank you everyone for attending this hearing. We appreciate your assistance in developing these regulations.

Thanks.

(Thereupon the Secretary of State public hearing adjourned at 11:00 a.m.)

CERTIFICATE OF REPORTER

I, JAMES F. PETERS, a Certified Shorthand Reporter of the State of California, and Registered Professional Reporter, do hereby certify:

That I am a disinterested person herein; that the foregoing California Secretary of State hearing was reported in shorthand by me, James F. Peters, a Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing nor in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of March, 2009.

JAMES F. PETERS, CSR, RPR
Certified Shorthand Reporter
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