



David J. Burman
PHONE: 206.359.8426
FAX: 206.359.9426
EMAIL: dburman@perkinscoie.com

1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
PHONE: 206.359.8000
FAX: 206.359.9000
www.perkinscoie.com

December 1, 2004

Sam S. Reed
Secretary of State

Nick Handy
Director, Elections Division

Office of the Secretary of State
520 Union Avenue
P.O. Box 40220
Olympia, WA 98504-0220

Re: Hand Recount of All "Ballots Cast"

Gentlemen:

On behalf of the Democratic Party, I write to request that your office make clear in its hand recount guidelines that ballots previously rejected by canvassing boards or election staff should be reviewed again, just like all other ballots cast in the election. Any other position would run contrary to the text of the Washington recount statutes, their purpose, and Washington policy supporting liberal construction of those laws to assure that every lawful vote counts. Further, a contrary result would enforce unconstitutional disparities among the counties created during the initial canvassing.

Common sense tells us that the whole point of a hand recount is to correct any errors in earlier efforts, whether those errors caused votes to be counted or not counted. Accordingly, Washington election law states that during a recount, county canvassing boards conduct a recount of "*all votes cast*." RCW 29A.64.021(1) (emphasis supplied); *see also* RCW 29A.64.050 (during partial recount that may change the result of election, Secretary of State shall order "a complete recount of *all ballots*

[15934-0006/SL043350.171]

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · HONG KONG · LOS ANGELES
MENLO PARK · OLYMPIA · PORTLAND · SAN FRANCISCO · SEATTLE · WASHINGTON, D.C.

Perkins Coie LLP (Perkins Coie LLC in Illinois)

Sam S. Reed
Nick Handy
December 1, 2004
Page 2

cast") (emphasis added). It is clear from the election code as a whole that the Legislature knew the difference between ballots cast and ballots counted. Neither the Washington statutes nor the administrative code contain any language that limit a recount to only those ballots that the canvassing board has previously accepted.

The purpose of recount statutes is to "determine the result of an election as evidenced by legal ballots." C.J.S. *Elections* § 289 (2004). The Washington Supreme Court has recognized "the general rule that election statutes are considered remedial and should be liberally construed." *Gold Bar Citizens for Good Gov't v. Whalen*, 99 Wn.2d 724, 728 (1983). See also *Dumas v. Gagner*, 137 Wn.2d 268, 284 (1999) (adopting canon of construction for liberal construction of election laws articulated in *Whalen*). The general policy that informs that liberal construction favors maximum enfranchisement of voters. RCW 29A.04.205; see *State ex rel. Pemberton v. Superior Court*, 196 Wash. 468, 480 (1938) ("As we have heretofore held, courts should not be too ready to reject ballots or votes on account of the violation of technical requirements, especially in the absence of a charge of fraud, lest, in so doing, they disfranchise persons who voted in entire good faith."). Courts in other jurisdictions have similarly recognized that recount statutes are remedial statutes that should be liberally construed to facilitate a complete and accurate vote. E.g., *Dowden v. Benham*, 234 Ind. 103, 109 (1955) ("It has been the policy of this court to give a liberal construction to a statutory provision on recounting votes."); *State ex rel. Thomas v. District Court*, 154 P.2d 980, 982 (Mont. 1945) ("[recount statute is a] remedial statute, enacted to supplement election laws and to provide for a more careful counting of the ballots").

In light of common sense, Washington's statutory directive for a recount to include "all votes cast," and the liberal construction Washington places on election laws, the most reasonable reading of the law is that votes cast, but previously excluded, be reconsidered during the recount process.

Beyond those bedrock principles, there is no question that, even though acting in good faith, county canvassing boards and election officials took actions during the initial vote counting and machine recount that were legally erroneous and inconsistent with the policy of maximum enfranchisement, and that varied dramatically from county to county.

As your office has already recognized, for example, the statutes and regulations as to provisional ballots did not impose sufficient uniformity across the counties. King

Sam S. Reed
Nick Handy
December 1, 2004
Page 3

County rejected hundreds of provisional ballots (and over 1500 absentee ballots) due to the voter's signature on the ballot envelope not sufficiently matching the voter's registration card, the latter of which was often completed decades earlier. Some of these voters were erroneously refused their right to vote at their polling place, where no signature matching would have been done at all, and apparently also would have avoided erroneous signature rejection if they had voted as an unregistered out-of-state voter.

If signature matching is to be an obstacle to counting the vote of a lawful voter, then any subjective element must at least be governed by uniform statewide substantive standards and procedures. There are none. Almost no county rejected as high a percentage of provisional or absentee ballots for this reason as did King County; most rejected none; and a few admitted candidly that they did not review the provisional ballot signatures at all. Any assumption that King County voters are less honest than voters elsewhere in the State is false and offensive. King County elections officials had already confirmed that these were registered voters and that they had not already voted, and these voters went to the effort of going to their polling place in person or requesting an absentee ballot and being checked by the County as part of that process. Many people have more than one form of signature, especially over time or depending on how rushed they are or their mood. Disenfranchising these people for sloppy handwriting is inexcusable, particularly when many of the rejections in King County were done by staff below the canvassing board level. Some other counties required that the board make every decision to reject a lawful vote due to insufficient matching of signatures.

Another category of mistaken and disparate actions amplifies the problems with unusually strict signature scrutiny in King County. King County, unlike some other counties, refused to contact provisional ballot voters with signature problems in the same way they were required to contact absentee ballot voters. The Democratic Party succeeded in Court in getting access to the list of such voters, but it was very late in the process. Despite that, King County set a deadline of 4:30 p.m. on November 16 for voters to validate their signatures on their absentee and provisional ballots. No exception was made for the provisional ballot voters who got delayed or no notice due to the policy reversed by the Court, or for absentee ballot voters who, due to county error or mail delay, got late or no notice of problems with their signatures. This arbitrary deadline is inconsistent with the statutory command that absentee ballots

Sam S. Reed
Nick Handy
December 1, 2004
Page 4

received in the mail on the day of certification must be counted and with the policy of maximum enfranchisement of lawful voters. Moreover, we know that at least one county, Gray's Harbor, accepted signature validation materials on the 17th.

Rejection of validation efforts on the morning of the 17th is not even justified by administrative convenience in light of the fact that King County had a canvassing board meeting many hours later that day and that after 5:00 p.m. on the 17th your office allowed a late submission of certification by one county. (If you had enforced that deadline, Senator Rossi would now be behind—significantly by current standards—in the total vote count.)

These disparities and mistakes can and must be remedied during the hand count. Any concern with having sufficient time to review the documents prior to the November 17 certification deadline is moot now that all votes will be subject to manual recounting. Although that process will hardly be leisurely, there is time to do it right, and it is more important to do it right than to do it quickly. Your office should require that canvassing boards review all rejected ballots, and should provide them with consistent standards and procedures for doing so.

Some of your communications in the last week have suggested that your office need not worry about whether counties are following the law. The implicit suggestion is that such problems can be dealt with through an election contest after the last recount or through litigation earlier to challenge conduct contrary to law or neglect of duty.

As you know, we disagree strongly with such a limited view of your office's role, and we wonder why you are issuing guidelines at all if you are not going to help resolve these issues in a uniform statewide manner without requiring litigation. More importantly, we think such a position is not in the public interest. This is the most important office in state government. We think it is very important that this recount be done right and that it be the final word if at all possible. If there is to be an election contest as to this office, the Constitution requires that it be decided by the Legislature, not the Judiciary, and that would inevitably drag into the early months of next year.

Sam S. Reed
Nick Handy
December 1, 2004
Page 5

Pre-recount litigation is an option, but we hope that your office will do everything possible to keep that from becoming necessary.

Sincerely,

A handwritten signature in black ink, appearing to read 'David J. Burman', with a long horizontal flourish extending to the right.

David J. Burman

cc: Peter Schalestock
Robert Maguire